INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING THE LAND, ISLAND AND MARITIME FRONTIER DISPUTE

(EL SALVADOR/HONDURAS)

REPLY OF THE REPUBLIC OF EL SALVADOR

DECEMBER 15, 1989

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CHAPTER I

INTRODUCTION

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

1.2. Following this brief Chapter of Introduction, this Reply is divided into two Parts.

1.3. Part I deals with the Land Frontier Dispute. This Part contains three Chapters. Chapter I considers The Law Applicable to Formal Title Deeds to Commons and consists of five sections, dealing respectively with the Opinion of Professor Nieto Garcia, the fact that the Commons belonged to the Municipal Councils ("Cabildos"), the Administrative Control over the Commons, the Authority to Adjudicate Commons, and the Effect of Article 26 of the General Peace Treaty of 1980 in relation to Formal Title Deeds to Commons. Chapter III considers The Sectors of the Land Frontier in Dispute and consists of seven principal sections, the first six of which deal with the six individual Sectors of the Land Frontier in Dispute and the seventh of which deals with Royal Landholdings. Chapter IV considers Arguments of a Human Nature Presented by El Salvador in support of its Frontier Rights.

1.4. Part II deals with the Island and Maritime Frontier Dispute. This Part contains two Chapters. Chapter V considers The Determination of the Juridical Status of the Islands and consists of seven sections, dealing respectively with the Law Applicable to this Determination, the Period of the Spanish Conquest, the "Reales Cédulas" of 1563 and 1564, the Later Spanish Colonial Documentation, the Ecclesiastical and Civil Jurisdiction over the Islands, the Peaceful and Continuous Display of State Authority, and the Position of the Isla del Tigre (also known as the Isla de Amapala). Chapter VI considers The Maritime Spaces and consists of three principal sections, dealing respectively with the arguments contained in Chapters XIII, XIV, and XV of the Counter Memorial of Honduras.

1.5. This Reply then concludes with the Submissions of the Government of El Salvador to the Chamber of the International Court of Justice.

1.6. Appended to this Reply are two further volumes containing, respectively, the Annexes to this Reply and the Maps to which reference is made in this Reply.

1.7. In the text that follows, the Pleadings presented by the Parties to this litigation to the Chamber of the International Court of Justice are referred to by the following initials:

E.S.M. The Memorial of El Salvador;

H.M. The Memorial of Honduras;

E.S.C.M. The Counter Memorial of El Salvador;

H.C.M. The Counter Memorial of Honduras;

E.S.R. The Reply of El Salvador.

PART I

CHAPTER II

THE LAW APPLICABLE TO FORMAL TITLE DEEDS TO COMMONS

2.1. As is indicated in the E.S.C.M. (1), there is a radical disagreement between the Parties to this litigation as to the force and validity that should be given to the Formal Title Deeds to Commons ("Títulos Ejidales") as a firm and decisive proof of uti possidetis iuris and in relation to the manner in which such Formal Title Deeds to Commons should be interpreted and applied. The H.C.M. presents in relation to this fundamental question an erudite Opinion of Professor Nieto García which merits detailed analysis.

I. The Opinion of Professor Nieto García

2.2. The Opinion of Professor Nieto García, whose conclusions are adopted by the H.C.M., is based on the distinction between, on the one hand, what he denominates "ejidos of reduction", that is to say the Formal Title Deeds to Commons granted by the Crown to the native communities, and, on the other hand, what he denominates "ejidos de composición", that is to say Commons acquired not by virtue of any concession by the Crown but rather by virtue of the payment of a price, in other words by virtue of a transaction of sale and purchase. Professor Nieto García argues that this distinction has important consequences in relation to the juridical nature of the Commons in question.

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1. E.S.C.M.: Para. 2.2., p. 12.

2.3. Professor Nieto García asserts that the "ejidos of reduction" or original Commons constituted lands of public domain which had the following characteristics. First, they were for use in common of the favoured Indian community. Secondly, they were incapable of being acquired by prescription or of being alienated. Thirdly, they were subject to a pre-determined economic purpose. Fourthly, their ownership was shared between the municipality (as a juridical person) and the community of inhabitants of the settlement in question. Fifthly, they were not able to become subject to private proprietary rights (2).

2.4. In contrast, the "ejidos de composición" had the following characteristics. First, the owner thereof was not the municipality but solely and exclusively the community of inhabitants of the settlement in question. Secondly, they were subject to a patrimonial relationship or to private proprietary rights. Thirdly, these private proprietary rights were not of the Romanic type but rather of the Germanic type, in the form of a "Gesamtehand", that is to say of property subject to joint-ownership (3).

2.5. Professor Nieto García and, on the basis of his Opinion, the H.C.M. argue that the Formal Title Deeds to Commons that are at issue in this litigation are Formal Titles Deeds to "ejidos de composición" (4). Consequently, these Formal Title Deeds constitute nothing more than private proprietary

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2. H.C.M.: Annexes: p. 45.
3. H.C.M.: Annexes: pp. 45-46.
4. H.C.M.: Annexes: p. 55.

rights or rights of ownership amounting only to a "droit foncier" of a private nature. Consequently, affirms the H.C.M., El Salvador is confusing Formal Title Deeds conferring private proprietary rights with Formal Title Deeds conferring sovereignty (5).

2.6. Professor Nieto García also affirms that "avec le temps, les "ejidos de réduction" finirent pour disparaître pour être remplacés par des terrains acquis par composition" (6). This affirmation relating to the disappearance of the original "ejidos of reduction" and their replacement by the execution of Formal Title Deeds to "ejidos de composición" is quite remarkable given that the "Reales Cédulas" (Royal Decrees) and the Spanish Ordinances expressly excluded the Commons granted by the Crown to the native Indian communities from the régime of "composición" save in respect of those new settlements who had no title or whose Formal Title Deeds did not cover all the land which they occupied. Thus in the "Real Cédula" of El Pardo of 1 November 1591, which was directed to the "Real Audiencia" of the Colonial Kingdom of Guatemala, the Commons granted by the Crown to the native communities are excluded from the process of "composición" ordered by the Crown in relation only to private landholdings. The Crown, in effect, conferred on the "Real Audiencia" of Guatemala the power, the duty and the faculties to proceed to the measurement and valuation ("composición") of landholdings:

"aprés avoir réservé en priorité, ce qui vous paraîtra nécessaire pour les places, les "ejidos", les terrains communaux, les pâturages et les friches des lieux et conseils municipaux en prenant en considération

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5. H.C.M.: pp. 76-78.

6. H.C.M.: Annexes: p. 59.

la situation présente et en envisageant la croissance que peut connaître chacun d'entre eux à l'avenir, et en réservant aux indiens ce dont ils auront besoin pour leurs cultures, travaux et élévages" (emphasis added) (7).

2.7. This special régime for the protection of the native Indian communities and the exclusion of their Commons from the régime of "composición" (the process of measurement and valuation of landholdings) was preserved, as inevitably had to be the case, in the Ordinance which was established to give effect to the "Real Cédula" of 1591. In the instructions which the President of the "Real Audiencia" of Guatemala sent in 1598 to his subordinates, the Judges and Commissioners for Land Measurements, he instructed them that, when any application was made to them for the measurement and valuation of land according to the process of "composición", they should first obtain information both as to the area of land which would be needed for the Indian settlements that existed in the locality in question and as to the area of lands which would be needed for their Commons (8); the object of this was to provide the reserve of land which the Crown had ordered to be set aside in favour of the Indian communities.

2.8. Paragraph 7 of this Ordinance has been incorrectly interpreted in the H.C.M. and this fundamental error vitiates the argument contained

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7. H.C.M.: Annexes: pp. 68 & 70.

8. H.C.M.: Annexes: p. 75.

therein (9). The H.C.M. declares that the régime of "composición" was "applicable non seulement aux colons espagnols mais aussi aux indiens et communautés indigènes" (10), an incorrect affirmation which is based on Paragraph 7 of the Ordinance of 1598. However, the text of this Ordinance, respecting the provisions of the "Real Cédula", excluded the Commons of the Indian communities that were already in existence from the régime of "composición" in that it directed the Judges and Commissioners for Land Measurements not to apply the régime of "composición" to native communities which already had and possessed Commons. In the light of this objective, the Ordinance directed that these lands "should be excluded and should not be dealt with in any respect" ("se les deje y no trate de ellos en manera ninguna" in the original Spanish text). The Judges and Commissioners for Land Measurement were ordered only to engage in the process of "composición" with those native communities who had no Formal Title Deed to Commons, the Ordinance directing that "with the latter, deal in respect of the process of "composición" as with the others" ("con estos tratará de la composición como con los demás" in the original Spanish version). This last phrase, translated into French somewhat misleadingly as "avec les autres", from its scope and generality is only capable of referring to the other persons who might request landholdings, on the basis that they were prepared to pay for them, by the process of

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9. As this error may possibly stem from an incorrect translation into French of the original Spanish Text of the Ordinance, El Salvador is depositing with the Registrar a copy of the work by Solano entitled "Cedulario de Tierras" so that the original Spanish text can be verified.

10. H.C.M.: p. 67.

"composición". The only distinction between the two types of "composición" was that, in respect of those native communities who either had no Formal Title Deed to Commons or had a Formal Title Deed to Commons that was insufficient, the process of "composición" would be carried out only in respect of the landholdings that they had in excess of their original Commons and the "composición" demanded would be "moderate".

2.9. The subsequent "Reales Cédulas" confirm the interpretation which has been maintained by El Salvador, that is to say that the régime of "composición" was not applicable to the native communities save in the event that such communities either had no Formal Title Deed to Commons or had a Formal Title Deed that was insufficient to cover the landholdings which exceeded their Commons. Thus, the "Real Cédula" of 17 June 1617 made clear "that the lands which do not belong to the Indians have to be sold and are to be sold by public announcement and in public auction ("que las tierras que no fueren de los indios se han de vender y se venden en pregón y pública almoneda" in the original Spanish version) (emphases added) (11). On 16 March 1642 the obligation to "protéger les indiens sur les terres qu'ils possédaient avec des titres suffisants à cet effet" was reiterated by a further "Real Cédula" (12) with the object of avoiding their lands being taken away from them in favour of Spaniards by means of the process of "composición". This is confirmed by Ley 18, Título 12, Libro IV of the Recopilación de Indias: "the Indians should be left with their landholdings"

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11. Cited in H.C.M.: p. 92. The Spanish text is in Solano: Cedulario de Tierras: p. 311.

12. H.C.M.: Annexes: p. 81.

("que a los indios se les dejen sus tierras" in the original Spanish version) (emphases added) (13). On 16 March 1646 a further "Real Cédula" ordered that "soient laissées aux indiens toutes celles (les terres) qui leur appartiennent et notamment en ce qui concerne les communautés" (emphases added) (14). In the same year, on 30 June 1646, another "Real Cédula" was issued in accordance with which "ne sont pas admises à "composition" les terres qui auraient appartenu aux indiens" (emphasis added) (14). Finally, on 4 March 1661, the Crown ordered that the process of "composición" should never be carried out in respect of the landholdings of the native communities. This "Real Cédula" added "je leur ordonne de ne plus envoyer de juge dans les villages d'indiens pour la composition des terres" and proceeded expressly to abrogate and annul any disposition which stated the contrary (15).

2.10. On 1 July 1746, instructions were sent to the delegate judges of the "Real Audiencia" (16) in which they were directed that in relation to the native communities they ought to favour Commons and communal lands and ought only to apply the process of "composición" to them (it being made clear that this was for the first time) in respect of lands which they were occupying unlawfully without the appropriate Formal Title Deeds. Only for these excess landholdings was a moderate payment to be fixed, a calculation being made of what lands had to be adjudicated to them and what lands had to be the subject of a

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13. Solano: Cedulario de Tierras: p. 450, note 4.

14. Cited in the Opinion of Nieto García: H.C.M.: Annexes: p. 32.

15. H.C.M.: Annexes: p. 83.

16. H.C.M.: Annexes: p. 95.

"composición" (17). It was at the same time expressly recognised that the Formal Title Deeds to the Commons of the Indians had been granted "sans aucune composition de sa Majesté" (emphasis added). On 15 October 1754 royal instructions were issued (18) in which the order not to harm the interests of the Indians was reiterated and, with this objective, it was stated that, in relation to the Commons of the native communities "il ne doit pas être fait de modification, ceux-ci étant maintenus dans leur possession, et en leur rendant dans les terres qui leur auront été usurpés, en leur concédant de plus grandes étendues sur ces terres, conformément aux exigences de population" (emphasis added) (19).

2.11. From the above review of Indian law, it clearly emerges that, contrary to what is affirmed by Professor Nieto García and adopted by the H.C.M., there never existed any widespread replacement of the original Commons nor were these original Commons substituted by Commons granted through the process of "composición". To the contrary, the original Formal Title Deeds to the Commons of the native communities were respected and, in the event that they had disappeared or been lost, were confirmed and replaced. However, in the event of such confirmation, no payment whatsoever by way of "composición" was ever required (20). The process of "composición" was only appropriate for the new native communities who, like every Spanish colonist, requested that they be adjudicated royal landholdings

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17. H.C.M.: Annexes: pp. 97-98 (para. 9).
18. H.C.M.: Annexes: p. 88.
19. H.C.M.: Annexes: p. 89.
20. H.C.M.: Annexes: p. 92 (para. 9).

which they had in excess of their Commons or in respect of which they had no pre-existing Formal Title Deed.

2.12. What is more, the facts confirm the juridical régime that has just been described. The Spanish colonial Formal Title Deeds to Commons which constitute the proof of the land frontier claimed by El Salvador, that is to say the Formal Title Deed to the Commons of Citalá of 1776, the Formal Title Deed to the Commons of Arambala and Perquín of 1815, the Formal Title Deed to the Commons of Torola of 1743, and the Formal Title Deed to the Commons of Polorós of 1760, are not Formal Title Deeds to "ejidos de composición". In none of these did the respective native communities have to pay any price or make any form of "composición" whatever in order to procure the recognition or confirmation of their Commons. In the H.C.M. (21) it is insinuated that there was a payment by way of "composición" in the case of the Commons of Polorós but this Formal Title Deed does not indicate that any payment whatever was made by way of "composición". To the contrary, given that this Formal Title Deed was a Deed of Confirmation of existing Commons, no "composición" would have had to be paid, only the judicial costs of obtaining the Deed, exactly as was indicated by the royal instructions of 15 October 1754 (22).

2.13. The Formal Title Deed to Commons relied on by El Salvador in which there does appear a limited form of "composición" was the Formal Title Deed to the Commons of Arcatao (23). The execution

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21. H.C.M.: p. 72.

22. H.C.M.: Annexes: p. 92.

23. E.S.C.M.: Annexes: Vol. III, p. 10.

of this Formal Title Deed involved the measurement of 22 "caballerías" 15 "cuerdas". 16 "caballerías" 15 "cuerdas" were recognised and confirmed as belonging to the original Commons of this settlement and in relation to this area no form of "composición" by way of the payment of a price was either demanded or made. Only in respect of the remaining 6 "caballerías" of royal landholdings which were not included within the original Commons did the judge demand the appropriate "composición". The corresponding public auction duly took place and the land was acquired by the only bidder, the native community of Arcatao. Thus, only to this partial extent existed any form of "composición" by means of the procedure of public announcement and public auction required by the "Reales Cédulas" and the Ordinances which carried these "Reales Cédulas" into effect. In no other Formal Title Deed to Commons invoked by El Salvador as proof of its rights, was this procedure followed. All this confirms the interpretation of Indian law presented by El Salvador in relation to the processes of confirmation and of "composición" in the system of Formal Title Deeds to Commons.

2.14. Professor Nieto García is, therefore, mistaken as to a fundamental question of fact when he affirms categorically in his Fifth Conclusion that:

"Des documents écrits prouvent qu'ont eu lieu, au XVIIIe siècle, dans la juridiction de la Real Audiencia de Guatemala, de nombreuses ventes et "compositions" de terres à des communautés d'indiens; on y trouve celles qui ont donné lieu au présent différend frontalier" (emphasis added) (24).

This final phrase (emphasised above) is inexact.

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24. H.C.M.: Annexes: p. 59.

Professor Nieto Garcia (25) enumerates a series of "composiciones" made by native communities which are duly registered in the Archivo General de Indias. Contrary to his affirmations, none of the Formal Title Deeds to Commons invoked by El Salvador in support of its rights is included in this list. The only native community mentioned in the course of this litigation whose name appears in this list as having made a payment by way of "composición" is the native community of Jocoara in 1776 in respect of the 2.5 "caballerías" onto which this community encroached at the expense of the Indians of Arambalá and Perquín (26). This Formal Title Deed to Commons is cited not by El Salvador but by Honduras. This is the only Formal Title Deed to which the thesis advanced by Honduras is applicable in the sense that this Deed only created "une relation patrimoniale .... faisant l'objet d'une propriété privée" (27).

2.15. Consequently, the fundamental premise upon which the entire argument of this section of the H.C.M. is based collapses completely and the categoric affirmation contained therein (28) that, "s'agissant dans le cas présent de "ejidos de composition", ceux-ci ne constituent en aucune façon des biens appartenant au domaine public des municipalités" is thus shown to be totally erroneous. The Formal Title Deeds to Commons presented by El Salvador are thus not Formal Title Deeds to "ejidos de composición" but Formal Title Deeds to the original Commons of the native communities in question, that is to say to "ejidos of reduction". Therefore the

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25. H.C.M.: Annexes: pp. 36-37.
26. H.M.: Annexes: p. 1269.
27. H.C.M.: p. 76.
28. H.C.M.: p. 76.

juridical characteristics possessed by Formal Title Deeds to privately owned property, such as for example the Formal Title Deed to the Commons of Jocoara, have no applicability whatever to the Formal Title Deeds to Commons presented by El Salvador; what are instead applicable thereto are the juridical characteristics which Professor Nieto García attributes to those Formal Title Deeds to Commons which are not Formal Title Deeds to "ejidos de composición" but Formal Title Deeds to original Commons, that is to say to "ejidos of reduction". These characteristics have already been enumerated (29) and, in summary, demonstrate that such Formal Title Deeds to Commons constitute titles to land in the public domainty and not to privately owned property and that ownership thereof is shared between the municipality (as a juridical person) and the community of inhabitants of the settlement in question (30). The erudite Opinion of Professor Nieto García thus confirms the traditional position of El Salvador, that is to say that its Formal Title Deeds to Commons are titles to land in the public domain governed by public law and not merely titles to privately owned property and that, consequently, these titles inevitably attribute jurisdiction and administrative control to the municipal authorities of the settlement favoured with the grant of the Commons in question.

2.16. Professor Nieto García is correct when he states in his Opinion that it is "important de tenir compte du type d'"ejidos" devant lequel nous nous trouvons; de concession royale et domaine public

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29. In Paragraph 2.3. above.

30. H.C.M.: Annexes: p. 41.

ou résultant d'une "composition" ou contrat d'achat--vente" (31). His Opinion is valuable and the distinction which he propounds is acceptable. However, the Party who sought his opinion failed to inform him of a decisive fact: namely that none of the Formal Title Deeds to Commons invoked by El Salvador which the Chamber is required to apply in this litigation is a Formal Title Deed to "*ejidos de composición*" equivalent to a contract of sale and purchase; instead all the Formal Title Deeds to Commons invoked by El Salvador are Formal Title Deeds to original Commons granted by the Crown and therefore constitute public proprietary rights.

2.17. In support of the arguments presented in this Section, El Salvador is presenting as an Annex to this Reply (32) an Opinion prepared by Professor López Rodo, whose conclusions are completely in accordance with the position adopted by El Salvador in this litigation.

II. The fact that the Commons belonged to the Municipal Councils ("Cabildos")

2.18. The juridical principles of Spanish law and of Indian law confirm the opinion of Professor Nieto Garcia to the effect that those Commons which were not "ejidos de composición" belonged jointly to the Municipal Councils or "Cabildos" of the native communities to which they had been granted and to the native community in question.

2.19. In the "Reales Cédulas" of El Pardo of 1

November 1591, the King reiterated on various occasions that the Commons belonged to the Municipal Councils. He thus recognised and confirmed the existence of a relationship between the Commons and the municipal authorities involving both municipal public law and administrative control. This link expressly established by the Spanish Crown between the Municipal Councils and the Commons did not arise out of any mute acquiescence on the part of the Crown in the sense of permitting the continuation without correction of an arrangement that was contrary to its wishes in the manner which has been described in the judgement of the Tribunal which decided the Arbitration between Guatemala and Honduras (33). In this case, on the other hand, what is in issue is a relationship established as the result of a positive decision to that effect by the Spanish Crown.

2.20. As from 1568, in a "Real Cédula" issued in that year, the Spanish Monarch had said that the Royal landholdings "could be assigned and shared out between the places and the councils for private use and for commons and for public areas and for municipal and other purposes" ("se podrá asignar y repartir a los lugares y consejos para propios y ejidos y términos públicos y concejiles y otros aprovechimientos" in the original Spanish text) (emphases added) (34). The expressions "municipal commons" and "commons of the Council" ("ejidos concejiles" and "ejidos del Consejo") are frequently

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33. Guatemala-Honduras Special Boundary Tribunal: Opinion and Award (Washington, D.C. (1933)) pp. 7-8.

34. Solano: op.cit.: p. 209 (cited in H.C.M.: p. 91, n. 1.).

found in the terminology of that era (35). In one of the "Reales Cédulas" of El Pardo of 1 November 1591, the King proclaimed his will "de faire des dons et de répartir équitablement lesdits sols, terres et friches assignés aux localités et conseils municipaux pour ce qui paraissait leur convenir, afin qu'ils aient suffisamment de "ejidos", de terrains communaux et de terrains publics, selon la qualité desdites localités et conseils municipaux" (emphasis added) (36). Further, in another "Real Cédula" of the same date, in this case directed specifically to the "Real Audiencia" of Guatemala, the King authorised that "Real Audiencia" to alienate lands, after having reserved the land necessary for the Commons "des lieux et conseils municipaux" (37).

2.21. In the "Novísima Recopilación", with the objective of putting an end to the abusive practices by means of which the Spaniards deprived the Indians of their Commons, it was ordered on the basis of an aged principle of Spanish law that "tous les 'ejidos' ..... soient ensuite restitués et rendus auxdits conseils municipaux a qui ils appartenaient" ("cuyos fueron y son" in the original Spanish text (38)). The "Novísima Recopilación" continued (using the royal plural): "ordonnons qu'ils soient déclarés d'utilité publique pour lesdits villes, bourgs et localités où ils se situent" (39). Given that the Commons were thus declared not only to belong to the Municipal Councils but also to be public utilities,

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35. Solano: op.cit.: pp. 87 & 225.

36. H.C.M.: Annexes: p. 68.

37. H.C.M.: Annexes: p. 70.

38. Cited by Nieto García: H.C.M.: Annexes: pp. 12-13.

39. H.C.M.: Annexes: p. 13.

it is not possible, as Honduras has attempted, to put them on the same level as simple private properties of an immoveable nature ("droit foncier").

2.22. This is further confirmed by looking at the list of the persons who were interested in sustaining the various Formal Title Deeds to Commons on the basis of which El Salvador supports its claims. In these proceedings there appeared before the "Juez de Tierras" (Royal Land Judge) in question the native communities represented by the Magistrates of the Municipal Council, the Mayor, the Principal Councillor, the Second Councillor, and the Sheriff, that is to say the municipal authorities of each native settlement (40). This confirms as a matter of practice the relationship of public municipal law established between the municipal councils and the Commons by the rules of Spanish and Indian law applicable to the native communities in question.

III. The Administrative Control over the Commons

2.23. The very nature of Formal Title Deeds to Commons made indispensable the existence of a strict administrative control over the Commons both by the municipal authorities who governed the settlement entitled to the Commons in question and by the authorities of the "Alcaldia Mayor" of the Colonial Province of San Salvador and, at a higher level still, by the "Real Audiencia" of Guatemala itself, which was not merely a judicial body but also a genuine governmental authority. What is more, administrative control over the Commons was even

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40. See, for example, E.S.C.M.: Annexes: Vol. III. pp. 54, 59 & 61; Vol. IV, p. 302; H.M.: Annexes: p. 1795.

exercised by the actual hierarchical head of the colonial régime, the King of Spain.

2.24. A fundamental characteristic of the "ejidos of reduction", which did not exist in the case of "ejidos de composición", was the most important of the reasons which produced the need for the implementation of this strict administrative control. This fundamental characteristic is the inalienable nature of the "ejidos of reduction", established in Spanish law from the time of the "Partidas", maintained in Indian law (41), and reiterated by the "Real Audiencia" of Guatemala on each occasion on which it approved a Formal Title to Commons. Just as private property was freely alienable and, consequently, did not require any administrative control over its use, manner of utilisation, sale, and ownership, so the inalienable nature of the Commons belonging to the native communities required the different levels of Spanish authorities to take particular care that the essential nature of these Commons was not perverted by any partial or total alienation thereof. The greed of the average Spanish colonist made this type of corruption relatively frequent, something which obliged the Spanish Crown repeatedly to issue "Reales Cédulas" in order to correct what the King described in one of them as "la confusión et l'excés qu'ont regné". It was with this objective that the King, in the exercise of his supreme administrative control, ordered the "Reales Audiencias" that the native communities should not be deprived of their Commons and that the lands of which they had already been deprived should be restored to them.

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41. Opinion of Nieto García: H.C.M.: Annexes: p. 12.

2.25. Thus, for example, it was declared by "Real Cédula" on 30 June 1646 (42) that "les compositions de terres ne s'appliquent pas à celles que les Espagnols ont acquis des indiens en violation de nos Cédulas royales et Ordenances" and that "les procureurs-protecteurs, ou les membres des Audiencias *s'il n'y a pas* de procureurs-protecteurs, appliquent leur justice et le droit de par les pouvoirs dont ils sont dotés par les Cédulas et ordonnances, pour requérir la nullité contre de tels contrats. Et nous chargons les vice-rois, présidents et Audiencias de prêter toute leur assistance pour son entière exécution". In the same way, a "Real Cédula" of 15 October 1713 (43) ordered the Spanish authorities to adopt measures which required a rigorous administrative control of the Commons of the native population. The "Real Cédula" first indicated that it had been reported that "the governors and concessionaries not only are not granting land to the Indians so that they can form their settlements but also, if the Indians have lands, they are taking these lands away from them by the use of violence" ("los gobernadores y encomenderos no sólo no les dan tierra *a los indios para* que formen sus pueblos, sino que si las tienen, se las quitan con violencia" in the original Spanish text). Therefore, the King ordered "by this present document that, in the light of the distress that this news has caused me, care should be taken in the future to remedy this pernicious abuse and to castigate those who have transgressed the established laws" ("por la presente que, en inteligencia del desagrado que me han causado estas

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42. H.C.M: Annexes: p. 82.

43. Solano: op.cit.: pp. 404-405 (cited in H.C.M.: p. 59).

noticias, cuiden en lo adelante del remedio de este pernicioso abuso y castigo de los transgresores de las expresadas leyes" in the original Spanish text). Finally, the King emphasised to his delegate authorities that they should put "all their greatest effort and efficiency into procuring that the said Indians be given the land, the commons, and the water that have been granted to them" ("todo su mayor desvelo y eficacia en que se les dé a los referidos indios, la tierra, ejidos, agua que le están concedidos" in the original Spanish text) (emphases added).

2.26. On 27 October 1784 (44), the "Consejo de Indias" (the Council for the Indies) felt obliged to reiterate the prohibition "on Indians carrying out any type of alienation of communal or distributed property" ("a los indios de toda clase de enajenación con respecto a los bienes de comunidad y repartimiento" in the original Spanish text). This was in order to combat "the disorder or abuse which from day to day has been being experienced contrary to the laws of the "Recopilación"" ("el desarreglo o abuso que de día en dia se había ido experimentando contra las leyes de la Recopilación" in the original Spanish text) by virtue of the fact that the Indians were alienating their lands, plots and houses no matter whether these constituted their private property or communal or distributed property. Finally, the Ordenanza de Intendentes of 1786 created the new office of "Intendente" (Intendant) "with the objective of organising in a uniform manner the government, management and distribution of all the public property and taxes ..... of the communal property of the Indian settlements" ("con el objeto de arreglar uniformemente

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44. Solano: op.cit.: 486-487.

el gobierno, manejo y distribución de todos los propios y arbitrios ..... de los bienes comunes de los pueblos de indios" in the original Spanish text) (45). For this purpose an administrative control was implemented over the resources and the costs of the native communities so as to be able to pay both their functionaries and the dues and taxes which were payable to the King (46).

2.27. More generally, the review of Indian law carried out above (47) evidences a constant effort on the part of the Spanish Crown to control and defend the Commons granted to the native communities from the greed of the colonists. This demanded both a constant vigilance and a strict administrative control on the part of the delegate and sub-delegate authorities for the purposes of preserving the inalienable character of the Commons of the native communities. Another decisive reason for the implementation of administrative control over the Commons by the authorities of the Colonial Province of San Salvador was the collection of the taxes which were demanded from the native communities (48).

2.28. Another characteristic of the "ejidos of reduction" which produced the need for the implementation of a continuous administrative control on the part of, on this occasion, the immediate municipal authorities was the need for the regulation of and vigilance over the utilisation in common of the lands. It was necessary to restrain the inhabitants

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45. Solano: op.cit.: p. 489.
46. Solano: op.cit.: pp. 490, 491, 501 & 505.
47. See Paragraphs 2.6. - 2.10. above.
48. E.S.C.M.: Para. 6.25, pp. 178-179.

of the Commons who, as Professor Nieto García observes (49), "ne résistent pas à la tentation de cultiver individuellement les terrains les plus faciles d'accès". This problem also did not exist in the case of "ejidos de composición" and for this reason also it is not possible, as the H.C.M. has attempted, to put a Formal Title Deed to Commons on the same level as a Title conferring merely private proprietary rights. It was also necessary to regulate and control the utilisation of the different sections of the Commons: the section dedicated to pasture, the section dedicated to the cultivation of crops and their seedlings, as well as the sections dedicated to other purposes) since, as Professor Nieto García indicates (50), the "ejidos sont des terrains qui, par leur destination, sont polyvalents" (original emphasis).

IV. The Authority to Adjudicate Commons

2.29. Another of the objections formulated by the H.C.M. is that the arguments of El Salvador as to the probative value of Formal Title Deeds to Commons cannot prosper because the only body that was competent to establish or modify the frontiers of the Spanish Colonial Provinces was the Spanish Crown. The obvious response to this argument is that the power to adjudicate Commons to the native communities had been delegated by the Spanish Crown to the "Real Audiencia" of Guatemala in its capacity as the Supreme Governor of the Colonial Provinces. Thus in the "Real Cédula" of El Pardo mentioned in the H.C.M. (51), the King, who was directing himself

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49. H.C.M.: Annexes: p. 14.

50. H.C.M.: Annexes: p. 9.

51. H.C.M.: Annexes: p. 70.

directly to the President of the "Real Audiencia" of Guatemala, said this (52):

"je vous confère pouvoir, mission et faculté pour que vous puissiez composer toutes les terres, après avoir réservé en priorité ce qui vous paraît nécessaire pour les places, les "ejidos", les terrains communaux, les pâturages et les friches des lieux et conseils municipaux en prenant en considération la situation présente et en envisageant la croissance que peut connaître chacun d'entre eux à l'avenir, et en réservant aux indiens ce dont ils auront besoin pour leurs cultures, travaux et élévages". (emphases added)

This signifies that the "Real Audiencia" of Guatemala, which had jurisdiction over each and every one of its component Colonial Provinces, received directly from the King the power, the duty, and the faculties to grant Formal Title Deeds to Commons, without this authority being qualified or restricted in any way by any requirement to respect vague territorial divisions between the various provinces and districts governed by that "Real Audiencia".

2.30. Honduras has argued repeatedly that Formal Title Deeds to Commons have no relevance for the purpose of fixing provincial boundaries on the grounds that such boundaries could only be determined by means of a "Real Cédula" or as a result of custom and long user. These affirmations by Honduras completely ignore various essential provisions of the First Law of Title I of the Fifth Book of the "Recopilación de Leyes de Indias" (53). This law expressly ordered "Viceroys, "Audiencias", Governors, Magistrates, and "Alcaldes Mayores" to keep and observe the limits of their jurisdictions, in the manner in which these jurisdictions might be indicated by: (1) the laws contained in this book; (2) the deeds

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52. H.C.M.: Annexes: p. 70.

53. E.S.R.: Annexes: p. 1

appointing them to their offices; (3) the enactments of the Supreme Governments of the Provinces; and (4) legitimately introduced user and custom." This law is clear and peremptory; its provisions totally refute the affirmations of Honduras that jurisdictional boundaries could only be defined or altered by the Spanish Monarch by means of a "Real Cédula".

2.31. In the Case concerning the Arbitration Award of the King of Spain between Honduras and Nicaragua, Nicaragua argued that jurisdictional boundaries could only be altered by means of a "Real Cédula" and Honduras refuted this argument, advancing the thesis now propounded by El Salvador. In these proceedings, Honduras cited exactly the same four numbered clauses set out above and affirmed that these contained "the true meaning of the First Law of Title I of the Fifth Book of the "Recopilación de Indias"". *It appears that Honduras has now changed its opinion* and is now adopting the argument which it refuted in its Arbitration with Nicaragua (54). The new position now adopted by Honduras ignores the second and third of the four numbered clauses set out above. It is obvious that the adjudication of Commons to native settlements governed by "Alcaldes Mayores" constitutes an application of "the deeds of appointment to their offices" mentioned in Clause 2 of this law; equally, the approval by the "Real Audiencia" of Guatemala, the Supreme Government of that Province, *of a Formal Title Deed to Commons* constitutes an application of "the enactments of the Supreme Government of the Provinces" mentioned in Clause 3 of this law. What is more, such Formal Title Deeds to Commons are at the same time fortified and supported

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54. E.S.R.: Annexes: p. 6

by the "user and Custom" referred to in Clause 4 of the law.

V. THE EFFECT OF ARTICLE 26 OF THE GENERAL PEACE TREATY OF 1980 IN RELATION TO FORMAL TITLE DEEDS TO COMMONS

2.32. In order to decide the crucial question which divides the Parties to this litigation as to the manner in which Formal Title Deeds to Commons ought to be read and interpreted, it is necessary to take into account not only the juridical nature of Formal Title Deeds to Commons but also the correct interpretation which should be given to Article 26 of the General Peace Treaty of 1980, the provision which defines the law applicable to the land frontier dispute.

2.33. In that part of Article 26 which establishes the conditions which documents issued by the Spanish Crown have to fulfil in order to be able to be used as a basis for delimitation, there are six words which are decisive for the correct interpretation of both the letter and the spirit of this provision. These words are emphasised in the following transcription of this part of Article 26:

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

2.34. The first three words so emphasised indicate that for a Formal Title Deed to be able to be taken into account by the Chamber as a basis for delimitation it must have been issued by a Spanish authority. Thus what is important and decisive is the question of from where each Formal Title Deed was issued; in other words, where were the Spanish

authorities who ordered and directed the measurements which gave rise to the various Formal Title Deeds to Commons and where did they exercise their jurisdiction? The Formal Title Deeds to Commons invoked by El Salvador were all issued as the result of measurements carried out by Sub-Delegate Land Judges of the Provinces of Chalatenango, San Salvador or San Miguel, that is to say of districts which at that time formed part and continue to form part today of what is now the Republic of El Salvador. Thus the Formal Title Deed to the Commons of Tecpangüisir was issued by a Sub-Delegate Land Judge of the Colonial Province of Chalatenango; the Formal Title Deed to the Commons of La Palma was issued by the Governor of the Province of San Salvador; the Formal Title Deed to the Commons of Arcatao was issued by a Sub-Delegate Land Judge of the Colonial Province of San Salvador; and the Formal Title Deeds to the Commons of Arambala and Perquín, of Torola, and of Polorós by Sub-Delegate Land Judges of the Colonial Province of San Miguel.

2.35 The Formal Title Deeds thus issued by the appropriate Sub-Delegate Land Judge of the Colonial Province in question which attribute lands as Commons "constitute the best possible proof of the fact that (these lands) were included within the appropriate Province, and principally if that Province has subsequently continued to exercise sovereignty over the same land". El Salvador is not alone in maintaining this argument. The statement which has just been quoted was actually made by Honduras, who propounded the argument now presented by El Salvador in the course of the Mediation carried out before the State Department of the United States of America

n the dispute between Guatemala and Honduras (55). :n the course of these proceedings, the Government of Honduras also made the following statement:

"The concession which a State makes to individual persons or to corporations of the ownership of or right to enjoy a piece of land is the perfect expression of the sovereignty of the country; and the Formal Title Deed which the government of the same State issues in consequence is the full demonstration of the exercise of that sovereignty. If two townships of the same State dispute their boundary line and one of them presents the Formal Title Deed to a piece of land which has been issued on the basis that it falls within its jurisdiction, the boundary of this land will denote the said line. The same has to be said if two Provinces of the same nation have the dispute."

As the above passage shows, in the course of its dispute with Guatemala, Honduras argued that even Formal Title Deeds conferring private proprietary rights prove sovereignty. Thus in this present litigation Honduras has openly contradicted the thesis which it advanced in the earlier dispute with Guatemala, since Honduras now maintains that Formal Title Deeds to Commons do not constitute any proof of sovereignty when they merely confer private proprietary rights.

2.36. The Sub-Delegate Land Judges were only given faculties to exercise their functions in an exclusive manner within a determined area. These Judges could not operate outside the jurisdiction which was indicated to them in their deeds of appointment. Thus, if Commons or even private proprietary rights were assigned by a person appointed as Sub-Delegate Land Judge of, for example, the Colonial Province of San Miguel and the rights granted were subsequently confirmed by the "Real Audiencia"

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55. E.S.R.: Annexes: p. 11

of, in that case, Guatemala, the Formal Title Deed thus issued constitutes irrefutable proof that the land so assigned belonged to the jurisdiction in question, in the example above to the jurisdiction of San Miguel. If any confirmation of this proposition is required, it is sufficient to draw attention to what occured when the Sub-Delegate Land Judge of Gracias a Dios, Cutiño and Mazariego exceeded his jurisdiction by entering onto and measuring lands within the jurisdiction of the Colonial Province of San Salvador. The "Real Audiencia" of Guatemala ordered that the measurement thus carried out should be regarded as ineffective and the Indian population of Ocotepeque should return the Formal Title Deed that they had thus illegitimately acquired (56). This incident admittedly referred to an area which is already delimited and not to an area whose delimitation is still sub-judice but it is nevertheless equally illustrative.

2.37. The fourth word in the first part of Article 26 of the General Peace Treaty of 1980 which was emphasised above has been translated into English, both in the earlier stages of these Pleadings and also in this Reply, by the verb "to indicate", just as it has been translated into French by the verb "indiquer". In fact, the Spanish verb "señalar" used in the original text of this Article is very much stronger and significant than the English and French verbs by which it has been translated, which are really a translation of the weaker Spanish verb "indicar". In the context of the Article, a more faithful translation of the real connotation of "señalar" would be the utilisation of the English verbs "to signal", "to mark", or "to pinpoint" and of the French verbs

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56. E.S.C.M.: Annexes: Vol. I, p. 24 et seq..

"signaler", "marquer", or "fixer". The manner in which Honduras proposes that the Formal Title Deeds to Commons should be read and interpreted does not satisfy this particular requirement of Article 26, namely what these Formal Title Deeds "signal", "mark", or "pinpoint". This is because, if these Formal Title Deeds are read and interpreted in the manner proposed by Honduras, they do not "signal", "mark", or "pinpoint" precise geographical features, boundary markers, or defined points which will enable the Chamber (or later on a Demarcation Commission, in accordance with the instructions handed down by the Chamber) to trace a definitive frontier in the manner that is required by the Special Agreement.

2.38. *In effect, according to the interpretation* proposed by Honduras, when considering the Formal Title Deeds to Commons attention has to be given not to the precise and well-defined geographical features, boundary stones, and places pinpointed in the course of the measurements carried out, but rather to certain incidental references made in the course of carrying out the measurement as to whether, prior to effectuating the measurement, some particular area belonged to one or the other of the old Colonial Provinces under the control of the "Real Audiencia" of Guatemala. However, these incidental references, often contained in the declarations of witnesses, neither marked nor pinpointed precise geographical features, boundary markers, or places which would today permit any delimitation and demarcation of the frontier to be carried out. They were simply vague and imprecise affirmations about a supposed pre-existing provincial distribution, of which there remain neither traces on the ground nor historical data which permit its definition.

2.39. *The fact that these incidental references*

neither mark nor pinpoint precise features is very well documented in the Opinion of Professor Nieto García which has been presented by Honduras. In the course of this Opinion, Professor Nieto García makes the following observations pertinent to the matter at present under discussion:

"Les limites géographiques de ces circonscriptions administratives "intra-audienciales" ne sont pas décrites dans les lois" (57);

"les lois ..... se bornèrent à des références abstraites politico-administratives, sans entrer dans les détails géographiques" (58).

"(Pour délimiter) on se dispense de toute référence à la géographie. ..... on décrit le territoire et la juridiction de la "Real Audiencia" de Guatemala par une simple référence abstraite (ou politico--administrative) aux circonscriptions inférieures: deux "Gobernaciones" et Capitaineries Générales (celles de Valladolid de Comayagua et de la Province du Honduras) et deux "Alcaldias Mayores" (de Trinidad de Sonsonate et la ville de San Salvador) .....

"La délimitation des districts des "Audiencias" ne permet pas de résoudre le problème, vu qu'elle renvoie au territoire de chaque province, de sorte que, si ceux-ci étaient géographiquement pré-établis dans une disposition générale, nous aurions la réponse souhaitée; malheureusement, ce n'est pas le cas étant donné que la compilation des "Reales Cedulas" ne nous dit rien à ce sujet" (59).

The H.M. itself, as had to be the case, has recognised that in a particular Formal Title Deed to Commons, when read and interpreted in the manner proposed by Honduras, there is "l'absence d'indication ..... de points géographiques précis" (60) and the H.C.M. admits that a "document de l'epoque coloniale n'indique pas concrétement les limites des juridictions" (61).

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57. H.C.M.: Annexes: p. 61.

58. H.C.M.: Annexes: p. 50.

59. H.C.M.: Annexes: p. 49.

60. H.M.: p. 324.

61. H.C.M.: p. 115.

2.40. Further, in the Pleadings presented by Honduras in 1918-19 in the Mediation carried out before the State Department of the United States of America, it was stated that the King "could make the division of the districts as he wished. If he had described in detail the boundaries of the Province or Intendency of Honduras in order to distinguish those of the Province or Intendency of Guatemala this dispute would not have arisen. But he did not do this in that way" (62). Later the Pleadings add that "The detailed geographical delimitation of the Provinces of Honduras and of Guatemala is not found in any specific "Cédula"" (63). Similarly, in the Reply presented to the King of Spain in the course of the frontier dispute with Nicaragua, Honduras reiterated: "The King of Spain, with the data of that time, was able to trace general boundaries to his vast territories in the Indies" (64).

2.41. The fifth word in the first part of Article 26 of the General Peace Treaty of 1980 which was emphasised above has been translated into English as "boundaries" and into French as "limites", the Spanish word in the original text being "límites". Thus, for a Formal Title Deed to be able to be taken into account by the Chamber as a basis for delimitation. it must indicate jurisdictions or boundaries in order to make possible later on the demarcation of the international frontier. This will never be able to be done if the Formal Title Deeds to Commons are read and interpreted in the manner proposed by Honduras. As is indicated by Professor Nieto Garcia, precise boundaries to the former

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62. E.S.R.: Annexes: p. 15

63. E.S.R.: Annexes: p. 15

64. E.S.R.: Annexes: p. 6

provincial territories were never indicated. If the Honduran proposal as to the manner in which the Formal Title Deeds to Commons should be read and interpreted were to be accepted, the Chamber would find it impossible to indicate any precise features which could serve as boundaries for the purpose of the demarcation of the frontier between the former Provinces of the "Real Audiencia" of Guatemala. There are no firm indications in the Formal Title Deeds to Commons when these are read and interpreted in the manner proposed by Honduras which permit the successful completion of the archaeological task of reconstructing the territorial limits of the former Provinces whose boundaries were never delimited by the Spanish Crown.

2.42. The sixth word in the first part of Article 26 of the General Peace Treaty of 1980 which was emphasised above has been translated into English as "towns" and into French as "localités", the Spanish word in the original text being "poblaciones". Both translations are imprecise since they omit one of the two meanings which the word "población" has in Spanish; it was in colonial times used above all to refer to native communities (65). Professor Nieto García observes in his Opinion that the Spanish word "pueblo" (or its synonym "poblaciones") "a en espagnol un doble sens: d'une part, il équivaut à agglomération, c'est à dire habitat urbain ou ensemble de constructions; d'autre part, il équivaut à communauté sociale" (66). In the context of this litigation, the word "poblaciones" embraces both of the two distinct meanings which it has in Spanish and in this

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65. Solano: op.cit.: pp. 216, 217, 218 & 303.

66. H.C.M.: Annexes: p. 23.

way clearly refers to Formal Title Deeds to Commons in so far as, as is once again indicated by Professor Nieto García, "les "ejidos" ("resguardos") originels sont liés au village "pueblo" (ou agglomération au sens physique et topographique) des lors qu'ils sont à proximité des constructions" (67); "leur titularisation est partagée entre la municipalité (personnalité juridique) et la communauté des habitants" (68).

2.43. In accordance with the provisions of Article 26 of the General Peace Treaty of 1980, recourse must be had to Formal Title Deeds to Commons that indicate the boundaries of "poblaciones". The only Formal Title Deeds which indicate the boundaries of "poblaciones" are the Formal Title Deeds to Commons. As has already been stated (69), there are no Formal Title Deeds which indicate the boundaries of territories. Further, those Formal Title Deeds which merely confer private proprietary rights rather than Commons are not acceptable for the purposes of Article 26, since such documents do not indicate boundaries of "poblaciones", merely the boundaries of individual properties. The H.C.M. has accused El Salvador of referring only to Formal Title Deeds to Commons (70). It is not that El Salvador wishes to restrict the Spanish colonial Title Deeds to Formal Title Deeds to Commons; the fact is that Formal Title Deeds to Commons are the only Spanish Title Deeds which indicate the boundaries of "poblaciones" in the manner required

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67. H.C.M.: Annexes: p. 23.
68. H.C.M.: Annexes: p. 45.
69. See Paragraphs 2.30. - 2.31. above.
70. H.C.M.: p. 110.

by Article 26.

2.44. Finally, the manner in which El Salvador contends that Formal Title Deeds to Commons ought to be read and interpreted is the manner in which Honduras and the International Court of Justice itself read and interpreted the Formal Title Deed to the Commons of the Sitio de Teotecacinte in the Case concerning the Arbitration Award of the King of Spain between Nicaragua and Honduras. In this respect, El Salvador refers to the comments already made in respect of this matter in the E.S.C.M. (71).

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71. E.S.C.M.: Paras. 2.46. - 2.47., pp. 38 - 39.

CHAPTER III

THE SECTORS OF THE LAND FRONTIER IN DISPUTE

I. Tecpangüisir Mountain

(A) The Juridical Issue

3.1. The decisive issue in respect of this sector is of a juridical nature: that of determining by whom and from where the administrative control which determines the uti possidetis iuris was exercised over Tecpangüisir Mountain as from 1776. The only possible answer to this question can be that from 1776 until the date of the independence of Central America this administrative control was exercised from the settlement of Citalá by the Mayor and Town Council of Citalá and, at a level higher than that of these purely municipal authorities, by the "Alcalde Mayor" of San Salvador and by the "Real Audiencia" of Guatemala. The contrary argument produced by Honduras rests entirely on its erroneous conception of the nature of the appropriate Formal Title Deed to Commons, which Honduras equates with a simple alienation of lands in foreign territory as if what was in issue were a "droit foncier" of a purely patrimonial character. The erudite Opinion of Professor Nieto García, who was consulted by Honduras, confirms in an accomplished manner the thesis advanced by El Salvador, according to which Commons such as those in issue here which were not "ejidos de composición" established a régime of public municipal law which transcended a merely private proprietary right in foreign territory.

3.2. Another objection formulated by Honduras to the claim made by El Salvador to Tecpangüisir Mountain is the argument that the

attribution to a settlement in one Colonial Province of Commons situated in another Colonial Province did not have the effect of altering the inter-provincial boundaries on the grounds that any modification of such boundaries could only be carried out either by virtue of a "Real Cédula" or by a decision of the "Consejo de Indias" (1). This argument has already been answered (2) and it has been made clear that such a "Real Cédula" in effect exists. This is the "Real Cédula" issued in El Pardo on 1st November 1591, which gave powers to the "Real Audiencia" of Guatemala to adjudicate Commons to the native communities without any limitation of these powers by any requirement to respect the vague inter-provincial boundaries then existing. The "Juez Principal de Tierras" (Principal Royal Land Judge) and the President of the "Real Audiencia", who was the person who took the definitive decisions, had complete jurisdiction over the whole of the territory governed by that "Real Audiencia" and consequently was entitled to take no notice of the supposed inter-provincial boundaries. This is confirmed by the First Law of Title I of the Fifth Book of the "Recopilación de Leyes de Indias", whose provisions have already been considered (3).

3.3. The H.C.M. also observes (4) that it was necessary to overcome the difficulties of the jurisdiction of the Sub-Delegate "Juez de Tierras" of Chalatenango, adding that the extension of his jurisdiction was agreed as an exceptional measure and, consequently, could not have any effect on the

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1. H.C.M.: p. 152.
2. In Paragraphs 2.28. - 2.30. above.
3. In Paragraph 2.29. above.
4. H.C.M.: p. 159.

inter-provincial boundaries. The H,C,M. concludes (5) by affirming that the "Juez de Tierras" of Chalatenango was incompetent "ratione materiae" to carry out any modification of the inter-provincial boundaries. But as the Opinion of Professor Nieto Garcia indicates, in this case there was utilised "la solution simple du recours à l'autorité superieure, dont la juridiction s'étend sur le territoire des deux juridictions séparées" (6). The H.C.M. cannot question the validity of this Formal Title Deed to Commons of 1776 simply because it recognises that the authorisation given to the "Juez de Tierras" of Chalatenango "n'est valable que pour ce cas particulier" (7). Consequently, this Formal Title Deed to Commons is wholly valid and duly adjudicated to the native community of Citalá its Commons in Tecpangüisir Mountain, together with all the juridical consequences which emerge from this adjudication.

3.4. The fact that this adjudication was carried out correctly is confirmed by the Opinion of Professor Nieto Garcia (8). Under the heading: "L'autorité ne peut agir en dehors du territoire de sa juridiction, Professor Nieto Garcia explains that this constitutes the general rule but that "Cependant, afin d'éviter le blocage officiel qui pourrait résulter de cette compartimentation de la juridiction, on utilise la solution simple du recours à l'autorité supérieure, dont la juridiction s'étend sur le territoire des deux juridictions séparées des autorités inférieures." ..... "Et l'"Audiencia", pour sa part,

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5. H.C.M.: p. 194.
6. H.C.M.: Annexes: p. 57.
7. H.C.M.: p. 120.
8. H.C.M.: Annexes: p. 53.

(qui n'avait pas de problèmes de juridiction, vu que la sienne comprenait celle des deux circonscriptions inférieures) pouvait agir comme suit: soit confier la tâche à l'autorité inférieure compétente, soit commettre ou déléguer une autorité initialement incompétente pour qu'elle exerce des pouvoirs exceptionnels". This is exactly what occurred.

(B) The "Effectivités"

3.5. Honduras affirms that in this sector is useless to take into account "Effectivités" and that what ought to prevail is the Formal Title Deed to the Commons in question. El Salvador does indeed invoke the "effectivités" and the arguments of a human nature but the only function of these matters is to confirm the rights that emerge from the Formal Title Deed to these Commons. El Salvador enjoys the benefit of both pre-conditions: not only is the right to the territory in dispute vested in El Salvador according to the Formal Title Deed thereto but also it is a Municipality of El Salvador that has administered and continues to administer this territory. In reality, the adoption of the frontier line claimed by Honduras would suppose the transfer to the territory of Honduras of the following nineteen villages and hamlets of El Salvador that belong to the Municipality of Citalá: San Lorenzo, San Ramón, La Lima, La Cuestona, El Chaguitón, Talquezalar, Hacienda Montecristo, El Socorro, Peñasco Blanco, Los Planes, El Ocotillo, Cerro Negro, La Quebrada, Los Hornitos, Lagunetas, Las Higueras, Palos Bonitos, La Chicotera, and El Plan Grande. These are townships which, as Honduras argued in the course of its litigation with Guatemala: "had economic and social interests which were common to them and common traditions. Therefore, the principle of uti possidetis thus possesses a basis which is as moral as it is

legal. Take into account the sentiments of the townships that have lived, struggled and died together and do not break the communal links" (Fiore, Revue Generale de Droit International Public, Vol. XVII, pp. 251, 252) (9). These were the arguments on which Honduras based its claim to the Merendón line, emphasising the existence in this line of hills of eight villages and eleven hamlets of Honduras which "belong to the Municipalities of Concepción and Santa Fé" (10). El Salvador today is relying on exactly the same considerations. The administrative control over the native villages and hamlets in the sector of Tecpangüisir Mountain has been exercised and is still exercised from what is now El Salvador. The "Alcalde Mayor" of the Colonial Province of San Salvador during the colonial period administered the assets of the township of Citalá, controlled its books of accounts and ensured that the Indian population sowed their lands so that they would later be able to pay their taxes. Jurisdiction and administrative control was exercised over the Commons of Tecpangüisir Mountain from San Salvador. As Honduras expressly recognised in the course of its litigation with Guatemala, "the territorial boundaries or political jurisdiction of a Province or State are those up to which there legally extends power and authority to govern and put laws into effect" (11).

(C) Geographical and Cartographical Comments

3.6. The observations formulated in the H.C.M. in relation to the Formal Title Deed to

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9. E.S.R.: Annexes: p. 20
10. E.S.R.: Annexes: p. 24
11. E.S.R.: Annexes: p. 31

the Commons of Citalá of 1776 reveal the contradictory and ambivalent attitude maintained by Honduras both in respect of this particular Formal Title Deed to Commons and in respect of Formal Title Deeds to Commons in general. On the one hand, Honduras impugns such Title Deeds on the grounds that they lack the efficacy to provide the basis of uti possidetis iuris, yet on the other hand Honduras relies on such Title Deeds where their provisions appear to be favourable to the Honduran case. This dual attitude is also manifest in the inconsistencies that appear between some of the observations formulated by the H.C.M. and the conclusions to be drawn from the maps presented by Honduras.

3.7. Thus, for example, the H.C.M. (12) criticises the coordinates provided by El Salvador as the exact geographical location of the Cerro de Montecristo and indicates those which Honduras regards as the correct location of this peak. However, the coordinates indicated in the text of the H.C.M. do not in any way coincide with those that emerge from the map presented by Honduras, Montecristo 2359 III (13), and the map presented by El Salvador, Metapan 2359 (14). There is complete agreement between the maps presented by the Parties and consequently there is no reason whatever to have recourse to the coordinates that emerge from the map of the Joint Technical Commission of Honduras and Guatemala of 1937.

3.8. The H.C.M. (15) equally criticises the fact

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12. H.C.M.: p. 125.
13. H.C.M.: p. 132.
14. E.S.M.: Book of Maps: Map 6.I..
15. H.C.M.: p. 129.

that El Salvador makes the frontier between the two States commence at the Cerro de Montecristo. The obvious response to this criticism is that this frontier cannot possibly commence from any other point given that the Cerro de Montecristo is the tripartite boundary marker agreed between Guatemala, Honduras and El Salvador. Honduras also makes the frontier which it claims commence at the Cerro de Montecristo.

3.9. It is true that the small triangle which runs from the tripartite boundary marker on the Cerro de Montecristo to the Cabecera del Pomola is not included within the Formal Title Deed to the Commons of Citalá. Nevertheless, this triangular area forms part of the forestry reserve of El Salvador and is inhabited by citizens of El Salvador, as indeed is recognised by the Annexes to the H.C.M. (16). This has been the case at least since 1742, since the Formal Title Deed to the Commons of Citalá of this date makes reference to a mountain "which the inhabitants of Citalá have always cultivated" (17). The human argument of a complementary character made applicable by the latter part of Article 26 of the General Peace Treaty of 1980 establishes that this small additional area of land should be governed by the same criteria as are applicable to the Commons of Citalá included within its Formal Title Deed. This small triangular area constitutes an example of one of those cases in which, as writes Professor de Lapradelle in a passage transcribed in the H.C.M. (18), the frontier "doit respecter dans la mesure du possible les groupements qu'elle rencountre et éviter de les sectionner, qu'il

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16. H.C.M.: Annexes: p. 295.
17. E.S.M.: Paragraph 6.7..
18. H.C.M.: p. 178.

s'agisse d'agglomérations ou d'unités économiques, agricoles et industrielles."

3.10. The H.C.M. (19) also objects to the mention made of the Cerro Obscuro and the location in which this peak appears on the map presented by El Salvador. In this respect Honduras has committed an error of interpretation. The Cerro Obscuro is the name given, in a generic form, to the entire mountainous mass of the region where the Cabecera or source of the Quebrada del Pomola is located since it is from this highest point that the waters which constitute this "cabecera" or source actually flow. The highest point in this area, 2,120 metres above sea level, is the Plan de los Martinez, which the maps presented both by El Salvador and by Honduras place in exactly the same position. It is precisely there that it is necessary to locate, for indisputable hydrographic reasons, the boundary point, that is to say the Cabecera del Pomola (20).

3.11. However, the H.C.M. (21) instead attempts to locate the Cabecera del Pomola in a quite different position, ignoring the geographical fact that the sources of rivers occur in the high areas of the mountains, and invoking arguments based on inference and indirect deduction which do not stand up to detailed analysis. Two objections are made to the position in which El Salvador has located the Cabecera del Pomola: first, that the record of the measurement affirms that the measurers took a westerly direction and, secondly, that there were more than

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19. H.C.M.: p. 130.
20. E.S.R.: Atlas: Map 6
21. H.C.M.: p. 198.

forty "cords" between the two points measured. The first objection, namely that the Cabecera of Pomola could not be located in a western direction as from the boundary marker of Talquezalar, arises out of a misinterpretation of the Formal Title Deed in question. The Title Deed declares that, upon leaving the boundary marker of Talquezalar, the direction of the measurement was changed so as to move towards the west upstream along the Quebrada del Pomola. This indeed was exactly what happened. The measurers began moving towards the west, as is indicated on the maps produced both by El Salvador and by Honduras. But very rapidly they were obliged to follow the undulations which the Quebrada del Pomola makes throughout its course until they arrived at the source of its waters, the Cabecera del Pomola. What is of interest in Formal Title Deeds of this type, when it is possible to identify the topography or the natural geographical location of the different places mentioned therein, is the point from which each measurement started and the point where each measurement finished; this is much more important than either the initial direction which the measurement took or the number of "cords" between the starting and finishing points. This is the case because, in mountainous and uneven areas, any estimate of the general direction of a measurement is made as the result of looking from the starting point to the finishing point as the crow flies. Imprecisions in the measurements in respect of the number of "cords" are common to almost all the Formal Title Deeds of this period since the measurers of those times lacked the techniques available to modern surveyors.

3.12. The H.C.M. (22) makes a further inference

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22. H.C.M.: p. 199.

or supposition when it affirms that the Cabecera del Pomola must be located at a different point because the direction mentioned in the Formal Title Deed is south-west while the map presented by El Salvador indicates that the direction taken was almost due south. However, it is appropriate to comment that a similar direction, almost due south, is also taken by the line proposed in the map 2359 III presented by Honduras (23) as from the point which Honduras selects as the Cabecera del Pomola to the confluence of the Quebrada de la Chicotera and an unnamed Quebrada. Thus the supposed difference in direction indicated by Honduras between the direction indicated in the Formal Title Deed and the direction adopted by the line imposed by the natural geographical features would also exist in the interpretation given by Honduras itself to this Formal Title Deed to the Commons of Citalá. All this demonstrates once again that, when interpreting a Formal Title Deed of this period, attention should be given to the starting point or boundary marker and finishing point or boundary marker of each individual measurement rather than to the necessarily imprecise descriptions of each change of direction made in the course of carrying out each measurement.

3.13. Honduras also argues (24) that there is an error of interpetation as to the final point of the western boundary on the basis that the Formal Title Deed indicates only that the measurement proceeded "par le confluent du torrent appelé Taguilapa". However, the Formal Title Deed states much more than this; it adds "and downstream from

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23. H.C.M.: p. 132.

24. H.C.M.: p. 202.

there (the measurement) continued through the density of the mountain, measured by eye because of its intransitable nature" until a spot known as Las Cruces was reached. There is agreement between the Parties to this litigation as to this final point of the measurement at Las Cruces. The line followed in the measurement "through the density of the mountain" to Las Cruces must necessarily be the line indicated by the map presented by El Salvador (25). This in any event coincides to a considerable degree with the map Montecristo 2359 III presented by Honduras (26), which, on the other hand, does not coincide with the line of the frontier now proposed by the H.C.M. (27), that is to say the confluence of the Quebrada de la Chicotera and an unnamed stream. Once again, disagreement between the text of the H.C.M. and the map presented by Honduras can be observed. Even Honduras, ignoring the text of the H.C.M., has followed in the map Montecristo 2359 III the same interpretation of the Formal Title Deed to the Commons of Citalá as has been made by El Salvador (28).

3.14. There is, however, one discrepancy between the two maps in the southern part of the boundary line, as is indeed mentioned by the H.C.M. (29). The reason for this minimal discrepancy is that the line presented by El Salvador makes the boundary coincide with the intersection of the road which runs from Metapán to Citalá, exactly as is required by the Formal Title Deed.

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25. E.S.M.: Book of Maps: Map 6.I..
26. H.C.M.: p. 132.
27. H.C.M.: p. 202.
28. E.S.R.: Atlas: Map 6
29. H.C.M.: p. 133.

II. Las Pilas or Cayaguanca

3.15. In support of its claim to this sector, the H.M. has cited a document set out on one single page of the Annexes thereto (30). This document requires a detailed analysis.

(A) The document relied on by Honduras

3.16. This document of a single page, extracted from a considerably longer original, is the basis of the entire argument presented by Honduras in respect of this sector. However, this document is susceptible of considerable adverse comment in relation both to its form and to its substance.

3.17. In relation to its form, the adjudication which was approved in 1742 by the two "Jueces de Tierras" by virtue of powers conferred upon them by the "Real Audiencia" of Guatemala was in favour only of the inhabitants of Citalá, not in favour of the inhabitants of Ocotepeque (31). No measurement took place of the land supposedly adjudicated to the inhabitants of Ocotepeque nor were any boundary markers fixed. These formal defects, as will be seen, affect considerably the process of interpretation of this document invoked by Honduras.

3.18. El Salvador has presented the complete text of this document, within which are the parts extracted by Honduras. From this document, it emerges that the Principal "Juez de Tierras" of the "Real Audiencia" of Guatemala instructed the two Sub-Delegate

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30. H.M.: Annexes: p. 2069.

31. E.S.C.M.: Para. 3.33., p. 60; Annexes: Vol. I, p. 135.

"Jueces de Tierras" who had jurisdiction respectively over Citalá and Ocotepeque to revise and reconfirm the boundary markers of the two settlements in order to put an end to the continuing disputes between their inhabitants. The two Sub-Delegate "Jueces de Tierras" duly sat at Citalá and summoned the inhabitants of Ocotepeque, who appeared before them and stated that "so far as concerned the lands of Jupula, they consent that possession thereof be given to the inhabitants of the township of Citalá", adding a request "that the lands of Jupula should be restored to them in another place". The two "Jueces de Tierras" viewed "all the lands which were in the possession of the inhabitants of Ocotepeque" and concluded "that they had more than sufficient lands for the purposes of cultivation", "all of which were irrigated lands, ... flat lands away from the mountains, pastures and watering places, which must cover more than four leagues". On the other hand, the two "Jueces de Tierras" established that the inhabitants of Citalá had only "rugged and unfruitful land" and that "in order to maintain their township, they travel for a distance of three leagues to cultivate a mountain to the west".

3.19. In relation to the lands of Jupula that were in dispute, the two "Jueces de Tierras" concluded "clearly and distinctly that the inhabitants of Ocotepeque did not have any right or just claim to those lands". The two "Jueces de Tierras" accordingly provided that the inhabitants of Citalá "should be given the lands that surround their township from the Río Lempa towards the west leaving free for them the mountain which the inhabitants of Citalá have always cultivated" (emphasis added) and directed that they should proceed to revise and confirm the appropriate boundary markers. The inhabitants of Ocotepeque did not contradict this decision but at

this stage "only requested that there should be left free for them a mountain called Cayaguanca which is above the Rio de Jupula". The two "Jueces de Tierras", in the light of what had been declared, provided that the inhabitants of Ocotepeque should "desist and not continue with the proceedings and the dispute that they have maintained with the inhabitants of Citalá and should be ready to assist at the handing over of the possession which his Excellency directs should be given to the inhabitants of Citalá".

3.20. For this purpose they went out into the countryside and proceeded to revise and confirm the boundary markers, the "Jueces de Tierras" finding that "the possession of these lands thus given to the inhabitants of Citalá was not prejudicial to the inhabitants of Ocotepeque because of the extensive area of land both cultivated and uncultivated that the inhabitants of Ocotepeque have, while the inhabitants of Citalá do not have any such lands, as indeed is evidenced by viewing the area". The two "Jueces de Tierras" thus ordered that boundary markers should be erected or confirmed in the places which they described and declared in relation to the lands attributed to Citalá "in these lands only the mountain has any utility because the land consists of crags and unworkable rocky ground without any fruits" (emphasis added). It was only when "the foot of a white crag which is at the summit of a very high peak was reached" that the inhabitants of Ocotepeque requested that they should be left with "the land which runs from this final boundary marker towards the east" and the "Jueces de Tierras" authorised the inhabitants of Ocotepeque to use that mountain.

3.21. In the dispositive part of these judicial proceedings, the two "Jueces de Tierras" supported "the inhabitants of Citalá in the possession

which they have had and have of these lands". Further, the Principal "Juez de Tierras" of the "Real Audiencia" of Guatemala duly decreed "that the possession given to the Indians of the township of Citalá of the lands in dispute with the Indians of the township of Ocotepeque should be confirmed".

3.22. Various conclusions can be drawn from this lengthy transcription of these proceedings, the full text of which is annexed to the E.S.C.M. (32). First, the reading of the proceedings in their entirety, which clearly demonstrates that the result was in favour of the inhabitants of Citalá, explains why Honduras only presented short extracts occupying only a single page. Secondly, the clearly proven penury of the lands of the inhabitants of Citalá in comparison with the abundance of the lands of the inhabitants of Ocotepeque demonstrates the implausibility of the claim by Honduras that "tout le massif" was adjudicated to Ocotepeque. Thirdly, the dispositive part of the decree handed down by the Principal "Juez de Tierras" of the "Real Audiencia" of Guatemala only supported the inhabitants of Citalá and not the inhabitants of Ocotepeque.

3.23. Turning now to the substance of this document, it is appropriate to formulate the following observations. First, although the mountain of Cayaguanca is indeed mentioned in this document, even the extract from the document presented by Honduras clearly demonstrates that this geographical feature is not situated in the disputed sector of the frontier at present under discussion but is instead situated in a sector the delimitation of which has already been agreed by the Parties to this litigation.

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32. E.S.C.M.: Annexes: Vol. I, p. 135.

The second sector of the land frontier whose delimitation was agreed by El Salvador and Honduras in Article 16 of the General Peace Treaty of 1980 completely respects the contents of this document of 1742 and delimits this sector of the frontier in accordance with the measurements and boundary markers established therein. Secondly, the fact that this geographical feature is situated within this sector which has already been delimited by El Salvador and Honduras, that is to say the sector between the summit of Cerro Zapotal and the peak of Cayaguanca, is confirmed by Map 3.1. presented by Honduras in the H.C.M. (33).

3.24. In the extract from this document presented by Honduras, the inhabitants of Ocotepeque "only requested that there should be left free for them a mountain called Cayaguanca which is above the Rio de Jupula" ("ils sollicitent seulement qu'on leur laisse la montagne dite Cayaguanca, qui se trouve au-dessus de la rivière Jupula" in the translation into French in the H.C.M.). Now the Rio de Jupula ends in a sector of the frontier which has already been delimited, at least one kilometre to the south of the peak of Cayaguanca, which is the final point of the second sector of the frontier delimited by Article 16 of the General Peace Treaty of 1980. Consequently, if the area requested by the inhabitants of Ocotepeque is situated above the Rio de Jupula, this area must be in Honduras, in the sector of the frontier between the summit of Cerro Zapotal and the peak of Cayaguanca which has already been delimited.

3.25. This is confirmed by Map 3.2., presented

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33. H.C.M.: p. 212.

by Honduras in the H.C.M. (34) as a supposed illustration of its rights. On this map, the Rio de Jupula is shown as ending before the meridian of the peak of Cayaguanca; in other words, this river is inside El Salvador according to the frontier already agreed between the Parties for the second sector delimited by Article 16 of the General Peace Treaty of 1980. Similarly, the mountain called Cayaguanca is situated symmetrically above the Rio de Jupula in the territory of Honduras on the other side of this agreed frontier.

3.26. The really conclusive evidence of the true location of this area referred to in the extract from this document presented by Honduras, namely in a sector of the frontier which has already been delimited, emerges from the Formal Title Deed to the Commons of Ocotepeque of 1818, presented as evidence by Honduras (35). In this Formal Title Deed, authorised a short time prior to the date of the independence of Central America, the rights of the inhabitants of Ocotepeque were regrouped and defined (36). The Formal Title Deed establishes (37) that the "Juez de Tierras", accompanied by his assessors, the surveyor and the measurer, carried out a visual inspection of the land which was to be measured and that, "having climbed up to the summit of the Cerro de Cayaguanca", he was able to see the other boundary markers. This indicates that he climbed up to the highest point, that is to say to the peak of Cayaguanca. On the following day, from the path from

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34. H.C.M.: p. 214.

35. H.M.: Annexes: p. 1677.

36. H.C.M.: p. 231.

37. H.M.: Annexes: p. 1717.

the peak called Cayaguanca, he went in the direction of the Monte de Sedros towards the east and from there, going in a north easterly direction, reached the Monte San Antonio.

3.27. Now a line running from the starting point to the finishing point of this measurement, that is to say from the peak of Cayaguanca to the peak of the Monte San Antonio passing through the Monte de Cedros, demonstrates conclusively that the mountain of Cayaguanca referred to in the document presented by Honduras cannot possibly be located in the disputed sector at present under discussion but instead in the second sector of the frontier which has already been delimited. This is sufficiently shown by looking at the boundaries of the Commons of Ocotepeque as fixed in 1818 in the manner that these are shown on Map 3.A. presented by El Salvador in the E.S.C.M. (38). Further, the Monte San Antonio, whose location is crucial in order to fix the line of the eastern boundary of the Commons of Ocotepeque, is shown in the same place on the maps presented by El Salvador and the map 2359 II Nuevo Ocotepeque presented by Honduras (39). This representation of the boundaries of the definitive Formal Title Deed to the Commons of Ocotepeque on Map 3.A. presented by El Salvador demonstrates that the settlement of Ocotepeque does not have anything to do with the lands which are in issue in this disputed sector of Las Pilas and the Rio Sumpul and that the area of land assigned to the inhabitants of Ocotepeque on the mountain of Cayaguanca is already inside the territory of Honduras, within the frontier agreed for the sector between the summit of Cerro Zapotal and the peak of

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38. E.S.C.M.: p. 49.

39. H.C.M.: p. 214.

Cayaguanca.

3.28. It is indeed logical that this should be the case. A last minute concession arising out of the proceedings of 1742, without measurements or boundary markers or judicial approval from the "Real Audiencia" of Guatemala, cannot possibly have attributed title to "tout le massif" de Cayaguanca in the manner claimed by Honduras (40). The land thus conceded must necessarily be limited to the east by the line running from the peak of Cayaguanca to the peak of the Monte San Antonio passing through the Monte de Cedros, as is shown by the Formal Title Deed to the Commons of Ocotepeque of 1818, which summarised and regrouped the vast tracts of land obtained by that voracious municipality (41).

(B) The true interpretation of the Formal Title Deed to the Commons of La Palma and the "Effectivités"

3.29. The H.C.M. affirms (42) that in this sector the claims of El Salvador are based entirely on "Effectivités", that is to say the fact that this sector is populated and economically exploited only by citizens of El Salvador. It is of course true that the sector of Las Pilas and the lands which border on the right bank of the upper reaches of the Río Sumpul are and have been for time out of mind inhabited and exploited by citizens of El Salvador. However,

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40. H.C.M.: p. 233.

41. In this Formal Title Deed referring to Ocotepeque (H.M.: Annexes: p. 1793), it is stated: "cette caste étant toujours encline à accaparer toutes les terres qui les jouxtent, cela les incite à solliciter 8 fois plus de terrains".

42. H.C.M.: p. 238.

in this sector El Salvador relies above all upon a Formal Title Deed and resorts to arguments of a human nature only in a subsidiary or perhaps complementary way in respect of a small part of the sector which is not covered by the Formal Title Deed to the Commons of the municipality of La Palma. Although this Formal Title Deed relates to a measurement carried out in 1829, after the date of the independence of Central America, this document is relevant and acquires binding force in this particular case for two reasons.

3.30. The first of these reasons is that this measurement was carried out during the period when what are now the five Central American Republics were validly linked by virtue of a federal régime. The authorities of Honduras and the municipalities dependent on Honduras did not manifest the slightest opposition or objection to this particular measurement in spite of the fact that the Municipality of Ocotepeque, justly celebrated for its aggressiveness in defending and even extending its Commons, was summoned to appear and did not judge it necessary to do so. Indeed Honduras later argued, in the course of the Mediation carried out before the State Department of the United States of America in the dispute between Honduras and Guatemala, that (43):

"The Formal Title Deeds executed after the date of independence, but before the Federation was dissolved, also have special importance for the discussion, not only because of their proximity to that date but also because, in the event that one State had by virtue of its measurements, prejudiced the rights of another State, there was an authority able to reestablish justice."

To the same effect, Honduras argued on 27 November 1918 that the Formal Title Deeds executed during the federal régime had "greater force when they most

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43. E.S.R.: Annexes: p. 35

approached the date of independence and greater [force] if the concessions were made during the period in which Honduras and Guatemala were two states of one nation governed by a common Federal Government with sufficient authority to put an end to all the differences that might occur between them" (44).

3.31. The second of these reasons is the fact that, as has emerged from the previous section of this Reply, the supposed title of Honduras to the area in dispute, namely the proceedings of 1742, has been totally discredited in that the part of the document in question relied on by Honduras refers only to a geographical feature which is not located within this disputed sector of the frontier. In these circumstances, the Formal Title Deed to the Commons of La Palma acquires an indisputable value as the only document capable of guiding the Chamber in the process of fixing the frontier in this sector. It is clearly appropriate to apply to questions concerning frontiers the proposition stated by the Permanent Court of International Justice in the Eastern Greenland Case in relation to the acquisition of territorial sovereignty in circumstances in which two concurrent claims have been submitted to a tribunal and the latter has had to decide which of the two is well-founded. The Permanent Court said this (45): "in many cases, the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim". Further, in the Minquiers and Ecrehos Case, the International Court

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44. See Article 137 of the Constitution of the Federal Republic of Central America; also the Annexes to the Reply in this Mediation: Vol. II, p. 41.

45. P.C.I.J. Reports: Series A-B: No. 53, p. 46.

of Justice stated that (46): "the Court has to determine which of the Parties has produced the more convincing proof of title". In questions concerning frontiers where a tribunal is faced with concurrent claims, this criterion, namely that the more authoritative of two documents, even though it lacks some formal requirement as to antiquity, can serve as the basis for a judicial decision, has to be accepted. Indeed, Honduras has itself recognised this fact by devoting numerous pages to the question of the interpretation which ought to be given to the Formal Title Deed to the Commons of La Palma.

3.32. The most important question which is at issue in this disputed sector of Las Pilas arises out of the attempt by Honduras to ignore the two historical and geographical realities which have, traditionally, determined the frontier in this sector: first, the fact that the upper part of the course of the Rio Sumpul has always been regarded as constituting the frontier and, secondly, the fact that the highest peak in this area, the Cerro El Pital, belongs to El Salvador. Both these geographical features are supported by the Formal Title Deed to the Commons of La Palma. What is more, Honduras recognised the fact that the upper part of the course of the Rio Sumpul constitutes the frontier, admittedly only partially, in the conciliatory proposition which it formulated in 1985 (47). However now Honduras, which is unable seriously to oppose these two historical and geographical realities, has resorted to an attempt to transfer ideologically the location of the mountain of Cayaguanca, which is situated in a sector which has already been delimited, with the

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46. I.C.J. Reports 1953 p. 52.

47. H.M.: p. 346.

intention of obtaining by means of this change of location both the upper part of the course of the Río Sumpul and the Cerro El Pital. El Salvador does not believe that the Chamber will allow itself to be deceived by this change of location of this mountain.

3.33. Honduras presents in the H.C.M. (48) an interpretation of the Formal Title Deed to the Commons of La Palma which is both whimsical and arbitrary. Honduras does not go so far as to question the fundamental aspect of this Formal Title Deed to Commons - the recognition of the fact that the upper part of the Río Sumpul constitutes the frontier as far as its source, the confluence of the Río Sumpul and the Quebrada de Copantillo. However, as from this point, the incorrect and arbitrary interpretation of Honduras commences.

3.34. With the object of explaining the straight line which it proposes as the frontier in Map 3.1. (49) rather than the broken line proposed by El Salvador, Honduras affirms that, as from the confluence of the Río Sumpul and the Quebrada del Copantillo, the "Juez de Tierras", according to the Formal Title Deed, walked in a straight line. The H.C.M. states (50): "le titre ne va pas en ligne droite alors que le juge indique que c'est ce qu'il fit". However, the original Spanish version of this Formal Title Deed does not state that the "Juez de Tierras" walked in a straight line. What it states is that "from this point the direction was changed upstream

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48. H.C.M.: pp. 240 et seq. & Map 3.1. (p. 212).

49. H.C.M.: p. 212.

50. H.C.M.: p. 241.

along the little stream to the south west four points to the south west and thirty-five more (cords) were measured as far as the place known as El Pital" ("de este punto se cambió el rumbo aguas arriba de la quebradita al Sud-Oeste cuatro grados al Sud-Oeste y se midieron treinta y cinco mas hasta el paraje llamado El Pital" in the original Spanish text). It is obvious that the "Juez de Tierras" continued the measurement following the curves of this stream until he reached the place known as El Pital. Thus the straight line proposed by Honduras on its Map 3.1. as an alternative must clearly be discarded.

3.35. The interpretation of the Formal Title Deed to the Commons of La Palma proposed by Honduras also attempts to adjudicate to Honduras the Cerro El Pital. The Formal Title Deed indicates that the "Juez de Tierras" reached "the place known as El Pital". Common sense indicates that this place must be on the summit of the Cerro El Pital and this is exactly where El Salvador places it. On the other hand, the interpretation of Honduras on its Map 3.1. (51) locates "the place known as El Pital" at some two kilometres to the north east of the Cerro El Pital. This notion of Honduras as to the location of this place is so distant and imprecise that Honduras does not actually dare to indicate its location on this map, putting nothing more than the words "Paraje del Pital" (52).

3.36. From "the place known as El Pital", the measurement proceeded, according to the Formal Title Deed, to the neighbourhood of the Copo

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51. H.C.M.: p. 212.

52. E.S.R.: Atlas: Map 7

de Cayaguanca and from there to the source of the Río Jupula. On the Map 3.1. presented by Honduras (53), the location of the place described as being in the neighbourhood of the Copo de Cayaguanca is shown as being some four kilometres from the peak of that name and so certainly not in its neighbourhood, while the location of the source of the Río Jupula is shown as being some two kilometres from the point where the Río Jupula ends. The fact that these two boundary markers are shown to be located in positions so inconsistent with their description in the Formal Title Deed corroborates the whimsical and arbitrary interpretation which Honduras makes of the Formal Title Deed to the Commons of La Palma.

3.37. The Formal Title Deed to the Commons of *La Palma states that the surveyor summoned* the proprietors of the adjoining "haciendas" (farms) and that among them was included Santiago Valle, the proprietor of the Hacienda de Sumpul. This "hacienda" is located within the jurisdiction of the District of Tejutla in the Republic of El Salvador and contains an ancient settlement, which in 1829 belonged to Santiago Valle. Honduras incorrectly argues that the E.S.M. has not presented the location of the hamlet of Sumpul or the location of the "hacienda" of that name in the past (54). However, the H.C.M. itself (55) describes as the location of this place that indicated by El Salvador. Further, the Formal Title Deed to the Commons of La Palma states (56) that the proprietor of the Hacienda de Sumpul was Santiago

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53. H.C.M.: p. 212.

54. H.C.M.: p. 237.

55. H.C.M.: p. 235.

56. E.S.C.M.: Annexes: Vol. II, p. 7.

Valle.

3.38. The H.C.M. also affirms (57) that El Salvador has not presented certain documents of the colonial period mentioned in the E.S.M. (58), namely Formal Title Deeds of 1689 and 1718 which confirm the jurisdiction of the Colonial Province of San Salvador over the hamlet of Sumpul. The original Spanish version of these documents was sent to Honduras on 10 October 1988 under Reference Number 10788; however, in the light of the fact that these documents have once again been asked for in the H.C.M. (59), they will be presented as Annexes to this Reply (60).

3.39. Further, other colonial documents exist which corroborate the jurisdiction of the Colonial Province of San Salvador over the hamlet of Sumpul. The geographical account of the Colonial Province of San Salvador drawn up in 1742 by Manuel de Galvez, "Alcalde Mayor" of San Salvador, contains a *description of the settlement of Texutla, some* 18 eighteen leagues from the capital (San Salvador) in a north easterly direction on the far side of the Rio Lempa, and indicates that within the circumference of this valley known as San Juan Chalatenango and Sumpul, there were 222 mulattos and half-breeds together with the soldiers of two companies for the defence of the coasts (61). Similarly, the Report presented in 1807 by the "Corregidor Intendente" (Intendant Magistrate) of the Colonial Province of

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57. H.C.M.: p. 236.
58. E.S.M.: Paras. 6.16. & 6.17..
59. H.C.M.: pp. 236-237.
60. E.S.R.: Annexes: p. 38-42
61. E.S.R.: Annexes: p. 48

San Salvador, Antonio Gutiérrez y Ulloa, in its description of Chalatenango as the Twelfth Judicial District of that Province, made the following statement: through this judicial district pass three mighty rivers, the Río Sumpul, the Río Tamulasco and the Río Lempa, the first of which divides this jurisdiction from the jurisdiction of Gracias a Dios in Honduras (62).

3.40. In the Reply made by the representatives of Honduras to the Pleadings of Guatemala in the course of the Mediation carried out before the State Department of the United States of America in the dispute between Honduras and Guatemala, Honduras argued (63):

"In relation to the Valle de Copán, included in the line of mountains claimed by Guatemala, we must state that Honduras is at present in possession of the greater part of this valley: its Honduran settlements, villages and hamlets within this area are governed by the authorities and by the laws of this Republic. Consequently, no special document is necessary in order to justify that this valley was in the possession of Honduras in 1821 because, having checked the jurisdictional possession in 1818 against the evidence of the historian Juarros and the ecclesiastical records, and having recognised the present possession of Honduras, its possession during the intervening period is confirmed by the presumption of juris tantum which is adopted by every legislature."

El Salvador today is invoking the very same and even more cogent arguments, proving, by means of the documents of the Spanish colonial authorities to which reference has already been made, that jurisdiction over the hamlet of Sumpul was exercised during the colonial period by the "Alcalde Mayor" of the Colonial Province of San Salvador, something which is duly

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62. E.S.R.: Annexes: p. 57

63. E.S.R.: Annexes: p. 62

confirmed by the Formal Title Deed to the Commons of La Palma of 1829 which has been presented by El Salvador.

III. Arcatao or Zazalapa

3.41. First and foremost, it is necessary to emphasise the decisive nature of the fact that Honduras has not presented in relation to this sector any Formal Title Deed which has juridical validity nor even any which refers thereto. On the other hand, El Salvador has presented the Formal Title Deed to the Commons of Arcatao of 1724; this Formal Title Deed is the basis of the right of El Salvador to this sector and explains its present possession of the whole of this sector. Acceptance of the frontier claimed by Honduras would signify the transfer to Honduras of the following fifteen municipalities: La Ceiba, Lagunetas, El Jocotillo, El Amatillo, La Vecina, Gualcimaca, El Pito, Los Filos, Zazalapa, El Corozal, Las Cuevas, San Pablo, Los Apantes, Horconcillos, and Portillo del Aguacate.

3.42. In relation to this sector, two questions arise which must be examined separately: first, the observation by Honduras to the effect that the Formal Title Deed to the Commons of Arcatao does not cover the whole of the territorial claim formulated by El Salvador in this sector; and, secondly, the correct interpretation of the Formal Title Deed to the Commons of Arcatao and the exact location of the boundary markers referred to therein.

(A) The Scope of the Formal Title Deed to the Commons of Arcatao

3.43. It is true that El Salvador has not been able to present to the Chamber certain other

Formal Title Deeds to Commons which complement the Formal Title Deed to the Commons of Arcatao. An example is the Formal Title Deed to the Commons of Nombre de Jesús, whose absence is indeed the subject of adverse comment in the H.C.M. (64). The authorities of Honduras in fact know perfectly well that this Formal Title Deed was lost as the result of a fire which occured last century in the Archives of the Republic of El Salvador. Fortunately, however, certain Formal Title Deeds which have been presented by Honduras permit this shortcoming to be remedied and so by this means complete the Formal Title Deeds upon which is based the frontier claimed by El Salvador.

3.44. This is illustrated by the Formal Title Deed to the Commons of San Juan de Lacatao of 1768 which Honduras has presented (this time in its entirety) in the Annexes to the H.C.M. (65). This Formal Title Deed states (66) that the measurement which was carried out in this location reached "au point de rencontre avec une petite rivière où un grand ravin qu'on a dit s'appeler de Los Amates, ou également de Gualcuquin, servant également de limite et de *frontière à la propriété de Nombre de Jésus*". Immediately afterwards (67), the Formal Title Deed adds that "le domaine se trouve aux limites de la jurisdiction de la province de San Salvador", making clear the fact that this boundary proceeded "jusqu'à l'endroit de la jonction avec un petit ravin dénommé Tuquin ou de los Amatillos ou de Palo Verde ..... ce ravin étant la limite de la juridiction et de la

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64. H.C.M.: p. 279.
65. H.C.M.: Annexes: pp. 151 et seq..
66. H.C.M.: Annexes: p. 161.
67. H.C.M.: Annexes: p. 162.

division des provinces".

3.45. The Formal Title Deed subsequently states (68) that the inhabitants of Nombre de Jesús claimed, on the basis of the Formal Title Deed to their Commons which they presented to the "Juez de Tierras", "la petite rivière de Gualcuquin, sur la gauche jusqu'à l'endroit où cette rivière se joint au ravin de El Amatillo ou Palo Verde", adding that "cette petite rivière de Gualcunquin était la limite divisant les provinces de San Salvador et Comayagua". The "Juez de Tierras" decided (69) to "continuer la mesure par cet angle en recherchant les bornes anciennes du domaine de Nombre de Jésus sans y toucher, même le plus légèrement". This signifies that the "Juez de Tierras" found in favour of the claim made by the inhabitants of Nombre de Jesús, a settlement within the jurisdiction of the Colonial Province of San Salvador, thus ratifying the jurisdiction of El Salvador over this initial part of this disputed sector.

3.46. The Formal Title Deed continues (70): "Et l'arpenteur a suivi la direction du nord-est quart-nord, en suivant le ravin de Amatillo en laissant à gauche les terres de Nombre de Jésus jusqu'à arriver à une plaine qui se trouve à mi-hauteur de la colline où se trouve une borne ancienne de Nombre de Jesús". The line of the frontier claimed by El Salvador reaches precisely the line described in this measurement, following the small river Río Gualcuquin or El Amatillo (see the Maps 6.III. (71), Arcatao and La Virtud 245811

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68. H.C.M.: Annexes: p. 162.
69. H.C.M.: Annexes: p. 163.
70. H.C.M.: Annexes: pp. 163-164.
71. H.M.: Book of Maps: Map 6.III.

(72)). As is clearly seen, the frontier which begins at the Poza del Cajón on the Río Amatillo or Gualcuquin, does not leave this river in the manner claimed by Honduras but rather follows this river in the manner claimed by El Salvador.

(B) The Correct Interpretation of the Formal Title Deed to the Commons of Arcatao

3.47. The H.C.M. affirms (73) that El Salvador has been guilty of a "localisation inexacte, plus à l'Est et plus au Nord, de certains points indiqués dans l'arpentage effectué" in respect of the Commons of Arcatao. This observation refers in particular to the source of the Río Gualmoro, the Quebrada de Colomariguan, and the Chupadero de Agua Caliente. In making this observation, Honduras makes a supposition, namely that, if the boundaries of these Commons had been those claimed by El Salvador, the surveyor would have made some reference to the Río Zazalapa, given the importance of this river, and would have mentioned that he had crossed the river.

3.48. However, the supposition so made by Honduras is unsound. The "Juez de Tierras" and the surveyor had no reason to mention the crossing of the Río Zazalapa at this particular point of their measurement, simply because at this point this river was not used either to constitute or to denote the boundary of the Commons that were being delimited. That is not to say, however, that they totally ignored the Río Zazalapa. The Formal Title Deed to the Commons of Arcatao contains in the course of the measurement

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72. H.C.M.: p. 260.

73. H.C.M.: pp. 289-290.

thereof express references to this river. Thus, it is indicated (74) that the measurement "went back along a large and narrow hill until a small stream was reached ..... the which descends to the meeting of the Río Gualquire and Zazalapa". By using the word "descends" ("baja" in the original Spanish text), it is being stated that the measurement continued further to the north of the Río Zazalapa. The interpretation given by Honduras to this part of the Formal Title Deed ignores the whole of this particular part of the measurement in that this interpretation fails to take into account the climb and, later on, the descent to the place where the river meets a marsh, this being the route which, according to the Formal Title Deed, the measure actually took.

3.49. Subsequently, the surveyor proceeded "above Zazalapa on the boundary with the Province of Gracias a Dios", that is to say proceeding up the course of the river looking for its sources, "until he reached the summit of some very high hills" (75), which can only be the hills of the Cerro del Fraile. It is in this place that the Formal Title Deed states that there was a tree of "guanacaste", something very different from a place or a settlement called Guanacaste, a confusion which has produced an error on the part of Honduras. A further proof that the measurement reached this particular northern point is that it is declared in the Formal Title Deed that the surveyor, changing the direction of the measurement so as to continue from north to south, went back, that is to say descended, towards the boundary markers on the Cerro de Arcataguera, the Loma de El Sapo,

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74. E.S.C.M.: Annexes: Vol. III, p. 8.

75. E.S.C.M.: Annexes: Vol. III, p. 8.

and from there "to the Loma de Guanpa which is very high" (76).

3.50. The H.C.M. refers repeatedly to a place named Guanacaste which it attempts to situate at and identify with La Cañada. The H.C.M. indicates that the Formal Title Deed to the Commons of Arcatao declares that, upon leaving the boundary marker of Guanacaste, "nous avons longé des terres de San Juan de Lacatao" (77). In the first place, as has already been mentioned, the Formal Title Deed to the Commons of Arcatao does not mention a place or settlement called Guanacaste, only a tree of "guanacaste". In the second place, the Formal Title Deed to the Commons of Arcatao does not say what Honduras claims. What it actually says is that the land in question had a common boundary with lands of San Juan de Lacatao as from another point, which is the boundary marker of Guanpa, further to the north than where Honduras attempts to locate it.

3.51. Thus once again the attempt on the part of Honduras to amputate the other limb from the Formal Title Deed to the Commons of Arcatao fails. The boundary of these Commons therefore proceeds up the course of the Rio Zazalapa as far as its sources on the predominant heights of the area (the Cerro de Fraile) and then, changing radically in direction, descends once again along the line of a series of boundary markers which are confirmed by the Formal Title Deeds cited by Honduras, such as the Cerro de Arcataguera, the Loma de El Sapo, the Cerro de Guanpa, the "talpetates blancos", and the Cerro de Caracol.

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76. E.S.R.: Atlas: Map 9

77. H.C.M.: p. 292.

The location of this last boundary marker is arbitrarily moved by Honduras) (78).

3.52. As the E.S.C.M. indicates (79), the Cerro de Caracol is important, not only because this boundary marker was accepted by the inhabitants of Arcatao but above all because Honduras gives it a location which is not merely incorrect but also imaginary. All the errors which Honduras makes in relation to the other boundaries of the Commons of Arcatao are derived from the erroneous location which it gives to this boundary marker. This location is described as imaginary for the simple reason that Honduras has invented another Cerro de Caracol. On the official Maps 2458 II and 2458 III La Virtud (80) presented to the Chamber by Honduras there appear two Cerros de Caracol, separated by a distance of four kilometres. On these maps, the real Cerro de Caracol appears, as it exists today, at Latitude 14°05' 45" North and Longitude 88°43'48" West. It also appears with these same coordinates on the Map 2458 II. The other Cerro de Caracol, the imaginary one invented "pour les besoins de la cause", appears at Latitude 14°03'44" North and Longitude 88°44'20" West. The erroneous location of the Cerro de Caracol is the reason why Honduras also positions incorrectly the peaks and the boundary markers of the Formal Title Deed to the Commons of Arcatao which according to this Formal Title Deed are more to the north of the Cerro de Caracol, such as the Cerro de Arcataguera, the Loma de El Sapo, the Cerro de Guanpa, and the "talpetates blancos".

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78. E.S.R.: Atlas: Map 9

79. E.S.C.M.: Para. 3.52.; pp. 72-73.

80. H.C.M.: p. 260.

(C) The "Effectivités"

3.53. As in the case of the other sectors, El Salvador is once again able to prove in this sector not only its rights under its Formal Title Deeds but also its "Effectivités". This latter point is confirmed by a document from Honduras of the highest possible authority, which is appended as an Annex to this Reply (81). After an end had been brought about in 1968 to the armed conflict of that time and after the armed forces of El Salvador had given up their occupation of the area of La Virtud but with Arcatao remaining, as was only logical, subject to the jurisdiction of El Salvador, the President of Honduras, General Osvaldo López Arellano, publicly declared that, as a result of this movement of the armed forces of El Salvador, he was celebrating "with all my heart the fact that peace has returned to the Republic as a consequence of their departure from our territory."

IV. Nahuaterique and Torola

3.54. In relation to this sector of the frontier, El Salvador has relied, first, on the Formal Title Deed to the Commons of Arambala and Perquín of 1815, which covers the localities of Perquín, Sabanetas, and Nahuaterique, and, secondly, on the Formal Title Deed to the Commons of Torola of 1743. Honduras for its part has relied, first, on a Survey carried out in 1793 by Andrés Pérez and, secondly, on a Formal Title Deed of 1770 adjudicating two and a half "caballerías" to the inhabitants of Jocoara. It is necessary to examine separately the two Formal Title Deeds to Commons cited by El Salvador and the

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81. E.S.R.: Annexes: p. 65

Survey and the Formal Title Deed cited by Honduras.

(A) The Formal Title Deed to the Commons of Arambala and Perquín

3.55. The Formal Title Deed to the Commons of Arambala and Perquín, which was approved judicially in 1815, is the decisive evidence on which is based the frontier claimed by El Salvador in this sector. This Formal Title Deed shows clearly and indisputably that the Commons of the inhabitants of Arambala and Perquín extended towards the north as far as the heights which are perfectly identifiable today as, mentioning only the three principal points which fix the northern boundaries of these Commons, the Montaña de la Isla, the Cerro de la Ardilla, and the Portillo de Osicala or el Alumbrador.

3.56. This line of mountains towards the north, thus established as the northern boundary of the Commons of Arambala and Perquín, in itself demonstrates the lack of foundation of the claim by Honduras that the Río Negro Cuyaguara constitutes the frontier; such a frontier would have the effect of cutting in half the Commons of Arambala and Perquín, since the Formal Title Deed to these Commons clearly states that its boundary was delimited by the Río Negro Pichigual. Acxcording to this Formal Title Deed, on changing the direction of the measurement from north to south, the "Juez de Tierras" reached the boundary marker of Guiriri, where "there were to the west and the south west royal landholdings which belong to this jurisdiction (that is to say to [the jurisdiction of) San Miguel) because beyond these lands is the Río Negro which is also known as Pichigual which said river divides this jurisdiction from that

of Gracias a Dios" (emphasis added) (82). The validity of this Formal Title Deed to Commons has been recognised by Honduras in all the negotiations ever carried out between the two Parties to this litigation. Consequently, the claim by Honduras that the river which constitutes the frontier is instead the Rio Cuayaguara is both arbitrary and directly contrary to this Formal Title Deed, which repeatedly describes the Rio Pichigual as the frontier.

3.57. The Formal Title Deed then continues by stating that, when the measurement reached another boundary marker, the Roble Negro, the inhabitants of Colomoncagua appeared and the "Juez de Tierras" asked them for their Formal Title Deeds "which they said that they had not brought with them but which they would deliver to me within two days" (83). The experts who were accompanying the "Juez de Tierras" maintained that the Roble Negro was a boundary marker of the Commons of Arambala and Perquin "because from the said Roble (Negro) to the Rio Negro or Pichigual there was about a quarter of a league and at that river this jurisdiction ends" (84). This confirms the identification of the Rio Pichigual as the frontier. The "Juez de Tierras" ordered that "this boundary marker should be confirmed on the grounds that (the inhabitants of Colomoncagua) had not appeared with their Formal Title Deeds as they had offered" (85).

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82. E.S.C.M.: Annexes: Vol. IV, p. 92 (p. 326 of the original Spanish text).

83. E.S.C.M.: Annexes: Vol. IV, p. 93 (p. 327 of the original Spanish text).

84. E.S.C.M.: Annexes: Vol. IV, p. 93 (p. 327 of the original Spanish text).

85. E.S.C.M.: Annexes: Vol. IV, p. 93-94 (p. 327 of the original Spanish text).

3.58. In the same manner, the "Juez de Tierras" affirmed that between the Roble Negro and the Río Negro or Pichigual "the intermediate land was a royal landholding" (86), just as he had maintained earlier that "there were to the west and the south west royal landholdings which belong to this jurisdiction" (emphasis added) (87). This affirmation indicates that these lands of the Spanish Crown, although they did not form part of the Commons of Arambala and Perquín, were nevertheless included within the jurisdiction of the Colonial Province of San Miguel.

3.59. This Formal Title Deed to the Commons of Arambala and Perquín upon which the claims of El Salvador are based is so categorical that the defence which Honduras has attempted to use in order to oppose its terms is to attack the "Juez de Tierras" and the Sub-delegate "Juez de Tierras" who ordered and carried out the measurement, basing this attack on the criticisms which were formulated against them by the representatives of Colomoncagua, the people who were not able to present their Formal Title Deeds. However, this criticism overlooks a fundamental fact. Contrary to what occurred in the case of the Survey carried out by Andrés Pérez (88), the Formal Title Deed to the Commons of Arambala and Perquín received the superior judicial approbation of the President of the "Real Audiencia" of Guatemala and Exclusive "Juez de Tierras" (89); this approval deprives of

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86. E.S.C.M.: Annexes: Vol. IV, p. 93 (p. 327 of the original Spanish text).

87. See Paragraph 3.56. above.

88. See Paragraphs 3.63.-3.66. below.

89. E.S.C.M.: Annexes: pp. 35-36.

any substance the criticisms set out in the H.C.M. (90) which the lawyer representing the inhabitants of Colomoncagua formulated against the "Jueces de Tierras".

(B) The Two and a Half "Caballerías" adjudicated to the Inhabitants of Jocoara

3.60. The Formal Title Deed to the Commons of Arambala and Perquín includes the claim made by the inhabitants of the settlement of Jocoara to two and a half "caballerías". The same Formal Title Deed however also clearly establishes that this small area of land was sold to the inhabitants of Jocoara on the basis of a "composición", that is to say "with the condition that they must pay his Majesty for them at the rate of eight "tostones" (silver coins) for each one which is the half of their true value" (91). In accordance with the thesis maintained by Honduras and supported by the Opinion of Professor Nieto García, these two and a half "caballerías" constitute the clearest possible example of a typical grant of "ejidos de composición", which does not serve as a basis for any claim of sovereignity but merely confers a "droit foncier", that is to say private proprietary rights. This explains why the Principal "Juez de Tierras" of the "Real Audiencia of Guatemala" ordered, directing himself to the "Jueces de Tierras" of both San Miguel and Comayagua, that both the inhabitants of Arambala and Perquín and the inhabitants of Jocoara should be protected in their landholdings. The two "Jueces de Tierras" were so directed with the object of

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90. H.C.M.: pp. 358-361.

91. E.S.C.M.: Annexes: Vol. IV, p. 135 (p. 349 of the original Spanish text).

protecting the private proprietary rights of the inhabitants of Jocoara over the two and a half "caballerías".

3.61. On the other hand, the Formal Title Deed to the Commons of Arambala and Perquín does not constitute a grant of "ejidos de composición". The proof of this is simply that the payment that would have been appropriate by way of "composición" was not demanded and the "Juez de Tierras" instead simply ordered that the inhabitants of the united settlements of Arambala and Perquín should be protected "in the age-old possession of their Commons" (92). Consequently, this Formal Title Deed to Commons did not become affected nor in any way diminished by virtue of the area of land which the inhabitants of Jocoara obtained and which, as was shown in the E.S.C.M. (93), was situated to the west and the south of the mountain of Nahuaterique.

3.62. Honduras is attempting to confuse the issue with the object of claiming, on the strength of the very small area of two and a half "caballerías" held, what is more, only by virtue of private proprietary rights, no less than the whole of the Montaña de Nahuaterique. The H.C.M. affirms that "les "ejidos" de Perquín y Arambala ont été arpentés, en partie dans la province de San Miguel, en partie dans celle de Comayagua" (94). This is totally false. A measurement could not possibly take place over land comprised within two different jurisdictions since

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92. E.S.C.M.: Annexes: Vol. IV, p. 147 (p. 354 of the original Spanish text).

93. E.S.C.M.: Para. 3.77., p. 86.

94. H.C.M.: p. 347.

it was expressly indicated to the Sub-delegate "Juez de Tierras" in his Commission the only jurisdiction in which he had competence. The Formal Title Deed to the Commons of Arambala and Perquín was drawn up by the Sub-delegate "Juez de Tierras" of San Miguel and was subsequently duly approved by the "Real Audiencia" of Guatemala. The reference made by the Principal "Juez de Tierras" in the "Real Audiencia" to "all the "Jueces de Tierras" and justices of the Province of San Miguel and all those of (the Province of) Comayagua" (95) in order that they should protect and defend the possession of these lands by their inhabitants simply indicates that this Formal Title Deed had to be respected as much by the "Juez de Tierras" of San Miguel, on the basis that the land in question was within his jurisdiction, as by the "Jueces de Tierras" and justices of Comayagua, on the basis that this was the neighbouring Province from which the Commons of Arambala and Perquín were frequently invaded by the inhabitants of Jocoara, who were subject to the jurisdiction of Comayagua. What is more, dual jurisdiction over the same territory was impossible because of the terms of the First Law of Title I of the Fifth Book of the "Recopilación de las Leyes de Indias" which was transcribed and discussed in the preceding Chapter of this Reply (96), given that this law ordered the colonial authorities "to keep and observe the limits of their jurisdictions". This provision constituted a direct prohibition on the joint exercise of jurisdiction over the same territory by the authorities of two different Colonial Provinces.

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95. E.S.C.M.: Annexes: Vol. IV, p. 148 (p. 354 of the original Spanish text).

96. See Paragraph 2.29. above.

(C) The Survey carried out by Andrés Pérez

3.63. Honduras cites in support of its claim a Survey carried out in 1793 by Andrés Pérez in favour of the inhabitants of Colomoncagua (97). However, this document does not constitute a Formal Title Deed conferring rights of any type whatsoever but is merely the record of a simple "reconnaissance visuelle circulaire" (98), carried out as the result of a petition from the inhabitants of Colomoncagua with the object of "réparer ou borner l'ensemble du terrain qu'ils ont reconnu et reconnaissent comme étant leur" (99). In the course of this procedure, the adjoining landowners were duly summoned but, when one of them attempted to make an objection, Andrés Pérez simply stated "qu'il se présente pour user de su droit devant qu'il juge bon, mais que je continuerais le cours de l'arpentage comme il m'est ordonné", adding that "je continuai l'instruction des endroits, des bornes et des directions qui étaient portés dans l'écrit présenté par Sisto Gonzales, fondé de pouvoir des natifs du village de Colomoncagua" (1). Consequently, this procedure was not of a contentious nature but merely a survey, without binding effect for third parties, of the area claimed by the inhabitants of Colomoncagua.

3.64. In the course of this survey, Andrés Pérez encountered the inhabitants of Arambala and Perquin accompanied by the "Alcalde" of the settlement of San Fernando, all of whom objected

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97. H.M.: Annexes: pp. 1296-1325.

98. H.M.: Annexes: p. 1297.

99. H.M.: Annexes: p. 1297.

1. H.M.: Annexes: p. 1307.

violently to the operation which he was carrying out at the request of the inhabitants of Colomoncagua (2). This opposition caused Andrés Pérez to stop his survey (3). However, more than a month later he continued the operation, very possibly after having explained to the inhabitants of San Fernando that this procedure was neither to confer nor to take away rights since what the inhabitants of Colomoncagua were seeking was merely a visual survey.

3.65. The proof of how exaggerated the pretensions of the inhabitants of Colomoncagua actually were is that they included within their claims no less than *the entire settlement of San Fernando* (4) which, as is well known, is the head of a municipal district of El Salvador. Consequently, this Survey of Andrés Pérez has, from the point of view of Honduras, the defect that it actually proves far too much in favour of Honduras. It is, therefore, so excessive that it cannot be taken seriously into account. Thus, for example, Honduras has not gone so far as to dare to claim the whole of the municipality of San Fernando, in spite of the fact that the whole of this municipality is included within the area surveyed by Andrés Pérez in 1793. Nevertheless, the frontier shown by the Maps B.2.2. (5) and 5.1. (6) presented by Honduras cuts in half this very same municipality of San Fernando. On the other hand, the Official Map of Honduras 2557 I Río Negro (7) does not include this half of the

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2. H.M.: Annexes: p. 1308.
3. H.M.: Annexes: p. 1309.
4. H.M.: Annexes: p. 1310.
5. H.M.: p. 216.
6. H.C.M.: p. 326.
7. E.S.R.: Atlas: Map 13

municipality of San Fernando within the territory of Honduras. According to this last map, San Fernando is some two and a half kilometres away from the frontier. These inconsistences confirm the comments which have already been made, namely that this Survey carried out by Andrés Pérez cannot be taken into account as a basis for the delimitation which has to be carried out by the Chamber.

3.66. The definitive confirmation that the Survey carried out by Andrés Pérez cannot be regarded as having attributed any legal rights is the events of 27 July 1793. Summoned to defend his rights, Pedro de Montoya, in representation of all the inhabitants of San Fernando, said (8): "que parce que l'emplacement de San Fernando est reconnu par le juridiction de l'intendence de San Salvador, et qu'il se trouve dans une autre juridiction, qui a toujurs [sic] été reconnu par ledit intendant, il est prêt à se présenter à l'une ou l'autre juridiction". This indicates that this survey relied on by Honduras neither attributed any rights to the inhabitants of Colomoncagua nor constitutes any valid proof of the rights alleged by Honduras. Nevertheless, the position adopted by Honduras is so extreme that the furthest points of the frontier claimed by Honduras go well beyond the boundaries of the Honduran frontier department of Intibuca as shown on the Official Maps of Honduras (9). Further, the boundary marker El Carrizal, whose existence is insisted upon by the H.C.M. (10), is in this way moved towards the east to such an extent that, according to Map B.2.2.

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8. H.M.: Annexes: p. 1324.
9. E.S.R.: Atlas: Map 13
10. H.C.M.: p. 390

presented by Honduras (11), it finishes up beyond the actual municipality of San Fernando. The location of this boundary marker in this place is wholly arbitrary since there is not the slightest evidence that this place was ever known either by the actual name of this boundary marker or by the name of Soropay.

(D) The Formal Title Deed to the Commons of Torola

3.67. The Formal Title Deed to the Commons of Torola is categorical in that it establishes the crucial question which has to be decided in this sub-sector, namely the determination of whether the Río de las Cañas or Yuquina is the boundary of the Commons adjudicated to the inhabitants of Torola in 1743. The Formal Title Deed states that, in the course of carrying out the measurement, the measurers "reached with a measurement of twenty-four cords the banks of a river situated in a ravine which is known as the Río de las Cañas and going towards the east the cord was passed upstream along the river and a measurement of eighty cords was taken as far as the royal road which goes from Torola to the township of Colomoncagua, whose justice and principal inhabitants with their royal Title Deed were present" (12).

3.68. In the H.C.M. (13) this Formal Title Deed to Commons is questioned on the basis of the fact that the evidence that certifies it was executed at the request of a member of the armed forces of El Salvador. Nevertheless, the authenticity and

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11. H.M.: p. 216.
12. E.S.C.M.: Annexes: Vol. VI, p. 39.
13. H.C.M.: pp. 345 & 382-383.

antiquity of this Formal Title Deed emerges from its own contents. The original Formal Title Deed to the Commons of Torola was destroyed by fire and so was replaced by the Spanish colonial authorities in 1743 and, when this latter document started to suffer some physical deterioration, it was protocolised by the Notary Public, José Córdova, in 1843 (14). Subsequently, owing to frontier problems with the inhabitants of Colomoncagua, the Municipality of Torola thought it convenient that a new measurement should be carried out. This was duly sought from the Political Governor of the Department of San Miguel. Further confirmation of the validity of this Formal Title Deed to Commons is the fact that it was recognised as such in the course of the negotiations maintained between the Parties to this litigation in 1869 and 1884, in which the Boundary Commissioners of both States additionally recognised that it is "le cours de la rivière dite "Río de la Cañas" qui forme ladite limite en aval" (15).

3.69. The weight of this Formal Title Deed to Commons presented by El Salvador is that the Formal Title Deed establishes as the frontier between the settlements of Torola and Colomoncagua the Río de las Cañas or Yuquina and that this same frontier was recognised by the inhabitants of Colomoncagua in the Formal Title Deed which has been presented by El Salvador. In this Formal Title Deed the inhabitants of Colomoncagua recognised "as their boundary the Río de la Yuquina and, having been asked for this river, stated that it is the same as the

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14. E.S.C.M.: Annexes: Vol. VI, pp. 1 et seq..

15. H.M.: Annexes: pp. 64, 85-86 & 182; Art. 17 of the Cruz-Letona Convention 1884.

Río de las Cañas" (16). This Formal Title Deed is now presented in its entirety as an Annex to this Reply (17).

3.70. In the same way, the Formal Title Deed to the Commons of Colomoncagua of 1776, presented by Honduras through the Secretariat of the International Court of Justice, confirms that the inhabitants of that settlement in the course of the measurement of their Commons neither reached nor crossed the Río de las Cañas. According to this Formal Title Deed, the measurement reached the Río Chicaguita and, proceeding upstream along this river, with a measurement of two hundred cords reached the royal road which joins Colomoncagua with Torola. At this point there appeared the "Alcalde" and the inhabitants of Torola, who presented the Formal Title Deed to their own Commons, from which it emerged that the boundary that separates the jurisdiction of the two Commons was a river. This river can only be the Río de las Cañas or Yuquina, which is therefore the boundary that ought to be followed as far as the Cajón de Champate.

(E) The "Effectivités"

3.71. So far as concerns "effectivités" in this sector, El Salvador has at no time attempted to move away from or act contrary to the provisions of Article 26 of the General Peace Treaty of 1980 and even less has attempted to make such "effectivités" prevail over what emerges from Formal Title Deeds to Commons. In this sector, El Salvador

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16. E.S.M.: Annexes: Annex 6, Chapter 6.

17. E.S.R.: Annexes: p. 69

has recourse to the human arguments with the sole object of providing confirmation and support for its Formal Title Deeds to Commons; this is because El Salvador has exercised and continues to exercise its sovereignty over this sector in a continuous and effective manner. Acceptance of the frontier line for which Honduras is striving would suppose the transfer to the territory of Honduras of the following settlements of El Salvador: in the sub-sector of Arambala and Perquín, the settlements of El Rincón, Los Amates, Las Trojas, Sitio El Aguacate, Sitio Llano Verde, El Guachipilín, El Carrizal, El Huatalón, El Mono, El Naranjo, El Borbollón, El Moral, El Paraíso, Las Aradas, Nahuaterique, El Cedral, Las Vegas, Palo Blanco, El Zancudo, San Juan del Agua, Los Chagüites, La Galera, Sabanetas, Loma de Enmedio, El Barrancón, Los Patios, and El Palmar, where there is a substantial population of citizens of El Salvador; and, in the sub-sector of Torola, the settlements of El Picacho, Las Piletas and Portillo Blanco.

V. Dolores, Monteca and Polorós

3.72. The frontier claimed by El Salvador in this sector is based principally (18) on the Formal Title Deed to the Commons of Polorós of 1760. Within the area covered by this Formal Title Deed to Commons is included the Hacienda de Monteca. It is true that, as the H.C.M. observes (19), the Formal

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18. "(P)rincipally" because the small triangle whose apex is the Loma de López is not included within the Formal Title Deed to the Commons of Polorós. In relation to this triangle, El Salvador invokes human arguments since this area is entirely populated by citizens of El Salvador.

19. H.C.M.: p. 420.

Title Deed to the Commons of Polorós does not contain any reference to the Hacienda de Monteca. However, there is no particular reason why a Formal Title Deed to Commons should refer to all the landholdings within its perimeter; what such a document does is rather to enumerate the various boundaries which comprise its perimeter.

(A) The Formal Title Deed to the Commons of Polorós

3.73. This Formal Title Deed to Commons was executed with all the formalities and all the guarantees required by the Spanish colonial legislation of the time. Contrary to what is stated in the H.C.M. (20), the adjoining landowners were duly summoned and on the occasions on which some objection was voiced by one of them, these objections were duly taken into account. Thus, when the measurement reached the boundary marker known as Piedra Parada, having carried out a measurement of thirty cords, the "Juez de Tierras" stated that (21) "the inhabitants of the township of Anamarós objected and showed me their Royal Title Deed, to which I gave its due obedience". The measurement carried by the Delegate "Juez de Tierras" was subsequently duly approved by the Principal "Juez de Tierras" of the "Real Audiencia" of Guatemala, who had jurisdiction both over the Colonial Province of Comayagua and over the Colonial Province of San Miguel (22). This approval by a superior judicial authority excludes completely the type of insinuations of partiality which Honduras

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20. H.C.M.: p. 447.

21. E.S.C.M.: Annexes: Vol. III, p. 76.

22. H.M.: Annexes: p. 1587; E.S.C.M.: Annexes: Vol. III, pp. 56-57.

has formulated against the "Juez de Tierras" who carried out this measurement.

3.74. The principal issue raised by the H.C.M. relates to the location of some of the boundary markers established by the Formal Title Deed to the Commons of Polorós, in particular the Cerro de Ribitá and the source of the Río Unire. Nevertheless, the location of two of the places mentioned in this Formal Title Deed is able to be clearly established and, proceeding from their locations, it is possible also to establish precisely the locations of the boundary markers in dispute.

3.75. The first of these places whose location is able to be clearly established is the Quebrada de Mansupucagua, which both Parties to this litigation place in the same location. The H.C.M. recognises that (23) "le torrent qui a aujourd'hui cette toponymie sur la cartographie hondurienne et salvadorienne este un cours d'eau qui coule, comme les autres, au Nord de la rivière Torola".

3.76. Nevertheless, the H.C.M. observes (24) that it is surprising that the "Juez de Tierras" did not mention the Río Torola, given that it was such an important river. Here Honduras once again produces the same argument which, on the basis of a supposition, it alleged in relation to the Río Zazalapa (25). The explanation for this omission is the same as on the previous occasion and is extremely simple. The Río Torola was not mentioned because its

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23. H.C.M.: p. 454.

24. H.C.M.: p. 455.

25. See Paragraphs 3.47.-3.48. above.

course was not utilised as a boundary of the Commons which were being measured. What was utilised as a boundary was the Quebrada de Mansucupagua.

3.77. From this agreed location, the Quebrada de Mansupucagua, the measurement proceeded: "... et changeant de direction pour se diriger d'Ouest en Est avec inflexion au Nord-Est, on arriva à un coteau qui sépare ces terres (celles de Poloros) de celles de Lopez, au droit de laquelle se trouve le "Jato de los Lopez"; ledit Jato reste en dehors" (26). The location of the places mentioned in this passage, the Cerro de López and the Hato de los López mentioned in this passage emerges from the Map Mercedes de Oriente No. 2657 IV presented by Honduras (27). On this map there appears a place called "Los López" with the coordinates Latitude 13°57'15" North and Longitude 87°53'10" West. Almost in the same position, with the coordinates 13°56'23" North and Longitude 87°53'21" West, appears the Cerro or Loma de López on the Map 6.V. presented by El Salvador (28). This location coincides with what is stated in the Formal Title Deed. Further the geographical feature in question can be identified today and corresponds to the present toponymy, which has been utilised jointly by the cartographical authorities of both States. The Cerro López is therefore situated approximately four and a half kilometres to the north of the Río Torola.

3.78. The establishment of the identity and the location of the Cerro de López also permits

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26. H.C.M.: p. 455.

27. H.C.M.: p. 432.

28. E.S.M.: Book of Maps: Map 6.V..

the location of the Cerro de Ribitá to be established. The Formal Title Deed continues by stating that "... et *en suivant la même direction, on arriva au cerro de* Ribitá" (original emphasis) (29). The significant words thus emphasised in the H.C.M. necessarily mean that the measurement proceeded from the Cerro de López in the direction from west to east with an inflection towards the north east. It is obvious that if the measurement thus continued in this same direction from west to east with an inflection towards the north east, the Cerro de Ribitá could not possibly have been situated to the south of the Cerro de López but rather somewhat further to the north. This removes completely the basis of the argument presented by Honduras, which attempts to situate the Cerro de Ribitá further to the south than the Cerro de López with the object of justifying its territorial claims and approaching closer to the Río Torola despite the fact that this river was bypassed by the projection of the measurement towards the north as far as the Cerro de López (30).

(B) The Formal Title Deed to the Commons of Santiago de Cacaoterique

3.79. The H.C.M. (31) affirms that the measurement of the Commons of Cacaoterique carried out in 1803 proves that the measurement of the Commons of Polorós did not extend to the north of the Río Torola. On the contrary, the Formal Title Deed to the Commons of Cacaoterique, when correctly

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29. H.C.M.: p. 457. La même direction "était de l'ouest à l'est avec inflexion au nord est" (emphasis added).

30. E.S.R.: Atlas: Map 15

31. H.C.M.: p. 445.

interpreted, actually confirms the contents of the Formal Title Deed to the Commons of Polorós and assists in the process of establishing the location of its boundary markers.

3.80. In the Formal Title Deed to the Commons of Cacaoterique it is stated that (32): "Le visage tourné vers le sud, ... on est descendu à un lieu qu'on nomme Brinco de Tigre" (original emphasis), which was also the boundary of the lands of the Indians of Polorós. The following day, the "Juez de Tierras" stated that (33) "les trois ou quatre bornes qui restent à localiser sont limitrophes avec les villages de Poloros et Lislique, dans la juridiction de la Province de San Miguel y l'Intendence de San Salvador (34).

3.81. On the Map 3J presented with the E.S.C.M. (35), El Salvador has established the identity and location of three or four of the boundary markers referred to in the Formal Title Deed to the Commons of Cacaoterique, which coincide with the boundary markers referred to in the Formal Title Deed to the Commons of Polorós, although with a different *toponymy*. *The H.C.M.* (36) *agrees that one of these* places, called in the Formal Title Deed to the Commons of Cacaoterique Sisicruz or the Llano del Camarón is the Quebrada de Mansupucagua.

3.82. However, the representation of these boundary

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32. H.M.: Annexes: pp. 1602-1603.
33. H.M.: Annexes: p. 1603.
34. H.M.: Annexes: pp. 1602-1603.
35. H.M.: Annexes: pp. 1602-1603.
36. H.C.M.: p. 474.

markers which Honduras makes on the Map B.3.2. (37) is totally implausible. If the inhabitants of Cacaoterique had invaded the Commons of Polorós in this manner, the principal inhabitants of the latter settlement, who were present, would certainly not have accepted a measurement that deprived them of the half of their Commons.

(C) Other Formal Title Deeds relied on by Honduras

3.83. Honduras has also sought to rely on other boundaries of former Colonial Provinces which have nothing whatsoever to do with the matters which are in dispute in this sector. The most extreme example of this is the supposed Formal Title Deed to the Commons of San Miguel de Sapigre, a settlement which, according to the H.C.M. (38), was extinguished as the result of an epidemic. In such an event, according to the relevant Spanish legislation (39), the lands in question would have once again become royal landholdings and consequently would have been able to have been adjudicated to another municipality, as indeed could have occured in the case of Polorós. It is also highly unusual in judicial proceedings for one of the Parties to make a map of the area covered by a Formal Title Deed on the basis of pure hypotheses and suppositions, as Honduras has done in the case of the Map B.3.2. (40).

3.84. Honduras also relies on the Formal Title Deeds to the Commons of San Antonio de Padua

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37. H.M.: p. 252.
38. H.C.M.: p. 471
39. H.C.M.: pp. 471-472.
40. H.M.: p. 252.

of 1682 and 1739 and the Formal Title Deed to the Commons of Cojinil of 1738. None of these Formal Title Deeds affects the Formal Title Deed to the Commons of Polorós or has anything to do with the land which is in dispute in this sector. This can be seen in the representation of the Formal Title Deeds made on the Map 3J presented with the E.S.C.M. (41). If there ever was at any time any point of contact between the Commons of Polorós and the Commons of San Antonio in the sector at present under discussion, this could only have resulted from Formal Title Deeds other than those of 1682 and 1739 which Honduras has presented.

(D) The "Effectivités"

3.85. So far as concerns "effectivités" in this sector, El Salvador invokes them for the purpose of providing support for its Formal Title Deeds to Commons. Acceptance of the frontier line claimed by Honduras in this sector would suppose the transfer to the territory of Honduras of the following settlements of El Salvador: Coyolar, Guacamaya, Guanacastillo, Lajitas, Cerro de Peñas, Mesetas, Hacienda Dolores, San Juan, Sitio Las Ventas, Sitio Agua Blanca, and Plan de Isletas.

VI. The Estuary of the Río Goascorán

(A) Los Amates

3.86. El Salvador has established, both in the E.S.M. and in the E.S.C.M., that the line of the frontier in this sector is formed by the oldest and most easterly of the branches of the Río Goascorán

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41. E.S.C.M.: p. 116.

which flows into the Golfo de Fonseca (also known as the Bahia de la Unión or the Bahía de Fonseca) in the Estuario de La Cutú opposite the Isla de Zacate Grande. The land which is in dispute in this sector forms part of the jurisdiction of Pasaquina, in the Department of La Unión of the Republic of El Salvador.

3.87. El Salvador has demonstrated that this frontier line satisfies completely, both in the geographical and in the juridical sense, the terms of Article 26 of the General Peace Treaty of 1980. On the other hand, the H.C.M. (42), in the course of a substantial number of pages which contain nothing that has any relation whatsoever with the subject matter of this dispute, merely confines itself to making insignificant distinctions as to geographical terminology. An example of this is the attempt to prove, quite unnecessarily, that El Salvador has confused the meanings of the two Spanish words "estero" and "estuario" (43). In fact these terms are synonymous and simply signify "estuary". In Central America, it is more general to use the term "estero", while in South America it is, on the other hand, more general to use the term "estuario", such as in the case of the Estuario del Río de la Plata. What is more complex is the meaning of the word "delta", utilised indistinctly both in Spanish and in English. The definition provided for this word by the "Real Academia Española" (44) is: "a piece of land comprised between the arms of a river at its mouth; it is thus called because of its similarity with the shape of that Greek

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42. H.C.M.: pp. 482-489.

43. H.C.M.: p. 468.

44. Diccionario de la Real Academia Española (1984 - 20th Edition) (Madrid).

letter. The said shape is in the from of a triangle: "△"."; (in the original Spanish text, "un terreno comprendido entre los brazos de un Río en su desembocadura; llámase así por la semejanza con la figura de aquella letra griega. Dicha figura es en forma de un triángulo: "△".").

3.88. El Salvador considers that these lengthy digressions of this type in which Honduras has engaged are a total waste of time in that they simply try to demonstrate a supposed terminological confusion created by El Salvador. The reality is that these terms have been used indistinctly because this area constitutes a geographical phenomenon which is "sui generis. This is indeed recognised by the H.C.M. itself in the following passage (45): "Dans la zone de Goascorán, il est manifeste que phénomènes terrestres, phénomènes maritimes et phénomènes fluviaux sont parfois difficiles à séparer et que terres marécagueses caractérisées par la présence de palétuviers ("manglares" ou "mangroves"), eaux douces fluviales et eaux salées maritimes constituent un milieu complexe et mouvant, susceptible de variations suivant qu'on se place à la saison des pluies ou à la saison sèche".

3.89. Apparently, the notion of a "delta" includes within the triangle formed by land, fresh water, and salt water, a greater proportion of what the H.C.M. describes as "phénomènes fluviales" and has more arms or channels than an "estero" or an "estuario". However, the terminology utilised by El Salvador has not attempted to make distinctions which the geographers themselves encounter difficulties

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45. H.C.M.: pp. 484-485.

in making. Consequently, at some times of the year what is encountered is a predominance of channels containing fresh water, something which makes appropriate, especially when the triangular shape of this geographical formation is taken into account, the utilisation of the name "Delta de Goascorán". At other times of the year, channels containing salt water have a greater impact, particularly in the areas where the various channels are descending towards the sea, something which makes appropriate the utilisation of the name "Estuario de Goascorán". El Salvador wishes to record that the word "estero" has on occasions been utilised simply because this was the terminology employed by the authorities of the Spanish Crown in the Formal Title Deeds which they issued. Without attempting either, on the one hand, to provide a strictly scientific defintion or, on the other hand, to attempt to produce terminological confusion, El Salvador opines that what really exists in this area is a "delta", simply because there exist many arms or channels of the river emerging onto the shore in such a way as to form a convex triangular shape.

3.90. These geographical phenomena that have occurred in this disputed sector are accepted by Honduras. The H.C.M. contains the following statement (46). "Il est vrai que, pendant la saison des pluies", le Río Goascorán déborde et, quittant son lit ordinaire, peut utiliser d'autres déversoirs, d'autres canaux d'écoulement épisodiques. Il est vrai également que le Río Goascorán n'a pas ou n'a pas toujours eu une embouchure unique ...." (emphases added).

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46. H.C.M.: p. 485.

3.91. It is precisely this point that has led Honduran historians and geographers to maintain, correctly, that the oldest mouth of the Río Goascorán used to be in the Estero de La Cutú opposite the Isla de Zacate Grande. This has been demonstrated by El Salvador in the E.S.M. (47), where reference was made to the "Monografía del Departamento de Valle", a detailed study of this area carried out under the direction of the distinguished Honduran, Professor Bernardo Galindo y Galindo.

3.92. As the juridical foundation of its position in this sector, El Salvador has presented (48) a Formal Title Deed, executed in 1695 by the resident Spanish authorities, namely the "Real Audiencia" of Guatemala, in favour of Juan Bautista de Fuentes, a resident of the town of San Miguel, in respect of the land known as "Los Amates", within the jurisdiction of San Miguel. This matter of jurisdiction was the reason why the "Alcalde Mayor" of the Colonial Province of San Salvador, José Calvo de Lara, was given the responsibility for carrying out the measurement and issuing of this Formal Title Deed, but this task was in fact carried out with the appropriate legal formalities by the "Escribano de Cámara" (Notary of his Chamber) Francisco Goicochea y Uriarte, to whom the "Alcalde Mayor" had expressly delegated the matter. This document proves that the lands which were measured were at that time within the jurisdiction of San Miguel and so within the jurisdiction of the Colonial Province of San Salvador, something which is clearly indicated in the Formal

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47. E.S.M.: Para. 6.67.

48. E.S.M.: Annexes: 8.

Title Deed itself since the Commission of each "Juez de Tierras" always expressly indicated the jurisdiction in which he was competent.

3.93. The Formal Title Deed satisfies the characteristics referred to in Article 26 of the General Peace Treaty of 1980 in that it is a document issued by the Spanish authorities during the colonial period. It is of course true that it does not constitute a Formal Title Deed to Commons of the type which El Salvador has presented in order fully to justify its rights in the other disputed sectors. However, although this Formal Title Deed thus did not constitute a grant to a native community through its municipal council, it is nevertheless a Formal Title Deed of the colonial period issued with all the appropriate legal formalities by the Spanish authorities in favour of a citizen of San Miguel in the Colonial Province of San Salvador. It was of course a Formal Title Deed conferring only private proprietary rights by means of the process of "composición". As such, this Formal Title Deed has indisputable value, even though it does not constitute one of the Formal Title Deeds to Commons issued in favour of native communities through their municipal authorities, simply because the Commons of such native settlements were expressly excluded from the process of "composición" by the "Real Cédula of El Pardo of 1 November 1591, which was confirmed by the subsequent Ordinance of 1598.

3.94. This Formal Title Deed in favour of Juan Bautista de Fuentes is not, consequently, as is claimed by Honduras (49), an "imaginary title"

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49. H.C.M.: pp. 514-543.

but, repeating what has already been stated, a document issued by the Spanish authorities of the colonial period of the type mentioned in Article 26 of the General Peace Treaty of 1980; it was issued by a Spanish secular authority during the colonial period and contains a clear statement as to colonial jurisdiction - thus, for example, the record of the measurement carried out on 30 October 1694 clearly states that the measurement was carried out in the place known as "Los Amates" in the jurisdiction of San Miguel.

3.95. Honduras has attempted, with what can only be described as true sophism, to deny the validity of this Formal Title Deed. Honduras refers in the H.C.M. (50) to the fact that the course of the measurement is stated to have reached "al monte que confina con el Río de Guascorán (sic)". The area in question consists of mangrove swamp, the Spanish word for which ("manglar") has been defined (51) as "land in the tropical zone which the highest tides inundate forming on many occasions low islands where trees which live in salt water grow" ("un terreno de la zona tropical que lo inundan las grandes mareas formando muchas veces islas bajas, donde crecen los árboles que viven en el agua salada" in the original Spanish text). It is therefore quite obvious that the Spanish word "monte" used in the Formal Title Deed by the Spanish notary Francisco Goicochea y Uriarte was not used in the first of the two meanings

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50. H.C.M.: p. 525.

51. Aristos: Diccionario Ilustrado de la Lengua Española (1974): Editorial Ramón Sopena S.A. (Barcelona, Spain).

given by the "Real Academia Española" (52) as "a great natural elevation of land" ("una grande elevación natural de terreno" in the original Spanish text), but rather in the second of the two meanings given as "uncultivated land covered by trees, bushes or shrubs" ("tierra inculta cubierta de árboles, arbustos o matas" in the original Spanish text).

3.96. The lack of Formal Title Deeds with which to defend its claims has meant that Honduras has had to have recourse to arguments which neither have a sound logical base nor are pertinent to the subject matter of this litigation. On the other hand, El Salvador, in order to reinforce its rights in this sector, is presenting as an Annex to this Reply (53) a further Formal Title Deed of 1711, once again executed by the Spanish authorities in favour of Juan Bautista de Fuentes, a resident of the Colonial Province of San Salvador, confirming a grant of lands by the process of "composición", this time in the area known as "El Nagarejo". This Formal Title Deed confirmed the grant to this resident of the Colonial Province of San Salvador of the rights to thirteen and a half "caballerías" of land in the disputed sector at present under discussion.

3.97. This land was stated to be situated in the jurisdiction of Choluteca in the Colonial Province of Guatemala. Therefore, it was this Colonial Province which had charge of the administrative and jurisdictional control of this sector. This Formal Title Deed thus enables El Salvador to ratify and fortify the contention expressed in the E.S.C.M. (54)

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52. Diccionario de la Real Academia Española (1984 - 20th Edition) (Madrid).

53. E.S.R.: Annexes: p. 73

54. E.S.C.M.: Para. 3.126., pp. 119-120.

that in 1580 the "Alcaldia Mayor" of Tegucigalpa was not created as an independent Colonial Province with its own territory; that the only thing which happened was that the the office of "Alcalde Mayor" of Mines was established by the "Real Audiencia" of Guatemala with the title of "Alcalde Mayor" of Mines of the Province of Honduras with exclusive jurisdiction, but only over matters relating to mines, in the judicial districts of San Miguel and Choluteca, both within the jurisdiction of the Province of Guatemala. The argument advanced by El Salvador was that, despite the creation of the "Alcaldía Mayor" of Mines of the Province of Honduras, the administrative control and jurisdiction over San Miguel and Choluteca continued to correspond to the "Real Audiencia" of Guatemala and, at a subsidiary level, to the Colonial Province of San Salvador. This argument is completely confirmed by the fact that the Formal Title Deed of 1711 confirming the rights of Juan Bautista de Fuentes to land in this sector was sought by his representative on his behalf from Francisco de Colio, President of the "Real Audiencia" of Guatemala who resided in the town of Sonsonate in the Colonial Province of Guatemala. There is not the slightest mention in this Formal Title Deed of any confirmation being sought from authorities of the Colonial Province of Honduras. This was for the simple reason that the jurisdiction of the Province of Honduras in this sector extended only to matters relating to mines. Consequently, any argument to the effect that the uti possedetis iuris of 1821 is in this sector in favour of Honduras is clearly shown to be erroneous.

3.98. What is more, Honduras has presented in relation to this sector only documents which either do not cover the disputed part of the sector or have no juridical relevance or illustrate sections of the frontier which have already been delimited.

This has already been demonstrated by El Salvador in the E.S.C.M. (55). On the other hand, El Salvador has indeed presented irrefutable documents issued by the Spanish colonial authorities which are directly relevant to Los Amates, the disputed part of this sector.

(B) The Delta of the Río Goascorán

3.99. The exact date on which the change of course of the Río Goascorán occured is both uncertain and ill-defined. It is possible that this change of course took place in the Seventeenth Century - this at least can be deduced from the Spanish colonial documents of the Sixteenth Century in which what was considered to be the mouth of the Río Goascorán was its oldest mouth in the Estero de La Cutú opposite the Isla de Zacate Grande. This view is indeed expressed in the H.C.M. (56) which contains the following statement: "Et sans doute n'est-il pas possible de le dater avec exactitude." Consequently, the arguments formulated in the H.C.M. (57) to the effect that acquiescence has taken place on the part of El Salvador in recognising the Río Goascorán as the frontier between the two States since time out of mind lack any foundation. A river exposed to the type of mutations to which the Río Goascorán is subject does not constitute a sufficient clear boundary for it to be possible to argue that acquiesence has arisen in respect thereof. Such acquiescence can only arise after an agreement between the Parties or a judicial decision has been reached establishing what norms

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55. E.S.C.M.: Paras. 3.136.-3.138, pp. 126-128; Map 3.K., p. 128.

56. H.C.M.: p. 577.

57. H.C.M.: pp. 610-617.

should be applied in the case of the mutations or changes which have taken place in the course of this river. Consequently, the estoppel claimed by Honduras in its own favour and against El Salvador is rejected. The only occasions upon which El Salvador has recognised the Río Goascorán as the frontier between the two States has been when what has been taken into account has been its oldest mouth and nothing else.

3.100. The change that has taken place in the course of the Río Goascorán must necessarily be due to a sudden and violent event, which possibly took place in the Seventeenth Century, perhaps as a result of the impact of one of the hurricanes which lash the Caribbean and Central American region. Honduras has tried to avoid any possibility of the waters of the Río Goascorán returning to their former course by means of the installation of artificial river walls. In fact, these obstacles, probably constructed around the year 1916 on the left bank of the Río Goascorán at Los Amates prevent the river from returning to its former course. Such a course of events may be deduced from a letter sent by the Minister of War and Marine of the Republic of El Salvador on 16 June 1920 as from the Palacio Nacional, San Salvador, to the Minister of External Relations of that Republic, the relevant part of which is as follows (58):

"I have the honour to acknowledge the receipt of your most attentive note of 5 of the present (month), which refers to the report sent to this Ministry by General Antonio Castellanos, from the Department of La Unión, in relation to the fact that the Government of Honduras has appropriated a strip of land within Salvadoran territory by virtue of the fact that the Río Goascorán has changed course ...." (emphasis added).

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58. E.S.R.: Annexes: p. 80

The occurrence is also proven by another earlier letter from the Minister of War and Marine of El Salvador to the Minister of External Relations of that Republic on 4 June 1920, the relevant part of which states (59):

"I must not omit to point out to you that according to information the Honduran Government has appropriated a strip of land from our territory by virtue of the fact that the Rio Goascorán has changed course; the strip referred to has an area of five leagues in length by three in breadth ...."

Additionally, inspections have been made "in situ" and aerial photographs have been taken of the sector.

3.101. This violent and sudden change in the course of the Rio Goascorán must inevitably have been favoured by the "Law of Babinet or of Baer" whose applicability to the Río Lempa and the Rio Goascorán was considered by Doctor Santiago I. Barberena in a study referred to in the E.S.M. (60) and which states:

".... the flow of its waters (those of the Río Lempa) tends to have preference for the right hand bank in which the effect of erosion is much more fierce and efficient than on the opposite bank.

" .... in 1888 I made an analogous observation in relation to the Goascorán."

(C) The "Effectivités"

3.102. Acceptance of the frontier line claimed by Honduras in this sector would suppose the transfer to Honduras of the following four municipalities: Los Amates, La Ceiba, El Conchal, and El Capulín. In relation to this sector, as is

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59. E.S.R.: Annexes: p. 82

60. E.S.M.: Para. 6.68..

also the case in relation to the other disputed sectors, the lengthy arguments produced by Honduras have no solid base since, as has already been demonstrated, the Formal Title Deeds which have been presented by Honduras have neither relevance nor validity so far as concerns the issues in dispute. The incongruence of the arguments produced by Honduras can be sufficiently proved simply by making reference to the fact that the H.C.M. (61) attempts to allege that Honduras enjoys possession over this sector, a position which is both ambiguous and contradictory, since it affects the validity of the arguments produced by Honduras with the object of denying the "effectivités" which El Salvador, in a clear and decisive manner, has demonstrated that it enjoys to the full in all the sectors in dispute. This argument by Honduras thus goes against the other arguments which it has expounded for this sector which are based on sophisms, erroneous premises, and inappropriate claims.

VII. Royal Landholdings ("Tierras Realengas")

3.103. El Salvador proposes to comment briefly on the discussion in the H.C.M. (62) of "Questions relatives aux "tierras realengas"".

3.104. Honduras affirms in the H.C.M. (63) that it is necessary to take into account "deux éléments figurant dans la sentence arbitrale de 1933 dans le différend frontalier entre le Guatemala et le Honduras" (original emphasis).

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61. H.C.M.: pp. 631-632.
62. H.C.M.: pp. 83-101.
63. H.C.M.: p. 89.

3.105. First, that the Tribunal of Arbitration "en effet, a indiqué" that Formal Title Deeds to Commons provide, in the words of the Tribunal, "ample opportunity for examining and determining questions of territorial jurisdiction" (64). Honduras thus adopts the argument maintained by El Salvador in the E.S.M. (65) relating to the validity and decisive character of such Formal Title Deeds to Commons for the purpose of defining the line of the land frontier in the present litigation.

3.106. Honduras adds (66) that the Tribunal of Arbitration "n'excluait pas d'autres sources pour déterminer les frontières des juridictions coloniales, bien que celles-ci fussent de moindre importance" (emphasis added), since the Tribunal stated that "not only had boundaries not been fixed with precision by the Crown, but there were great areas in which there had been no effort to assert any semblance of administration authority". The areas thus referred to by the Tribunal of Arbitration were Crown Landholdings ("Tierras Realengas"), which, because they were not Commons, were not subject to any defined administrative control by the colonial authorities.

3.107. Even though Honduras goes on to state that the Tribunal of Arbitration made no reference to Crown Landholdings (67), this in no way affects the position which has been sustained by El Salvador. Honduras, on the other hand, is guilty of multiple

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64. H.C.M.: pp. 89-90 and judgment there cited.
65. E.S.M.: Paras. 4.1. & 4.14..
66. H.C.M.: p. 90 and judgment there cited.
67. H.C.M.: p. 91.

inconsistencies and incongruities in the different Chapters of the H.C.M.. For example, in an earlier Section of the same Chapter, Honduras affirms (68) that "le "territoire" et la "juridiction" qui s'exerce sur lui se trouvent juridiquement définis par la Couronne d'Espagne", a comment wholly contradictory of what was stated by the Tribunal Of Arbitration in the section of its judgment set out above.

3.108. The territorial area established by a Formal Title Deed to Commons by virtue of this fact constituted a part of the territory belonging to the Colonial Province in question, over which that Province exercised a clearly defined administrative control. Beyond the boundaries so fixed, there existed large areas of territory which, because they constituted Royal Landholdings granted to private individuals, did not produce any particular indication as to which of two Colonial Provinces exercised administrative control thereover for the purposes of enabling a determination to be made as to the extent of the territory under its control. This is confirmed by the research carried out by Linda Newson based on the Title Deeds to native properties in Honduras, to which reference is made in the H.C.M. (69). This author states that: "In addition to lands that were owned by the Community by right, there were other lands, generally in the vicinity of the village, that had been purchased either by the community or by individual indians" (emphasis added).

3.109. In a similar manner, the H.C.M. (70)

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68. H.C.M.: p. 82.

69. H.C.M.: p. 62.

70. H.C.M.: p. 93.

indicates that "au-delà des terres des villages des communautés indigènes, il restait également des terres sans titulaire" (emphasis added). These lands were the uncultivated lands which constituted the Royal Landholdings. As the H.C.M. (71) emphasises later on: "la Couronne étant titulaire des "terres en friche" ou "tierras realengas", elle pouvait en disposer "à sa guise et selon sa volonté", selon l'expression de ladite "Cédula" royale de 1568. .... Les "terres en friche" ou "tierras realengas" constituent de cette façon l'élément de base de la "composition de terres". Honduras thus recognises that it was the Royal Landholdings, that is to say the lands situated outside the lands of the townships of the native communities, which were, as from 1591, the subject matter of a Crown policy of making land grants by means of the process of "composition" and not the Commons of the native communities which, as El Salvador has demonstrated in Chapter II of this Reply (72), were expressly excluded from this process of "composition".

3.110. El Salvador does not claim, as Honduras has chosen to allege (73), that these Royal Landholdings are subject to its exclusive ownership on the grounds that it is the sole successor in title to the Spanish Crown. What El Salvador has indicated in the E.S.M. (74) is that it is those Royal Landholdings which are not included within the scope of the Formal Title Deeds to the Commons of the respective native communities which are the principal

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71. H.C.M.: p. 94.

72. Paragraphs 2.6.-2.15. above.

73. H.C.M.: p. 98.

74. E.S.M.: Para. 5.4..

cause of conflicts over frontiers. It is for this reason that El Salvador, in order to facilitate the work of the Chamber, has asked that Honduras present the relevant Title Deeds, if they indeed exist, which establish its rights to the Royal Landholdings or, at the very least, the precise extent of its jurisdictional boundaries.

3.110. The H.C.M. (75) cites a paragraph of the E.S.M. in support of the proposition that "El Salvador prétend que les "tierras realengas" lui appartiennent, sauf si le Honduras présente "un titre comparable par sa force et ses effets juridiques" à ceux d'El Salvador" (emphasis added).

3.111. El Salvador does not consider that any bad faith is involved in its request that the Title Deeds of Honduras which accredit its possible rights to Royal Landholdings should be produced, above all when it is taken into account that the Title Deeds which Honduras has presented are almost all either Title Deeds to lands in the sectors already delimited by the General Peace Treaty of 1980 or Title Deeds to lands some considerable distance from the sectors at present in dispute.

3.112. Neither does El Salvador consider that there is any great relevance in the fact that some of these Title Deeds may well have been able to have been examined by one or more of the various Joint Boundary Commissions of the two Parties to this litigation which have functioned in the past. None of these Commissions has managed to achieve a duly ratified agreement and the fact that such Title Deeds

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75. H.C.M.: p. 95.

and other colonial documents as Honduras may have in its possession may have been examined in the past makes it even more imperative that they should also be examined in this litigation.

3.113. A brief consideration will now be made of the relevance of Royal Landholdings to the determination of the land frontier in the various sectors which are in dispute in this litigation.

3.114. Tecpangüisir Mountain. In this sector, there is an area of Royal Landholdings which is not included within the boundaries established by the Formal Title Deed to the Commons of Citalá of 1776 (76) but which nevertheless today forms part of the forestry reserve of El Salvador and is inhabiated by citizens of El Salvador, something which is indeed recognised by the H.C.M. (77).

3.115. Las Pilas or Cayaguanca. In this sector, Map 3.C. presented by El Salvador (78) represents the area included within the Formal Title Deed to the Commons of Ocotepeque of 1818, which has been presented by Honduras (79). In this Formal Title Deed, the rights of the inhabitants of Ocotepeque were regrouped and defined a short time before the date of the independence of Central America. The same map also represents the area included within the Formal Title Deed to the Commons of La Palma of 1833 which has been presented by El Salvador (80). It can be

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76. H.M.: Annexes: pp. 1795 et seq..
77. H.C.M.: Annexes: p. 295.
78. E.S.C.M.: p. 51.
79. H.M.: Annexes: pp. 1677 et seq..
80. E.S.C.M.: Annexes: Vol. II, pp. 1 et seq..

clearly observed that between the line taken in the course of the measurement of the Commons of Ocotepeque from the Peña de Cayaguanca to the Cerro de San Antonio and the line taken in the course of the measurement of the Commons of La Palma from the Peña de Cayaguanca to the meeting of the Río Sumpul and the Quebrada de Copantillo, there is an area of Royal Landholdings which today is inhabited by citizens of El Salvador. Honduras has not presented a single document which justifies its claim to any rights over these Royal Landholdings.

3.116. Arcatao or Zazalapa. In this sector, an area of Royal Landholdings not included within the boundaries established by the Formal Title Deed to the Commons of Arcatao of 1723 (81) has, as El Salvador has shown in the E.S.M. (81), been populated from time immemorial by citizens of El Salvador.

3.117. Nahuaterique and Torola. In this sector, an area of Royal Landholdings not included within the boundaries established by the Formal Title Deed to the Commons of Arambala and Perquín of 1769 (82) is expressly stated in that Formal Title Deed to be within the jurisdiction of the Colonial Province of Guatemala (83).

3.118. Dolores, Monteca and Polorós. In this sector, since, as is shown by Map 3.J. presented by El Salvador (84), certain of the boundary markers

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81. E.S.M.: Paras. 6.25. et seq. and Annexes thereto.

82. E.S.C.M.: Annexes: Vol. IV, pp. 1. et seq..

83. E.S.C.M.: Para. 3.75., pp. 84-85.

84. E.S.C.M.: p. 116.

established by the Formal Title Deed to the Commons of Polorós (85) coincided on its north-western boundaries with those established by the Formal Title Deed to the Commons of Santiago Cacaoterique (86), El Salvador has no difficulty in recognising that there are no areas of Royal Landholdings between these two Commons. However, El Salvador considers that Honduras ought to present the Title Deeds which justify its rights to the areas of Royal Landholdings on the north-eastern boundaries of the Commons of Polorós, since here the lands of San Miguel had a common boundary with lands subject to the jurisdiction of the "Alcaldia Mayor" of Mines of Tegucigalpa, which, as El Salvador has shown in the E.S.C.M. (87) and in this Reply (88), did not belong to the Colonial Province of Honduras; there is consequently no apparent justification for Honduras to claim historic rights on the strength of a colonial jurisdiction which did not form part of the Colonial Province of Honduras.

3.119. The Delta of the Rio Goascorán. In this sector, El Salvador has made no claim to any area of Royal Landholdings. However, Honduras bases its claim to this entire sector on historic rights proceeding from the "Alcaldía Mayor" of Mines of Tegucigalpa, which at the date of independence of Central America was a jurisdiction which did not form part either of the Intendency of Comayagua or of the Intendency of Honduras. It is important to emphasise that Tegucigalpa, the present capital of Honduras, has nothing whatever to do with the "Alcaldía

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85. E.S.C.M.: Annexes: Vol. III, pp. 48 et seq..
86. H.M.: Annexes: pp. 1594 et seq..
87. E.S.C.M.: Paras. 3.127.-3.121., pp. 120-123.
88. See Paragraphs 5.28-5.32. below.

Mayor" of Mines of Tegucigalpa, whose territory during the colonial period was beyond the Rio Goascorán and included Choluteca and Nacaome.

3.120. Having thus answered the affirmations made by Honduras that El Salvador, without the slightest grounds, is claiming Royal Landholdings which supposedly belong to Honduras, El Salvador in its turn wishes to emphasise and reiterate that Honduras has not presented one single Title Deed which accredits its rights to these Royal Landholdings; presumably no such Title Deeds have been presented because they simply do not exist. In reality, these lengthy and false arguments produced by Honduras are simply an attempt to confuse the issue and thereby deny El Salvador the Royal Landholdings which really belong to it, some of which, such as the area of Royal Landholdings mentioned in the Formal Title Deed to the Commons of Arambala and Perquín, are actually clearly mentioned in the Formal Title Deeds to Commons which have been presented by El Salvador.

CHAPTER IV

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

4.1. El Salvador reiterates in this Reply that the same probative value must in this litigation be given to, on the one hand, the evidence of a juridical nature furnished by the Formal Title Deeds to Commons issued in its favour by the Spanish Crown in strict compliance with the procedural requirements which the Spanish Crown had itself established and, on the other hand, the arguments of a human nature ("effectivités"). This was recognised by El Salvador and Honduras in Article 26 of the General Peace Treaty of 1980 signed by the two States, a recognition which was motivated by the historical circumstances which have brought about the present configuration of the two States and by considerations of elementary justice towards the Salvadoran population which has traditionally inhabited the area close to the frontier. Honduras, despite the efforts of those who prepared the H.C.M. and the comments made on the contents of the E.S.M. (1) by its Ambassador in London, Max Velásquez Díaz, has not been able for a single moment to detract in any way from the value of such "effectivités" as evidence in this litigation. Indeed, denying the probative value of the "effectivités" would contradict the spirit and the letter of the General Peace Treaty of 1980 and perpetuate an historical injustice which El Salvador has suffered ever since the date of independence of Central America.

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1. H.C.M.: Annexes: pp. 292 et seq..

4.2. Honduras has introduced comments such as that made by Ambassador Velásquez Diaz to the effect that (2): "El Salvador essaie d'introduire dans cette affaire ce qu'il appelle des arguments de nature humaine". Such comments constitute an attempt to reduce the process of analysing and resolving the issues which arise in this litigation to a simple juridical operation, when these issues have not only sociological connotations but also an evident human background. Honduras itself recognised this in its long-term insistence that the conflict between the two States in 1969 was motivated by questions of human settlements and frontiers. Yet, now that it is before an international tribunal, Honduras wishes to reduce the issues before that tribunal to a simple evaluation of the evidence of a juridical nature when it has always previously accepted, in the lengthy negotiations that have taken place between the Parties, and in the General Peace Treaty of 1980, that the question of the human settlements was a fundamental aspect of this dispute.

4.3. Honduras, having contended, that (3): "lorsqu'El Salvador invoque l'uti possidetis iuris, l'application qu'il en fait est inconsistente. Il ne produit pas de documents de l'epoque coloniale pour certaines sections de la ligne divisoire", it goes on to affirm (4) that El Salvador "tente de renforcer des preuves aussi tenues et des arguments aussi inexacts par le recours aux effectivités".

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2. H.C.M.: Annexes: p. 292.
3. H.C.M.: p. 348.
4. H.C.M.: p. 348.

4.4. With the same intention of attacking the probative value of the "effectivités", Honduras makes the following statement (5):

"Comme il a été dit précédemment, en ce qui concerne les quatre zones indiquées sur la carte 5.2. en regard de la page 328 du présent contre-mémoire, El Salvador ne fournit aucun document de l'époque coloniale indiquant des limites de territoires, ni même des documents postérieurs à 1821. Son tracé de la ligne dans ces zones ne peut pas, par conséquent, se baser sur l'uti possidetis iuris de 1821, mais sur un autre fondement: le recours aux "effectivités". Ce qui évidemment met en lumière le "dualisme" de la position juridique d'El Salvador, qui invoque conjointement des effectivités et des titres juridiques, contrairement aux dispositions de l'article 26 du Traité Général de Paix de 1980. La finalité de cette attitude est, en dernière instance, de faire prévaloir les effectivités sur les titres, ainsi qu'on peut en juger à la simple lecture du chapitre 7 de son mémoire."

Honduras thus concludes by affirming that El Salvador has ended up in a "dualism" of evidence in which it abandons Formal Title Deeds and has recourse only to the "effectivités". No such "dualism" exists in the arguments presented by El Salvador; it is more accurate to say that the arguments produced by Honduras are guilty of "unilateralism" in that they wish in an arbitrary manner to eradicate the human arguments envisaged by the provisions of a binding Treaty which Honduras signed and ratified in 1980.

4.5. The reality is that the argument of Honduras set out above has no validity whatsoever. El Salvador has relied on two different types of evidence which mutually complement and fortify one another and which will enable the members of the Chamber, by virtue of the links between the evidence presented by El Salvador, to pronounce a just decision

that takes into account the strength of the integrated truth and the weight of these complementary arguments.

4.6. In the process of evaluation of the evidence produced in a trial, the judge, in the function of imparting justice, has the right to take the whole of these proceedings into account with the objective that, above all else, the judgement may be consistent with reality and justice.

4.7. Both the General Peace Treaty of 1980 and the Special Agreement between El Salvador and Honduras to submit the land frontier dispute to the International Court of Justice are governed by Public International Law. Consequently, it is not possible to accept an arbitrary reduction of the applicable principles of Public International Law by either of the Parties to this Treaty and this Special Agreement. Article 26 of the General Peace Treaty of 1980 clearly states that, for the delimitation of the frontier line in the disputed areas, El Salvador and Honduras accept as evidence the documents mentioned therein and that "account shall equally be taken of other methods of proof and arguments and reasons of a juridical, historical or human nature or of any other kind which may be adduced by the Parties and which are admissible under International Law". This provision determines the range of evidence which may be adduced by the Parties but, equally, determines the standard to be adopted in evaluating the evidence so adduced.

4.8. The Chamber therefore has well-defined powers and evidentiary standards with which to resolve the conflicts over territorial delimitation and to determine the juridical status of the islands, to which El Salvador has proved that it is entitled, and of the maritime spaces. These are the criteria

on which the Chamber of the International Court of Justice relied in its judgement in the Case concerning the Frontier Dispute between Burkina Faso and the Republic of Mali (6).

4.9. Honduras is capriciously trying to forget that the decision which is to be handed down by the Chamber is, as a result of the express mandate of the Parties, to be subject to the provisions of Article 26 of the General Peace Treaty of 1980 and of the Special Agreement. Honduras wishes to leave to one side the "effectivités" and thus evade the substantially human components of a dispute which relates not only to the ownership of physical areas but also to the permanent destiny of communities of human beings.

4.10. El Salvador, in a section of the E.S.C.M. headed "No Arguments of a Human Nature can validly be invoked by Honduras", stated that, in the H.M., (7): "The human beings involved receive no consideration whatever in the discussion of a matter which basically concerns human beings. .... No reference whatever is made to the fact that what is in issue are inhabited settlements, where people live, work, eat and drink, need medicines and education, and where by tradition and custom they feel that they have their roots."

4.11. The "effectivités" have, above all in cases such as this one, special significance and singular importance in the process of the determination

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6. I.C.J. Reports 1986, p. 554.

7. E.S.C.M.: Para. 4.6., p. 132.

of the issues before the Chamber, namely the resolution of the conflicts over the land frontier and the determination of the juridical status of the islands and the maritime spaces. This prominence of the "effectivités" is not a matter only of mere legalities but also of unquestionable justice.

4.12. In the Case concerning the Frontier Dispute between Burkina Faso and the Republic of Mali, the Chamber of the International Court of Justice, having examined the arguments presented by the two Parties, stated (8):

"a distinction must be drawn among several eventualities. Where the act corresponds exactly to law, where effective administration is additional to the uti possidetis iuris, the only role of effectivité is to confirm the exercise of the right derived from a legal title. Where the act does not correspond to the law, where the territory which is the subject of the dispute is effectively administered by a State other than the one possessing the legal title, preference should be given to the holder of the title. In the event that the effectivité does not co-exist with any legal title, it must invariably be taken into consideration. Finally, there are cases where the legal title is not capable of showing exactly the territorial expanse to which it relates. The effectivités can then play an essential role in showing how the title is interpreted in practice."

4.13. El Salvador has presented in the E.S.M. and the E.S.C.M. documentation which is more than sufficient to prove fully that, in all the sectors of the land frontier claimed by Honduras (Tecpangüisir Mountain, Las Pilas or Cayaguanca, Arcatao or Zazalapa, Nahuaterique and Torola, Dolores, Monteca and Poloros, and the Estuary of the Río Goascorán), El Salvador has exercised and continues to exercise an effective administrative control.

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8. I.C.J. Reports 1986, Para. 63, p. 554.

Consequently, El Salvador is able to make the following affirmations:

(1) That, by virtue of the practice of effective administrative control, the "animus" on the part of the administrative organs of state of El Salvador to possess these disputed territories has been expressly demonstrated.

(2) That, in consequence, El Salvador has satisfied the requirements of "effectivité" by means of the effective exercise of State authority over the territories claimed by Honduras, such authority having been exercised continuously and notoriously through a quite incontrovertible administrative system.

(3) That, alongside the "animus occupandi", El Salvador has exercised and continues to exercise a physical possession of these territories which can in no sense be categorised as fictitious.

(4) That, by means of these "effectivités", El Salvador has sufficiently proven the existence of the two elements which are necessary in order to establish sovereign title and the manifestation of State authority.

4.14. El Salvador provided in the E.S.M. (9) an account of how the Government of El Salvador, its municipal authorities, and the people of El Salvador had developed and exploited economically all the sectors of the land frontier and of the islands which are claimed by Honduras, as well as the relationship between man and the land which has been fortified for three quarters of a century, thus creating irrefutable Salvadoran interests. These same

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9. E.S.M.: Paras. 7.8.-7.10..

arguments were also invoked by El Salvador in the E.S.C.M. (10) in order once again to affirm that the social and economic development of the sectors claimed by Honduras has been carried out by the Government and by the municipal authorities of El Salvador and by the human population that has established its roots in these territories.

4.15. Honduras is now rejecting these arguments relating to human settlements and economic development, forgetting that these same arguments were the basis of the claim brought by Honduras against Guatemala which led to the Arbitration between Guatemala and Honduras, in which Honduras was awarded substantial territories to which Guatemala had always considered itself to be entitled.

4.16. In this Arbitration between Guatemala and Honduras, the Tribunal of Arbitration stated that (11):

"In fixing the boundary, the Tribunal must have regard (1) to the facts of actual possession; (2) to the question whether possession by one Party has been acquired in good faith and without invading the right of the other Party; and (3) to the relation of territory actually occupied to that which is as yet unoccupied."

4.17. The Tribunal subsequently applied these principles to the facts in the following manner in the following passages:

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10. E.S.C.M.: Paras. 4.11.-4.15., pp. 135-137.

11. Guatemala-Honduras Special Boundary Tribunal: Opinion and Award (Washington, D.C. (1933)) p. 70.

"Honduras has been in possession of Omoa since 1832 (12)".

"The developments in the Cuyamel area after 1832 were made by Honduras (13)".

"it was not until about 1912 that Honduras sought by her concessions and grants to establish her interests to the west of that line. Since independence, and until about 1912, Honduras had been engaged in developing the territory east of the Tinto river, through the Cuyamel area, and in the south in the direction of Cerro San Ildefonso" (14).

4.18. El Salvador has proven that the facts (the actual possession) corresponds to the right (the Formal Title Deeds to Commons); namely, that the territories, the islands, and the maritime spaces are administered by El Salvador, who possesses the title, understanding by that the appropriate written document. It has also been proven that El Salvador has possession.

4.19. El Salvador, through the arguments which it has expounded to the Chamber in the E.S.M., in the E.S.C.M.; and in this Reply, reaffirms its request that a decision should be handed down in accordance with the rights which it has invoked, namely in accordance with the justice due to the Salvadoran human groups who have fixed their roots in the territories and in the islands which Honduras claims without the slightest right. El Salvador

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12. Guatemala-Honduras Special Boundary Tribunal: Opinion and Award (Washington, D.C. (1933)) p. 87.

13. Guatemala-Honduras Special Boundary Tribunal: Opinion and Award (Washington, D.C. (1933)) p. 88.

14. Guatemala-Honduras Special Boundary Tribunal: Opinion and Award (Washington, D.C. (1933)) p. 92.

therefore requests that a decision should be handed down which resolves the territorial delimitation and establishes the juridical status of the maritime spaces. The human, social, cultural, economic, administrative and political development which has been carried out by the people of El Salvador in these disputed sectors determines beyond any doubt that these sectors belong to El Salvador; it has been on the basis of this understanding that the Government of El Salvador and its municipal authorites over a lengthy period of time have exercised full administrative control over these sectors and have brought about its development to the benefit of thousands of Salvadoran families who have fixed their roots in the sectors and in the islands claimed by Honduras.

4.20. This is not merely a legal question, nor merely a right to possession on the basis of exercise over a long period of time. This is, above all, a situation with profound human repercussions. Will the Chamber be inclined to wrest territory from a State so unjustly diminished in size as El Salvador without first pondering what each inch of its scarce and unproductive territory represents for that country? From this point of view, law, conscience, and justice are all in favour of El Salvador and that Republic consequently expects, with total sincerity and full confidence, that the Chamber will reach its decision as the result of a consideration of the global problems of this litigation and on the basis of the integrated view of the evidence presented.

PART II

CHAPTER V

THE DETERMINATION OF THE JURIDICAL STATUS OF THE ISLANDS

I. The Law Applicable to this Determination

5.1. The Parties to this litigation disagree as to the law applicable for the purpose of determining the juridical status of the Islands of the Golfo de Fonseca. El Salvador maintains its position that, in accordance with the principles of *Public International Law* as established by the decisions of the International Court of Justice and of the various Tribunals of Arbitration and as expounded by the most important commentators, the decisive criterion is the peaceful and continuous display of State authority, provided always that this has been carried out on the basis of that possession which permits the acquisition of sovereignty. Honduras, on the other hand, insists that, in accordance with Article 26 of the General Peace Treaty of 1980, the decision of the Chamber must be based exclusively on the Spanish Colonial Formal Title Deeds. In the opinion of El Salvador, the application of either of these two criteria will produce the same conclusion, namely the recognition of its unanswerable rights to all the islands of the Golfo de Fonseca *(other than the Isla de Zacate Grande) since these* rights are firmly established not only by the peaceful and continuous display by El Salvador of State authority but also by the Spanish Colonial Formal Title Deeds issued prior to the independence of Central America in 1821.

5.2. The H.C.M. (1) states that the invocation by El Salvador "des titres qu'il appelle historiques n'intervient qu'à titre subsidiaire". This is not the case. El Salvador does not invoke its historic Formal Title Deeds to the islands as subsidiary evidence but in the form of joint evidence, since it believes that its rights over the islands of the Golfo de Fonseca are not merely confirmed but fortified by the combined effect of the application of the two criteria which are in play.

5.3. The H.C.M. devotes to what it calls "Le Differend Insulaire" only thirty-three pages, that is to say less than four and a half per cent of an extensive and repetitive Counter Memorial of some seven hundred and fifty pages. Such a shallow development within a Counter Memorial divided into three parts must undoubtedly be due to the diminished conviction as to its claims now held by Honduras, clearly overwhelmed by the documentation which has been presented by El Salvador. This documentation covers the entire time from the period of the Spanish conquest of Central America passing through the period of colonisation right up until to the date of the independence of Central America.

II. The Period of the Spanish Conquest

5.4. Throughout the H.C.M. (2), Honduras has persisted in reiterating systematically that El Salvador has not made any historical exposition dealing with the period of the Spanish conquest and subsequent colonisation because of the lack of any

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1. H.C.M.: p. 639.
2. See, for example, H.C.M.: p. 645.

documentation in its favour. Honduras states that it was at this time when its rights over the Isla de Meanguera and the Isla de Meanguerita commenced. It is alleged that jurisdiction over these islands, which are the only ones claimed by Honduras, was assigned to Choluteca in the Colonial Province of Guatemala when the "Alcaldia Mayor" of Mines of Tegucigalpa was created in 1580.

5.5. El Salvador has not wished to bother the Chamber with lengthy historical discourses; however, in view of the insistence of Honduras on this point, El Salvador will try to summarise as briefly as possible a part of the extensive historical documentation which demonstrates categorically that not only by right of conquest but also by virtue of the provisions of "Reales Cédulas" and of the exercise of jurisdiction, all the islands of the Golfo de Fonseca belonged ab initio to San Miguel in the "Alcaldia Mayor" of San Salvador and therefore today belong to the Republic of El Salvador.

5.6. On 18 December 1527, the King nominated Pedro de Alvarado as Governor and Captain-General of the Colonial Province of Guatemala, giving him faculties to make General Ordinances for the whole of his Governorship and, in particular, for each of its settlements (3). In the documents and receipts of the Viceroy of México relating to the settlements of Spaniards subject to that Colonial Kingdom and when and by whom they were populated, it is stated that in the Province and Governorship of Guatemala, there were five townships of Spaniards which were Santiago de Guatemala, San Salvador, Villa de la

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3. E.S.R.: Annexes: p. 84

4. E.S.R.: Annexes: p. 92

Trinidad, Villa de San Miguel and Villa de Xerez de la Frontera, while in the Province and Governorship of Honduras, there were six townships of Spaniards, which were Valladolid, Gracias a Dios, San Pedro, San Juan Puerto Caballos and San Jorge de Olancha (4).

5.7. On 12 May 1535 the Governor Pedro de Alvarado sent a Letter to the King, relating to him what had occured during his journey to Peru and his arrival at the Governorship of Guatemala and "how he had on many occasions thought that on that coast of the Southern Sea there must be many islands and coasts of "terra firma" and sought permission to conquer and retain all that there was in the Southern Sea; and of how he was making settlements and had just finished settling the Villa de San Miguel of that Governorship" (emphases added) (5).

5.8. Honduras, in the course of the Mediation carried out before the State Department of the United States of America in the dispute between Guatemala and Honduras, included as an Annex another letter of 20 November 1535 sent by the Governor Pedro de Alvarado to the King, referring to his earlier Letter of 12 May 1535 and to the instructions by which the King had ordered him to look for a port in the Northern Sea close to his Governorship. Alvarado declared that "the empress ordered him that he should not interfere in anything which affects the land of Honduras because Diego de Albitez has been placed in that Governorship nor in the land of Cozumel which the Governor Montejo is going to settle and that in

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5. E.S.R.: Annexes: p. 96

these two Governorships is contained all the coast of the Northern Sea which has boundaries with this Governorship". At the same time, he reported that "on the coast of the Southern Sea which belongs to his Governorhip a good safe deep water port has been discovered and that he has settled a township which is called San Miguel" (emphases added) (6).

5.9. On 16 April 1538 formal Royal Instructions were given to the Governor Pedro de Alvarado, Governor and Captain General of the Province of Guatemala relating "to the agreement and the terms of surrender relating to the discovery and conquest of certain Islands and Provinces on the coast of the Southern Sea towards the west, which he had to discover conquer and govern" (emphasis added) (7). Pedro de Alvarado from Puerto Viejo informed the King about the death of Pedrarius and that "the latter had had two ships and that he took them for the Puerto de Fonseca of his Governorship" (emphases added) (8). In the account (9) which the Licentiate Pedraza, Protector of the Indians and Bishop of Honduras, made to the King, he informed him of the distances that there were from one sea to the other, establishing that the Puerto de Fonseca was on the Southern Sea and the Villa de San Miguel within the Governorship of Guatemala and that the Governorship of Honduras reached almost as far as the Puerto de Fonseca and that there were common boundaries between that Governorship and that of Guatemala.

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6. E.S.R.: Annexes: p. 104
7. E.S.R.: Annexes: p. 114
8. E.S.R.: Annexes: p. 123
9. E.S.R.: Annexes: p. 131

5.10. In 1531 Diego de Albitez, the Governor of Honduras, in a Report presented to the "Consejo de Indias", requested the King to indicate to him the boundaries of his Governorship, both on the northern coast and on the southern coast. He asked that the town of Nequepio (later San Salvador) should be included within his boundaries in order to be able to go along the coast of the Southern Sea towards the settlements of Choluteca because these were the boundary of his Governorship; he also stated that Pedro de Alvarado had these settlements and Provinces occupied to the great damage of his Governorship. This Report is cited in the H.M. (10) but Honduras incorrectly states that the King duly acceeded to the above mentioned request. On the basis of this erroneous citation, Honduras affirms in an equally erroneous manner (11): "Il résulte de ce texte qu'en 1531 les limites de la Gobernación du Honduras étaient les suivantes: Au Sud, la Mer du Sud (aujourd'hui Océan Pacifique), et au Sud-Ouest la ville de San Miguel (aujourd'hui à El Salvador) dans les limites susdites".

5.11. El Salvador presents, as an Annex to this Reply, the answer that the King actually provided to the request contained in this Report. This was indeed correctly cited by Honduras in the Reply to the Pleadings of Nicaragua which it presented to the King of Spain in the Arbitration between Nicaragua and Honduras. This was the position which Honduras defended in that litigation, affirming: "We proposed to ourselves and we have achieved a situation that not the least doubt remains as to the fact that the determination of boundaries by the Monarch

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10. H.M.: p. 15.

11. H.M.: p. 15.

sustained in the Pleadings of Nicaragua did not exist" (12).

5.12. In the Report which the Licentiate Pedraza, Protector of the Indians and Bishop of Honduras, made on 18 May 1539 upon his arrival in that Province which was governed by the Governor Montejo, he asked the King to add the Villa de San Miguel to the Governorship of Honduras for the following reasons (13):

"That the Villa de San Miguel which is situated in the Governorship of Guatemala really belongs to the Governorship of Honduras, something which would be very convenient for Your Majesty, because it is close to two seas, that the said Villa is situated in the most convenient part of the land, close to gold and silver, and its site is the most beautiful valley and the most fruitful valley of this land and all would be for the good of this land because of the dealings from one sea to the other and thus it has been said to the Governor and as Your Majesty may favour us by giving us the Villa de San Miguel which is usurped by and placed in the Governorship of Guatemala, and in order that Your Majesty may have in the Governorship of Honduras both one sea and the other and it will not be shared between two Governorships and it is worth more that a fortress has one "Alcalde" and not two, because a house ruled by two gentlemen cannot be well ruled, especially if they are powerful gentlemen [referring here to Alvarado and Montejo] and in this Your Majesty will do what is most convenient for your Royal service".

But the King did not accede to this request.

5.13. The historical documentation which has just been considered refutes totally and finally the affirmation made in the H.C.M. (14) to the effect that El Salvador is deliberately ignoring the circumstances of the discovery of the islands and

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12. E.S.R.: Annexes: p. 137

13. E.S.R.: Annexes: p. 132

14. H.C.M.: p. 645.

that the Villa de San Miguel de la Frontera and the region situated to the East of the Rio Lempa were considered as territory whose jurisdiction could be attributed to the Governorship of Honduras.

5.14. It is possible to appreciate as from that time onwards the restlessness and ambition of the first Colonisers, Conquerers, and Ministers of the Spanish Crown who had a participation in the Province of Honduras towards what is now the territory of El Salvador, since that territory provided for them the shortest way out to the Southern Sea, that is to say to the Pacific Ocean.

III. The "Reales Cédulas" of 1563 and 1564

5.15. The situation during the period of the Spanish Conquest was confirmed by the "Reales Cédulas" of 1563 and 1564. Admittedly Honduras has cited as evidence two earlier "Reales Cédulas" - that of 1524 placing vast territories under the Governorship of Gil González Dávila (15) and that of 1525, which placed a territory called "the Province of the Golfo de Higueras" under the Governorship of Diego López de Salcedo (16). However, the effect of these two "Reales Cédulas" as evidence has been totally destroyed by the express recognition made by the representative of Honduras, Policarpo Bonilla, before the Mediator in the dispute with Nicaragua relating to the validity of the Arbitration Award of the King of Spain that "The Province of Honduras .... did not have a coast on the Pacific" and that "the coast of this Province

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15. H.M.: p. 527.

16. H.M.: p. 529.

.... does not reach the Southern Sea" (emphases added) (17).

5.16. Honduras admits in the H.C.M. (18) that its representative before the Mediator in this dispute with Nicaragua made this recognition and simply adds that the phrases set out above were followed by another in which Policarpo Bonilla added that "J'indiquerai ci-après l'extension de cette province au cours des siècles". As will be seen, there were indeed subsequent changes but there is not the slightest doubt that the initial situation was that the Province of Honduras had no jurisdiction whatsoever over any part of the coast of the Pacific Ocean. This is due to the existence of the two "Reales Cédulas" of 1563 and 1564, in which the King provided that the Province of Guatemala (which at that time included what is now the Republic of El Salvador) should have for boundaries "from the Bay of Fonseca inclusive as far as the Province of Honduras exclusive" (19). Honduras, in the course of the Mediation carried out before the State Department of the United States of America in the dispute between Guatemala and Honduras, declared the validity of the "Real Cédula" of 1564 and presented a map in which the engineers of the Boundary Commission of Honduras indicated by means of a dotted line the boundary line indicated in this "Real Cédula" (20); this map illustrates the interpretation of the "Real Cédula" made by El Salvador. These two "Reales Cédulas" of 1563 and 1564 are two of the relatively few "Reales Cédulas" which

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17. E.S.C.M.: Para. 6.10., p. 167.

18. H.C.M.: pp. 650-651.

19. E.S.C.M.: Para. 6.11., pp. 167-168, and the Annexes there cited.

20. E.S.R.: Annexes: p. 145
look Atlas map. 18

established jurisdictional boundaries; such boundaries, once so fixed, could only subsequently be amended or modified by a further "Real Cédula". Honduras has not presented, nor is in position to present, any "Real Cédula" which alters what was established by the King in 1563 and 1564.

5.17. In the H.M. (21), Honduras has cited as evidence a "Real Provisión" of 1580 (which is incorrectly described by Honduras as a "Real Cédula") appointing Juan Cisneros de Reynoso "Alcalde Mayor" of Mines of the Province of Honduras, of the town of San Miguel and its jurisdiction, and the town of Choluteca and the settlements within its jurisdiction in order to justify its claim to the Islands of the Golfo de Fonseca. El Salvador has, however, demonstrated that at this time the Islands of the Golfo de Fonseca were not included within the settlements subject to the jurisdiction of the Governorship of Honduras. This emerges from a Report of 1582 sent to the King by the Governor of the Province of Honduras, in which he listed "all the townships of his jurisdiction" (22). Neither the "Alcaldía Mayor" of Mines of Tegucigalpa nor the settlement of Choluteca were mentioned in this list. Similarly, in 1581 the Governor of Honduras made a complaint to the King that the creation of the "Alcaldía Mayor" of Mines had not increased but rather diminished his jurisdiction, so much so that the "Alcalde Mayor" of Mines denied him the deference to which he was entitled and instead claimed to be directly dependant on the "Real Audiencia" of Guatemala (23).

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21. H.M.: p. 533.

22. E.S.C.M.: Annexes: Vol. V, pp. 7-47.

23. E.S.C.M.: Annexes: Vol. V, p. 36.

5.18. A further argument expounded by the H.C.M. (24) makes reference to the search for an inter-oceanic route carried out in 1590 by a commission of engineers and colonial military officers, on the basis of which Honduras explains the attribution of Choluteca to the "Alcaldia Mayor" of Mines of Tegucigalpa in 1578 and 1580. To reinforce this argument, Honduras presents partial extracts from the record of this search (25). However, if this record is read in its entirety, the true nature of the partial quotations and the distorted interpretation which Honduras draws from them become abundantly clear. This document, addressed to the King, commences (26): "Par ordre de votre Majesté, se sont rendus dans ces provinces de San Miguel et Honduras, Francisco de Baluerdi et le Capitaine Quintanilla et le Capitaine Pedro Ochoa Leguisamo et l'Ingénieur Bautista Antonelli pour voir les ports de Fonseca y de Caballos .et la disposition des terres et des chemins. Ils ont sondé et ils ont examiné le port de Fonseca sur la Mer du Sud qui est le plus utile, et le meilleur qu'il y ait dans tout le royaume de votre Majesté". The report subsequently enumerates all the riches that existed "dans ces provinces de San Miguel et du Honduras" (27). The Town Council of San Miguel contemporaneously sent a letter to the King, thanking him for having remembered that Province and for having sent these four gentlemen "to see and survey this Bahía de Fonseca which is within its jurisdiction and which will be so useful for those who might begin such commerce, consequently they ask for permission to move for both

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24. H.C.M.: p. 646.

25. H.C.M.: pp. 646-648.

26. H.C.M.: Annexes: p. 268.

27. H.C.M.: Annexes: p. 269.

the town and its population, because they have houses and warehouses erected, and the things necessary for the comfort of those who arrive from such lengthy voyages and this Corporation, in the name of the city of San Miguel, will be very grateful. Signed in the Puerto de Fonseca on 8 June 1590" (28).

IV. The Later Spanish Colonial Documentation

5.19. In order to avoid becoming totally lost within the abundant Spanish colonial documentation which has been presented by the two Parties to this litigation in relation to the question of jurisdiction over the Islands of the Golfo de Fonseca, it is absolutely vital to take into account the dates of the different documents. This is for two reasons. First, the juridical status of the islands could not possibly have remained completely unchanged throughout the three centuries of the Spanish colonial domination. Thus, the probative force of each document depends entirely on the date on which it was executed. Secondly, in accordance with the doctrine of uti possidetis iuris, it is necessary to attach prime importance to the situation as it existed on or shortly before the date of independence of Central America in 1821. This means that it is not possible to attribute the same probative effect to documents of 1500 as to those of 1600 or to those of the Eighteenth Century or of the beginning of the Nineteenth Century.

5.20. There is a point in time which permits a division to be made in the chronological study of the documentation which has been presented by the Parties; this point in time can be situated

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28. E.S.R.: Annexes: p. 150

between the years 1672 and 1688. It was in this period of seventeen years that the transfer of Choluteca from the ecclesiastical jurisdiction of the Bishopric of Guatemala to the ecclesiastical jurisdiction of the Bishopric of Comayagua took place; consequently, it was during this period that the phenomenon of the slow and progressive adaptation of the civil jurisdiction to the ecclesiastical jurisdiction which was required by the "Real Cédula" governing this matter was occuring (29).

5.21. Prior to this period, as is demonstrated by the very fact of the transfer of jurisdiction and confirmed by the documentation which has been presented by the two Parties to this litigation (30), Choluteca belonged to the jurisdiction of the Bishopric of Guatemala and was therefore administered from San Salvador and not from the Governorship of Honduras. This signifies that the few documents which have been presented by Honduras,

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29. The H.M. (p. 540) affirms that this transfer of ecclesiastical jurisdiction included the Guardanía de Nacaome. However, the E.S.C.M. (Para. 6.30., p. 182) has shown, by means of reliable documents which have greater probative force than those referred to in the H.C.M. (p. 276), that the Guardanía de Nacaome remained subject to the jurisdiction of the Bishopric of Guatemala as it had always been. Consequently, the document referred to in the H.C.M. (p. 270) relating to a visit from Nacaome to the Islands does not constitute the slightest proof of any jurisdiction whatsoever of Honduras over the Islands of the Golfo de Fonseca.

30. The documentation presented by El Salvador is that referred to in E.S.C.M.: Para. 6.20., pp. 175-176, and in E.S.C.M.: Annexes: Vol. VII, pp. 65, 70 & 107. The documentation presented by Honduras is that in H.M.: Annexes: pp. 2283 & 2297.

all of which date from the period between 1590 and 1686 (31), from which certain links between Choluteca and some of the Islands of the Golfo de Fonseca might be said to emerge, do not constitute any proof whatsoever in support of any jurisdiction of Honduras over the Islands. These documents only indicate that jurisdiction and administrative control over the Islands was exercised from the Province of Guatemala through San Miguel. Although some documents have indeed appeared on the basis of which Honduras has claimed that jurisdiction over the Islands was exercised from Choluteca, the explanation for this is extremely simple. The "Alcalde Mayor" of San Salvador had jurisdiction over both San Miguel and Choluteca. The proof of this is in the documents of appointment of the "Alcaldes Mayores" of San Salvador (32).

5.22. However, the situation changed when the transfer of ecclesiastical jurisdiction over Choluteca from the Bishopric of Guatemala to the Bishopric of Comayagua took place and when this transfer was subsequently extended so as to embrace also the civil jurisdiction over Choluteca. From this time onwards, it was no longer possible to continue governing and exercising administrative control over the Islands from San Miguel through Choluteca. Choluteca was now subject to a different ecclesiastical jurisdiction and this necessarily determined that from that time onwards the Islands had to be administered exclusively from San Miguel. This fact is proven by the documents which have been presented. All the documentation presented by Honduras in support of its claim to the Islands is prior to 1687. On the

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31. H.M.: Annexes: pp. 2297, 2300, 2302, 2303 & 2315.

32. E.S.C.M.: Annexes: Vol. VII, p. 65; E.S.R.: Annexes: p.

other hand, the documentation presented by El Salvador which shows its administrative control over and government of the Islands as from San Miguel, both in respect of civil and ecclesiastical jurisdiction, covers the periods both before and after 1687. The documentation presented by El Salvador has the special characteristic that it extends over the whole period and as from 1687 becomes the only documentation relating to the Islands. On the other hand, not one single document presented by Honduras in respect of the period after 1687, either relating to civil jurisdiction or to ecclesiastical jurisdiction, establishes any connection whatever either between Choluteca and the Islands or between the "Alcaldia Mayor" of Mines of Tegucigalpa and the Islands.

5.23. Honduras attempts to conceal this highly significant lack of Spanish documentation as from 1687 by affirming that, after jurisdiction over Miangola (Meanguera) was attributed to Choluteca in 1535, "Au cours des années suivantes, il n'y a pas trace de ce que l'attribution, à Choluteca, de l'ile en litige ait été modifiée" (33). In reality, the starting point of this argument is misconceived. To affirm that in 1535 jurisdiction over Meanguera was attributed to Choluteca amounts to a radical contradiction of the provisions of the "Reales Cédulas" of 1563 and 1564. What is more, the reasoning adopted subsequent to this initial error is also unacceptable: it is based on a sweeping affirmation which purports to cover almost three centuries of Spanish colonial domination during which there is abundant evidence that the administrative control over and the civil and ecclesiastical government of the Islands was

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33. H.C.M.: p. 646.

exercised from San Miguel.

V. The Ecclesiastical and Civil Jurisdiction over the Islands

5.24. The documentation relating both to the ecclesiastical and to the civil jurisdiction which has been presented by El Salvador demonstrates simultaneously, in a negative sense, that neither jurisdiction nor administrative control was ever exercised over the Islands from Choluteca and Nacaome and, in a positive sense, that this jurisdiction and administrative control over the islands was in fact exercised from San Miguel.

5.25. So far as concerns the ecclesiastical jurisdiction, it is sufficient to list the following documents.

(a) 1665 In this document presented in the E.S.C.M. (34), the Convento de Amapala and the Islands are mentioned as dependencies of San Miguel; none of the Islands is mentioned as a dependency of Choluteca or Nacaome.

(b) 1673 In this document presented in the E.S.C.M. (35), exactly the same is shown.

(c) 1675 In this document presented as an Annex to this Reply (36), the Bishop of Honduras having attempted to aggregate to his Bishopric the Guardania de Nacaome, the Bishop of Guatemala replied that: "the

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34. E.S.C.M.: Para. 5.18., p. 152; Annexes: Vol. VII, pp. 1 & 7.

35. E.S.C.M.: Para. 5.19., p. 152; Annexes: Vol. VII, pp. 24 & 25.

36. E.S.R.: Annexes: p. 170

Bishops, not being content with the jurisdiction of their dioceses, wish to extend them by taking jurisdiction away from other Bishops and in this they are serving neither God nor his Majesty". By a "Real Cédula" of 21 July 1678, the King resolved not to accede to the request made to him by the Bishop of Honduras.

(d) 1733 In this document presented in the E.S.C.M. (37), the dependencies of the ecclesiastical jurisdiction of Choluteca are enumerated and no such dependency in the Islands is mentioned.

(e) 1765 In this document presented in the H.M. (38), the Report prepared by Joseph Valle, there is no mention of any curacy in the Islands dependent on Choluteca or on the "Alcaldia Mayor" of Mines of Tegucigalpa.

(f) 1791 In this document presented in the H.M. (39), the list of Curacies drawn up by the Bishop of Comayagua, Fernando de Cadiñanos, there is no mention of any dependency of Comayagua, Choluteca or Nacaome in the Islands. This list was considered to be decisive by the *Tribunal of Arbitration* which decided the litigation between Guatemala and Honduras (40).

(g) 1804 In this document presented in the E.S.C.M.

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37. E.S.C.M.: Annexes: Vol. VII, p. 36.
38. H.M.: Annexes: p. 13.
39. H.M.: Annexes: p. 17.
40. See E.S.C.M.: Para. 5.23., pp. 154-155.

(41). the Report of the Governor of Honduras, Ramón de Anguiano, there are no islands included in the enumeration and description of either Choluteca or Nacaome.

5.26. So far as concerns the civil jurisdiction, it is sufficient to list the following documents.

(a) 1625 In this document presented in the E.S.C.M. (42). a measurement on the Isla de Amapala was ordered from San Miguel.

(b) 1676 In this document presented in the E.S.C.M. (43). the "Real Audiencia" of Guatemala declared that the government of the Islands ought to be carried out from San Miguel.

(c) 1677 In this document presented in the E.S.C.M. (44). taxes were collected in respect of the Islands from San Miguel.

(d) 1706 In this document presented in the E.S.C.M. (45). a petition seeking an exemption from taxes in respect of the Islands was directed to San Miguel.

(e) 1711 In this document presented in the E.S.C.M.

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41. E.S.C.M.: Para. 6.51., pp. 193-194; Annexes: Vol. VIII, p. 195.

42. E.S.C.M.: Para. 6.23., pp. 177-178: Annexes: Vol. VIII, p. 3.

43. E.S.C.M.: Para. 6.32., p. 183; Annexes: Vol. VIII, p. 57.

44. E.S.C.M.: Para. 6.27., p. 180; Annexes: Vol. VIII, p. 49.

45. E.S.C.M.: Para. 6.33., p. 184; Annexes: Vol. VIII, p. 113.

International Court of Justice

CASE CONCERNING THE LAND, ISLAND AND

MARITIME FRONTIER DISPUTE

(El Salvador / Honduras)

REPLY OF THE *REPUBLIC OF EL SALVADOR*

ERRATUM

1. Page 15. Chapter II. The Law Repplicable to Formal Deeds to Commons. Footnotes should read:

31. H.C.M. Annexes. Page 47

32. E.S.R. Annexes. Page 404.

2. Page 120. Chapter IV. *Arguments of a human nature* Footnote should read:

Annexes to Chapter IV. Page 267.

3. Page 134. Chapter V. The Determination of the Juridical Status of the Islands.
The second footnote should read:

32. E.S.C.M.: Annexes: Vol. VII, p. 65.

E.S.R. Annexes: p. 159 and 160.

4. Page 146. Chapter V. The Determination of the Juridical Status of the Islands. At the end of the footnotes. it is

76 bis. E.S.R. Annexes: p. 198.

5. Page 198. Chapter VI. The Maritime Spaces. The second footnote should read:

77. H.C.M.: pp. 705-706. Chapter XIV. Para 13.7.

E.S.R.: Annexes. Page 349.

(46), taxes were collected in the Isla de Meanguera under the jurisdiction of San Miguel.

(f) 1740 In this document presented in the E.S.C.M. (47), a description by the "Alcalde Mayor" of San Salvador of that Colonial Province, the Islands are included.

(g) 1743 In this document presented in the E.S.C.M. (48), an exhaustive description by the "Alcalde Mayor" of Tegucigalpa, Baltasar Ortiz de Letona, of the Colonial Province of Honduras, the references to Choluteca and Nacaome do not contain any mention of the Islands and indicate that this coast has no sea ports (49).

(h) 1746 In this document presented as an Annex to this Reply (50), it is stated that the inhabitants of Nuestra Señora de las Nieves de Amapala and of Meanguera, within the jurisdiction of San Miguel, had to pay their tithes to the "Alcaldía Mayor" of San Salvador.

(i) 1750 In this document presented by the E.S.C.M.

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46. E.S.C.M.: Para. 6.34., p. 185; Annexes: Vol. VIII, p. 219.

47. E.S.C.M.: Para. 6.35., p. 185; Annexes: Vol. VIII, p. 155.

48. E.S.C.M.: Paras. 6.37.-6.39., pp. 186-187, and the documents there cited.

49. In 1745 a "Real Cédula" was issued in favour of Juan de Vera which is cited by the H.C.M. (p. 652n). The E.S.C.M. (Paras. 5.29.-5.31., pp. 158-160) and the E.S.M. (Para. ?.??.) set out the reasons why this "Real Cédula" has nothing whatever to do with the question of the delimitation of the Spanish colonial possessions in America.

50. E.S.R.: Annexes: p. 177

(51), a census of the Indian population of the Isla de Amapala states that it is within the jurisdiction of San Miguel. (52)

(j) 1776 In this crucial document presented by the E.S.C.M. (53), the "Real Audiencia" of Guatemala upheld the jurisdiction of San Miguel over the Isla de Exposición. The H.C.M. (54) inserts a colon into this document in order to try to sustain that the island in question was not the Isla de Exposición but the Isla de Zacate Grande. However, far from improving the claim of Honduras, this alteration actually makes it worse. If the decision of the "Real Audiencia" of Guatemala refers to the Isla de Zacate Grande, that demonstrates that all the remaining islands, which are further from the coast than the Isla de Zacate Grande, were a fortiori also subject to the jurisdiction of San Miguel.

(k) 1812 In this document presented as an Annex to this Reply (55), the Corporation of Comayagua asked once again that the "Alcaldia Mayor" of Tegucigalpa should be incorporated into it and that the Judicial District of San

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51. E.S.C.M.: Para. 6.36., p. 185; Annexes: Vol. VIII, p. 219.

52. In 1770 the Bishop Cortes y Larraz produced a Report which is relied on by the H.C.M. (p. 649). As is explained in the E.S.C.M. (Para. 5.26., pp. 526-527) this Report, whose text is in the Annexes to the H.M. (p. 2319), has not been correctly interpreted by Honduras.

53. E.S.C.M.: Paras. 6.43.-6.46., pp. 189-191; Annexes: Vol. VIII, p. 172.

54. H.C.M.: pp. 655-657.

55. E.S.R.: Annexes: p. 185

Miguel, within the jurisdiction of the Intendency of San Salvador, should be added to it, thereby asking for all the lands as far as the Rio Lempa (that is to say all the territory which is today comprised in the Departments of Chalatenango, San Miguel, Morazán and La Union in the Republic of El Salvador), the boundaries of the Province of Honduras being the bank of the Rio Lempa as from its source, which was within the boundaries of that Province. The Spanish "Consejo de Estado" (Council of State) felt that it was not appropriate to make any changes until the new demarcation of the "Provincias de Ultramar" (the Provinces beyond the Seas) took place.

5.27. The H.C.M. (56), unable to make any reply to these categoric documents, merely produces its original argument that matters could have been different in so far as San Miguel could have been attributed to the Governorship of Honduras, since this was indeed proposed to the King, even though the King never accepted this proposition (57). To this type of hypothetical argument, the only appropriate response is to recall the maxim avec des si et cetera.

5.28. Finally, the H.C.M. (58) relies on the Arbitration Award of the King of Spain between Nicaragua and Honduras, in which it was affirmed that in 1791 the "Alcaldia Mayor" of

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56. H.C.M.: p. 645.
57. H.M.: p. 531.
58. H.C.M.: p. 652.

Tegucigalpa was incorporated into the Intendency and Governorship of Comayagua together with all the territory of its Bishopric. In relation to this reliance on an Arbitration Award which is res inter alios, the following observations must be made.

5.29. First, this incorporation proves that prior to 1791 the "Alcaldia Mayor" of Mines of Tegucigalpa did not form part of the Governorship of Honduras.

5.30. Secondly, this incorporation of 1791 was rescinded by a "Real Cédula" of 1816 (59), by which it was provided that the "Alcaldia Mayor" of Mines of Tegucigalpa should once again be separated from the jurisdiction of Comayagua so that the situation which had existed prior to 1791 was reestablished. Thus this "Alcaldia Mayor" was once again dependant on the "Real Audiencia" of Guatemala and not on the Governorship of Honduras (this is proved by documents of 1714, 1744, 1762 and 1765 which have been presented by El Salvador (60) by which "Alcaldes Mayores" of Mines of Tegucigalpa in the Provinces of Guatemala were appointed).

5.31. Thirdly, these transfers of jurisdiction had nothing whatsoever to do with the juridical status of the Islands of the Golfo de Fonseca simply because the "Alcaldia Mayor" of Mines of Tegucigalpa never either had or exercised jurisdiction over these Islands. Not one single document establishes any such jurisdiction. The confusion displayed by

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59. E.S.C.M.: Para. 6.22., p. 177; Annexes: Vol. V, p. 48.

60. E.S.C.M.: Para. 6.21., p. 176; Annexes: Vol. VII, p. 145.

Honduras as to the jurisdiction which it alleges that the "Alcaldía Mayor" of Mines of Tegucigalpa enjoyed over the Islands of the Golfo de Fonseca is dispresed once and for all by a document of 13 March 1685 presented as an Annex to this Reply (61). This document records that, during a Council of War attended by the President and the "Oidores" (Judges) of the "Real Audiencia" of Guatemala, letters were read from the "Alcaldes Mayores" of San Salvador and Sonsonate on the dangers posed by hostile pirates who were in the immediate vicinity of the ports of these jurisdictions. The President and "Oidores" of the "Real Audiencia of Guatemala resolved that, "in order to anticipate what would be necessary for their defence if the enemy who was in the immediate vicinity of these ports tried to sack the cities and townships of San Miguel and San Salvador, the "Alcalde Mayor" of Mines of Tegucigalpa, Antonio Ayala, is ordered to go there with the armed companies from his jurisdiction to provide such help as the occasion might demand giving his assistance in everything that could be offered in the service of His Majesty and the said "Alcaldes Mayores"". As may be seen, it emerges from this document that the "Alcalde Mayor" of Mines of Tegucigalpa was ordered to provide defensive help for the Islands only in a situation of emergency and with the object of assisting in the defense of the ports which remained subject to the jurisdiction of the "Alcaldes Mayores" of San Miguel and San Salvador.

5.32. Fourthly, the "Alcalde Mayor" of Mines of Tegucigalpa would have had great difficulty in exercising his alleged jurisdiction over the Islands since, as is demonstrated in the Report made by the

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61. E.S.R.: Annexes: p. 191

President of the "Real Audiencia" of Guatemala in 1752 (62), the coast under his jurisdiction had no ports. The H.C.M. (63) seeks to counter this conclusive Report of the President of the "Real Audiencia" of Guatemala by means of a Report by Luis Diez Navarro in 1758 (64) but this document does not in fact mention any port on the coast which was subject to the jurisdiction of the "Alcalde Mayor" of Mines of Tegucigalpa.

VI. The Peaceful and Continuous Display of State Authority

5.33. In considering the discussion of this matter in the E.S.M. (65), the H.C.M. (66) limits itself to affirming that arguments of this type are irrelevant, despite the fact that they are clearly based on both the decision of the International Court of Justice in the Minquiers Ecrehos Case (67) and on the decision of the Permanent Court of Justice in the Eastern Greenland Case (68). Consequently, in this Reply El Salvador will confine itself to a brief resumé of the antecedents of its peaceful and continuous display of State authority over the Islands of the Golfo de Fonseca and the documents which support these antecedents.

5.34. This resumé comprises the following

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62. E.S.C.M.: Para. 6.41., p. 188, and the document there cited.
63. H.C.M.: p. 654.
64. H.C.M.: Annexes: p. 267.
65. E.S.M.: Chapter 11.
66. H.C.M.: p. 662.
67. I.C.J. Reports 1953 p. 65.
68. P.C.I.J.: Series A/B No. 53 p. 45.

antecedents.

(a) 1849 The British Consul Chatfield ordered a blockade and took as a pledge "all the Islands of this Bay belonging to the actual State of El Salvador, especially Meanguera, Conchagüita, Punta de Zacate and Pérez" (69).

(b) 1850 The same Chatfield returned to El Salvador the Islands mentioned above (70).

(c) 1854 The authorities of El Salvador agreed to grant permission for the sales of land on various Islands of the Golfo de Fonseca (71).

(d) 1854 Judicial organs of San Miguel authorised measurements in various Islands, including the Islas de Meanguera, Conchagüita, Punta de Zacate, Ilca, and Los Pericos (72).

(e) 1854 El Salvador protested to Honduras in respect of an attempt to carry out a measurement on the Isla de Meanguera and Honduras desisted from proceeding therewith (73).

(f) 1879 Authorities of El Salvador ordered a public auction of uncultivated lands on the Isla de Meanguera (74).

(g) 1893 The Government of El Salvador established

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69. E.S.M.: Para. 11.10.; E.S.C.M.: Para. 6.54..

70. E.S.M.: Para. 11.11.; E.S.C.M.: Para. 6.56..

71. E.S.M.: Para. 11.3. and the documents cited therein.

72. E.S.M.: Para. 11.4. and the documents cited therein.

73. E.S.C.M.: Para. 6.60., p. 199.

74. E.S.M.: Para. 11.5. and the documents cited therein; E.S.C.M.: Para. 6.67., p. 203.

a school for girls on the Isla de Meanguera (75).

(h) 1894 The Government of El Salvador captured and disarmed revolutionary Honduran forces on the Isla de Meanguera and placed their arms and munitions at the disposition of the Government of Honduras (76).

(i) 1900 Honduras signed a definitive Boundary Treaty with Nicaragua which established a line of equidistance between "the coasts of both Republics" drawn between the Isla del Tigre and the Punta de Cosigüina. This line implied a definite recognition by Honduras that the Isla de Meanguera belonged to El Salvador since the line of equidistance would have been totally different if the Isla de Meanguera belonged to Honduras.

(j) 1914 El Salvador passed a Law authorising a free port on one of the Islands of the Golfo de Fonseca (77).

(k) 1914 A contract was approved for the construction and exploitation of this free port on the Isla de Meanguera (78).

(l) 1916 El Salvador passed a Law declaring that the township of the Isla de Meanguera had the status of a "villa" with the name of

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75. E.S.C.M.: Para. 6.70., pp. 204-205, and the document cited therein.

76. E.S.M.: Para. 11.7. and the documents cited therein.

77. E.S.M.: Para. 11.8. and the document cited therein.

78. E.S.M.: Para. 11.8. and the document cited therein.

Meanguera del Golfo (79).

5.35. Honduras has not presented one single document which establishes any peaceful and continuous display of State authority on any of the islands of the Golfo de Fonseca.

VII. The Position of the Isla del Tigre (also known as the Isla de Amapala)

5.36. In an attempt to exclude the Isla del Tigre (also known as the Isla de Amapala (80)) from the scope of the dispute over the Islands, the H.C.M. (81) affirms that El Salvador recognised the sovereignty of Honduras over this Island in a Diplomatic Note of 12 October 1864 (82). However, any attempt to verify this assertion leads to the surprising discovery that this supposed recognition would emanate from an energetic Note of Protest sent by El Salvador to Honduras firmly expressing its opposition to two decisions which the Government of Honduras was proposing to take: the projected sale of the Isla del Tigre to the United States of America and a proposed measurement of the Isla de Meanguera and the Isla de Meanguerita. In this Note, the Government of El Salvador impugned the projected sale of the Isla del Tigre, indicating that such a sale would bring about the economic ruin of the ports of

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79. E.S.M.: Para. 11.9. and the documents cited therein.

80. The two names are used quite interchangeably (see below Paragraph 5.41. et seq.). However, except where the context otherwise requires, this section will refer to this island simply as the Isla del Tigre.

81. H.C.M.: p. 635.

82. H.M.: Annexes: p. 2294.

San Lorenzo and La Unión and, that the transfer into foreign hands of the coasts and islands of Central America would bring along with it the loss of the independence of the States of Central America. Consequently, El Salvador protested energetically against any alienation of that Island that might be made and stated that it would not hesitate in taking all the measures required by the situation.

5.37. The Government of El Salvador did not content itself merely with sending this Note of Protest to the Government of Honduras; it also sent a circular letter to the other three States of Central America, asking them to procure that their energetic protests also reached the Government of Honduras with the object of impeding alienations which would be "as unpredictable as (they would be) fatal" (83). (This firm policy of El Salvador as defender and promoter of an exclusively Central American character for the Golfo de Fonseca is the same policy which subsequently led it in 1916 to ask the Central American Court of Justice to annul the Bryan-Chamorro Treaty, a request which gave rise to the proceedings between El Salvador and Nicaragua in that Court in 1917.) This decided opposition from El Salvador determined that the Government of Honduras desisted from the projected sale and the measurement which it had contemplated.

5.38. To attempt to extract from this serious incident and from the Note and the circular letter sent by El Salvador a type of implicit recognition by that State that exclusive rights of sovereignty over the Isla del Tigre were vested in

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83. H.M.: Annexes: p. 2251.

Honduras is to draw from the text of these documents a meaning totally opposed both to their letter and to their spirit.

5.39. The H.C.M. (84) affirms that the position adopted by El Salvador in respect of the Isla del Tigre lacks either foundation or historical documents to support it and is instead based on a supposed Agreement of 1833. El Salvador has not even mentioned this Agreement, never mind relied on it.

5.40. On the other hand, there does indeed exist a de facto occupation of the Isla del Tigre by Honduras on the basis of an authorisation which, with limited objectives, was agreed by El Salvador in 1833 (85).

5.41. Honduras has not indicated to the Chamber, as it did in the H.M. (86) in the case of Meanguera (which is also called Meangola), that during the colonial period the Isla del Tigre was most commonly known as the Isla or Puerto de Amapal or Amapala or as the Isla de Tigres. For this reason, the E.S.C.M. (87) on occasions referred to this Island as the Isla de Amapala when discussing colonial documents in which that name was used.

5.42. Earlier in this Chapter (88), El Salvador set out a cronological list of the documentation which constitutes complete proof that

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84. H.C.M.: p. 641.

85. E.S.M.: Para. 11.13..

86. H.M.: p. 481.

87. E.S.C.M.: Paras. 6.23. & 6.32., pp. 177-178 & 183.

88. In Paragraphs 5.25., 5.26., & 5.28.-5.32..

neither the "Alcaldía Mayor" of Mines of Tegucigalpa nor Choluteca and Nacaome ever exercised either civil or ecclesiastical jurisdiction over the Islands of the Golfo de Fonseca. A brief resumé will now be made of the historical documents which support the rights of El Salvador over the Isla de Tigre (also known as the Isla de Amapala).

(a) 1625 In this document presented in the E.S.C.M. (89), the Isla de Amapala or del Tigre is stated to be within the jurisdiction of San Miguel.

(b) 1643 In this document presented as an Annex to this Reply (90), it is stated that Dutch pirates threatened to attack the Puerto de Amapala in the jurisdiction of the "Alcaldía Mayor" of San Salvador, once again proving that this port was within the jurisdiction of San Salvador.

(c) 1644 In this document presented as an Annex to this Reply (91), a Spanish vessel applied for permission to disembark in the Puerto de Amapala, described as being within the jurisdiction of San Miguel.

(d) 1688 In this document presented as an Annex to this Reply (92), the "Alcalde Mayor" of San Salvador reported on events which had occurred at the Ensenada de Amapala and Isla del Tigre within his jurisdiction. It is interesting to note that in the same document the assistance provided by the "Alcalde Mayor" of Mines of Tegucigalpa is mentioned.

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89. E.S.C.M.: Para. 6.23., pp. 177-178.

90. E.S.R.: Annexes: p. 203

91. E.S.R.: Annexes: p. 208

92. E.S.R.: Annexes: p. 215

The fact that aid was thus sought from the "Alcalde Mayor" of Mines of Tegucigalpa demonstrates that he did not have any right as such to interfere in the area of the Golfo de Fonseca and its Islands (93).

(e) 1697 In this document presented as an Annex to this Reply (94), the "Alcalde Mayor" of San Salvador was replying to a Report from the President-Guardian of the township and district of Nuestra Señora de las Nieves de Amapala, Fray Luis Davalos de Osorio, that the Indians of Amapala were very few on account of the invasions of hostile pirates which they had suffered on these coasts from 1688 onwards and that consequently they had added themselves, together with the images and statues of their Saints, to the township of the Island of Meangola but that they nevertheless always went in their canoes to sow their maize fields on the Isla de Tigres. The "Alcalde Mayor", in a document signed in San Salvador on 10 July 1697, replied that he considered it very convenient that the Indians of Amapala should form a common settlement and unite with the Indians of Meangola.

(f) 1714 In this document presented as an Annex to this Reply (95), Fray Juan Bautista Alvarez de Toledo, Bishop Elect of Chiapas and Governor of Guatemala, made reference to the formal legal records of his visit to the Judicial District of Amapala in the

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93. See Paragraph 5.31. above.

94. E.S.R.: Annexes: p. 221

95. E.S.R.: Annexes: p. 239

city of San Miguel, in the course of which he asked that all the records of the administration of the said Judicial District should be exhibited to him. Fray Juan Achutegui, Parish Priest of the Curacy of Amapala, exhibited the books in which were written and recorded the certificates of those who were baptised, married and buried in the townships of Santa Maria Magdalena de la Meanguera, Santiago Conchagua and Amapala, townships which he declared to be under his care with the approval of the Bishop of Guatemala. Bishop Alvarez de Toledo, having seen these legal records made in Meanguera, Conchagua and Amapala, whose administration appurtained to the Religious Order of San Francisco of the Convent founded in the city of San Miguel, ordered in a document signed on 16 February 1714 in the city of San Miguel, that an original copy of these legal records should be put in the Register of Baptisms of the Parish Church of the township of Amapala to remain as a record there for all time.

(g) 1729 In this document presented as an Annex to this Reply (96), the title of "Maestre de Campo de Infantería" of the city of San Miguel was conferred on Juan Joseph de Molina in order that he might defend its coasts and ports, electing him "Maestre" of the Province of San Miguel on account of the notoriety of the invasion by pirates of the Bahía de Amapala, its islands, and its coves in order to avoid any repetition of

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96. E.S.R.: Annexes: p. 246

the same.

(h) 1745 In this document presented as an Annex to this Reply (97), it was provided that the inhabitants of Nuestra Señora de las Nieves de Amapala, of the Province of San Miguel, within the jurisdiction of San Salvador, should pay their taxes each year to the "Alcalde Mayor" of San Salvador. This document once again confirms the jurisdiction over Amapala was that of San Salvador.

(i) 1819 In this document presented as an Annex to this Reply (98), José Tinoco, Intendent of the Province of Honduras, informed the King of the state of that Province, stating that, due to the fact that the maritime explorers and geographers had spoken very little of the coast and bays of Honduras, it had appeared to him appropriate to his ministry thereof to include in his Report an account of the topographical state of its ports, rivers and islands. This document contains a very detailed description, with references to numerous geographical features such as bays, islands, rivers, ports and so forth, of the entire Province of Honduras in the period immediately prior to the date of the independence of Central America in 1821; however, in spite of this extremely detailed geographical account, there is no mention anywhere of the Golfo de Fonseca nor of its Islands. This is of course simply because they did not form part of that Colonial Province.

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97. E.S.R.: Annexes: p. 177

98. E.S.R.: Annexes: p. 254

(j) 1820 In this document presented as an Annex to this Reply (99), a Formal Record drawn up by the Municipality of Comayagua on 18 October 1820, it is stated that the Province of Comayagua had well known boundaries and lines of demarcation and that this Province had to the north the ports of Fuerte Trujillo, Omoa and El Triunfo de Cruz, and to the south the ports of San Bernardo, Zapotillo and La Baraja. This Formal Record does not include among the list of ports belonging to Honduras the Isla or Puerto de Amapala or El Tigre. This document, when added to those that have already been discussed, shows clearly that the Isla or Puerto de Amapala or El Tigre was subject to the jurisdiction of San Miguel from the period of the Spanish Conquest right up until the very threshold of the date of the independence of Central America in 1821. This is clearly demonstrated by the absence of any mention of this Island in these two descriptions of the Province of Honduras made in 1819 and 1820, immediately before the date of the independence of Central America in 1821.

5.43. The historical antecedents presented by El Salvador would fully justify the Chamber in putting an end to the de facto occupation of this Island by Honduras and adjudicating it to El Salvador on the basis of the very arguments relating to uti possidetis iuris which, according to Honduras, ought to be used as the exclusive criterion for deciding

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99. E.S.R.: Annexes: p. 264

the dispute between the Parties to this litigation as to the Islands of the Golfo de Fonseca. Nevertheless, El Salvador maintains its position that, in accordance with the principles of Public International Law as established by the decisions of the International Court of Justice and of the various Tribunals of Arbitration and as expounded by the most important commentators, the decisive criterion is the peaceful and continuous display of State authority.

CHAPTER VI

THE MARITIME SPACES

6.1. In this part of its Reply, the Government of El Salvador will respond to the corresponding section of the H.C.M.. The adoption of the wording of the headings used in the H.C.M. is for convenience only and does not signify acceptance of the substantive implications of those headings. The presentation of El Salvador will follow generally the same order as that of the H.C.M..

1. "CHAPTER XIII: THE SUBJECT OF THE DISPUTE RELATING TO THE JURIDICAL POSITION OF THE ISLANDS AND THE MARITIME SPACES"

"Section I. The Interpretation of the Compromis."

(A) "The legal nature of the Compromis and its consequences"

6.2. The Government of El Salvador begins by affirming that there is no dispute between it and the Government of Honduras regarding the legal quality of the Compromis. It is an international agreement and it falls to be interpreted in accordance with the rules of international law relating to the interpretation of treaties as codified in the Vienna Convention on the Law of Treaties, Articles 31 and 32.

6.3. At the same time, the applicability of those Articles does not exclude the relevance of either the jurisprudence of international tribunals bearing upon the subject or of the practice of States.

6.4. The H.C.M. (1) seeks to exclude any comparison between the Compromis in this case and the compromis in other cases, invoking the maxim res inter alios acta and arguing that there is no common law relating to the subject of disputes and of contentious claims.

6.5. The Government of Honduras misunderstands the purpose of the reference by the Government of El Salvador to the wording of other special agreements. The Government of El Salvador does not suggest that these other texts control the present situation. Rather, the purpose of the reference was to show that in the practice of States there is a clear cut distinction between, on the one hand, the determination of relevant legal rules or relavant legal status and, on the other, the delimitation of a maritime boundary. The two concepts are in themselves entirely different and this difference is reflected in and illustrated by the practice of States as set out in the E.S.M. (2). Even though the Government of Honduras may wish to "spend no more time" in considering these other examples of the manner in which such questions have been expressed in the past, the fact remains that other States have clearly seen and expressed the difference between the determination of legal status and the delimitation of maritime areas.

6.6. This appreciation of the distinction and of its importance has been recognised by the I.C.J. itself in that, where requested to lay down principles and rules, it has done that and no more than that. Only where the Court has been expressly

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1. H.C.M.: Chapter XIII, Para. 3.
2. E.S.M.: Chapter I, Paras. 1.2.-1.6..

requested to decide upon the course of the maritime boundary or to indicate to the parties "the practical method" for applying the relevant rules and principles, has it sought to draw a line. The fact that the Court has not been asked to perform this additional function in the present case is evident as a matter of plain language from the clear distinction drawn between the two ways in which Questions One and Two have been formulated. The Government of El Salvador need not repeat the relevant part of its argument as set out in the E.S.M. (3) and the E.S.C.M. (4).

6.7. The Government of Honduras has argued that there is support in decisions of the P.C.I.J. and I.C.J. for the rather broad proposition that "the terms of an agreement under which jurisdiction is granted must receive an interpretation giving full scope to the subject of the dispute and full effectiveness to its judicial settlement" (5). The Government of El Salvador will presently point to decisions of the I.C.J. which support a more restrictive approach to the interpretation of clauses conferring jurisdiction on the Court. First, however, it may be helpful to look more closely at the two decisions in contentious cases that are cited by the Government of Honduras.

6.8. The first is the following passage in the Free Zones case:

".... in case of doubt, the clauses of a special agreement by which a dispute is referred to the Court must, if it does not involve doing violence to their terms, be construed in a manner enabling the clauses

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3. E.S.M.: Chapter I.

4. E.S.C.M.: Chapter VIII, Section I.

5. H.C.M.: Chapter XIII, Para. 5.

themselves to have appropriate effects" (emphases added).

6.9. In its anxiety to draw support from this passage for its rather broad proposition, the Government of Honduras has failed to consider the significance, so adverse to its position, of the words that have been emphasised in the above quotation. Thus the Court stressed the importance of not "doing violence" to the terms of the agreement. Surely, in the present case, "violence" is precisely what is done to the terms of Question Two if the words "to determine the legal status" are replaced by the words "to delimit the boundaries".

6.10. Again the Government of Honduras fails to note the significance of the adjective "appropriate" in the phrase "enabling the clauses themselves to have appropriate effects". The inclusion of this adjective means that the Court is not entitled to interpret the provision in such a way as to give it any effect whatever - e.g. the large effect claimed by the Government of Honduras, namely, that of delimiting the boundary, when delimitation is not called for and, indeed, is not required at this stage of the process of dispute settlement between Honduras and El Salvador. The Court may give the clause only "appropriate" effect - an idea which involves a limitation of power appropriate to the circumstances.

6.11. Nor does the reference by the Government of Honduras to the Corfu Channel Case stand up to scrutiny any better. The question there was whether the words "is there any duty to pay compensation?", when read in the context of the question as a whole, conferred upon the Court the power to assess the amount of compensation. The Court's approach to the matter was clearly influenced by the

fact that Albania evidently thought so little of its argument that it did not raise it until its last oral statement; and the British Agent did not ask leave to reply. Also the Court attached weight to the fact that the *main object* that both Parties had in mind when they concluded the Special Agreement "was to establish a complete equality between them by replacing the original procedure based on a unilateral Application by a procedure based on a Special Agreement" (6).

6.12. It would have been rather more to the point if the Government of Honduras had recalled those cases in which the Court had expressly stated that jurisdictional clauses should be restrictively interpreted.

6.13. The nature of the Court's approach to these matters is well illustrated by the Anglo-Iranian Oil Company Case. Although the Court did not actually use the expression "restrictive" to describe its approach to interpretation of a jurisdictional text, the fact that this would be the correct word to describe the Court's approach is demonstrated by the language of dissent employed by Judge Read. He said (7):

"It has been contended that the Court should apply a restrictive construction to the provisions of the Declaration, because it is a treaty provision or a clause conferring jurisdiction on the Court .... The making of a declaration is an exercise of State sovereignty, and not, in any sense, a limitation. It should therefore be construed in such a manner as to give effect to the intention of the State, as indicated by the words used; and not by a restrictive interpretation, designed to frustrate the intention of the State in exercising this sovereign power."

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6. I.C.J. Reports 1949 pp. 24-25.

7. I.C.J. Reports 1952, p. 143.

6.14. It is well known that one of the most valuable features of dissenting opinions lies in the clarification of the Court's position that arises from the implied contrast between the reasoning of the dissentient judge and that of the Court. No case could better illustrate this. Judge Read dissented because the Court adopted a restrictive interpretation of the Iranian declaration and thereby rejected the liberal or expansive approach favoured by Judge Read.

6.15. The correctness of this interpretation of the situation resulting from the Anglo-Iranian Case is confirmed by the language used by the Court itself in its Advisory Opinion on Judgments of the Administrative Tribunal of the I.L.O.. There, considering the scope of the jurisdiction conferred upon the Administrative Tribunal of the I.L.O., the Court said (8):

"The arguments, deduced from the sovereignty of States, which might have been invoked in favour of a restrictive interpretation governing the jurisdiction of a tribunal adjudicating between States are not relevant to a situation in which a tribunal is called upon to adjudicate upon a complaint of an official against an international organization".

The words to which emphasis has been accorded in the above quotation can be read by themselves as a positive statement of the Court's views on the matter.

"(B) The background to this dispute and the context surrounding the compromis"

6.16. The argument of Honduras places great reliance on its assertion that the purpose

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8. I.C.J. Reports 1956, p. 97.

of the Compromis is to achieve "the definitive and total solution of the difference existing for nearly a century and a half between Honduras and El Salvador .... regarding the determination of their land and sea boundaries" (9).

6.17. Before embarking upon an examination of the presentation by Honduras of the history of the matter, the Government of El Salvador must draw attention to the fact that so far as the attempt by Honduras to achieve a maritime boundary in the Pacific Ocean outside the Gulf of Fonseca is concerned, the allegation that a dispute has existed "for nearly a century and a half" is patently absurd. The concept of the continental shelf only began to form part of Central American thinking regarding the extent of maritime claims in about 1950. (It was in that year that Honduras, for example, introduced into its Constitution a reference to the continental shelf.) The concept of the exclusive economic zone (E.E.Z.) is an even later development - of which there were no significant signs before 1970 and which did not crystallize, even in treaty form, before 1982. So, truth to tell, the dispute regarding the legal status of the maritime area outside the Gulf of Fonseca is of relatively recent origin. This dispute could not even have come into being prior to the emergence in the last four decades of entirely new ideas in the law of the sea.

"(1) From the Treaty of Cruz-Letona to the General Peace Treaty (1884-1980)."

(a) The Cruz-Letona Treaty

6.18. During this period, Honduras suggests first

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9. H.C.M.: p. 672, para. 6.

that negotiation of the unratified Cruz-Letona Treaty showed that the two countries accepted the principle of the delimitation of maritime areas and also decided to give it concrete expression. However, it is necessary to look closely at the words used in the relevant part of that treaty:

"Article 2

La frontière maritime entre le Honduras et le Salvador, part du Pacifique en divisant par deux dans le Golfe de Fonseca, la distance qu'il y a entre les îles Meanguera, Conchaguita, Martin Perez et Punta Sacate, du Salvador, et les îles de Tigre, Sacate Grande, Inglesa et Exposicion du Honduras et finit à l'embouchure du Goascoran".

6.19. As can be seen, other than by the presence of the words "part du Pacifique", the words of the remainder of the Article, when related to the specific geographical descriptions used, do not establish a delimitation throughout the Gulf, but only between the islands specifically named. As can be seen from several of the maps that are referred to below, a line following the directions given in the Article terminates at a point between the island of Meanguera and the island of El Tigre. There is nothing in the manner in which the description has been interpreted that would enable it now to be extended seawards to the east and south of Meanguera so as to reach the Pacific at a point on the closing line of the Gulf of Fonseca.

6.20. Indeed, this is confirmed by close scrutiny of Map A.16. to be found in Vol. VI of the Annexes to the H.M.. This map, which bears the inscription that it was prepared by Mr. A.T. Byrne, the Civil Engineer of Honduras, and was published in 1886, only two years after the signature of the treaty in question, shows a boundary line in the Gulf of Fonseca that terminates in the manner just

described. In Map A.19., published in 1899 and prepared by Mr. Altschul on behalf of the "Directorio Nacional de Honduras" the projection of the maritime frontier between El Salvador and Honduras into the Gulf of Fonseca is even shorter.

6.21. Other maps demonstrate a similar understanding of the situation.

(i) Mapa político escolar y telegráfico de la República del Salvador, por G.J. Dawson, San Salvador, 1887, Bajo la Inspección de E. Pector, Consul General.

(ii) Mapa de la República de Honduras Levantado por E.P. Mayes I.c. 1:530.000. (1907) *(probably made in Hayana) Published by* Rand, McNally & Co.

(iii) *Honduras, copyright 1909, by E.C. Fiallos,* published August R. Ohman & Co. NY; 1:800,000.

(iv) Atlas de Centro-América, ed. L. Mendioroz (1912).

(v) Tomado del: Prontuario Geográfico de Centro--América que va a ser publicado proximamente (propiedad de J.F. Ponciano) (published at Masaya, Nicaragua), Map 35, La Unión.

(vi) Map of Honduras 1:500.000 (Undated, but acquired by the Royal Geographical Society, 13 March 1936), "Hecho en Honduras". Bears emblem "Repca de Honduras libre Soberana Independiente 15 Septre 1821".

(vii) "Tegucigalpa". American Geographical Society 1937. 1:1,000,000.

(viii) Esso (of Honduras) road map of Honduras, 1963.

6.22. In any event, El Salvador remains puzzled

as to why Honduras should wish to attach such importance to the Cruz-Letona Treaty, the terms of which appear to run so contrary to the interests of Honduras. First, the Treaty acknowledges that the islands of Conchagüita and Meanguera belong to El Salvador. The result of this is inevitably to cut Honduras off from the Pacific. Second, the Treaty lends additional support to the manner in which El Salvador has interpreted the word "Pacific" as used in the legislation of Honduras, to describe generally the southern side of Honduras. The 1886 Treaty uses the word "Pacific" in Article I as the equivalent of the Gulf of Fonseca:

"Le frontière maritime et terrestre qui délimite la République du Honduras et celle du Salvador commence au Pacifique, au Golfe de Fonseca, Baie de la Union, et se termine à la montagne "del Brujo" ..."

Nor is this a unique example of this practice. In its Presentation to the Mediator in 1978, Honduras again used the expression "le golfe de Fonseca dans le Pacifique" - a form of words which makes it clear that for Honduras the Gulf of Fonseca is the equivalent of the Pacific (10). Note may also be taken of the fact that the same equation appears again on the next page (11) in the phrase "la baie de la Union dans l'ocean Pacifique". As the "baie de l'Union" is in the extreme north-western part of the Gulf of Fonseca, there is no way that it can be regarded as being "in the Pacific" unless the Gulf of Fonseca is itself regarded by Honduras as forming part of that ocean. That is just what El Salvador says that the use of the expression in the treaty means. Needless to say, that use does not give Honduras an entitlement to waters outside the closing line of the Gulf.

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10. H.M.: Annexes: IV.1.44, Vol. II, p. 709.

11. Ibid.: p. 710.

(b) The reaction of El Salvador to the delimitation between Honduras and Nicaragua

6.23. Honduras also asserts that in relation to the conclusion of the Agreement of 1900 between Honduras and Nicaragua relating to the delimitation of their respective maritime areas, El Salvador made no protest. This is not the first time that it has made this assertion. Honduras did so previously in the note of protest that it sent to El Salvador on 30 September 1916 (12).

6.24. The point was fully answered in the Note sent to Honduras by El Salvador on 16 October 1916 (13). Referring to the observation made by the Foreign Minister of Honduras in his note to the effect that El Salvador had raised no objection to the delimitation between Honduras and Nicaragua, the Foreign Minister of El Salvador said:

"My Government had no objection to make against the validity of the Agreement referred to [that of 1900] nor against the corresponding limitation of jurisdictions between Honduras and Nicaragua in the waters of the Gulf, to the extent that it affected only the legal relations of those two Republics. For this reason, it had nothing to propose previously in relation to these acts .... [El Salvador] cannot admit that this agreement and this act of partial division of the patrimony could result in the annulment of the rights of condominium that belong to El Salvador in the waters of the Gulf. ...."

6.25. El Salvador also made its positive position quite clear in claiming, and establishing, before the Central American Court of Justice that the Gulf of Fonseca was subject to the régime of

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12. H.M.: Annexes: XIII.2.40, Vol. V, p. 2354.

13. H.M.: Annexes: XIII.2.41, Vol. V, p. 2357.

condominium. Nicaragua, by denouncing the treaty which it had concluded with the United States and which had led to the proceedings commenced by El Salvador, impliedly accepted the Court's assessment of the juridical status of the Gulf and it thereby also accepted that its maritime boundary delimitation with Honduras could not affect that status.

6.26. Honduras next contends in a rather loose way that "relations between the two countries were, moreover, to show that, at a later time (even after the 1917 Judgment upon which El Salvador set such store) that it did recognise the partition of the waters of the Gulf" (14). The practice which Honduras invokes is "bilateral practice in regard to measures to control smuggling and regulate the fishing industry", and reference is made to the material filed with the H.M. (15). El Salvador replied to this contention in the E.S.C.M. (16), where it made clear that the arrangements to which Honduras referred related only to activities within the zone of exclusive rights extending to one marine league from the coasts of the two countries. Such arrangements were consistent with the status of the waters outside these limits being subject to the régime of condominium.

"(2) The General Peace Treaty and the Negotiations within the framework of the Joint Boundary Commission (1980-1985)

6.27. Honduras next refers to the General Peace

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14. H.C.M.: Pt. III, Para. 9, p. 674.

15. H.M.: Chapter XIX, Paras. 73-78, pp. 676-683.

16. E.S.C.M.: passim and in particular Paras. 7.52.- 7.55., pp. 244-247.

Treaty of 1980. It acknowledges that the language of Article 18 is quite clear in the distinction that it draws between the "delimitation" of the land frontier and the "determination of the juridical status of the islands and of the maritime spaces". Nonetheless, Honduras insists that, despite that difference in wording, both countries regarded the Commission as entitled to consider the delimitation of the maritime spaces (17). In truth, however, the H.C.M. makes no greater effort than did the H.M. to analyze closely the General Treaty of Peace. It is therefore necessary to examine the sequence of negotiations and texts more carefully.

6.28. By way of introduction, it should be recalled that the distinction drawn in the Compromis in the present case between "delimitation of the land frontier" and "determination of the juridical status of the islands and the maritime spaces" is a reflection of the wording used in the General Peace Treaty of 1980, where Article 18 describes the functions of the Joint Boundary Commission in terms which distinguish between the "delimitation of the frontier line" and "the determination of the legal régime of the islands and of the maritime spaces".

6.29. The point should therefore be made that in view of the clarity of the distinction thus drawn in the Treaty of 1980 there is no more need, in relation to the interpretation of the Treaty, to go behind these clear words to explore either the preparatory work or the subsequent conduct of the Parties than there is in relation to the Compromis itself. However, in view of the weight that the H.C.M.

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17. H.C.M.: pp. 675-676.

gives to these aspects of the matter, El Salvador will now examine (a) the considerations which led to the adoption of the wording of Article 18 of the Treaty of 1980 and (b) the manner in which the Treaty of 1980 was applied by the Parties.

(a) The background to Article 18 of the Treaty of 1980

6.30. In the Annexes to the H.M. (18), Honduras filed part of the text of its Presentation during the process of mediation that began in May 1978. In Paragraph 46 (19) it contended that the terms of the resolution on the basis of which the mediation was taking place and which referred to "questions limitrophes" covered not only the land boundary but also "the maritime spaces and the islands situated in the Gulf of Fonseca".

6.31. Naturally one must ask whether this formulation covered both the general status of the Gulf of Fonseca and the question of the waters beyond the closing line of the Gulf.

6.32. The answer is to be found in the passages that follow. The very next sub-paragraph (20) makes it clear that Honduras had in mind the delimitation of waters in the Gulf only to the extent that they might be affected by the settlement of the land boundaries or the determination of title to the islands. There is no suggestion there that the claim of Honduras extended to waters beyond the closing line of the Gulf.

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18. H.M.: Annexes: IV.1.44, Vol. II, p. 696.
19. H.M.: Annexes: IV.1.44, Vol. II, p. 699-700.
20. H.M.: Annexes: IV.1.44, Vol. II, p. 699.

6.33. The same Presentation refers to the prior discussions between the two sides in the period April-June 1972 (21), which concluded with the so-called "Act of Guatemala" (22). This Act, it may be noted, dealt only with the land frontier.

6.34. Moreover, the Presentation claims only that *the records of these 1972 discussions show* that (23):

"la controverse comprend .... aussi les lignes maritimes dans la zone du golf de Fonseca".

This conclusion is accurate, but only as a reflection of the fact that the discussions only touched *marginally upon the maritime boundary within the Gulf* insofar as it might be affected by the terminus of the land boundary. Further, it is confirmed by the Reply of Honduras filed in the course of mediation (24). There (25), the Government of Honduras recalled that it had proposed that the procedure should examine

"l'ensemble de questions territoriales; celles-ci, on le répète, comprennent la frontière terrestre ou la frontière maritime dans le golf de Fonseca" (emphasis added).

6.35. That El Salvador shared this view of the limited range of maritime questions is shown by the concluding paragraphs of its own Replique (26). This too was the understanding of El Salvador when,

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21. H.M.: Annexes: IV.1.44, Vol. II, p. 704-707.
22. H.M.: Annexes: IV.1.22A, Vol. II, p. 577.
23. H.M.: Annexes: IV.1.44, Vol. II, p. 708.
24. H.M.: Annexes: IV.1.46, Vol. II, p. 738.
25. H.M.: Annexes: IV.1.46, Vol. II, p. 760.
26. H.M.: Annexes: IV.1.47, Vol. II, p. 769.

in the course of its Duplique (27) it proposed the establishment of an inter-State boundary commission "to study, delimit and demarcate the boundary line and to determine the status of the islands". No mention was made of any boundary within or beyond the Gulf of Fonseca.

6.36. In short, there is nothing in the discussions prior to the General Peace Treaty of 1980 to require any interpretation of Article 18 different from that called for by a straightforward and literal reading of its words. The distinction between "delimitation" in relation to land boundaries and "determination of status" in relation to the islands and the maritime spaces is quite clear.

(b) The manner in which the Treaty of 1980 was applied by the Parties

6.37. The only question that remains, therefore, is whether the Parties by their conduct after the Treaty of 1980 evidenced in a clear and unequivocal manner a common wish to change the meaning of the Treaty of 1980 so as to confer upon the Joint Boundary Commission the task of drawing a maritime boundary not only within the whole of the Gulf of Fonseca but also in the Pacific Ocean outside the closing line of the Gulf.

6.38. In this connection Honduras refers to two items in the work of the Commission. The first is a reference in the records of the meeting of 26-27 March 1981 (28) which Honduras sees as

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27. H.M.: Annexes: IV.1.49, Vol. II, p. 776.

28. H.M.: Annexes: V.1.3, Vol. II, p. 834.

identifying delimitation of the maritime areas as one of the agreed tasks of the Commission. But, as can be seen from the text of Points V and VI of that record, the reference to delimitation - if it is one at all - is very circumscribed. The Commissioners did no more than agree that they would undertake a reconnaissance of "the maritime areas of the Gulf of Fonseca and its islands, including even its entrance" (29) with the following objects:

"(a) the possibility of determining dividing lines;

"(b) reconnaissance of the islands;

"(c) possibility of developing programmes of cooperation and joint exploration and exploitation of these maritime spaces and adjacent zones".

Thus the nearest that this item comes to a reference to the areas beyond the closing lines of the Gulf is the reference to "adjacent zones" - and even this does not necessarily mean "adjacent zones" outside the Gulf. It is even more to the point that in respect of these "adjacent zones" there was no suggestion of delimitation, but only of the possibility of developing joint programmes of exploration and exploitation. Such a possibility is clearly not a matter for judicial settlement by means of a delimitation. The development of programmes of cooperation and joint exploration and exploitation is something that can be done only by agreement between the parties.

6.39. The second, and only other item in the work of the Commission adduced in support of the thesis of Honduras that, in effect, the parties amended the nature of the difference between them by their conduct, is to be found in the proposal for

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29. See point V.

the delimitation of the maritime areas made by El Salvador. This, says the H.C.M. (30), is "the definitive expression of El Salvador's position" The same paragraph then goes on to make so inflated an assertion of the alleged significance of this proposal that it deserves to be quoted as an illustration of the exaggeration to which the Government of Honduras is driven in the attempt to substantiate its position (31):

"(These propositions) were formulated at the end of five-year period of negotiations and provide additional, particularly striking supplementary evidence of the consistency with which El Salvador has always envisaged the settlement of the maritime difference between it and Honduras in terms of delimitation - even though it continued to refer to the condominium agreement".

6.40. Several responses may be made to these assertions.

6.41. The first may take the form of a question: how can one speak, as Honduras does in the passage just quoted, of the "consistency" with which El Salvador contemplated delimitation as a solution when the only evidence of this "consistency" is a single item, a unique proposal made, as the Government of Honduras itself says, at the end of five years of negotiations?

6.42. Turning then to the significance of this single proposal, one may respond, secondly, by recalling the general rule, already referred to in the E.S.C.M. (32) that proposals made in the course

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30. H.C.M.: p. 676.

31. H.C.M.: pp. 676-677.

32. E.S.C.M.: Para. 7.57., pp. 247-248.

of negotiations may not properly be invoked in the course of subsequent negotiations.

6.43. Thirdly, proceeding from the general to the particular, there should also be noted the express reservations by El Salvador that preceded the presentation of its proposal. Thus El Salvador, in its Rejoinder in the Mediation Process said (33):

"XI. If the inter-State frontier Commission does not reach complete agreement on the territorial question that is the subject of its task, all partial agreements, decisions, opinions, formalities, procedures and resolutions will be regarded as having no probative value for the litigation itself, should the latter be submitted to other peaceful means of settlement, or for new territorial cases between the two countries which may be submitted to any procedure of peaceful settlement of international disputes".

Again, on 1 June 1982, at the Meeting of the Joint Boundary Commission in Tegucigalpa, the delegate of El Salvador, Dr. Gomes Vides (34)

"suggested, and this was agreed, as on previous occasions, the proposition to be made by the Government of El Salvador to that of Honduras, would remain under the most absolute reserve and in a confidential manner, in order not to fetter the negotiations that, with good will, the governments of the two countries wished to continue".

6.44. As regards the proposal itself, note must first be taken of the specific circumstances in which it was made. These may be identified in the Proces-Verbal of the meeting of the Joint Boundary Commission on 23-24 May 1985 (35). It can be seen that the proposal followed the suggestion made by the legal adviser of the delegation of Honduras, Mr. Pedro Pineda Madrid, that conversations should continue

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33. H.M.: Annexes: IV.1.49, Vol. II, p. 794.

34. See Proces-Verbal in H.M.: Annexes: V.1.6., Vol. II. p. 837.

35. H.M.: Annexes: V.1.20, Vol. II, p. 898.

at the working-group level and entirely informally to try and find a way of reconciling the positions of the two parties. The proposal of El Salvador was made in response to this proposal.

6.45. Next, close regard must be paid to the wording of the proposal itself. It was introduced by the statement that it is

"of an eminently conciliatory character that did not assert [El Salvador's] maximum claim".

This qualification was echoed in the response of Honduras, which expressly noted that the main proposal was of a "*caractère eminemment conciliatoire*", though it reserved its opinion until the next meeting (36).

6.46. As to the content of the El Salvador proposal, particular emphasis should be laid on the fact that in point 1, the "maritime line" did <u>not</u> have its seaward terminus at the entrance of the Gulf, but was expressly stated "to begin <u>near</u> the entrance of the Gulf, bisecting, in the Gulf of Fonseca, the distance that lies between the islands". There was thus, no recognition that the dividing line was to extend right to the closing line of the Gulf.

6.47. Moreover, this proposal has to be read together with the annex to it (37). This contains a reassertion of the status of the Gulf of Fonseca as a historic bay with the characteristics of a closed sea and of the character of its waters as internal waters. There is an express recognition that the waters of the Gulf belong to El Salvador and Honduras "in community".

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36. H.M.: Annexes: V.1.20, Vol. II, p. 905-906.
37. H.M.: Annexes: V.1.20, Vol. II, p. 901.

6.48. In relation to the maritime areas outside the Gulf, the El Salvador proposal did not in any way involve a delimitation of those waters but merely a proposal to engage in cooperation in a vaguely defined zone lying between "lines drawn from points leaving the mouth or entrance of the Gulf of Fonseca, in accordance with the rules of equidistance to a distance of 200 marine miles".

6.49. The conciliatory and tentative character of the El Salvador proposal is confirmed by the fact that it went on to include a section on international rivers - a subject not previously regarded as in issue and which the initial response of Honduras immediately identified as falling "outside the mandate of the Commission" (38).

6.50. The reply of the Honduras delegation, when it was filed at the meeting of 20-21 June 1985 in the form of a counter-proposal, was marked by the following features:

(i) It too was made as "a constructive contribution to the negotiation process and without prejudice to its being amplified and developed as necessary" (39);

(ii) Honduras adopted a completely different standpoint from that of El Salvador as regards delimitation within the Gulf. In particular, it proposed a line which completely disregarded El Salvador's title to Meanguera and Meanguerita (40);

(iii) It treated the closing line of the Gulf of Fonseca as the baseline for the delimitation of the

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38. H.M.: Annexes: V.1.20, Vol. II, p. 906.
39. H.M.: Annexes: V.1.21, Vol. II, p. 908.
40. H.M.: Annexes: V.1.21, Vol. II, p. 908.

territorial sea and the maritime spaces of the two countries (41);

(iv) It expressed "the limit of the territorial sea and of the maritime spaces of El Salvador and of Honduras" as a single line, drawn seawards perpendicular to the closing line of the Gulf at a distance of three marine miles from Punta Amapala. It did not define the boundary between the two countries seawards of the closing line of the Gulf, beyond saying that it would in due course be drawn by agreement of the Parties on a map.

(v) It proposed the development of a programme of cooperation between the Parties, but limited to the area within the Gulf.

6.51. This rejection by Honduras of the El Salvador proposal was expressly noted at the meetings held on 23-24 July 1985 (42). "In consequence", the El Salvador delegation said, it "left without effect and regarded as not having been submitted, the proposition which, in its totality and under the conditions there mentioned, remained as part of the relevant records of the meetings between the two sides" (43). Despite the subsequent contention by Honduras that it had not rejected the El Salvador proposal, but that it had accepted the proposal insofar as there was coincidence between the positions of the two countries, El Salvador adhered to its view that, as its proposal had been put forward as a package, there could be no effective acceptance of some points while

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41. H.M.: Annexes: V.1.21, Vol. II, p. 908.
42. H.M.: Annexes: V.1.22, Vol. II, p. 917.
43. H.M.: Annexes: V.1.22, Vol. II, p. 918.

others were rejected (44).

6.52. It can thus be seen from a careful study of the relevant records that:

(1) the proposals attributed to El Salvador were put forward by the delegates in the Joint Boundary Commission as no more than an unofficial basis of discussion:

(2) the proposal by El Salvador for delimitation within the Gulf was a limited one and certainly did not extend even to the closing line of the Gulf. The restricted scope of the El Salvador proposal is clearly illustrated in Map C.4. of the H.M. (45);

(3) the El Salvador proposal for delimitation did not extend outside the closing line of the Gulf;

(4) the El Salvador proposal regarding the waters outside the Gulf was for a regime of cooperation, but did not acknowledge any existing legal right or claim for Honduras in those waters;

(5) Honduras effectively rejected the El Salvador proposal as a basis for discussion by disregarding the basis for the El Salvador proposals within the Gulf, namely, acceptance of El Salvador's title to Meanguera and Meanguerita, and by replacing the El Salvador proposal for cooperation outside the Gulf by insistence upon division of waters in the Pacific Ocean.

6.53. These exchanges therefore provide no support for the Honduras statement that El Salvador proposed delimitation both within and outside the

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44. H.M.: Annexes: V.1.23, Vol. II, p. 925, especially at p. 929.

45. H.M.: opposite p. 684.

Gulf (46).

(3) The Compromis of 24 May 1986

6.54. Turning to the relationship between the Treaty of 1980 and the Compromis, the H.C.M. (47) points out that the words used in the second question of the Compromis are identical with those used in Article 18 (4) of the Treaty. El Salvador cannot accept the next assertion in the H.C.M., namely, that "the inclusion in the Special Agreement of the wording of Article 18, para. 4, of the Peace Treaty, was a sufficiently clear reflection of the will of the two Parties to arrive at a definition of the boundaries of their areas of maritime jurisdiction in the Gulf of Fonseca and beyond its closing line" (48).

6.55. El Salvador has already shown in detail why developments within the Joint Boundary Commission do not support the Honduras argument that the parties wished to see the limits of their maritime jurisdiction established beyond the closing line of the Gulf (49). Likewise, examination of the records of the negotiations (50) in 1986 leading up to the conclusion of the Compromis reveals no suggestion by either Party that the scope of the dispute should be widened beyond that foreseen in the General Peace Treaty of 1980. There is certainly nothing in the

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46. H.C.M.: pp. 676-678, Para. 12.

47. H.C.M.: pp. 678-679, Paras. 13 & 14.

48. H.C.M.: pp. 679-680, Para. 15.

49. See Paragraphs 6.37.-6.53. above.

50. These records take the form of a series of six protocols covering meetings that took place in January-June 1986.

records referring to delimitation outside the closing line of the Gulf as an aspect of the case being submitted to the Court.

6.56. Equally, there is nothing to suggest the assertion made in the H.C.M. (51) to the effect that Honduras "had itself initially proposed a more explicit version". The formulation of the question was considered by the delegates of the two Governments at a meeting on 29 April 1986. Honduras submitted only one proposal. The relevant question was worded thus (the Spanish text is used to avoid any disagreement about translation): "Qual es la situación juridica insular y de los espacios maritimos de cada República?". El Salvador is unable to see how this formulation can be said to be "more explicit" than the question as posed in Article 2 (2) of the Compromis as finally adopted: "Que determine la situación jurídica insular y de los espacios maritimos". Are not the pertinent words of the two questions absolutely identical?

6.57. Nonetheless, it remains significant that Honduras should now advance this argument, notwithstanding its evident lack of factual foundation. Honduras recognises that the question could have been made more explicit if the Parties had so chosen. Moreover, Honduras now sees that there would have been advantage (at any rate to it) if the question had been more explicitly formulated. Despite this, the fact remains that Honduras itself, and without any prompting by El Salvador, put forward a question in the terms set out above. It clearly did not think

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51. H.C.M.: p. 679, Para. 14.

that the formula used in the Treaty of 1980 needed alteration.

6.58. The H.C.M. (52) next seeks to draw support for its extended interpretation of the second question by observing "the economic importance which attaches today to the existence for each coastal State *of the right of exploitation of the resources within* the relevant zones". The Government of El Salvador sees no need to dispute the general proposition that off-shore areas are economically important. The statement may explain why Honduras seeks additional off-shore areas. Otherwise, it does not advance the debate at all. It cannot serve to extend the power of the Court, under the second question, to do more than "determine the juridical status of the islands and of the maritime spaces". In other words, the first - and necessarily the first - question is whether Honduras has any exclusive rights in the maritime spaces both of the Gulf of Fonseca and beyond its closing line. Only if it has got some rights in either or both of these can the question of delimitation arise.

6.59. Honduras goes on (53) to argue that if its extended interpretation of the Compromis is not accepted "any other interpretation would simply have the effect of depriving the claim, as submitted to the Court, of any purpose". This clearly cannot be right. Just because the second question does not extend to delimitation does not mean that there is no dispute between the Parties suitable for judicial settlement. The Honduras argument entirely disregards

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52. H.C.M.: p. 680, Para. 16.

53. H.C.M.: pp. 680-681, Para. 17.

the fact that there can be no dispute about delimitation until it is established that each side has exclusive rights in a given area. This is the first question - and it is the basic question between the Parties. As regards the position within the Gulf, El Salvador says that the status of the Gulf as an area subject to condominium excludes division. As regards the position outside the Gulf, El Salvador says that Honduras is not a coastal State and is, therefore, not entitled to any rights in that area. Honduras, of course, says otherwise. The dispute between the Parties on these points is a real and substantial one. Its resolution must necessarily precede the consideration of any question of delimitation. Thus, it is self-evidently unsustainable for Honduras to argue that exclusion of the question of delimitation in those areas would "deprive the claim of any purpose".

Section II. "The need for a delimitation"

6.60. Nonetheless, Honduras develops two further arguments in support of its insistence that the Court's function extends beyond the determination of questions of legal status.

(A) "Community of interests implies delimitation"

6.61. The first takes the form of an assertion that the existence of a "community of interest" in the Gulf implies delimitation.

6.62. There are two elements in this assertion. Neither is substantiated by Honduras.

6.63. First, there is the claim of the existence of a "community of interest". That there is some community of interest between the States

bordering the Gulf there can be little doubt. But this is a vague and indeterminate concept to which Honduras gives no specific content. It is to be contrasted with the relatively precise meaning of the concept of "condominium" or "co-ownership". There is no reason why the two concepts - of community of interests and co-ownership - cannot co-exist; community of interest does not exclude co-ownership. Indeed, the identification by the Central American Court of Justice of the existence of a community of interests between the three States surrounding the Gulf of Fonseca is precisely what led that court to the conclusion that the Gulf was subject to condominium or co-ownership.

6.64. Honduras argues, secondly, that community of interest implies delimitation (54) because *there is no fusion of ownership*. This amounts to a denial of the status of the Gulf as an area subject to common ownership. The E.S.C.M. has already answered this point (55) and there is no need to repeat the authorities already cited.

6.65. At this point, Honduras introduces the observation that the absence of delimitation within the Gulf has been "a constant source of tension and disputes". This assertion finds no basis in fact. El Salvador is unaware of any such constant tension or disputes, other than some minor episodes in recent years arising out of the political situation in the area with which the Court is familiar.

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54. H.C.M.: p. 683, Para. 21.

55. E.S.C.M.: Paras. 7.1.-7.21, pp. 212-225.

(B) "The determination of the legal status of the waters implies delimitation"

6.66. Honduras rests its argument in this section on the fundamental proposition that the basis of title over waters is sovereignty over land. With this proposition El Salvador has no quarrel. El Salvador advances the proposition in the E.S.C.M. and supports it with the same authorities as are presented by Honduras.

6.67. So what is the disagreement between the two sides?

6.68. It is, first, that Honduras invokes the proposition to require delimitation within the Gulf of Fonseca. El Salvador accepts that this proposition would be correct, were it not for the fact that the Gulf is subject to a special legal régime, that of condominium or co-ownership. While there is room for delimitation of the band of exclusive jurisdiction one marine league wide that the Judgement of 1917 attributed to each littoral State, the concept of condominium otherwise totally excludes the need for, or the possibility of, comprehensive delimitation.

6.69. The second disagreement lies in the attempt by Honduras to extend the reasoning which it applies within the Gulf to the area of Pacific Ocean outside the Gulf. This it does by the blunt assertion (56) that "Honduras, as a coastal state of the bay, is a coastal State of the Pacific Ocean". The proposition is not supported by reasoning. Although there may in some cases be room for the view that

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56. H.C.M.: pp. 685-686, Para. 24.

a coastal State of a particular bay is also a coastal State of the sea of which the bay forms a landward projection, the validity or not of that view depends entirely upon the geography of the relevant area. In the present case, it is evident that the contention of Honduras is firmly contradicted by the pertinent geography. Honduras is cut off from the Pacific Ocean by, first, the islands of Conchagüita, Meanguera and Meanguerita within the Gulf and, in addition, by the fact that the fauces terrarum - the closing points of the Gulf of Fonseca belonging respectively to El Salvador and Nicaragua - are so close to each other as to exclude any projection of Honduras towards the Pacific through the opening. This aspect of the matter has already been covered in the E.S.C.M. (57).

6.70. Honduras concludes this section of the H.C.M. (58) with the repetition of its contention that determination of the status of the maritime areas if not accompanied by delimitation:

"will not provide a solution to the dispute between the two Parties in the present case. Without delimitation, the status amounts to nothing or, more exactly, it is only an empty shell, a qualification without content".

6.71. El Salvador repeats that it cannot accept the validity of this assertion. The dispute before the Court is the one defined in the Compromis. There is and can be no other. The possibility, suggested by Honduras, that the solution of the dispute as there defined may open up a further dispute has nothing to do with this case. The Court has not been given a universal jurisdiction to determine

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57. E.S.C.M.: Paras. 8.52.-8.73., pp. 277-290.

58. H.C.M.: p. 687, Para. 26.

comprehensively all disputes between the two countries, but only those disputes that are defined in the Compromis. As El Salvador sees it, there is nothing insubstantial in the task which the Parties have asked the Court to perform.

(i) The Court is asked to determine title to the disputed islands within the Gulf. If, as El Salvador claims, Conchagüita, Meanguera and Meanguerita belong to El Salvador, then they effectively cut Honduras off from the Pacific Ocean. This would be an important finding since it would confirm one of the main reasons why there is no basis for a delimitation of areas within the Pacific Ocean.

(ii) The Court is asked to determine the legal status of the Gulf of Fonseca. If, as El Salvador maintains, it is subject to a condominium, the only waters appropriate for delimitation are those constituting the zones of exclusive jurisdiction one league wide adjacent to the shores of each littoral State.

(iii) The Court is also asked to determine, partly by reference to (i) and (ii) above and partly by reference to the geographical configuration of the area generally, whether Honduras has any valid claims to maritime areas outside the Gulf of Fonseca.

6.72. If these matters are dealt with, important substantial questions would be disposed of. If the Court were to uphold the contentions of El Salvador, then there would be no need for delimitation, whether inside or outside the Gulf. If the Court were to uphold the contentions of Honduras, then there would need to be negotiations between the two sides regarding delimitation in the light of the Court's findings. But there can be no dispute about delimitation proper for the Court to consider unless and until proper negotiations about delimitation have taken place and have failed to achieve a settlement.

2. "CHAPTER XIV: THE LEGAL STATUS OF THE WATERS WITHIN THE GULF AND THE JUDGMENT OF 1917"

Section I. "The Place to be given to the 1917 Judgment in the present case"

(A) "The limited relevance of the 1917 Judgment to the present case"

6.73. The H.C.M. seeks to argue first that the 1917 Judgment is of only limited relevance in the present case because it was not necessary for the Central American Court of Justice to decide that case on the basis of condominium. Rather, so Honduras contends, the Court could have decided the case by reference to "community of interests".

6.74. This approach neglects the obvious fact that the Central American Court of Justice did decide the case on the basis of condominium. The two Parties to the case were bound by that approach and, prior to this case, Honduras accepted it in relation to the area of the Gulf lying seaward of the internal zone of exclusive jurisdiction.

6.75. Inherent in the thesis of Honduras is the idea that the 1917 Judgment is in some way obsolete. That appears to be a view held only by Honduras. Perusal of official commentaries and doctrinal writing provides no support for such a view: the status of the Gulf of Fonseca as a condominium is universally accepted without criticism.

6.76. It is, of course, always difficult to prove a negative, but El Salvador would respectfully invite the Court to examine those passages of the following obvious works of reference where consideration is given to the 1917 Judgment. The Court

will observe that in none of these works (with a qualified exception in one case) is any adverse comment made on the decision. In each work the 1917 Judgment is accepted as a valid and authoritative precedent.

6.77. The examples set out below are presented in chronological order.

(i) Jessup, The law of Territorial Waters and Maritime Jurisdiction (1927), concludes a section of 12 pages, pp. 398-410, as follows:

> "The evidence adduced of the historic claims to the bay and the general acquiescence therein confirm the soundness of the result reached by the court. The geographical characteristics make the claim a reasonable one."

(ii) Hackworth, Digest of International Law (1940), Vol. I, p. 704.

(iii) Ireland, Boundaries, Possessions and Conflicts in Central and North America and the Caribbean (1941), pp. 205-208.

(iv) Hyde, International Law, (2nd revised edition, 1945), Vol I, p. 475.

(v) Oppenheim's International Law, (8th edition by H. Lauterpacht, 1955), p. 508, n. 4.

(vi) United Nations Secretariat, Historic Bays (A/CONF.13/1, 1957), Paras. 44-47.

(vii) Schwarzenberger, International Law, (3rd edition, 1957), p. 332.

(viii) Blum, Historic Titles in International Law (1965), though in some respects critical of the decision, concludes:

> "Thus, if the Court's decision is limited to the case itself, without being regarded as a precedent to be applied under different circumstances, the Gulf of Fonseca case

might perhaps appear to be less unjustified in law than most writers have hitherto been prepared to assume."

(ix) Colombos, International Law of the Sea, (6th edition, 1967), at pp. 188-189.

(x) Verdross, Public International Law, (Spanish edition, 1969), p. 210.

(xi) Brownlie, Principles of International Law, (3rd edition, 1979), p. 200, n. 7.

(xii) O'Connell, The International Law of the Sea (1982), Vol. I, pp. 436-437.

6.78. Even more cogent as evidence of the doctrinal acceptance of the correctness of the 1917 Judgment is the fact that Latin-American authors, including ones who have accorded the decision extended consideration, have accepted the decision without criticism. Moreover, some of these authors are themselves from Honduras or have published their work in Honduras.

(i) Antonio Sánchez de Bustamente y Sirvén, El Tribunal Permanente de Justicia International (1925), especially pp. 74-75.

(ii) Antonio Sánchez de Bustamente y Sirvén, Manual de Derecho Internacional Público (1939), especially p. 308.

(iii) Carlos José Gutiérrez G., La Corte de Justicia Centro Americana (1975), published in Tegucigalpa by the Secretary General of the Organization of Central American States under the auspices of the Government of Honduras, especially pp. 47-53.

(iv) Humberto López Villamil, Professor of International Law at the University of Honduras, Permanent Delegate of Honduras to the United Nations, La Corte Centro

Americana de Justicia en Politica Internacional (1960), especially pp. 215-228.

(v) Lucio M. Moreno Quintana, Tratado de Derecho Internacional (1963), Vol. I, pp. 363-364.

(vi) Halajczuk and Moya Rodríguez, Derecho Internacional Público (1972), p. 235.

(vii) Carlos José Gutiérrez, La Corte de Justicia Centro Americana (1978), especially pp. 129-139.

6.79. The H.C.M. also suggests in this connection that "the whole evolution of the public international law of the sea, rests in relation to the waters adjacent to coasts, not on the concept of indivisibility but on that of delimitation of maritime areas belonging to the sovereignty of the coastal States". The inaccuracy of this assertion is demonstrated by the examples to the contrary cited in the E.S.C.M. (59).

6.80. The H.C.M. signally fails to provide any support for its proposition that the reasoning that led the Central American Court of Justice to decide in 1917 that a condominium existed in the Gulf "would be impossible today". There are several instances in which States have resolved continental shelf delimitation differences by means of the establishment of areas of joint or undivided authority. Thus the arrangements relating to the Kuwait-Saudi Arabia Neutral Zone, which were originally established in 1922, were extended to the offshore areas in the 1950s. More recently, Malaysia and Thailand have entered into joint development

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59. E.S.C.M.: Paras. 7.15.-7.21., pp. 219-225.

arrangements in respect of offshore areas. Again, in the case of the Jan Mayen Continental Shelf in 1981 (60), the Conciliation Commission, rather than proposing a demarcation line for the continental shelf different from that for the economic zone, recommended a joint development arrangement for that part of the area in which there was a significant prospect of hydrocarbon production (61). So there is no warrant in the Honduras contention that today the concept of joint ownership has been replaced by that of delimitation (62).

6.81. Moreover, it is absurd to suggest that because there have been a number of international judicial or arbitral decisions on delimitation, this fact in some way dictates the conclusion that the Chamber in this case must also proceed to a delimitation. As the earlier portions of the H.C.M. themselves emphasise, the scope of the competence of the Court must be determined in each case by reference to the specific wording of the question. As has already been pointed out, not one of the delimitation cases has been decided by reference to a question expressed in terms of "determining the juridical status" of an area - and, a fortiori, the same is true where the relevant compromis contains another and contrasting question that specifically requests the tribunal to delimit or define the land boundary. There have indeed - as it is hardly necessary to recall - been several maritime boundary cases where the rôle of the Court has stopped short of actual delimitation: the North Sea Continental Shelf cases;

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60. 62 International Law Reports 108.

61. 62 International Law Reports 108 at p. 126.

62. H.C.M.: pp. 692-693, Chapter XIV, Para. 9.

the Libya/Tunisia Continental Shelf case; and the Libya/Malta Continental Shelf case.

6.82. The reference in the H.C.M. (63) to the rejection at U.N.C.L.O.S. III of a proposition by Zambia for the establishment of an E.E.Z., common to several States in a sub-region, is difficult to understand in the context in which it appears. Rather than assisting the argument of Honduras, it seems to weaken it. Although Honduras is not land-locked in the same way as Zambia, it is nevertheless locked out of the Pacific Ocean. The rejection by U.N.C.L.O.S. of the proposal that nearby States should have access to E.E.Z. resources is impliedly a rejection of the claim by Honduras to have access to the resources of the Pacific simply because it believes itself near to them, but in respect of which it does not possess the necessary generative adjacent coasts. The E.S.C.M. referred to this matter (64).

6.83. The H.C.M. then goes on to challenge the correctness of the 1917 Judgment by the assertion that once the Central American Court had found that the Gulf of Fonseca was a historic bay it failed to draw the essential conclusion that all its waters possessed the character of internal waters (65). This suggests that all "historic" waters are subject to identical legal régimes. This is clearly not correct. Historic waters or bays are areas which, by definition, are exceptions to the legal régime that would otherwise be applicable to them. The nature

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63. H.C.M.: pp. 692-693, Para. 9.

64. E.S.C.M.: Paras. 8.23.-8.33., pp. 262-268.

65. H.C.M.: pp. 693-694, Para. 10.

and degree of that exceptional quality are determined entirely by the historical circumstances that brought them into being. There is no single category of "historic bays" or "historic waters" to which - once their existence is established - one single and exclusive set of rules applies. The legal position of each historic case depends upon its circumstances. There is thus no basis for saying that "all the waters of a historic bay are placed under the unequivocal status of internal waters". In the case of the Gulf of Fonseca, the circumstances were such as to lead the Court to the view that there are within that Gulf not only areas of "exclusive jurisdiction" but also zones of "maritime inspection" as well as areas of water not affected by these concepts.

(B) "The legal scope of the 1917 Judgment"

6.84. Although there is little said in this sub-section (66) that is not said elsewhere in the H.C.M. and has not been answered elsewhere in this Reply, it may be convenient to respond directly and briefly to what is said in these paragraphs.

6.85. Honduras denies the "objective authority" of the 1917 Judgment and invokes the rules of international law (including the Vienna Convention on the Law of Treaties) relating to the effect of treaties on third parties as a justification for the denial of effect to the 1917 Judgment.

6.86. Honduras evidently mistakes the character of El Salvador's arguments regarding the nature and effect of the 1917 Judgment. Honduras does

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66. H.C.M.: pp. 694-696.

not say that the 1917 Judgment has the quality of a treaty or as such is binding on Honduras. The Judgment is self-evidently not a treaty. Nor does El Salvador say that the Judgment, as a judgment, is binding on Honduras.

6.87. All that El Salvador contends is that the 1917 Judgment is evidence of the rule of customary international law applicable to the Gulf of Fonseca and that that rule of customary international law binds the three riparian States. The reasoning and conclusions of the Judgment reflect the pre-existing rules of customary international law which operated independently of the Judgment. The Judgment is merely the authoritative statement of the law - and the legal position of the Gulf as thus stated is that of condominium.

6.88. Moreover, the authority of the 1917 Judgment in this respect has never in any real respect been doubted either by States or by writers of authority. Honduras has not pointed to any State, except Nicaragua and itself (as to which more in a moment) that has rejected or even questioned the Judgment. And as the references given above (67) make plain, there is the widest doctrinal acceptance of the value of the Judgment as a statement of international law.

6.89. Finally, as to the attitudes of Nicaragua and Honduras: the attitude of Nicaragua was widely condemned; the attitude of Honduras was governed, so it would appear, only by its concern to protect its rights in its territorial waters.

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67. In Paragraphs 6.77. & 6.78..

"Section II. Honduras's Objection to the Line of Argument Set Forth in the 1917 Judgment"

6.90. The H.C.M. next attempts to show that it did not accept the 1917 Judgment. This matter has already been examined in the E.S.C.M. (68). In particular, El Salvador has shown quite clearly that the Honduras protest of 1916 was limited to the rejection of condominium only in the inner belt of exclusive jurisdiction. The protest did not amount to a denial of condominium in the remainder of the Gulf.

6.91. However, Honduras makes a number of specific points that require some comment.

6.92. First, the H.C.M. devotes quite unnecessary detail (69) to rebutting a point that El Salvador never made. When El Salvador referred to the participation of an Honduran judge in the Central American Court it was not attempting a "consensualist analysis" in the sense of attempting to extract from that fact a formal agreement by Honduras to the terms of the Judgment. El Salvador was really saying only that even a judge from Honduras - a judge whose independence was in no way questioned - did not disagree in this respect with the 1917 Judgment.

6.93. Next, the H.C.M. (70) seeks to widen the substantive impact of its 1916 protest. Contrary to the Honduras contention that "it is clear" that the protest related to the whole of the Gulf

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68. E.S.C.M.: Paras. 7.38.-7.49, pp. 235-243.

69. H.C.M.: p. 697, Para. 18.

70. H.C.M.: pp. 700-701, Paras. 20-21.

of Fonseca in denying the régime of condominium, it is in fact clear from a study of the text that Honduras sought only to oppose any interpretation of the status of the Gulf that would impose condominium on its zone of exclusive jurisdiction. The relevant phrase is that Honduras "does not recognise the status of condominium with El Salvador or any other republic in the waters of the Gulf that belong to it". The crucial words have been underlined. Honduras appears not to have recognised condominium in the waters "that belong to it". It did not deny condominium in the waters of the Gulf that did not belong to it. The waters "that belonged to it" were those comprised within the inner belt of exclusive jurisdiction.

6.94. The H.C.M. makes no reference to the explanations of the protest given by the Foreign Minister of Honduras. These are referred to in the E.S.C.M. (71). Understandably, Honduras could not have anticipated what was to be said in the E.S.C.M.; but as the explanation by the Honduras Foreign Minister is quoted by the Court in the 1917 Judgment (72), it might have been expected that Honduras would offer some comment in an attempt to diminish the adverse impact of its content.

6.95. In addition, reference may be made to the statement of the President of Honduras made to the Congress of Honduras on 1 January 1917. This statement, the text of which has been found by El Salvador subsequent to the filing of the E.S.C.M. in the volume for 1917 of the Foreign Relations of the United States, at pp. 834-835, (and not to be

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71. E.S.C.M.: Para. 7.43., p. 238.

72. A.J.I.L. Report: p. 716.

confused with the Presidential statement of 3 January of the following year referred to in the E.S.C.M. (73) nor with the statement of the Honduras Foreign Minister also referred to in the E.S.C.M. (74)), contains a paragraph that also sheds clear light on the contemporary understanding by Honduras of its own protest. The President said:

"The action was primarily based on the right of joint dominion which the Salvadorean Government means to exercise in the waters of the Bay of Fonseca, [sic] [T]he Government of this Republic sent a protest to the first named and to the Central American Court of Justice in order to protect the rights which belong to Honduras over the islands and waters of the Gulf, bearing in mind that the adjacent territorial sea which, in accordance with the universal doctrine and our domestic law, is nothing but a continuation of the national territory, subject, therefore, to the exclusive sovereignty of the State" (emphases added).

6.96. It is important that the Honduran Note of 1916 should be read in the manner in which it was understood by both El Salvador and the Central American Court of Justice in 1916 and 1917. There is no legal merit in the attempt by Honduras in 1989 retrospectively to accord an interpretation to its message of 1916 that evidently does not accord with the understanding at the relevant time of those to whom it was addressed.

6.97. As to the declaration made by the President of Honduras on 3 January 1918, El Salvador thanks Honduras for making available a French translation of a text said to be taken from "La 'Gaceta', no. 4858, Serie 480, 8 January 1918" (75)

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73. E.S.C.M.: Para. 7.45.; pp. 240-241.

74. E.S.C.M.: Para. 7.43., pp. 238-239.

75. H.C.M.: p. 705, Para. 24.

- particularly as scrutiny of the text as thus translated shows that its words do not support the interpretation that Honduras attempts to place upon them. The important points to be drawn from the text are these:

(i) First, there is no doubt that the President accorded the Central American Court of Justice the same praise that he did the International Bureau: it "fulfilled its mission with satisfactory results and in accordance with its objectives";

(ii) Second, the Court

"recognised the rights of Honduras in the Gulf of Fonseca, a recognition which was in perfect harmony with the protest of the government of this country (Honduras) against the claims of El Salvador in relation to the limit of the territorial waters up to which the rule and sovereignty of Honduras extend".

These points are made in the E.S.M. (76).

6.98. The H.C.M. (77) contends that the presentation by El Salvador of this item of material is distorted and incomplete. El Salvador cannot see how this can properly be said. What really matters is that the President of Honduras regarded the 1917 Judgment as being in perfect harmony with the protest of Honduras. Since the central feature of the Judgment is its acceptance of a status of co-ownership for the whole of the Gulf of Fonseca outside the zone of exclusive jurisdiction, how could the President have said there was harmony between the protest and the Judgment unless he accepted the condition of co-ownership outside the area of Honduran territorial waters?

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76. E.S.M.: Para. 13.7..

77. H.C.M.: pp. 705-706, Chapter XIV, Para. 13.7.

6.99. Nonetheless, despite both the objective validity and applicability of the 1917 Judgment and the evidence of the acceptance of it by Honduras, El Salvador is bound to ask itself: does the repudiation by Honduras of the legal status of condominium for the Gulf in this case really advance the case of Honduras or set back that of El Salvador? Honduras, by rejecting the idea of condominium within the Gulf, excludes the only legal status for the Gulf that could form even the beginning of an argument in favour of the existence of a common baseline coincident with the closing line of the Gulf and from which Honduras could claim an E.E.Z. in the Pacific. As will presently be shown, the claim by Honduras to the existence of "a community of interest" in the region sufficient to generate Pacific Ocean rights is untenable. There are good reasons why El Salvador insists that the status of the Gulf is that of condominium. Its Government is constitutionally obliged to adhere to this position by the terms of Article 84 of the El Salvador Constitution of 1983 (the text of which appears in the Annexes to the H.M. (78)). Moreover, the Government of El Salvador believes that this constitutional statement accords with the correct position in international law. But if El Salvador is wrong in its position and Honduras is right, how does that help Honduras? If within the Gulf each littoral State has a zone of exclusive jurisdiction equivalent (in the view of Honduras) to territorial sea, and if outside that band of exclusive jurisdiction there is no condominium in the remaining waters of the Gulf, then the consequence is that the waters of the Gulf must be delimited (though not in these proceedings) in accordance with the rules of customary

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78. H.M.: Annexes: II.3.12, Vol. I, p. 50.

international law. Both sides are agreed that the coasts of each State generate pertinent maritime rights. El Salvador maintains that at the very least Conchagüita, Meanguera and Meanguerita belong to El Salvador, while the Farallones belong to Nicaragua. The evidence in support of this position is virtually irrefutable. The result, in terms of delimitation, is clear. There is no way at all in which the maritime area of Honduras can "escape" to the south and southwest of these islands or penetrate into the mouth of the Gulf. A fortiori, there is no recognizable legal basis on which the closing line of the Gulf can be taken as the baseline upon which to construct a common claim, whether bipartite (as between El Salvador and Honduras) or tripartite (as between El Salvador, Nicaragua and Honduras), to a territorial sea and an E.E.Z. in the Pacific Ocean.

6.100. How, then, is the matter to be resolved? In the submission of El Salvador there are only two significant possibilities - neither of which assists Honduras. The first alternative is that the Court should accept the contention of El Salvador that the legal status of the Gulf is that of condominium. However, that status can only exist within the Gulf itself. The fact that there is a condominium in the waters of the Gulf does not convert the outer limit of those waters into a common coast. Only real coasts can support claims to maritime areas and the only real coasts on the Pacific Ocean are those of El Salvador and Nicaragua. Honduras, lacking a real coast on the Pacific, is not entitled to any share of Pacific waters.

6.101. The second alternative is that the Court should accept the contention of Honduras that there is no condominium in the waters of the Gulf. In that case, the waters in the Gulf would need

to be delimited (although this is not the function of these proceedings). The basis of such delimitation would be the actual coasts of the Parties. The effect of such an approach would be that the El Salvador and Nicaraguan islands in the Gulf would cut Honduras off from any entitlement to maritime areas outside the Gulf.

6.102. The suggestion made in the H.C.M. (79) that *the burden of proof rests upon El Salvador* to establish the existence of a condominium is not valid. If the concept of burden of proof is to be introduced into this case, there is only one way in which it can make any sense, namely, as a reflection of the abnormality of the claim to Pacific Ocean areas made by Honduras. The basic position, which is much more than a prima facie one, is that geography excludes any claim by Honduras to maritime areas in the Pacific. If a different legal status is to be established for these areas, the burden of proof rests fully upon Honduras (80).

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79. H.C.M.: pp. 707-708, Chapter XIV, Para. 25.

80. El Salvador relegates to the present footnote its response to the H.C.M.: pp. 708-709, where complaint is made of an error in a quotation made in the E.S.M.: Para. 10.9.. Honduras is undoubtedly right in identifying the error. It must, indeed, to quote the language of the H.C.M., be "annoying" to *find that the burden of responding* to arguments that are troublesome enough by their cogency is further increased by the mere error of transcription. But let Honduras be assured that the error was entirely accidental. More to the point, the error makes absolutely no difference to the thrust of the argument in connection with which the quotation was used.

3. "CHAPTER XV: THE RIGHT OF HONDURAS TO MARITIME AREAS IN THE PACIFIC OCEAN, BEYOND THE CLOSING LINE OF THE GULF OF FONSECA"

(A) "Refusal to accept that Honduras should be present on the closing line or any part of that line"

6.103. In Section A of Chapter XV of the H.C.M. (81), which bears the title at the head of this Section, Honduras appears to be making two points - though how they relate to the heading under which they are placed is far from clear.

6.104. First, Honduras contends that the extension in international law of territorial sea from six to twelve miles assumed that the existing rights of access to the high seas and the right to an E.E.Z. would be maintained.

6.105. Even if that contention were correct it would scarcely make any difference in the present case. The situation of Honduras is affected not by the width of the territorial sea of El Salvador and Nicaragua at the mouth of the Gulf where the closing line runs between Punta Amapala and Punta Cosigüina. The territorial sea which cuts Honduras off from the outer part of the Gulf is the territorial sea of El Salvador generated by the islands of Conchagüita, Meanguera and Meanguerita, as well as the territorial sea of Nicaragua as generated by the Nicaraguan island of Farallones de Cosigüina. The distance between the mainland of El Salvador and Conchagüita, between the latter and Meanguera, and between Meanguera and Meanguerita in no case exceeds

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81. H.C.M.: pp. 712-716.

three nautical miles, while the distance from Meanguerita to Farallones and from the latter to the nearest point on the mainland of Nicaragua in neither case exceeds twice three nautical miles. Thus there is no navigable passage in the Gulf of Fonseca which does not pass through the territorial sea of either El Salvador or Nicaragua even when regarded as limited to three nautical miles.

6.106. This makes the discussion in the H.M. and H.C.M. of the effect upon vested rights of an increase in the width of the territorial sea entirely irrelevant. But even if it did not, El Salvador need only make the point that there is no rule of customary international law or in the 1982 Law of the Sea Convention which inhibits a State from taking the full benefit of a legitimate extension of the width of its territorial sea or entitles other States to protection from the disadvantages of such an extension, save in the two specific cases mentioned in the H.M. (82), namely the use of the system of straight baselines (Article 7 (6)) and the application of the concept of archipelagic baselines (Article 47 (5)). There is absolutely no support for the proposition advanced in the H.C.M. (83), without any citation of authority, to the effect that there is a general policy, applicable in every case where the width of territorial waters is extended from three miles to twelve miles, protecting existing rights of access of coastal States to the high seas.

6.107. The second point made by Honduras (84) is

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82. H.M.: p. 713.

83. H.C.M.: p. 713.

84. H.C.M.: p. 713.

is that the assumption by El Salvador that the boundary between El Salvador and Nicaragua in the mouth of the Gulf and seawards of the closing line is an equidistance line is "not only speculation but bad law". El Salvador is at a loss to understand why this should be so. Where there are only two valid claimants to maritime rights in an area with a geographical configuration such as the one that exists at the mouth of the Gulf and in the adjacent Pacific coasts, equidistance would seem to be the only appropriate test.

6.108. Honduras then purports to find another fault in the argument of El Salvador. Invoking the impermissibility of inconsistencies in the argument of a party (a two-edged sword which - as will be seen - cuts Honduras more deeply than it does El Salvador), Honduras argues (85) that El Salvador cannot assert the legal status of co-ownership of the waters of the Gulf without at the same time conceding that the outer limit of those same waters must constitute a baseline for the construction of seaward maritime areas owned in common by three States.

6.109. The reply of El Salvador to this argument has already been given. The closing line of the Gulf is not a straight baseline and it cannot exclude the overriding effect of the geographical configuration of the area which accords an exclusive rôle to the coasts of El Salvador and Nicaragua.

6.110. Or, to put the point in another way, if Honduras wishes to rely upon the exceptional character of the condominium, it must show in the

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85. H.C.M.: pp. 714-715.

origin and operation of this condominium a basis for extending its impact beyond the specific geographical are in which it exists. El Salvador can find nothing in the situation that converts the co-ownership of the waters into a concept of a common straight baseline along the line of contact between the Gulf and the Ocean. That line merely serves as the line of termination of the exceptional right of Honduras within the Gulf. Once that exceptional right comes to an end, the force of the geographical factors as the dominant generators of maritime rights reasserts itself and El Salvador and Honduras, as the only States with actual coasts on the Pacific Ocean, are thus alone entitled to rights in it.

6.111. There is a further reply that El Salvador may give in this connection - and this in response to the anticipation shown by Honduras of the possibility that what has throughout these pleadings been called "the closing line of the Gulf" may not actually coincide with the outer limit of the Gulf. Clearly, Honduras is apprehensive that the outer limit of the condominium may lie landwards of the fauces of the Gulf and thus be separated from the "closing line" upon which Honduras constructs its oceanic claim.

6.112. Honduras is right to feel this concern, though only partly for the reason that Honduras states. The real reason lies in the fact that the outer limit of the Gulf of Fonseca accepted by Honduras lies not, as loosely assumed and stated in these pleadings, at the so-called closing line of the Gulf running between Punta Amapala and Punta Cosigüina, but rather to the north and east of the line drawn from Punta Chiquiria to Punta del Rosario. This was the position repeated without expression of dissent in the Note of Protest of the Minister

of Foreign Affairs of Honduras addressed to his opposite number in El Salvador on 30 September 1916 (86). On this basis, therefore, there is a clear distinction between what may be called the inner closing line - at which the rights of Honduras as a co-owner end - and the outer closing line across the mouth of the Gulf.

6.113. Having thus attempted to establish a false inconsistency in the position of El Salvador, Honduras pretends that there is no inconsistency in its own position (87). But in truth there is a major inconsistency in the position of Honduras. Honduras is in effect claiming that its coasts generate a territorial sea twice over: once within the Gulf, immediately adjacent to the coasts of Honduras; and again outside the Gulf along the Pacific side of the closing line. True, this is not the impression conveyed by the pleadings of Honduras so long as they deny the status of common ownership to the Gulf. But once Honduras shifts its ground and accepts the concept of condominium for the purpose of claiming a share in a territorial sea baseline coincidental with the outer closing line of the Gulf, it creates a fundamental and insuperable inconsistency in its own position.

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86. H.M.: Annexes: XIII.2.40, Vol. V, p. 2355. The manner in which the French translation of this Note is presented in the H.M., and in particular the location of the quotation marks, makes it difficult to be sure whether the statement was original to Honduras or is one that Honduras is trying to quote. But whichever is the correct interpretation, it is clear that Honduras expresses no disagreement with it.

87. H.C.M.: pp. 723-729, Chapter XV, Para. 8.

(B) "The contention that Honduras is not a coastal State of the Pacific Ocean"

6.114. Honduras begins by recalling the reference in the H.M. (88) to what it regards as the relevant case law. Honduras adds nothing to the argument there set out. The inaccuracy of the Honduran use of these authorities was demonstrated in the E.S.C.M. (89). There is no need to repeat here what was said there.

6.115. Next (90) Honduras seeks to rebut the point made by El Salvador in the E.S.M. that the reference in the Honduras Decree of 17 January 1951 to the "Pacific Ocean" was not understood by El Salvador as amounting to a claim to waters of the Pacific beyond the closing line of the Gulf of Fonseca. However, beyond the bold assertion that the position of El Salvador in this respect "verges on the absurd" and that "it is very clear that Honduras has been laying claim to a continental shelf and an epicontinental sea in the Pacific - and beyond the Gulf - ever since 1950", Honduras produces no reasoned response. Evidently Honduras has given no consideration to the various instances to which El Salvador has pointed earlier in the present Reply (91), as well as in its earlier pleadings, that exemplify the use by Honduras of the expression "Pacific Ocean" as the equivalent of the Gulf of Fonseca.

6.116. Honduras has, therefore, not made out a

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88. H.M.: pp. 723-729, Vol. II, Chapter XX.
89. E.S.C.M.: Paras. 8.66.-8.73., pp. 284-290.
90. Beginning at H.C.M.: p. 716, Para. 11.
91. See Paragraph 6.22. above.

case for insisting that El Salvador should also have protested against the reference in the 1950 Honduran Decree to the Pacific Ocean. The reference was understood by El Salvador to be one, in common with other comparable practice of Honduras, to the Gulf of Fonseca and, as such, called for no protest. And it remains an undeniable fact that Honduras did not follow up that decree by any specific action linking it to the Pacific Ocean outside the closing line of the Gulf of Fonseca. It was only in 1974, when the delegate of Honduras made the remarks at U.N.C.L.O.S. III that are quoted in the E.S.M. (92), that it became necessary for El Salvador to react - and it did so immediately in the form of the response by Mr. Galindo Pohl, also quoted in the E.S.M. (93).

6.117. The paragraphs of the H.C.M. that follow (94) refer to a number of developments that are evidently intended not so much to show some failure on the part of El Salvador to protest against some pertinent action of Honduras as to demonstrate the existence from 1978 onwards of a dispute between the two countries embracing the claim by Honduras to maritime areas beyond the closing line of the Gulf. This then leads into a further attempt by Honduras to show that Question Two in the Compromis must be so interpreted as to request and authorize the Court to delimit as between El Salvador and Honduras areas of the Pacific Ocean lying outside the closing line of the Gulf.

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92. E.S.M.: Para. 14.2..

93. E.S.M.: Para. 14.2..

94. H.C.M.: pp. 719 et seq., Chapter XIII, Paras. 13 et seq..

6.118. The line of argument at this point retraces an argument that the H.C.M. has already developed some pages earlier (95) and to which a response has already been made in this Reply (96). There is no need to retrace what has already been sufficiently said.

(C) "The importance of good faith: preclusion and estoppel"

6.119. El Salvador regrets that Honduras has thought it necessary to make an allegation of bad faith against El Salvador (97). Certainly, the allegation does not advance the case of Honduras since it assumes precisely what has to be proved, namely, that the correct interpretation of the Second Question is that it covers delimitation as well as determination of status.

6.120. El Salvador will not repeat here the arguments that it has already developed (98) to support its conclusion that the Second Question means exactly what it says. However, in the context of a discussion about bad faith, El Salvador is entitled to ask the following question: if the Second Question was understood by Honduras to cover delimitation as well as determination of status, how could Honduras in good faith have proposed and accepted wording which was so manifestly different from that

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95. H.C.M.: pp. 675-678, Chapter XIII, Paras. 10-12.

96. See Paragraph 6.2.-6.72. above.

97. H.C.M.: See pp. 725-726 & 726-729, Chapter XV, at the end of Para. 20 and the section beginning at Para. 21.

98. E.S.M.: Chapters I & VIII; E.S.C.M.: Chapters I & VIII, especially Paras. 8.2.-8.10..

used in the First Question where delimitation is expressly called for?

6.121. It is to be borne in mind that the wording of the Second Question as proposed by Honduras at the fourth meeting of the Commission on 29 April 1986 anticipated almost exactly the present wording of that question. If Honduras believed that the words that it used meant something different and larger than their normal meaning would convey, it was, as a matter of good faith, up to Honduras to say so. It never did. Nor was there any basis for Honduras to believe that El Salvador shared the interpretation of Honduras other than in the sense that both parties were seeking to reflect the original wording of the General Peace Treaty of 1980. As is stated in the Affidavit filed herein by Sr. Ricardo Acevedo Peralta (99), it was no part of his interpretation of the Second Question that it covered delimitation as well as determination of status; and if the interpretation now advanced by Honduras had been put to him, he would have rejected it as unacceptable.

6.122. Indeed, if there is to be talk of "good faith", El Salvador is bound to ask how Honduras can present to the Court as binding on El Salvador, a proposal made by El Salvador in the course of negotiations, confidentially and under the most explicit reservation that if complete agreement was not reached "nothing would have probative value for the litigation itself" (1)? Such a presentation by Honduras cannot be reconciled with the dictates of

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99. E.S.R.: Annexes: p. 344

1. See Paragraph 6.42. above.

good faith. If the contention of Honduras were to be accepted, it would mean that the Court would deprive negotiations of the protection afforded them by the rule that what is said or proposed in negotiations cannot be adduced in subsequent litigation as evidencing the position taken by a party or as binding that party in any way. And if such protection is withdrawn, then the utility of negotiations as the principal mode of settlement of disputes would be reduced to near the point of disappearance. Such a development would be to the detriment of all States and, for that reason, El Salvador respectfully submits that the Court must not countenance it.

SUBMISSIONS

I. Delimitation of the Land Frontier

1. The Government of El Salvador ratifies the petition to the Chamber of the International Court of Justice contained in its Memorial that the Chamber delimit the land frontier between El Salvador and Honduras in the disputed sectors in accordance with the line indicated in the Submissions contained in the Memorial. This petition was ratified in the Counter Memorial of El Salvador, which rebutted the arguments contained in the Memorial of Honduras, and is now ratified again in view of the fact that in Chapters II, III & IV of this Reply El Salvador has rebutted the arguments contained in the Counter Memorial of Honduras.

II. The Juridical Status of the Islands

2. The Government of El Salvador ratifies the petition to the Chamber of the International Court of Justice contained in its Memorial as to the juridical status of the islands. This petition was ratified in the Counter Memorial of El Salvador, which rebutted the arguments contained in the Memorial of Honduras, and is now ratified again in view of the fact that in Chapter V of this Reply El Salvador has rebutted the arguments contained in the Counter Memorial of Honduras.

III. The Juridical Status of the Maritime Spaces

3. The Government of El Salvador ratifies the petition to the Chamber of the International Court of Justice contained in its Counter Memorial as to the juridical status of the maritime spaces in view of the fact that in Chapter VI of this Reply

El Salvador has rebutted the arguments contained in the Counter Memorial of Honduras.

In The Hague, 15 December 1989

ALFREDO MARTINEZ MORENO

Agent of the Government of
El Salvador

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OF EL SALVADOR

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