

***JURA NOVIT CURIA? CONDOMINIUM IN
THE GULF OF FONSECA AND THE “LOCAL
ILLUSION” OF A PLURI-STATE BAY***

*Christopher R. Rossi**

I.	INTRODUCTION.....	793
II.	CONDOMINIA IN INTERNATIONAL LAW	796
III.	THE HISTORICAL SETTING	804
	A. <i>Pre-Independence: 1522–1821</i>	805
	B. <i>Post-Independence: 1821–1917</i>	813
IV.	CONDOMINIUM AND OUTSIDE INTERESTS; CONDOMINIUM AND HARMONY OF INTERESTS	815
V.	THE BRYAN-CHAMORRO TREATY AND ITS AFTERMATH....	821
VI.	THE 1917 DECISION OF THE CACJ AND ITS AFTERMATH	830
VII.	CONCLUSIONS	835

I. INTRODUCTION

The concept of sovereignty as an indivisible building block of the state system dates to the Peace of Westphalia in 1648.¹ A doctrinal formulation introduced earlier by Jean Bodin

* Adjunct Faculty, University of Iowa College of Law. Ph.D. and M.A., Johns Hopkins School of Advanced International Studies; LL.M., University of London; J.D., University of Iowa; B.A. Washington University, St. Louis.

1. See generally Derek Croxton, *The Peace of Westphalia of 1648 and the Origins of Sovereignty*, 21(3) INT'L HIST. REV. 569, 591 (1999) (explaining the origins of the concept of sovereignty).

(1530–1596)² distilled to the “absolute, and perpetual power” of an individual to rule over subjects and territory.³ This personification of the individual as ruler found artistic and iconic expression on the copper-plate engraving adorning the title page of the first English language edition of Hobbes’ *Leviathan* (1651).⁴ The inscription at the top of the copper-plate, serving as the motto of the sovereign, derives from the *Book of Job* (41:33): *Non est potestas super terram quae comparetur ei*: “Upon earth, there is not his like.” The uniqueness of the sovereign, the *magnus homo*,⁵ meant he had no earthly counterpart with whom to divide or share power; as French king Louis XIV (1638–1715) purportedly quipped, “*L’État c’est moi*.”⁶ Carl Schmitt, Hobbes’ twentieth century admirer, interpreted the *Leviathan* engraving as contributing powerfully to the evocative effect of the book,⁷ and doubtless, to the enduring significance of the concept of undivided sovereignty. Few concepts in international law have endured as long or have been subject to as much scrutiny and diatribe.⁸

2. Jean Bodin, ENCYCLOPAEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/71021/Jean-Bodin> (last updated July 1, 2013); see Jacques Maritain, *The Concept of Sovereignty*, 44(2) AM. POL. SCI. REV. 343, 344 (1950) (introducing the doctrinal formulation of sovereignty).

3. JEAN BODIN, SIX BOOKS OF THE COMMONWEALTH 25 (M.J. Tooley trans., 1955) (translating Jean Bodin’s *De la République*, Bk. I, Ch. 8: “*La souveraineté est la puissance absolue et perpétuelle d’une République*”); see also Maritain, *supra* note 2, at 346 (noting that Bodin conceived the sovereign as ruling over the entire body politic).

4. See CARL SCHMITT, THE LEVIATHAN IN THE STATE THEORY OF THOMAS HOBBS: MEANING AND FAILURE OF A POLITICAL SYMBOL 17–18 (1996) (displaying the copper-plate engraving).

5. *Id.* at 19. Schmitt noted the realistic interpretation of the significance of the illustration would disappoint readers expecting a depiction of a dragon or sea monster or creature resembling a whale, in the sense depicted in the Hebrew Bible. *Id.* at 18. Hobbes’ modern Leviathan, representing *civitas* or *res publica* (which Hobbes references at the beginning of *Leviathan*) is the *magnus homo*, or huge man. *Id.* at 18–19.

6. *Louis XIV (1638–1715)*, BBC NEWS, http://www.bbc.co.uk/history/historic_figures/louis_xiv.shtml (last visited Feb. 26, 2015). See generally Herbert H. Rowen, “*L’État c’est à moi*”: *Louis XIV and the State*, 2(1) FRENCH HIST. STUD. 83–98 (1961) (discussing Louis XIV’s views on sovereignty).

7. SCHMITT, *supra* note 4, at 18.

8. See Croxton, *supra* note 1, at 569 (listing descriptions of sovereignty as defiled, cornered, eroded, extinct, anachronistic, and more).

In an age where this “dogma of sovereignty” still influences international legal discussion,⁹ how curious is it to consider the prospect of an amalgam of sovereignties presiding indivisibly over joint property, where states are granted a *jus prohibendi*, enjoining “one joint owner from doing anything” harmful to the interests of other *socii* (associates)?¹⁰ And how more curious is it to consider the extension of this essentially territorial concept seaward, to a realm once thought by Hugo Grotius (1583–1645) so immense it could never be possessed?¹¹ Analogized from private property concepts of Roman law (*pro indiviso communis*),¹² these curious adaptations resulted not by international agreement among states, but by the judgment of the Chamber of the International Court of Justice (ICJ) in the historically complicated case involving the Gulf of Fonseca and the 1992 *Land, Island and Maritime Frontier Dispute Between El Salvador and Honduras, with Nicaragua Intervening (Gulf of Fonseca case)*.¹³ There, the Chamber gave juridical expression to the pelagic adaptation of the concept of condominium.¹⁴

9. Hans Kelsen coined the phrase “dogma of sovereignty.” Hans Kelsen, *Absolutism and Relativism in Philosophy*, 42(5) AM. POL. SCI. REV. 906, 910 (1948). See generally Brad R. Roth, *Enduring Significance of State Sovereignty*, 56 FLA. L. REV. 1017 (2004) (explaining the significance of the dogma of sovereignty).

10. P. van Warmelo, *Aspects of Joint Ownership in Roman Law*, 25 TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS 125, 125 (1957); see also 1 G.H. HACKWORTH, DIGEST OF INTERNATIONAL LAW 615–16 (1940–1944) (involving 1923 German Court of Criminal Appeals holding *jus prohibendi* principle applicable to Lake Constance and riparian interests of Germany, Switzerland, and Austria).

11. See Christopher R. Rossi, *A Particular Kind of Dominion: The Grotian Tendency and the Global Commons in a Time of High Arctic Change*, 11 J. INT’L L. & INT’L REL. 1 (2015) (citing to Grotius’ *Mare Liberum* where he claimed the oceans were “unbounded except by the heavens”).

12. Van Warmelo notes the term *condominium* was not known to Roman jurists and probably arises around the 14th and 15th centuries. Van Warmelo, *supra* note 10, at 125. The concept was understood in variegated form, however, employed but “not very much” favored, and “widely scattered” throughout Justinian’s *Digest* (“compilation”). *Id.* at 127; see also Vincent P. Bantz, *International Legal Status of Condominia*, 12 FLA. J. INT’L L. 77, 79 (1998) (explaining the evolution of the concept of condominium).

13. *Land, Island and Maritime Frontier Dispute (El Sal./Hond.; Nicar. intervening)*, Judgment, 1992 I.C.J. 351 (Sept. 11).

14. *Id.* ¶ 412 (“the waters of the Gulf [being] the subject of the condominium or co-ownership”).

This Article investigates the legal and historical bases for this application of condominium, which found expression in the Chamber's determination that the maritime space in dispute—the Gulf of Fonseca—constitutes “a condominium” of “co-ownership”;¹⁵ not simply of “an historic bay”¹⁶—but of “an enclosed pluri-State bay”;¹⁷ it characterized the Gulf as a “closed sea”¹⁸—but “subject to a joint sovereignty of . . . three coastal states,”¹⁹ having “internal waters”—but “subject to a special and particular regime *not only* of [threefold]²⁰ joint sovereignty but of rights of passage.”²¹

In judicial administration, the presumption of *jura novit curia* reigns: “The court knows the law,” which it may apply *ex officio*, that is, independent of the legal arguments of the parties in dispute.²² But in this case, did the Chamber know its facts? And after wending its way through land, island, and maritime geo-space regimes, involving by its own estimation “a kind of bay for which . . . there are notoriously no agreed and codified rules,”²³ where did the Chamber find this curious law about sharing sovereignty?

II. CONDOMINIA IN INTERNATIONAL LAW

Condominium arrangements arise when two or more states exercise joint sovereignty over a territory.²⁴ The concept “is not common in the relations among nations,” but its appearance is

15. *Id.*

16. *Id.* ¶ 432.

17. *Id.* ¶¶ 395, 412 (“pluri-State historic bay”).

18. Land, Island and Maritime Frontier Dispute, 1992 I.C.J. at 594 ¶ 395.

19. *Id.* ¶ 404.

20. *Id.* ¶ 418.

21. *Id.* ¶ 412 (emphasis added).

22. See Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, 1986 I.C.J. 14, 24, ¶ 29 (“the principle *jura novit curia* signifies that the Court is not solely dependent on the argument of the parties before it with respect to the application of law”); see also Fisheries Jurisdiction (U.K. v. Ice.), Merits, 1974 I.C.J. 3, 9 (discussing the court's ability to bring its own legal arguments); S.S. Lotus (Fr. v. Turk), 1927 P.C.I.J. (ser. A) No. 10, 31 (Sept. 7) (discussing the court's ability to bring its own legal arguments).

23. Land, Island and Maritime Frontier Dispute, 1992 I.C.J. at 588–89, ¶ 384.

24. I L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 453, 220 (Peace 1905).

“not an inconceivable or an isolated fact.”²⁵ Such arrangements resemble the “community of interest” standard governing riparian relations, where the interest in a navigable river becomes “the basis of a common legal right.”²⁶ Although often confused with other post-war or post-colonial administrative arrangements, such as mandates, trusts, non-self-governing territories, and protectorates, condominiums retain their significance because their purpose and scope attach to the administering powers rather than to third parties, and they are intended to be longstanding if not permanent arrangements.²⁷

There is some doctrinal variance. Hans Kelsen, for example, wrote of condominium in the proposed rule over post-Nazi Germany,²⁸ and again when the United States, Soviet Union, Great Britain and Provisional Government of the French Republic signed the Berlin Declaration of 5 June 1945.²⁹ In his construction,

25. *El Salvador v. Nicaragua*, C.A.C.J., Judgment of 9 Mar. 1917, 11 AM. J. INT'L L. 674, 712 (1917).

26. *Territorial Jurisdiction of the International Commission of the River Oder* (U.K. v. Pol.), 1929 P.C.I.J. (ser. A.), No. 23, at 27 (Sept. 10); *see also* *Land, Island and Maritime Frontier Dispute*, 1992 I.C.J. at 602, ¶ 407 (“That there is a community of interest of the three coastal states of the Gulf is not open to doubt.”). The Chamber puzzled over Honduras’ claim that application of the “community of interest” standard requires a delimitation of the waters. *See id.* ¶ 372 (noting that Honduras’ claim seemed misguided). A condominium arrangement (*communauté de patrimoines*), however, would be incompatible with a delimitation. *Id.* ¶ 408. According to the Chamber: “It seems odd . . . to postulate a community of interest régime as an argument against a condominium régime; for a condominium is almost an ideal juridical embodiment of the community of interest’s requirement of perfect equality of user[.]” *Id.* ¶ 407.

27. *See* Joel H. Samuels, *Condominium Arrangements in International Practice: Reviving an Abandoned Concept of Boundary Dispute Resolution*, 29 MICH. J. INT'L L. 727, 758–67 (2008) (discussing how condominiums retain their significance).

28. *See* Hans Kelsen, *The International Legal Status of Germany to Be Established Immediately Upon Termination of the War*, 38 AM J. INT'L L. 689, 692–94 (1944) (discussing the idea of condominium in relation to post-Nazi Germany).

29. *See generally* Hans Kelsen, *The Legal Status of Germany According to the Declaration of Berlin*, 39 AM J. INT'L L. 518, 518–26 (1945) (assuming “supreme authority” over the territory of the German Reich and the division of allied-occupied Germany into four zones in accordance with understandings reached at the February 1945 Yalta Conference). Kelsen understood that the condominium could be terminated, but employed the concept nonetheless because all vestiges of the previous political order would have been destroyed permanently through its application: “No continuity between the destroyed Nazi state and the new democratic Germany would exist;” and the “new constitution of sovereign Germany would not be the result of a constitutional or

the temporal element was less important than the special quality of the new political order created: he employed the concept in the post-war German context given what he considered to be a *sui generis* circumstance: all continuity with the previous political order was to be destroyed through its application and the “new constitution of sovereign Germany would not be the result of a constitutional or revolutionary change” from within.³⁰ In contrast, the Chamber in the *Gulf of Fonseca* case “relied on principles of state succession”³¹ and detailed references to historical continuity to validate its application—the opposite of Kelsen’s formulation. But the Chamber nevertheless “found it sensible to regard the waters of the Gulf and the subject of the condominium of ownership, as *sui generis*.”³²

Despite notable historical examples,³³ recourse to the concept has been limited and generally “dismissed” both as a means of dispute settlement and territorial administration.³⁴ A leading international legal treatment of the concept calls it “incompatible” with modernity, an “historical relic from the feudal age,” and a “patently inadequate anomaly” that has never established itself

revolutionary change” from within. Kelsen, *supra* note 28, at 693.

30. Kelsen, *supra* note 28, at 689.

31. Iain Scobbie, *The ICJ and the Gulf of Fonseca: When Two Implies Three but Entails One*, 18 MARINE POL’Y 249, 255 (1994).

32. Land, Island and Maritime Frontier Dispute, 1992 I.C.J. at 605, ¶ 412.

33. Kelsen’s list of well-known examples of condominium include Austria’s and Prussia’s joint rule over Schleswig-Holstein and Lauenburg (1864–1866), Great Britain’s and Egypt’s condominium over the Sudan (ongoing since 1898 to the date of Kelsen’s writing, but ending in 1955), British and French joint sovereignty over the New Hebrides (1914–[1980]; although others date the condominium beginning in 1906), and Austria’s and Hungary’s condominium over Bosnia and Hercegovina (1909–1918). See Kelsen, *supra* note 29, at 524 (discussing different times the possibility of condominium has been entertained); *Anglo-Egyptian Condominium*, ENCYCLOPÆDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/25025/Anglo-Egyptian-Condominium> (last visited Feb. 26, 2015) (noting the end of the British condominium over Sudan); *Republic of Vanuatu*, ONE WORLD NATIONS ONLINE, <http://www.nationsonline.org/oneworld/vanuatu.htm> (last visited Feb. 26, 2015) (discussing the end of the British and French condominium over New Hebrides and the country’s name change to Vanuatu, along with the argument that the condominium began in 1906). There are numerous other examples of condominium attempts throughout history. See generally Samuels, *supra* note 27, at 727–76 (explaining prior attempts at condominium).

34. See Samuels, *supra* note 27, at 728–30 (dismissing condominium as a workable concept).

in modern international law as anything more than an exigent stop-gap measure of last resort.³⁵

J.H.W. Verzijl referred to it as “peculiar and exceptional,” citing the provisional condominium created in 1920 with the Free City of Danzig and surrounding communities.³⁶ Others have investigated its provisional application, for example as between the United States and Great Britain and their joint control over the Oregon Country/Columbia District of the Pacific Northwest from 1815–1846,³⁷ in the Atacama desert region of Bolivia/Chile/Peru,³⁸ in the 1910/1912 trilateral conferences among Norway, Sweden, and Russia on the High Arctic administration of Spitsbergen (Svalbard),³⁹ or in regard to the historical oddity of tiny Andorra, which from 1278–1993 was administered jointly by France and the Catalan Bishop of Urgell.⁴⁰ Part of this “exceptional” treatment stems from condominium’s incompatible relation to sovereignty, as classically construed above. Another part relates to a perceived lack of need for the concept. Hersch Lauterpacht thought it practical only where “an atmosphere of understanding or co-operation” prevails between two states, “in which case solutions more simple than a condominium will be found in the first instance.”⁴¹ The Chamber in the *Gulf of Fonseca* case seemingly agreed, noting it would be “difficult to see how such a structured system of joint government

35. Peter Schneider, *Condominium*, in 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 732, 734 (Rudolf L. Bernhardt ed., 1992).

36. J.H.W. VERZIJL, 6 INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 69 (1973).

37. See generally Joseph Schafer, *British Attitude Toward the Oregon Question, 1815–1846*, 16 AM. HIST. REV. 273, 273–99 (1911) (discussing the question of whether the United States or Great Britain “would succeed in establishing its sovereignty over the region west of the Rocky Mountains . . .”).

38. See generally Ronald Bruce St. John, *The Bolivia-Chile-Peru Dispute in the Atacama Desert*, 1 BOUNDARY & TERRITORY BRIEFING 1, 1–32 (1994) (discussing the dispute between Bolivia, Chile, and Peru over the Atacama Desert on the central-west coast of South America).

39. See Torbjørn Pedersen, *The Svalbard Continental Shelf Controversy: Legal Disputes and Political Rivalries*, 37 OCEAN DEV. & INT’L L. 339, 342 (2006).

40. See Jordie Saperia, *Jerusalem: Legal Status, Condominium and Middle East Peace*, 3 J. E. ASIA & INT’L L. 175, 184 (2010).

41. 1 INTERNATIONAL LAW: BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT 371–72 (E. Lauterpacht ed., 1970).

could be created” absent agreement.⁴² Problematically, the Chamber went on to apply the concept over the objections of two of the three parties involved.⁴³

Notwithstanding its rare appearance in modern relations, the concept intrigues international legal scholars, who periodically revisit its prospects in disputed boundaries, including Gibraltar, Brčko in the former Yugoslavia, the West Bank and Gaza, the Caspian Sea, and in pelagic spaces such as the Barents Sea, the Baie du Figuier, possessed jointly by France and Spain, and Lake Constance, located on the adjoining shores of Germany, Switzerland, and Austria.⁴⁴ It has received an indirect boost in attention from the work of Elinor Ostrom and common-pool resource theorists.⁴⁵ These theorists investigate the often informal but enduring joint management “rules” regarding natural or human made resources deemed too large to exclude beneficiaries from use.⁴⁶ The concept of condominium is not far removed from proposals involving joint administration of the global commons, making its significance more important than is perhaps appreciated.

But its controlling appearance in the *Gulf of Fonseca* case stands out and is almost alone in the jurisprudence. In dissent, the erudite and meticulously systematic Judge Shigeru Oda⁴⁷ rebuked the Chamber for its application of *jura novit curia*.

42. Land, Island and Maritime Frontier Dispute, 1992 I.C.J. at 597, ¶ 399.

43. *Id.* ¶ 398 (noting both Honduras and Nicaragua opposed the condominium solution).

44. See Samuels, *supra* note 27, at 729, 753 n.157 (discussing areas in dispute); see also Land, Island and Maritime Frontier Dispute, 1992 I.C.J. at 599–600, ¶ 401 (giving an instance of condominium).

45. See generally ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990) (proposing solutions to governance of natural resources used by many individuals in common); see also Samuels, *supra* note 27, at 772–76 (describing “principles for a model condominium drawn from Ostrom’s work on common pool resources combined with lessons derived from past condominia”); Jack McNeily, *A Condominium Approach to Abyei*, 13 CHI. J. INT’L L. 265, 280–81 (2012) (discussing Ostrom’s baseline design principles).

46. See ELINOR OSTROM ET AL., RULES, GAMES, & COMMON-POOL RESOURCES 4–5 (1994) (discussing research done on rules enabling individuals to utilize resources over long periods of time).

47. See W. Michael Reisman, *Judge Shigeru Oda: A Tribute to an International Treasure*, 16 LEIDEN J. INT’L L. 57, 61 (2003) (describing Judge Oda’s characteristics).

Judge Oda intimated that the Chamber engaged in a perilous form of judicial innovation, claiming the Chamber's condominium articulation of an historic, pluri-state bay had no basis in law.⁴⁸ He had problems with the Chamber's usage of the term "historic bay," which found hardly any legal support prior to 1910,⁴⁹ and could not be granted legal status *sua sponte*, as a *sui generis* regime;⁵⁰ he had problems with the notion that a bay, regardless of its description geographically or historically, could be accorded special legal status as one united area as between two or more riparian states;⁵¹ he had problems with the conflated treatment of the waters within the bay, as "internal waters" and as "territorial sea." He argued that sea waters adjacent to the coasts of states admit to one of two conjoined legal descriptions:⁵² they are either territorial seas, which provide for a right of innocent passage, or internal waters, which do not.⁵³ The Chamber, relying on the findings of an earlier court decision,⁵⁴ recognized this conjoined tension, but dismissed it because such analysis was not necessarily appropriate to discussions involving a pluri-state bay.⁵⁵ And Judge Oda had problems with establishing an inner littoral maritime belt along the coastlines of the three states in relation to establishing a closing line between the bay and the Pacific Ocean. The Chamber seemingly recognized that "if the waters internal to that bay are subject to a threefold joint sovereignty, it is the *three* coastal states that are entitled to territorial sea [outside] the bay."⁵⁶ Aside from implications involving condominium over the territorial sea (or involving

48. Land, Island and Maritime Frontier Dispute (El Sal./Hond.; Nicar. intervening), 1992 I.C.J. 351, 733, ¶ 2, 745–46, ¶ 24 (dissenting opinion of Judge Oda).

49. *Id.* ¶ 11.

50. *Id.* ¶¶ 4, 46.

51. *Id.* ¶ 13.

52. *Id.* ¶ 24.

53. Land, Island and Maritime Frontier Dispute, 1992 I.C.J. at 746–47, ¶ 26, 756, ¶ 44, 759–60, ¶ 51 (dissenting opinion of Judge Oda).

54. See generally *El Salvador v. Nicaragua*, 11 AM. J. INT'L L. 674 (1917) (opinion and decision of the Central American Court of Justice in the case involving those two countries).

55. See Land, Island and Maritime Frontier Dispute, 1992 I.C.J. at 592–93, ¶ 393.

56. *Id.* ¶ 418.

the continental shelf and exclusive economic zones),⁵⁷ such a formulation gave rise to a tension recognized, but not completely answered,⁵⁸ by the Chamber: “[A] state cannot have two territorial seas off the same littoral” coast.⁵⁹ This confusing prospect prompted Judge Oda to wonder what the judgment did to the concept of the three-mile coastal belt.⁶⁰ The Chamber, he concluded, employed concepts to denominate the legal status of Fonseca’s waters in ways that were “extraneous” to the historical and current understanding of the law of the sea.⁶¹

Moreover, Judge Oda pinpointed the source of the legal fiction, the Central American Court of Justice’s (CACJ) 1917 judgment, on which the ICJ Chamber heavily relied.⁶² “[N]ot until the rendering of that Judgment,” wrote Judge Oda, had the legal status of the Gulf of Fonseca ever been “clothed as ‘a[n] historic bay.’”⁶³ Indeed, the concept of the historic bay had arisen in the context of limited and long-standing usages,⁶⁴ as recognized

57. See *id.* ¶ 420 (“Since the legal situation on the landward side of the closing line is one of joint sovereignty, it follows that all three of the joint sovereigns must have entitlement outside the closing line to territorial sea, continental shelf and exclusive economic zone.”).

58. By special agreement the Chamber was tasked “to determine the legal situation of the maritime spaces”; the Chamber ruled this charge did not confer jurisdiction to effect any delimitation of those maritime spaces within or outside the Gulf, but reminded the parties that any such delimitation would have to be effected by agreement on the basis of international law. *Id.* ¶¶ 432(2)–(3).

59. *Id.* ¶ 416.

60. Land, Island and Maritime Frontier Dispute, 1992 I.C.J. at 754, ¶ 40 (dissenting opinion of Judge Oda). Judge Oda also argued Honduras’ geographical situation, “bottled up” as it is in the Gulf, precluded its offshore claim to areas of the Pacific coast outside the Gulf, except, possibly, in line with rights of geographically disadvantaged nations as contemplated in the 1982 United Nations Convention on the Law of the Sea. See ¶ 6 (“bottled up”); *id.* ¶ 55 (geographically disadvantaged). He reminded the Chamber that geographical realities of nature cannot be refashioned by judicial administration. *Id.* ¶ 53. None of the three Central American states was party to the 1982 Convention on the Law of the Sea. *Id.* at 588, ¶ 383.

61. Land, Island and Maritime Frontier Dispute, 1992 I.C.J. at 734, ¶ 5 (dissenting opinion of Judge Oda).

62. *Id.* ¶ 38.

63. *Id.* ¶ 27.

64. These claims pertained to geographical bays considered internal waters by single coastal state claimants that historically had exercised jurisdiction beyond the range of cannon shot—for example the Delaware and Chesapeake Bays on the Atlantic seaboard of the United States, part of the Bristol Channel, and Conception Bay in

by the 1910 Award of the Permanent Court of Arbitration in the *North Atlantic Coast Fisheries Case*,⁶⁵ but Judge Oda argued the term had been misapplied to the Gulf of Fonseca (which was enclosed by more than one littoral state),⁶⁶ asserted unanimously as true by the CACJ on the basis of a questionnaire formulated by that Court,⁶⁷ and, in turn, affirmed by a litany of established doctrinal authorities, who echoed and validated the 1917 judgment, thus providing the Chamber a faulty basis for concluding that “commentators generally, are agreed that [the Gulf of Fonseca] is an historic bay, and that the waters of it are accordingly historic waters.”⁶⁸ Judge Oda identified Oppenheim’s third edition of *International Law* (1920), as the doctrinal source of this faulty shift in thinking, with Fauchille, Jessup, Wheaton, Gidel “and others” dutifully affirming in succession.⁶⁹ “[But they] never presented any justification for this label,” according to Judge Oda, “outside the fact that the 1917 Judgment had so styled the Gulf.”⁷⁰

Judge Oda’s dissent can be read as a sublime critique of the historiography of international law and the various legal authorities who, in treatise form, uncritically take for granted

Newfoundland. *Id.* ¶¶ 10, 32; N. Atl. Coast Fisheries (U.K. v. U.S.), 11 R.I.A.A. 167, 197, 205 (Perm. Ct. Arb. 1910) (explaining the “cannon-shot” rule); cf. Donat Pharand, *The Arctic Waters and the Northwest Passage: A Final Revisit*, 38 OCEAN DEV. & INT’L LAW 3, 5 (2007) (discussing historic title as a basis for internal waters).

65. N. Atl. Coast Fisheries, 11 R.I.A.A. at 206; see also Land, Island and Maritime Frontier Dispute, 1992 I.C.J. at 747, ¶ 27 (dissenting opinion of Judge Oda) (discussing the term “historic bay”).

66. Land, Island and Maritime Frontier Dispute, 1992 I.C.J. at 751, ¶ 33 (dissenting opinion of Judge Oda).

67. See *El Salvador v. Nicaragua*, 11 AM. J. INT’L L. at 693 (“Taking into consideration the geographic and historic condition, as well as the situation, extent and configuration of the Gulf of Fonseca, what is the international legal status of the Gulf?”); see also Land, Island and Maritime Frontier Dispute, 1992 I.C.J. at 591, ¶ 390 (quoting the ninth question of the CACJ Judgment). The judges answered unanimously that the Gulf is an historic bay possessed of the characteristics of a closed sea, but provided no basis for its conclusion. See *id.* ¶ 32 (dissenting opinion of Judge Oda) (questioning the unanimous decision). In a thinly veiled critique of *juria novit curia*, Judge Oda wrote: “[I]t seems a needless self-restriction on the part of the Chamber to have refrained from any critical inspection of [this point].” *Id.* ¶ 34.

68. Land, Island and Maritime Frontier Dispute, 1992 I.C.J. at 588, ¶ 383.

69. *Id.* ¶ 28 (dissenting opinion of Judge Oda).

70. *Id.*

“local illusions” of law and historical fact.⁷¹ Once misrepresented by a court, these illusions thereby facilitate the reception of these false conclusions into the corpus of international law.⁷² Judge Oda’s opinion carries considerable weight given his professorial reputation as a leading law of the sea scholar and specialist.⁷³ The Chamber found it “clearly necessary” to “investigate the particular history of the Gulf of Fonseca” to arrive at its conclusion.⁷⁴ Indeed.

III. THE HISTORICAL SETTING

The Gulf of Fonseca is a small bay fronting the Central American countries of El Salvador, Honduras, and Nicaragua. El Salvador’s Cape Amapala, to the north-west, and Nicaragua’s Cape Cosiguina, to the south-east, pinch the 19.75-mile-wide entrance of Pacific Ocean waters into its basin, which penetrates thirty to thirty-two nautical miles landward.⁷⁵ Honduras lies between the two countries, with its outlet to the sea “bottled up” by the impinging coastlines adjacent to its shore.⁷⁶ Christopher Columbus identified the entire region for future European exploit on his fourth voyage to the New World in 1502.⁷⁷ Two decades later, explorer Andrés Niño, specifically in search of an interoceanic route,⁷⁸ sailed into the Gulf, “encountered a

71. Judge Oda’s actual words were: “It appears to me that the 1917 Judgment [on which the ICJ “heavily” relied] was based upon a local illusion as concerns the historical background of law and fact.” *Id.* ¶ 39 (dissenting opinion of Judge Oda).

72. *Id.* ¶¶ 27–28.

73. Oda’s doctoral dissertation, supervised by Myers McDougal at Yale Law School, took up the subject of the law of the sea; he served a member of the Japanese delegation to the United Nations’ First and Third Law of the Sea Conferences in 1958 and 1974; he served on the United Nations Seabed Committee when it formed in 1968 and joined the German legal team before the ICJ in the *North Sea Continental Shelf Cases*. Reisman, *supra* note 47, at 60, 62; JUDGE SHIGERU ODA AND THE PATH TO JUDICIAL WISDOM: OPINIONS (DECLARATIONS, SEPARATE OPINIONS, DISSENTING OPINIONS) ON THE INTERNATIONAL COURT OF JUSTICE, 1993–2003, at 7–11 (Edward McWhinney & Mariko Kawano eds., 2006).

74. *Land, Island and Maritime Frontier Dispute*, 1992 I.C.J. at 589, ¶ 384.

75. *Id.* ¶ 382.

76. *Id.*; *Land, Island and Maritime Frontier Dispute*, 1992 I.C.J. at 735, ¶ 6 (dissenting opinion of Judge Oda).

77. LINDA A. NEWSON, *INDIAN SURVIVAL IN COLONIAL NICARAGUA* 92 (1987).

78. Esteban Montes Gomez, *Archaeology of the Colonial Period Gulf of Fonseca*,

complex, interrelated socioecological zone inhabited by multiple ethnic” and linguistic groups,⁷⁹ and claimed it on behalf of Spanish monarchs, naming it after the expedition’s patron, Juan Rodríguez de Fonseca, Bishop of Burgos,⁸⁰ overseer of Spanish colonial interests in the New World,⁸¹ and Columbus’ Andalusian rival.⁸²

A. *Pre-Independence: 1522–1821*

For almost three hundred years, the Crown of Castile administered this region of the Spanish Indies through the Viceroyalty of New Spain (Mexico),⁸³ which included the Captaincy-General of Guatemala,⁸⁴ consisting of the provinces of Chiapas, Guatemala, San Salvador, Honduras, Nicaragua, and Costa Rica.⁸⁵ But the Spanish conquest of this region met with varied,⁸⁶ sometimes difficult and persistent resistance,⁸⁷ and was not as placidly uninterrupted as the Chamber’s historical reading

Eastern El Salvador, 42 (2010) (unpublished Ph.D. dissertation, University of California Berkeley) (on file with UC Berkeley Electronic Theses and Dissertations).

79. *Id.* at 37.

80. Land, Island and Maritime Frontier Dispute, 1992 I.C.J. at 589, ¶ 385. The expedition was organized by Captain Gil González Dávila. *Id.*

81. FELIPE FERNÁNDEZ-ARMESTO, COLUMBUS 101 (1991).

82. *Id.* at 148.

83. JOHN A. BOOTH, ET AL., UNDERSTANDING CENTRAL AMERICA: GLOBAL FORCES, REBELLION, AND CHANGE 43 (4th ed. 2006). The Viceroy of Mexico dispatched the brigantine *El Activo* in 1794 to survey the Gulf of Fonseca. The expedition mapped the gulf but its chart, the *Carta Esférica*, was lost and later recovered after the 1992 judgment, launching a claim by El Salvador to revisit the judgment based on a perceived avulsion to the Goascorán River. G.A. Res. 58/4, ¶¶ 235–39, U.N. Doc. A/RES/58/4 (Oct. 29, 2003); Application for Revision of the Judgment of 11 September 1992 in the *Case Concerning the Land, Island and Maritime Frontier Dispute (El Sal./Hond.: Nicar. Intervening)* (El. Sal. v. Hond.), Judgment, 2003 I.C.J. 392, 401–02, ¶¶ 25, 26 (Dec. 18).

84. Mary Wilhelmine Williams, *The New Central America*, 214 N. AM. REV. 297, 297 n.790 (1921).

85. Charles L. Stansifer, *United States-Central American Relations, 1825–1950*, in UNITED STATES-LATIN AMERICAN RELATIONS, 1800–1850, at 25, 27 (T. Ray Shurbutt ed., 1991).

86. The conquest of Pacific Nicaragua was “relatively easy” although Spanish fortifications had to be built in the urban centers of León and Granada; coordinated resistance arose in Honduras and aboriginal resistance to Spanish colonizers “persisted throughout the colonial period” in eastern Nicaragua. NEWSON, *supra* note 77, at 92.

87. Montes, *supra* note 78, at 49.

suggests.⁸⁸ The early development of the Gulf of Fonseca as an interoceanic port connecting the Pacific to the Caribbean stalled under the weight of imperial demands elsewhere;⁸⁹ the region's high population density became the object of the Crown's enslavement needs for mining operations in Honduras and South America;⁹⁰ Spanish slave laws, imprecisely applied, difficult to generalize,⁹¹ but brutally depicted by the Spanish Dominican, Bartolomé de las Casas' (c. 1484–1566) accounts,⁹² sparked rebellions from Fonseca's Lenca-speaking island inhabitants,⁹³ and other indigenous peoples throughout the region;⁹⁴ the Crown's administration of tribute (the *encomienda*),⁹⁵ created fierce intramural rivalries among competing Spanish *encomenderos*,⁹⁶ inducing some to circumvent colonial regulation.⁹⁷ Between 1522

88. Land, Island and Maritime Frontier Dispute, 1992 I.C.J. at 381, ¶ 30, 589, ¶ 385.

89. See Montes, *supra* note 78, at 40–41 (noting that the prospect of developing the Gulf was abandoned after the settlers realized the land was “unprofitable”).

90. *Id.* at 41–42.

91. Spanish slave laws dated to the thirteenth century *Siete Partidas* of Alonso X, “*el Sabio*” (1221–1284), and were meant by Queen Isabella's royal *cédula* in 1503 to apply only to “hostile” *indios*, a practice later abandoned until reinstated in 1534. *Id.* at 45; see also CLIFFORD L. STATEN, *THE HISTORY OF NICARAGUA* 16 (2010) (discussing the Crown's laws after 1542 to protect indigenous populations from abuse).

92. See generally BARTOLOMÉ DE LAS CASAS, *AN ACCOUNT, MUCH ABBREVIATED, OF THE DESTRUCTION OF THE INDIES, WITH RELATED TEXTS* (Franklin W. Knight ed., Andrew Hurley, trans., 2003) (describing in lengthy detail the violence and mistreatment the indigenous people suffered at the hands of the Spaniards); Helen Rand Parish & Harold E. Weidman, *The Correct Birthdate of Bartolomé de las Casas*, 56 *HISP. AM. HIST. REV.* 385, 385–86 (1976) (discussing de las Casas' life). An object of de las Casas' moral complaint, “the great tyrant captain,” Pedro de Alvarado, provided accounts of his own incursion into Guatemala, in letters sent back to his superior, Hernando Cortes. *AN ACCOUNT OF THE CONQUEST OF GUATEMALA IN 1524 BY PEDRO DE ALVARADO* 9, 125 (Sedley J. Mackie ed., 1924).

93. See Montes, *supra* note 78, at 48 (discussing how the Lenca-speaking people resisted the Spanish to defend their lands).

94. See LINDA A. NEWSON, *THE COST OF CONQUEST: INDIAN DECLINE IN HONDURAS UNDER SPANISH RULE* 96 (1986) (attributing problems of conquest to large numbers of independent indigenous groups).

95. See Montes, *supra* note 78, at 42 (discussing the *encomienda*).

96. See CHRISTOPHER M. WHITE, *THE HISTORY OF EL SALVADOR* 32 (1974) (noting, for instance, competition in the 1520s between conquistador factions controlled by Davila, Cortez and de Alvarado).

97. See Montes, *supra* note 78, at 42 (noting that colonial involvement incentivized some individuals to hide their acquisitions to avoid paying royalty taxes on them).

and 1531, the Governors of Nicaragua and Guatemala “jockeyed for control in the area,” which “functioned under separate royal orders,”⁹⁸ precipitating armed conflicts and diplomatic disputes between the governorships until 1543,⁹⁹ when jurisdiction over the islands and Gulf consolidated with the *encomienda* awarded to Guatemala under Melchor Hernandez.¹⁰⁰ Astonishingly, European diseases, which were carried south from their landward entry point in Mexico, preceded the arrival of Spaniards in the region of the Bay of Fonseca, killing up to 50 percent of the indigenous populations before the conquistadors’ campaign launched in 1524.¹⁰¹ This demographic, estimated to have reduced the original native numbers from around one million to tens of thousands within a few decades, stands as perhaps the most consequential and tragic result of Europeans’ immediate encounter with the New World,¹⁰² and may suggest the placid waters off Fonseca’s coast were due to viral decimation interpreted centuries later as pelagic accord.

Although non-Spaniards had been excluded officially from the Indies in 1501,¹⁰³ by the 1560s and 1570s, the circum-Caribbean region became the focal point of pirating expeditions,¹⁰⁴ with buccaneers “swarming through the Caribbean between the 1650s and the 1680s.”¹⁰⁵ Elizabethan sea interests, ambitious but still no match for other European powers, developed a seaborne “cold war” strategy against the Castilian Crown, which focused on raiding its burgeoning silver trade in the Americas

98. *Id.*

99. *Id.* at 49.

100. *Id.* at 43.

101. WHITE, *supra* note 96, at 32.

102. See THOMAS W. WALKER & CHRISTINE J. WADE, NICARAGUA: LIVING IN THE SHADOW OF THE EAGLE 8–9 (5th ed. 2011); VICTOR PERERA, UNFINISHED CONQUEST: THE GUATEMALAN TRAGEDY 4–5 (1993) (noting diseases “unknown in the New World killed several times more Mayas than the most sanguinary of conquistadores ever intended to”).

103. Paul E. Hoffman, *Diplomacy and the Papal Donation 1493–1585*, 30 AMERICAS 151, 154 n.2 (1973).

104. KRIS E. LANE, PILLAGING THE EMPIRE: PIRACY IN THE AMERICAS 1500–1750, at 40–41 (Robert M. Levine ed., 1967).

105. J.H. ELLIOTT, EMPIRES OF THE ATLANTIC WORLD: BRITAIN AND SPAIN IN AMERICA 1492–1830, at 224 (2006).

as a means of “waging war on the cheap.”¹⁰⁶ This predation also took place in Pacific waters, up and down the west coast of the Americas—the so-called Spanish South Sea—reaching its damaging apex in the 1680s,¹⁰⁷ but extending well into the eighteenth century.¹⁰⁸

In the 1570s, Dutch sea rovers, or Sea Beggars, also began plying the waters of the Spanish Caribbean, raiding Luso-Castilian shipping and settlements, when not in search of salt.¹⁰⁹ Historians will recall Grotius’ *Mare Liberum* (The Free Sea, 1609) was commissioned to validate the actions of these private auxiliaries (in the form of the Verenigde Oostindische Compagnie: VOC, operating, albeit, in East Asian waters)¹¹⁰ as a means of making just war against transgressors of the natural order and the right of the Low Countries to engage in trade.¹¹¹ Labeled pirates by Philip II (1527–1598), their depredations against the Crown in the New World were an outgrowth of a generalized state of war.¹¹² In 1614 a fleet sponsored by the rebellious States-General and its corporate agent, the VOC, crossed the Atlantic, rounded South America and “wreak[ed] havoc” in the Spanish South Sea, searching to abduct the newly appointed Viceroy of Peru while cruising from Chile to Mexico; it reconnoitered the Gulf of Fonseca [Amapala Bay] before eventually crossing the Pacific to Manila and the Moluccas to plunder again, this time against Spain’s Asian holdings and

106. PAUL KENNEDY, *THE RISE AND FALL OF THE GREAT POWERS: ECONOMIC CHANGE AND MILITARY CONFLICT FROM 1500 TO 2000*, at 61 (1987); *see also id.* at 53–55 (describing how the Crown seized American silver imported for its people, and forced them to accept government bonds in exchange).

107. *See* LANE, *supra* note 104, at 153–54 (describing the journey of the pirates through the Spanish sea, traveling through various parts of the Americas).

108. *See* Simon Smith, *Piracy in Early British America*, 46 *HIST. TODAY* 29, 30 (1996) (noting that piracy experienced a “golden age” at the start of the eighteenth century).

109. LANE, *supra* note 104, at 62, 64–65.

110. Grotius was hired to justify the Dutch seizure and condemnation in an Amsterdam admiralty court of the Portuguese carrack, *Santa Catarina*, captured off the coast of Singapore in 1603. *See* Rossi, *supra* note 11.

111. HUGO GROTIUS *MARE LIBERUM 1609–2009*, at 153, 155 (Robert Feenstra trans., 2009); *see also* Rossi, *supra* note 11.

112. LANE, *supra* note 104, at 62.

Portugal's *Estado da Índia* (colonial empire).¹¹³ The voyage was a “watershed” awakening for Spanish South Sea defense strategy, compelling the Viceroy to order construction of fixed garrisons and increase taxes on an increasingly burdened merchant class,¹¹⁴ all in support of an overstretched imperium. European privateers, empowered by loosely administered and widely abused letters of marques and reprisal, began populating the island chain of the Antilles by the 1620s—Barbados, St. Kitts, Martinique and Guadeloupe—using them as staging ports for raids against the Crown at sea, on the northern coast of Hispaniola,¹¹⁵ and certainly throughout the Spanish Main.¹¹⁶ The island of Tortuga became central to French Huguenot operations; Jamaica's Port Royal—the “wickedest town in America”—became the base of Oliver Cromwell's “Western Design,” prompting the Anglo-Spanish War (1654–1660) to establish a “Protestant empire in the Indies.”¹¹⁷

113. *Id.* at 79–83; see Kevin Joseph Sheechan, *Iberian Asia: The Strategies of Spanish and Portuguese Empire Building, 1540–1700*, at 5, 287–89 (2008) (unpublished Ph.D. dissertation, University of California, Berkeley) (noting Manila was controlled by Spain and the Moluccas were controlled by Portugal).

114. *Id.* at 83–84.

115. See PETER EARLE, *THE PIRATE WARS* 90 (2003) (discussing the origins of buccaneers); David J. Bederman, *Privateering*, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* VIII 475, 476 (Rüdinger Wolfrum ed., 2012) (discussing abuse of letters of marques and reprisal); *English Letters of Marque Against Spain, James I, 1625*, CONSTITUTION SOC'Y (Feb. 16, 2015), <http://www.constitution.org/mil/lmr/1625engl.htm> (granting actions against the Spanish Crown).

116. EARLE, *supra* note 115, at 90. Broadly defined, the Spanish Main came to designate the entire Caribbean Sea and the southern half of the Gulf of Mexico; more narrowly, it was intended to denote the Spanish “Mainland,” or *tierra firme*, stretching from the northern coast of South America from Panama to the Florida Gulf coast and on the east to Trinidad. PHILIP AINSWORTH MEANS, *THE SPANISH MAIN: FOCUS OF ENVY 1492–1700*, vii (1935).

117. EARLE, *supra* note 115, at 91; see Gérard Lafleur & Lucien Abénon, *The Protestants and the Colonialization of the French West Indies*, in *MEMORY AND IDENTITY: THE HUGUENOTS IN FRANCE AND THE ATLANTIC DIASPORA* 267 (Bertrand Van Ruymbeke & Randy J. Sparks eds., 2003) (discussing a Huguenot republic on the island of Tortuga); Matthew Craig Harrington, “The Worke Wee May Doe in the World”: The Western Design and the Anglo-Spanish Struggle for the Caribbean, 1654–1655 at 5 (May 26, 2004) (unpublished M.A. thesis, Florida State University) (The Anglo-Spanish War was “sparked by the Western Design.”); WILLIAM EDMUNDSON, *A HISTORY OF THE BRITISH PRESENCE IN CHILE: FROM BLOODY MARY TO CHARLES DARWIN AND THE DECLINE OF BRITISH INFLUENCE* 5 (2009) (discussing the Anglo-Spanish War).

By the latter part of the seventeenth century, freebooting and privateering had turned the Spanish Main into a “paradise for . . . adventurous robber[s],” who operated on a scale “almost unbelievable.”¹¹⁸ And yet, notwithstanding the fractious intramural and international problems of Spanish rule in the New World, the ICJ Chamber concluded, with scant historical evidence,¹¹⁹ that on these shores of the South Sea— “[i]t appears that the Spanish Crown . . . exercised continuous and peaceful sovereignty over the waters of the Gulf [of Fonseca], without serious or more than temporary contestation” for almost three hundred years.¹²⁰

How so? Judge Oda recognized the fundamental circumstances of topography and history prior to decolonization: “[T]he Gulf of Fonseca was surrounded by the territory of Spain, as a single state.”¹²¹ But for him “there is no ground for believing [at that time the Spanish Crown] had any control in the seawaters beyond the traditionally accepted rule of the range of cannon-shot in the Gulf.”¹²² Moreover, both the CACJ and ICJ judgments “depend[ed] on the hidden assumption that the maritime area in question” was not only “single and undivided” but “*in its entirety* . . . within the territorial jurisdiction of a single riparian State”—“overlook[ing] the basic fact that [no such legal conception of a bay existed at that time].”¹²³

After 1522, “few available documents . . . comment on the Gulf of Fonseca,” save for notable late sixteenth century accounts by administrators and Franciscans.¹²⁴ But more general, less serene, matters are known: Sir Francis Drake (c. 1539/1543–d. 1596) reconnoitered the Gulf in 1579,¹²⁵ and allegedly used the

118. *Id.* at 93–94.

119. See Montes, *supra* note 78, at 43 (“After 1522 there are few available documents that comment on the Gulf of Fonseca.”).

120. Land, Island and Maritime Frontier Dispute, 1992 I.C.J. at 589, ¶ 385.

121. *Id.* ¶ 37 (dissenting opinion of Judge Oda).

122. *Id.*

123. *Id.*

124. Montes, *supra* note 78, at 43; see also *id.* at 39 (noting these rare recordings “are considered canonical documents” among scholars of Central American, pre-Colombian, and Latin American colonial studies).

125. See HARRY KELSEY, SIR FRANCIS DRAKE: THE QUEEN’S PIRATE 165 (1998) (“seeing the volcanos of Honduras and Guatemala”). Drake was born “a date no earlier

island El Tigre as a launching point for raids. He plundered many Spanish vessels, most importantly one two leagues off the coast of Nicaragua near the Gulf of Fonseca that provided sea charts of inestimable value, opening up the coasts of Mexico and California and showing a route to him of the Indies to the Cape of Good Hope,¹²⁶ contributing doubtless to his and future predatory incursions in the Americas and around the globe.¹²⁷ In 1671, the Welsh buccaneer Henry Morgan laid siege to Panama City after marching across the Isthmus of Darien (Panama);¹²⁸ and in the 1680s, English buccaneers led by Bartholomew Sharpe, hacked their way across the isthmus again, commandeered the Spanish battleship, *La Santissima Trinidad*, launched an eighteen month terror campaign on the South Sea, plundered with impunity along the unprotected Pacific shore,¹²⁹ captured sea charts and maps of immeasurable military value (that he would later parlay into an amnesty for his campaign),¹³⁰ and

than 1539 or later than 1543” and died in 1596. *Id.* at 396, 412–13. See E.G. SQUIER, NICARAGUA; ITS PEOPLE, SCENERY, MONUMENTS, AND THE PROPOSED TRANSOCEANIC CANAL II 168, 243 (1856) (“Drake had his headquarters on the island of Tigre” during his operations in the Pacific Ocean and the South Sea.).

126. George Davidson, *Francis Drake on the Northwest Coast of America in the Year 1579: The Golden Hinde Did Not Anchor in the Bay of San Francisco*, 5 TRANSACTIONS & PROC. GEOGRAPHICAL SOC’Y PAC. 1, 35 (1908); see also George Davison, *The Discovery of San Francisco Bay*, 4 TRANSACTIONS & PROC. GEOGRAPHICAL SOC’Y PAC. 1, 17–18 (1907) (Drake took refuge in a California harbor he likely learned of from the papers obtained from captured Spanish vessels.).

127. Drake’s “enormous haul of booty” inspired a generation of English adventurers, including Thomas Cavendish, who successfully sailed and plundered in Drake’s wake in 1588, and others who were less successful in rounding the treacherous Magellan Straits. KENNETH R. ANDREWS, *DRAKE’S VOYAGES: A RE-ASSESSMENT OF THEIR PLACE IN ELIZABETHAN MARITIME EXPANSION* 84 (1967); see THE ROUTLEDGE ENCYCLOPEDIA OF TUDOR ENGLAND 197 (Arthur F. Kinney & David W. Swain eds., 2001) (Drake’s “return to London with a rich haul of plunder inspired imitation, which came with Thomas Cavendish’s circumnavigation from 1586 to 1588.”).

128. See PHILIP GOSSE, *THE HISTORY OF PIRACY* 158–59 (1934) (discussing Morgan’s attack in Panama). Morgan and his raiders alone are credited with sacking fifty-seven cities, towns and villages in New Spain. See MARCUS REDIKER, *BETWEEN THE DEVIL AND THE DEEP BLUE SEA* 58 (1987) (discussing Morgan’s feats in New Spain).

129. See PHILIP GOSSE, *THE PIRATES’ WHO’S WHO* 259 (1924) (“eighteen months [of] sacking towns and attacking Spanish ships”); GOSSE, *supra* note 128, at 161–62 (discussing the attack on *La Santissima Trinidad*).

130. A BUCCANEER’S ATLAS 1 (Derek Howse & Norman J. W. Thrower eds., 1992); see MARK DONNELLY & DANIEL DIEHL, *PIRATES OF VIRGINIA* 21 (2012) (stating that the

then “rounded Cape Horn and crept up the South Atlantic.”¹³¹ Although not at war with Spain at this time due to the Treaty of Madrid,¹³² that peace was understood in practice not to apply in the New World, where maritime lines of amity, once crossed (the meridian of the Azores to the west and the Tropic of Cancer to the south), prompted application of the European code that “there shall be no occasion for complaints and claims for damages,” and likewise, “No Peace Beyond the Line.”¹³³

In the 1680s, English buccaneers sojourning in the Bay of Fonseca contracted tropical fever; they decamped but were replaced by French corsairs, who used the bay as a staging ground for raids against settlements to the northwest before trekking overland to the Caribbean and back to their island retreat of Tortuga.¹³⁴ Such episodes on the Spanish South Sea strike against the claim of peaceful and uninterrupted Spanish rule, as evidence of the colonial *effectivité* demonstrating effective exercise of territorial jurisdiction,¹³⁵ without opposition and with *possessio longi temporis*.¹³⁶ Interestingly, the Chamber

maps “were of such strategic importance that when the pirates returned to England, they presented them to Charles II, who granted the crew a full pardon.”)

131. GOSSE, *supra* note 128, at 168.

132. See generally Donald Grunewald, *The Anglo-Guatemalan Dispute over British Honduras*, 5 CARIBBEAN STUD. 17, 17–44 (1965) (discussing centuries of conflict in British Honduras).

133. Garrett Mattingly, *No Peace Beyond What Line?*, 13 TRANSACTIONS ROYAL HIST. SOC'Y 145, 149 (1963). The agreement stemmed from the Treaty of Vervins (1598) between Henry IV of France and Philip II of Spain. DAVID HACKETT FISCHER, CHAMPLAIN'S DREAM 67–68 (2008). European amity ended for those who ventured west and south of the line; it was the “maxim that governed both the official action and private conduct of all Englishmen (Frenchmen, Dutchmen, and Spaniards too)” through the seventeenth century. CARL BRIDENBAUGH & ROBERTA BRIDENBAUGH, NO PEACE BEYOND THE LINE 3 (1972).

134. LANE, *supra* note 104, at 147, 153–54.

135. See Land, Island and Maritime Frontier Dispute, 1992 I.C.J. at 388–89, ¶ 45, 589, ¶ 385 (discussing “title” to the contested areas and finding the “Spanish Crown thereafter claimed and exercised continuous and peaceful sovereignty over the waters of the Gulf, without serious or more than temporary contestation, until . . . 1821.”); Frontier Dispute (Burk. Faso/ Mali), 1986 I.C.J. 554, 586–87, ¶ 63 (Dec. 22) (defining “colonial *effectivités*” as “the conduct of the administrative authorities as proof of the effective exercise of territorial jurisdiction in the region during the colonial period”).

136. Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116, 130 (Dec. 18) (*possessio longi temporis* can justify a claim that “waters are territorial or internal on the ground that [a

came to the important conclusion that the terrestrial principle of *uti possidetis juris* (as you possess, so you may possess), should apply to the waters of the Gulf of Fonseca as well as the land,¹³⁷ but the presumption of peaceful and uninterrupted control of what was not contemplated as a “single-state” bay under the single sway of the Spanish Crown suffers in light of the specific (albeit scant) historical record involving the Gulf of Fonseca and the general and known mayhem taking place on the Spanish Main and on the South Sea due to the onslaught of piracy and freebooting. In the late seventeenth century, piracy (not Spanish colonial rule) forced the Lenca off the islands of the Gulf of Fonseca,¹³⁸ again countering the conclusion of effective, peaceful, and unopposed Castilian control of these waters.

B. Post-Independence: 1821–1917

Post-independence politics in the region were equally turbulent. In 1821, the provinces gained independence.¹³⁹ Following a brief period of annexation to Mexico, five of the six former colonies attempted a union as the Federal Republic of Central America, with Chiapas choosing to remain with Mexico.¹⁴⁰ But fractious problems stood in the way, foreshadowing the violent century to follow: a structural arrangement denied densely populated Guatemala majority control in the federation assembly; indigenous populations remained unassimilated; ethnic homogeneity did not exist; post-colonial differences emerged on the role of the church;¹⁴¹ provincial dependencies formed in proximity to the central administration in Guatemala; rivalries arose between liberal and conservative elites;¹⁴² and a movement began in El Salvador to cleave the western Los Altos highlands from Guatemala to diminish Guatemalan power in

country] has exercised the necessary jurisdiction over [the waters] for a long period of time without opposition from other states”).

137. Land, Island and Maritime Frontier Dispute, 1992 I.C.J. at 589, ¶ 386.

138. *Gulf of Fonseca*, U.N. EDUC., SCI. & CULTURAL ORG. (Sept. 21, 1992), <http://whc.unesco.org/en/tentativelists/206>.

139. Stansifer, *supra* note 85, at 27.

140. *See id.* at 28 (discussing early post-independence Central American history).

141. *Id.*

142. BOOTH ET AL., *supra* note 83, at 43–44.

any future federation.¹⁴³ After the federation's failure in 1838, and despite fitful attempts to reestablish the union reaching into the twentieth century,¹⁴⁴ Costa Rica, Salvador, Guatemala, Honduras, and Nicaragua began reorganizing as individual republics.¹⁴⁵

The Chamber concluded that sovereign control of the Gulf seamlessly passed from the Crown to the federation and ultimately to the respective individual republics.¹⁴⁶ This seamless transfer is of critical importance to a major aspect of the *Gulf of Fonseca* case—the application of *uti possidetis juris*. This Roman law concept specifically was imported into international law to ensure that questions of sovereignty were never held in abeyance, and to forestall recrudescent claims of *terra nullis* that would provoke post-colonial land grabs and war.¹⁴⁷ But the extension of this historically terrestrial concept of *uti possidetis juris* to pelagic space to avoid the problem of *terra nullius*, created logical incongruities, as recorded by Judge Oda in his dissent:

[I]f the assumption of unitary status for the entire waters in the Gulf had been correct [at the time of independence or after the failure of federated union], why should the 1917 Judgment and the [Chamber] Judgment not have preferred the far more natural

143. WAYNE M. CLEGERN, ORIGINS OF LIBERAL DICTATORSHIP IN CENTRAL AMERICA: GUATEMALA, 1865–1873, at 1–2 (1994).

144. Attempts at union were made in 1835, 1842, 1847, 1852, 1889, 1895, and 1921. See Manley O. Hudson, *The Central American Court of Justice*, 26 AM. J. INT'L L. 759, 759 (1932) (discussing attempts at unions among Central American states); see also James Brown Scott, *The Central American Peace Conference of 1907*, 2 AM. J. INT'L L. 121, 122–24 (1908) (discussing efforts to form a union among Central American countries).

145. See Scott, *supra* note 144, at 122 (“[T]he various states . . . set up independent governments . . . and national constitutions.”); see also *El Salvador v. Nicaragua*, 11 AM. J. INT'L L. at 700 (discussing the right of exclusive ownership in the Gulf of Fonseca).

146. See *Land, Island and Maritime Frontier Dispute*, 1992 I.C.J. at 589, ¶ 385 (reviewing the history of the control of the bay from the time of Spanish rule).

147. See GIUSEPPE NESI, L'UTI POSSIDETIS IURIS NEL DIRITTO INTERNAZIONALE 3 (1996) (defining *uti possidetis* as an instrument for preventing neo-colonial land grabs); Christopher R. Rossi, *The Northern Sea Route and the Seaward Extension of Uti Possidetis (Juris)*, 83 NORDIC J. INT'L L. 476, 476, 487–89, 492 (2014) (discussing the importance of *uti possidetis juris* for retaining colonial era borders in times of post-colonial transition).

interpretation that, once the territory over which a single state, Spain, and later the Federal Republic of Central America, had sovereignty was divided into five States as a result of their independence, the authority over and control of the offshore waters (which had always been considered as appurtenances of the land) might have been divided correspondingly to the divided territories of those newly independent States, and that the three riparian States of El Salvador, Honduras and Nicaragua each inherited authority over and control of their respective offshore waters of their own land territory in the Gulf of Fonseca?¹⁴⁸

His answer, stated elsewhere, was that the 1917 Judgment was not really about the legal status of the Gulf waters or the historically unknown equation that “historic bay = condominium.”¹⁴⁹ That latter idea may indeed have been an invention of El Salvador to parry an imperial initiative by the United States and its then-amenable ally, Nicaragua, to militarize the region and control trade routes.¹⁵⁰

IV. CONDOMINIUM AND OUTSIDE INTERESTS; CONDOMINIUM AND HARMONY OF INTERESTS

The transition from colonial rule to independence stoked pre-existing hostilities throughout Central America, vexing relations throughout the nineteenth and early twentieth centuries.¹⁵¹ A boundary dispute between Guatemala and Honduras, stemming from the Gulf of Fonseca to the Gulf of Honduras, embittered relations for nearly one hundred years.¹⁵² Disputes over

148. Land, Island and Maritime Frontier Dispute, 1992 I.C.J. at 753, ¶ 38 (dissenting opinion of Judge Oda).

149. *Id.* ¶ 34.

150. *See id.* (discussing the idea of “historic bay = condominium” in relation to El Salvador’s opposition to the building of a U.S. naval base on Nicaraguan territory).

151. *See Scott, supra* note 144, at 121–28 (reviewing post-independence political turmoil and attempts at peace in Central America).

152. *See* F.C. Fisher, *The Arbitration of the Guatemalan-Honduran Boundary Dispute*, 27 AM. J. INT’L L. 403, 403 (1933) (summarizing the resolution of a boundary dispute between Guatemala and Honduras in 1933). This boundary dispute preceded independence; in 1812 a Hondureñan claim to the eastern part of present day El Salvador was presented to the King of Spain. Memorial of the Republic of El Salvador, Land, Island, and Maritime Frontier Dispute (El Sal./Hond.), 1988 I.C.J. 1, ¶ 7.11 (June 1).

Fonseca's islands first arose in 1854, and land disputes followed in 1861.¹⁵³ An economic world of "Banana men" and transport barons also began to complicate the region in the mid part of the nineteenth century;¹⁵⁴ this world was dominated by North American adventurers, financiers, filibusters, and mercenaries,¹⁵⁵ in pursuit of the United States' "Manifest Destiny."¹⁵⁶ But not exclusively. European "metropole countries"—Great Britain, Italy, Germany, France, Belgium, Holland—which dominated world-wide production and distribution—also began to compete for access to raw materials and communication routes in the region.¹⁵⁷ After independence, and particularly by the mid-nineteenth century, "fledgling Central American republics were shunted aside by the superpowers, Great Britain and the United

153. Malcolm N. Shaw, *Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, *Judgment of 11 September 1992*, 42 INT'L & COMP. L.Q. 929, 930 (1993); see also Land, Island and Maritime Frontier Dispute, 1992 I.C.J. at 381, ¶¶ 30–31 (discussing El Salvador's objection to a proposal by the United States to purchase land from Honduras in 1854 and El Salvador's note to Honduras marking the beginning of a land dispute in 1861).

154. See LESTER D. LANGLEY & THOMAS SCHOONOVER, *THE BANANA MEN: AMERICAN MERCENARIES AND ENTREPRENEURS IN CENTRAL AMERICA, 1880–1930*, at 6–7 (1995) (noting the intervention of U.S. filibusters in Central America during the 1850s).

155. *Id.* at 6. At that time, a filibuster referred to a "non-authorized military incursion into another country for the purpose of seizing power." STATEN, *supra* note 91, at 23. See generally WILLIAM O. SCROGGS, *FILIBUSTERS AND FINANCIERS: THE STORY OF WILLIAM WALKER AND HIS ASSOCIATES* (1916) (detailing the activities of William Walker and other filibusters in Central America).

156. See JOHN E. FINDLING, *CLOSE NEIGHBORS, DISTANT FRIENDS: UNITED STATES-CENTRAL AMERICAN RELATIONS* 26–27 (1987) (connecting filibusterism to American attitudes concerning Manifest Destiny).

157. See LANGLEY & SCHOONOVER, *supra* note 154, at 8–11 (providing an overview of the intervention of industrializing countries, including European metropole countries); see also Thomas Schoonover, *Metropole Rivalry in Central America, 1820s to 1929: An Overview*, in *CENTRAL AMERICA: HISTORICAL PERSPECTIVES ON THE CONTEMPORARY CRISES* 21, 21–46 (Ralph Lee Woodward, Jr. ed., 1988) (providing information on the competition between metropole countries and its effect on Central America); THOMAS SCHOONOVER, *THE FRENCH IN CENTRAL AMERICA: CULTURE AND COMMERCE, 1820–1930*, at 1–46 (2000) (providing an account of French intervention in Central America in the mid-nineteenth century); THOMAS SCHOONOVER, *GERMANY IN CENTRAL AMERICA: COMPETITIVE IMPERIALISM, 1821–1929*, at 12–54 (1998) (providing general information about Germany's intervention in Central America during the nineteenth century).

States,” which dealt with isthmian political questions “with little or no regard for Central American interests.”¹⁵⁸

Prompted by continuous intra-American strife, the United States and Mexico organized the 1907 Central American Peace Conference, convened in Washington, D.C. It produced eight conventions, including the establishment of the CACJ,¹⁵⁹ which rendered the 1917 judgment of decisive import to the Chamber in the *Gulf of Fonseca* case.¹⁶⁰ But by this time, decolonization had registered particularly disruptive effects on relations between small but densely populated El Salvador and large but sparsely populated Honduras, which disputed ill-defined portions of frontier boundary dating from the time of independence.¹⁶¹ Honduras’ central station became a political center of gravity and launching point for belligerent activity across the isthmus, making its future and permanent neutrality a major focus of Salvadoran diplomacy and result of the 1907 Conference.¹⁶²

But during the period dating from independence up to the 1917 CACJ judgment, the CACJ found that successive authorities had affirmed notorious and peaceful ownership of the Gulf, “without protest or contradiction by any nation

158. Stansifer, *supra* note 85, at 38–39.

159. Scott, *supra* note 144, at 133. The Conference convened from November 14 through December 20, 1907. *See id.* at 127–43 (summarizing relevant articles, and preparatory statements of U.S. Secretary of State Elihu Root and Mexican Ambassador Extraordinary and Plenipotentiary to the United States, Don Enrique C. Creel).

160. *See infra* Part V.

161. *See* Jeffrey J. Smith, *Notre Mer? An Independent Québec’s Maritime Claims in the Gulf of St. Lawrence and Beyond*, 35 CAN. Y.B. INT’L L. 113, 172 (1997) (revealing that the history of conflict between Honduras and El Salvador began soon after independence). Fractious immigration, political, and economic issues resulted in belligerent relations in the 1960s, resulting in a brief but damaging 100 Hour War between the two countries in 1969 (also known as the Football War). *See* Vincent Cable, *The “Football War” and the Central American Common Market*, 45 INT’L AFF. 658, 659–62 (1969) (summarizing the events surrounding the Football War).

162. *See* Salvador Rodríguez González, *The Neutrality of Honduras and the Question of the Gulf of Fonseca*, 10 AM. J. INT’L L. 509, 509 (1916) (discussing the purpose of the 1907 conference and the geographical and political status of Honduras); *see also* Scott, *supra* note 144, at 135 (referencing article III of the 1907 General Treaty of Peace and Amity: “Honduras declares from now on its absolute neutrality in any conflict between the other republics”).

whatsoever.”¹⁶³ The Chamber found no evidence there was for the waters “anything analogous” to the disputes associated with the land boundary;¹⁶⁴ and it concluded the 1917 Judgment had to be taken into consideration for its examination of an important part of the Gulf’s history.¹⁶⁵ But according to Iain Scobbie, the Chamber “did no more than repeat and affirm the conclusions reached by the [CACJ]”¹⁶⁶ by holding: “The essence of the 1917 decision . . . was . . . that these historic waters were then subject to a ‘co-ownership’ (*condominio*) of the three coastal States.”¹⁶⁷ Again, that factual conclusion warrants closer attention, as it is based on a convenient distinction between the asserted placid waters of the bay and longstanding terrestrial hostilities among its littoral powers. The CACJ judgment did take judicial notice of the “repeated and dangerous controversies” in the region between the United States and Great Britain.¹⁶⁸ These controversies led to the Clayton-Bulwer Treaty,¹⁶⁹ which attempted to quiet mid-nineteenth century rivalry over control of possible trade routes.¹⁷⁰ But in view of this competition, the CACJ adopted the sanguine perspective that, “whatever may have been the motives” behind concluding the treaty, it “consecrated a principle of justice—of honorable respect for the sovereignty and independence of the weak Central American nations.”¹⁷¹ Moreover, the CACJ’s treatment of Great Power interest in the region comes across as starkly Pollyannaish, certainly dismissive of the filibuster campaigns and practices of the Banana men and dueling transit

163. *El Salvador v. Nicaragua*, 11 AM. J. INT’L L. at 700–01; *see also* Land, Island and Maritime Frontier Dispute, 1992 I.C.J. at 593, ¶ 394 (discussing consensus that the Gulf of Fonseca is an historic bay).

164. Land, Island and Maritime Frontier Dispute, 1992 I.C.J. at 589, ¶ 386.

165. *Id.* ¶ 387.

166. Scobbie, *supra* note 31, at 252.

167. Land, Island and Maritime Frontier Dispute, 1992 I.C.J. at 597, ¶ 398.

168. *El Salvador v. Nicaragua*, 11 AM. J. INT’L L. at 701.

169. *Id.*

170. *See* Thomas M. Leonard, “Keeping the Europeans Out”: *The United States and Central America Since 1823*, in CENTRAL AMERICA: HISTORICAL PERSPECTIVES ON THE CONTEMPORARY CRISES 5, 7 (Ralph Lee Woodward, Jr. ed., 1988) (providing an overview of the Clayton-Bulwer Treaty).

171. *El Salvador v. Nicaragua*, 11 AM. J. INT’L L. at 701.

barons.¹⁷² Salvador's Minister to the United States, in a 1913 letter to the U.S. Secretary of State, bluntly reinforced this point, protesting the repeated interferences of "filibustering hordes" which preyed on Central American coastlines with the intention of "work[ing] their way up to the heart of the [G]ulf [of Fonseca] in their intention to settle on Tigre Island."¹⁷³ According to the CACJ, however: though "the diplomatic history of certain Powers shows that for more than a half a century they have been seeking to establish rights of their own in the Gulf for purposes of commercial policy," such machinations were done "always on the basis of respect for the ownership and possession which the States have maintained by virtue of their sovereign authority."¹⁷⁴ While aware of police powers exercised in the Gulf by El Salvador, Honduras, and Nicaragua,¹⁷⁵ no support was proffered suggesting police powers amounted to the establishment of condominium. To the contrary, the CACJ glossed over the fact that Honduras and Nicaragua attempted to "[fix] a divisionary line between the two . . . in the waters of the Gulf" in 1900,¹⁷⁶ as did El Salvador and Honduras in 1884.¹⁷⁷ In support of a supposed "cordial harmony" of interests,¹⁷⁸ the CACJ relied on a detailed description of the Gulf by the American geographer, and former U.S. Chargé d'Affaires for Central American States, George Squier,¹⁷⁹ who noted the Bay of Fonseca was not simply valuable for its "admirable ports,"¹⁸⁰ but

172. Note, for example, the U.S. adventurer and filibuster, William Walker, who, with a band of transport-financed mercenaries, formed a coalition with Nicaraguan Liberals, and overthrew the government in 1855, receiving recognition from U.S. President, Franklin Pierce's administration. For an account of his filibusterism and its consequences in the region, see FINDLING, *supra* note 156, at 26–33.

173. Letter from Francisco Dueñas, the Minister of Salvador to the Secretary of State (Oct. 21, 1913) (on file at Papers Relating to the Foreign Relations of the United States 1913–1915, File No. 817.812/49, at 1028), *available at* <http://images.library.wisc.edu/FRUS/EFacs/1913/reference/frus.frus1913.i0028.pdf>.

174. *El Salvador v. Nicaragua*, 11 AM. J. INT'L L. at 701.

175. *Id.* at 700–01.

176. *Id.* at 678, 710.

177. *See id.* at 710 (noting that the Honduran Congress rejected the demarcation convention).

178. *Id.*

179. *Id.* at 702–04.

180. *El Salvador v. Nicaragua*, 11 AM. J. INT'L L., at 704.

even more valuable “to us” considering its inevitable geopolitical position as the “inevitable terminal, in the Pacific, of a railway between the two oceans.”¹⁸¹ Furthermore, it should be recalled that the Central American War of 1907 served as the immediate prompt for the 1907 Peace Conference,¹⁸² a conference described as a three-way mediation between the belligerent states of Salvador, Honduras, and Nicaragua.¹⁸³ The acceptance of a condition of peaceful and conjoined administration of waters on the west coast of these three states—historically riven with rivalry and engaged so recently before in a vicious land war that also included Caribbean sea assaults—strains credulity, particularly in light of regional tensions that would arise again

181. *Id.*

182. *See* LANGLEY & SCHOONOVER, *supra* note 154, at 62–67 (discussing the Central American War of 1907). Nicaragua invaded Honduras after Honduras had overthrown Nicaragua’s political ally. *See id.* at 64 (discussing the Nicaraguan invasion of Honduras in February 1907). Nicaragua attacked Honduras’ northwestern frontier, seized the city of San Marcos, and set sail against major Atlantic Ocean ports on the Honduran north coast, where Honduras drew its revenue from U.S. concessionaires and banana companies. *See id.* (examining the main front of the Nicaraguan invasion, which took San Marcos). U.S. Marines and bluejackets intervened to protect nationals and interests but did not act to halt the invasion. *See id.* at 65 (noting the United States sent Marines ashore to police seaports). Guatemala began arming Salvador, which had an alliance with Honduras. *See id.* at 64 (noting that Guatemala sent arms to the president-elect of El Salvador and the existence of a Hondurian-Salvadoran treaty). On 17 March 1907, Honduran and Salvadoran troops were decimated at the battle of Namasigüe, due in part to the introduction in Central America of Maxim machine guns. *See id.* at 66 (describing the battle of Namasigüe). In terms of the number killed in proportion to the number engaged, Namasigüe holds the grim distinction of the bloodiest battle in history. *Id.* Shortly after the creation of the CACJ, the President of Costa Rica, using his good offices, convinced Honduras, Nicaragua, Guatemala, and El Salvador to address grievances in the CACJ, but a judgment secured the signatures of only three of the four judges, in violation of article 24 of the Convention establishing the Court, thus calling into question the judgment’s validity. *See* Hudson, *supra* note 144, at 768–69 (discussing the resort to the Court to maintain peace and harmony between Guatemala, El Salvador, Honduras, and Nicaragua and the judgment rendered).

183. *See* Rodríguez, *supra* note 162, at 517 (characterizing El Salvador, Nicaragua, and Honduras as belligerents and describing the conference as a mediation). The assessment of impending war is a fair one and is borne out by a barrage of communications among the heads-of-state and their plenipotentiaries. *See generally* PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES: PART 2, at 606–43 (Wash. Gov’t Printing Office 1910) (relating to the diplomatic correspondence leading up to the conclusion of the Central American Protocol of Washington, September 17, 1907).

almost immediately following the outbreak of World War I.¹⁸⁴ It was in this setting, against a political backdrop of control over a trade route across the isthmus, that international decision-makers asserted the legal idea of condominium.

V. THE BRYAN-CHAMORRO TREATY AND ITS AFTERMATH

On August 5, 1914, Nicaragua and the United States concluded the Bryan-Chamorro Treaty.¹⁸⁵ Article I of the treaty granted the United States an option to construct and maintain an interoceanic canal using the San Juan River route through Nicaragua.¹⁸⁶ Article II granted the United States exclusive jurisdiction and a renewable ninety-nine-year lease of a naval base on islands in the Gulf of Fonseca.¹⁸⁷

Although the maiden voyage through the United States-constructed Panama Canal was by that time only days away,¹⁸⁸ the United States had reasons to negotiate an option to construct another, nearby canal: it wanted to prevent any foreign power of opportunity to construct a competing interoceanic canal.¹⁸⁹ Other

184. Austria-Hungary and Germany declared war on Serbia on July 28, 1914. See BARBARA W. TUCHMAN, *THE GUNS OF AUGUST 71* (1962) (noting Austria-Hungary's declaration backed by Germany's "faithful support"); HOLGER H. HERWIG, *THE FIRST WORD WAR: GERMANY AND AUSTRIA-HUNGARY, 1914–1918*, at 18 (1997) (noting Kaiser Wilhelm's signed war declaration on the same date).

185. Interoceanic Canal (Bryan-Chamorro Treaty), Aug. 5, 1914, in CHARLES I. BEVANS, *10 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA, 1776–1949*, at 379–81 (1972). The treaty was ratified by the U.S. Senate on 18 February, 1916. *Id.* at 379.

186. *Id.* art. I.

187. *Id.* art. II. The treaty bears the name of then-U.S. Secretary of State William Jennings Bryan and Nicaragua's Ambassador to the United States, General Emiliano Chamorro. *Id.* at 381; SARA STEINMETZ, *DEMOCRATIC TRANSITION AND HUMAN RIGHTS: PERSPECTIVES ON U.S. FOREIGN POLICY 97* (1994); see *Biographies of the Secretaries of State: William Jennings Bryan*, U.S. DEPT. OF STATE, <https://history.state.gov/departmenthistory/people/bryan-williams-jennings> (last visited Feb. 26, 2015) (showing that William Jennings Bryan was Secretary of State from 1913–1915).

188. See Interoceanic Canal (Bryan-Chamorro Treaty), *supra* note 185, at 379 (noting that the treaty was signed August 5, 1914); DAVID McCULLOUGH, *THE PATH BETWEEN THE SEAS: THE CREATION OF THE PANAMA CANAL, 1870–1914*, at 609 (1977) (noting that the first voyage crossing the Panama Canal was on August 15, 1914). The Panama Canal officially opened on August 15, 1914. See *id.* (noting the *Ancon's* crossing on August 15 and the official declaration of the Canal's opening were not headline news).

189. See George A. Finch, *The Treaty with Nicaragua Granting Canal and Other*

possible canal and transport routes long had been of interest to explorers. As early as 1539–1540, Spanish colonial authorities had charted a transport route connecting the Bay of Honduras in the Caribbean to the Gulf of Fonseca;¹⁹⁰ Squier uncovered Spanish documents from the sixteenth and seventeenth centuries favoring the Honduras route, which apparently was abandoned due to concerns about expense and pirates.¹⁹¹ The Gulf’s “superior advantages,” however, and “constellation of ports” made it “the unrivaled terminus on the entire Pacific coast of America,” according to Squier’s nineteenth century account.¹⁹² A Nicaraguan route across the isthmus, making use of Lake Nicaragua, also had long intrigued engineers, financiers,¹⁹³

Rights to the United States, 10 AM. J. INT’L L. 344, 346 (1916) (discussing the treaty with Nicaragua as only a way to guarantee that nobody else built a competing interoceanic railway).

190. See E.G. SQUIER, *THE STATES OF CENTRAL AMERICA 677–78* (1858) (noting that Spain had charted an interoceanic railway through the Isthmus of Panama). Francisco de Montejo, governor of Honduras, urged in a letter to the emperor in 1539 construction of a road between Puerto de Caballos and the Gulf of Fonseca, owing to a better climate and pacific inhabitants. C.L.G. ANDERSON, *OLD PANAMA AND CASTILLA DEL ORO* 309 (1911).

191. Charles L. Stansifer, *E. George Squier and the Honduras Interoceanic Railroad Project*, 46 HISP. AM. HIST. REV. 1, 2 n.4 (1966).

192. SQUIER, *supra* note 190, at 678, 690, 692.

193. See generally STEPHEN DANDO-COLLINS, *TYCOON’S WAR: HOW CORNELIUS VANDERBILT INVADED A COUNTRY TO OVERTHROW AMERICA’S MOST FAMOUS MILITARY ADVENTURER* (2008) (chronicling Cornelius Vanderbilt’s efforts as a financier of the Nicaraguan Route across the Isthmus). Cornelius Vanderbilt, one of the richest Americans, secured rights from Nicaragua to construct a canal along the San Juan River route in 1849, as a means of facilitating a faster U.S. east coast connection to the newly discovered gold mines in California. See NOEL MAURER & CARLOS YU, *THE BIG DITCH: HOW AMERICA TOOK, BUILT, RAN, AND ULTIMATELY GAVE AWAY THE PANAMA CANAL* 37 (2011) (discussing Vanderbilt securing rights to build a canal along the San Juan River). In 1850, he sent his agent, Orville Childs, seasoned by the Erie Canal dig, to scope out a plan, which ultimately fell through because of a lack of financing and concerns about dredging and draft requirements. See *id.* at 37–38 (describing Orville Childs’ plan for the canal which ultimately fell through). In 1889, the U.S. Congress granted a charter to the Maritime Canal Company to again develop a San Juan River route, which excavated one and one-half miles of canal and eleven and one-half miles of railroad before running out of money in 1893. See *Central American: Panama Canal: Pre-Canal History*, GLOBAL PERSPECTIVES, <http://www.cotf.edu/earthinfo/camerica/panama/pctopic2.html> (last visited Feb. 17, 2015) (noting that the Maritime Canal Company was chartered by the United States to build in Nicaragua on the San Juan River Route, but ran out of funding in 1892 before completing the project); *Canals and Costa Rica*, POWER & MONEY (Oct. 3, 2008),

and Nicaragua's profit-sensing elites,¹⁹⁴ as did an interoceanic railroad route through Honduras.¹⁹⁵ Hedging bets, the Spooner Act (1902) authorized the U.S. President to negotiate a canal with Nicaragua should the Panama venture collapse.¹⁹⁶ Maritime and commercial powers naturally gravitated to the region, spawning, most importantly, a rivalry in Central America between the United States and Great Britain dating to the mid-1830s.¹⁹⁷ Although a proto-maritime power at the beginning of the Mexican-American War (1846–1848), the United States made the seizure of Mexican Pacific coast ports from Mazatlán up the California coast to Oregon an almost immediate objective of the war—a stratagem motivated more because of Britain's designs on California rather than grievances with Mexico.¹⁹⁸ At war's outset, the U.S. Navy also opened up a second theatre in the Gulf of Mexico, effectively blockading then seizing key ports of Veracruz and Tampico in the Yucatan Peninsula. Establishing this two-theatre naval operation in seas 2,500 miles apart by land and 14,000 miles apart by sea had a “revolutionary impact” on burgeoning U.S. seaborne interests and thoughts about spreading Manifest Destiny.¹⁹⁹ In 1846, the United States secured a right of way across Panama in an agreement with New Granada (now Colombia).²⁰⁰ The British

<http://noelmaurer.typepad.com/aab/2008/10/canals-and-cost.html> (noting the length of canal excavated and railroad built before construction stopped in 1893).

194. See MICHEL GOBAT, *CONFRONTING THE AMERICAN DREAM: NICARAGUA UNDER U.S. IMPERIAL RULE* 28 (2005) (noting the dreams of elite Nicaraguans for a canal).

195. See Stansifer, *supra* note 191, at 1 (noting that beginning in 1850 following a trip by the U.S. Chargé d'Affaires in Central America to the Bay of Fonseca, an interoceanic railway was envisioned).

196. See Edwin C. Hoyt, *Law and Politics in the Revision of Treaties Affecting the Panama Canal*, 6 VA. J. INT'L L. 289, 294 n.26 (1966) (describing the Spooner Act).

197. See Stansifer, *supra* note 4, at 38 (acknowledging the rivalry between the United States and Great Britain on the isthmus in the mid-1830s in Central America).

198. See K. JACK BAUER, *THE MEXICAN AMERICAN WAR, 1846–1848*, at 164–66 (1974) (discussing U.S. seizure of ports from Mazatlan up the coast to Oregon and fears about the British that motivated these actions).

199. See K. JACK BAUER, *SURFBOATS AND HORSE MARINES: U.S. NAVAL OPERATIONS IN THE MEXICAN WAR, 1846–48*, at 239 (1969) (describing the impact of the Mexican-American War on U.S. history).

200. See Treaty of Peace, Amity, Navigation and Commerce with New Granada, Dec. 12, 1846, art. 35, in CHARLES I. BEVANS, 6 TREATIES AND OTHER INTERNATIONAL

responded by seizing in 1848 the port of San Juan del Norte on the Atlantic coast of Nicaragua in exercise of its protectorate of the Mosquito Nation,²⁰¹ but also thinking it the “most likely” isthmian canal terminus.²⁰² In 1849, it seized Tigre Island in the Gulf of Fonseca.²⁰³ “War fever” abated, however, when the two powers agreed to end bids for exclusive control over possible canal sites (the Clayton-Bulwer Treaty (1850–1901)),²⁰⁴ an agreement the British negotiated to forestall further annexations to its weakening holdings and interests in Central America,²⁰⁵ which included in addition to its historical presence on the Mosquito Coast,²⁰⁶ interests in British Honduras [Belize], and the Bay

AGREEMENTS OF THE UNITED STATES OF AMERICA 1776–1949, at 868–81 (1971) (holding that the United States “shall enjoy in the Ports of New Grenada . . . all the exemptions, privileges, and immunities, concerning commerce and navigation, which are now . . . enjoyed by Granadian citizens”). The Mallarino-Bidlack Treaty is named after New Granada Commissioner, Manuel María Mallarino, and U.S. Chargé d’Affaires in Bogotá, Benjamin A. Bidlack. *See id.* at 868 (noting Manuel María Mallarino and Benhamin A. Bidlack agreed to the general treaty of peace).

201. GEORGE THOMAS WEITZEL, *AMERICAN POLICY IN NICARAGUA* 6 (1916); *see* Hoyt, *supra* note 196, at 302 (noting that the British seized control of the mouth of the San Juan River in the name of the Mosquito Indians).

202. Stansifer, *supra* note 85, at 40.

203. WEITZEL, *supra* note 201, at 6.

204. *See* Stansifer, *supra* note 85, at 44 (discussing the cooling of “war fever”); Treaty with Great Britain for Facilitating and Protecting the Construction of a Ship Canal Between the Atlantic and Pacific Oceans, Apr. 19, 1850, in CHARLES I. BEVANS, *12 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES, 1776–1947*, at 775 (1974) (discussing neutrality of the Canal) [Clayton-Bulwer Treaty]; abrogated with the Hay-Pauncefote Treaty, Nov. 18, 1901. *See generally* GRAHAM H. STUART & JAMES L. TIGNER, *LATIN AMERICAN AND THE UNITED STATES 184–96* (6th ed. 1975) (detailing Anglo-American Isthmian Diplomacy).

205. *See* Richard W. Van Alstyne, *British Diplomacy and the Clayton-Bulwer Treaty, 1850–60*, 11 J. MODERN HIST. 149, 156 (1939) (citing Bulwer’s “History of the Mosquito Question”). Van Alstyne considered the treaty an “imperial triumph” of British diplomacy for the concessions agreed to by a vacillating and anxiety-prone U.S. upstart administration. *Id.* at 157. British declarations excepted application with regard to British interests in Belize and the Bay Islands. *See id.* at 160 (discussing Belize and the Bay Islands as outside the scope of the treaty). The treaty was revisited and abrogated in 1901 with the Hay-Pauncefote Treaty, when changing circumstances, prompted by the United States’ rise to primacy with its defeat of Spain in the 1898 Spanish-American War, necessitated Britain’s political but not commercial retirement from the scene. *See id.* at 161 (discussing the abrogation of the Clayton-Bulwer treaty with the Hay-Pauncefote Treaty of 1901).

206. *See* Robert A. Naylor, *The British Role in Central America Prior to the Clayton-*

Islands (off the Atlantic coast of Honduras).²⁰⁷ Geo-strategic posturing continued, notwithstanding the Clayton-Bulwer Treaty,²⁰⁸ and stoked long-established U.S. suspicions about foreign imperial intentions in the region²⁰⁹ and hemisphere.²¹⁰ These suspicions had been stirred more recently by a 1902 European blockade and British bombardment of ports on the mouths of Venezuela's sprawling Orinoco River.²¹¹ That crisis began when the destabilized Venezuelan government defaulted on payments to European creditors for development of Venezuela's interior.²¹² A veiled threat of naval intervention on Venezuela's behalf by U.S. President Theodore Roosevelt brought the row to a resourceful conclusion through the famous Venezuelan Arbitrations of 1903.²¹³ Moreover, in 1909, animated in part by German and Japanese canal-construction overtures with Nicaragua's president José Santos Zelaya, United States marines were dispatched to Nicaragua, where they remained until 1933.²¹⁴ In 1912, following Japanese corporate attempts to

Bulwer Treaty of 1850, 40 HISP. AM. HIST. REV. 361, 363 (1960) (describing British activities in Central American and the Mosquito Coast). The Mosquito Coast forms part of the eastern seaboard of Nicaragua and Honduras. ENCYCLOPEDIA OF WORLD GEOGRAPHY: MOSQUITO COAST 634 (R.W. McColl ed., 2005).

207. See Stansifer, *supra* note 85, at 38.

208. See Leonard, *supra* note 170, at 7 (noting "the ink barely dried on the Clayton-Bulwer Treaty before differences in interpretation surfaced").

209. See ROBERT W. AGUIRRE, 15 INTERNATIONAL STRAITS OF THE WORLD: THE PANAMA CANAL 178–79 (Gerald J. Mangone ed., 2010) (discussing the U.S. suspicions of European interest in the region).

210. See James Monroe, Message of the President of the United States at the Commencement of the First Session of the Eighteenth Congress (Dec. 2, 1823), in AMERICAN STATE PAPERS, FOREIGN RELATIONS V 245, 246 (1858) (describing U.S. concerns about British intentions in the hemisphere) [the "Monroe Doctrine"].

211. See Christopher R. Rossi, Jus ad Bellum *in the Shadow of the 20th Century*, 15 N.Y.L. SCH. J. INT'L & COMP. L. 49, 55 (1994) (describing the British naval blockade against five Venezuelan ports on the Orinoco River).

212. See *id.* at 57 (discussing the events that precipitated the European Blockade and British bombardment).

213. See *id.* at 56–57 (explaining the events leading to the Venezuelan Arbitrations of 1903); see also JACKSON H. RALSTON & W.T. SHERMAN DOYLE, VENEZUELAN ARBITRATIONS OF 1903 (1904) (chronicling the Venezuelan Arbitrations).

214. STEINMETZ, *supra* note 187, at 98. The United States also severed diplomatic relations with Nicaragua in 1909 due to filibusters' support of revolutionary activity against the Zelaya regime. See *A Guide to the United States' History of Recognition*,

secure land in Magdalena Bay in Baja, Mexico, the United States Senate adopted the “Lodge Corollary” to the Monroe Doctrine, making non-American ownership or control of ports in the Americas a matter of grave concern to the United States.²¹⁵ Thus, the canal option signed with Nicaragua in 1914 and ratified in 1916 (following failed attempts to ratify in 1911 and 1913),²¹⁶ secured longstanding United States interests against further meddling: it foreclosed the possibility of a competing non-American-controlled pathway between the oceans.²¹⁷

But more was required. Article II of the Bryan-Chamorro Treaty granted the United States a renewable lease of a naval base on islands in the Gulf of Fonseca.²¹⁸ Here, U.S. intentions sought to deny Europeans control over the flanks of the proposed isthmian canal, which could provide port access to Haiti, St. Thomas, and the Galápagos Islands and serve as much needed

Diplomatic, and Consular Relations, by Country, Since 1776: Nicaragua, U.S. DEPARTMENT ST., <http://history.state.gov/counties/nicaragua> (last visited Feb. 5, 2015) (discussing the United States severing diplomatic relations with Nicaragua in 1909). U.S. Marines landed in Bluefields soon thereafter. *Id.* Zelaya’s regime collapsed in December 1909. *See id.* (noting that Zelaya resigned in December 1909).

215. Henry Cabot Lodge, Corollary to the Monroe Doctrine (Aug 2, 1912), in 62 CONG. REC. 10045 (1912); *see* Donald H. Estes, *Asama Gunkan The Reappraisal of a War Scare*, J. SAN DIEGO HIST., Summer 1978, at 1 (1978), available at <http://www.sandiegohistory.org/journal/78summer/asama.htm> (discussing the corollary to the Monroe Doctrine as resulting from Japanese negotiations to purchase Magdalena Bay).

216. Hudson, *supra* note 144, at 777–78. The third attempt at the convention was signed at Washington on 5 August 1914. *Id.* at 777.

217. *See* LAWRENCE LENZ, POWER AND POLICY: AMERICA’S FIRST STEPS TO SUPERPOWER, 1889–1922, at 176 (2008) (discussing the United States signing the Wertz-Chamorro Treaty). A French company began construction of the Panama Canal in 1881 but after declaring bankruptcy in 1889, the United States Congress authorized purchase in the 1902 Panama Canal Act. *See* MAURER & YU, *supra* note 193, at 55–76 (discussing the French initiative and the American take-over). Twelve days after declaring independence from Colombia (6 November, 1903), the United States and the Republic of Panama concluded an agreement for the construction of the canal across the Panamanian Isthmus. Convention for the Construction of a Ship Canal, Nov. 18, 1903, U.S.-Panama 1968, in CHARLES I. BEVANS, 10 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES, 1776–1947, at 663 (1972). In June 2013, Nicaragua awarded a Chinese company a \$40 billion concession to construct a massive waterway between the Atlantic and Pacific to rival the Panama Canal. Bruce Kennedy, *Nicaragua Plans Its Own Panama Canal* CBS NEWS (Feb. 24, 2014), <http://www.cbsnews.com/news/nicaragua-plans-its-own-panama-canal>.

218. Convention for the Construction of a Ship Canal, *supra* note 217, at 380.

coaling stations for extended European naval fleets.²¹⁹ The Atlantic flank was well protected due to United States naval bases at Guantanamo Bay, Cuba, and at San Juan, Puerto Rico.²²⁰ But the Pacific expanse was exposed, presenting a serious threat, with only two options—purchasing the small, isolated, and “bleak” Cocos Island, one hundred miles south of the canal, or Little Corn and Great Corn Islands in the Gulf of Fonseca.²²¹ The Gulf of Fonseca might have become a site by default, but it also retained interest as a means to stymie German interest in constructing a naval station in the Gulf of Fonseca.²²² Although several hundred miles away from the western terminus of any canal constructed by way of Lake Nicaragua, and 600 miles west and 300 miles north of Panama, Fonseca’s waters provided the strategic way station “from which to launch a flank attack upon any unfriendly naval demonstration directed against” the United States’ Pacific control over the Panama Canal.²²³

The naval base agreement was negotiated for three million dollars and reworked as forgiveness of debt owed by cash-strapped Nicaragua to the United States.²²⁴ But to the embarrassment of the United States—and most certainly to one of its chief architects of the 1907 Central American peace process, the preeminent international lawyer, Elihu Root²²⁵—furious protests

219. See AGUIRRE, *supra* note 209, at 177–80 (discussing the United States not wanting Europeans to have control over the isthmian canal).

220. PAOLO E. COLETTA, UNITED STATES NAVY AND MARINE CORPS BASES, OVERSEAS 69 (K. Jack Bauer ed., 1985).

221. *Id.*

222. See EDWARD S. KAPLAN, U.S. IMPERIALISM IN LATIN AMERICA: BRYAN’S CHALLENGES AND CONTRIBUTIONS, 1900–1920, at 46 (1998); see also Robert Freeman Smith, *A Note on the Bryan-Chamorro Treaty and German Interest in a Nicaraguan Canal, 1914*, 9(1) CARIBBEAN STUD. 63, 63–64 (1969) (discussing Germany’s interest in a Nicaraguan canal).

223. Finch, *supra* note 189, at 347.

224. See HAROLD EUGENE DAVIS ET AL., LATIN AMERICAN DIPLOMATIC HISTORY: AN INTRODUCTION 161 (1977) (noting the United States attempted to help Nicaragua with the treaty that gave Nicaragua three million dollars to meet debt payments); Hudson, *supra* note 144, at 777 (noting that funds from treaty would be used to “rehabilitate [Nicaragua’s] depleted treasury”).

225. Root was a leading officer in the American Society of International Law and co-founder of its journal; the American delegate to the 1907 Hague Peace Conference; the

erupted throughout the region, fueled by the “considerable secrecy” attending the treaty’s negotiation.²²⁶ From Central American perspectives, the treaty embedded designs to render Nicaragua a protectorate of the United States, “mak[ing] forever impossible” any lingering prospect of federation.²²⁷ Indeed, a previous and ultimately forestalled attempt to secure such a treaty (the so-called Weitzel-Chamorro treaty, signed but not ratified on 8 February 1913), contained an article that expressly attempted to extend provisions of the Platt Amendment regarding Cuba to Nicaragua.²²⁸ Moreover, the proposed arrangement complicated regional discussions concluded at the Fourth Central American Conference of 1912, which proposed making extensive use of the Gulf of Fonseca for a new communications network in Central America.²²⁹ But an economic imperative was at work as well, an imperative that cleaved Nicaraguan interests from its neighboring powers in Fonseca’s waters: Nicaragua had no port of entry within the Gulf of Fonseca; Salvador and Honduras operated two large ports at La Union and Amapala; both ports

first President of the Carnegie Endowment for International Peace; a member of the Permanent Court of Arbitration; the U.S. Secretary of War (1899–1904); the U.S. Secretary of State (1905–1909); Senator from New York (1909–1915); Ambassador Extraordinary to the Provisional Government of Russia; and 1912 Nobel Peace prize recipient. See CHRISTOPHER R. ROSSI, *EQUITY AND INTERNATIONAL LAW: A LEGAL REALIST APPROACH TO INTERNATIONAL DECISIONMAKING* 100 n.58 (1993) (footnote omitted) (discussing Root’s qualifications and achievements).

226. Hudson, *supra* note 144, at 777 n.103; *Timeline: Nicaragua*, STANFORD.EDU, http://web.stanford.edu/group/arts/nicaragua/discovery_eng/timeline (last visited Feb. 26, 2015).

227. Finch, *supra* note 189, at 345 (footnote omitted).

228. J.S. Reeves, *Clearing the Way for the Nicaragua Canal*, 17 AM. J. INT’L L. 309, 311 (1923). The Platt Amendment (to a U.S. Army appropriations bill of March 1901) secured for the United States a right to intervene in Cuban affairs. See generally James H. Hitchman, *The Platt Amendment Revisited: A Bibliographical Survey*, 23 AMERICAS 343–69 (1967) (discussing the implications of the Platt Amendment). U.S. Secretary of State, William Jennings Bryan repeatedly lobbied, unsuccessfully, the U.S. Senate Foreign Relations Committee to extend the Platt Amendment provision to Bryan-Chamorro Treaty. *Bryan-Chamorro Treaty*, http://www.read-facts-about.com/bryan%E2%80%9393chamorro_treaty (last visited Feb. 26, 2015) (stating that the Wilson administration wanted to add an amendment similar to the Platt amendment, but the US Senate opposed it).

229. *Conventions Adopted by the Fourth Central American Conference*, Managua, 1–11 Jan., 1912, reprinted in 7 AM. J. INT’L L. (Supp.: Official Documents) 34, at 40 (1913).

contributed considerably to the material well-being of the countries and worryment arose that a U.S. naval base in the Gulf would strongly and negatively affect the revenue and police powers of Honduras and Salvador.²³⁰

Protests swept Central America. Colombia reasserted sovereign claims to the islands that Nicaragua purportedly leased to the United States;²³¹ Honduras registered objections to the treaty²³² (although possibly because its own, almost identical, loan-forgiveness agreement recently had failed to secure United States Senate ratification);²³³ Costa Rica complained of the “contemptuous slight,”²³⁴ and El Salvador and Costa Rica—“two states to which America’s ‘Dollar Diplomacy’ had not been applied”²³⁵ brought suit against Nicaragua before the CACJ. Costa Rica asserted violations of riparian rights on the San Juan River, citing a previous arbitral award and claiming an interoceanic canal across Nicaragua could not be built without affecting riparian interests of Costa Rica.²³⁶ El Salvador claimed

230. Letter of Francisco Dueñas, *supra* note 173, at 1030 (noting the importance of the ports and concern that a U.S. naval base would be a hindrance).

231. Hudson, *supra* note 144, at 778; *see also* The Letter of Francisco José Urrutia, “Minister for Foreign Affairs of Colombia to the Minister for Foreign Affairs of Nicaragua,” 24 Dec., 1913, in PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES 1032 (1913), available at <http://images.library.wisc.edu/FRUS/EFacs/1913/reference/frus.frus1913.i0028.pdf> (registering Colombia’s claim).

232. *See* Hudson, *supra* note 144, at 779 (noting the resolution of the Senate referred to objections from Honduras).

233. *See* Finch, *supra* note 189, at 349 (discussing the loan forgiveness agreement failed to be ratified).

234. Hudson, *supra* note 144, at 779 n.108.

235. “Dollar Diplomacy” characterizes that period of U.S. foreign policy immediately preceding World War I, where the goal of diplomacy was to improve financial opportunities by use of private capital to assist U.S. interests abroad. *See Milestones: 1899–1913: Dollar Diplomacy, 1909–1913*, U.S. DEPARTMENT ST., <https://history.state.gov/milestones/1899-1913/dollar-diplo> (last visited Feb. 26, 2015) (discussing when Dollar Diplomacy came about and where it was used). The practice was most evident in the Caribbean, Central America, and China. *Id.*

236. *Costa Rica v. Nicaragua*, C.A.C.J. Judgment of 30 Sept., 1916, 11 AM J. INT’L L. 181 (1917), available at http://www.worldcourts.com/cacj/eng/decisions/1916.09.30_Costa_Rica_v_Nicaragua.htm. Costa Rica alleged the U.S. agreement with Nicaragua, which it came to learn about through private channels, violated an 1888 arbitral award rendered by U.S. President Grover Cleveland, based on the 1858 Cañas-Jerez Treaty, and the Central American Treaty of Washington. *Id.* at 191–92; *see also* Finch, *supra*

the treaty impinged on neutral rights,²³⁷ citing instances of state practice that precluded fortifications of points near neutral waters as a menace to the principle of neutrality.²³⁸ El Salvador's complaint necessarily raised questions about the status of the Gulf of Fonseca's waters, suddenly launching longstanding territorial disputes seaward.

VI. THE 1917 DECISION OF THE CACJ AND ITS AFTERMATH

In its petition to the CACJ to enjoin enforcement of the treaty, El Salvador introduced the claim of co-ownership over the waters of the Gulf.²³⁹ Much of the argument seems to have been crafted by Salvador's legation to the United States, whose chief, Francisco Dueñas, simply asserted that "Salvador, Honduras, and Nicaragua conjoint sovereignty over the Gulf of Fonseca 'ha[d] not ceased, even for a day' since the time of the Spanish discoverers."²⁴⁰ Salvadoran diplomat and Central American Peace Conference delegate, Don Salvador Rodríguez González,²⁴¹ fortified this argument one year before the CACJ's judgment in a 1916 journal piece published by the *American Journal of International Law*,²⁴² and refined subsequently in

note 189, at 347–48 (relating to the impossibility of constructing a Nicaraguan canal without affecting Costa Rican interests). Disputes regarding this border area persist. See *Pending Cases*, INT'L CT. JUST., <http://www.icj-cij.org/docket/index.php?p1=3&p2=1&code=ncr2&case=152&k=7f> (last visited Mar. 11, 2015) (showing that the proceedings on *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.)* have been joined with *Construction of a Road in Costa Rica Along the San Juan River (Nicar. v. Costa Rica)*).

237. See *El Salvador v. Nicaragua*, 11 AM. J. INT'L L. at 685 (discussing El Salvador's concerns regarding neutral rights).

238. Finch, *supra* note 189, at 350. Finch cites the Salvadoran contention that the 1858 Treaty of Paris, the 1911 Congo agreement between France and Germany, and a 1904 agreement between France and England regarding the Straits of Gibraltar required that states bordering neutral, navigable waters were obligated not to fortify their coasts. *Id.*

239. *El Salvador v. Nicaragua*, 11 AM. J. INT'L L., at 685.

240. Letter from Francisco Dueñas, *supra* note 173, at 1028.

241. See Minutes of the Central American Peace Conference (preliminary session), November 1907, Papers Relating to the Foreign Relations of the United States Part 2, 685ff (listing Don Salvador Rodríguez González as a delegate).

242. Rodríguez, *supra* note 162, at 509–42.

treatise form.²⁴³ Washington's deal flagrantly violated Honduran neutrality and the rights of co-guarantors of Honduran neutrality; it imperiled nations fronting the Gulf by placing them in range of possible artillery fire; it violated provisions of the 1907 Treaty of Peace and Amity, and it gave rise to legal causes of action. Rodríguez' argument asserted a controlling security, rather than economic, interest in pluri-state control over the Gulf of Fonseca,²⁴⁴ arguing that underlying natural law principles in support of national security interests had imposed indivisible and joint holdings for the three "riparian owners."²⁴⁵ Drawing on extensive references to the 1830 Belgian revolution against The Netherlands²⁴⁶—"perfectly applicable" in his mind to the teachings on the need for permanent neutrality in the Gulf of Fonseca²⁴⁷—Rodríguez laid the basis for a *jus prohibendi* argument that would heavily influence the 1917 CACJ judgment. He argued that national security and defense considerations were more suitable for condominium arrangements over gulfs and bays, and that the "indivisible community of property" enjoined any actions by any co-owners that might jeopardize the security or existence of the others.²⁴⁸ Part of his argument traced vaguely to Grotius' "common use" argument articulated in *Mare Liberum*: "One cannot appropriate what is common to all" (or to the joint owners in the Gulf), because the natural order—Grotius' immutable primary law of nature—precluded individual appropriations that prejudice the community property interests of others.²⁴⁹ Reflecting this argument, the CACJ judgment held: "One coparcener cannot lawfully alter, or deliver into the hands of an outsider, or even share with it, the use and enjoyment of

243. See *El Salvador v. Nicaragua*, 11 AM. J. INT'L L., at 725–28 (alleging violations of articles II and IX).

244. See Rodríguez, *supra* note 162, at 527 (noting the purpose of joint control is for safety and defense).

245. *Id.*

246. *Id.* at 515–26.

247. *Id.* at 523 (as especially applied to Honduras' neutrality, according to Rodríguez).

248. See *id.* at 527 (discussing the impact of joint control).

249. See HUGO GROTIUS, *THE FREE SEA* 80–81 (David Armitage ed., Richard Hakuyult trans., 2004) (discussing the sea being common to all); Rodríguez, *supra* note 162, at 528 (discussing the co-ownership of the Gulf).

the thing held in common, even though advantage might result therefrom to the other coparceners, unless the consent of all is obtained.”²⁵⁰ But Rodríguez’ argument of condominium drifted far from Grotius’ shore and merely asserted the historical existence of a *jus prohibendi* in the Gulf of Fonseca that should be respected so as to not endanger the peace, or upset the tenuous neutrality of its waters.²⁵¹ The legal basis for this *jus prohibendi* argument—the historical *effectivités*—do not appear to be more apparent than the unfolding political interests to forestall a naval agreement with port-development consequences between Nicaragua and the United States.

But the CACJ agreed with Salvador, concluding the Bryan-Chamorro treaty “menaced” its “primordial interests” and national security, and violated its rights of co-ownership in the Gulf,²⁵² save for the sovereign establishment of three-mile “littoral marine leagues,” a proto-contiguous nine-mile zone for police powers, and a right of innocent use for third states in nonlittoral waters.²⁵³ It found Nicaragua’s agreement with the United States violated Article II of the General Treaty of Peace and Amity concluded by the Central American Republics in 1907, and ordered Nicaragua to restore the *status quo ante* to conclusion of the Bryan-Chamorro Treaty.²⁵⁴ In support of its conclusions, the CACJ referenced the “separate opinion” of the distinguished Argentine jurist, Luis Drago, an arbiter in the 1910 *North Atlantic Coast Fisheries Case*.²⁵⁵ Yet, as alluded to

250. *El Salvador v. Nicaragua*, 11 AM. J. INT’L L., at 712.

251. *See Rodríguez, supra* note 162, at 527–30 (discussing the historical rights of all of the countries).

252. *El Salvador v. Nicaragua*, 11 AM. J. INT’L L., at 694–96.

253. *Id.* at 711, 715–16.

254. *Id.* at 694–95.

255. *Id.* at 707. I believe the CACJ was referring to Drago’s partial dissenting opinion. *See Grounds for the Dissent to the Award on Question V by Dr. Luis M. Drago, N. Atl. Coast Fisheries*, 11 R.I.A.A., at 203–11. Drago wrote: “[I]t may safely be asserted that a certain class of bays, which might be properly called historical bays, such as the Chesapeake Bay and Delaware Bay in North America and the great estuary of the River Plate in South America, form a class distinct and apart and undoubtedly belong to the littoral country.” *Id.* at 993. He emphasized the need to show “a continuous and established usage.” *Id.* at 992.

by Judge Oda in his *Gulf of Fonseca* case dissent,²⁵⁶ the 1910 discussion revolved around the subject of a single-state bay and the jurisdictional character of a limited number of gulfs that fell into the category of a historic bay. The CACJ took notice of the “voluminous commentaries” and authorities cited by the eminent Drago to buttress this point,²⁵⁷ but none actually discussed, much less referenced, condominium.

Historians have written that the CACJ wrote its own obituary by holding that the naval base agreement violated co-ownership rights possessed in the Gulf.²⁵⁸ Nicaragua ignored the proceedings, declared the decision null and void, and later gave notice to terminate the convention creating the CACJ.²⁵⁹ Manley O. Hudson observed the court “was doomed to failure from the outset,” given the influences of “an overshadowing outside state,”²⁶⁰ an obvious reference to the United States. So ended the first international court in modern history,²⁶¹ “during a period of unusual unrest in Central America,”²⁶² and over a matter that ultimately never came to pass: the “unexpected success of using colliers for refueling during the Navy’s world cruise of 1907–

256. Land, Island and Maritime Frontier Dispute, 1992 I.C.J., at 732, ¶ 32 (dissenting opinion of Judge Oda); see also *id.* ¶ 27 (“The Gulf of Fonseca, a bay bordered by the land of the three littoral States, was certainly not uppermost in the minds of the members of the 1910 Arbitral Tribunal”).

257. El Salvador v. Nicaragua, 11 AM. J. INT’L L., at 707.

258. Nicaragua ignored the proceedings. See DAVIS ET AL., *supra* note 224, at 162 (claiming the actions by the Court “sounded the court’s definitive death knell”). This result provided an historical defeat to the legacy of America’s premier proponent of international law, Elihu Root, who played a central role in the creation of the Central American Court. Dana G. Munro, *Dollar Diplomacy in Nicaragua, 1909–1913*, 38 HISP. AM. HIST. REV. 209, 209 (1958).

259. Hudson, *supra* note 144, at 777–81. Nicaragua also declared it would not abide by any adverse judgment brought against it in the proceedings initiated by Costa Rica. *Id.* at 775.

260. *Id.* at 785.

261. The Court was re-established in 1991, pursuant to the Protocol of Tegucigalpa and the creation of the Central American Integration System. *Central American Court of Justice*, INT’L JUST. RESOURCE CENTER, <http://www.ijrcenter.org/regional-communities/central-american-court-of-justice/> (last visited Feb. 15, 2015).

262. Hudson, *supra* note 144, at 785–86.

1909,” reduced the benefit of constructing a naval station on the islands of the Gulf of Fonseca; the option was never exercised.²⁶³

But the shadow cast over international judicial integrity would have a long and dark effect on the prospects of third party dispute settlement. Attempts to re-create the Central American tribunal sputtered and bled over into Honduras’ refusal to sign, and Nicaragua’s refusal to submit, the Protocol of Signature of 16 December 1920, establishing the Permanent Court of International Justice (PCIJ).²⁶⁴ In the case of Nicaragua, the failure to perfect its adherence to the compulsory jurisdiction of the PCIJ became a forgotten point, until raised by the United States decades later, first to escape from the compulsory jurisdiction of the ICJ in preliminary phases of the *Military and Paramilitary Activities in and Against Nicaragua Case*,²⁶⁵ and then, failing that bid, to assail the institutional integrity of the ICJ for finding that Nicaragua’s declaration consenting to compulsory jurisdiction was to be treated as in force though admittedly never in force.²⁶⁶ This faulty demonstration of *jura novit curia* indicated to the United States the ICJ’s predisposition to proceed to the merits of the case notwithstanding its relevant procedural due process objections. The United States withdrew from the proceedings on the heels of its own, illegal, modification to its compulsory jurisdiction clause.²⁶⁷ Its departure harmed the

263. COLETTA, *supra* note 220, at 69–70. The Author thanks Alexandra McCallen of the Navy Department Library at the U.S. Naval History and Heritage Command for bringing this point to his attention.

264. See Hudson, *supra* note 144, at 784.

265. The United States contended, “Nicaragua never became a party to the Statute of the Permanent Court of International Justice, and that accordingly it could not and did not make an effective acceptance of the compulsory jurisdiction of the Permanent Court.” *Military and Paramilitary Activities in and Against Nicaragua, Jurisdiction and Admissibility (Nicar. v. U.S.)*, Judgment, 1984 I.C.J. 392, 400 (Nov. 26).

266. See Christopher R. Rossi, *A Nicaraguan Feast: Having the Jurisdictional Cake and Eating It Too*, in 1 HISTORIC U.S. COURT CASES: AN ENCYCLOPEDIA 228, 230 (John W. Johnson ed., 2001) (noting that the United States spotted Nicaragua’s weakness in its failure to properly file the signature of protocol to inform the international community that it officially agreed to the compulsory jurisdiction of the ICJ).

267. On 6 April, 1984, U.S. Secretary of State George Schultz deposited with the United Nations Secretary-General a unilateral modification to the United States’ 1946 declaration consenting to the compulsory jurisdiction of the ICJ. The 1946 declaration promised six months prior notice for termination or modification but the Schultz letter

integrity of the international judicial process as the ICJ turned to the merits of the case—a residual and oblique outcome of the turn of the twentieth century turmoil in Fonseca’s waters.

The ICJ Chamber’s finding of condominium provoked yet another round of institutional attacks against the integrity of international decision-making, beginning with the tension recognized but not completely answered by the Chamber’s 1992 judgment involving condominium and its seaward extension over the continental shelf and exclusive economic zones beyond the Gulf itself. Ironically, it was El Salvador, the progenitor of the condominium concept in Fonseca’s waters, that was charged (twice) by Honduras with unjustifiably delaying and disregarding “the letter and the spirit” of the 1992 judgment, first by registering reservations to a joint marine and environmental convention governing Pacific waters,²⁶⁸ and then again by refusing “to fully observe the right of joint sovereignty . . . in the non-delimited waters” of the Gulf of Fonseca.²⁶⁹ Honduras directly asserted El Salvador’s failure to execute the judgment “pose[d] a challenge to the authority, validity and binding nature of the decisions of the main judicial organ of the United Nations,”²⁷⁰ another reminder of the consequences of a judicially prescribed application of condominium.

VII. CONCLUSIONS

If the inscription on *Leviathan’s* book plate encapsulates the “dogma of sovereignty”—*Non est potestas super terram quae comparetur ei* (“Upon earth, there is not his like”)—another inscription adorning the main façade of the Peace Palace at The

declared the 1946 declaration void effective immediately with regard to any Central American State. *Military and Paramilitary Activities in and Against Nicaragua, Jurisdiction and Admissibility*, 1984 I.C.J. at 398. Nicaragua filed suit three days after submission of the Shultz letter. *Id.* at 395.

268. Deputy Permanent Rep. of Honduras, Letter dated 11 March, 2002, from the Chargé d’Affaires a.i. of the Permanent Mission of Honduras to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2002/251 (Mar.11, 2002).

269. Minister for Foreign Affairs of Honduras, Annex to the letter dated 22 January 2002 from the Chargé d’Affaires a.i. of the Permanent Mission of Honduras to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2002/108 (Jan. 22, 2002).

270. *Id.*

Hague, the seat of the ICJ, might serve as the *Leviathan's* counterpart: summarizing the “impressive and onerous” task of the decision-maker, it reads: *Pacis tutela apud judicem* (“The fostering of peace is the task of the judge”).²⁷¹ The latter translation comes from Judge Nagendra Singh, a former president of the ICJ,²⁷² and embraces a generative quality to the judicial function that an alternate translation, preferred perhaps by Judge Oda, might somewhat downplay. The inscription also could translate to read: “The judge is the guardian of the peace.”²⁷³

To foster or to guard: which is it? Part of the onerous task of judicial administration is differentiating between overly generative and overly autocratic applications of justice. And a comparison of these two inscriptions embraces a central tension in the *Gulf of Fonseca* case: the role and limits of judicial administration in relation to competing sovereign claims. The solution articulated by the ICJ Chamber in the *Gulf of Fonseca* case, attempted to diminish, if not negate, any competing claims to the waters of the Gulf while establishing a condominium arrangement over such waters, even mindful of the internecine violence that historically beset and continues to beset the principal Central American countries fronting the Gulf. But the basis for this arrangement in view of history and the *effectivités* borne of Spanish colonial rule appear more as an artifice of the judicial mind than as an application of law grounded in historical fact. There can be no doubt that *jura novit curia* reigns, and that the Court is presumed to know the law. But history tells a complicated story about the degree to which the condominium ruling has been received by the parties involved, underscoring

271. GLEN NEWAY, ROUTLEDGE PHILOSOPHY GUIDEBOOK TO HOBBS AND LEVIATHAN 23 (2008); NAGENDRA SINGH, THE ROLE AND RECORD OF THE INTERNATIONAL COURT OF JUSTICE 1 (1989).

272. Judge Singh served as the presiding judge of the ICJ from 1985 until 1988. Nagendra Singh, *Judge at the World Court*, 74, N.Y. TIMES (Dec. 13, 1988), <http://www.nytimes.com/1988/12/13/obituaries/nagendra-singh-judge-at-the-world-court-74.html>.

273. Ernst-Ulrich Petersmann, *The Doha Development Round Negotiations on Improvements and Clarifications of the WTO Dispute Settlement Understanding 2001–2003: An Overview*, in THE WTO DISPUTE SETTLEMENT SYSTEM 1995–2003, at 3 (Federico Ortino & Ernst-Ulrich Petersmann eds., 2004).

the difficulty of applying a judicially prescribed cohabitation ruling over the objections of some parties involved.

In international jurisprudence, one would be hard pressed to find a more litigious part of the world than the Central American region surrounding the Gulf of Fonseca; it comprises part of the “long saga” of decisions springing from successor claims to Spanish imperial holdings in the Americas.²⁷⁴ That complicated and interwoven history alone makes it the unlikely *situs* for an application of condominium, or its continuing hold in the region, particularly in light of a litany of events darkening its more recent history: the four-day 1969 “Football War” that resulted in 2,000 Honduran and Salvadoran deaths and a forced repatriation of 130,000 Salvadoran migrant workers;²⁷⁵ a re-ignition of hostilities again in 1976; intervention by the Organization of American States (OAS) in 1980 to quell disturbances between the same two countries;²⁷⁶ the use of Central American proxies for Cold War military and paramilitary activity of the 1980s; the

274. Shaw, *supra* note 153, at 929 (citing notable South American disputes including the *Argentine/Chile* case, the *Beagle Channel* case, and the *Arbitral Award of the King of Spain*). The docket of the ICJ today bears witness to the contentious legacy of Central American decolonization. Pending cases before the ICJ include three disputes between Costa Rica and Nicaragua (involving *Certain Activities carried out by Nicaragua in the Border Area*, the proceedings of which have been joined with a dispute on *Construction of a Road in Costa Rica along the San Juan River*; and *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean*); and two disputes involving Nicaragua and Colombia (*Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast*, and *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*). See generally *List of Contentious Cases by Date of Introduction*, INT’L CT. JUST., <http://www.icj-cij.org/docket/index.php?p1=3&p2=2> (last visited Feb 16, 2015) (listing cases referred to the ICJ since 1946). In 2002, El Salvador presented a claim before the ICJ that decisive new facts rendered unreliable documents forming the basis for the Chamber’s *ratio decidendi*, which the ICJ Chamber found inadmissible. See *Application for Revision of the Judgment of 11 September 1992 in the Case concerning the Land, Island and Maritime Frontier Dispute (El Sal./Hond.: Nicar. Intervening) (El Sal. v. Hond.)*, Judgment, 2003 I.C.J. 392, 392 (Dec. 13).

275. Maura A. Bleichert, *The Effectiveness of Voluntary Jurisdiction in the ICJ: El Salvador v. Honduras, A Case in Point*, 16 FORDHAM INT’L L.J. 799, 813 (1992).

276. Gideon Rottem, *Land, Island and Maritime Frontier Dispute ((El Salvador/Honduras: Nicaragua intervening)*, 87 AM. J. INT’L L. 618, 619 (1993). El Salvador and Honduras signed the *General Peace Treaty* after they ceased fire. For the terms of the treaty, see *General Peace Treaty*, El Sal.-Hond., Oct. 10, 1980, 1310 U.N.T.S. 213 (entered into force Dec. 10, 1980).

devolution of El Salvador and Guatemala into vicious civil war and documented genocide; the rise of the Gulf of Fonseca as a hotbed of clandestine activity involving gun-running,²⁷⁷ drug-trafficking,²⁷⁸ and surveillance,²⁷⁹ and of Honduras as the murder capital of the world;²⁸⁰ the numerous United Nations attempts at peace-seeking in the region²⁸¹ culminating in the November 1989 United Nations Security Council decision to send military observers to the Gulf of Fonseca to monitor land, sea, and air borders.²⁸²

Tensions today in the Gulf of Fonseca oscillate between regional peace initiatives and cooperative economic engagements and flashes of animus punctuated by ruptures in relations. In

277. Alan Riding, *U.S. to Put Radar System In Honduras*, N.Y. TIMES (Mar. 12, 1983), <http://www.nytimes.com/1983/03/12/world/us-to-put-radar-system-in-honduras.html> (citing gun running concerns).

278. See Abigail Hernández et al., *Honduras, Nicaragua, El Salvador to Safeguard Gulf of Fonseca*, DIÁLOGO (Sept. 10, 2012), http://dialogo-americas.com/en_GB/articles/rmisa/narconews/features/main/2012/09/10/feature-01 (“[T]he Gulf of Fonseca [has] emerged as a waterway used by narco-traffickers and gangs to move drugs throughout Central America.”).

279. See JUAN CARLOS NEVES, UNITED NATIONS PEACE-KEEPING OPERATIONS IN THE GULF OF FONSECA BY ARGENTINE NAVY UNITS 5–6 (1993) (noting the Gulf of Fonseca as a supply line for Nicaraguan Sandinista forces, Salvadoran FMLN guerrillas and Nicaraguan resistance fighters (Contras)); Hernández et al., *supra* note 278 (increased watch on drug smuggling); see also Riding, *supra* note 277 (United States to increase surveillance of the area with new radar system).

280. *Which Countries Have the World's Highest Murder Rates? Honduras Tops the List*, CNN NEWS (Apr. 11, 2014, 12:48 PM), <http://www.cnn.com/2014/04/10/world/un-world-murder-rates> (quoting a 2013 United Nations Office on Drugs and Crime report and listing Belize, El Salvador, and Guatemala in the top five).

281. Requests of the United Nations to facilitate peace-seeking resulting in the establishment of the United Nations Observer Mission to verify the electoral process in Nicaragua (ONUVEN), the International Support and Verification Commission (CIAV), the United Nations Observer Mission in El Salvador (ONUSAL), the United Nations Mission in El Salvador (MINUGUA), and the United Nations Mission for the Verification of Human Rights in Guatemala (MINUGUA). *Central America—ONUCA: Background*, UNITED NATIONS, <http://www.un.org/en/peacekeeping/missions/past/onucabackgr.html> (last visited Feb. 16, 2015).

282. S.C. Res. 644, ¶ 2, U.N. Doc. S/RES/644 (Nov. 7, 1989) (creating the United Nations Observer Group in Central America (ONUCA)). From June 1990 until January 1992, Argentine vessels, flying the United Nations flag, sailed more than 72,000 nautical miles over 6,479 patrol hours to observe on site verification of the 1987 Guatemala Agreement. NEVES, *supra* note 279, at ii, 35.

March 2013, a tripartite attempt to create a Gulf of Fonseca “zone of peace” collapsed, with Honduras threatening to send gunboats and fighter aircraft into the Gulf to safeguard fishing interests against purported Nicaraguan naval intrusions;²⁸³ in September 2014, the Honduran military provoked El Salvador’s ire by raising its national flag over disputed Conejo Island in the Gulf, stirring nationalist sentiments in both countries dating to the Football War.²⁸⁴

Surprisingly, some scholars argue that the judicially prescribed application of condominium in the Gulf of Fonseca has proven successful, notwithstanding these persistent troubles; this alleged success “indicates that sovereign States can share valuable resources without protracted conflict or a tragedy-of-the-commons-type depletion of resources.”²⁸⁵ In specific reference to the Gulf of Fonseca case, the argument has been made that “the Judgment has already been complied with to a considerable extent [even though El Salvador’s application for revision has been rejected]” and that “the ICJ Judgment has had a significant, almost outcome-determinative effect on the ground, succeeding in reducing political tensions significantly.”²⁸⁶

If this is so, then perhaps the condominium concept has proven more useful as a stop-gap measure *vis-à-vis* the strategic and commercial interests of metropole or external powers than as a pelagic expression of Central American patrimony. Could condominium adaptively have been employed to alienate these waters from predatory external incursions while providing the vulnerable, littoral powers the time needed to sort out their historical difference? Construed in the historical setting of the 1917 Judgment, this outcome may have been intended by

283. *Tensions in the Gulf of Fonseca*, NICARAGUAN DISPATCH (Mar. 13, 2013), <http://nicaraguadispatch.com/2013/03/tensions-in-the-gulf-of-fonseca>; Jorge Kawas, *El Salvador: Sovereignty Issues over Gulf of Fonseca*, PULSA MERICA (Mar. 18, 2013), <http://www.pulsamerica.co.uk/2013/03/18/el-salvador-sovereignty-issues-over-gulf-of-fonseca>.

284. Christine Wade, *Border Disputes, Political Tensions Threaten Needed Cooperation in Central America*, WORLD POL. REV. (Sept. 15, 2014), <http://www.worldpoliticsreview.com/articles/14058/border-disputes-political-tensions-threaten-needed-cooperation-in-central-america>.

285. Samuels, *supra* note 27, at 758.

286. Aloysius P. Llamzon, *Jurisdiction and Compliance in Recent Decisions of the International Court of Justice*, 18 EUR. J. INT’L L. 815, 828–29 (2007).

that Court. Placed in the setting of 1992, no such historical consolidation had yet taken place, making Judge Oda's queries as to the illogic of it all seem persuasive.

International law, and its theoretical dynamic in the eyes of constructivists, accommodates a path for the attainment of legal validity of Court pronouncements by way of "historical consolidation,"²⁸⁷ but such pronouncements were meant to follow the consolidation, and not the other way around. This was the method by which Norway perfected its title to the Indreleia—its intercoastal navigation route—in the *Fisheries Case*, a claim, which was deficient originally but which subsequently became opposable to the world.²⁸⁸ The local illusion of a pluri-state bay, fostered as a judicial creation rather than as an astute demonstration of *jura novit curia*, suggests of the dangers of judicial adventurism, particularly when confronting squarely or attempting to reconfigure the dogma of sovereignty.

287. *Fisheries Case*, 1951 I.C.J., at 138.

288. *Id.*