Before the

CENTRAL AMERICAN COURT OF JUSTICE

The Republic of El Salvador

Against

The Republic of Nicaragua

OPINION AND DECISION OF THE COURT

Translation

WASHINGTON
PRESS OF GIBSON BROS., INC.
1917

BEFORE THE

Central American Court of Justice

THE REPUBLIC OF EL SALVADOR

v.

THE REPUBLIC OF NICARAGUA.

OPINION AND DECISION OF THE COURT.*

San José de Costa Rica, on the ninth day of March, nineteen hundred and seventeen, at four o'clock, p. m.

In the action commenced and maintained by the Government of the Republic of El Salvador against the Government of the Republic of Nicaragua, arising out of the conclusion of a treaty by the latter with the Government of the United States of North America, known as the Bryan-Chamorro Treaty, which relates, among other matters, to the leasing of a naval base in the Gulf of Fonseca, the Court, having considered the proceedings had herein, hereby renders its decision.

The Honorable the Chargé d'Affaires of El Salvador in this Republic, Dr. Don Gregorio Martin, intervened herein on behalf of the Complainant Government and Dr. Don Alonso Reyes Guerra appeared on its behalf as attorney of record; the High Party Defendant was represented by Dr. Don Manuel Pasos Arana.

*Translated by Harry W. Van Dyke, Esquire, of the Washington, D. C. bar.

FIRST PART.

CHAPTER I.

It appears:

I. That on the 28th day of August, 1916, in accordance with powers to that end duly exhibited, the Honorable the Chargé d'Affaires of El Salvador, Dr. Don Gregorio Martin, appearing in the name of his Government, brought before this Court a complaint against the Republic of Nicaragua wherein the conclusion of the Bryan-Chamorro Treaty by the latter Government with the United States of North America, was alleged. In support of the action, the complaint sets forth the arguments of fact and law, and it is accompanied by the evidence considered pertinent thereto by the High Party Complainant.

ARGUMENTS OF FACT AND LAW.

Stated concretely, the High Party Complainant alleges as follows:

The treaty referred to, which was negotiated by the then Secretary of State of the United States, the Honorable William Jennings Bryan, and the then Minister of Nicaragua at Washington, General Don Emiliano Chamorro, in addition to granting to the United States certain rights for the construction of an interoceanic canal, grants to that Republic, for the term of ninety-nine years (renewable for a further term of the same duration), for the establishment of a naval base, a part of the Gulf of Fonseca. The stipulations of that pact are held by El Salvador to be

highly prejudicial to her supreme interests, in that they endanger her security and preservation, violate her rights of co-ownership in the Gulf of Fonseca and strike at her legitimate hopes for the future as a Central American nation.

II. The complaint is made up of various captions intended to develop, from different points of view, the claims of the High Party Complainant.

The first caption is devoted to a discussion of the following point: "The Treaty is an Official Act of the Government of Nicaragua that Places in Danger the National Security of El Salvador." It begins with this paragraph:

> "It must be patent to every one that the establishment, by a powerful State, of a naval base in the immediate vicinity of the Republic of El Salvador would constitute a serious menace—not merely imaginary, but real and apparent—to the freedom of life and the autonomy of that republic. And that positive menace would exist, not solely by reason of the influence that the United States, as an essential to the adequate development of the ends determined upon for the efficiency and security of the proposed naval base, would naturally need to exercise and enjoy at all times in connection with incidents of the highest importance in the national life of the small neighboring States, but would be also, and especially, vital, because in the future, in any armed conflict that might arise between the United States and one or more military powers, the territories bounded by the Gulf of Fonseca would be converted, to an extent incalculable in view of the offensive power and range of modern armaments, into belligerent camps wherein would be decided the fate of the proposed naval establishment —a decision that would inevitably involve the sacrifice of the independence and sovereignty of the weaker Central American States as has been the case with the smaller nations in the present European struggle under conditions more or less similar."

At the outset, for the purpose of showing that, in negotiating that treaty, the Government of Nicaragua did not, as it has maintained, confine itself to its own exclusive territorial jurisdiction, but infringed thereby upon the rights of El Salvador, the Agadir case was invoked. That case involved an attempt by Germany, in 1911, to seize the port of Agadir on the Moroccan coast for the establishment of a naval base, which attempt occasioned protests on the part of England and France, who claimed that the project constituted a menace to their national security with respect to their colonies in South Africa, and, because of the nearness of that port, a menace to the route followed by their vessels bound for East India through the Strait of Gibraltar.

Cited also is the Magdalena Bay case, wherein the United States of North America made positive objection to the transfer by certain United States citizens, to a Japanese commercial company, of land along the shores of that bay and which had been ceded to them by the Mexican Government. The matter resulted in the adoption, by the United States Senate, of the so-called Lodge Resolution, which is quoted in the complaint as follows:

> "That when any harbor or other place in the American continent is so situated that the occupation thereof for naval or military purposes might threaten the communications or the safety of the United States, the Government of the United States could not see without grave concern the possession of such harbor or other place by any corporation or association which has such a relation to another Government not American as to give that Government practical power of control for national purposes."

In discussing the same point, the complaint quotes from the editorial comment on the Lodge Resolution contained in the American Journal of International Law, and adds:

"The Lodge Resolution is susceptible of being misleading under the test of legal opinion, because the principle maintained therein does not refer to official acts or measures of government; nevertheless, it shows how far in the opinion of the North American Senate, a nation, even though powerful, may give way to its fears and display its zeal for national security, and for this reason the Foreign Office cites the Magdalena Bay case. Furthermore, the Senate's resolution puts in strong relief the fact that the opinion of that high legislative body of the United States—the nation with which the Bryan-Chamorro treaty was concluded—is wholly in conformity with El Salvador's contentions against that treaty, however much that same high body, in its amendments to the said convention adopted at the time of its ratification, showed that it did not have it in mind to affect any existing right in either of the States of Costa Rica, El Salvador, or Honduras, which, however, it was recognized, had protested *for fear of the contrary*. This declaration of the United States Senate is in no way consonant with the spirit of the Lodge Resolution and the trend of opinion which, but a few years before, controlled that body in adopting the Lodge Resolution.

"Consequently the reasoning on which the Government of Nicaragua relies in support of the legitimacy of its action in concluding the Bryan-Chamorro treaty, when it says that it contracted 'without injuring in the slightest degree the legitimate rights and interests of El Salvador or those of any other Central American republics,' is in manifest contradiction of the positions taken by other nations, for instance, the North American nation, through the medium of its national legislature; and it stands to reason that the fears entertained by the Government of El Salvador are of greater moment than were those of England and France in the Agadir case, and are of a character more definite and real than the fears that agitated the United States in the Magdalena Bay and other analogous cases contemplated by the Lodge Resolution."

III. Caption II of the complaint deals with the following point; "The Bryan-Chamorro Treaty Ignores and Violates the Rights of Co-ownership Possessed by El Salvador in the Gulf of Fonseca." From the XVIth century—says the complaint—when this gulf was discovered by the Spaniards, it belonged throughout the entire period of her dominion to Spain, the mother country, whose rights of exclusive ownership were never placed in doubt; and, on the emancipation of Central America, that ownership passed into the patrimony of the Federal Republic that was formed by the five States.

The complaint goes on to allege the exclusiveness of the Spanish ownership over those waters, the transfer of those rights to the Central American States constituting the Federal Government, and the exclusive ownership subsequently exercised by El Salvador, Honduras and Nicaragua, the geographic situation of the countries surrounding the gulf, the circumstance that the use of those waters for fishing and other analogous purposes has never been exercised or even claimed by any other nations, and, denying the pretensions of the Nicaraguan Government that the waters of the Gulf of Fonseca are not common to the three States, advances the following argument:

(a) That because, for a long period of years, those waters belonged to a single political entity, to wit, the Spanish Colonial Government in Central America, and, later, to the Federal Republic of the Center of America, the fact conclusively results that, on the dissolution of the federation without having effected a delimitation among the three riparian States of their sovereignty therein, the ownership of those waters continued in common in those three States.

(b) That it matters not that in the year 1900, as a consequence of the convention for the demarcation of boundaries, the Governments of Honduras and Nicaragua fixed

a divisionary line between the two countries in the waters of the Gulf; because that act was brought about without the intervention of El Salvador, and such intervention was essential to its validity and practical effect, since it dealt with property that was common, not only as between Honduras and Nicaragua, but also to the sovereign State of El Salvador; and that that antecedent did not affect the root of the question, but, on the contrary, showed, as did the attempt that was made, in 1884, with the same object in view, by El Salvador and Honduras—without consummation, however—that the idea that has always prevailed among the three riparian States is that their ownership over the waters of the Gulf of Fonseca is an undivided ownership.

(c) That the reasons urged against the theory of co-ownership in the annual report of the Ministry of Foreign Relations of Nicaragua, to the National Congress for the year 1914, are unsound; and that in that report the Minister maintains on behalf of his Government the following:

> "There exists, then, no community between Nicaragua and Honduras in the Gulf of Fonseca, and El Salvador, being neither a neighbor nor a co-boundary State with us—the Republic of Honduras lying in between—the community claimed with Nicaragua and alleged in the Salvadorean protest, does not and cannot exist.
>
> "Furthermore, the status of common ownership in, and the indivisibleness of, the waters of a bay are very different from the status of an inheritance or an estate in lands, for, whereas, with respect to the former, there exists the general principle that the parts adjacent to their coasts belong to the several nations —so that, on the laying out of the terrestrial boundary line, demarcation of the maritime waters is understood—there is no similar principle with respect to landed properties, since at one point or another the coparceners thereof stand to receive what belongs to

them indifferently—though even then, where those landed properties are contiguous, the civil law provides that the portion to be adjudicated to each coparcener shall be that part of the common property which is contiguous to his own land.

"One nation cannot possess the right to a greater portion of the waters of a bay possessed in common with others than that shown to belong to it by the extension of its respective coasts; and the Republic of El Salvador being situated at the extreme northwest of the Bay of Fonseca, and that of Nicaragua in the extreme southeast, the two being separated by Honduras, the maritime ownership enjoyed by the first-named Republic could not possibly extend one inch farther than the point fixed by the limit of its coasts which separates it from Honduran territory."

That in opposition to this argument, the complaint maintains that the Gulf of Fonseca belongs to the category of what are called "Historic Bays," such as the Chesapeake and Delaware Bays on the coasts of the Great Republic of the North, and the Bays of Conception, Chaleur and Miramiche in the Dominion of Canada; and it adopts wholly the doctrines put forth by the Salvadorean Foreign Office in its protests before the Department of State at Washington, which were directed first against the Chamorro-Weitzell Treaty, and later against the Bryan-Chamorro Treaty.

(d) That the circumstance that not one State alone, but three, possess the shores of the Gulf, does not prevent the application to the Gulf of Fonseca of the principles underlying Historic Bays, because those three States, in the course of their history, have not always been independent each of the others, but heretofore formed parts of a single international political entity.

(e) That, apart from its character as a Historic Bay, the Gulf of Fonseca presents the particular condition that its entrance, between the summits of the Islands of Mean-

guera and Meanguerita on the line traced from *Chiquirín Point*, on the mainland of El Salvador, to *Rosario Point*, in the northeast region of the peninsular that forms the Nicaraguan promontory of Cosigüina, is not of an extent greater than the ten miles fixed generally by the publicists as essential to considering a bay as "territorial" or "closed," and adds the following consideration:

> "The geographical situation of the Salvadorean Islands in the Gulf and the legal fact that they are separated from each other and from the Island nearest the mainland, and the latter from Chiquirín Point, by narrow straits, the lower depths of which are sown with sand banks which in some instances prevent navigation by vessels of large draft, and, in others, permit navigation only through channels of narrow width that have been established by soundings, are elements sufficient, under international law, to sustain conclusively the contention that the chain formed by those islands constitutes a prolongation of the national territory into the Gulf; so that the Salvadorean mainland reaches out along the line above indicated as far as Meanguerita Island and in that locality narrows the entrance to the Gulf, in the direction of Rosario Point on the Nicaraguan coast, to a width of less than ten miles, counting such miles at sixty to a degree of latitude.
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> "This Foreign Office claims that that width is less than ten miles because the measurement is verified by the scale on the best known maps of El Salvador, Honduras and Nicaragua. Those maps show that the width of the Gulf's mouth proper is at most thirty-five kilometers, which, at one kilometer to 0.539 (five hundred and thirty-nine thousandths) of a nautical mile, equalling one-sixtieth of a degree of latitude, are equivalent to eighteen miles and eight hundred and sixty-five thousandths (18.865) of a mile (Lloyd's Calendar for 1916, page 213, on 'Nautical Measures'); that the width of the entrance between Meanguerita Island and Rosario Point, at its

widest, is only half or less than half that distance, that is, nine miles and four hundred and thirty-two thousandths (9.432) of a mile; that the latter width is cut by the sand banks (the Farallones) that form a prolongation of Nicaraguan territory and in reality reduce that entrance to a much smaller number of miles."

(f) And, finally, the complaint makes an exhaustive examination of the doctrine that is maintained by the scientific authors and associations and which upholds the ownership exercised by States over the sea and bays, beginning with the rule laid down by Bynkerschoek whose general maxim, "*imperium terræ feniri ubi finitur armorum vis*" is traced through its historical evolution.

IV. Caption III maintains the proposition that "The Treaty Violates Primordial Interests of El Salvador as a Central American State" and goes on to say that in the political Constitution of El Salvador like those of the other Central American States, the principle is consecrated that those Republics are disintegrated parts of the Republic of the Center of America and that, as such, the power remains inherent in each to concur with all or any of the Central American States in the organization of a Common National Government; that the Constitution of Nicaragua, although in its second Article it provides that the public capital powers may not enter into pacts or treaties that are opposed to the independence and integrity of the Nation or which in any way affect its sovereignty, excludes from that rule pacts or treaties that "tend toward union with one or more of the Republics of Central America." The High Party Complainant continues, under the caption above quoted:

"Alienations of territory by a Central American State to a foreign nation result, therefore, in impairing the transcendental interests that the Salvadorean

people have always held, and still hold, constantly in mind as one of their greatest and most legitimate aspirations: that of the reconstitution, undiminished, with the brother peoples, of the great country that was once the master of the ancient Central American domain—an aspiration towards which the five States are impelled by their common origin, religion and history. Such alienations would deeply wound that aspiration and detract from the efficacy of the great interests that the Salvadorean people, as a fractional part of the Central American people, hold to be of first importance to their national life in the future. The Nicaraguan people and the peoples of the other three States recognize, maintain and value those interests in the same measure. This is shown by the multitude of historic facts and political acts of their independent lives, among which may be mentioned those that gave rise to the negotiation of the conventions that were concluded at Washington in 1907. One of those conventions was the pact that instituted the Honorable Tribunal before which, through the medium of the Salvadorean Government, represented by this Foreign Office, one of those peoples, is now appearing in quest of justice, to wit, the people of El Salvador."

V. Caption IV deals with the proposition that "The Treaty is Contrary to Article II of the General Convention of Peace and Amity Subscribed by the Republics of Central America at Washington on the Twentieth of December, 1907." In that chapter the Complainant argues that the text of said article imposes upon the States the agreement not to alter in any form their constitutional order, because any alteration of that order was conceived by the delegates to the treaty convention to be a menace to the peace and security of each of the States they represented, and of Central America in general, and to be contrary to their established policy and to the prestige with which they ought to surround themselves—this for

the purpose of warding off, for the future, every danger that could threaten the peace of Central America; that, with those ideas in mind, they could not be oblivious to the greatest danger of all, which was the possible change of the constitutional order, by which must be understood, not only the form of Government adopted by the fundamental law of each State, but all standards adopted by the constituent assemblies whereby the Public Powers must model their acts of Government in matters of primordial interest; and that National sovereignty, independence and integrity are matters that are found, in this sense, ranged in culminating rank.

VI. Caption V maintains the following proposition: "The Treaty Could Not Have Been Validly Concluded," and, in support thereof, cited Article 2 of the Political Constitution in force in the Republic of Nicaragua, which reads as follows:

> "Sovereignty is one, inalienable and imprescriptible, and resides essentially in the people, from whom the functionaries established by the Constitution and the laws derive their powers. Consequently, no pacts or treaties may be entered into that are opposed to the independence or integrity of the nation, or which in any way affect its sovereignty, save only those that tend toward unity with one or more of the Central American Republics."

The chapter continues by way of commentary:

> "The text of this article constitutes a fundamental rule of government which previous political constitutions of that same Republic have adopted as the rule that the Nicaraguan people have wished to see repected by the Public Power.
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> "Openly and essentially is the text opposed to the stipulations of the Bryan-Chamorro Treaty, wherein the Government of Nicaragua not only cedes to the United States a zone of Nicaraguan soil for the

construction therethrough of an interoceanic canal, besides the Corn Islands in the Atlantic and a portion of territory to be selected by the North American Government on the littoral of the Gulf of Fonseca, but, conformably with the amendments to Article III of the Treaty, made by the United States Senate in its ratification resolution, restricts its sovereignty in fiscal and financial matters.

"Those stipulations, therefore, are absolutely invalid, and for that reason cannot be carried out in face of the principles of international justice that control cases of international agreements that are fundamentally null, especially when the nation that has contracted with another whose fundamental laws are opposed to the subject-matter of the agreement has previous and full knowledge of the reasons why it is invalid and when, moreover, such agreements diminish by their invalid stipulations, the promordial rights of a third nation."

VII. In Caption VI of the complaint the High Party Complainant confines itself to showing: "that the Government of El Salvador sought to discuss with the Nicaraguan Government its right to oppose the effective consummation of the Bryan-Chamorro Treaty; that to that end the Salvadorean Foreign Office addressed to the Nicaraguan Foreign Office a note on that subject which was placed in the hands of the Minister of Foreign Relations of Nicaragua by special Foreign Office couriers, and that, as the note referred to has not even been acknowledged, the Government of El Salvador is forced into the position of being unable to reach a settlement with the Nicaraguan Government and of being justified in concluding that the latter has rejected any settlement of the matter.

In an additional paper, however, presented on the same date with the complaint, the High Party Complainant sets forth that after the signing of the complaint the answer of the Nicaraguan Foreign Office was received, and that

therein, having recited the bases on which the Salvadorean Government relies in its opposition to the Bryan-Chamorro Treaty, and having set forth, in its turn, the bases considered by the Nicaraguan Government as warranting its insistence, over the protests of El Salvador, on fulfilling the Treaty, the answer concludes as follows:

> "In conclusion, Your Excellency must permit me to observe that, in consonance with the solemn declaration, contained in the Note itself, that the Government of El Salvador will avail itself of every means afforded it by justice, law and existing international agreements to secure the invalidation of that pact, my Government, in its turn, expresses to your Excellency's Government its unalterable purpose to avail itself also of all means afforded to it by justice and law to maintain inviolate the validity of that diplomatic agreement."

VIII. The complaint, which has been epitomized in the foregoing, concludes with the following formal petition and prayers:

> "For the reasons above set forth, the Salvadorean Foreign Office, in the name of and representing the Government of El Salvador, prays that the Government of Nicaragua be enjoined to abstain from fulfilling the Bryan-Chamorro Treaty, subscribed at Washington the fifth day of August, nineteen hundred and fourteen, and, therefore, reiterating its expressions of respect and consideration, petitions the Honorable, the Central American Court of Justice:
>
> "*First.*—That the complaint hereby interposed be admitted and considered together with the Appendices hereto attached.
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> "*Second.*—That, in conformity with the text and spirit of Article XVIII of the Central American Convention concluded at Washington, herein last above cited, the appropriate decree may issue fixing the legal situation to be maintained by the Government of Nicaragua in the matter which is the subject

of this complaint, in order that the things here in litigation may be preserved in the status in which they were found before the conclusion and ratification of the Bryan-Chamorro Treaty.

"*Third.*—That, by the final decision, the Government of Nicaragua be enjoined to abstain from fulfilling the aforesaid Bryan-Chamorro Treaty, and,

"*Fourth.*—That this Honorable Court grant such other and further relief as may seem to it just and proper."

IX. The High Party Complainant attaches to its complaint the documents on which it relies for support. Those documents, in the form of Appendices, are specified in the complaint as follows:

A. Copy of protest presented on the 21st of October 1913, by the Salvadorean Foreign Office, through the medium of the Legation at Washington, to the Department of State of the United States.

B. Reply of the Hon. W. J. Bryan, Secretary of State, relating to that protest.

C. Copy of the Salvadorean Legation's rejoinder.

Ch. Copy of the note of July 8, 1914, addressed by the Salvadorean Legation on the same subject to the Department of State.

D. Reply of the Department of State, dated July 16, 1914.

E. Copy of the note addressed on the 21st of July, 1914, by the Salvadorean Legation to the Department of State referring to its answer of the 16th of the same month.

F. Copy of the Salvadorean Legation's note of December 21, 1914, to the Salvadorean Foreign Office, transmitting the Bryan-Chamorro Treaty which had been handed to it by the Secretary of State of the United States.

G. Note of the Hon. William J. Bryan to the Salvadorean Legation transmitting copy of the above-mentioned Treaty.

H. The Bryan-Chamorro Treaty.

I. Note of protest relating to said Treaty, addressed on the 9th of February, 1916, through the medium of the Salvadorean Legation, to the Department of State.

J. Note of the United States Legation, dated the 19th of February, 1916, wherein, under instructions from the Department of State, the Minister informs the Salvadorean Foreign Office that the said Bryan-Chamorro Treaty had been ratified, with amendments by the United States Senate.

K. Copy of the Salvadorean Foreign Office's reply, dated March 3, 1916, wherein it protests against the ratification of the said Treaty.

L. Copy of the note addressed by the Salvadorean Foreign Office to the Nicaraguan Foreign Office on the 14th of April, 1916, and delivered by Foreign Office Couriers, Captain José A. Menéndez and Lieutenant Santiago Ch. Jáuregui.

Ll. Copy of the telegrams addressed from Managua to the Salvadorean Foreign Office on the 4th of May, 1916, by His Excellency the Minister of Foreign Relations of Nicaragua and by the Foreign Office Courier, Captain J. A. Menéndez.

M. Copy of certain paragraphs of the report for the year 1914 presented to the National Congress of Nicaragua by His Excellency the Minister of Foreign Relations of that Republic.

N. Copy of certain articles of the Law of Navigation and Marine in force in El Salvador.

O. Technical report of Civil Engineers, Don Santiago I. Barbarena and Don José E. Alcaine, relating to the Gulf of Fonseca.

P. Map of the Gulf of Fonseca.

CHAPTER II.

Answer to the Complaint and Proceedings in the Case.

It Appears:

That the Court, by resolution adopted on the sixth of last September and communicated to the High Parties

and to the other Central American Governments, admitted the complaint herein, basing its action on the consideration that the signatory nations to the Conventions of Washington, in entering into the solemn agreement to submit to this Court all controversies or questions that might arise among them, whatever might be their nature and origin, established, in Article I of the respective convention, the jurisdiction and competency of this Court in such controversies, and imposed no other limitation than the requirement to seek first a settlement between the respective departments of foreign affairs of the Governments in controversy; that in view of the terms set forth in the answer of the Department of Foreign Relations of Nicaragua to the note of His Excellency the Minister of Foreign Relations of El Salvador, the Court is of the opinion that such previous settlement was impossible, and that, therefore, the complaint comes properly under the jurisdictional power of the Court; wherefore, the Court rendered a preliminary decision in which it was ordered: that the complaint be admitted, that the evidence presented therewith be made a part of the record in the case, that the complaint be communicated to the Defendant Government in due legal form, with notice to present its case and submit its evidence within the period of sixty days, and, finally, that, pending the final decision herein, the High Parties remain in the same legal status that subsisted between them, prior to the conclusion of the Bryan-Chamorro treaty.

That, during the period allowed within which to answer the complaint, the High Party Complainant, through the medium of the Chargé d'Affaires of El Salvador in this Republic (Costa Rica), and pending official confirmation by the Court, amplified the prayers contained in its complaint, by supplemental petitions of September 30, and October 2, 1916, in which, after restating its first

prayers, the following points were added to its complaint and judgment asked thereon:

A. That the Bryan-Chamorro treaty violates the rights of El Salvador in the Gulf of Fonseca;

B. That the said treaty also violates the rights resulting to El Salvador by virtue of Article IX of the General Treaty of Peace and Amity, concluded at Washington by the Central American Republics, by reason of the fact that no express and special reservation of those rights was made in said first-named pact;

C. That the Bryan-Chamorro treaty violates the rights of El Salvador in the Gulf of Fonseca, because the grant therein to the United States, of a naval station in those waters, by its very nature, necessarily compromises the national security of El Salvador, and, at the same time, nullifies the rights of co-ownership, possessed by El Salvador in the said gulf; and that, without the intervention and consent of that country, the Government of Nicaragua was without power legally to make that grant;

Ch. That the aforesaid grant and the lease of Great Corn Island and Little Corn Island to be held subject to the laws and exclusive sovereignty of the United States, are acts in violation of Article II of the General Treaty of Peace and Amity that was concluded by the plenipotentiaries of the Central American Republics at Washington; and

D. That the Government of Nicaragua be declared to be under the obligation to restore and maintain, in all respects and in all matters heretofore indicated, the legal status that existed between the two countries prior to the conclusion of the Bryan-Chamorro treaty.

It Appears:

That the Court, by resolution adopted on the 2nd day of the same month of October, admitted the petitions referred to as integral parts of the complaint, on the

ground that because the Government of Nicaragua, did not answer the complaint brought herein by the Government of El Salvador, it was proper to admit amplifications thereof in obedience to the universal rules of legal procedure; and it thereupon ordered that a new period of sixty days be allowed to run, within which to answer the complaint and its amplifications;

That, although notified of the above action, the High Party Defendant did not avail itself of the period granted; whereupon, in conformity with Article XV of the respective convention, and on the request of the attorney representing the High Party Complainant, the Court issued an order requiring the Defendant Government to present its answer within a further period of twenty days;

That, before the expiration of the last-mentioned period, the Government of Nicaragua made its appearance in the case through the medium of its attorney, Dr. Don Manuel Pasos Arana; and, having been notified that said time limit was running against his Government, that gentleman, on the 6th of February, 1917, presented for the consideration of the Court a waiver of the time limitation together with the evidence he believed to be pertinent.

It Appears:

That counsel for the High Party Defendant, before analyzing the arguments on which the Government of El Salvador relied in support of its complaint, protested that it was not his intention to answer the said complaint in its entirety, nor to acknowledge in any manner that the Central American Court of Justice had acquired jurisdiction to decide the case; and that, thereupon, under special captions, he made the following observations:

The Bryan-Chamorro treaty does not place in danger the national security of El Salvador, nor does the establishment of an American naval base in the Gulf of Fonseca constitute a serious menace to its free and autonomous life,

because, in order to maintain the contrary, it would be necessary to show that American influence in the republics of this continent, or even in the Central American republics, was initiated or—commenced to reveal itself—by virtue of the Bryan-Chamorro treaty, for history demonstrates that that influence, already long-existent therein, has not proven to have been an obstacle to the enjoyment by those Republics of their full national life; there are even cases in which that influence has been beneficient.

Furthermore, says Nicaragua's counsel, the security and maintenance of the naval station does not involve, necessarily, the operation of the influence of the States bordering on the Gulf. That security and maintenance will depend upon other causes, such, for instance, as engineering work, war material stored, and the number of troops that may be needed to guard the station. "Force protects itself by force."

Such naval station would be, moreover, a guarantee of the independence of the Central American countries, since that independence, from the time of the break with Spain, has been guaranteed by the United States Government under the Monroe doctrine, which makes it the defender and guardian of the continent; and the geographical situation of the Republic of Nicaragua, the possession of the Great Lake of Nicaragua and the rapid-strewn river of San Juan, which latter are to be combined for the construction of an interoceanic way of communication, place that Republic in an exceptional and different position from the other Republics of Central America, and make it subject to different criteria.

Counsel goes on to combat the argument of the High Party Complainant that the case of the naval station in the Gulf of Fonseca is similar to the Agadir case, which, he points out, concerned great military powers involved in important rivalries in commerce and territorial expansion,

whereas, with respect to the United States and the small countries adjacent to the Gulf of Fonseca, it is to be presumed that such rivalries and friction do not exist, and for many centuries will not exist.

Similar comment is made in reference to the case of Magdalena Bay, wherein, says counsel, were involved certain subjects of Japan, a military and naval power of the first class, that might have established in that bay a naval station that would have been a menace to the communications and security of the United States or any other nation on this continent.

In regard to the argument that the Bryan-Chamorro treaty ignores and violates the rights of El Salvador in the Gulf of Fonseca, counsel for Nicaragua refers to the reply on that point made by the Nicaraguan Foreign Office to the note addressed by the Salvadorean Foreign Office on the subject of the negotiation of the Bryan-Chamorro treaty; and he adds certain other observations as follows:

He declares that the Government of Nicaragua understands perfectly that the ancient Spanish Provinces of Nicaragua, Honduras and El Salvador, by reason of the fact that they are adjacent, are owners of the Gulf in the sense that to each belongs a part thereof, but not in the sense that, thereby, a community in the legal acceptation of the word exists among those republics. Demarcation of frontiers therein is lacking; but this, he says, does not result in common ownership.

Counsel proceeds to argue that Nicaragua is not co-riparian with El Salvador in the Gulf of Fonseca, because the indispensable element of adjacency is absent. The States that are truly co-riparian, he continues, are Nicaragua with Honduras and Honduras with El Salvador, between which the status of being co-boundary States does exist.

In support of his argument, counsel invokes the boundary treaty entered into by the Republics of Nicaragua and Honduras in the year 1900. In that treaty Nicaragua takes the attitude of being in full exercise of her sovereignty, undisputed by any neighbor, over the portion of the waters that correspond to her in the Gulf of Fonseca. So, also, he invokes the attempt made by El Salvador, in 1884, to negotiate a boundary convention fixing the maritime boundary between El Salvador and Honduras; and, although that convention was not carried into effect, because of the failure of the Honduran Congress to approve it, all of its moral force, he says, detracts from El Salvador's present argument, because, for the conclusion of that treaty, the intervention and consent of Nicaragua was not asked—the very same point that is now made by El Salvador, in her own favor, with respect to the conclusion of the Bryan-Chamorro treaty.

Those declarations are reinforced by citing the protest of the Honduran Government, a copy of which is before this Court, and which is discussed by counsel in a special section of his brief.

Counsel for the Defendant Government understands, he says, that the lines of demarcation in the Gulf between Nicaragua and Honduras are actually traced, whereas those between El Salvador and Honduras are not; whereupon he makes the following statement of his understanding on this point:

> "The Government of Nicaragua is not inconvenienced by the claim that the Gulf of Fonseca is a bay that should be considered as being under the exclusive ownership of the three adjacent States thereto, for this does not indicate that such ownership by the three States constitutes a community: exclusive ownership over the Gulf, and nothing more, belongs to the Republics of Nicaragua, Honduras and El Salvador in the maritime territorial parts that belong to them as owners of their respective coasts."

In his brief counsel makes lengthy legal argument as to the reasons set forth in the complaint in favor of co-ownership; but a résumé of that argument by the High Party Defendant is contained in the following paragraphs:

> "The Government of Nicaragua does not dispute, or cast doubt upon, the perfectly evident fact that the Bay of Fonseca is a closed or territorial bay; but it does deny that that characteristic attaches to it by reason of the fact that the three States adjacent to the Gulf, Nicaragua, Honduras and El Salvador, formerly belonged to a single international political entity, for, besides the fact that the said States preserved their autonomy, independence and even sovereignty whilst in the federation, the true reason underlying that characteristic is that the Gulf of Fonseca is *small in extent*, and, therefore, belongs to the nations that own its coasts.
>
> "The Government of Nicaragua understands perfectly that *imperium* may be exercised by the States independently of ownership and *absolute jurisdiction* over the sea, this in order that its economic laws may not be evaded in a zone as great as four leagues; but maintains that that right may only be exercised directly opposite along and coextensive with the coast of a nation over the high seas and not to the right or left over portions of the territorial waters of other nations adjacent on those sides; for the insurmountable barrier of foreign sovereignties stands in the way."

The argument that the Bryan-Chamorro treaty violates primordial interests of El Salvador as a Central American State, is denied in the answer to the complaint, on the following grounds:

That El Salvador, like Nicaragua, Guatemala, Honduras and Costa Rica, is a free, independent and sovereign State; that the circumstance that those States were members of the Federal Republic of the Center of America does not diminish or alter the rights of sovereignty that

pertain to them as a result of their reorganization as separate States; that the declarations contained in the various constitutions that now control, or have controlled, the republics of Central America, with regard to the reconstruction of the old Federation, imply no more than the *possibility* of a return to the union—never an irrevocable obligation; that the Bryan-Chamorro treaty is not contrary to Article II of the General Treaty of Peace and Amity concluded at Washington on the 20th of December, 1907, because it is not true that the five Central American States agreed not to alter in any form their constitutional order; that what they did agree to was to do nothing that would operate in any of them to the prejudice of the constitutional order. In support of this argument, various observations are made and the following conclusion is reached:

> "The High Party Complainant only enunciates, but does not prove, the strange doctrine that the expression *constitutional order* must apply to every rule adopted by the Constituent Assemblies whereon the Public Powers might model their act in matters of primordial interest."

The answer then proceeds to interpret Article II of the treaty referred to in the following manner:

> "The dispositions or measures that are prohibited by the article cited are not such as are TAKEN BY THE SIGNATORY GOVERNMENTS WITH RESPECT TO THEMSELVES, but are direct dispositions, or measures, which, independently of one of the signatory Governments, operate to alter the constitutional order in ANY OF THE OTHER REPUBLICS."

It maintains that the nullity of the Bryan-Chamorro treaty can not be properly alleged, because the exclusive power to do so resides in the parties who negotiated that pact, or those who possessed the right to join therein; that

the signatory parties to the treaty are Nicaragua and the United States of America, and that El Salvador did not possess the right to intervene in its negotiation, since Nicaragua, an independent, free and sovereign republic, is not subordinated, by any international agreement, either to that republic or to any other on earth.

The answer goes on to contest the bases underlying the additions to the complaint presented in the documents of September 30, and October 2, last, and announces that this Court may not take cognizance of the complaint interposed by the Government of El Salvador, for the reason that the present controversy does not involve a question purely Central American, but, rather, a mixed question that depends upon the rights of a third nation, which did not previously submit to the authority of this Court by means of the special convention provided for in Article IV of the organic pact; and in support of that argument, the answer invokes the document contained in the last conducive premise ("*considerando*") of the decision rendered by this Court in the action brought by the Government of Costa Rica against that of Nicaragua arising out of the concession by the latter Government to the United States for the construction of an interoceanic canal by way of the San Juan River, or any other route through Nicaraguan territory.

In conclusion, the High Party Defendant, through its counsel, makes the following exceptions:

First.—That the controversy between the Foreign Offices, on the subject, was not exhausted, because "the Government of the Republic of El Salvador, having chosen, in presenting its complaint, to ask that the decision be rendered on a new claim—a claim that had not been discussed between the respective Foreign Offices—it is obvious that in that case it cannot be truly stated that an agreement could not be reached"; and,

Second.—That the Court is incompetent, for lack of jurisdiction, to take cognizance of, and decide, the complaint and the additions thereto presented by the Government of El Salvador.

The evidence adduced by the High Party Defendant, and attached to its answer, comprises:

A. Note of the Nicaraguan Foreign Office of July 26, 1916, in reply to the note addressed to it by the Salvadorean Foreign Office relating to the conclusion of the Bryan-Chamorro treaty;

B. A royal *cédula* (decree) addressed to Diego Gutiérrez referring to territorial boundaries during the colonial period; and,

C. Documents relating to the attempt made in 1901 by the Governments of Nicaragua and the United States looking to the alienation of the canal route across Nicaraguan territory.

It Appears: that the Court, by resolution of February 9th, of the present year, held that the time limit granted to the Nicaraguan Government within which to answer the complaint and the additions thereto had expired, and declared that the case was ready for hearing; it then fixed the 19th of February as the day on which the final arguments of the High Parties were to be heard.

It Appears: that, at the public hearing called as above stated, Dr. Don Alonso Reyes Guerra, for the High Party Complainant, and Dr. Don Manuel Pasos Arana, for the High Party Defendant, appeared and argued at length their respective claims.

It Appears: that, at the session held by this Court on the first and second days of the present month, the questions submitted were fully discussed, and the points contained in the questionnaire (statement of issues) heretofore approved were voted upon in the manner set forth in the act passed at that session, which act reads as follows:

ACT RECORDING THE VOTES OF THE COURT IN THE CASE.

THE CENTRAL AMERICAN COURT OF JUSTICE, San José de Costa Rica, at 5 o'clock in the afternoon of the 2d of March, nineteen hundred and seventeen.

The Court, having concluded its deliberations preparatory to a final decision of the suit brought by the Government of El Salvador against the Government of Nicaragua, proceeded to take a vote on each of the twenty-four points comprised in the questionnaire heretofore approved, with the following result:

> *First Question.*—"Shall the Court proceed to take cognizance of the peremptory exception to its competency for lack of jurisdiction (submitted by the High Party Defendant on the expiration of the time limit running against it), insofar as that exception relates to the original complaint, notwithstanding the Court admitted that complaint by act of September 6, nineteen hundred and sixteen?"

Answered in the affirmative by all the Judges.

> *Second Question.*—"Is the Court competent to take cognizance of the case on the issues presented?"

Answered in the affirmative by all of the Judges, Judge Gutiérrez Navas adding: "insofar as relates exclusively to the Republics of Nicaragua and El Salvador."

> *Third Question.*—"In view of the fact that the case involves contractual interests of a third nation that is not a party thereto, and that is not subject to the jurisdiction of the Court, has this Court jurisdiction to render a decision therein with reference to the rights in controversy between El Salvador and Nicaragua?"

Answered in the affirmative by all the Judges, Judge Guitérrez Navas adding the same proviso that appears in the answer to the preceeding question.

Fourth Question.—"Do the additions to the complaint, dated the 30th of September and 2d of October, nineteen hundred and sixteen, contain matter extraneous to the origin of the diplomatic controversy that preceded the litigation?"

Answered in the negative by Judges Medal, Oreamuno, Castro Ramírez and Bocanegra, and in the afirmative by Judge Gutíerrez Navas.

Fifth Question.—"Referring to the answers to the preceding question, and the findings in the acts of the Court herein, was the Salvadorean Government under the obligation previously to seek a diplomatic settlement with the Government of Nicaragua on the concrete points set forth in the additions to the complaint?"

Answered in the negative by Judges Medal, Oreamuno, Castro Ramírez and Bocanegra, and in the affirmative by Judge Gutiérrez Navas.

Sixth Question.—"Is the Court competent to take cognizance of and decide the prayers contained in the additions to the complaint above referred to?"

Answered in the affirmative by Judges Medal, Oreamuno, Castro Ramírez and Bocanegra, and in the negative by Judge Gutiérrez Navas.

Seventh Question.—"Is the Court competent to take cognizance of, and declare the law with respect to, the initial petition in the complaint?"

Judges Medal, Oreamuno and Castro Ramírez answered in the affirmative, on the ground that such cognizance is for the purpose of establishing the legal relations between the High Parties Litigant; Judge Gutiérrez Navas answered in the negative on the ground that he regarded it as legally impossible to prohibit the fulfillment of a contract without affecting the rights of one of the contracting parties that is not a party to the suit; and Judge Bocanegra answered in the affirmative, on the ground that

such cognizance is for the purpose of declaring the legal relations that exist between the contending Central American States, but not for the purpose of deciding anything that affects third parties that are not parties to the suit.

> *Eighth Question.*—"As a consequence, should the exceptions proposed by the High Party Defendant be accepted or rejected?

Judges Medal, Oreamuno and Castro Ramírez answered that they should be rejected; Judge Gutiérrez Navas answered that they should be accepted; and Judge Bocanegra answered that the Court should accept the exceptions proposed insofar as they relate to the concluding part of the answer made by him to the Seventh Question, and that the rest thereof should be rejected.

> *Ninth Question.*—"Taking into consideration the geographic and historic conditions, as well as the situation, extent and configuration of the Gulf of Fonseca, what is the internatioal legal status of that Gulf?"

The Judges answered unanimously that it is an historic bay possessed of the characteristics of a closed sea.

> *Tenth Question.*—"As to which of those characteristics are the High Parties Litigant in accord?"

The Judges answered unanimously that the parties are agreed that the Gulf is a closed sea.

> *Eleventh Question.*—"What is the legal status of the Gulf of Fonseca in the light of the foregoing answer and the concurrence of the High Parties Litigant, as expressed in their arguments, with respect to ownership and the incidents derived therefrom?"

Judges Medal, Oreamuno, Castro Ramírez and Bocanegra answered that the legal status of the Gulf of Fonseca, according to the terms of the question, is that of property belonging to the three countries that surround it; and

Judge Gutiérrez Navas answered that the ownership of the Gulf of Fonseca belongs, respectively to the three riparian countries in proportion.

> *Twelfth Question.*—"Are the High Parties Litigant in accord as to the fact that the waters embraced in the inspection zones that pertain to each, respectively, are intermingled at the entrance of the Gulf of Fonseca?"

The Judges answered unanimously that the High Parties are agreed that the waters which form the entrance to the Gulf intermingle.

> *Thirteenth Question.*—"What direction should the maritime inspection zone follow with respect to the coasts of the countries that surround the Gulf?"

Judges Medal, Oreamuno, Castro Ramírez and Bocanegra answered that the zone should follow the contours of the respective coasts, as well within as outside the Gulf; and Judge Guitérrez Navas that, with respect to the Gulf of Fonseca, the radius of a marine league zone of territorial sea should be measured from a line drawn across the Bay at the narrowest part of the entrance towards the high seas, and the zone of inspection extends three leagues more in the same direction.

> *Fourteenth Question.*—"Does the right of co-ownership exist between the Republics of El Salvador and Nicaragua in the non-littoral waters of the Gulf, and in those waters also, that are intermingled because of the existence of the respective zones of inspection in which those Republics exercise police power and the rights of national security and defence?"

Judges Medal, Oreamuno, Castro Ramírez and Bocanegra answered that such right of co-ownership does exist, without prejudice, however, to the rights that belong to Honduras in those non-littoral waters; Judge Gutiérrez Navas answered in the negative.

Fifteenth Question.—"Wherefore, as a consequence, and conformably with their internal laws and with international law, should there be excepted from the community of interest or co-ownership the league of maritime littoral that belongs to each of the States that surround the Gulf of Fonseca adjacent to the coasts of their mainlands and islands respectively, and in which they have exercised, and may exercise, their exclusive sovereignty?

Answered in the affirmative by Judges Medal, Oreamuno and Castro Ramírez; and in the negative by Judge Gutiérrez Navas, on the ground that in the interior of closed gulfs or bays there is no littoral zone; Judge Bocanegra answered in the affirmative on the ground that the High Parties Litigant, having accepted the Gulf of Fonseca as a closed bay, the existence of the marine league of exclusive ownership becomes necessary, since the Gulf belongs to three nations instead of one.

Sixteenth Question.—"Did the Government of Nicaragua, in granting the concessions contained in the Bryan-Chamorro treaty for the establishment of a naval base, violate the right of co-ownership possessed by El Salvador in the Gulf of Fonseca?"

Answered in the affirmative by Judges Medal, Oreamuno, Castro Ramírez and Bocanegra, and in the negative by Judge Gutiérrez Navas.

Seventeenth Question.—"Does the establishment, in the Gulf of Fonseca, of a naval base, by reason of its nature and transcendental importance, compromise the security of El Salvador?"

Answered in the affirmative by Judges Medal, Oreamuno and Castro Ramírez, and in the negative by Judge Gutiérrez Navas. Judge Bocanegra answered in the affirmative, on the ground of the possible risk of aggression against the naval base on the part of other powers with which the concessionary power might in the future be at war.

Eighteenth Question.—"Are the concessions for a naval base in the Gulf of Fonseca and the lease of Great Corn Island and Little Corn Island, that were granted by Nicaragua, and that placed certain waters and territory of Nicaragua under the laws and sovereignty of a foreign nation, acts that violate Article II of the General Treaty of Peace and Amity concluded at Washington by the Central American Republics?"

Answered in the affirmative by Judges Medal, Oreamuno and Castro Ramírez, and in the negative by Judge Gutiérrez Navas. Judge Bocanegra answered in the affirmative, but on the ground that the change here contemplated affects not only the State wherein it operates, but also the other countries signatory to the treaty referred to in the question.

Nineteenth Question.—"Can it be legally declared that the Bryan-Chamorro treaty violates primordial interests of El Salvador as a Central American State?"

Judges Medal, Oreamuno and Castro Ramírez answered in the affirmative, insofar as relates to the aspirations consecrated by their respective political constitutions and the purview of Central American public law regarding the reconstruction of the old Federal Republic of the Center of America. Judge Gutiérrez Navas answered in the negative. Judge Bocanegra answered that such declaration may not properly be made, because it refers to interests pertaining to the future and possessed of a moral and political character, the judicial determination of which is impossible on the part of the Court at this time.

Twentieth Question.—"Was the intervention and consent of the Republic of El Salvador necessary to the Government of Nicaragua in order that the latter might validly grant the concession for a naval base in the Gulf of Fonseca?"

Judges Medal, Oreamuno and Castro Ramírez answered that the intervention and consent of the Government of El Salvador were necessary to the Government of Nicaragua for the concession of a naval base; Judge Gutíerrez Navas answered in the negative; and Judge Bocanegra answered that, in view of the fact that the question of nullity is not involved in this action, the word "validly" should be eliminated from the question and that, therefore, he eliminates the word from his answer, which is affirmative.

> *Twenty-first Question.*—"Has the Government of Nicaragua, by its conclusion of the Bryan-Chamorro treaty, violated rights that belong to El Salvador by virtue of Article IX of the General Treaty of Peace and Amity above mentioned?"

Judges Medal, Oreamuno, Castro Ramírez and Bocanegra answered in the affirmative, and Judge Gutiérrez Navas in the negative.

> *Twenty-second Question.*—"Is the Defendant Government under the obligation, in conformity with the principles of international law, to reestablish and maintain the legal status that existed between El Salvador and Nicaragua prior to the conclusion of the Bryan-Chamorro treaty respecting matters here at issue?"

Judges Medal, Oreamuno and Castro Ramírez answered that in conformity with measures possible under that law, that Government is so obligated. Judge Gutiérrez Navas answered in the negative, on the ground that there has been no change in the legal status; and Judge Bocanegra answered that in his opinion the Nicaraguan Government is under the obligation to make such reparation as may be possible in conformity with the principles of international law.

Twenty-third Question.—"Can the Court enjoin the Government of Nicaragua to abstain from fulfilling the Bryan-Chamorro treaty, as prayed by the High Party Complainant?"

Judges Medal, Oreamuno and Casto Ramírez answered in the negative, on the ground that one of the High Parties signatory to the Bryan-Chamorro treaty is not subject to the jurisdiction of the Court; Judges Gutiérrez Navas and Bocanegra answered in the negative.

Twenty-fourth Question.—"Will the Court grant such other and further relief in this case as is asked for in the fourth prayer of the main complaint?"

Judges Medal, Oreamuno, Castro Ramírez and Bocanegra answered in the negative, on the ground that no such further relief has been expressly prayed for and argued in the case. Judge Gutiérrez Navas answered in the negative.

WHEREFORE the Court declares:

First.—That it is competent to take cognizance of and decide the present case brought by the Government of the Republic of El Salvador against the Government of the Republic of Nicaragua.

Second.—That the exceptions interposed by the High Party Defendant must be denied.

Third.—That the Bryan-Chamorro treaty of August fifth, nineteen hundred and fourteen, involving the concession of a naval base in the Gulf of Fonseca, constitutes a menace to the national security of El Salvador and violates her rights of co-ownership in the waters of said Gulf in the manner, and within the limitations, specified in the foregoing act recording the votes of the Court.

Fourth.—That said treaty violates Articles II and IX of the Treaty of Peace and Amity concluded at Washington by the Central American States on the twentieth of December, nineteen hundred and seven.

Fifth.—That the Government of Nicaragua, by availing itself of measures possible under the authority of international law, is under the obligation to reestablish and maintain the legal status that existed prior to the Bryan-Chamorro treaty between the litigant republics insofar as relates to matters considered in this action.

Sixth.—That the Court refrains from making any pronouncement with respect to the third prayer of the original complaint.

Seventh.—That, with respect to the fourth prayer of the original complaint, the Court takes no action.

ANGEL M. BOCANEGRA,
DANIEL GUTIÉRREZ N. (NAVAS),
MANUEL CASTRO RAMÍREZ,
NICOLÁS OREAMUNO,
SATURNINO MEDAL,
MANUEL ECHEVERRÍA,
Secretary.

It Appears in Conclusion: that, during the course of the present action, the Department of Foreign Relations of the Republic of Honduras brought to the attention of this Court a copy of a communication it had addressed, by way of protest and for the safeguarding of its rights, on the thirtieth of September of last year, to the Ministry of Foreign Relations of the Republic of El Salvador, against the text of the Salvadorean complaint that alleges co-ownership in the Gulf of Fonseca; which communication went on to declare that the Government of Honduras has not recognized the status of co-ownership with El Salvador, nor with any other republic, in the waters belonging to it in the Gulf of Fonseca. That communication was, by resolution of the Court, transcribed and sent to the High Parties Litigant, and in due course replies were received, from their respective Foreign Offices.

SECOND PART.

Examination of Facts and Law

CHAPTER I.

Concerning the Peremptory Exception as to the Competency of the Court.

Whereas: The High Party Defendant bases its exception to the competency of the Court because of lack of jurisdiction on two grounds of very distinct import, to wit, first: "The Government of El Salvador, in preparing its complaint, chose to ask for a decision on a new claim that had not been argued between the respective foreign offices, and thus cannot correctly say, in regard thereto, that a settlement could not be reached; wherefore, diplomatic channels not having been exhausted in an effort towards settlement thereof, the complaint cannot properly be admitted;" and, second: The Court is without jurisdiction to decide *mixed* controversies or questions such as those with which Central American nations may concern themselves in connection with interests of a power foreign to Central America.

Article I of the convention that created the Court confers on it the amplest jurisdiction over those controversies that may arise between Central American Governments, wherein "the respective Departments of Foreign Affairs may not be able to reach an understanding." And it appears from the documents filed in the case by both High Parties, that the Governments of El Salvador and Nicaragua not only had recourse to argument between their respective foreign offices, but exhausted that means of settlement by their notes of April 14, and July 26, 1916, wherein the two Governments contemplated the conclusion

of the Bryan-Chamorro treaty in all its many aspects, both legal and moral, and the Government of Nicaragua reached the following conclusion, which is incompatible with any idea of amicable settlement:

> "In conclusion, Your Excellency must permit me to observe that, in consonance with the solemn declaration contained in the note itself that the Government of El Salvador will avail itself of every means afforded to it by justice, law and existing international agreements to secure invalidation of that pact, my Government, in its turn, expresses to Your Excellency's Government its unalterable purpose also to avail itself of all means afforded to it by justice and law to maintain inviolate the validity of that diplomatic agreement."

The argument that the efforts towards settlement were made solely in connection with the additions to the complaint is futile, for those additions do not involve a new dispute or controversy; they constitute perfectly germane amplifications of the Salvadorean claims that were fully set forth, in the note of the Foreign Office of that country, not only without reservation as to concrete points or subject-matter, but as an appeal to the cordial friendship of the Nicaraguan Government for the purpose of dissuading it from consummating the Bryan-Chamorro treaty—which, the note pleads, "will seriously injure the primordial interests, not alone of this Republic, but of all Central America." And it is clear that since, through diplomatic channels, efforts were resorted to that were directed against the entire legal structure of the Bryan-Chamorro treaty, the Complainant Government was justified in confining the petition contained in its complaint to such, or any of the matters in controversy, and this, without prejudice to its right—universally conceded to every plaintiff, by the laws of procedure—to amplify its prayers before the answer to the complaint brings about

the quasi-contractual status of *lis pendens;* provided, of course, that such additional prayers relate, as is the case here, to matters concomitant with the injuries of which complaint is made by the High Party Complainant.

Whereas: What may be called the fundamental argument: that the Court has no jurisdiction over the subject-matter of this suit because it involves interests of a third nation that is not subject to the authority of the Court, is also unsound in the opinion of the Judges. The jurisdiction of the Court is general as to all questions or differences that arise between two or more Central American Governments, "whatever may be their nature and whatever their origin." This is the language of Article I of the Convention, the natural interpretation whereof excludes every exception incompatible with an agreement for a judicial arbitration that is entered into without reservation, as is the case with the arbitration here entrusted to the Central American Court of Justice.

The circumstance that the Republic of the United States of North America has interests connected with the Republic of Nicaragua does not justify the latter in evading its obligation to submit herself to the jurisdiction of the Court, which is here called upon to adjust the legal situation between two countries signatory to the Treaties of Washington, even though its jurisdictional power does not extend to a third nation the interests of which have not been controverted, and could not be controverted, without special agreement on her part.

The absolute competency of the Court is guaranteed by the fact that the Bryan-Chamorro treaty relates immediately to the legal order created in Central America, and contracts exclusively respecting property located in Central America over which it is natural that this international court of justice should be the only authority called upon to settle controversies between two or more States arising out of an action that may be called *real.*

In carrying out its mission, it is enough that the Court shall confine itself within the scope of its peculiar power and render a decision embracing solely the rights in litigation between El Salvador and Nicaragua; for, by accepting the argument of the High Party Defendant, many questions that might arise among or between Central American Governments would be excluded from its cognizance and decision if weight be given to the trivial argument that a third nation foreign to the institutional system created by the Treaties of Washington possesses interests connected with the matters or questions in controversy.

To admit that argument would be to render almost negligible the judicial power of the Court, since the fact of invoking interests connected with a third nation would detract from the Court's judicial mission, which, according to the treaty, is indispensable to the object of "efficaciously guaranteeing the rights of the Signatory Parties and maintaining inalterably peace and harmony in their relations without being obliged to resort in any case to the employment of force." Questions of transcendental importance, having their origin in treaties entered into by a Central American Government with a Foreign Government would be excluded from the cognizance of the Court even though something might be stipulated therein that in concrete form might menace, violate, or imply violation of, the fundamental rights of the States or of the treaty rights that reciprocally have been conceded by the nations of the Central American Isthmus. That restriction, according to the unanimous consensus of the Judges' opinions, cannot be accepted by the Court because it would violate the letter and spirit of the treaty creating this Court and would constitute a germ of conflicts that might perhaps engender consequences that would be painful.

On the other hand, Article XXII of the Convention confers on the Court the power to determine its competency by interpreting treaties and conventions pertinent to the matter in dispute and by applying the principles of international law—a high prerogative which, to the end that once the *potestas judicandi* is decreed, the obligatory character of its decision may not be denied, removes from the field of free arbitrament among the signatory nations the right to decide as to the competency of the Court.

By virtue of the foregoing considerations, the Court hereby declares its competency to take cognizance of and decide the action brought by the Government of El Salvador which falls within the letter and spirit of Article I of the Convention referred to: providing for full judicial arbitration, without restriction as to justiciable subject-matter.

CHAPTER II.

Analysis of the Action.

The Legal Status of the Gulf of Fonseca.

Whereas: In order to fix the international legal status of the Gulf of Fonseca it is necessary to specify the characteristics proper thereto from the threefold point of view of history, geography and the vital interests of the surrounding States.

The historic origin of the right of exclusive ownership that has been exercised over the waters of the Gulf during the course of nearly four hundred years is incontrovertible, first, under the Spanish dominion—from 1522, when it was discovered and incorporated into the royal patrimony of the Crown of Castile, down to the year 1821—then under the Federal Republic of the Center of America, which in that year attained its independence and sovereignty, down to 1839; and, subsequently, on the dissolu-

tion of the Federation in that year, the States of El Salvador, Honduras and Nicaragua, in their character of autonomous nations and legitimate successors of Spain, incorporated into their respective territories, as a necessary dependency thereof for geographical reasons and purposes of common defence, both the Gulf and its Archipelago, which Nature had indented in that important part of the continent, in the form of a gullet.

During these three periods of the political history of Central America, the representative authorities have notoriously affirmed their peaceful ownership and possession in the Gulf; that is, without protest or contradiction by any nation whatsoever, and for its political organization and for police purposes, have performed acts and enacted laws having to do with the national security, the observance of health and with fiscal regulations. A secular possession such as that of the Gulf, could only have been maintained by the acquiescence of the family of nations; and in the case here at issue it is not that the *consensus gentium* is deduced from a merely passive attitude on the part of the nations, because the diplomatic history of certain powers shows that for more than half a century they have been seeking to establish rights of their own in the Gulf for purposes of commercial policy, but always on the basis of respect for the ownership and possession which the States have maintained by virtue of their sovereign authority.

Those efforts, manifested in conventions entered into with certain Governments of Central America, or by attempts of a different import on the part of agents of those powers, had the result, finally—and for the purpose of putting an end to repeated and dangerous controversies—of crystalizing themselves in the stipulations of the Clayton-Bulwer Treaty of April 19, 1850, between the United States and Great Britain, wherein was announced

reciprocally the right to construct or maintain fortifications dominating any canal across the Isthmus, or to occupy, fortify, colonize or exercise any measure of dominion over Nicaragua, Costa Rica, the Mosquito Coast or any other part of Central America. The coveted Gulf of Fonseca, then, was protected against all danger, at least down to the time of the conclusion of the Hay-Pauncefote Treaty, which abrogated the former pact.

Therefore, whatever may have been the motives that brought about the conclusion of the Clayton-Bulwer Treaty, and whether or not those motives are the subject of divergent points of view, the fact is that that pact consecrated a principle of justice—of honorable respect for the sovereignty and independence of the weak Central American nations—which should continue to serve as the rule of action in the international legal relations respecting the Gulf of Fonseca.

The locality and geographic conditions of the Gulf should be studied in the light of the following maps that the Court has had before it: a copy of the map issued by the American Admiralty (*i. e.*, the United States Hydrographic Office, see Chart No. 973), and which, in the opinion of the engineers Barberena and Alcaine, is the best map extant of this part of the Central American coast and the one that served as the basis of the report and opinion of those engineers; the map drawn and published in 1884 by a North American naval commission under the direction of Commander E. C. Clark; the map prepared in 1838 by Captain Sir Edward Belcher of the Royal English Navy which was used by E. G. Squier in connection with his interesting work, *Notes on Central America*, published in 1850, and, finally, the map published in 1909 by the engineer E. C. Fiallos. The report and opinion of the above-mentioned engineers filed with the complaint states:

"Paralleling the coast, we have traced on the Salvadorean and Nicaraguan parts that form the gullets or entrance to the Gulf, the two lines (distant twelve miles from the coast) that mark the respective limits of the zone of Maritime Inspection according to the generally accepted prescriptions in that connection, and it is thus clearly to be seen that those lines intercept or overlap, thus closing the Gulf, which is thereby reduced to an interior bay of purely Central American jurisdiction.

"We have arrived at the same conclusion by merely considering that the entrance to the Gulf is 35 kilometers, approximately, from Amapala Point, in El Salvador, to Cosigüina Point, in Nicaragua; and that, by measuring four marine leagues, or 22,220 meters, from each of those points, the lines traced necessarily meet and dovetail; otherwise the entrance would have to be at least 44,440 meters, or nearly 10 kilometers wider than it is.

"If the shortest distance between Meanguerita Island—an integral part of the Salvadorean coast—and the Peninsular of Cosigüina be taken as the points of entrance to the Gulf, the width would be 15 kilometers, which is barely equal to 8 miles; and, if the islets known as the Farallones be taken as the limit of the Nicaraguan coast on that side, the entrance would be reduced to 7 kilometers 950 meters, or some 4 miles and a little more than a quarter."

The foregoing could be reenforced from other authoritative sources, such as the Lawyers' Society of Honduras, which adopted the report of a select commission appointed to study the legal aspects of the case of the Gulf of Fonseca in relation to the Bryan-Chamorro treaty, and which report is published in the important review of that body known as the *Foro Hondureño*, and the description given by the geographer Squier in his above-mentioned work. The report of that commission reads as follows:

"The entrance is fixed by a straight line running from Cosigüina Point, in Nicaragua, to Amapala

Point, in El Salvador, a distance of 19⅓ geographic miles or 35 kilometers and a fraction. Its coves or bays are those of Cosigüina, San Lorenzo and La Unión, and its principal islands are Tigre, Zacate Grande, Güegüensi, Exposición, the islets of Sirena, Verde, Violín, Garrobo, Coyote, Vaca, Pájaros and Almejas, belonging to Honduras; Meanguera, Conchagüita, Meanguerita, Punta Zacate, Martín Pérez and other islets belonging to El Salvador, and the Farallones, belonging to Nicaragua. Between El Salvador and Honduras no definitive treaty has been entered into marking out the two jurisdictions over the waters of this Gulf.

"In order to arrive at the distances between the points pertinent to the present inquiry, we have taken as a basis—without prejudice, however, to other opinions—the map prepared and published in 1884 by American naval officers under the direction of Commander E. C. Clark, which agrees almost entirely with the Sonnestern map and with Nicaragua's 1905 map, published by the Oficina Internacional Panamericana. The map published in Honduras in 1909 by the engineer E. C. Fiallos shows certain insignificant differences from the one we have taken for our basis.

"The width of the waters in the Cove of Cosigüina, on the boundary line with Nicaragua, and drawn by the Mixed Commission of 1894, is 10⅜ marine miles, or 19 kilometers. Half that distance is 5⅛ miles, or 9.5 kilometers. From the coast to Amatillo the distance is approximately 17.5 kilometers. From Rosario Point, or Mony Penny, towards the Southernmost point of Tigre Island, the distance is 11⅓ miles or 21 kilometers. From Rosario Point to Meanguerita it is 8⅔ miles. From Amapala Point to Rosario Point, 19⅛ miles; half that distance is 9¾ miles. From Amapala Point to the Farallones the distance is 15⅝ miles and from those islets to Rosario Point, 6 miles. From Meanguerita to the Farallones, 15 kilometers.

"The northern and eastern coasts of this Gulf belong to Honduras, and they are more than 60

geographic or marine miles in extent. The coasts that belong to Nicaragua on the south extend for 57 miles from Amatillo Point to Cosigüina Point; and the Salvadorean coasts, to the west, extend over a distance of 25 miles. There is, therefore, in the waters of the Gulf of Fonseca, an overlapping of the jurisdictions of the States of Honduras, Nicaragua and El Salvador.

"The depth of water in the Gulf varies from 14 to 25 feet at the entrance. In the interior are certain points of considerable depth and others where it does not exceed three feet. The channel for deep-sea vessels runs between Meanguerita and the Cosigüina coast, although the depth of 10 to 15 feet between Meanguera and Conchagüita also permits the passage of vessels of regular draft. These are the only entrance points towards Amapala. The entrance to La Unión for deep-sea vessels is by way of the channel lying between the Conchagua coast and the Islands of Conchagüita and Punta Zacate. Outside of these routes navigation is dangerous because of shallowness and the existence of many sandbanks. The safest anchorages at present are Amapala and La Unión. San Lorenzo and Cosigüina Bays or Coves have a mean depth of 7 feet, which permits navigation by light-draft vessels only, and at the widest part of the Gulf, which lies between Tigre Island and the Real Estuary, in Nicaragua, the mean depth is from 6 to 7 feet."

And, finally, the North American geographer makes the following statement on this subject:

"The Bay of Fonseca, sometimes called the Gulf of Amapala or Gulf of Conchagua, is without dispute one of the best ports—or, rather 'constellation of ports'—along the entire extent of the Pacific coast of this continent. Its greatest length is 50 miles and its mean width is 30 miles.

"It will be seen that this bay lies in the great longitudinal valley comprised between the volcanic hills of the coast and the true cordillera that extends from

Guatemala to Costa Rica. The entrance from the sea into the bay is nearly 18 miles between the great volcanoes of Conchagua and Cosigüina, which, like giant guardians, stand on either side as unfailing guides to mariners. On a line behind this entrance, and almost equidistant therefrom, lie the two considerable islands of Conchagüita and Meanguera and a group of rocks called the Farallones which protect the bay against the force of the ocean swells and divide the entrance into four channels of sufficient depth to admit vessels of all drafts.

"The Bay of Fonseca, by reason of its admirable ports, the means it offers for the construction and repair of vessels, its productive lands and the local traffic between El Salvador, Honduras and Nicaragua, is of great value and importance commercially. But its value to us is even greater, considering its position from a political and geographical point of view and especially as the inevitable terminal, in the Pacific, of a railway between the two oceans. And I do not hesitate to repeat what I said on a former occasion to the Government of the United States when I was its representative in Central America: 'The Bay of Fonseca is under every consideration the most important position on the Pacific coasts of Central America and so favored by nature that it cannot escape becoming the emporium of commerce and the center of enterprises in that part of the continent.'"

The foregoing descriptions give an exact idea of how vital are the interests guarded by the Gulf of Fonseca, and, if those interests are of incalculable value in making up the characteristics of an "Historic Bay" applicable thereto, there are other factors that determine even more clearly that legal status. These are:

A. The projected railway that Honduras began and which she will not abandon until this great aspiration of hers shall have been concluded. Over that railway will pass the interoceanic traffic that is to develop the rich and extensive regions of the

country. Its terminal stations, with their wharves, etc., will be located very probably on one of the principal islands nearest the coast of the Gulf.

B. El Salvador, in her turn has under her control a railroad which, starting at the port of La Unión, follows its course through important and rich departments of the Republic to connect with lines entering from Guatemala at the Salvadorean frontier.

C. The long-projected prolongation of the Chinandega railroad to a point on the Real Estuary on the Gulf of Fonseca to expedite and make more frequent communication on that side with the interior of Nicaragua.

D. The establishment of a free port decreed by the Salvadorean Government on Meanguera Island.

E. The Gulf is surrounded by various and extensive departments of the three riparian countries. These are of great importance because they are destined to great commercial, industrial and agricultural development; their products, like those of the departments in the interior of those States, must be exported by way of the Gulf of Fonseca, and through that Gulf must come also the increasing importations.

F. The configuration and other conditions of the Gulf facilitate the enforcement of fiscal laws and regulations and guarantee the full collection of imposts against frauds against the fiscal laws.

G. The strategic situation of the Gulf and its islands is so advantageous that the riparian States can defend their great interests therein and provide for the defence of their independence and sovereignty.

Whereas: It is clearly deducible from the facts set forth in the preceding paragraphs that the Gulf of Fonseca belongs to the special category of historic bays and is the exclusive property of El Salvador, Honduras and Nicaragua; this on the theory that it combines all the characteristics or conditions that the text writers on international law, the international law institutes and the precedents have prescribed as essential to territorial waters, to wit,

secular or immemorial possession accompanied by *animo domini* both peaceful and continuous and by acquiescence on the part of other nations, the special geographical configuration that safeguards so many interests of vital importance to the economic, commercial, agricultural and industrial life of the riparian States and the absolute, indispensable necessity that those States should possess the Gulf as fully as required by those primordial interests and the interest of national defence.

Whereas: The High Party Defendant, in its answer and in its allegations in opposition to the points of law set up by the High Party Complainant in its complaint, admits the following concrete propositions:

(a) The Gulf of Fonseca is a closed or territorial sea because it is small in extent and, therefore, belongs to the nations that own its coasts.

(b) The Gulf of Fonseca is a bay owned exclusively by El Salvador, Honduras and Nicaragua; but only as to the maritime territorial part that belongs to them respectively as owners of their coasts in their respective parts.

(c) Although Nicaragua, Honduras and El Salvador are owners of the Gulf, in those parts that pertain to each there is no community in the legal acceptation of the word; because the mere fact that there is no demarcation of frontier lines between two or more countries does not constitute community, although such lack of demarcation may have existed during the colonial dominion or during the brief domination by the Central American Federation. Even under the Spanish dominion territorial delimitations of the colonies were not ignored; this is shown by Appendix 2 which refers to a royal *cédula* addressed on the 11th of January, 1541, to all the governors, judges and captains of the Indies and of the islands and mainland of the ocean sea, commanding them to respect the boundaries of the Cartago Government (*Gobernación de Cartago*).

(d) The Government of Nicaragua recognizes that States may exercise *imperium* beyond their absolute jurisdiction over the sea, but in front of the coast over the open sea, and not to the right or left over portions of the territorial sea pertaining to other nations, for the insurmountable barrier of foreign sovereignties here arises to oppose such exercise of *imperium*. It also recognizes that the overlapping of lines traced parallel to the coasts at a distance of twelve miles respectively from the Points of Amapala and Cosigüina only demonstrates that the Gulf of Fonseca is territorial, but urges that the fact of overlapping does not give the Government of El Salvador the right to exercise its *imperium* over the parts of the Gulf itself that belong to Honduras and Nicaragua territorially.

(e) The jurisdictional waters of El Salvador, Honduras and Nicaragua do not merge and commingle in the Gulf itself, and, therefore, even in those waters thereof wherein the States may exercise police power and rights looking to security and defence, they may not maintain and exercise rights of sovereignty and co-ownership.

Whereas: The theory that the High Party Defendant accepts as the true test of the territoriality of the Gulf is one that must be examined in the light of the distances traced on the maps, because they give an idea of the real, or at least probable, extent of the Gulf. The geographer Squier fixes it approximately at 50 miles in length by 30 in width. The technical study by the engineers Barberena and Alcaine declares the existence of two zones in which, according to the law of nations and the internal laws of the riparian states, they may exercise their jurisdiction, to wit, the zone of one marine league contiguous to the coasts, wherein the jurisdiction is absolute and exclusive, and the further zone of three marine leagues, wherein they may exercise the right of *imperium* for defensive and fiscal purposes. And, in referring to the lines drawn parallel

with the coast from Amapala Point, in El Salvador, and from Cosigüina Point, in Nicaragua, those engineers claim that there is an overlapping of jurisdictions in the zones of maritime inspection.

So, then, if those lines be prolonged, following the contours of the respective coasts in that expanse of waters which, like a vestibule, lead up to the other or inner and narrower entrance to the bay—*i. e.*, the one between Meanguerita and the Cosigüina Peninsular—as far as the heights of the islands and promontories, which constitute a sort of counterfort that moderates the force of the waves entering the Bay from the outer sea, the overlapping becomes more pronounced, and probably might even extend over and embrace certain parts of the adjacent three-mile territorial zone over which the riparian States enjoy exclusive ownership. The circumstance that, in that narrower entrance, the line between Meanguerita and the Cosigüina Peninsular, may be a little more than eight miles in length, or four miles and a quarter if it runs by way of the Farallones, off the Nicaraguan coast, is undoubtedly a condition characteristic of territorial seas because that entrance is susceptible of defence by the cross-fire of cannon; but, taken alone, it is not sufficient for the deduction that because of its small extent the Gulf is a territorial sea, since the merging in the maritime inspection zone, chiefly in the gullets or entrances, shows the existence of a greater expanse of water than is comprised in that zone and over which each of the States enjoys exclusive ownership.

Much less can it be said that the conception of the authorities cited (Calvo, Grotius, Vattel and others) may be applied to such considerable expanses of waters as that of the Gulf of Fonseca. The lesser of the distances as to which consideration has been given, only indicates the need of the proprietary States of the Gulf to maintain

their exclusive ownership because of its strategic qualifications for defence against outside attack; and this is the more evident when the historic origin of the ownership is taken into account for the purpose of showing continuous, peaceful and undisputed use of the waters of the Gulf itself—a further capital characteristic that gives it a special legal status.

Whereas: The juridical character of the Gulf of Fonseca is subordinated to other conditions of first importance than those relating to the extent more or less great of its capacity and the narrowness of entrance; and it is in that sense that this Court has held it to belong to the category of *historic bays* and to be possessed of the characteristics of a *closed sea,* basing its opinion on what was decided as to territorial waters by the arbitral award of the Permanent Court of the Hague of September 7, 1910, and on the voluminous commentaries of the eminent jurist, Dr. Drago, one of the judges in the arbitration who rendered a separate opinion citing authorities on the point.

In fact, the award admitted the British claim that the bays referred to in the treaty with the United States, which was the basis of the controversy, are "geographic bays" irrespective of the width of their entrances; that they are "exceptions" and, according to the international writer cited, "appear in many treaties, and the doctrine expressly recognizes them." "The character of a bay," said the arbitral tribunal, "is subject to conditions that concern the interests of the territorial sovereign to a more intimate and important extent than those connected with the open coast. Thus conditions of national and territorial integrity, of defense, of commerce and of industry, are all vitally concerned with the control of the bays penetrating the national coast line." Dr. Drago, commenting on the award in his dissent, said:

"In what refers to bays it has been proposed as a general rule that the marginal belt of territorial waters should follow the sinuosities of the coast, so that the marginal belt being of three miles, only such bays should be held as territorial as have an entrance not wider than six miles.

"If the marginal belt be traced geographically along the sinuosities of the coast, it will be noted that at the point of entrance where the two lateral zones meet, there is a small triangle, or funnel-shaped figure, the delimination of which would be very difficult in actual practice. For reasons of convenience, and in order to avoid involuntary trespassing on fishing waters, many recent treaties, particularly those of Great Britain, have extended the width of the entrance to ten miles, measured between the opposite points towards the open sea.

"But this refers to common or ordinary bays, and not to those which, in our dissent, we have called 'historic bays.' As has been seen, the principle that underlies all the rules and jurisdictional distances is no other than that of paramount necessity to protect fiscal interests, persons and territory of the nation that claims sovereignty over the contiguous seas and over the gulfs, bays and coves that penetrate its coast line.

"From this point of view a fundamental distinction instantly becomes apparent. Not all of the entrances from the sea are of equal importance for defense, nor do they all demand the same degree of protection. Some are far from the centers of population, in places uninhabited or inaccessible and without fisheries or other exploitable wealth; and some are so intimately involved in the very vitals of a nation that any departure from full, absolute and indisputable possession thereof would be intolerable. Delaware Bay, which stands as the entrance to the great port of Philadelphia, Chesapeake Bay, which lies in a populous district of the United States, Conception Bay, in Newfoundland, from which, by an easy descent, the capital of that colony would be vulnerable—all are in that class."

Dr. Drago cites the opinions of Chancellor Kent, Secretaries of State Pickering, Buchanan and John Davis, and concludes his commentary by saying:

> "The United States appear to have abandoned that exaggerated theory (referring to the doctrine of promontories). At least, in the case before us, they adhere to the strict rule of the six-mile entrance for the generality of bays; but they except, as in necessity bound to do, their own vital bays, and cite a great collection of authorities and arguments in support of their exception. Those excepted bays appear in many treaties and the doctrine expressly recognizes them. * * * Continued use, necessities of self-defense and the will to appropriate expressly stated, must have greater weight in this case than in any other in giving effect to the theory of acquisition by prescription, and as placing historic bays in a special and separate category, wherein ownership belongs to the embracing country, which, having made the declaration of its sovereignty, has affirmed possession and incorporated them into its dominion with the acquiescence of the other nations."

And, finally, it is worthy of consideration that the Government of the United States itself, in the note addressed by the Department of State on the 18th of February, 1914, to the Minister of El Salvador at Washington, said categorically:

> "In your protest the position is taken that the Gulf of Fonseca is a territorial bay whose waters are within the jurisdiction of the bordering States. This position the Department is not disposed to controvert."

This evidently implies an express recognition of the unequivocal claim of sovereignty set up by the three States that surround the Gulf. The Secretary of State could do no less than follow the traditional doctrine proclaimed by other representatives and statesmen of the great North

American nation and apply it to the *vital bays* that indent the extensive coasts of the federal territory.

Whereas: in regard to the co-ownership in the Gulf of Fonseca claimed by the High Party Complainant, and in view of what is alleged on that point by the High Party Defendant, the question of division, demarcation or delimitation of jurisdictions between the provinces that constituted the patrimony of the Spanish Crown must be examined in the light of historical truth in order to harmonize their conclusions with the legal relations that now govern among the riparian States. A series of controversies over purely territorial boundaries demonstrates that the royal cedulas traced topographical lines based on the claims of the governors of the political divisions who knew little about their geographical conditions, wherefore arose many errors as to places, directions and distances. These circumstances, on the one hand, and, on the other, the secondary consideration that monarchs were not interested to prevent jurisdictional transgressions, since the patrimony of those political divisions pertained to a single proprietor or lord, resulted in the fact that the demarcations were in general confused and lacking in detail as is very properly said by counsel for Nicaragua. Proof of this lies in the fact that in their autonomous lives the Central American countries, and even the other countries of Latin America, have found themselves under the supreme necessity to mark out and make clear their frontiers in order to preserve harmony among the sister peoples, and in the failure of his Majesty the King of Spain, Don Alfonso XIII, in rendering his arbitral award in the boundary arbitration between Honduras and Nicaragua, to give weight to the royal cedula because the capitulation with Diego Gutiérrez of January 11, 1541, referred to territories with which it had nothing to do, such as Honduras and Nicaragua.

With respect to the Gulf of Fonseca, it must be noted that, as no fact of first importance had disturbed the cordial harmony of the States that surround it in the use and benefits of its waters, the Governments concerned themselves solely with fixing upon portions thereof as to which the exercise of the rights of neighboring countries might involve them in conflict. Thus it was that by mixed commissions, in 1884, between El Salvador and Honduras, and, in 1900, between the latter and Nicaragua, in marking out and making clear their respective land frontiers, they reached the point of drawing divisionary lines that started from certain coves and extended to a certain point in the Gulf. The first line did not endure because the Honduran Congress rejected the convention relating to land boundaries, signed at San Miguel, in the Republic of El Salvador, on the 10th of April, 1884, on the ground, among others, that the Commission exceeded its powers by extending its operations to the Gulf, a course unauthorized by the Honduran Government (Legislative Decree of 1885). The division adjusted with Nicaragua is the only one that still subsists. The line of this division appears on the maps here presented as running to a point midway between the southern part of Tigre Island and the northern part of Cosigüina Point (Mony Penny, or Rosario Point), thus leaving undivided a considerable expanse of waters belonging to the riparian States which extends as far as the Gulf's great outside entrance, which measures 35 kilometers in width.

Escriche's Dictionary of Legislation and Jurisprudence defines "community" as the quality that makes a thing common, so that any one may participate freely in its use; "common" things are those which, belonging privately to no one, belong or extend to many, all of whom enjoy the equal right to make use of them; "possession in common" is the enjoyment of or possession by two or

more persons of the same thing undivided, that is, in such way that the thing in its entirety belongs to all, none being able to specify his part.

The High Party Defendant recognizes that no demarcation existed among the countries adjacent to the Gulf prior to their constitution as independent entities, notwithstanding the fact that demarcations were then not unknown; but no proof whatever is adduced to show that subsequently those same States ever effected a complete division of all the waters embraced therein, for, although there was a division made with Honduras in 1900—which has been here invoked—the line drawn, according to the map of the engineer Fiallos (who was a member of the Mixed Commission), only extends as far as a point midway between Tigre Island and Cosigüina Point, thus leaving undivided, as already stated, a considerable portion of the waters embraced between the line drawn from Amapala Point to Cosigüina Point and the terminal point of the division between Honduras and Nicaragua.

Consequently, it must be concluded that, with the exception of that part, the rest of the waters of the Gulf have remained undivided and in a state of community between El Salvador and Nicaragua, and that, by reason of the particular configuration of the Gulf, those waters, though remaining face to face, were, as declared in the report of the engineers Barberena and Alcaine and as recognized by the High Party Defendant, confounded by overlapping.

And, since it is true in principle that the absence of demarcation always results in community, it is self evident that every community necessarily presupposes, in the legal sense, the absence of partition. This community in the Gulf has continued to exist by virtue of continued and peaceful use of it by the riparian States, and this is shown most clearly by the overlapping of jurisdictions in the zone in

which both litigant countries have been exercising their rights of *imperium;* though from this it is deduced that that legal status does not exist in the three marine miles that form the littoral on the coasts of the mainland and islands which belong to the States separately and over which they exercise ownership and possession both exclusive and absolute.

Similarly, no community exists in those waters that are embraced between islands and promontories the proximity of which to each other, in the littoral zones of exclusive ownership, results in an overlapping of the jurisdictions of the States, for in that case the demarcations must result from an arrangement in conformity with the recognized principles of international law. It is, therefore, evident that the exercise of jurisdiction in the unpartitioned waters is based on the legal nature of the Gulf, which makes them common, and in the all-important necessity to protect and defend the vital interests of commerce and industries, these being indispensable to national development and prosperity.

A change in the theory of the use of the common waters of the Gulf—which waters, because of their nature, must respond to the reciprocal needs of the adjacent States—would imply nullification of jurisdictional rights that should be exercised with strict equality and in harmony with the interests of the community. One coparcener cannot lawfully alter, or deliver into the hands of an outsider, or even share with it, the use and enjoyment of the thing held in common, even though advantage might result therefrom to the other coparceners, unless the consent of all is obtained. Wherefore, in the case here at issue, the concession of the naval base in the Gulf granted by the Government of Nicaragua to the United States, at such point on Nicaraguan territory as the concessionary may select (Article II of the Bryan-Chamorro treaty),

necessarily presupposing, as it does, occupation, use and enjoyment of waters in which El Salvador possesses a right of co-sovereignty, would have the practical effect of nullifying, or at least restricting, those primordial rights; because American warships in those waters, and all that depends on the naval base as well as territory, as such, and water highways, would be subject exclusively to the laws and sovereign authority of the United States (Article II of the above-mentioned treaty); in other words, the concession in question grafts a foreign power upon a part of the continent that has been, and is, subject to the exclusive and undivided ownership of three sister nations and thus places in grave danger the vital interests that they of necessity must possess and protect for their own development.

The universal principles that govern community in things are perfectly applicable to the Gulf of Fonseca, from the international point of view. Community is not common in the relations among nations, but it is not an inconceivable or an isolated fact. "In public law," says Heffeter, "there are certain acts and relations which, independently of agreements, and in a manner analogous to the quasi-contracts of civil law, produce effects similar to those arising from treaties. (3). Of an accidental community (*communio rei vel juris*), in a case wherein a country belongs at once to various states or sovereignties, or in the event of an acquisition of a thing in common over which the dispositions of the civil laws of a single country are not applicable. In such cases recourse must be had to principles heretofore explained relating to treaties of association, which principles are: that of equality of rights and obligations, at least where a portion shall have been previously stipulated; that of free enjoyment of a thing by each coparcener with a proviso against mutual injuries; and, finally, the principle that forbids the disposal of a

thing completely without the consent of the other coparceners, the power so to convey being limited to the portion corresponding to each. The dissolution of a community can only take place by means of a treaty or accidentally."

The same opinion prevails among other authorities, such as Fiore, Bluntschli, Perela, Rivier, E. Nys, and the Bolivian statesman Federico Díaz Medina, who cites the case of Prussia and Austria when, by the treaty of Vienna of 1864, they acquired from Denmark an undivided sovereignty over the Duchies of Schleswig-Holstein, and the case of Chile and Bolivia, who, by the treaty of 1876, recognized their reciprocal and definitive territorial ownership in the 24th parallel of latitude and at the same time community of ownership in, and the right to exploit, the guano deposits lying between the 23d and 24th parallels —an agreement that was superseded by the treaty of armistice of 1884.

Also from the point of view of various civil laws, among them those of Central America, and especially those of Nicaragua, in the light whereof the question of community in the Gulf may be contemplated. Article 1700 of the Civil Code of the Republic last mentioned gives to the coparcener of a thing held in common full ownership over his part, together with its emblements and profits, including the right freely to sell, grant or mortgage, provided no right personal to another be involved. But naturally that power should be, and is in fact, limited by Article 1710, which provides:

> "No coparcener may take for himself or give to a third party real estate held in common, in whole or part, in usufruct or for use, habitation or rental in the absence of agreement with the other interested parties."

A conflict of meaning is apparent here which, however, is perfectly explicable by an error of the copyist as shown

by a comparison of the Nicaraguan article with Article 399 of the Civil Code of Spain, which served as a model for the former. The latter gives the same power provided in the other but prescribes that "the effect of alienation or mortgage, with respect to co-owners, shall be limited to the portion adjudicated in the partition *on the extinction of the community.*" The article of the Nicaraguan Code omitted the complementary and conditional proviso; and proof of this lies in the fact that, in spite of providing for free disposition on the part of the coparcener, it excepts the personal rights to usufruct, use, occupation and leasing which, like all the others, are subject to the following rules of the Nicaraguan Code:

> "ARTICLE 1695.—Each coparcener may make use of the things held in common, provided also that he use them for the usual purposes for which they are destined, and that such use be not against the interests of the community."
>
> "ARTICLE 1698.—None of the coparceners may make any change in the thing held in common, even though such change would operate to the advantage of all, in the absence of their consent thereto."
>
> "ARTICLE 1699.—The agreement of the majority of the coparceners is necessary for the administration and better enjoyment of the thing held in common."

Whereas: The High Parties Contestant are in accord respecting the existence of the zone of maritime inspection in the Gulf of Fonseca, wherein the States exercise the right of *imperium* beyond their *absolute* jurisdiction over the sea for purposes fiscal and for purposes of national security; but the High Party Defendant claims that, because an unsurmountable barrier attributable to alien sovereignty stands in the way, that right should be exercised on the high sea directly opposite the respective coasts of the several countries, and not to the right and left over portions of the territorial sea belonging to others,

whereas the High Party Complainant claims that that zone exists as well within the Gulf as without.

The Court has admitted the latter claim because it finds that it is supported by Articles 2, 13 (first paragraph) and 16 of the Law of Navigation and Marine of the Republic of El Salvador, which read as follows:

> "ARTICLE 2.—Estuaries, coves and bays and the contiguous open sea to a distance of one marine league, measured from extreme low tide, are of national ownership; but the police power, for purposes connected with the country's security and the enforcement of the fiscal laws, extends to a distance of four marine leagues, measured from extreme low tide."
>
> "ARTICLE 13.—The territorial sea of the Republic is divided into five maritime departments as follows:
>
> "*First.*—The Maritime Department of La Unión, comprising the Bay of Conchagua, that part of the Gulf of Fonseca wherein are situated the Salvadorean islands, and the territorial sea as far as the parallel of the eastern mouth of the San Miguel River."
>
> "ARTICLE 16.—All officers exercising marine command will enforce the nation's police power over the four marine leagues mentioned in Article 2, within the limits indicated by the prolongations of the parallels that mark out the respective departments."

From the above-quoted provision it may be deduced without effort that the zone of inspection should be measured in the same manner as the littoral marine league, that is to say, from the line of extreme low tide; and, as that league, according to the principles of law, must be measured in connection with the sinuosities of the coast, so also that zone, which is a prolongation of the former, must follow the same direction. The fact that the waters of the Gulf belong to the three States that surround them has not operated to prevent the existence of a second zone that tends to protect the rights of each State with respect

to the others, under regulations, which, as the publicist, Don Andrés Bello, says, "are concerned more immediately with their prosperity and well-being"; because, considering their present political organization, the States contiguous to the Gulf possess among themselves rights and duties of reciprocal application in the use and enjoyment of the non-littoral waters, and because, the merchant vessels of all nations possessing, as they do, the right of *uso inocente* over those waters, the right of the States to exercise the police power and powers incident to national security and fiscal matters off their respective coasts is correllative to those rights. The overlapping that would result from continuing the prolongation of the lines towards the interior of the Gulf, would demonstrate the necessity of settling that collision of interests by means of treaties between the respective governments and, furthermore, the imperative necessity of avoiding an upsetting of the situation by other acts distinct from those exercised up to the present time with the reciprocal acquiescence of the co-owners of the Gulf.

And even in the contrary hypothesis—that is, assuming, as claimed by the High Party Defendant, that the right of *imperium* can be exercised directly off the coast only, taking for base the thirty-five kilometer line from Amapala Point, in El Salvador, to Cosigüina Point, in Nicaragua, and, therefore, ignoring the question of the right of ownership in the interior of the Gulf—the fact remains that the non-littoral waters preserve the same legal status of community as among the co-owners, subject only to certain fixed restrictions in the respective laws and regulations concerning use by outsiders. That claim the Court has been unable to admit, because the obligatory character possessed by the Laws of Navigation and Marine, of El Salvador, which were enacted to safeguard in the Gulf the rights and interests of the Republic,

cannot be ignored, and because, furthermore, those laws conform to the generally admitted principles of international law in regard to the points that are the subjects of those special provisions.

Whereas: The legal status of the Gulf of Fonseca having been recognized by this Court to be that of a historic bay possessed of the characteristics of a closed sea, the three riparian States of El Salvador, Honduras and Nicaragua are, therefore, recognized as co-owners of its waters, except as to the littoral marine league which is the exclusive property of each and, with regard to the co-ownership existing between the States here litigant, the Court, in voting on the fourteenth point of the questionnaire, took into account the fact that as to a portion of the non-littoral waters of the Gulf there was an overlapping or confusion of jurisdiction in matters pertaining to inspection for police and fiscal purposes and purposes of national security, and that, as to another portion thereof, it is possible that no such overlapping and confusion takes place. The Court, therefore, has decided that as between El Salvador and Nicaragua co-ownership exists with respect to both portions, since they are both within the Gulf; with the express proviso, however, that the rights pertaining to Honduras as coparcener in those portions are not affected by that decision.

Whereas: In regard to the protest addressed by the Government of Honduras to the Government of El Salvador, copy of which has been brought to the attention of the Court in this case by His Excellency the Minister of Foreign Relations of the former Government, the Court can do no less than accord to it the full effect claimed therefore by that high officer in his report of January 6, 1917, to the national congress of his country concerning the conduct of affairs of the foreign relations branch of the Executive power. The paragraphs that deal with this subject read as follows:

"The Government of Honduras, although it disclaimed a purpose to oppose in any manner the steps being taken by the sister Republic of El Salvador in this delicate matter, nevertheless believed it to be its duty to protest, and did protest, against the allegation of the complaint referred to, wherein co-ownership in all of the waters of the Gulf of Fonseca is claimed on the ground of the status of community among the three riparian Republics even as to the waters contiguous to the coasts and islands of Honduras, over which extends the undisputed sovereignty of the Republic as exclusive owner thereof, and in which that Republic has exercised, and now exercises, jurisdiction, as is recognized in the public documents of the Government of El Salvador itself.

"The Government is of the opinion that whatever may be the ultimate conclusion as to the legal status of the Gulf of Fonseca outside the territorial waters, co-ownership over those waters by any other republic cannot be recognized without compromising the integrity of the territory which the Constitution brings under the safeguards of the Powers of the State.

"As was to have been expected, the Government of El Salvador took the protest mentioned into consideration and gave to this Government frank and satisfactory evidence of its full justification, to that end accrediting thereto the Confidential Agent, Dr. Don Manuel Delgado, with whom an adjustment was signed, which, when approved by the Government of El Salvador, will put an end to the differences that have arisen and safeguard the rights of thisRepublic."

CHAPTER III.

Concerning the Establishment of a Naval Base.

Whereas: The legal status of the Gulf of Fonseca as an *historic or vital bay*, having already been established by its historical, geographical and sociological antecedents,

the Court will now proceed to examine that legal status in relation to the stipulation of the Bryan-Chamorro treaty which refers to a naval base and which reads as follows:

> "ART. II. To enable the Government of the United States to protect the Panama Canal and the proprietary rights granted to the Government of the United States by the foregoing article, and also to enable the Government of the United States to take any measure necessary to the ends contemplated herein, the Government of Nicaragua hereby leases for a term of 99 years to the Government of the United States, the islands in the Caribbean Sea known as Great Corn Island and Little Corn Island; and the Government of Nicaragua further grants to the Government of the United States for a like period of 99 years the right to establish, operate, and maintain a naval base at such place on the territory of Nicaragua bordering upon the Gulf of Fonseca as the Government of the United States may select. The Government of the United States shall have the option of renewing for a further term of 99 years the above leases and grants upon the expiration of their respective terms, it being expressly agreed that the territory hereby leased and the naval base which may be maintained under the grant aforesaid shall be subject exclusively to the laws and sovereign authority of the United States during the terms of such lease and grant and of any renewal or renewals thereof."

The treaty, then, conveys a concession, in the form of a renewable lease, for the exploitation and maintenance of a naval base at a point on Nicaraguan territory in the Gulf of Fonseca, to be designated by the Government of the United States; and, considering the legal status of that Gulf and the extremely valuable interests possessed by El Salvador therein, it is proper here to determine whether the establishment of a naval base at any point on the bor-

ders of that closed sea would menace the security of that Republic and endanger its national integrity.

A distinguishing characteristic of all closed or territorial bays is, in the opinion of the text-writers, the exclusive possession enjoyed in its waters by the states that own its coasts and which is exercised for the purpose of safeguarding the rights of territorial defence and the rights that relate to their vital economic and commercial interests: The sovereigns of the territory extend the exercise of their *imperium* beyond the *maritime littoral* in such a bay and extend their protection throughout the waters comprised within the bay which nature entrusts to their moral and material domination as though those waters came under their complete ownership.

But without these circumstances, it would still be necessary to hold that the establishment of a naval base inside the Gulf would be a menace to the Republic of El Salvador, even though that base were located on the *maritime littoral* of the Republic of Nicaragua, since though the Government of that Republic may never, during its international life, have performed any official act that might have implied a menace to the Salvadorean nation.

The function of sovereignty in a state is neither unrestricted nor unlimited. It extends as far as the sovereign rights of other states. Bluntschli tells us that "sovereignty does not imply absolute independence or absolute liberty." "States," he says, "are not absolute beings but entities whose rights are limited"; and he adds that a state may not claim more than such independence and liberty as is compatible with the necessary organization of humanity, with the independence of other states, and with the ties that bind states together. (Nys, *Le Droit International*, Vol. I, p. 380.)

This doctrine takes on added moral and legal force when applied to such Central American countries as El Salvador, Honduras and Nicaragua, because in each independence and sovereignty with respect to the Gulf of Fonseca are limited by the concurrence of rights which carries with it, as a logical postulate, a reciprocal limitation.

To invoke the attributes of sovereignty in justification of acts that may result in injury or danger to another country is to ignore the principle of the *independence* of states which imposes upon them mutual respect and requires them to abstain from any act that might involve injury, even though merely potential, to the fundamental rights of the other international entities which, as in the case of individuals, possess the right to live and develop themselves without injury to each other; and, if those principles be deep-rooted in international life, they take on a greater importance when applied to Central American countries, which on certain occasions have incorporated those postulates as basic principles of their public law.

The Assembly of Plenipotentiaries that met at this Capital [of Costa Rica] in 1906 fixed as the point of departure for the discussions that preceded the General Treaty, a solemn Declaration of Principles consecrated by the Governments as canons of Central American international public law; among these is the following:

> "II.—The solidarity of the interests that relate to the independence and sovereignty of Central America, considered as a single nation."

That declaration, like the others adopted at the same time, is of high moral value, because in the protocols adopted at the Conferences of Washington it appears that the stipulation of the Treaty of San José served as the cementing basis of the system of law created in the treaties there subscribed in 1907 and now in force.

A reciprocal duty is entailed upon the Governments of El Salvador and Nicaragua to guard those supreme interests which are confided to the custody of all the sister countries; for, were that not so, it would be enough for the Court, in order to declare the naval base granted in the Bryan-Chamorro treaty to be a menace to El Salvador's security and vital interests, to take into consideration the fact that a naval base was stipulated for in the the neighborhood of the Republic of El Salvador, the establishment and development of which would make necessary the use of common waters in the Gulf of Fonseca and the construction of engineering works, the accumulation of war material and the installation of barracks in places which, because of the topography of the land, would completely dominate Salvadorean territory.

In the opinion of the Court, the Agadir case is perfectly applicable to the argument maintained by the High Party Complainant. It matters not that in that case the parties who claimed that their rights were "menaced" were great military powers. The proposition was there adopted as a fundamental principle of public law that all states are naturally equal and that they are under the same obligations and enjoy the same rights. "The relative magnitude," says Sir William Scott, referring to sovereign states, "creates no distinction of right, and any difference that may be claimed in respect to that basis must be considered as a usurpation." (Calvo, *Derecho Internacional*, p. 197.)

Similar doctrines have been put forth on various occasions by North American publicists in discussing the absolute respect due to nations however feeble and diminutive they may be.

The illustrious former Secretary of State, Mr. Root, at the Pan-American Congress held at Rio de Janeiro, said:

"We deem the independence and *equal rights* of the smallest and weakest member of the family of nations entitled to as much respect as those of the greatest empire, and we deem the observance of that respect the chief guaranty of the weak against the oppression of the strong."

Those declarations were confirmed by their author, in 1916, at the Pan-American Scientific Congress.

At the memorable Conference at the Hague in 1907, the principle of the legal equality of all states was adopted in obligatory form:

"Another glorious achievement that can never be denied to the world reunion of 1907, lies in the fact that it made secure against all attack the great principle of the legal equality of all nations. A certain chapter of the proceedings of that great conference shows clearly a more or less deliberate attempt to impose, by the rules of law, on the weak the sovereignty of the strong, by creating original means of intervention under the disguise of an independent jurisdiction.

"The clamor against those proposals was great and the opposition positive and successful. Rather than permit so radical a change in the society of nations and undo, in 1907, the work consecrated by four centuries of world struggle, the majority of the nations, great as well as small, would have broken up the Conference and brought about a turbulent dissolution." (*La Segunda Conferencia de la Paz*, by Don Antonio Bustamante y Sirvén.)

Consequently the considerations put forth on this point by counsel for the Government of Nicaragua are ineffectual when he points out that in the Agadir case great military powers were involved, among which the danger of collision and effective war is a constant menace, whereas in the case of the naval base in the Gulf of Fonseca, small adjacent countries only are involved, as to which neither clashes nor rivalries with the United States are to be thought of.

The history of Central America shows that *the principle of nationalities* has always been defended by the Public Power; and these were not animated by a feeling of rivalry or fear, but by obedience to the sociological law that governs the harmonious development of ethnical unities and brings about their cohesion.

Public documents* demonstrate that in the year 1854, in view of the fear that the Honduran Government would alienate Tigre Island, in the Gulf of Fonesca, and turn it over to a foreign government, Guatemala, Costa Rica and El Salvador lodged a formal protest with the Honduran Department of Foreign Relations—

> "The matter in question compromises, not only the nationality and independence of Honduras, but that of all Central America," said the Guatemalan Minister Señor Aycinena, in his note.

The Costa Rican Minister, Señor Calvo, after certain pertinent reflections, stated that:

> "The fact denounced by the official press of El Salvador and communicated to this Department by the Foreign Office at Cojutepeque that Tigre Island had been conveyed to Mr. Follin, who held himself forth as the American Agent, and the equally manifest intention of selling other parts of Central American territory, bears the character of *anti-nationalism* that affects the security of this part of the continent and forces the neighboring states to intervene in opposition to contracts that compromise their own future integrity as well as that of the contracting state.
>
> "As a government, that of Honduras is as independent as any other and may exercise its sovereignty and modify it as it pleases; but, as a member of the

*Contained in a study entitled: "*La Venta* (sale) *de la Isla del Tigre en 1854*," by Dr. David Rosales, Jr., in which the author places the official documents that relate to these facts at the disposition of the Government of El Salvador.

society of Central America, title to which it has so often descanted upon in these later times, it has no right to exercise its sovereignty at the cost of the whole, of which it is no more than a small part."

His Excellency Minister Gómez, in his turn, said:

"The Government of El Salvador believes that the transfer of our coasts or islands into foreign hands imports imminent or remote loss of the independence of those countries," etc.

The documents referred to also show that to those protests the Government of Honduras replied by declaring that the fears suggested were unfounded; but that, for the purpose of avoiding the anticipated danger, it had, on a date prior to the protests, issued a declaration making clear its purpose, as follows:

"That the State was not alienating, and could not alienate, the rights of ownership and sovereignty that it possessed over the said island."

This attitude of the Governments of Central America in support of the principle of nationalities is not unique on the American continents. It was also asserted by the Government of the Republic of Chile when it feared that the Government of Ecuador would convey the Galápagos Islands to the United States.

The diplomatic steps taken in that matter, in the year 1869, gave rise to the protocol parleys that culminated in the express declaration of the Government of Ecuador that such alienation was not intended; and, alluding to that important incident of South American diplomacy, Don Aurelio Bascuñán Montes said, in his valuable *Miscelánea histórico-diplomática* presented to the Fourth Scientific Congress (First Pan-American):

"The Minister of Foreign Relations, Señor Amunátegui, reiterated his accord with the facts set forth,

that constituted a guarantee of the correct and loyal procedure of a government bound to Chile by so many ties, and that he felt that he might be excused from giving further reasons, since, according to the declarations of the Ecuadorian Minister Plenipotentiary, there was no ground for belief that the Government of that sister Republic had any idea of entering into such a transaction.

"Such is the extract from the Flores-Amunátegui protocol conference of December 31, 1869.

"This was not the first time that the Galápagos matter had occupied the attention of the Pacific Republics.

"Minister Flores, in the course of his protocolized and detailed declaration of 1869, alludes to the mission of the Chilean Minister, Don José Francisco Gana to Quito, in the year 1855, to settle that same question, a mission that was of the greatest importance, judging from the following paragraph, which President Don Manuel Montt used in his inaugural address before the legislative body in 1856:

"'The extraordinary mission sent to Ecuador in the beginning of last year has returned home after faithfully carrying out the views of the Government. The Convention of November 20, 1854, referring to the Galápagos Islands, has remained without effect. The Ecuadorian Government, with dignity and caution has dissipated the anxieties caused among the Republics of the continent by certain stipulations of that Convention.'"

The antecedents invoked show that the proclamation of the Monroe Doctrine in the year 1823 did not prevent the American countries from excercising the unavoidable duty of looking after the integrity and defence of their territories, for that celebrated declaration, unquestionably of the highest interest, consecrates the express recognition of "the free and independent condition which they (the American continents) have assumed and maintain"; but it does not involve an international tutelage that

confides the defense of the continent against all attempts at colonization—in a unique and exclusive form—to the military and naval power of the United States, to the exclusion of and ignoring the duties that pertain to the other Latin-American Republics. That proposition does not comport with the solemn declarations of the statesmen of the United States, repeated on many memorable occasions, and much less could it constitute an obligatory tie for the Republic of El Salvador, which is not bound in contractual form to recognize even an authentic interpretation of the doctrine of President Monroe.

Whether the concession and operation of a naval base may be, as maintained by counsel for the High Party Defendant, for the greater welfare, security and guaranty of the Isthmian countries, or whether it signifies, as alleged by the High Party Complainant, a cause for vexation and worry, and a source of danger to its autonomy, is a question of purely political portent that conflicts with the tendencies or plans of the Government of the United States, an international entity not subject the jurisdiction of this Court. It is enough for its juridico-arbitral finality to consider, in its true weight, the moral obligation also imposed by treaties and express laws to maintain the integrity of Nicaraguan territory and to preserve its republican system free from all foreign sovereignty—however noble and disinterested it may be—in order to estimate the menace to the security of El Salvador resulting from the establishment of a naval base in the Gulf of Fonseca provided for, not in anticipation of a state of peace, but in anticipation of a state of war which, should it come, would convert the maritime and land territory of that Republic into a field of military operations subject to all the attendant risks and havoc, besides rendering nugatory El Salvador's duties of neutrality to the whole extent specified in the Hague Convention.

In support of the Court's conclusion that the establishment of a naval base at any point on that interior and closed sea would menace the natural security of El Salvador, a great many historic precedents could be invoked, and a needlessly prolix collation made of the uniform doctrines laid down by the publicists; but the Court does not think that this is necessary in a matter so clear in the light of the principles of science. It confines itself, therefore, in concluding this section, to quoting two principal conclusions reached by the Institute of International Law at its first session in Washington on the 6th of January, 1916, on the occasion of the Solemn Declaration of the Rights and Duties of Nations, as follows:

> "I.—Every nation possesses the right to exist and to protect and preserve its existence; but that right does not imply the power, nor justify any act, whereby a state, in order to protect and preserve its existence, may commit wrongful acts against innocent states that may be doing no harm."
>
> "V.—Every nation that possesses a right conformable with the law of nations also has the right to have it protected and respected by all nations, because right and duty are co-relative; and wherever a right exists in one, all are bound to observe it."

CHAPTER IV.

Concerning the Primordial Interests of El Salvador as a Central American State.

Whereas: It is also unquestionable that the Bryan-Chamorro treaty violates primordial interests of the Republic of El Salvador as a Central American State and that that moral violation results from the fact that the Government of Nicaragua ceded to the United States an integral part of Nicaragua's territory when it conveyed a naval base in the Gulf of Fonseca and leased

Great Corn Island and Little Corn Island in the Atlantic, turning those territories over to the complete domination of the sovereignty of the concessionary nation.

By virtue of the beautiful traditions of history the peoples of the Central American Isthmus make a *moral whole*, and, although, at present divided into five independent States, they have not broken the strong ties that call upon them, now as well as formerly, to form a single nationality.

Nicaragua and El Salvador cannot consider themselves as two international entities bound by mere ties of courtesy. No; the two countries together formed part of the Captaincy-General of Guatemala subject to the dominion of the Spanish monarchy; later they burst forth into a life of freedom by the same solemn declaration of independence, and remained constituent parts of the Federal Republic of the Center of America until the year 1839. Since that date the two countries have taken part in various attempts at union that culminated, in the year 1898, in the appearance of the Greater Republic of Central America.

Their political constitutions have always declared that the two countries are disintegrated parts of the Central American Republic and that they recognize the necessity of a return to the union. These repeated declarations cannot be interpreted as void of meaning, for they are a part of the fundamental codes, the most important organic acts of two peoples, laying down the basic principles for the regulation of their lives and their tendencies.

On the other hand, it is not true that the Republic of Nicaragua, in its present constitution, adopted in 1912, failed to declare—and merely as a simple aspiration—the longing of the Nicaraguan people to see reborn the Republic of Central America. Article II of that political constitution reads as follows:

"Sovereignty is one inalienable and imprescriptible and resides essentially in the people, from whom the functionaries appointed by the Constitution and laws derive their powers. Consequently, no pacts or treaties may be entered into that are in opposition to the independence and integrity of the nation or that in any way affect its sovereignty, save those that tend toward the union of one or more of the Republics of Central America."

The Court is of opinion that the above proviso constitutes the expression of the national sentiment of Nicaragua in regard to the reconstruction of the old Central American State, because for that purpose only does its sovereign will consent to acts that affect the sovereignty or integrity of the nation.

It should, therefore, be understood that every dismemberment of territory, even though in the form of a lease, violates primordial interests of El Salvador as a Central American people, above all in respect of those places in which both States have interests in common and in solidarity.

CHAPTER V.

Violation of Articles II and IX of the General Treaty of Peace and Amity.

Whereas: The Court is of opinion that article II of the Bryan-Chamorro treaty is violative of Articles II and IX of the Treaty of Peace and Amity entered into by the Republics of Central America. The text of Article II of the last-named treaty reads as follows:

"Desiring to secure in the Republics of Central America the benefits which are derived from the maintenance of their institutions, and to contribute at the same time in strengthening their stability and the prestige with which they ought to be surrounded, it is declared that *every disposition or measure that may*

tend to alter the constitutional organization in any of them is to be deemed a MENACE *to the peace of said Republics.*"

The High Parties Litigant do not agree respecting the interpretation and scope of that international pact. The High Party Compainant maintains that by the text of that provision the five States agree not to alter in any form their constitutional order, because such alteration would be considered by all and each of them as a menace to their security and derogatory to that prestige that should surround the institution under which we are governed. The High Party Defendant, on the contrary, gives it as its opinion that the provision has no other legal purpose than to inhibit such action on the part of a Central American State as would redound to the prejudice of the constitutional order in any of the others. The measures thus prohibited are not those dictated by a country for the conduct of its proper life; they are such as might be adopted by another State for the alteration of the constitutional order.

Pervading the letter and spirit of Article II, now under examination, is a thought of capital importance: the agreement to maintain peace in Central America, and, as a means for the realization of that main purpose, the observance of the institutions and the obligation to preserve inalterable the constitutional order. All agencies, measures, elements or circumstances that alter that constitutional order, whether arising from without or within that State whose constitutional order might thereby be disturbed, must, therefore, be logically, considered as prohibited. And in that sense it would be purposeless to discuss what is understood by constitutional order: whether it be the maintenance of the democratic representative system of government in its well-known division of power, or the harmonious functioning of those organisms;

or whether that order, in the language of the treaty, comprises also the phenomena of the relation between the signatory States, since it is unquestionable that under the principles of public law there is an alteration of constitutional order—in perhaps its most serious and transcendental form—when a state supplants, in all or part of the national territory, its own sovereignty by that of a foreign country and thereby, from that moment, overthrows its own laws in order that those of the concessionary State may govern therein.

In the sphere of principles the excercise of the public *auctoritas*, of *imperium* or of *jurisdictio*, on the part of the foreign sovereignty fundamentally alters the normal life of the nation, because national territory and its exclusive possession are indispensable elements of sovereignty.

The Government of Nicaragua, in infringing a constitutional standard—such as that which requires the maintenance of territorial integrity—has consummated an act that menaces the Republic of El Salvador, which is interested and obligated by the Treaties of Washington to maintain the prestige of the public institutions of Central America.

The application of those principles to the present discussion shows clearly that the five Central American States, by operation of the system of law created in virtue of the treaties concluded at Washington in 1907, solemnly agreed to save harmless their sovereign power and their autonomous systems, within the rule of strict legal relation which they are in duty bound to adhere to among themselves—this for the evident purpose of preserving those inalienable privileges for the work of political unity to which they aspire and which is so insistently safeguarded in those memorable pacts.

Article II of the Bryan-Chamorro treaty also infringes Article IX of the General Treaty of Peace and Amity

in force among the Republics of Central America because it provides that "the territory hereby leased and the naval base which may be maintained under the grant aforesaid shall be subject exclusively to the laws and sovereign authority of the United States."

The United States could, therefore, concede to the vessels of Nicaragua, in the waters that remained under her sovereignty, all the exemptions, immunities and privileges that they might please to bestow upon such vessels; but Nicaragua could not ask that similar concessions be extended to the vessels of the other Central American countries. The United States have the power to disrupt the equality of treatment accorded to all the vessels of the signatory countries by Article IX of the Treaty of Peace and Amity; and Nicaragua, by the voluntary act of her Government, has incapacitated herself from complying with what was agreed to. It is true that nothing prevents that Republic from bestowing any rights or imposing any charges upon its own vessels and the vessels of the other signatory countries; but this on a footing of perfect equality, and in such solemn manner that no difference whatsoever could be made between a Nicaraguan vessel and any other Central American vessel. Nicaragua, in transferring her adjacent seas to the ownership and sovereignty of a foreign nation, not only as to her coastal mainland on the Gulf of Fonseca, but as to the so-called Corn Islands in the Atlantic, has surrendered all power to enact laws and regulations for her own vessels, and, therefore, to control, with equality in laws and regulations, the vessels of the other Central American States.

The Court has no hesitation in affirming that the Bryan-Chamorro treaty, which contains no limitation or reserve in that respect, but which rather avoids expressing the fact that in the leased territory and waters

the laws and sovereign authority of the United States alone will govern, places in jeopardy what the Republic of El Salvador acquired in Article IX of the General Treaty of Peace and Amity, since it leaves them dependent upon a foreign sovereignty that is under no obligation to recognize or respect them.

CHAPTER VI.

Concerning the Intervention and Consent of El Salvador and the Obligation of the Nicaraguan Government to Re-establish and Maintain the Status Quo Ante.

Whereas: The Government of Nicaragua, being bound by solemn agreements to the Government of El Salvador to maintain unchanged the constitutional order and the full exercise of the perfect rights that have been mutually recognized in the General Treaty of Peace and Amity, the ceding Government could not, without the authorization and consent of El Salvador grant a naval base in the Gulf of Fonseca, impressed as it is with common ownership pertaining to three co-sovereigns, since none of them could properly dispose of its rights independently without affecting those of the other sovereigns, in view of the status of community in which the Gulf has been and is held, thanks to the universal principle handed down by Roman law and faithfully observed in modern law, that coparceners may not perform any act disposing of a thing possessed in common except jointly or with the consent of all.

The absence of that *joint will* is equivalent to the omission of an *empowering formality*, since the Government of Nicaragua lacks the legal capacity to alter by itself the *status jure* existing in the Gulf of Fonseca; and hence is born the right of the High Party Complainant to hold that the Bryan-Chamorro treaty violates its rights.

Whereas: As a logical consequence of the violation of rights claimed by the Government of El Salvador and recognized by this tribunal, the Government of Nicaragua is impressed with the obligation to take all possible means sanctioned by international law to re-establish and maintain the legal status that existed between the two countries prior to the conclusion of the Bryan-Chamorro treaty.

It is clear that under the principles of international law and the previous stipulations agreed to in the Treaties of Washington, the High Party Defendant was without power to enter into a new treaty that undermined in any degree the moral and legal structure of those principles and stipulations. (See the doctrines laid down by Fiore, Olivart and Pradier Fodéré.) Hence the obligation imposed on the Government of Nicaragua to re-establish and maintain, by all means possible, the legal status respecting the matters here in controversy that existed with El Savador prior to the 5th of August, 1914, on which date that memorable treaty was concluded.

CHAPTER VII.

Concerning Prayers III and IV of the Original Complaint.

Whereas: The Court is without competence to declare the Bryan-Chamorro treaty to be null and void, as in effect, the High Party Complainant requests it to do when it prays that the Government of Nicaragua be enjoined "to abstain from fulfilling the said Bryan-Chamorro treaty." On this point the Court refrains from pronouncing decision, because, as it has already declared, its jurisdictional power extends only to establishing the legal relations among the High Parties Litigant and to issuing orders affecting them, and them exclusively, as sovereign entities subject to its judicial power. To declare absolutely the nullity of the Bryan-Chamorro

treaty, or to grant the lesser prayer for the injunction of *abstention*, would be equivalent to adjudging and deciding respecting the rights of the other party signatary to the treaty, without having heard that other party and without its having submitted to the jurisdiction of the Court. The Court, therefore, in this regard, adheres to the doctrine laid down in the former decision—of September, 3 1916, in the case of Costa Rica *vs.* Nicaragua (Reports of the Central American Court of Justice, Volume V, Nos. 14 to 16).

Nor does the Court grant herein any other form of relief, as prayed by the High Party Complainant in the fourth prayer of its original complaint, because such relief has not been prayed for in concrete form, and was not made the subject of argument in the case during the trial.

WHEREFORE:

The Central American Court of Justice, in the name of the Republics of Central America, and in the exercise of the jurisdiction conferred upon it by the Convention of 1907, concluded at Washington, to which it owes its existence; also in conformity with the provisions of Articles I, XIII, XXI, XXII, XXIV and XXV of said Convention, and with the provisions of Articles 6, 38, 43, 56, 76 and 81 of the Ordinance of Procedure of this Court; and, furthermore, in accordance with the conclusions voted at the session of the 2nd instance, hereby, and by a majority vote—which is made necessary because of the dissent of the Judge for Nicaragua, whose vote was, therefore, recorded separately—renders the following—

DECISION:

First. That the Court is competent to take cognizance of, and decide the present action brought by the Government of the Republic of El Salvador against the Government of the Republic of Nicaragua;

Second. That the exceptions interposed by the High Party Defendant be, and they are hereby, denied;

Third. That, by the concession of a naval base in the Gulf of Fonseca, the Bryan-Chamorro treaty of August fifth, nineteen hundred and fourteen, *menaces the national security* of El Salvador and *violates* her rights of co-ownership in the said Gulf, in the manner and within the limitations, set forth in the Act Recording the Vote of of the Court and in Chapter II of the Second Part of this Opinion;

Fourth. That the said treaty *violates* Articles II and IX of the Treaty of Peace and Amity, concluded by the Central American States at Washington on the twentieth of December, nineteen hundred and seven;

Fifth. That the Government of Nicaragua *is under the obligation*—availing itself of all possible means provided by international law—to re-establish and maintain the legal status that existed prior to the Bryan-Chamorro treaty between the Litigant Republics insofar as relates to the matters considered in this section;

Sixth. That the Court refrains from rendering any decision in response to the third prayer of the original complaint; and

Seventh. That, respecting the fourth prayer of the original complaint, the Court also refrains from rendering decision.

Let the foregoing be communicated to the High Parties Litigant and to the other Governments of Central America.

ANGEL M. BOCANEGRA.
DANIEL GUTIÉRREZ N. (NAVAS).
M. CASTRO R. (RAMÍREZ).
NICOLÁS OREAMUNO.
SATURNINO MEDAL.
MANUEL ECHEVERRÍA, *Secretary.*