C6/CR 2003/2

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2003

Public sitting of the Chamber

held on Monday 8 September 2003, at 10.25 a.m., at the Peace Palace,

Judge Guillaume, President of the Chamber, presiding,

in the case concerning the* Application for Revision of the Judgment of 11 September 1992 in the Case concerning the *Land, Island and Maritime Frontier Dispute
(El Salvador/Honduras: Nicaragua intervening)
(El Salvador *v.* Honduras)

VERBATIM RECORD

ANNÉE 2003

Audience publique de la Chambre

tenue le lundi 8 septembre 2003, à 10 h 25, au Palais de la Paix,

sous la présidence de M. Guillaume, président de la Chambre,

en l'affaire de la* Demande en revision de l'arrêt du 11 septembre 1992 en l'affaire du *Différend frontalier terrestre, insulaire et maritime
(El Salvador/Honduras; Nicaragua (intervenant))
(El Salvador c. Honduras)

COMPTE RENDU

Present:	Judge	Guillaume, President of the Chamber
	Judges	Rezek
		Buergenthal
	Judges *ad hoc*	Torres Bernárdez
		Paolillo
	Registrar	Couvreur

Présents : M. Guillaume, président de la Chambre
MM. Rezek
Buergenthal, juges
MM. Torres Bernárdez
Paolillo, juges *ad hoc*

M. Couvreur, greffier

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The Government of the Republic of El Salvador is represented by:

Mr. Gabriel Mauricio Gutiérrez Castro,

as Agent;

Licda. María Eugenia Brizuela de Ávila, Minister for Foreign Affairs,

Mr. Rafael Zaldívar Brizuela, Ambassador of the Republic of El Salvador to the Kingdom of the Netherlands,

as Co-Agents;

Lt. Agustín Vásquez Gómez,

as Deputy-Agent;

Mr. Antonio Remiro Brotóns, Professor of International Law, Universidad Autónoma, Madrid,

Mr. Maurice Mendelson, Q.C., Professor Emeritus of International Law, University of London,

as Counsel and Advocates;

Mr. Mauricio Alfredo Clará,

Mr. Domingo E. Acevedo,

as Counsel;

Licda. Beatriz Borja de Miguel,

Ms Patricia Kennedy,

Ms Ana Mogorrón Huerta,

as Advisers;

Lic. César Martínez,

Ms Lilian Overdiek,

Ms Cecilia Montoya de Guardado,

as Assistants.

The Government of Honduras is represented by:

H.E. Mr. Carlos López Contreras, Former Minister for Foreign Affairs,

as Agent;

Le Gouvernement de la République d'El Salvador est représenté par :

M. Gabriel Mauricio Gutiérrez Castro,

comme agent;

Mme María Eugenia Brizuela de Ávila, ministre des affaires étrangères,

M. Rafael Zaldívar Brizuela, ambassadeur de la République d'El Salvador auprès du Royaume des Pays-Bas,

comme coagents;

M. Agustín Vásquez Gómez,

comme agent adjoint;

M. Antonio Remiro Brotóns, professeur de droit international à l'Université autonome de Madrid,

M. Maurice Mendelson, Q.C., professeur émérite de droit international à l'Université de Londres,

comme conseils et avocats;

M. Mauricio Alfredo Clará,

M. Domingo E. Acevedo,

comme conseils;

Mme Beatriz Borja de Miguel,

Mme Patricia Kennedy,

Mme Ana Mogorrón Huerta,

comme conseillers;

M. César Martínez,

Mme Lilian Overdiek,

Mme Cecilia Montoya de Guardado,

comme assistants.

Le Gouvernement du Honduras est représenté par :

S. Exc. M. Carlos López Contreras, ancien ministre des affaires étrangères,

comme agent;

H.E. Mr. Julio Rendón Barnica, Ambassador of Honduras to the Kingdom of the Netherlands,

as Co-Agent;

Mr. Pierre-Marie Dupuy, Professor of International Law, University of Paris (Panthéon-Assas) and European University Institute, Florence,

Mr. Luis Ignacio Sánchez Rodríguez, Professor of International Law, Universidad Complutense de Madrid,

Mr. Philippe Sands, Q.C., Professor of Law, University College London,

Mr. Carlos Jiménez Piernas, Professor of International Law, Universidad de Alcalá, Madrid,

Mr. Richard Meese, avocat à la cour d'appel de Paris,

as Counsel and Advocates;

H.E. Mr. Aníbal Quiñónez Abarca, Minister for Foreign Affairs *par interim*,

H.E. Mr. Policarpo Callejas, Ambassador, Adviser to the Ministry of Foreign Affairs,

Mr. Miguel Tosta Appel, Chairman of the Honduran National Section of the El Salvador-Honduras Demarcation Commission,

as Counsel.

S. Exc. M. Julio Rendón Barnica, ambassadeur du Honduras auprès du Royaume des Pays-Bas,

comme coagent;

M. Pierre-Marie Dupuy, professeur de droit international à l'Université de Paris (Panthéon-Assas) et à l'Institut universitaire européen de Florence,

M. Luis Ignacio Sánchez Rodríguez, professeur de droit international à l'Université Complutense de Madrid,

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M. Richard Meese, avocat à la cour d'appel de Paris,

comme conseils et avocats;

S. Exc. M. Aníbal Quiñónez Abarca, ministre des affaires étrangères *par intérim*,

S. Exc. M. Policarpo Callejas, ambassadeur, conseiller au ministère des affaires étrangères,

M. Miguel Tosta Appel, président de la section nationale hondurienne de la commission de démarcation El Salvador-Honduras,

comme conseils.

Le PRESIDENT DE LA CHAMBRE : Veuillez vous asseoir. L'audience est ouverte.

La Chambre se réunit maintenant en application de l'article 61 de son Statut et des articles 99 et 100 de son Règlement pour entendre les Parties en leurs plaidoiries dans l'affaire de la *Demande en revision de l'arrêt du 11 septembre 1992 en l'affaire du* Différend frontalier terrestre, insulaire et maritime (El Salvador/Honduras; Nicaragua (intervenant)) *(El Salvador c. Honduras)*.

Comme il a été rappelé, la République d'El Salvador a introduit la présente instance par le dépôt au Greffe de la Cour, le 10 septembre 2002, d'une requête du même jour, dans laquelle, se référant à l'article 61 du Statut et à l'article 99 du Règlement, elle priait la Cour de reviser l'arrêt rendu le 11 septembre 1992 par la Chambre chargée de connaître de l'affaire du *Différend frontalier terrestre, insulaire et maritime (El Salvador/Honduras; Nicaragua (intervenant))*. Conformément au paragraphe 2 de l'article 40 du Statut, une copie certifiée conforme de la requête a été immédiatement communiquée à la République du Honduras.

Je rappellerai que, dans sa requête, El Salvador, se référant au paragraphe 1 de l'article 100 du Règlement, a prié la Cour «de constituer une chambre appelée à connaître de la demande en revision de l'arrêt en tenant compte des termes arrêtés d'un commun accord par El Salvador et le Honduras dans le compromis du 24 mai 1986», puis les Parties, dûment consultées par le président de la Cour le 6 novembre 2002, ont fait savoir qu'elles souhaitaient la formation d'une nouvelle chambre de cinq membres, dont deux juges *ad hoc* désignés par elles, conformément au paragraphe 3 de l'article 31 du Statut. Comme l'a indiqué le président Shi dans sa déclaration inaugurale, la Cour a décidé d'accéder à la demande des Parties et a constitué la présente Chambre par ordonnance du 27 novembre 2002.

Par la même ordonnance, et conformément au paragraphe 2 de l'article 99 du Règlement, la Cour a fixé au 1er avril 2003 la date d'expiration du délai pour le dépôt des observations écrites de la République du Honduras sur la recevabilité de la requête, la suite de la procédure étant réservée.

Le 1er avril 2003, dans le délai qui lui avait été prescrit, le Honduras a déposé au Greffe ses observations écrites sur la recevabilité de la requête d'El Salvador.

Par lettre du 8 avril 2003, l'agent d'El Salvador, se référant aux observations écrites du Honduras, a fait valoir que celui-ci avait soumis des documents nouveaux et des arguments y relatifs, qui appelaient une réponse de la part d'El Salvador accompagnée de la documentation nécessaire. A la suite d'une réunion tenue par le président de la Chambre avec les agents des Parties le 28 avril 2003, la Chambre a décidé que le dépôt de pièces écrites additionnelles n'était pas nécessaire en l'espèce, que la procédure écrite était en conséquence close, et que si El Salvador désirait présenter des documents nouveaux, sa demande serait par suite examinée selon la procédure prévue à l'article 56 du Règlement; par lettres du 8 mai 2003, le greffier a porté cette décision à la connaissance des Parties.

Par lettre du 23 juin 2003, El Salvador a alors présenté une demande visant à la production de nouveaux documents, conformément aux dispositions de l'article 56. Ces documents, déposés au Greffe le même jour, ont été communiqués au Honduras, ainsi qu'il est prévu au paragraphe 1 du même article. Le Honduras s'étant opposé à la production desdits documents, un nouvel échange de correspondance est intervenu entre les Parties. Après avoir pris connaissance des vues ainsi exprimées, la Chambre a décidé, conformément au paragraphe 2 de l'article 56 du Règlement, de n'autoriser la production que de certains des documents déposés par El Salvador. La Chambre a en outre constaté qu'un nouveau document joint aux observations soumises par le Honduras le 10 juillet 2003 ne pouvait être produit qu'en vertu de cette même disposition du Règlement, et a décidé de ne pas autoriser sa production. Par lettres du 29 juillet 2003, le greffier adjoint a porté ces décisions à la connaissance des Parties, qui ont été informées que le Honduras, conformément au paragraphe 3 de l'article 56, était autorisé à présenter, le 19 août 2003 au plus tard, des observations sur les documents d'El Salvador dont la production avait été autorisée par la Chambre, et de produire des documents à l'appui de ses observations. Le 19 août 2003, dans le délai ainsi fixé, le Honduras a déposé au Greffe de telles observations, ainsi que quatre documents à l'appui de celles-ci.

Conformément au paragraphe 2 de l'article 53 du Règlement, la Chambre, après s'être renseignée auprès des Parties, a décidé de rendre accessibles au public, à l'ouverture de la procédure orale, des exemplaires des observations écrites du Honduras sur la recevabilité de la

requête d'El Salvador et des documents annexés auxdites observations, ainsi que des documents nouveaux ultérieurement produits par les Parties avec l'accord de la Chambre.

Je constate la présence à l'audience des agents, conseils et avocats des deux Parties. Ainsi que les Parties en ont été informées, les audiences se dérouleront de la manière suivante. La Chambre entendra tout d'abord la République d'El Salvador, en sa qualité de demandeur dans cette affaire; et El Salvador disposera de toute la séance de ce matin, légèrement prolongée pour tenir compte, bien entendu, de la séance inaugurale et de mon discours introductif, puis la République du Honduras prendra la parole demain, mardi 9 septembre, à 10 heures, et disposera à son tour de toute la matinée pour ses plaidoiries. Un second tour de plaidoiries se tiendra le mercredi 10 septembre à 15 heures et le vendredi 12 septembre à 10 heures, au cours duquel la Chambre entendra les deux Parties en leurs répliques; chacune d'entre elles disposera alors, aux fins de sa réplique, d'un temps de parole maximal de deux heures.

Ces différents éléments étant rappelés, je vais maintenant donner la parole à S. Exc. Mme María Eugenia Brizuela de Ávila, ministre des affaires étrangères de la République d'El Salvador. Madame la ministre vous avez la parole.

Ms BRIZUELA de ÁVILA: Mr. President, distinguished Members of the Chamber.

I. OPENING COMMENTS

1. This is the second time that El Salvador, a small State which is proud to have had one of its most illustrious jurists, José Gustavo Guerrero serving as the first President of this International Court of Justice, appears before the honourable Court with reference to the same case. More correctly stated, for part of that case, but in an independent and separate proceeding on the admissibility of the request for revision of the 1992 Judgment.

2. This is the first time that I have the honour to appear before the highest court of justice in the world. I beg the Court's indulgence and ask the honourable judges to attribute any missteps in my presentation to my inexperience in this venue. Any shortcomings on my part do not diminish the utmost respect that I have for the honourable Court or the confidence that I have in the rightness of our cause.

3. I will be a disappointment, though, to the other Party, as I am not a *"plaideur invétéré"*, one of the more gentle expressions that they have used to label the Salvadoran representation throughout the case.

4. As the Chamber is aware, Honduras's representatives have been bedevilled by the supposedly late submission of our Application for revision, and from that they have drawn their own conclusions on the matter, none very generous to be true. Reality, of course, shows us that new facts are not discovered according to any predetermined timetable. The truth is the undeniable fact that we exercised our right within the time-limit established in the Statute.

5. When the new "Carta Esférica" and the new log of the brigantine *El Activo*, with all of their corresponding facts and effects, were discovered, I do confess that I had my doubts as to whether it was feasible or possible for a State to seek to have an injustice corrected through the existing legal means. Some of my friends Foreign Ministers and experts, discouraged me saying it was practically impossible that the Court would even admit a request for revision, and that if there was any chance at all, the path to it would be much narrower than the one leading to heaven. Yet my heart made me feel that we were at the beginning of that path, and that it would be worth our while to engage upon it.

6. Mindful of what the experts had said, I asked myself the following questions:

— Isn't our case — with its supporting documents containing the new facts discovered by El Salvador — different from the other requests for revision that the Court has taken up?

— If the revision proceeding is a means to preserve justice, then wouldn't justice be better served if the proceeding was construed not as a criticism of an earlier judgment but rather as a proceeding based on new facts that the earlier judges never had the opportunity to consider?

— Would we not signal our respect for the institution by limiting our request for revision to just one sector of this land border, which represents 4 per cent of the total length of the land border between the two countries?

— Isn't this a two-stage process: the first only to settle the question of admissibility, leaving the merits for a second stage?

— Wasn't this procedure in the Court's Statute created for it to be used whenever reasonable, to function, and to achieve justice?

7. All of these questions found an answer in my belief in justice: "Seek and ye shall find, ask and ye shall be given." That, simply stated Excellencies, is the origin of the story of our case.

II. CRITIQUE OF THE CHARGES MADE BY HONDURAS CONCERNING EL SALVADOR'S REQUEST FOR REVISION

8. The main strategy of our learned opponents in their written observations is to disparage the Government of El Salvador and create a climate hostile to it, by means of subjective and contrived assertions calculated to cast it in the light of an accused standing trial. In striving to achieve that purpose, the bulk of the assertions made are irrelevant and immaterial at this stage in the proceedings. All that the honourable Chamber is asked by either Party to decide now, is the admissibility of El Salvador's Application for revision, that pertains to only the sixth sector of the land border.

9. El Salvador's Application for revision satisfies all the admissibility requirements set out in Article 61 of the Court's Statute. These — and only these — are the conditions that the Court must recognize in the Application; if the Court determines that those conditions have been satisfied, a judgment declaring the Application for revision admissible is in order.

10. Honduras claims, in its Written Observations, that El Salvador's Application for revision does not satisfy the admissibility requirements stipulated in the Statute, except that the Application be filed within the ten-year time-limit[1], and even then they pretend to draw deviated conclusions from the fact that the Application for revision was submitted one day before the time-limit expired[2].

11. The Honduran observations are based on a misconception of the system for revision of the Court's judgments and for the admissibility requirements that have to be met. Therefore, before embarking upon a detailed analysis of the observations pertaining to the new facts that El Salvador has made known to the Court, it is convenient to correct the conceptual mistakes made by those representing Honduras in the interpretation of the Statute.

12. The points that the representation of Honduras make are the following:

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[1]Observations écrites, Chap. V, para. 2.

[2]See, for example, Observations écrites, paras. 1.3, 1.8, 1.16, 2.34, 3.19.

— That the Application for revision was submitted just a few hours short of the expiration of the ten-year time-limit set in the Statute[3]. Honduras assumes this point when its states in its Written Observations and gives us the answer that: "It is a ten-year lapse, as stipulated in the Statute." Therefore, the Application was presented on time and El Salvador has exercised its statutory right.

— That El Salvador refuses to comply with the Judgment[4]. In this allegation, Honduras omits any reference to a number of measures that the Salvadoran State took to underscore its express acceptance of the Judgment's full legal validity. Honduras makes no mention of the Convention on Nationality and Acquired Rights, negotiated at El Salvador's initiative to guarantee the human rights of any Salvadorans or Hondurans left outside the territory of their native country by the effects of the Judgment.

[Slide]

— Even more, here we have a meeting in October 2002, where two Presidents, of El Salvador and Honduras, with the declaration from President Maduro on 12 February 2003 and may I quote from the President of Honduras: "I want to be very clear there has been no breach of the pledge of the result made explicit by Honduras and El Salvador, which was to establish the boundary on the basis of the delimitation set by the International Court of Justice at The Hague in the Judgment it delivered more than ten years ago." Even more significant is the fact that in its note to the Registry of the Court, dated 12 April 2003, Honduras again complains of supposed non-compliance with the Judgment, yet fails to disclose that just one day earlier — on 11 April — us Foreign Ministers of Honduras and El Salvador meeting in Washington at the Organization of American States had arrived with Assistant Secretary General Luigi Einaudi, to an agreement to appoint a third party to settle the technical problems that had arisen in executing the Judgment, caused by the discrepancies between the geodesic co-ordinates and the geographic accidents, among others.

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[3]Observations écrites, Chap. I, paras. 1.3.

[4]Observations écrites, Chap. I, paras. 1.3, 1.4, 1.5, 1.6, 1.7, 1.8.

13. To further refute that allegation, El Salvador respectfully refers the Chamber to Section I of the volume of new documents[5], which were admitted by the Chamber[6].

14. This is not a new allegation. As Honduras points out, they made the same allegation in a complaint they filed with the Security Council. What its Written Observations fail to include, or even allude to, is El Salvador's reply[7], wherein it gave the President of the Security Council reassurances of El Salvador's commitment to the international obligations. Additionally, Honduras makes no mention of the Council's silence, which I, in diplomatic parlance, have learned to interpret as a refusal of our request.

15. Honduras does enclose evidence of a series of unilateral measures that the Government of Honduras took in relation to the Judgment of the International Court of Justice, to which El Salvador promptly protested, as their purpose was to unilaterally impose their criteria in territorial matters[8].

16. Honduras's allegation of non-compliance is all the more extraordinary when on the day following the giving of the Judgment; its military and civilian authorities occupied, and continue to occupy, all portions of land which they consider had been adjudged to them, ignoring the correct procedures for determining and demarcating exactly what they truly have been given.

17. How can El Salvador be accused of refusing to comply with the Judgment in these circumstances? To put it plainly, by Honduras's definition, compliance with the Judgment means allowing them to take any arbitrary measures they please. In that order of ideas I find it convenient to signal out to the Court that contrary to what Honduras's representatives would have you believe, El Salvador took steps to demarcate the border according to the General Peace Treaty of 1980, and with regard to the Judgment issued by the Court, last 18 July both States received the first "Resolution of Technical Differences Found in the Demarcation of the El Salvador-Honduras Border, Sector I (Tepanguisir)", issued by the independent expert, engineer John Gates, the appointed third party, which is now being implemented. That resolution was the product of the

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[5]Note of the Secretary of the Court of 29 July 2003.

[6]Volume of New Documents, 23 June 2003, Section I. Implementation of the Judgment of the International Court of Justice of 11 September 1992, Nos. 1–8.

[7]Note of the Minister for Foreign Affairs of El Salvador to the President of the Security Council dated 27 August 2002.

[8]Observations écrites, Annexes, Vol. II, Ann. 3.

bilateral process filed by El Salvador, initiated by El Salvador, before Honduras filed its Written Observations with the Court on 1 April. You may judge for yourselves which State is acting in procedural bad faith.

18. In spite of all the above, it must be taken into account that the representatives of Honduras, in two notes presented to the honourable Chamber, expressly and emphatically attempted to recast the central issue of the proceedings into one of compliance with the Judgment[9], just as they do in their Written Observations[10].

19. But then, they abruptly changed their posture. While El Salvador's request to produce new documents pursuant to Article 56 of the Rules of Court was being examined, Honduras, by note dated 24 July, paragraph 7, belatedly withdrew its requests for previous compliance. In effect, the Honduran representation states the following:

> "Secondly, upon reflection, Honduras has decided not to seek previous compliance with the judgment, so as not to delay consideration of the admissibility of the Application for Revision by setting off additional incidental proceedings and so as not to expose itself to the same procedural behaviour on El Salvador's part."

20. Our conclusion is that Honduras was told by its advisers that with its earlier notes they had committed a serious mistake, since according to the Statute and Rules of Court, it is plain that the Chamber is empowered, but not obliged, to make the admissibility of a request for revision conditional upon previous compliance with the judgment; in other words, a condition of compliance presupposes that the Application is admissible.

21. El Salvador is of the view that Honduras's requests implied a tacit acceptance of the admissibility of El Salvador's Application for revision. By the very nature of law and out of respect for the courts, parties are not at liberty to request whatever pleases them; and for that reason they are accountable for all the legal consequences of their petitions. Every right exercised carries correlative obligations. Thus Honduras has accepted that El Salvador's Application for revision is admissible, so consequently we would petition the Chamber to adjudge and decide accordingly. Our opponents' tardy repentance, evidenced by the withdrawal of their requests for

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[9]Notes dated 29 October and 29 November, 2002, which the Agent for the Republic of Honduras sent to the Registrar of the International Court of Justice.

[10]Observations écrites, Chap. I, para. 1.10.

previous compliance, does not alter their initial acknowledgment of the Application's admissibility implicit in their compliance demands.

22. Another assertion made by Honduras in their Written Observations is the following: III. El Salvador's conduct is contemptuous of the *res judicata* authority of the Judgment[11].

23. Even though Honduras makes a number of references to a supposed failure to comply with the judgment, calling particular attention to a note that the Minister for Foreign Affairs of El Salvador, who is addressing you, sent on 20 January 2003, subsequent to the filing of the Application for revision[12], and to the directives attached to it, the truth is that all these allegations simply hide the Honduran representation's resentment over the fact that El Salvador submitted an Application for revision[13].

24. I realize that I am not citing the written observations in their sequential order and for that I beg the honourable Chamber's indulgence. But it is impossible, at least within our capacities, to follow a logical order in the Honduran arguments in a document that could best be described as "circular". The assertions, allegations and contentions follow one upon the other. Just as the circle appears to have spent itself, it begins again, spinning in a veritable "carrousel".

25. Struggling to discern some logic to our counterpart's line of argument, what they really amount to is that since El Salvador accepted the legal validity of the Judgment; and since this is of course *res judicata*, therefore, by presenting a request for revision, El Salvador denies the *res judicata*[14].

26. Regarding this, it is enough to remember what revision is for. Besides, the Honduran representation has already taken it upon itself to do the job for us, giving a full course on the subject. Revision applies and only applies in the case of judgments that have already become *res judicata.* This is one of the distinctive features that distinguish "revision" from appeal and cassation.

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[11]Observations écrites, Chap. I, paras. 1.8, 1.9 and 1.10.

[12]Observations écrites, Chap. I, para. 1.8.

[13]Observations écrites, Chap. I, paras. 1.7, 1.8.

[14]Observations écrites, Chap. I, para. 1.10.

27. However, we will make the following comments on Honduras's absurd and even dangerous assertion. El Salvador recognized, recognizes and will always recognize the legal validity of the Court's judgment and its authority as *res judicata.* Filing a request for revision — in this case, one that concerns just one sector of the land border — does not constitute disrespect for the authority of a judgment; it is the exercise of a right that the Statute and Rules of Court recognize and give to the parties. El Salvador and Honduras both signed the Convention that created the Statute. We have no knowledge of any Honduran reservation that would exempt it from the legally binding force that the Statute of the International Court of Justice gives to requests for revision and interpretation of judgments.

28. Following Honduras's logic, States would not recognize the validity of judgments until the statutory ten-year time period for requests for the revision of judgments had expired, since according to them, that would imply previous waiving of their right to submit an Application for revision. We also reject the analogy that Honduras's attempts to draw in footnote 3 on page 3, between our case and the Nicaraguan case that the Court heard in 1960 when Nicaragua did deny the validity of the Arbitral Award made by the King of Spain.

29. Honduras falls on the fallacy of *argumentum ad ignorantiam*, even prone to argue that its theses must be true because they have not been proven false.

30. Revision was not instituted purely for the sake of the parties in a trial or for the party that exercises it. Its raison d'être transcends the parties. Revision is a necessity of justice; there is basis of public international order in establishing it. Hence, it is disturbing to watch Honduras build their defence on purely formal grounds, refusing material and historical discussions, in an attempt to delegitimize revision, robbing it of its reasonable interpretation.

31. Honduras continues with the following point: "IV. It is particularly remarkable that the so-called 'new facts' discovered by El Salvador were found in the last six months, precisely to the day, before the expiration of the ten-year lapse during which an Application for revision can be submitted."[15]

[15]Observations écrites, Chap. I, para. 1.8.

32. In the Application for revision and its documentary and cartographic appendices you find the reasoned and documented discovery of the new facts that triggered the clock on the six-month time period for filing the Application for revision.

33. To our distinguished counterpart, we only need recall that in exercising our right we need not render any explanations. New facts are not discovered according to some predetermined timetable, and since in fact, what Honduras insinuates is that the facts were not discovered within that six-month time frame or that we acted in bad faith; a better argument would have been made if they had presented any such evidence.

Section I. The contrived nature of El Salvador's Application for revision

34. Honduras's representatives charge again with a mixture of assertions that echo earlier accusations, in a disordered analysis of the elements or requirements that an Application for revision must satisfy[16], in an attempt to show what it calls the contrived nature of El Salvador's Application for revision, a thinly-veiled way of accusing our State that the new facts did not appear in a natural way and that, at the very least, the new facts do not satisfy the requirements that the Statute sets.

35. We shall again reiterate that when El Salvador files the Application for revision and examines the new facts, we do not attack either the Chamber or the Judgment of being flawed or without foundation, since the Chamber ruled on the basis of the existing evidence, at a time when the new evidentiary facts had still not surfaced, as no one knew of their existence. Hence, the Chamber ruled on the basis of the evidence the parties presented and if this Application is admitted, then the ensuing judgment should take into account the new facts presented.

36. The second element upon which Honduras's interpretation is based is that El Salvador has only introduced additional elements of proof of facts already known to the Court; consequently Honduras's claim is that El Salvador has not presented new facts.

37. In response to Honduras's assertion that what has been presented is additional evidence[17], may I reiterate that new facts have been introduced and additional proof has been

[16]Observations écrites, Chap. I, paras. 1.10, 1.11.

[17]Observations écrites, Chap. I, para 1.11 and 4.7.

presented with the logical references to the first. On this we refer to the statements made in paragraphs 38 and 39 of our Application for revision.

38. In effect, in all procedures, a judge is called upon to reconstruct and connect facts and evidence, additionally to consequent axiological analysis and the application of the law. When the honourable Chamber delivered its Judgment relying upon the "Carta Esférica" accompanied or in relation to the log, it drew a connection to the conduct of the parties at the Saco negotiations. There is a necessary nexus between a revision proceeding and the original Judgment, the evidence upon which the original Judgment relied, and its axiological and legal assessments. The evidences offered in trial are concurrent.

39. We have indeed introduced new facts, as well as others that, while not new, only made sense and became constructive with the discovery of these new facts. A number of facts included in the Application for revision and its annexes became significant upon the discovery of new facts. The new facts and those that support, shed light on, and explain them, are the means by which we arrive at the truth. Their allegations is just part of a reductive strategy on the part of our learned opponents to make all facts relied on by El Salvador disappear.

40. Honduras's representatives insist that El Salvador should refer the Chamber only to its new facts in the very strict sense of the term. However we would not be doing our duty to the Chamber if we failed to explain the context and relevance of those new facts. The better informed a court is, the more enlightened its judgments will be. All facts need to be taken into account by the Chamber.

41. El Salvador's contention is that the Application for revision is based on new facts, and the presence of facts, that, while not new, are necessary for an understanding of the new facts, and it does not diminish the reality that these new facts are on trial.

42. In reality, Honduras's position has a strategic purpose: by relentlessly attacking the additional and complementary facts or evidence and insisting on it numerous times, its purpose is to bury the new facts and seek that their existence is forgotten.

43. The representatives of Honduras are very liberal in their accusations, including the accusation that El Salvador was culpably negligent. However, having made the accusation, they completely fail to make a convincing case out of this point.

44. Diligence and negligence are not abstracts; rather, each specific case of alleged diligence or negligence must be examined in its particular context.

45. In each concrete situation, the Chamber will examine whether a State reasonably was able to access a certain piece of evidence or whether it was unable to do so because of either the nature of things or the counterpart's obstructionist conduct. Lack of diligence or negligence is an indeterminate legal concept; it is up to the Chamber to invest it with a content that is at once reasonable and fair. In assessing the diligence or negligence of a given act or event, a court must be attentive to the fact that if certain elements are not allowed to be entered into evidence, the resulting judgment may bear little resemblance to justice or to truth.

46. We can discern our opponents' purpose; disguised as it is behind the charges of culpable negligence, *"négligence coupable"*, that they level against El Salvador. They are a smoke screen thrown up to hide the fundamental questions that Honduras either could not or did not want to answer.

47. Our opponents claim that El Salvador's explanation is always the same: the war. Indeed, the war was a serious impediment in all respects and Honduras's attempt to minimize the disruption to, and suffering of, a neighbouring nation, is unworthy of them.

48. So far as concerns El Salvador's alleged culpable negligence in failing to find documents earlier, this hardly lies in the mouth of a State who took such extreme measures to prevent public access to documentation and works that they considered could be dangerous for their territorial interests.

49. When we submit that the discovery of the "Carta Esférica" and the log of the brigantine *El Activo* does not imply negligence in not having found them earlier in an unexpected and unusual location, we are appealing to the Chamber's common sense as to what normal diligence a State should show in its search for evidence, particularly a State like ours with limitations, even more disabling at the time of the original and principal proceeding. We must recall that the proceedings on the main case occurred in the decade of the most profound social and economic crisis in our recent history.

50. An example might help illustrate our point. In subsequent research to our Application, we have found reference to the fact that a library in Prague had certain materials on expeditions of

Spanish navigators in the eighteenth century in the Pacific Northwest. Would either of the two States in the original proceedings, and even in these proceedings of revision, be deemed negligent because it never occurred to either one of us to conduct research in Prague or other cities in Eastern Europe? Definitely not, as to do so would be to carry things to a ridiculous, absurd and unreasonable extreme.

51. Another seemingly innocent remark made in the Honduran Observations warrants examination because they raise and discuss it on more than one occasion throughout, generating confusion. It appears at the end of paragraph 1.12, and reads as follows: "These various elements are being portrayed as proof of a supposed new fact, when in fact the Chamber was already aware of the existence of the very facts now being invoked in support of the Request for Revision."

52. As its subsequent arguments make clear, what Honduras is claiming is that inasmuch as El Salvador alleged the fact of the avulsion that shifted the course of the Goascorán River away from its old mouth on the La Cutú estuary, and those are the very same facts that it now asserts in the proceeding in revision, what we have here is not a new fact at all, but rather the very same fact already known to the Chamber in the principal proceeding. To put it another way, had we asserted that the river had another course and another mouth, such an assertion would have risen to Honduras's standard of what constitutes "new fact". There could be an even more serious consequence that could be inferred, which is that the charge is being levelled not just against El Salvador but the Court as well, as the implication is that during the principal proceedings the documents from the Newberry Library were already known[18]. This is something we categorically reject and a paragraph-by-paragraph reading of the original proceedings shows no reference to those documents.

53. This is how absurd the Honduran position is. Our opponents forget that revision is a legitimate procedure for seeking justice. And although it is a separate proceeding, it necessarily and by definition harkens back to the principal case whose outcome the request for revision seeks to change. In other words, the central truths and the key facts are and must be the same as they were in the original case, thus the new facts must be of such a nature that, had they been known to

[18]Observations écrites, paras. 1.12, 2.17, 2.21, 3.14.

the Court, they would have been a decisive factor in the Judgment. Only new facts or evidence can have a decisive influence on a judgment. On review, courts are ruling on evidence intended to demonstrate what the party requesting review originally sought.

54. It is unnecessary to discuss the baseless and exaggerated claims and arguments of our opponents regarding the Island of Conejo and the Bahía de La Unión, because this is just another of Honduras's procedural tactics calculated to distract attention away from the only issues which are pertinent to the present case[19].

Section II. El Salvador's lack of procedural good faith

55. Honourable Chamber, continuing with Section II, El Salvador's lack of procedural good faith, this section of Honduras's Written Observations is basically a repetition of arguments already made, particularly the belaboured claims of an alleged failure to comply with the Judgment and disrespect for the authority of *res judicata.*

56. The statement made in paragraph 1.19, however, is particularly troubling:

> "Declaring this request for Revision admissible would set an unfortunate precedent that would eventually become an invitation for any State dissatisfied with a Court judgment to request revision, even on the eve of the expiration of the ten-year lapse during which such a request is procedurally possible."

57. Honduras is effectively warning the honourable Chamber of the dangers that would ensue were it to admit a request for revision. Honduras considers it bad precedent. But Honduras's assertion raises one obvious question: is it bad precedent for institutions to work?

58. We must not fail to mention the Honduran representatives' observations regarding the documents which the Chamber authorized El Salvador to produce in its Order of 29 July 2003, in particular the ones regarding the copy of the Order of Viceroy Revilla-Gigedo concerning reconnaissance of the Nicaraguan coastline. Summing up, they contend that the Spanish texts supplied by Honduras and El Salvador are identical and regret the fact that their French translation, which appears in Annex 4, was so poor, and make their apologies to the Chamber for this unintentional and unfortunate act.

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[19]Observations écrites, Chap. I, para. 1.13.

59. We will not address what meaning or intent they had by that "unintentional act", as they provide their own partial explanation in the Observations. We do, however, regret the fact that their contrition comes belatedly, only after the Chamber had already agreed to the document's production. It is also unfortunate that they persist in misrepresenting the facts by contending that the two documents are identical. They ignore the difference in the sequence of the pages and pin the blame on the French translator, whose only fault was that he was loyal to the text he was given, while pointing out that the text was truncated.

60. The insincerity of Honduras's representatives contrition is glaringly obvious given what they had said before the Court authorized the document's production. Concerning the document in question, Honduras argued *"la reproduction et la traduction en français a un goût d'amertume pour l'Agent d´El Salvador"*[20].

61. Lastly, as to the accusation of El Salvador's lack of procedural good faith, we are only too happy for the Chamber to decide what our conduct in these proceedings has been. We have been passionate at times, something to be expected in those who believe they are defending a just cause. Yet, our conduct has been ever respectful.

62. We have made our case, but we have done so with reason and in accordance with the provisions of the Statute and the Rules of Court. Above all, we have told the truth in these proceedings and have made no false claims concerning situations that have already been settled. Finally, we have introduced our evidence properly, with no alterations either by negligence or bad faith. We ask the distinguished representation of Honduras: can you look the judges squarely in their eyes and make these same assertions?

III. FINAL CONSIDERATIONS

63. Distinguished President and Members of the Chamber. Judicial review is a universal, established procedure used by judicial systems of every kind. Even judicial systems that make no express provision for judicial revision, such as the Inter-American Human Rights System, have

[20]Observations sur les Nouveaux Documents présenté par El Salvador le 23 Juin 2003, 10 Juillet 2003, para. 32.

adopted it "pursuant to the general principles of both domestic and international procedural law, and in accordance with the criterion of generally accepted doctrine . . ."[21].

64. We do regret that throughout this revision process, the representatives of Honduras have harped on the subject of compliance with the Judgment and other allegations against our country, which became the centrepiece of the Honduran observations and its participation. In so doing, they have to a large extent obstructed any discussion or serious analysis of the important issues which are in this admissibility stage of the revision process. We sincerely regret this, even though we understand, but not justify, the why and wherefores of what they did.

65. Access to justice is a right of States, as much as of individuals; and to have a due process of real and effective revision, is an integral part of that right.

66. Indépendamment du résultat final de notre demande en révision, je dois vous remercier, Monsieur le président et les honorables membres de la Chambre, au nom de mon gouvernement, pour l'attention avec laquelle vous avez suivi mon exposé introductif des plaidoiries qui seront développées par le professeur Maurice Mendelson et le professeur Antonio Remiro Brotóns. Je voudrais aussi exprimer à la République et au peuple du Honduras notre fraternité et respect, qui doivent exister toujours entre deux nations avec un destin commun.

Je vous prie, Monsieur le président, de donner maintenant la parole au Professeur Mendelson. Merci beaucoup.

Le PRESIDENT : Je vous remercie Mme la ministre, et je donne maintenant la parole au professeur Maurice Mendelson.

Mr. MENDELSON: Mr. President, would it be convenient if I were to pause about 20 minutes into my presentation which would be just before 11.30, which is somewhat later than the customary hour, but perhaps in view of the introductory proceedings might be convenient.

Le PRESIDENT : Tout a fait d'accord.

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[21]Inter-American Court of Human Rights, *Genie Lacayo* case, Application for Judicial Review of the Judgment of 29 January 1997, Order of the Court of 13 September 1997, para. 9 (http://www.corteidh.or.cr).

Mr. MENDELSON: Merci. Mr. President and distinguished Members of the Chamber, it is a great honour and a pleasure to appear before you once again.

1. My task is threefold. Her Excellency the Minister for Foreign Affairs of El Salvador has already addressed you on the character of revision proceedings; I shall *first* add a few very brief observations on this topic and attempt to correct some misconceptions from which Honduras apparently suffers. *Secondly*, I shall examine in detail the conditions laid down by the Statute of the Court for the admission of an application for revision, with particular reference, naturally, to the facts of this case. Here too, our distinguished opponents regrettably labour under a number of serious misapprehensions. *Thirdly*, I will attempt to explain the significance of the new evidence of a scientific, technical, and "historical" or documentary character that El Salvador has obtained in relation to the original course of the Goascorán River and its avulsion, and address Honduras's criticisms of it. My friend Professor Remiro Brotóns will likewise deal with the new evidence relating to the *El Activo* documents, having first made some brief comments about the *uti possidetis juris* of 1821. I begin then, with a few observations on the nature of the present type of proceeding.

I. THE GENERAL NATURE OF REVISION PROCEEDINGS, ESPECIALLY ON ADMISSIBILITY

2. Revision exists in all domestic legal systems, and even if subject to conditions, it is perfectly normal. The same is true for international courts and tribunals. The reason is found in lapidary form in the unanimous Report of the Advisory Committee of Jurists commissioned by the League of Nations to draft the Statute of the Permanent Court of International Justice. In relation to what became Article 61 of the present Statute, it said (and I quote the French version, since the English is a clumsy translation):

> "Le droit de révision est un droit très grave, qui heurte, avec l'autorité des sentences rendues, ce qui, pour la paix des nations, doit être considérée comme acquis; *mais la justice a cependant ses légitimes revendications*. Tout bien pesé, le Comité a estimé que la révision devait être *de droit.*"[22]

[22] Advisory Committee of Jurists, *Procès-Verbaux* of the Proceedings of the Committee, 11 June-24 July, 2920, (with Anns. 1920), 744.

3. So El Salvador is simply exercising a right accorded by the Statute, and Honduras's efforts to depict this as improper and as a challenge to the sanctity of *res judicata* are very wide of the mark.

4. Secondly, Article 61 (2) of the Statute and Article 99 (4) of the Rules of Court plainly envisage that revision is a *two-stage* procedure: as the Court put it in the *Tunisia/Libya* revision case, "Article 61 of the Statute requires, as a first stage in a procedure on a request for revision, a judgment *limited to the question of admissibility* of that request"[23]. An important corollary, which Honduras chooses to ignore, is that not everything has to be proved or established to the full at the admissibility stage. Otherwise, there would be nothing left to decide at the second, "merits" stage.

5. I hasten to add that El Salvador does not claim that the Chamber has, at this first stage, to assume all the facts in our favour — we do not claim this, the admissibility phase is intended, clearly, as some sort of filter. But it does mean that we do not have to remove every possible doubt or question mark now. What has to be established, by whom, and to what standard in these preliminary proceedings in fact depends on the particular criterion. Which brings me to the criteria for admission of an Application for revision.

II. THE STATUTORY CRITERIA OF ADMISSIBILITY

6. Six criteria are set out in Article 61 of the Statute:

(1) The application must be made within ten years of the original judgment.

(2) It must also be made within six months of the discovery of the fact or facts in question.

(3) Neither the Court nor the applicant must have had knowledge of the fact or facts prior to the judgment. I shall, of course, go into this in detail.

(4) The applicant's lack of knowledge must not have been due to its negligence.

(5) The application must be based on the "discovery" of a "fact" or "facts".

(6) The fact or facts must be "of such a nature as to be a decisive factor"[24].

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[23] *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (*Tunisia* v. *Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985*, p. 197, para. 10. Also, *Application for Revision of the Judgment of 11 July 1996 in the Case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia), Preliminary Objections *(Yugoslavia* v. *Bosnia and Herzegovina*, Judgment of 3 February 2003 ("*Yugoslavia/Bosnia and Herzegovina Revision case*"), para. 15.

[24] See *Yugoslavia/Bosnia and Herzegovina* revision case, para. 16.

This is not disputed — the identification of these criteria is not disputed between the Parties; however, there remain serious differences regarding their meaning and their fulfilment.

1. The ten-year rule

7. Article 61, paragraph 5, of the Statute provides that "No application for revision may be made after the lapse of ten years from the date of the judgment." Honduras does not and cannot dispute that this criterion has been fulfilled; instead, it seeks to capitalize on the fact that El Salvador was unable to make its Application until the last day before the ten years elapsed by a series of gratuitous and even offensive remarks. With heavy-handed irony, it characterizes the Application as "so tardy" and "so convenient", and later describes the delay as both "noteworthy" and "surprising"[25]. Apparently afraid that these insinuations might nevertheless be too subtle, it later comes right out and baldly accuses El Salvador of "procedural bad faith"[26].

8. He who alleges bad faith has to prove it; but, needless to say, Honduras has not a shred of evidence to back up these calumnies. What is more, they reveal a triple misunderstanding of what the Statute requires. First, the League of Nations deliberately chose the ten-year period — increasing it, incidentally, from five years as proposed by the Advisory Committee of Jurists[27]. A statutory limit *is* a statutory limit, and you are either inside it or outside it. Secondly, the Statute contains a double safeguard against procedural abuse of the right to apply for revision: the relevant facts must have been unknown to the applicant before the judgment and, furthermore, any application for revision has to be made within six months of their discovery. El Salvador fully accepts that it has to meet these requirements — and I will return to them — but there is absolutely no procedural bad faith in making an application within the limits expressly stipulated in the Statute. And thirdly — something that Honduras forgets, or feigns to forget[28] — the Statute emphatically *does not* impose a duty to seek out new evidence *after* the original judgment. If a party finds something, or it comes its way by accident, then it must be brought to the Court's

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[25]Honduras's Written Observations (HWO), paras. 1.8 & 3.19. Other similar assertions are found throughout the Observations.

[26]HWO, para. 2.34.

[27]Advisory Committee, 744; League of Nations, *Procès-Verbaux* I-VIII of 3rd Committee of 1st Assembly Meeting, 139.

[28]E.g. HWO, paras. 2.34, 4.21 and 4.26.

attention within six months, but that is all. So when Honduras repeatedly complains that it has taken until 1992 to discover this material, it is including a period of ten years which it should not include in its criticisms, except in so far as there is question of a statutory limit which, as is agreed, has been fulfilled.

9. Thus the Honduran observations in this regard are gratuitously offensive; they lack any supporting evidence; and they are triply misconceived as a matter of law.

2. The six-months' rule

10. Paragraph 4 of Article 61 provides "The application for revision must be made at latest within six months of the discovery of the new fact." The Application was made on 10 September 2002, and hence the earliest permissible date for the discovery of any of the new facts relied upon by El Salvador is 10 March 2002.

11. Honduras does not, it seems, specifically dispute that any of the discoveries relied on by the Applicant fall foul of this six-months' rule. Indeed, at one point, it seems to concede that they do not[29]. Rather, it contents itself with generalized assertions of procedural bad faith and with a complaint that El Salvador has not discharged its burden of proving compliance with the six-months' rule[30]. But in fact, El Salvador has clearly indicated the date of discovery of each separate new item relied on. The Documental Annexes containing the *"Geografía de Honduras"* by Ulises Meza Cálix and the scientific report by Coastal Environments Incorporated, which are Annexes XI and II respectively, indicate on their face when these documents were obtained[31]. In the case of the new "Carta Esférica", Cartographic Annex 3, and the Navigation Record — or ship's log — of the *El Activo*, Documental Annex XIV, paragraph 7 of the Application — a document signed by the Minister for Foreign Affairs — attests to the fact that the documents were found in the six months preceding the Application; and it was on 30 July 2002 that the Newberry Library in Chicago certified that it was in their possession[32]. The technical field study at Annex IV admittedly does not carry its date on its face. However, the Application expressly states at

[29]HWO, para. 1.8.

[30]HWO, para. 2.34.

[31]See Vol. I, pp. 455-464 in the former case, and pages i and 1 in the latter.

[32]ESA, Documental Ann. XIV, p. 669.

paragraph 54 that the study was conducted in July 2002. The photographs at ground level, which form the bulk of this Annex, were in fact taken on 11 July 2002 and — I might add — perfectly lawfully. Some of the other photographs were taken by helicopter, from the Salvadoran side of the boundary delimited by the 1992 Judgment, at various dates in the month of July. The higher altitude photographs either emanate from the United States of America or, if from Salvadoran sources — such as the National Institute of Geography — were taken at a time before the 1992 adjudication and so again without any wrongdoing. The significance of this material is, as I shall indicate in more detail in due course, that it demonstrates that the old course of the river still exists and is clearly visible. The discovery consists partly in finding these traces on the ground and from the air in July 2002, and partly in putting together this material with older data in the public domain, in accordance with recognized geographical techniques, in order to draw conclusions about the original course of the river. Consequently, as well as most of the individual components of the study satisfying the six-months' rule, the *procedure* of conducting the study and drawing conclusions from it also satisfies the rule.

12. El Salvador has thus clearly and fully complied with the six-months' rule.

3. Absence of knowledge on the part of the Court and the Applicant

13. Article 61, paragraph 1, of the Statute requires that the fact relied on for revision "was, when the judgment was given, unknown to the Court and also to the party claiming revision".

14. So far as concerns absence of knowledge on the part of the Court, one might think it self-evident that the material discovered and produced for the first time by the Applicant must have been unknown to the Chamber in 1992. And this is indeed the case. But there is a series of arguments that Honduras makes, albeit in an obscure and confused way, which can conveniently be dealt with here. It repeatedly seeks to exclude or render nugatory material that it says was before the Chamber in the earlier proceedings[33]. In its reductive approach, it uses a variety of techniques that entirely lack legal foundation. One, to which I shall return shortly when I deal with the appropriate part of the Statute, is the invention of an absurdly narrow conception of what constitutes a "fact" and of what is meant by "new". Another technique is to lump together four

[33]For example, HWO paras. 1.11, 1.12 and 4.9.

separate ideas: *first*, whether the fact in question was *known to the Court*; *second*, whether it was known to the *Applicant*; *third*, if it was *not* known to the Applicant, whether it *should* have been; and *fourth*, whether the fact was *newly discovered*. Certainly, they are connected; but there are important distinctions between them. And by blurring all of these criteria together, in a way which is not so much impressionistic perhaps as Abstract Expressionist, Honduras in no doubt hopes to escape the consequences which a more precise analysis of its contentions would lead to.

15. There are indeed some facts to which El Salvador refers in the present proceedings which *were* known to it and/or to the Court (at least in part) in 1992. El Salvador is nevertheless entitled to rely on them now. They are documents which are components used in a new discovery (for example, an old aerial photograph used in a new way in the scientific report); or documents which formed part of the 1992 chain of reasoning which the Applicant seeks to have revised because of its new discoveries (e.g., the Madrid *El Activo* documents); or materials which corroborate newly-discovered material (for example, as I will show, Galindo y Galindo, cited in an extract by Honduras in its Counter-Memorial, corroborates a newly-discovered work by another author, Meza Cálix). It seems obvious that there is nothing wrong with deploying documents in such ways; but lest there remain any doubt I will attempt to dispel it completely when I come to analyse what constitutes a "fact".

16. El Salvador therefore submits that it has, to the extent required by the Statute, fulfilled the requirement that the facts in question should have been unknown to the Chamber and to the applicant at the time of the original judgment.

4. Absence of negligence

17. Even if an applicant for revision was previously ignorant of the facts in question, Article 61 (1) provides that it is not entitled to succeed if its ignorance was due to negligence.

18. Because the matter of negligence is a negative proviso — "always provided that such ignorance was not due to negligence" — it is certainly arguable that it is for the *opponent* of the applicant to establish that there was, indeed, negligence. But even if the Chamber were to hold otherwise, it must be stressed that the mere fact that new information is subsequently discovered does not prove that there must have been negligence. It is not a matter of *res ipsa loquitur*. For

one thing, the matter should not be judged from the perspective of hindsight; and secondly, what is negligent depends on the circumstances pertaining at the time of the original judgment.

19. All of us who have been involved in litigation know that, particularly in a complex case, there is a limit to the avenues that can reasonably be explored. It is a question of weighing up the likelihood of finding something decisive, or even useful, against the cost of the search in terms of human resources, money and time. The fact that a piece of evidence later emerges by chance, from an obscure or unpredictable source, is far from demonstrating that a party has been neglectful in failing to locate it previously. Even the wealthiest States cannot afford to devote unlimited resources to the search for evidence; and the great majority of States parties to the Statute are far from wealthy.

20. In the present case, it is also important to avoid the particular type of hindsight that would be involved in focusing just on the sixth sector of the land boundary. In the original proceedings, it was not just this sector which was in issue, but five others as well, plus the status of the islands in the Gulf of Fonseca, the status of its waters, and the régime beyond. Not to mention the Nicaraguan intervention. Each of these questions was important; each by itself raised a multiplicity of issues; and the parties did not have unlimited time or resources to pursue every possibility to the very limit.

21. Tunisia's position in its revision case[34] is very easily distinguishable. There was a good deal of evidence — as the Court concluded — that it should have known of the concession in question, the information being very readily accessible from well-known sources, not to mention from Libya itself.

22. Judge Torres Bernárdez has furthermore observed — rightly, if I may respectfully say so — that the question of negligence depends on the circumstances of the case[35]. El Salvador submits that this includes the particular circumstances of the parties to the suit. It is a matter of public record that, for virtually the whole period between 1980 and the handing down of the Judgment on 11 September 1992, a bitter civil war was raging in El Salvador. (I refer, for instance,

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[34] *I.C.J. Reports 1985*, pp. 205-206, paras. 25 & 27.

[35] Torres Bernárdez, "A propos de l'interprétation et de la révision des arrêts de la Cour internationale de Justice", in *Le droit international à l'heure de sa codification: Etudes en l'honneur de Roberto Ago*, Vol. III, pp. 443, 480.

to the widely-known and well-respected publication, *Keesing's Contemporary Archives* — later renamed *News Digest* — for the period 1981-1992.) The war meant that there were many demands on El Salvador's human and financial resources, however much importance it attached to the litigation before the Chamber. For example, *Keesing's* for June 1986 says that the guerrillas were conducting a "war of attrition" strategy, including economic sabotage, designed to "bleed the economy to the point of collapse", and also "observers estimated that as much as 47 per cent of government income was spent on the war effort". Another report indicated that the US embassy estimated the cost of war damage — excluding capital flight and foregone investment and industrial output — at US$ 1.5 billion, and that just up to the end of 1985[36]. So this was a very serious strain on El Salvador's resources, human and financial.

23. Honduras seeks to counter this point by invoking the Chamber's response in 1992 to a claim that the civil war had made it difficult for El Salvador to gain evidence of its *effectivités.* The Chamber refused to use these obstacles to justify making presumptions about the existence or content of evidence that El Salvador had been unable to produce[37]. The present point is, however, entirely different. The Applicant is not asking you to make any speculative inferences or presumptions in our favour; it simply submits that, when taking all the relevant circumstances into account in order to decide whether there was negligence, the civil war is a very pertinent circumstance. The Awards of the Franco-German Mixed Arbitral Tribunal in *Heim et Chamant c. Etat allemand*[38], and of the German-Yugoslav Mixed Arbitral Tribunal in *Epoux Ventense c. Etat S.H.S.*[39] give strong support to this proposition.

24. As well as the huge general disruption caused by the civil war, there were also particular problems associated with particular forms of evidence-gathering in the region in the period prior to the Judgment. For instance, survey work could obviously not be done by aeroplane or helicopter for fear of being shot down by rebel forces. *Keesing's* reports just such shootings-down in 1985, 1990 and 1991[40]. In addition to this, as we shall see when I come to deal with the scientific

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[36]Vol. XXXII, pp. 34413 & 34414; Vol. XXXIII, 35243, respectively.

[37]HWO, paras. 1.15, 4.17; *I.C.J. Reports 1992*, p. 399, para. 63.

[38](1922) 3 TAM 50, at 54.

[39](1927) 7 TAM 79, at 82.

[40]*Op. cit.*, Vol. XXXI, 33715; Vol. XXXVI, 37850; and Vol. XXXVII, 37957, respectively.

evidence in more detail, important technological developments had not yet occurred or were not available to El Salvador. My friend Professor Remiro Brotóns will refute Honduras's specific reproach that the Newberry Library materials could easily have been found.

25. Honduras points out that the civil war ended in 1992 and repeatedly demands an explanation of why El Salvador was unable to discover the new facts before 10 June 2002[41]. This is manifestly ill-conceived as a matter of law. As the Statute makes clear, the issue of negligence relates only to the period preceding the *original* judgment.

26. For all of these reasons, El Salvador was plainly not negligent in remaining unaware of the facts in question prior to the original Judgment.

5. The decisive character of the fact in question

27. Article 61 (1) of the Statute requires an application for revision to be based on the discovery of "some fact of such a nature as to be a decisive factor". What "decisive" means is that, when placed in the chain of reasoning of the previous tribunal, it could make a difference to the outcome of the case. As the Franco-German Mixed Arbitral Tribunal put it in the *Baron de Neuflize case*[42],

> «la seule tâche à laquelle doit s'astreindre le juge de la revision est celle qui consiste à déterminer si un élément nouveau de fait, postérieurement découvert, en prenant sa place dans l'ensemble de la construction des faits, antérieurement examinée, peut en modifier sérieusement la structure et, partant, des conclusions qui en avaient été primitivement tirées …».

This formulation was cited with approval by the Iran-US Claims Tribunal in *Ram International Industries* v. *Air Force of Iran*, which spoke of the new facts "seriously upset[ting] the balance, and consequently the conclusions drawn by the tribunal"[43].

28. In El Salvador's submission, it is not necessary for it to prove, at the present, admissibility stage of the proceedings, that the newly discovered fact *would definitely* have changed the substance of the Judgment. It is enough that it plausibly or reasonably *could* have made such a difference. This is borne out by the words "of *such a nature* as to be a decisive

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[41]See HWO, paras. 2.34, 4.21 and 4.26.

[42](1927), 7 TAM 629, 633.

[43](1993), 29 Iran-US Claims Tribunal Rep., pp. 383, 390.

factor", and perhaps even more so by the French *"de nature à exercer une influence décisive"*. Not *"qui aurait exercé"*, but *"de nature à exercer"*. Certainly, this is the flavour given by the equally authentic Spanish text, *"un hecho de tal naturaleza* que pueda ser *factor decisivo"*. It is also corroborated by the language of paragraph 2 of Article 61.

29. Moreover, the logical place for a *definitive* decision on decisiveness is at the merits stage. For if the Application is held admissible, it will then be for the Chamber to determine the precise impact of the discovery on the original decision and exactly how, if at all, it is to be revised.

30. I wish to emphasize that El Salvador does *not* claim that it has *no* burden at this stage. Clearly, the language of the Statute suggests otherwise; and it makes sense for there to be some sort of filter at the admissibility stage. If, even with the evidence adduced, the decision would have been the same, there is no need to go further. This is common ground. But our case is very different. Where the original chain of reasoning was such that the new facts, had they been known, could quite possibly have had a decisive impact on it, the Application should be admitted, leaving a full determination to the second stage. This is fairer to applicants, whose claim, *ex hypothesi* serious and with a *fomus boni juris*, can get the detailed attention it merits; and it is arguably fairer to respondents, whose objections can then be examined in greater depth.

31. There is support for this in the literature — for example Geiss[44], and Rosenne, who says "The admission of a request for revision implies that the State making the request has established the existence of a new fact constituting *prima facie* justification for the revision of the judgment and for allowing the proceedings to continue . . ."[45]. And formulated in this way, it also seems consistent with the approach of Judge Torres Bernárdez who, in his remarkable essay of 1987, doubted the propriety of too rigid a distinction between the two phases of the proceedings[46].

32. I should perhaps add that, even if our analysis of the standard of legal proof required at the admissibility stage were for some reason to be rejected, it would make no difference in the circumstances of this case, because the facts on which El Salvador relies can satisfy an even more stringent test.

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[44] "Revision Proceedings before the International Court of Justice", 63 ZaõRV (2003) 167, 184.

[45] *The Law & Practice of the International Court, 1920-1996* (The Hague, 1997), III, p. 1671 (emphasis added).

[46] *Op. cit.*, p. 472, n. 100.

33. In the present case, it can hardly be doubted that the newly discovered facts invoked by El Salvador would have made a decisive difference, had they been before the Chamber in 1992. Professor Brotóns will make submissions in due course regarding the decisiveness of the *El Activo* evidence. So far as concerns the other material, there can equally be little doubt. It seems clear that the Chamber accepted the following propositions:

(a) That the international boundary was whatever the colonial boundary was in 1821 — the *uti possidetis juris.*

(b) That during the colonial period the boundary had — at least initially — been constituted by the course of the Goascorán River.

(c) That if the river had changed its course by means of avulsion, the location of the colonial boundary would, as a matter of law, probably have remained unchanged.

(d) That if the original course of the river had been radically different from its current one — for example, if it debouched into the sea at the Estero La Cutú — it was a reasonable supposition that its change to its present course was the result of avulsion and not accretion, given the geographical and hydrological characteristics of the region[47]; *but*

(e) It held that the evidence before it was insufficient to establish that this had been the case.

34. So change step *(e)* — assume that acceptable scientific or other data had been produced of the old course of the river — or *a fortiori* on avulsion — and it follows ineluctably that the decision as to the location of the boundary would have been radically different. The finding of fact was part of the *ratio decidendi* of the case. You cannot get more decisive than that.

Mr. President, with your permission, I think that this may be a convenient moment.

Le PRÉSIDENT de la Chambre : Je vous remercie professeur Mendelson. La Cour va suspendre sa séance pour une dizaine de minutes. La séance est suspendue.

L'audience est suspendue de 11 h 35 à 12 heures.

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[47] "were the Chamber satisfied that the river's course was earlier so radically different from its present one, then an avulsion might reasonably be inferred. While the area is low and swampy, so that different channels might well receive different proportions of the run-off at different times, there does not seems to be a possibility of the change having occurred slowly by erosion and accretion, to which, as El Salvador concedes, different legal rules may apply."

Le PRESIDENT de la Chambre : Veuillez vous asseoir. L'audience est reprise et je donne à nouveau le parole au professeur Maurice Mendelson.

Mr. MENDELSON : Merci, Monsieur le président.

6. The claim must be based on the discovery of a fact

35. I was going through the criteria, and I come now to the sixth criterion, which is that the claim must be based on the discovery of a fact.

36. Looking first at the *discovery* element, this is in a sense simply the counterpart of the rule that both the Court and the applicant should have been ignorant of the fact when the judgment was given.

37. Honduras, once again trying to conflate and at the same time misrepresent the criteria, has suggested that materials upon which El Salvador relies are not really "discoveries of new facts" because they were already known or could have been known before[48]. But as we shall see, its conception of what was "already known" is absurdly broad, whilst its proposition, that something that *should* have been discovered before is not a discovery, is a pure invention without any basis in the Statute or in logic. Honduras is confusing the concept of "discovery" with the separate requirement that the Applicant's previous ignorance should not have been due to its negligence.

38. It is, however, in its conception of what constitutes a "new fact" that Honduras appears to be most profoundly confused — both as to the nature of "newness", and also as to what constitutes a "fact", for the purposes of Article 61. One is tempted to wonder what, for Honduras, *could* be a fact? Thus, in what is, with respect, a rather obscure and confused exposition, our distinguished opponents apparently invite the Chamber to believe that the scientific and technical evidence cannot constitute an "objective" new fact — whatever that may be[49]; indeed, it cannot constitute a fact at all, but is a mere intellectual construction[50]; that a document, including a part of a book,

[48]HWO, para. 2.17.

[49]HWO, para. 2.18.

[50]*Ibid.* and para. 2.17.

cannot be a fact[51]; and that evidence cannot be a fact[52]. Let me try and shed some light on a question which has been unnecessarily obscured by the Respondent.

39. It is common ground that revision is not about "new facts", if by this is meant events and situations arising after the original judgment. That would be review due to change of circumstances, which is not what we are concerned with here: see paragraph 67 of the *Yugoslavia/Bosnia and Herzegovina* revision Judgment. Although the expression "new facts" is a convenient one, and is indeed used in paragraph 2 of Article 61, what we are really concerned with is new discoveries about *past* facts — past events and situations, to be precise. Take the example of a person who is convicted of murder, partly on the ground that the victim's blood was found on his shirt immediately following the killing. A new DNA — deoxyribonucleic acid — analysis of the blood establishes that it was not, after all, the blood of the victim. The original conviction has to be overturned because of a new test leading to an inference about a *past* fact — whose blood it was on the shirt. Similar examples could be given from areas other than criminal law.

40. Let me pursue this very simple and uncontroversial example, both at a more abstract level and also for its concrete implications for the present case.

41. First, it means that we should not be confused by supposed distinctions between facts and evidence, or evidence and proof — distinctions and terminology which can, in any event, mean different things in different legal systems, and in different contexts within the same legal system. After all, what is our DNA test, a fact or evidence? It is a fact that it was conducted. The inference drawn from the raw data it produced is an intellectual construction. But, if persuasive, we call those results and inferences a fact — the blood "was not" that of the victim — a statement of fact. Rather than play with words, it may be more helpful to employ the well-known distinction between a *factum probandum* and a *factum probans*. Although these concepts have come to be particularly associated, perhaps, with the names of the philosopher Jeremy Bentham and the great United States jurist John Henry Wigmore[53], they are by no means confined to the Common Law, because they embody principles of universally valid legal logic.

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[51]HWO, paras. 2.20 and 3.14-3.15.

[52]HWO, para. 2.20.

[53]See e.g. Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (2nd ed. 1923), Vol. I, 5 & 7.

42. A *factum probandum* is a fact that has to be proved. For example, that the accused committed the murder. A *factum probans* is a fact — often one of several facts — by which the *factum probandum* can be proved. For example, that the accused was found with the victim's blood on his shirt shortly after the murder is one *factum probans*; another is that he had the motive, and so on. It is important, incidentally, to appreciate that a *factum probans* can often also be a *probandum* — an intermediate *probandum*. For example, a blood test — *factum probans* — indicated that the blood on the shirt belonged to the same blood group — say, rhesus positive — as the victim's: the statement "the victim's blood was on the accused's shirt" is here both a *probans* — helping to prove that the accused caused the death — and it is also a *probandum.* Why? Because it needs to be proved that the blood actually was the victim's, and not just of the same group as the victim's. It will also be noted that they are all *facts* of some kind or other: it is simply that they occupy different places in the chain of reasoning.

43. So, in the present case, a — or perhaps the — ultimate *probandum* is avulsion. A *factum probans*, in the view of the Chamber in 1992, would be that the Goascorán originally flowed down the Cutú branch — or some other in its vicinity. Pausing there, it is important to note that the Chamber does not possess a time machine. It cannot go back to, say, the eighteenth century to see for itself where the river flowed. The *probans* of the previous course of the river can only be established by other facts — such as a scientific report or photographic or documentary evidence. Neither the Statute nor logic exclude this type of fact — this type of evidence — any more than would domestic law.

44. Thus, there is no basis for excluding *evidence* on the ground that it is not "a fact". This, as we have just seen, is clear as a matter of logic, but if authority is required, one may cite, by way of illustration, the award in *Heim et Chamant c. Etat allemand,* where the Franco-German Mixed Arbitral Tribunal, construing a statute very similar to that of the present Court, expressly recognized that evidence can constitute a fact for the purpose of revision[54].

45. Likewise, the scientific evidence cannot be dismissed on the ground that it is a mere *"intellectual construction"***.** The *Yugoslavia/Bosnia and Herzegovina* revision case, is entirely

[54](1922) 3 TAM 50, 55.

different from the present one. There the Court refused to admit an application for revision based on inferences, intellectual constructions described as "legal consequences" drawn from Yugoslavia's admission to the United Nations after the original Judgment[55]. *First*, it concerned inferences — not evidence — about questions of law, not fact: whether Yugoslavia was a new State, or the continuation of an old one, and whether it was a successor in law to the Genocide Convention. *Secondly*, Yugoslavia had sought to rely on inferences — in any event controversial — from a *wholly new event* — the admission of that country to the United Nations. And *thirdly*, the Court rightly appreciated that the admission of Yugoslavia to the United Nations was an entirely *sui generis* event, about which no reliable retroactive legal inferences could be drawn.

46. Equally, Honduras is quite wrong to say that a *document* cannot be a "new fact" for the purpose of Article 61. When the Sub-Committee of the Third Committee of the League of Nations came to consider the report of the Advisory Committee of Jurists on the draft PCIJ Statute, Italy proposed replacing the phrase "some new fact" in paragraph 1 by the phrase "some new fact *or document*". It was only after Mr. Politis expressly declared that "the discovery of a document was included in the discovery of a fact" that Italy withdrew its proposal[56]. Of course, a document is not *always* a new fact, or does not *always* have a decisive character. Thus, in the Advisory Opinion on the *Question of the Monastery of Saint-Naoum*, the Permanent Court of International Justice rightly held that "fresh documents do not *in themselves* amount to fresh facts"[57]. But this was because, even if the Conference of Ambassadors was unaware of the particular communication relied on, its *content* was already known to them and moreover, the documents did not in any way prove what they were claimed to prove. So that decision does not help Honduras either.

47. It also follows that there is no reason to exclude evidence which serves, not to prove a *probandum*, but to *disprove* it. Just as a DNA test or other evidence would be admissible in order to disprove a previous conclusion that the blood was the victim's, so it must be permissible to be

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[55]Judgment of 3 February 2003, para. 69.

[56]League of Nations, *Procès-Verbaux* I-VIII of 3rd Committee of 1st Assembly Meeting, *Documents*, 30 & 139 (emphasis added).

[57](1924), *P.C.I.J., Series B, No. 9*, p. 22 (emphasis added).

able to adduce the *El Activo* documents from the Newberry Library in Chicago — to attack the reliability of the Madrid version or versions on which the Chamber relied in its original Judgment.

48. It equally follows that it does not make any difference that some of the material relied on in the chain of proof predates the original trial. Many scientific and historical "discoveries" are indeed the result of synthesizing individual pieces of existing knowledge — but they are no less "discoveries" for that. Likewise, the fact that El Salvador's technical study, for example, relies not only on recently taken photographs but on a limited amount of older material, does not prevent it being a "discovery", in the sense that a synthesis leads to the conclusions to which I shall refer shortly.

49. Finally, it is necessary to draw attention to another proposition that might have seemed self-evident had Honduras not put it into question. It makes no difference that the fact in question was previously put in issue at the original trial. The accused, for instance, might have denied that the blood on his shirt was the victim's: his own blood is the same group as it happens, and he swore at the trial that he had cut himself shaving. Whose blood it was was squarely in issue, and the accused was disbelieved. There is no reason in logic or justice why he should now be debarred from adducing new, DNA, evidence to corroborate what he said all along. Indeed, one might rightly speculate that the majority of revision proceedings, national and international, involve reopening points that had previously been litigated. Certainly, there are international precedents for this, such as the decision of the European Court of Human Rights in *Pardo* v. *France*[58]. Likewise, the fact that El Salvador relied on avulsion at the earlier trial cannot preclude it from adducing new evidence now.

50. Viewed in the light of these elementary propositions of logic, the Honduran objections I have examined can be seen to be nonsensical — and I do not mean this in any way abusively, but literally, as lacking in any foundation in law, logic or common sense. Thus,

(a) to suggest that evidence of a fact is not itself a fact is simply wrong;

(b) to suggest that a new report is merely an intellectual construction, not a fact, is simply wrong;

(c) to suggest that a document or its content cannot be a fact is simply wrong;

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[58] Judgment of 10 July 1996 (revision–admissibility), *Reports of Judgments and Decisions*, 1996-III, 860.

(d) to suggest that evidence which undermines the credibility of other evidence is not a new fact is simply wrong; and

(e) to suggest that arguments rejected in the first hearing cannot be taken into account is, equally, simply wrong.

7. The evidence must be plausible

51. I come now to a criterion which is not expressly stipulated in the Statute which is that the evidence must be plausible. Nowhere does the Statute expressly say what standard of proof of facts should be applied in admissibility proceedings in an application for revision. In El Salvador's submission, the test is, in effect, the same as for decisiveness. What the Statute requires, is "some fact *of such a nature* as to be a decisive factor". In other words, it has to have the *potential* to be decisive. Part of that potential concerns its possible impact on the former judgment's chain of reasoning, and I have dealt with that. But the other component of a fact's ability to be decisive is its *plausibility*. Even if it could, theoretically, destroy a chain of reasoning, if it is wholly implausible it is not of a nature to be decisive. Furthermore, it would be a waste of the Court's time to allow such a case to go through, if it is bound to be rejected on the facts at the second stage.

52. But having said this, El Salvador does not consider that it is incumbent on an applicant to prove its case "up to the hilt", *"jusqu'au bout"*, at the first stage. Otherwise, why have a merits phase, and what would be left for it? Consequently, we submit that what is required is that the evidence should be *plausible*, in the sense of being *reasonably capable of being believed*. Not proven, at this stage, but plausible.

53. This, El Salvador submits, is an approach to the question of criteria and burden of proof at the admissibility stage which is consistent with the language and the purpose of the Statute; is rational; is conducive to the expeditious conduct of the Court's business; and is fair to both parties.

54. In the time remaining to me, I propose to outline why El Salvador considers that its positive evidence meets this standard.

PART III. DETAILED EXAMINATION OF THE EVIDENCE

55. [Project slide 5B (sketch-map No. F-1] El Salvador has new evidence that the Goascorán River formerly followed a course different from its present one, debouching into the Gulf of Fonseca at or about point C rather than point B, and that the change of course was the result of a process of avulsion. It says that this evidence is plausible and otherwise satisfies the criteria applicable to the present case. I should perhaps have mentioned that this is a sketch-map from the original Judgment and is to be found in your folders as tab 5B.

56. These claims are based on three types of evidence — what has loosely been termed the "historical evidence", the "technical evidence", and the "scientific evidence" and they mutually reinforce one another.

A. The historical evidence

57. The first class of evidence El Salvador produces is historical and documentary in character.

58. The newly-discovered material is, in the first place, the "Geografía de Honduras", written by Ulises Meza Cálix, a distinguished Honduran Professor of Geography. The whole book, in its original Spanish, is to be found at Documental Annex XI to the Application, page 273. It is noteworthy that it was published by order of the Honduran National Congress, after it had received the favourable opinion of the Council of Public Education[59]: presumably these bodies would not have authorized it if they thought it contained anything incorrect.

59. [Project image 5C (extract from Meza Calíx)] The passage to which El Salvador wishes to draw particular attention is being projected now and is to be found in your folders at tab 5C[60]. The key words are "Along the river's left bank vestiges of its primitive [i.e. original] bed are found: the current crossed between the villa de Goascorán and the village of Alianza, draining into the Estero of La Cutú, in front of Isla Zacate Grande."

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[59]Decree No. 64 of 14 February 1913, p. 276 of Vol. I of the Documental Annexes. (The original, Spanish, version is at p. 282.)

[60]It is to be found at p. 355 of Volume I of the Documental Annexes, p. 85 of Meza Calíx's text. An English translation is at p. 278.

60. Despite Honduras's efforts to discredit its own authority, honoured in his time by having his book officially approved and published at public expense, the book substantiates El Salvador's claim that the Goascorán River formerly flowed along the Cutú branch.

61. The Chamber will recall that, in the original proceedings, Honduras had referred to a 1934 publication by the Honduran Professor Bernardo Galindo y Galindo, "Monografía del Departamento de Valle"[61]. The volume itself, which was "Amended, Improved and Published by the Society of Geography and History of Honduras", was not produced to the Chamber by Honduras — as the Judgment notes[62]. It now, however, forms Documental Annex VII to the present Application. This author corroborates entirely what is said by Meza Calíx[63]. El Salvador does not cite Galindo y Galindo as a new discovery, so much as part of the context within which its newly-discovered material is to be assessed. Similar views were expressed in 1960 by the Honduran expert Felix Canales Salazar, whose work is reproduced in Documental Annex XXIV[64].

62. Further important historical documentary evidence concerns the *El Activo* logs and charts, but this will be dealt with by Professor Remiro Brotóns.

B. The technical evidence

63. As previously indicated, the material at Documental Annex IV is a synthesis, comprising to a large extent aerial and ground level photographs, but also integrating a certain amount of pre-existing photographic and cartographic data. I have already explained how it satisfies the criteria of the Statute regarding time, lack of negligence, and so on.

64. Honduras claims that this evidence is "totally irrelevant" as it does not provide any information at all concerning the proof or the origin of a right[65]. But this entirely misses the point. As we have already seen, in a strict sense, this is not a dispute about title or the "origin of a right". Both Parties agreed that the Goascorán River originally constituted the boundary between their predecessor units in colonial times. What is in issue is what course the river followed at the

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[61]The Galindo y Galindo work is reproduced and partly translated in ESA, Documental Ann. VII. At Documental Annex V is found what was presented to the Chamber by Honduras in the original proceedings.

[62]*I.C.J. Reports 1992*, p. 546, para. 309.

[63]See the passage on page 6 (p. 157 of the Annexes).

[64]See especially Volume I, p. 869 (English translation at p. 850).

[65]HWO, para. 4.12; cf. para. 3.9.

relevant time, and whether and how it subsequently changed course. This is what the technical evidence addresses and it is clearly relevant to the present Application. It demonstrates that the river used to flow down the Cutú branch before changing its course. (Incidentally, the way Honduras frames these issues in paragraphs 3.10 and 3.13 of its Written Observations is tendentious and misleading.)

65. There are a number of features to which I wish to draw attention, briefly, illustrating them with just a small selection of figures from the technical report. They are in the judges' folders, but since I shall switch back and forth between them a little, Members of the Chamber might find it more convenient to observe the screen.

— [Project image 5D (entrance at Rompición)] First, there is a determinant place, at La Rompición de Los Amates, where the entrance to the old course of the river can be seen. It continues in a southerly direction towards the Estero La Cutú.

— Next, a number of features shown indicate that this was a, or the, principal course of the river previously. [Project image 5E (hollowing, etc.)] I refer in particular to the hollowing of the ground and the fact that this hollowing has still not been filled in — as it would have been if the bed had been abandoned many centuries ago. I refer also to the density, type and size of the vegetation. It can be seen, for instance, in this image, tab 5E; as well as in the previous one, [project image 5D (entrance at La Rompición)], and in a closer picture of some large trees at tab 5G [project image 5G (trees)].

— [Project image 5E (hollowing, etc.)] Another indication is the type of gravely bed to be found along this course of the river, which is evident in a picture which you can see now, at tab 5E. And here is a close-up [project image 5F (gravel)] of the same material taken from the same place, clearly gravely material indicative of a river bed (this is tab 5G.)

— [Project image 5H (Ramaditas mouth)] Finally, the report bears out the scientific study's claim that the Ramaditas branch is not likely to have been the course of the river for long, particularly in view of the configuration and narrowness of its mouth at around point B. It is at most 50 m wide at its mouth. By contrast, the Estero Picadero Nuevo is 175 m wide; Pez Espada 400 m; El Coyol 700 m; Llano Largo 800 m; and La Cutú 900 m.

66. The technical study as a whole confirms that the old course is part of physical reality, and not just an artificial construct, as Honduras would have you believe. It was this physical reality that writers were able to identify. The material contained in the field study and the discoveries it embodies thus reinforce and corroborate both the historical evidence and also the scientific evidence, to which I now turn.

C. The scientific evidence

67. The scientific evidence consists of a report prepared by Doctors van Beek, Castille and Gagliano of the North American consultancy, Coastal Environments Incorporated, on the "Geologic, Hydrologic and Historic Aspects of the Goascorán Delta". It forms Documental Annex II to the Application for revision. Members of the Chamber will no doubt have read it, and I do not propose to take you through it in detail. To do so would involve my paraphrasing what the authors have said better in their own words. The more so when the purpose and duration of admissibility proceedings does not readily lend itself to minute scientific debate. Instead, I shall focus on some of the conclusions and respond briefly to Honduras's criticisms of the Report.

68. By way of introduction, I draw attention to the very impressive qualifications of the authors, set out at pages 31 to 74 of their Report. They are experts in the fields of geography, geology and archaeology, specializing in a variety of pertinent areas, including riverine and coastal geography and history. Perhaps particularly significant in the present context is their extensive involvement as experts in federal and state litigation in the United States of America.

69. The Report's conclusions are set out at page 26. I shall focus on these, and turn to the body of the Report for the supporting analysis where required. In the interest of clarity and brevity I will refer to the conclusions somewhat out of the order in which they are set out in the Report, and combine them where possible.

70. Focusing first on the disputed area as a whole, the *first conclusion* at page 26 is that two branches of the Goascorán River dominate the Goascorán delta complex. These are the westerly and presently active Ramaditas branch and the now inactive southerly Cutú branch. The delta appears in the false-colour satellite image included as figure 2, page 6; [project image 5I (Report, figure 2)], which you also see on the screen and is in your folders at tab 5I. The two lobes are

clearly identified, and one can easily see that the lobe associated with the currently active Ramaditas branch is substantially smaller[66]. The *fourth conclusion* is indeed that the Cutú-Capulin delta lobe accounts for more than half of the emergent Goascorán delta complex. Considerably more than half I would say.

71. Focusing now on the Cutú system, the important *third conclusion* is that the complexity of the Cutú-Capulin channels and associated features indicates that this was the favoured course of the Goascorán River during most of the Holocene Period [that is, the last 11,000 years] and for many centuries prior to its abandonment. This is derived from a number of observations that consider such matters as the size of the Cutú lobe; the maturity and complexity of its distributary channels; the extent of its sub-tidal delta platforms[67]; the reoccupation of distributary channels as indicated by geomorphic features[68]; and comparison between the Cutú lobe and the Ramaditas lobe[69]. I shall elaborate a little.

72. As stated in the *second conclusion*, the Cutú branch is a mature, complex system of branching channels. The radar imagery shows a fully developed distributary system of large channels for the Cutú lobe; and I draw the Chamber's attention especially to figure 3, at page 7, [project image 5J] which is in your folders at tab 5J and is now being projected. Characteristic is a repeated hierarchical bifurcation of the Cutú branch, first into secondary channels — the Cutú and the Capulin — and subsequently into further, third order, channels. These, I hope, are slightly clearer in your folders than they are in the Annex. A closer detail of this can be seen in figure 9, at page 15 [project image 5K], which is at tab 5K of your folders. This is an aerial photograph of the Cutú-Capulin distributary system. As the Report observes (at page 14), these distributaries are mature and had sufficient time to develop true bifurcations with approximately equal-size channels. This contrasts strongly with the single channel of the Ramaditas branch, which has only small distributaries breaking out of the trunk channel[70]. Further indications of the greater importance of the Cutú branch in the evolution of the Goascorán delta are the extensive sub-tidal delta platforms

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[66]CEI Report, pp. 5-7.

[67]CEI Report, p. 16.

[68]*Ibid.*

[69]CEI Report, p. 19.

[70]*Ibid.*

extending outward from the mouths of its distributaries. By contrast, the absence of a well-defined tidal platform at the Ramaditas branch outlet indicates limited duration of outflow there[71].

73. It should also be noted that the distributary channel complex and associated geomorphic features of the Cutú delta lobe are still highly visible despite being abandoned — as the technical report indeed confirms. As the CEI Report puts it (the scientific report), "this prominence of the geomorphic features associated with the Cutú flow is also evidence that the shift from the Cutú to the Ramaditas branch occurred *during the recent historical period (i.e., within about the last 250 years)*"[72]. It was likewise the analysis of geomorphic features that led to the *eighth conclusion* that "scientific analysis and physical evidence indicate that the Cutú branch and its distributary channels were the primary outlets of the Goascorán River at the time of abandonment".

74. The *fifth conclusion* on page 26 is that the condition of the abandoned trunk and distributary systems of the Cutú-Capulin system indicates that the Cutú system was abandoned very rapidly through a process of avulsion. To summarize the Report's analysis on this point, which may be found at pages 13 to 16, the fact that the geomorphic evidence of river flow and deltaic activity along the Cutú branch remains clear, rather than muted or obscured by terrestrial or marine processes, or by sedimentation associated with a very gradual decrease in flow, is indicative of a rapid abandonment of the Cutú branch. Pausing here, we now have the scientific evidence of avulsion which the Chamber in 1992 found to be absent — though it was apparently ready to infer it anyway if it could be shown that the Cutú branch (or another one in the vicinity) was a bed which had been abandoned.

75. The *sixth conclusion* concerns the dating of the avulsion. It is that integration of historic data and physical evidence suggests that a switch in flow to the Ramaditas branch and abandonment of the Cutú-Capulin channels occurred within a time span of 50 years or less prior to 1794.

76. The first part of the *seventh conclusion* is that a major flood is the most likely cause for the change in flow from the Cutú to the Ramaditas channel. Although historical flow and sediment discharge data for the Goascorán River for this period are not available, the authors make a series

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[71]CEI Report, pp. 13 & 16.

[72]CEI Report, p. 12.

of inferences based on historical and recent records of major weather events in the region, particularly hurricanes.

77. The Report goes on to try and date this change, observing that "the Dionysus Flood of 1762 [is] a highly probable cause". The reasoning underlying this hypothesis is set out at pages 21, 22 and 26.

78. The Report makes out a strong case for avulsion, and if the Chamber had had this evidence before it in 1992, the Judgment suggests that it would have been inclined to conclude that the colonial boundary would not have been affected and would have remained along the Cutú branch. For the purposes of the present, admissibility stage of the revision proceedings, moreover, all that is necessary is for you to consider that this possibility is at least plausible. It doesn't have to be proved at this stage, to the full. And even if the Chamber were not persuaded by the Report's reasoning on *avulsion*, even to the extent of considering it plausible, that still would not be fatal to our case. Because of course the Chamber in 1992 took the view — correctly, in El Salvador's submission — that if it could be shown that the Goascorán formerly flowed down the old bed, it would be reasonable to *infer* avulsion.

79. Honduras attacks this scientific evidence on the ground that its results are "merely indicia"[73] or "sheer conjecture, unsupported by convincing evidence"[74]. El Salvador submits that the Report speaks clearly and conclusively for itself on these matters, including as it does the sustained analysis of present and past hydrologic and physical processes, substantiated by reference to academic texts, scientific reports, radar and satellite imagery, aerial photography and the authors' very considerable personal experience.

80. In an attempt to discredit the Report of these distinguished scientists, Honduras relies on its own report prepared by Michael S. Kearney, an Assistant Professor in the Department of Geography at the University of Maryland[75]. It purports to be an independent assessment of the scientific evidence for the claims made in the CEI Report. Even at first glance, the following points stand out:

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[73]HWO, para. 3.59.

[74]HWO, para. 3.63.

[75]This report forms Ann. 14 to Honduras's Written Observations.

— It is very brief — excluding the summary and the discussion of whether the CEI Report made use of new technology (to which I will refer), it comprises only 12 paragraphs.

— The assessment is notably unscientific — it consists largely of non-specific allegations and unsubstantiated assertions relating to CEI's conclusions and methods, and it does not itself contain even a single reference to an academic or scientific source. On the contrary, it is based on no more than the author's own perceptions and conjecture.

81. It is not for me to rehearse Kearney's criticisms to you; but it may be useful if I add a few very brief additional comments — and they are not the only possible ones — on the so-called substance of his Report, to show how ill-founded they are.

(a) His assertion that the CEI Report as a whole does not meet the standard to be expected of an article submitted for publication in an academic or scientific journal[76] completely misses the point. It was prepared as a technical document *for use in judicial proceedings*; and in the way it is presented, with all of its supporting evidence and reasoning, it cannot be said to be deficient as a report to a court. On a personal note, I have yet to come across an expert report in litigation which could be reprinted in a serious scientific journal: it serves a quite separate purpose.

(b) Kearney questions whether what CEI calls the "Goascorán delta" really is a delta[77]. But he concedes that there are deltaic features and he does not explain what difference this makes. In the ultimate analysis, it is merely a semantic quibble.

(c) Equally trivial is the criticism that the Report does not make good its claim as to *when* within the last 250 years the shift occurred[78]. CEI has given powerful reasons for its view that dominance of the Ramaditas branch is a relatively recent phenomenon and as to what is the most likely cause; to expect certainty in relation to a past event of this sort is completely unreasonable. Furthermore, the Kearney Report itself presents no alternative hypothesis and is virtually devoid of any serious scientific context, including — I repeat — a single reference to the literature.

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[76]HWO, Ann. 14, p. 230 (§2A) and *passim.*

[77]HWO, Ann. 14, pp. 233-234.

[78]P. 234.

82. The techniques and processes relied on by CEI are described in its Report in the section headed Methods and Background (pp. 1-2). They included the conversion of topographic maps and aerial photography to digital format through scanning and subsequent georeferencing to digital files of remotely sensed imagery; the use of satellite imagery including "Thematic Mapper 7 imagery"; and the development of a "Digital Elevation Model" through post-processing of satellite-acquired radar data. Their Report records that much of the software and other tools required for these investigations were developed only in the last decade, and that data acquisition and availability have been greatly enhanced through the development recently of the internet. Without these tools, the present level of investigation could not have been accomplished. Further — they say —, even if such tools were available to the military or, possibly, a select group of academic institutions in the most highly developed States, countries like El Salvador would not have had access to them primarily because of a lack of resources.

83. In its Written Observations, based on the Kearney Report, Honduras concedes that the technologies used in the Report have evolved since 1992. However, it submits, first, that the technologies actually utilized by CEI were sufficiently developed in 1992 to permit it to carry out the investigations it did; and, secondly, that although other technologies referred to in the Report were not readily available before 1992, they were little used or were ignored in the Report. Both of these propositions are untenable. Assistant Prof. Kearney himself concedes that satellite *radar* data have become generally available only in the last decade[79] — he concedes this; but he goes on to say that "not one radar satellite image is shown as a figure in the Report". Astonishingly, this ignores figure 3, which is expressly so labelled, and also figure 2, which is a combination of a false-colour satellite image and a three-dimensional elevation model developed from radar imagery. Not only were new data obtained and new technology employed however; perhaps more importantly, a new *methodology, new techniques of interpretation were relied on*, based on an examination of geomorphic and hydrologic processes both in other areas of this type, and in the specific area, in order to gain insight into the functioning and characteristics of a physical system, the Goascorán Delta. This approach has been previously successfully used in petroleum

[79]HWO, Ann. 14, p. 232.

exploration and in the context of resource management. However, in 1992 it would not have been reasonable to expect El Salvador to be aware of the utility or the relevance of this technique for boundary litigation.

84. El Salvador therefore submits that this scientific evidence meets the criteria set out in Article 61 of the Statute, and that it provides a sound basis, both alone and in conjunction with the other material presented to you, for the admission of the Application for revision of the 1992 Judgment.

PART IV. CONCLUDING REMARKS

85. If I may make some very brief concluding remarks, Mr. President, distinguished Members of the Chamber. El Salvador and Honduras are in agreement that there are two stages to the revision proceedings. Our opponent, however, fails to draw the appropriate conclusions. On the one hand, it pedantically and, one might even say, bizarrely, upbraids El Salvador for having disclosed the relief that it intends to seek if the Application is declared admissible (at the same time making the patently incorrect claim that it is inappropriate to seek reversal of a decision in revision proceedings)[80]. On the other hand, Honduras repeatedly complains that El Salvador has not sufficiently proved its case — which seems to be a bit contradictory — but also overlooks the fact that, because there are two stages, it follows logically that what has to be established at the admissibility stage, by whom, and to what standard, must differ in at least some respects from the "merits" stage. El Salvador, though confident that it can pass the most stringent tests, has made its submissions on what it considers to be the relevant legal requirements for the admission of an application. It has not sought to persuade you that everything must be assumed in its favour, as in the trial of certain types of preliminary issue. Rather, it has put forward a reasoned and responsible analysis of the criteria, as well as going on to show that they have in fact been fulfilled. In particular, Honduras's attempts to reduce all our facts — documents, books, scientific and technical reports, and so on — to non-facts cannot withstand the cold light of reason. Likewise its claims that there have been no discoveries, no "new facts" are, with respect, preposterous. On the contrary, the Applicant has amply demonstrated that it has discovered "facts of such a nature as to

[80]HWO, paras. 4.1-4.4.

be decisive" which justify a re-examination of the original decision. It is perfectly clear from the 1992 Judgment that the Chamber considered the absence of satisfactory proof of avulsion, or even of the earlier course of the river, to be crucial; change that part of the equation, and the whole chain of reasoning is open to question.

Thank you for your kind attention. May I now ask you, Mr. President, kindly to give the floor to my friend and colleague Professor Remiro Brotóns?

Le PRESIDENT : Je vous remercie professeur Mendelson, et je donne maintenant la parole au professeur Antonio Remiro Brotóns.

M. BROTÓNS : Monsieur le Président, Messieurs les Membres de la Cour, permettez-moi tout d'abord de dire combien je suis honoré de m'adresser aujourd'hui à vous pour défendre la demande en revision déposée par la République d'El Salvador.

Ma plaidoirie a un double objectif. D'un côté, il s'agit de compléter les points développés par le professeur Mendelson, avec la considération maintenant de l'*uti possidetis juris* de 1821 à la lumière des règles du droit colonial espagnol applicables à l'avulsion (I). D'un autre côté, j'essaierai de soutenir la recevabilité de la revision sur la base aussi du *fait nouveau* déduit de la découverte dans la *Newberry Library* de Chicago d'autres copies de la *Carta Esférica* et du journal de bord d'*El Activo* (II).

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I. L'*UTI POSSIDETIS JURIS* DE 1821

a) *La nature du fait décisif*

1. En ce qui concerne l'*uti possidetis juris*, le Honduras affirme qu'en l'espèce, aux effets de la revision, le caractère décisif d'un *fait* ne peut être apprécié que sur la base de l'*uti possidetis*

juris[81]. Partant de ces prémisses, il soutient que ce *fait* ne peut consister qu'en la présentation d'un *titre* ou, à défaut, de nouvelles effectivités coloniales prouvées par les Parties [82].

2. Un tel exposé est, cependant, trop étroit, assez contradictoire avec les prononcés préalables du Honduras sur la notion du *fait*[83] et, surtout, peu ajusté à la situation qui dut être résolue par la Chambre dans le secteur du Goascorán.

3. Un *titre* est, certes, un fait connoté par le droit, un fait qui requiert une construction juridique. Mais les faits de la nature sont aussi des faits, des faits dont découlent des conséquences juridiques, et ces faits, dans notre cas, sont particulièrement importants.

4. Dans le secteur du Goascorán la Chambre se fonda sur l'acceptation par les Parties de ce fleuve comme limite territoriale durant la période coloniale, plus que sur l'«aportación» (production) de documents ou actes royaux établissant cette limite[84].

5. Néanmoins il y avait un désaccord sur le point de savoir si la limite suivait, ainsi que le soutenait El Salvador, le cours d'un lit abandonné qui débouchait dans l'*Estero La Cutú*, ou bien s'il suivait, ainsi que le soutenait le Honduras, le cours du fleuve à la date de l'indépendance, c'est-à-dire, le 15 septembre 1821[85].

6. La Chambre ne voulut pas entrer alors dans la thèse d'El Salvador, argumentant que l'avulsion du Goascorán n'avait pas été prouvée[86]; mais maintenant, ainsi que le professeur Mendelson l'a efficacement exposé, El Salvador compte sur la preuve scientifique et technique du fait géographique, corroborée en outre par d'autres documents historiques, et ce fait méconnu judiciairement à la date de l'arrêt est, sans doute, décisif.

7. Et il est particulièrement décisif car une fois que le lit du Goascorán cristallisa à la fin du XVII[e] siècle comme limite entre la *Alcaldía Mayor* de Tegucigalpa et la municipalité de San Miguel (sous la juridiction de la *Alcaldía Mayor* de San Salvador), le changement brusque de

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[81] Observations écrites du Gouvernement du Honduras, 1[er] avril 2003, par. 3.3, 3.6.

[82] *Ibid.*, par. 3.6, 3.9. Voir aussi par. 3.7, 3.8, 3.16, 4.23, 4.26. .

[83] *Ibid.*, par. 2.15, 2.16, 2.17, 2.18, 2.20, 2.25.

[84] Arrêt du 11 septembre 1992, *C.I.J. Recueil 1992*, par. 307.

[85] *Ibid.*, par. 306.

[86] *Ibid.*, par. 308.

son cours ne put affecter à la limite territoriale et juridictionnelle entre les deux entités, cette limite se maintenant dans l'ancien lit, selon les règles du Royaume de Castille applicables aux Indes.

b) ***Les règles du droit colonial espagnol applicables à l'avulsion***

8. Que le droit de Castille s'appliquât aux Indes fut expressément ordonné dans les dénommées «Ordonnances anciennes» *(Ordenanzas antiguas)* dictées pour la Nouvelle Espagne en 1528[87]. Réitérée dans d'autres corps normatifs, la règle fut consolidée dans le *Recueil (Recopilación) de lois* de 1680[88].

9. Les *Siete Partidas*, le corps normatif établi par ordre du roi Alphonse X, dit *le Sage*, étaient une partie de ce droit. Dans celui-ci le titre XVIII de la Partida III recueillit les textes essentiels du droit Romain sur les modes d'acquisition de la propriété[89] et consacra les lois 26 à 31 aux cas d'*alluvio, avulsio, insula in flumine nata* et *alveus derelictus*. Les lois de *Partidas*, comme il est bien connu, s'appliquaient profusément dans les Indes, étant considérées droit en vigueur à la date de l'indépendance (et même après).

10. Avec les lois de *Partidas* il y avait toute la doctrine élaborée à partir des sources romaines. La dénommée *communis opinio doctorum*, le *jus commune*, sur des textes romains était considérée comme loi[90].

11. Adaptant les textes romains sur les modes d'acquisition de la propriété privée à la délimitation des domaines de pouvoir public on élabora un *jure finium*, dont une des idées-force est que le fleuve est un signe qui *déclare*, mais ne *constitue* pas la frontière. En accord avec cette idée on soutient que le changement soudain de lit n'implique pas de modification de la délimitation territoriale que le fleuve signale. Il s'agit de minimiser les effets des mutations fluviales sur les droits acquis, qu'ils soient privés ou, comme dans notre cas, juridictionnels.

12. La règle est très claire et n'offre pas de doute, particulièrement depuis que dans la première moitié du XIV[e] siècle Bártolo de Sassoferrato s'occupa de cette question dans son

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[87] R. P. Monzón 4 juin 1528, Ch. 52. Reproduites dans J. Sánchez-Arcilla Bernal, *Las Ordenanzas de las Audiencias de Indias (1511-1821)*, Madrid, 1992, p. 77-101, à p. 100.

[88] Voir 2.1 *(De las leyes, provisiones, cédulas y ordenanzas reales).* Ley 1ª , ley ij.

[89] *De las cosas en que ome puede auer señorio, e como lo puede ganar.*

[90] Voir J. Castillo de Bovadilla, *Política para corregidores y señores de vassallos, en tiempo de paz y de guerra*, Amberes, 1704, éd. fac. avec une étude préliminaire de B. González Alonso, Madrid, 1978, lib. II. Cap. VII, nums. 7-13.

Tractatus de Fluminibus seu Tyberiadis. L'accord est total et on ne connaît pas une seule autorité contre : *mutato alveo, non mutantur fines publicorum territorium*. On n'admettrait jamais qu'un changement de lit modifie des limites attachées à ce lit. Pour qu'une altération territoriale se produise, il faudrait un ordre exprès du souverain, ordre qui, dans notre cas, n'existe pas.

c) *Conclusions*

13. Le Honduras accuse El Salvador de ne pas avoir apporté la preuve que le Goascorán suivait un cours différent en 1821[91]. Mais là n'est pas la question. *L'uti possidetis* de 1821 ne s'identifie pas avec le cours du fleuve à cette date-là.

14. Ce qui importe est le cours du fleuve à la date à laquelle il fut adopté comme limite entre des territoires voisins, parce qu'une avulsion postérieure ne put déplacer cette limite, qui demeura dans l'ancien lit, ceci étant l'*uti possidetis juris* de 1821, que les Parties accordèrent appliquer et la Cour reconnut comme principe normatif, justifié par l'origine commune des Parties dans la Couronne espagnole.

15. La conclusion est que les terres situées entre le lit ancien et le lit nouveau du fleuve ne se virent pas affectées par le changement de lit et demeurèrent là où elles étaient juridictionnellement, dans la municipalité de San Miguel, El Salvador.

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II. LA *CARTA ESFÉRICA* DE *EL ACTIVO* ET SON JOURNAL DE BORD

a) *Introduction*

1. El Salvador a aussi fondé sa demande en revision sur la découverte dans la *Newberry Library* de Chicago d'autres copies de la *Carta Esférica* et du journal de bord d'*El Activo*.

[91] Voir observations écrites du Gouvernement du Honduras, par. 2.26, 3.10, 3.13, 3.18, V.4.

2. Comme il est bien connu, les copies de ces documents qui se trouvent dans les archives du Musée naval de Madrid, apportées par le Honduras, furent le fondement primordial de la Chambre pour décider en 1992 la frontière dans le secteur du Goascorán.

3. La Chambre entendit que ces documents prouvaient un fait géographique précis, le point dans lequel le Goascorán débouchait dans le golfe. Et sur cette base elle décida la frontière[92].

4. El Salvador considère que les documents découverts dans la *Newberry Library* ont forcé une considération critique de la fiabilité et de la solidité des documents apportés par le Honduras et assumés par la Chambre.

5. Dans ses observations écrites à la demande d'El Salvador, le Honduras considère que la découverte des documents de Chicago n'est pas un *fait nouveau* «puisqu'il s'agit simplement ... de la copie imparfaite de celles qui avaient déjà été produites par le Honduras»[93]. Egalement, selon le Honduras, ces documents «se trouvaient rangés dans des archives auxquelles El Salvador aurait pu avoir facilement accès»[94]. En tout cas, le Honduras affirme que l'apport d'une carte marine générale ne peut pas «constituer un fait de nature à exercer une influence décisive à l'encontre d'une autre carte comportant des caractéristiques identiques»[95].

6. El Salvador s'en tient aux termes de sa demande et se propose maintenant de discréditer les observations du Honduras, observations qui s'inspirent très directement des rapports souscrits par Mme Martín-Merás, chef de cartographie du Musée naval de Madrid, et par le contre-amiral en retraite, García Moretón, ancien directeur de l'Institut hydrographique de Cadix[96].

7. Dans ce but, je me propose de démontrer qu'il n'y a pas lieu d'établir un ordre de *prelación* (priorité) entre les documents de Madrid, *originaux* et *officiels*, selon le Honduras[97], et ceux de Chicago, copies *imparfaites*[98], même *privées*[99]. Les uns et les autres ne peuvent être hiérarchisés. La localisation de ceux de Madrid dans les archives du Musée naval ne garantit pas

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[92] Voir *C.I.J. Recueil 1992*, par. 314, 316, arrêt du 11 septembre 1992.

[93] Observations écrites du Honduras, par. 2.18. Voir aussi 2.31, 3.34, 3.37, 3.40.

[94] *Ibid.*, par. 1.14. Voir aussi 2.17, 2.31, 3.23-3.28.

[95] *Ibid.*, par. 3.14. Voir aussi 3.29-3.34.

[96] *Ibid.*, vol. II, annexes 4 et 5, p. 147-177 et 179-207.

[97] *Ibid.*, par. 3.40, 3.41; vol. II, annexe 4, p. 151, par. 12, et p. 154, par. 24.

[98] *Ibid.*, par. 2.18.

[99] *Ibid.*, par. 3.32, 3.41.

leur caractère original ni officiel et ils ne peuvent pas prévaloir sur ceux de Chicago. En réalité on n'a établi le caractère original et officiel d'aucun d'entre eux. Les copies de la carte et du journal de bord sont différentes et si elles ont quelque chose en commun c'est leur accumulation d'inexactitudes dans la représentation géographique du golfe et de ses côtes. Les documents découverts à Chicago nourrissent l'inaptitude de ceux de Madrid pour établir un fait géographique dont on a extrait des conséquences très importantes dans la détermination et délimitation de la souveraineté terrestre des Parties.

8. Néanmoins, avant de développer ces points El Salvador doit contester l'imputation hondurienne selon laquelle le renom de l'*Ayer Collection* et l'accessibilité de ses fonds déjà décrits en 1927 dans un catalogue empêchent de considérer comme une «découverte» la localisation dans celle-ci des documents apportés par El Salvador[100].

b) ***La prétendue négligence d'El Salvador***

9. Même si, selon le rapport de Mme Martín-Merás, la *Newberry Library* est une bibliothèque prestigieuse reconnue pour ses manuscrits espagnols[101], l'*Ayer Collection*, le lieu où ils se trouvent n'est pas une collection exclusivement hispanique, mais bien au contraire. Selon sa propre présentation sur Internet[102], le noyau principal de la collection se compose de *an extensive body of literature that concerns the American Indian directly*; la documentation d'*El Activo* forme à peine partie de l'un des cinq domaines thématiques en dehors du noyau principal de la collection, à savoir, *the History of the Voyages and Travels which includes accounts of early America*.

10. Le fonds cartographique intéressant de l'*Ayer Collection* se compose seulement de cinq cents atlas, deux mille cartes publiées et trois cents manuscrits, un nombre bien modeste si on le compare avec celui d'autres institutions qui, sans sortir des Etats-Unis, réunissent aussi des manuscrits et de la cartographie hispaniques. Dans ce sens, l'*Ayer Collection* ne peut se comparer avec d'autres centres comme la *Bancroft Library* dans le campus de Berkeley, en Californie[103], qui contient plus de vingt-trois mille cartes et, surtout, cinquante millions de pages de manuscrits

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[100] *Ibid.*, par. 3.23-3.28.

[101] Observations écrites du Honduras, vol. II, annexe 4, p. 152, par. 18.

[102] http://www.newberry.org.

[103] http://bancroft.berkeley.edu/collections.

concernant en grande partie l'histoire du Mexique et de l'Amérique centrale, ou la *Nettie Lee Benson Latin American Collection* de l'Université du Texas[104], avec huit cent mille livres et journaux latinoaméricains, dix-neuf mille cartes et deux mille cinq cent manuscrits.

11. Sans atteindre cette excellence, le nombre de centres qui, seulement aux Etats-Unis, a accumulé une documentation similaire ou supérieure à celle de la *Newberry Library* est considérable. Ainsi, la *David Rumpsey Map Collection*[105], la *Hargrett Rare Book and Manuscript Library* à l'Université de Georgia[106], la *Harvard College Library-Map Collection*[107] et, naturellement, la *Library of Congress Geography and Map Division*[108].

12. Cela dit, il faut toujours tenir compte de la grande dispersion de la cartographie des possessions américaines de la Couronne. En Espagne, concrètement, on peut trouver des cartes américaines, manuscrites et publiées, dans les archives *General de Indias*, *General de Simancas*, *Histórico Nacional*, dans l'Académie de l'histoire, dans la Bibliothèque nationale, dans les archives militaires et, bien sûr, dans les archives du Musée naval.

13. En outre, il convient de se rappeler qu'il faut attendre le milieu de la décennie des années quatre-vingt dix pour que l'informatisation des fonds de ces collections commence, une laborieuse recherche dans le propre centre documentaire étant jusqu'alors inevitable.

14. En tenant compte de ces données, l'accusation hondurienne de manque de diligence imputé à El Salvador se fonderait sur une exigence d'exhaustivité impossible de remplir, y compris pour les travaux de recherche historique les plus rigoureux.

15. La publication d'un catalogue de l'*Ayer Collection* comprenant des références aux documents d'*El Activo*, en 1927, ne modifierait pas l'état de la question. Le Honduras lui-même a apporté dans l'une des annexes de ses observations un certificat de la Bibliothèque nationale du Mexique, en date du 10 décembre 2002, dans lequel, après avoir constaté que la «Carta Esférica» d'*El Activo* «ne se trouve pas dans les collections» de cette bibliothèque, on affirme que :

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[104] http://www.lib.utexas.edu/Libs/Benson.

[105] http://www.davidrumpsey.com.

[106] http://www.libs.uga.edu/darchive/hargrett/maps/maps.

[107] http://hcl.harvard.edu/maps.

[108] http://leweb.loc.gov/rr/geomap.

> «D'après nos recherches, il n'y a pas d'indices selon lesquels la «Carta Esférica» aurait été publiée, étant donné que dans les sources bibliographiques et les catalogues en ligne d'autres bibliothèques que nous avons consultés, nous n'avons trouvé, à ce jour, aucune référence à ce sujet»[109].

Si une institution comme la Bibliothèque nationale du Mexique, très prestigieuse et d'après le témoignage apporté par le propre Gouvernement du Honduras, n'était pas au courant en décembre 2002 de l'*Ayer Collection* et son catalogue de 1927, y a-t-il lieu d'accuser de négligence le Gouvernement d'El Salvador pour ne pas avoir eu connaissance de cette information dix ou vingt ans auparavant ?

16. En définitive, quoique l'on insiste sur l'«importance» de l'*Ayer Collection*, la connaissance de sa réduite, en termes comparatifs, collection de cartes et de manuscrits, ne peut être raisonnablement exigée, au préalable, à aucun spécialiste. L'*Ayer Collection* n'est pas une collection de référence obligatoire ni par le volume de ses fonds ni par sa spécialisation dans les expéditions hydrographiques des siècles XVI à XX.

17. Ajoutons que l'expédition d'*El Activo*, à la différence d'autres expéditions de l'époque, comme la grande expédition de Alejandro Malaspina (1789-1794) ou quelques-unes de celles qui vinrent à compléter ses travaux, comme celle de Dionisio Alcalá Galiano (1793) ou celle de José de Moraleda (1801), ne fut pas une expédition notoire, de celles qui laissent une trace historique suffisante pour permettre de tomber sur la documentation pertinente dans les différentes archives. On doit rappeler que l'expédition d'*El Activo* n'est même pas mentionnée dans la description des fonds des archives du Musée naval faite par Ana María Vigón[110] dans un travail qui continue à être une référence obligée.

18. Par conséquent, on ne peut qualifier de «négligente» la conduite d'El Salvador pour avoir ignoré jusqu'en 2002 l'existence de copies des documents d'*El Activo* dans les fonds des collections situées dans des lieux excentriques.

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[109] Observations écrites du Honduras, vol. II, annexe 8, p. 217.

[110] A. M. Vigón «Los manuscritos del Museo naval», dans *Revista de Historia Naval*, Instituto de Historia y Cultura Naval, Armada Española, año II (1984) n° 5, p. 78.

c) ***Il n'est pas attesté que les documents d'*****El Activo** ***soient les originaux***

19. Le Honduras affirme que les copies de la carte et du journal de bord du Musée naval sont les originaux envoyés à Madrid[111], tandis que les documents de la *Newberry Library* seraient des copies «imparfaites»[112], même «privées»[113].

20. L'experte hondurienne, Mme Martín-Merás, prétend certifier la nature ou le caractère *original* de la documentation du Musée naval en argumentant sa provenance de la direction hydrographique[114].

21. Cette direction fut créée par la marine espagnole dans le but de centraliser toute la documentation des commissions hydrographiques[115], jusqu'alors «ensevelie sans usage ni application»[116] dans les secrétaireries d'Etat, comme l'observait l'intendant général de marine, Don Luis María de Salazar, dans l'important d*iscours* qui préface en 1809 le premier des *Mémoires* de la direction [117].

22. Selon l'experte hondurienne la direction hydrographique était à partir de sa création — en 1796, dit Martín-Merás — la destinataire obligatoire des documents originaux, ses fonds passant ensuite, sans solution de continuité, aux archives du Musée naval. Martín-Merás invite à croire que la documentation d'*El Activo* suivit ce cours et non un autre. L´experte nous dit que le commandant d'*El Activo*, Meléndez Bruna, «envoya» directement la documentation à l'Espagne de la «manière habituelle», et «prit plus de temps pour réaliser la copie pour le vice-roi»[118].

23. Néanmoins, aucune de ces affirmations est vraie ou a été prouvée. Il est surprenant, en premier lieu, que Mme Martín-Merás fasse erreur sur la date de la fondation de la direction, étant donné que dans l'annexe II de son rapport elle transcrit des parties d'un travail dont elle est coauteur et dans lequel elle signale, à juste titre, que : «une ordonnance royale de 1797 créa la

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[111] Observations écrites du Honduras, par. 3.40, 3.41; vol. II, annexe 4, p. 151, par .12, et p. 154, par. 24.

[112] *Ibid.*, par. 2.18.

[113] *Ibid.*, par. 3.32, 3.41.

[114] *Ibid.*, vol. II, annexe 4, p. 151, par. 12, et n° 22.

[115] *Ibid.*, vol. II, annexe 4, p. 151, par. 12.

[116] «*sepultada sin uso ni aplicación*».

[117] L. M. de Salazar, *Discurso sobre los progresos y estado actual de la Hidrografía en España*, Imprimerie Royale, Madrid, 1809, p. 84. Voir observations écrites du Honduras, vol. II, annexe 4, p. 158 (annexe II, note 1).

[118] Observations écrites du Gouvernement du Honduras, vol. II, annexe 4, p. 151, par. 10.

direction des travaux hydrographiques»[119], et si l'on suit le texte complet de cet article au-delà des fragments reproduits dans l'annexe, on constatera que selon sa propre information ce fut à partir d'un Ordre royal du premier janvier 1800 que l'on disposa que «dorénavant, tous les navigants devaient remettre (à la direction) une copie des nouvelles hydrographiques»[120]. En fait, beaucoup des documents de l'ancienne direction — et c'est ainsi attesté — sont des copies, non des originaux[121].

24. En définitive, l'envoi des originaux de la carte et du journal de bord d'*El Activo* à la direction hydrographique en 1796 ne put se produire, car une institution inexistante ne put solliciter ni recueillir cette documentation ni, surtout, le faire quatre ans avant que l'Ordre royal du 1er janvier 1800 ne soumît les navigants à l'obligation de remettre les copies, et non pas les originaux, des nouvelles hydrographiques.

25. En réalité, lorsque l'expédition d'*El Activo* eut lieu les règles applicables au cours suivi par les documents des expéditions hydrographiques se trouvaient dans les ordonnances de la marine de 1793[122], inspirées directement de celles de 1748[123]. Cette législation, que le Honduras et ses experts omettent, était en vigueur dans l'Espagne européenne et américaine et donc elle l'était dans le département de San Blas, dont le commandant fut chargé de l'organisation de l'expédition d'*El Activo*[124].

26. On ne connaît pas toute l'histoire du cours suivi par la documentation d'*El Activo*, mais on connaît l'instruction précise donnée par le vice-roi Revilla-Gigedo au commandant de San Blas,

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[119] *Ibid.*, vol. II, annexe 4, p. 158.

[120] L. Martín-Merás y B. Rivera, «Instituciones cartográficas : el depósito hidrográfico y la escuela de pilotos», dans *Catálogo de cartografía histórica de España del Museo Naval*, Museo Naval, Ministerio de Defensa, Madrid, 1990, p. VI. Voir Observations écrites du Gouvernement du Honduras, vol. II, annexe 4, p. 151, note 23; partiellement reproduit dans *ibid.*, vol. II, annexe 4, p. 158-159 (annexe II).

[121] Voir M. P. del Pío, *Expediciones Españolas del Siglo XVIII*, Talleres de Mateu, Madrid, 1992, p. 138 et 140, notes 14 et 15.

[122] *Ordenanzas Generales de la Armada Naval. Parte Primera. Sobre la gobernación militar y marinera de la Armada en General y uso de sus fuerzas en la mar*. T. I, En Madrid, en la Imprenta de la viuda de Don Joachín Ibarra, MDCCLXXXXIII, artículos 7 y 8.

[123] *Ordenanzas de Su Magestad para el Govierno militar, político y económico de su Armada Naval. Parte Primera. Que contiene los Asuntos pertenecientes al Cuerpo General de la Armada*, de orden del Rey N.S. En Madrid, en la Imprenta de Juan de Zúñiga, Año de MDCCXLVIII. Artícles VI et XXX.

[124] Ordre de S.Exc. le vice-roi Revilla-Gigedo du 7 décembre 1793, (*Volume of New Documents (Article 56, Rules of Court)* de El Salvador, III.1, p. 139 et suiv.). Aussi *Commentaires du Gouvernement du Honduras sur les documents dont la production a été autorisée par la Chambre le 29 juillet 2003*, 19 août 2003, annexe 4, en joignant une nouvelle traduction en substitution de la traduction «déficiente» de cet Ordre jointe en annexe 4 des observations du 1er avril 2003, (vol. II, p. 156-157).

dans l'Ordre du 7 décembre 1793[125] : une fois l'expédition achevée, le vice-roi ordonne, «il me sera remis en mains propres les journaux de bord et les plans afin qu'il en soit fait l'usage correspondant»[126].

27. On connaît aussi par la lettre de Meléndez Bruna au marquis de Branciforte, successeur de Revilla-Gigedo, du 11 mai 1795[127], qu'il entretenait une correspondance avec le vice-roi , et non avec les autorités de la Couronne en Espagne.

28. L'histoire d'autres expéditions contemporaines, commissionnées par le même vice-roi de la Nouvelle Espagne dans un but similaire à celui d'*El Activo* confirment et précisent cette pratique. Nous faisons référence concrètement à l'expédition commandée par Dionisio Alcalá Galiano en 1793, dont le très notoire dossier, déposé dans les archives du Musée naval, n'a pas pu échapper à la connaissance du chef de cartographie, Mme Martín-Merás.

29. La pratique de l'époque révèle, donc, une situation plus compliquée et problématique que celle que le Honduras nous invite à partager. En effet, des ordonnances de la marine et de la pratique on déduit : 1) que le commandant de l'expédition devait envoyer les originaux, et non seulement une copie, au vice-roi ; et, 2) que ce n'était en aucun cas le commandant de l'expédition, en l'espèce Meléndez Bruna, mais le vice-roi , qui décidait les cours et les destinataires de la documentation, jouissant à ces effets d'une grande liberté. Dans notre cas, en outre, l'Ordre du vice-roi du 7 décembre 1793[128] était taxatif, ayant demandé au commandant du département de San Blas (duquel dépendait Meléndez) la remise «en mains propres» des journaux de bord et des plans «afin qu'il en soit fait l'usage correspondant»[129].

30. En conclusion, la négligente méconnaissance de la pratique institutionnelle de la monarchie catholique que le Honduras impute à El Salvador[130] est une poutre qui assombrit ses propres yeux. Le Honduras n'a pu apporter aucun document duquel on puisse déduire que la documentation d'*El Activo* qui aujourd'hui se conserve dans les archives du Musée naval soit celle

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[125] *Ibid.*

[126] *«dirigirá a mis manos los diarios y Planos para hacer el uso que corresponda»*.

[127] Requête, vol. II, annexe XVI, p. 711 et suiv.

[128] Volume of New Documents, III.1, p. 139 et suiv. Aussi Commentaires, annexe 4.

[129] «*dirigirá a mis manos los diarios y Planos para hacer el uso que corresponda»*.

[130] Observations écrites du Gouvernement du Honduras, par. 2.31.

qui dut être envoyée par le vice-roi , le marquis de Branciforte, à la secrétairerie d'Etat de la marine.

d) ***Les documents de* El Activo *n'eurent pas de reconnaissance officielle***

31. S'il n'est pas prouvé que la documentation d'*El Activo* dans les archives du Musée naval se compose des originaux, il est encore plus problématique d'établir le caractère *officiel* de ces copies.

32. La nature de l'institution dépositaire ne rend pas en elle-même *officiels* les documents qui s'y trouvent déposés. Pas plus que leur simple remise à l'autorité qui ordonna la commission. Les corrections des documents manuscrits étaient habituelles et leur caractère *officiel* dépendait d'un processus d'*acceptation* de la Couronne dans lequel intervenaient différentes institutions : le vice-roi (qui avait coutume de corriger beaucoup de données), le conseil de généraux (*Junta de Generales*) ou les secrétaireries d'Etat qui avaient décidé l'expédition. C'est donc l'histoire du document qui détermine son caractère.

33. Dans notre cas, on n'a pu mettre en place l'acceptation formelle des documents d'*El Activo* suivant les ordonnances de la marine. Le résultat, nous en tenant aux termes irréductibles d'une histoire critique, est que, actuellement, le caractère *officiel* de la documentation d'*El Activo* est indémontrable.

34. Cette circonstance aurait pu être surmontée au cas où serait intervenue la publication des documents d'*El Activo* par la direction hydrographique ou, du moins, si ces documents avaient servi dans l'élaboration postérieure de cartes officielles de la même direction. En fin de compte la direction fut créée dans le but aussi de publier des cartes fiables, une fois les erreurs des manuscrits supprimées, comme l'observait Luis María de Salazar, dans son célèbre *discours*[131].

35. Mais ce ne fut pas le cas de la documentation d'*El Activo*. La non-publication de la carte d'*El Activo* est encore plus frappante si l'on tient compte que la direction hydrographique publia d'autres travaux réalisés avant sa création. Ainsi, vers 1809 la direction avait déjà publié, selon

[131] L. M. de Salazar, Discurso, cit., p. 86.

l'information exacte que nous donne Salazar, plus d'une vingtaine de cartes qui intéressaient les territoires américains de la Couronne[132].

36. Ces données démontrent non seulement que la direction travailla beaucoup, mais aussi qu'elle *sélectionna* une série de cartes manuscrites préexistantes et qu'elle les *officialisa* moyennant leur publication. L'unique explication plausible de l'exclusion de la carte d'*El Activo* est que, soit elle n'était pas arrivée à la direction, soit elle n'avait pas atteint le standard minimum de qualité requis.

37. Ceci ne serait pas seulement dû à l'impéritie de ceux qui réalisèrent les copies, mais cela aurait pu être motivé par les priorités décidées par le vice-roi Revilla-Gigedo en établissant les objectifs de l'expédition dans son Ordre du 7 décembre 1793[133]. Après avoir ordonné que la reconnaissance de la côte devra porter «uniquement sur la partie située entre Acapulco et Sonsonate, qui devra être parcourue ... en dressant fidèlement la carte»[134], l'Ordre ajoute que «le golfe d'Amapala doit être considéré comme *secondaire*». On doit obtenir de celui-ci «une image *suffisante*», renonçant à ce qu'il soit examiné «avec *précision*»[135] (les italiques sont de nous).

38. Si Meléndez Bruna s'acquitta de la commission du vice-roi, il dut se limiter à donner *plus ou moins une idée* du golfe de Fonseca (ou Amapala). Les reconnaissances du golfe ne furent même pas faites à bord d'*El Activo*, mais d'une embarcation locale plus petite. En fait, quand en 1809 la direction hydrographique publie ses premiers *Mémoires*[136], auxquels fait référence l'experte Martín-Merás[137], son directeur, José Espinosa et Tello, se rappelle seulement que Don Salvador Meléndez, avec le brigantin *El Activo* «fut chargé de lever la carte de toute la côte

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[132] L. M.de Salazar, Discurso, cit., p. 105-106.

[133] Volume of New Documents, III.1, p. 139 et suiv. Aussi Commentaires, annexe 4.

[134] «*El reconocimiento de costa...ha de ceñirse solamente al trozo que media entre Acapulco y Sonsonate, recorriéndole,... y levantar exactamente la Carta*».

[135] «*El Golfo de Amapala ha de mirarse como secundario y aunque no se examine con escrupulosidad se ha de tomarse una idea capaz de formar concepto de él*».

[136] *Memorias sobre las observaciones astronómicas hechas por los navegantes españoles en distintos lugares del globo las cuales han servido de fundamento para la formación de las cartas de marear publicadas por la dirección de trabajos hidográficos de Madrid : Ordenadas por D. José Espinosa y Tello, Gefe de Escuadra de la Real Armada y Primer Director de dicho establecimiento*, t. I, Imprimerie royale, Madrid, 1809, p. 85.

[137] Observations écrites du Gouvernement du Honduras, vol. II, annexe 4, p. 150, note 16.

comprise entre Acapulco et le port de Sonsonate»[138]. Il n'est fait aucune mention du golfe de Fonseca.

39. A défaut d'une publication directe, Martín-Merás affirme que les cartes d'*El Activo* conservées dans le Musée naval de Madrid ont été incorporées à la *«Carta Esférica»* qui a été publiée par la direction hydrographique en 1822[139]. Cette carte, ainsi que l'indique le catalogue du dépôt, est la seule concernant la zone qui fut considérée par la direction comme «propriété» de laquelle elle répondait pour imposer ses résultats aux navigants civils et militaires[140].

40. Malheureusement, l'affirmation de l'experte hondurienne est dépourvue de fondement en ce qui concerne les travaux d'*El Activo* dans le golfe de Fonseca. La légende qui accompagne la carte de 1822 nous dit qu'elle fut «construite suite aux observations faites par les corvettes *Descubierta* et *Atrevida* et aux reconnaissances des officiels et pilotes de l'*Armada Nacional* effectuées durant plusieurs années»[141]. L'inférence que, entre ces reconnaissances, étaient celles d'*El Activo* est une *aportación* (contribution) gratuite de Mme Martín-Merás, une spéculation, puisque ce n'est pas documenté.

41. La plus légère comparaison entre les copies d'*El Activo* et la carte de 1822 suffit pour constater leurs différences. Dans la carte de 1822 le nom du fleuve Goascorán n'apparaît même pas, contrairement à ceux d'autres fleuves (le fleuve *de la Chuleteca*, le *Nuevo Río De Nacaume*, le fleuve *Siramitis*); par conséquent, on ne voit pas de quelle manière les copies d'*El Activo* se rattachèrent à la carte de 1822, à moins d'admettre l'existence d'autres copies que nous ne connaissons pas actuellement dans lesquelles le fleuve Goascorán n'apparaît pas.

42. Mais, si ce n'est pas le cas, les travaux additionnels à ceux des corvettes de Malaspina auxquels se réfère la légende de la carte de 1822 sont, en effet, d'*autres* travaux. Particulièrement dans les côtes américaines du Pacifique, comme nous l'avons déjà signalé, les expéditions

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[138] «*se le encargó que levantase la carta de toda la costa comprendida entre Acapulco y el puerto de Sonsonate*».

[139] «*Carta Esférica* desde el Golfo Dulce en la Costa Rica hasta San Blas en la Nueva Galicia...» Observations écrites du Gouvernement du Honduras, vol. II, annexe 4, p. 154, n° 35.

[140] *Catálogo de las cartas, planos, vistas, libros, etc. pertenecientes al Depósito Hidrográfico*, Madrid, julio de 1871, reproduit dans M. D. Higueras Rodríguez, *Catálogo crítico de los argumentos de la expedición Malaspina (1789-1794)*, del Museo Naval de Madrid, t. II, p. 162, réf. 2058, et p. 316 (carte).

[141] «*construida con las observaciones executadas en las corvetas Descubierta y Atrevida y otros reconocimientos de oficiales y pilotos de la Armada Nacional en varios años*». Observations écrites du Gouvernement du Honduras, vol. II, annexe 4, p. 154, n° 35.

commandées par Dionisio Alcalá Galiano (1793) et José de Moraleda (1801) furent bien connues. Ce dernier, Moraleda, reçut l'ordre de faire la reconnaissance et de dresser les plans des côtes de Guatemala entre Panama et Sonsonate pour procurer aux navires de guerre et de commerce des informations qui manquaient.

43. Mme Martín-Merás connaît bien cette expédition parce qu'elle-même constate dans l'une de ses contributions scientifiques qu'en 1803 une série d'expéditions étaient en train de se réaliser, parmi lesquelles était celle de José de Moraleda dans les côtes du Guatemala et dont le but était de produire une cartographie officielle hautement qualifiée[142]. Hélas ! En reproduisant partiellement cet article dans l'annexe II de son rapport[143], Mme Martín-Merás n'a pas jugé bon d'inclure ce paragraphe.

44. En résumé, les nouvelles qui nous parviennent du passé démontrent clairement que, à son jour, on n'accorda aucun degré de *fiabilité* ou *certitude* tant à la description géographique qu'à la représentation cartographique du golfe de Fonseca provenant de l'expédition d'*El Activo*. En 1801, six ans après, la secrétairerie d'Etat qui l'ordonna, soit n'avait pas d'information sur ses résultats, soit elle ne les accepta pas jusqu'au point qu'elle n'hésita pas à envoyer une autre expédition dans une zone qu'elle considérait méconnue en termes non plus juridiques, mais strictement géographiques.

e) ***Les documents d'*El Activo *: différences et déficiences***

45. La découverte des documents de Chicago et leurs différences avec ceux de Madrid fit que l'on prêta une attention renouvelée à leur contenu géographique et historique. Le Honduras préfère minimiser les différences, sinon les ignorer[144]. Mais, que cela plaise ou non au Honduras, les différences existent[145] et même si elles n'existaient pas il subsisterait toujours ce que les copies ont en commun, c'est-à-dire, leur nulle fiabilité technique pour asseoir le fait géographique significatif dans ce cas.

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[142] L. Martín-Merás y B.Rivera, «Instituciones...», *op. cit.*, p. XI.

[143] Observations écrites du Gouvernement du Honduras, vol. II, annexe 4, p. 158-159.

[144] *Ibid.*, par. 3.30, 3.32, 3.33, 3.34, V.3.

[145] Requête, par. 85 et suiv.

46. La *problematicidad* (problématisation) de la *Carta Esférica* en termes cartographiques a déjà été signalée dans la preuve scientifique apportée par El Salvador[146].

47. Les différences entre les copies d'*El Activo* et les cartes actuelles bien sûr sont considérables. En soutenant le contraire, García Moretón a fait une comparaison de la distance entre l'île Perico et l'embouchure du Goascorán selon *El Activo* (3,7 milles) et selon la carte de l'Amirauté britannique (2,6 milles) et la carte 21521 de la *Defence Mapping Agency* des Etats-Unis (2,5 milles)[147]. Les différences semblent minimes à l'expert hondurien[148], mais on peut douter de la sagesse de considérer minime une différence de 30 % dans une distance aussi courte.

48. Plus intéressante encore est la représentation des *Farallones du Cosigüina*, qui résultèrent de la grande éruption du volcan de ce nom en 1835. Selon le Honduras, El Salvador met en question les dates de la carte, les repoussant implicitement à une date postérieure à celle de l'éruption[149]. En réalité, El Salvador se limite à constater un fait, laissant les conclusions à la Chambre. Auparavant, selon une cartographie connue, ce qu'il y avait dans la position des *Farallones* était une île, la Cullaquina, île des Chauve-Souris *(de los Murciélagos)* ou Xinacantepeq.

49. Le Honduras essaie maintenant d'enlever toute valeur à cette cartographie qu'il a utilisée dans le passé à ses propres fins.

50. La répétition des *farallones* dans toutes les copies d'*El Activo*, quoique pas toujours dans la même position, ne rend pas la donnée plus fiable, ainsi que le Honduras le prétend[150], mais, au contraire, plus ferme le discrédit de toutes celles-ci; bien plus lorsqu'on l'impute à «l'expérience du second pilote de l'expédition», Juan Pantoja et Arriaga[151].

51. Induit par l'experte Mme Martín-Merás[152], le Honduras affirme catégoriquement que : «Suite à une recherche exhaustive et à un examen minutieux des travaux cartographiques les cartes

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[146] *Ibid.*, vol. II, annexe II, p. 22-24, 33-3511, 24-25. Voir figure 8 à la page 13 du texte anglais du rapport.

[147] Observations écrites du Gouvernement du Honduras, vol. II, annexe 5, p. 187, par. 27.

[148] *Ibid.*, vol. II, annexe 5, p. 185 et suiv., par. 23 et suiv.

[149] *Ibid.*, par. 3.36, 3.43.

[150] *Ibid.*, par. 3.43.

[151] *Ibid.*, par. 3.43.

[152] *Ibid.*, vol. II, annexe 4, p. 151, par. 14.

furent sans aucun doute réalisées par Juan Pantoja.»[153] Ajoutant un plus de fantaisie, l'experte hondurienne suggère comme probable — et le Honduras accepte comme possible[154] — qu'aussi bien la carte que le journal de bord de la *Newberry Library* «aient été des copies personnelles du pilote Juan Pantoja qu'il utilisa pour ses intérêts, afin d'avaliser sa promotion professionnelle»[155].

52. Cependant, la conclusion catégorique assumée par le Honduras n'a pu être en aucun cas le résultat d'une recherche exhaustive et minutieuse. Il n'est pas nécessaire d'être un expert pour se rendre compte qu'il n'existe pas de coïncidence calligraphique dans les écritures des différentes copies de la carte pas plus qu'entre n'importe laquelle de ces copies et les autres documents attribués indubitablement à Juan Pantoja, quelques-uns d'entre eux apportés même par le Honduras[156]. La conclusion est que l'on ne sait pas qui fit les copies de la carte d'*El Activo*, mais on sait sans aucun doute que ce ne fut pas Juan Pantoja.

53. Le Honduras ne constate pas de différences non plus entre les deux copies du journal de bord. Malgré cela, en argumentant que la copie de Madrid est datée et signée et celle de Chicago ne l'est pas et sa reliure étant récente, il conclut que celle de Chicago est une copie «privée»[157].

54. L'estimation hondurienne ne peut pas être plus maladroite.

55. Quant à la date de la copie de Madrid, nous démentîmes déjà, nous servant de la lettre de Meléndez Bruna au vice-roi, le marquis de Branciforte, du 11 mai 1795, la présumée conclusion du journal neuf jours auparavant par un commandant, éreinté et abattu, qui continuait prétendument à travailler les duplicatas[158].

56. C'était probablement à cause de ce manque de forces que la signature de Meléndez Bruna n'apparaît pas réellement sur la copie. Le Honduras a essayé de surmonter cet inconvénient avec l'aide de son experte Martin-Merás, qui propose que le signe «=» qui précède le

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[153] *Ibid.*, par. 3.43.

[154] *Ibid.*, par. 3.41, n. 132.

[155] *Ibid.*, vol. II, annexe 4, p. 153, par. 22.

[156] Note manuscrite datée le 22 mars 1787 adressée à S. Exc. M. le ministre, Don Antonio Valdés (*ibid.*, vol. II, annexe 4, p. 168).

[157] *Ibid.*, par. 3.32; vol. II, annexe 4, p. 152-153, par. 19 et n° 31.

[158] Requête, par. 88 et suiv.

nom du commandant signifie *par ordre* «comme cela — dit-elle — était courant dans les documents officiels»[159].

57. Mais, indépendamment que cette opinion ne paraît pas être celle des historiens et paléographes de l'époque coloniale en Amérique, celle-ci est démentie par le texte même du journal de bord dans lequel on peut observer une utilisation récursive et inéquivoque du signe «=» comme point ou comme pause[160].

58. Ainsi donc, dans le journal figure le nom du commandant, mais non sa signature. Et s'il ne put même pas signer le journal de bord à cause de sa mauvaise santé, comment put-il faire tout ce que le Honduras, de la main de son experte, lui attribue ?

f) ***Le fait invoqué satisfait les conditions de recevabilité***

J'en viens à la partie finale de mon intervention.

59. Les documents d'*El Activo* découverts par El Salvador et apportés à la Cour satisfont les conditions du *fait nouveau*.

60. Il s'agit, sans aucun doute, d'un *fait*. La découverte de documents jusqu'alors ignorés est un exemple caractéristique du type de faits qui ouvrent la voie à la révision dans tous les systèmes judiciaires[161], soit parce qu'ils constituent, eux-mêmes, le *factum*, soit parce qu'ils sont la source de leur connaissance. La preuve qui dément un fait établi par l'arrêt dont on demande la revision est, sans aucun doute, un *fait*, aux effets de l'article 61 du Statut.

61. Il s'agit, en outre, d'un *fait nouveau*. En premier lieu, parce qu'il s'agit de faits préexistants, mais non connus au moment du prononcé de l'arrêt.

62. L'affirmation que le Honduras étend à toutes les cartes et les documents, à savoir, que ce sont des faits connus «de longue date» se trouvant «dans les bibliothèques de différents pays»[162], est inacceptable. Le Statut de la Cour parle de «la découverte d'un fait», découverte qui ne peut se

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[159] Observations écrites du Gouvernement du Honduras, par. 3.32, note 111; vol. II, annexe 4, p. 149, par. 4 et note 3.

[160] Requête, Documental Annexes, vol. II, annexe XIV, p. 558, lignes 2, 3 et 4; p. 648, ligne 5; p. 659, ligne 17; annexe XV, p. 675, ligne 13.

[161] *Corte Interamericana de Derechos Humanos, caso Genie Lacayo, Solicitud de Revisión de la sentencia de 29 de enero de 1997. Resolución de la Corte de 13 de septiembre de 1997*, par. 12 (www.corteidh.or.cr).

[162] Observations écrites du Gouvernement du Honduras, par. 1.12.

circonscrire à des documents non catalogués. L'important est qu'ils n'étaient pas connus de la Partie qui les invoque sans qu'il y ait de sa part «faute à l'ignorer».

63. Dans notre cas, nous avons démontré que la diligence normale ou raisonnable ne conduisait pas à la *Newberry Library* et ce serait injuste de sanctionner El Salvador pour ne pas être arrivé à Chicago avant 1992, surtout en considérant le volume et la complexité de l'affaire soumise à la Cour et les autres circonstances déjà évoquées par mon collègue, le professeur Mendelson.

64. En dernier lieu, l'influence du fait apporté est *décisive* parce qu'elle met en évidence l'inconsistance des documents du Musée naval de Madrid pour avaliser le fait géographique duquel se dégagèrent dans l'arrêt de 1992 des conséquences si importantes.

65. Le Honduras prétend banaliser le *fait nouveau* affirmant que les documents apportés sont «une autre copie d'un même document déjà présenté par le Honduras»[163], document qui servit à prouver «un fait géographique concret et non pas un titre juridique»[164], ce qui, selon le Honduras, est dans l'espèce le seul fait possible d'importance décisive[165].

66. Une telle façon de poser ce problème ne s'ajuste pas, ainsi que nous l'avons déjà vu, à la situation qui dut être résolue par la Chambre. Le Honduras fit de gros bénéfices à la suite du *fait géographique* concret que la Chambre considéra prouvé avec les documents que le Honduras lui-même avait apportés[166]. Maintenant, à partir des documents de Chicago, la *ratio decidendi* de la Chambre en 1992 est détruite, on altère ses prémisses. Cela aussi est en soi décisif.

67. La thèse hondurienne, qui en tout cas obligerait à entrer dans le fond de l'affaire, ne tient donc pas debout. L'altération d'un fait géographique peut être — et dans notre cas est — décisive pour modifier l'application de la règle considérée ou pour la substituer par une autre.

g) *Conclusions*

J'arrive à mes conclusions, Monsieur le président, Messieurs les Membres de la Chambre.

68. La découverte des documents de l'*Ayer Collection* a éveillé l'analyse critique de la source utilisée par la Chambre pour prendre une décision. La Chambre, aurait-elle décidé la même

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[163] *Ibid.*, par. 3.34.

[164] *Ibid.*, par. 3.30.

[165] *Ibid.*, par. 3.6-3.9, 3.16, 3.17, 4.23, 4.26.

[166] Arrêt du 11 septembre 1992, *C.I.J. Recueil*, par. 316.

chose si elle avait eu connaissance d'autres copies de la *Carta Esférica* ? Aurait-elle décidé la même chose si elle avait eu connaissance que les copies du Musée naval n'étaient pas officielles ? Aurait-elle décidé la même chose si elle avait constaté, lors de l'*aportación* (production) d'autres copies, les différences existant entre elles ?

69. Etant donné qu'il existe au moins trois copies de la *Carta Esférica* et deux copies du journal de bord de connues avec des différences notables et des déficiences notoires, il n'y a pas lieu de donner préférence aux unes sur les autres quand il s'agit d'établir un fait géographique duquel on déduisit des conséquences juridiques importantes.

70. Plus encore, aucune d'entre elles ne méritait confiance pour représenter la vraie géographie du golfe et de ses côtes en 1794. Il s'ensuivit qu'elles n'eurent jamais une reconnaissance officielle et que les résultats de l'expédition ne firent pas l'objet d'une publication, directe ou indirecte. La seule carte officielle de la zone, celle de 1822, ne s'inspira d'aucune des copies connues d'*El Activo* et elle ne reproduisit ni fit aucune mention du fleuve Goascorán ou de son embouchure.

71. Une fois démontré que, à l'origine, les travaux de l'expédition d'*El Activo* ne furent pas assumés officiellement, il serait contradictoire que deux cents ans après ils servissent à la Cour pour établir la frontière dans le secteur du Goascorán. La Chambre ne devrait pas se montrer moins exigeante avec les résultats de l'expédition d'*El Activo* que ne le furent les propres contemporains de cette expédition.

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J'ai ainsi terminé ma plaidoirie et je vous remercie très sincèrement, Monsieur le président, Messieurs les Membres de la Chambre, de la patiente et de la courtoise attention avec lesquelles vous avez bien voulu suivre mes paroles.

Le PRESIDENT : Je vous remercie Monsieur le professeur, et je remercie l'ensemble de la délégation du Salvador pour les exposés qui nous ont été faits ce matin. Ceci met un terme à la

séance d'aujourd'hui. La Cour se réunira à nouveau demain matin à 10 heures pour entendre la plaidoirie de la République du Honduras. La séance est levée.

L'audience est levée à 13 h 20.

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