C6/CR 2003/3 (traduction)

C6/CR 2003/3 (translation)

Mardi 9 septembre 2003 à 10 heures

Tuesday 9 September 2003 at 10 a.m.

8 The PRESIDENT: Please be seated. The Court is open. We are meeting this morning to hear the first round of oral argument of the Republic of Honduras, and I shall immediately give the floor to His Excellency Mr. Carlos López Contreras, Agent of the Republic of Honduras.

M. LÓPEZ CONTRERAS : Monsieur le président, Messieurs les juges,

1.1. c'est un grand honneur pour moi que de me présenter devant cette Chambre spéciale en ma qualité d'agent de la République du Honduras pour ouvrir notre premier tour de plaidoirie 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 introduite par El Salvador.

1.2. Je voudrais tout d'abord indiquer que la délégation du Honduras compte en son sein aujourd'hui M. Aníbal Quiñónez, ministre des affaires étrangères, accompagné de M. Policarpo Callejas, son conseiller principal, et de M. Marlon Pascua, membre de la commission des affaires étrangères du Congrès.

Bref commentaire sur les plaidoiries d'El Salvador

1.3. Je commencerai par commenter brièvement les plaidoiries d'El Salvador. J'ai écouté avec une grande attention l'exposé liminaire fait hier matin par l'éminente ministre des affaires étrangères d'El Salvador. J'ai été frappé par le ton manifestement défensif qu'elle a adopté, tout comme ses deux non moins éminents collègues. Rappelons que c'est El Salvador qui est le demandeur, non le Honduras. Rappelons également que c'est le Honduras qui n'a cessé de soulever des questions quant à la non-exécution, par El Salvador, de l'arrêt de 1992. Peu importe que l'on sorte telle ou telle observation de son contexte, il n'en demeure pas moins que le Honduras a constamment cherché à rappeler à son voisin — et au Conseil de sécurité — que ses «mots et obligations n'[avaient] pas été suivis d'actes» et que notre voisin «n'a pas respecté l'arrêt». Voilà le contexte dans lequel il convient d'apprécier le dépôt tardif de la présente demande en revision.

1.4. Permettez-moi aussi d'assurer à la ministre des affaires étrangères ainsi qu'à la Chambre que le Honduras ne nie pas le droit qu'a El Salvador de former une demande en revision.
9 L'exercice de ce droit est toutefois subordonné au respect de conditions rigoureuses qui sont

établies par l'article 61 du Statut de la Cour. Vu que ces conditions n'ont pas été respectées, la demande est à notre avis irrecevable.

1.5. J'ai écouté avec beaucoup d'intérêt M. Mendelson s'évertuant à rappeler à la Chambre la «violente guerre civile» qui faisait rage en El Salvador de 1980 à 1992. Peut-être n'avait-il pas à l'esprit le paragraphe 63 de l'arrêt de 1992, qui cite le conseil d'El Salvador déclarant que le gouvernement salvadorien avait «connu de graves difficultés pour fournir à la Chambre toutes les preuves qu'il aurait souhaité présenter de ces «effectivités»… Ces difficultés sont liées à des *actes sporadiques de violence qui se sont produits dans certaines des zones en litige*.» (Les italiques sont de nous.) Monsieur le président, la Chambre était pleinement consciente des circonstances qui prévalaient alors et elle savait parfaitement comment celles-ci devaient être appréciées.

1.6. Si vous le permettez, le premier tour du Honduras sera organisé de la manière suivante :

— en tant qu'agent, je présenterai les arguments du Honduras dans le cadre d'un exposé général;

— M. Pierre-Marie Dupuy traitera ensuite la question du droit applicable;

— puis MM. Carlos Jiménez Piernas et Richard Meese réfuteront — tour à tour — les arguments sur lesquels El Salvador prétend fonder sa demande; et

— M. Luis Ignacio Sánchez Rodríguez réagira, pour les réfuter, à un certain nombre d'autres allégations formulées par El Salvador;

— lors du deuxième tour M. Philippe Sands et d'autres membres de l'équipe hondurienne interviendront selon les exigences du débat et, enfin, je présenterai nos observations finales ainsi que nos conclusions.

Je voudrais signaler, par ailleurs, que les conseils du Honduras ne citeront aucune source ni aucune référence dans leurs exposés mais que celles-ci seront indiquées dans les textes écrits.

Considérations générales

1.7. Monsieur le président, Messieurs les membres de la Chambre, en guise d'observation générale, je tiens à dire que la République du Honduras est un Etat pacifique, respectueux de la légalité et fermement attaché à la primauté du droit à l'échelle internationale. En effet, l'article 15 de la Constitution du Honduras dispose expressément que les décisions de la présente Cour et des autres juridictions internationales compétentes doivent être respectées. La Constitution garantit

10 également la primauté du droit international (article 18) et elle définit les frontières internationales du Honduras en s'appuyant sur des décisions de justice, des sentences et des traités internationaux (article 9, n° 1, 2 et 3).

1.8. C'est ce qui explique que le Honduras ait accordé le plus grand respect à l'arrêt rendu en 1992 par la Chambre de la Cour. Agir autrement consisterait à saper la primauté du droit, les relations bilatérales et constituerait une menace à la paix, à la stabilité et à la sécurité internationales.

La demande en revision d'El Salvador implique la reconnaissance de l'existence d'un arrêt définitif et obligatoire

1.9. Monsieur le président, Messieurs les Membres de la Chambre, le Honduras a été extrêmement déçu de voir El Salvador instituer la présente procédure, car nous considérions que l'arrêt de 1992 avait réglé de manière définitive les questions juridiques sur lesquelles il porte. Néanmoins, en analysant l'attitude d'El Salvador sous un autre angle, on pourrait également dire que ce pays a enfin et juridiquement reconnu l'arrêt de 1992 comme une décision définitive et obligatoire.

1.10. Il ne saurait en être autrement, car seules les décisions définitives en droit peuvent faire l'objet de la procédure de revision prévue par le Statut de la Cour. Comme nous le savons tous, la présente Cour ne peut pas être saisie de procédures d'appel (article 60).

1.11. Le Honduras se félicite donc qu'El Salvador ait à présent, par sa demande, reconnu la nécessité de se conformer à l'arrêt de 1992 dans son intégralité. Pourtant le demandeur a systématiquement refusé de s'acquitter des obligations que lui imposait l'arrêt, concernant notamment la démarcation territoriale, le respect du statut juridique des eaux du golfe de Fonseca et la délimitation des espaces maritimes qui se trouvent au-delà de la ligne de clôture du golfe. A tous ces égards, El Salvador n'a toujours pas honoré ses obligations.

1.12. Il est frappant de noter que, sur les six secteurs de la frontière terrestre déterminés par la Chambre en 1992, El Salvador ait attendu la veille de la date d'expiration du délai décennal imparti pour demander la revision de la décision portant sur le secteur de la rivière Goascorán. Je dois à ce propos exprimer la position du Honduras, qui juge totalement inacceptable que le demandeur reconnaisse ouvertement que l'annexe IV à sa requête en revision a été produite en

violation de l'intégrité territoriale du Honduras, de la Charte des Nations Unies, et au mépris de l'autorité de la chose jugée dont est revêtu l'arrêt rendu en 1992.

El Salvador ne s'est pas conformé à l'arrêt de 1992 11

1.13. Examinons les raisons pour lesquelles El Salvador ne s'est pas conformé à l'arrêt de 1992. Pendant les six premières années qui ont suivi le prononcé de l'arrêt, El Salvador a subordonné la démarcation terrestre à la signature d'un traité sur la nationalité et la reconnaissance des droits acquis dans les zones délimitées, bien que l'arrêt de 1992 ne contînt aucune obligation de ce genre.

1.14. Le Honduras a néanmoins cherché à tenir compte des vues que la Chambre avait exprimées par *obiter dictum* au paragraphe 66 (de son arrêt de 1992). En conséquence, en janvier 1998, les deux Etats sont enfin parvenus à un accord et ont signé un traité sur la question à Tegucigalpa.

1.15. Malgré la bonne volonté du Honduras, El Salvador a continué à refuser de donner effet à l'arrêt. Et cela nonobstant les engagements qui avaient été pris par les chefs d'Etat du Honduras et d'El Salvador en 1992, 1994, 1995, 1998 et 1999, y compris dans un accord signé le 19 janvier 1998 par le président salvadorien, M. Armando Calderón Sol, et son homologue hondurien, M. Carlos Roberto Reina, pour démarquer, dans un délai de douze mois, l'ensemble de la frontière terrestre telle que fixée par l'arrêt de 1992.

1.16. Cette situation délicate a contraint le Honduras à invoquer le 18 janvier 2002 l'application du paragraphe 2 de l'article 94 de la Charte des Nations Unies et à demander au Conseil de sécurité son intervention et son aide aux fins d'assurer l'exécution de l'arrêt de 1992.

Caractère artificiel de la demande en revision d'El Salvador

1.17. Monsieur le président, Messieurs les Membres de la Chambre, El Salvador ne s'est pas acquitté, au cours des onze dernières années, de l'obligation qui lui incombait de donner effet à l'arrêt de 1992. Plutôt que de s'acquitter de cette obligation, il a choisi d'introduire une demande en revision artificielle et, pour employer un euphémisme, extrêmement tardive.

1.18. C'est dans ce contexte que la Chambre est appelée à examiner la demande en revision formée par El Salvador au sujet du secteur de la rivière Goascorán, demande curieusement fondée

sur de prétendus «faits nouveaux», opportunément «découverts» dans les six mois qui ont précédé son introduction.

1.19. La Chambre relèvera que, dans sa requête, El Salvador fait valoir les mêmes arguments, précisément, que ceux qu'il avait déjà invoqués dans ses écritures et plaidoiries de 1992. De fait, il invite la Chambre à réexaminer la thèse qu'il défendait alors, celle d'une prétendue avulsion de la rivière Goascorán, thèse pourtant rejetée dans sa totalité en 1992 par un
12 vote à l'unanimité de la Chambre. Comme nous l'avons montré dans nos pièces, El Salvador n'a pas présenté de fait nouveau. Ce qu'il souhaite, en réalité, c'est voir rouvrir l'affaire, remettre en question la *ratio decidendi* de l'arrêt de 1992 et contester, comme il n'a cessé de le faire depuis 1992, l'autorité de la chose jugée dont est revêtue cette décision.

1.20. Les motifs de l'arrêt de 1992 posaient en prémisse l'accord des Parties — exprimé, du reste, au cours de la procédure — sur le fait que le «principe de l'*uti possidetis juris*» était applicable au différend en général, et au règlement de la question du sixième secteur, celui de la rivière Goascorán, en particulier, (par. 40, 45, 48, 56, 67, 307 et 308 de l'arrêt de 1992). Au paragraphe 34, l'arrêt de 1992 évoquait également les négociations entre El Salvador et le Honduras qui s'étaient déroulées en novembre 1888 à La Unión et à Guanacastillo, et avaient «about[i] à un accord faisant de la rivière Guascorán la frontière reconnue, «incontestée et incontestable»».

1.21. Au vu de ces éléments, il apparaît clairement que le véritable objet de la présente requête est de remettre en cause le fondement essentiel de l'arrêt de la Chambre. A notre humble avis, ce n'est pas là la fonction de l'article 61 du Statut de la Cour.

1.22. Dans son argumentation, El Salvador affirme de nouveau avoir été empêché de recueillir certains éléments de preuve étayant ses conclusions en raison des troubles que connaissait le pays. Cette question avait été exhaustivement débattue dans le cadre de la procédure qui a abouti à l'arrêt de 1992. Au paragraphe 63 de celui-ci, la Chambre prenait acte, comme je l'ai déjà indiqué, des difficultés qu'avait pu connaître El Salvador; elle précisait toutefois qu'elle ne pouvait présumer l'existence d'un élément de preuve qu'El Salvador n'avait pas produit, pas davantage qu'elle ne pouvait présumer qu'un élément de preuve qui n'était pas disponible aurait, s'il avait été produit, plaidé en faveur de sa cause.

1.23. Compte tenu de ce qui précède, je tiens à souligner que l'arrêt de 1992 concernait non pas une rivière fictive ou mythique, mais une rivière qui existe bel et bien dans le secteur de Goascorán. Toutefois, dans sa requête, El Salvador passe sous silence un certain nombre de faits qui étaient connus de la Chambre, et que celle-ci avait discutés et tranchés dans son arrêt de 1992. Si vous le permettez, sur ce point, j'illustrerai mon propos par quelques exemples.

1.24. *Premièrement*, lors de la procédure qui a abouti à l'arrêt de 1992, les Parties soumirent à la Chambre des prétentions divergentes quant au secteur de Goascorán. La Chambre releva (au paragraphe 306 de son arrêt) que le Honduras affirmait qu'en 1821 le Goascorán «constituait la limite entre les divisions coloniales auxquelles les deux Etats [avaient] succédé, qu'il n'y a[vait] pas eu de modification importante du cours de la rivière depuis 1821 et qu'en conséquence la frontière sui[vait] le cours actuel de la rivière». De son côté, El Salvador affirmait que «ce qui défini[ssait] la frontière, c'[était] un cours antérieur suivi par la rivière et que cet ancien cours, abandonné ensuite par la rivière [pouvait] être reconstitué» et aboutissait dans le golfe à un endroit différent. Ainsi la Chambre avait-elle connaissance de l'actuelle thèse d'El Salvador, et ce, bien avant 1992.

13

1.25. *Deuxièmement*, la Chambre, au paragraphe 307 de l'arrêt, notait que les Parties étaient d'accord pour dire «qu'au cours de la période coloniale une rivière appelée Goascorán constituait la limite entre deux divisions administratives de la capitainerie générale de Guatemala : la province de San Miguel et l'Alcadía Mayor de Minas de Tegucigalpa».

1.26. *Troisièmement*, au paragraphe 308 de son arrêt, la Chambre indiquait également que la prétention d'El Salvador selon laquelle la frontière de l'*uti possidetis juris* était constituée par un lit antérieur du Goascorán était subordonnée «du point de vue des faits, à l'affirmation suivante : anciennement, le Goascorán coulait à cet endroit et, à partir d'un certain moment, il a brusquement changé de cours pour couler à l'endroit où se situe son cours actuel». La Chambre précisait en outre que l'argument de droit d'El Salvador revenait à affirmer ceci : «lorsqu'une frontière est constituée par le cours d'une rivière et que le cours de celle-ci quitte soudainement l'ancien lit pour un autre, ce phénomène d'«avulsion» ne modifie pas le tracé de la frontière, qui continue de suivre l'ancien cours».

1.27. *Quatrièmement*, au paragraphe 312 de son arrêt de 1992, la Chambre considéra «qu'il [fallait] rejeter toute affirmation d'El Salvador selon laquelle la frontière sui[vait] un ancien cours que la rivière aurait quitté à un moment quelconque *avant* 1821. Il s'agi[ssait] là d'une prétention nouvelle et incompatible avec l'historique du différend.»

El Salvador n'a présenté aucun argument à l'appui de sa demande en revision

1.28. Monsieur le président, Messieurs les Membres de la Chambre, j'ai été amené à rappeler ses paragraphes de l'arrêt de la Chambre, et je sollicite, pour cela, votre indulgence. Mais j'ai la certitude que vous en avez déjà mesuré la pertinence et l'importance, puisque ces paragraphes portent précisément sur la prétention qu'El Salvador cherche à faire aboutir aujourd'hui.

1.29. Le Honduras conteste vigoureusement la recevabilité de la demande d'El Salvador. El Salvador n'a manifestement pas rempli les conditions posées par l'article 61 du Statut, telles que
14 récemment précisées par la Cour dans sa décision du 3 février 2003 en l'affaire de la *Demande en revision de l'arrêt du 11 juillet 1996*.

1.30. Mais le Honduras conteste également la recevabilité de cette requête à un autre titre, qui est que, sous le couvert d'une revision, c'est en réalité un appel que tente d'introduire El Salvador. Comme le montreront les conseils du Honduras, la requête d'El Salvador ne se fonde pas sur la découverte d'un fait nouveau; il s'agit, plutôt, d'une remise en cause de la *ratio decidendi* de l'arrêt de 1992.

1.31. Monsieur le président, Messieurs les membres de la Chambre, je voudrais, en guise de conclusion, formuler les observations suivantes :

— la demande en revision formée par El Salvador suppose la reconnaissance de l'existence d'un arrêt définitif et obligatoire;

— El Salvador a mis en oeuvre une politique officielle d'obstruction pour empêcher l'exécution de l'arrêt de 1992;

— la demande en revision qu'il a introduite est artificielle;

— elle n'est *pas* fondée sur la découverte d'un fait nouveau;

— El Salvador n'a présenté aucun argument à l'appui de sa demande, au mépris des conditions strictes et cumulatives énoncées par le Statut et le Règlement de la Cour;

— en conséquence, la demande en revision d'El Salvador doit être déclarée irrecevable.

1.32. Monsieur le président, je vous remercie infiniment de m'avoir donné cette occasion de prendre la parole devant la Chambre de la Cour. Je voudrais à présent vous prier d'appeler à la barre M. Pierre-Marie Dupuy, qui a pour tâche de traiter de la question du droit applicable.

Le PRESIDENT : Je vous remercie Monsieur l'agent et je donne maintenant la parole au professeur Pierre-Marie Dupuy.

Mr. DUPUY:

Applicable law: legal conditions for the revision of a judgment of the Court

1. Mr. President, Members of the Court, it is always a pleasure for me to appear before the International Court of Justice. Mr. President, yesterday we rather curiously heard an Applicant present a case in its defence! An Applicant which tended to reverse the burden of proof; an Applicant which constantly felt the need to justify itself — admittedly with a certain eloquence on occasion — reiterating that it was claiming the exercise of a right, whereas it has never been denied that exercise, especially not by Honduras, provided of course that it meets the relevant statutory requirements.

2. After listening to the oral arguments of the three distinguished speakers who appeared before you yesterday, the basic conclusion is that they are inviting the Chamber, and even beyond the Chamber, the International Court of Justice as a whole, to revise its jurisprudence on a fundamental element of its Statute. In the future, the Court would thus have to accept that its judgments could be revised on the sole basis of allegations pointing to the possibility, but not certainty, that a new interpretation of previously known facts was conceivable. And that purported new evidence would quite simply be provided by subsequent developments in science and technology, expediently called upon in order to challenge the merits of an international judicial decision.

3. Yesterday, Members of the Chamber, the Republic of El Salvador invited you to accept that, after the close of a case, a party, without even taking the precaution of executing the judgment in the meantime — which, we should not forget, is the case here — should have the possibility, for a further nine years and 364 days, to make up for its previous negligence in the search for evidence

of its legal title or of any other alleged right; for such purpose it would simply have to use that time to continue its investigations in archives, libraries or laboratories, wherever they might be found.

4. By its audacity and novelty, the argument of the Republic of El Salvador, if it were to be upheld by the Chamber of the Court, would certainly open interesting prospects for international litigation. In particular, since El Salvador's view is that one should accept as "new facts" allegations of a presumptive nature and, above all, the new interpretations — by definition subjective — that a party claims to derive from them, it would thus be necessary to review a significant part of the rules of *evidence* in international litigation. This is especially true of cases — which are proving increasingly frequent — in which counsel are assisted in the courtroom by historians, technicians and scientists. Thus, one would just need to wait a little while after the judgment had been delivered, or rather spend that time continuing the investigations that one was
16 unable to do or incapable of doing at the appropriate time . . . and it would always be possible to come back before the Court to seek revision of the *res judicata*.

That, Mr. President — lest we might tend to forget it — that is the crux of this case! *Res judicata* and the authority attaching thereto.

5. Any judgment rendered by the International Court of Justice is "final and without appeal". That is what Article 60 of its Statute states. It lays down a rule whose scope El Salvador seems to have some difficulty in comprehending, because ten years after the Judgment of 11 September 1992, it has still not implemented it. Those statutory provisions just referred to enshrine a fundamental principle of international litigation: the authority of *res judicata*, as reiterated by the International Court of Justice since its very first judgment rendered in 1949 in the *Corfu Channel* case[1].

As Charles de Visscher would observe some 20 years later, "the authority of *res judicata* is a specific characteristic of a judicial act. It attaches to the judgments of the Court in The Hague and,

[1] *I.C.J. Reports 1949*, p. 248.

generally, to all judgments that are binding and not susceptible of appeal rendered by international courts or tribunals"[2].

It may even be said that such authority represents the very *essence* of the Court's judgments, since it can only render judgments which possess binding force. That is something which this Court has had occasion to recall a number of times since its beginnings, whether it be the Permanent Court in the *Free Zones* case[3], or the present Court in the *Northern Cameroons* case[4]. The Advisory Committee of Jurists formed to draft the Court's Statute had stated this from the outset of their work: the authority of *res judicata* is a general principle of law[5].

6. Hence, it is in relation to this fundamental rule that the exceptional nature of the procedure
17 for revision of the Court's judgments must be understood. Moreover, Article 61 of the Statute takes full account of the quite distinctive and exceptional nature — and hence of the need for it to be *interpreted restrictively* — of the revision procedure. It demonstrates this right from the first paragraph, which is drafted in negative terms: "An application for revision of a judgment may be made *only when* . . .".

7. There are three important statutory consequences: the first is a *procedural* one. It thus follows from paragraph 2 of Article 61 of the Statute and paragraphs 3 and 4 of Article 99 of the Rules of Court that the procedure in question is divided into two phases. The first concerns the admissibility of the application for revision, enabling the Court to verify whether the application can be considered; the second can clearly commence only if the outcome of the first has been favourable to the position of the Applicant. This second phase relates to the merits of the case already decided, with a view to establishing whether the fact alleged is capable of resulting in modification of the impugned judgment and, if so, to what extent. However, contrary to what my eminent colleague Professor Mendelson claimed yesterday, these two phases cannot be distinguished by two different sets of rules of evidence, one less stringent than the other. There is certainly a difference between the two phases in the Court's law, but it pertains to the

---

[2]Ch. de Visscher, *Aspects récents du droit procédural de la Cour internationale de justice*, Paris, Pedone, 1966, p. 177.

[3]*Free Zones of Upper Savoy and the District of Gex, P.C.I.J., Series A, No. 24*, p. 14.

[4]*Northern Cameroons, Preliminary Objections, Judgment, I.C.J. Reports 1963*, pp. 33-34.

[5]Quoted by Judge Jessup in his dissenting opinion in the Court's Judgment of 18 July 1966 in the *South West Africa* cases, *I.C.J. Reports 1966*, p. 333.

subject-matter of the evidence to be adduced by the Applicant and not to its probative force. Right from the first of the two phases, the Applicant is required to adduce decisive evidence of a new fact and not simply allegations or pre-emptive assertions. But it is only required to adduce such evidence in respect of the admissibility of its application.

8. The Court itself recalled this in its Judgment of 10 December 1985 on the *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)*[6]. In the present case, it can be said at the outset that one may express a certain surprise at the haste with which El Salvador, even in its submissions to the Chamber at this stage, sets out a very precise description of the course of the boundary line that it seeks to obtain, including exact latitudes and

18 longitudes[7]. The Chamber can read this on page 71 of El Salvador's Application. This, if one may use such language, is quite simply to put the cart before the horse.

9. The second consequence attaching to the exceptional nature of an application for revision lies in the restricted possibilities available to the Court in the event of its finding that the application is admissible. It is this which distinguishes *revision* — permissible, albeit strictly circumscribed — from *appeal*, which is excluded by the very terms of Article 60.

10. Finally, the third consequence has to do with an element which — I have to say — I was not particularly surprised that Professor Mendelson failed to address in his arguments; he was careful not to mention it. I refer to the *cumulative*, rather than alternative, nature of the conditions which must be met in order for the alleged fact to create a right to revision of the judgment. *All* of the conditions required by Article 61 of the Court's Statute have to be met. Conversely and in consequence, as the Court noted in 1985: "Once it is established that the request for revision fails to meet one of the conditions for admissibility, the Court is not required to go further and investigate whether the other conditions are fulfilled."[8]

---

[6] *I.C.J. Reports 1985*, p. 197, para. 9.

[7] "Starting form the old mouth of the Goascoràn river in the inlet as the La Cutù Estuary situated at latitude 13° 22' 00" N and longitude 97° 41' 25" W, the frontier follows the old course of the Goascoràn river for a distance of 17,300 meters as far as the place known as the Rompicion de los Amates situated at latitude 13° 26' 29" N and longitude 87° 43' 25" W, which is where the Goascoràn river changed its course." Application for revision, p. 71.

[8] *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf *(Tunisia* v. *Libyan Arab Jamahiriya)*, Judgment, *I.C.J. Reports 1985*, p. 207, para. 29.

As Judge Suzanne Bastid dutifully acknowledged herself, notwithstanding her position as judge *ad hoc* for the Applicant for revision, Tunisia: "If one reaches the conclusion that the Application for revision does not directly invoke any new fact which is clearly relevant as such, there is no need to go any farther and the Application must be dismissed. Any further considerations would lead to an examination of the merits of the Application for revision."[9]

11. Given the nature of the arguments advanced yesterday before the Chamber, it is now necessary to reconsider in more detail the second and, especially, third consequences that have just been mentioned. As will be shown later in my observations, under the guise of an application for revision, the Salvadoran Application is in reality effectively seeking to have the Judgment of 11 September 1992 varied, as if it were appealing against that decision; furthermore, none of the allegations put forward by El Salvador in support of its Application corresponds to the requirements laid down by Article 61.

19

I. THE STATUTE OF THE COURT PROHIBITS ANY APPEAL AGAINST ITS JUDGMENTS

12. In its written response to El Salvador's Application, Honduras recalls the *Orinoco Steamship Co.* case of 1910, in which the Permanent Court of Arbitration prudently took the view that "the appreciation of the facts of the case and the interpretation of the documents were within the competence of the umpire" and that

> "his decisions, when based on such interpretation, are not subject to revision by this tribunal, whose duty it is not to say if the case has been well or ill judged, but whether the award must be annulled; that, if an arbitral decision could be disputed on a ground of erroneous appreciation, appeal and revision, which the Conventions of The Hague of 1899 and 1907 made it their object to avert, would be the general rule"[10].

It is precisely that same rule — the prohibition of appeal — that can be found in Article 60 of the Court's Statute.

---

[9] *I.C.J. Reports 1985*, p. 248, para. 5.

[10] *The Hague Court Reports*, ed. J. B. Scott, 1916, p. 231. This Award, rendered on 25 October 1910 (*American Journal of International Law* V, p. 230) is quoted by Judge Shahabuddeen in his separate opinion appended to the Judgment in the case concerning the *Arbitral Award of 31 July 1989 (Guinea Bissau* v. *Senegal), Judgment, I.C.J. Reports 1991*, p. 61.

Later, international jurisprudence would state further: "A mere error in law is no sufficient ground for a petition lending to revision . . . the proper criteria lies in a distinction, not between 'essential' errors in law and other such errors, but between 'manifest' errors . . . and other errors in law." *Trail Smelter* case, Award of 11 March 1941, *RIAA*, Vol. III, op. 1957.

13. However, under the guise of an application for revision, the Applicant is really calling for the Judgment to be reversed and has not hesitated, on a number of occasions, to criticize in veiled terms the approach followed by the Chamber in order to reach its decision of 11 September 1992, as if it were reproaching the Chamber with an error of judgment, whereas the facts now produced are certainly not "new" within the meaning of the Statute. When, for example, my colleague Professor Remiro Brotóns basically stated, yesterday morning, that what counts is not the course of the Goascorán in 1821 but where the boundary between the two provinces ran at that time, he was contradicting the 1992 Judgment, implicitly regarding it as erroneous in law and not simply in fact. Similar assertions can be found in paragraphs 71 and 123 of the Application.

Without giving an exhaustive list, I would also mention paragraphs 130, 145 and 164. What we find there is that it is the very authority of the 1992 *res judicata* which is being impugned through a challenge to the Chamber's reasoning on the basis of the elements of law and fact provided by each of the Parties: "The Chamber was inconsistent with its own observation when it held that the present day course and the 1821 course were practically the same", we are told for example in paragraph 145.

20

Here, as later in paragraph 164, it is not an error of law with which El Salvador is reproaching the Court, but quite simply the structural incoherence of its Judgment. The 2003 Chamber is basically being invited to correct the errors or inconsistencies of its predecessor in 1992. But that is not revision, Members of the Chamber, it is reversal on appeal. On the basis of what provision in the Statute? I must confess that I would be curious to know!

II. The conditions for the admissibility of the Application for revision are both restrictive and cumulative

14. I shall cite here the language used by the Court itself, quoting its own Statute, in its Judgment of 3 February 2003 on the *Application for Revision of the Judgment of 11 July 1996*:

> "Therefore, at this stage the Court's decision is limited to the question whether the request satisfies the conditions contemplated by the Statute. Under Article 61 of the Statute, these conditions are as follows:
>
> *(a)* the application should be based upon the 'discovery' of a 'fact';
>
> *(b)* the fact, the discovery of which is relied on, must be 'of such a nature as to be a decisive factor';

(c) the fact should have been 'unknown' to the Court and to the party claiming revision when the judgment was given;

(d) ignorance of this fact must not be 'due to negligence'; and

(e) the application for revision must be 'made at latest within six months of the discovery of the new fact' and before ten years have elapsed from the date of the judgment."[11]

15. As can be seen, over and above the requirement of the occurrence of a genuine *fact*, and not mere allegations, or simply purported new, more or less well-documented "evidence", there are certain conditions relating to the *nature* of the *fact* and others to the *conduct* of the party in question. Thus, after examining what is meant by a *fact*, we will then consider in turn these two categories of conditions, all of which must be satisfied before the Court may declare the Application for revision admissible.

21 A. The Application must be based on the "discovery" of a "fact"

16. What is a *fact* within the meaning of Article 61 of the Statute? There is no doubt, Members of the Chamber — as I have already stressed since the beginning of my presentation — that this is a key issue in the law governing the revision of your judgments.

The practice of requesting revision is rare, because the Parties know that it is not an easy path. But it is also recent, since Members of this very Bench rendered a decision only seven months ago in this regard.

It is therefore helpful to look at what you stated in the 2003 Judgment and, in particular, the comments of Bosnia Herzegovina's Judge *ad hoc* Mahiou, who — it must be emphasized — subscribed fully to the conclusions of the 3 February 2003 Judgment, observing as follows:

> "simply proceeding from the basic definition given in all dictionaries, notably those of public international law, I note that a fact is an event which occurred, which took place at a given point in time. From this basic, common-sense definition a crucial element stands out: the existence or objective reality of the fact, and hence the Court's ascertainment or finding that it did indeed happen, or that it occurred at an appropriate time such as to enable it to be invoked."[12]

---

[11] *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*, para. 16.

[12] *Ibid.*, separate opinion of Judge *ad hoc* Mahiou appended to the Judgment, para. 2.

17. Thus Judge Mahiou emphasizes quite correctly that the objective reality of a fact must be distinguished from the interpretation which the applicant party seeks to place upon it, and from the inferences or other new "intellectual constructs"[13] which it seeks to draw in regard to what it has itself decided to regard as a fact[14].

18. However, in the present case there is no new fact at all, whether from before or after the date of the 1992 Judgment: either El Salvador seeks to rely on arguments already put forward in the course of the pleadings prior to the Judgment (that relating to the "avulsion" of the Goascorán River); or it seeks to produce documents already known to the Chamber, since they had been published by Honduras; or it relies on purported "evidence" produced with a view to revision of the 1992 Judgment, notwithstanding that such evidence had been accessible at all times to any

22

reasonably diligent researcher, and in no way contradicts the documents produced by Honduras. Where, in all of this, do we see any new *fact* within the meaning of Article 61 of the Court's Statute?

19. In particular, new "scientific" and "technical" studies relied on as evidence of the "avulsion" of the lower course of the Goascorán River cannot be regarded as facts of an objective nature. They are the highly debatable product of a late initiative by El Salvador itself, undertaken only on the eve of the expiry of the deadline for an application for revision. And as to the discovery of the "Carta Esférica", also submitted in the Salvadoran Application, this cannot constitute a new fact either, since it is simply, as we shall show later, a further copy of maps already produced in the principal proceedings which resulted in the Judgment of 11 September 1992[15]. All the copies, moreover, are consistent in where they place the river's mouth.

20. Without further developing that point here, as it will be addressed by others[16], I would simply at this stage place on record the sense of perplexity raised by El Salvador's Application as

---

[13] *Ibid.*, para. 3.

[14] In his dissenting opinion, Judge Vereshchetin applies similar considerations when he states that the word *fact* falls under "something that actually exists" or under "circumstances, as distinguished from its legal effect, consequence, or interpretation", definitions which he takes from *Black's Law Dictionary*, 7th Ed., p. 610. Dissenting opinion of Judge Vereshchetin appended to the Judgment of 3 February 2003, para. 10.

[15] See below, Chap. III.

[16] *Ibid.*

regards the requirement of the existence of a fact. Essentially, the fact on which El Salvador sought to base the boundary in the sixth sector in 1992 consisted in the alleged existence of a former course of the Goascorán flowing into the Gulf of Fonseca at Estero La Cutú. El Salvador contended that this former course had been suddenly changed as a result of the phenomenon known as "avulsion". Yet, it is precisely on this same fact that the Applicant seeks to rely today. The Court was aware of the phenomenon in question during the principal proceedings. Avulsion, Mr. President, is certainly no revolution! Unless we are talking in terms of astronomy, where "revolution" means to go round in a full circle, bringing you back to the point of departure!

21. In reality, the Republic of El Salvador indicates that what is new is not the discovery of a fact but simply that of new *evidence*, based in particular on new documents: Professor Mendelson stated this explicitly yesterday. However, according to settled case law, there is a distinction in kind between the facts alleged and the evidence relied upon to prove their reality and only the

23 discovery of the former opens a right to revision. The Permanent Court of International Justice stated this as far back as 4 August 1924, in its Advisory Opinion on the delimitation of the boundary between Serbia and Albania at the *Monastery of Saint-Naoum*: "In the opinion of the Court, fresh documents do not in themselves amount to fresh facts."[17]

22. Moreover, in a passage in paragraphs 38 and 39 of its Application, whose hesitant language reflects its embarrassment, El Salvador appears to have a very broad conception not only of the "facts" but also of their novelty, and that conception was confirmed yesterday by Mr. Mendelson. Thus it extends this quality of novelty to matters already perfectly well known to the Chamber, but whose interpretation it claims would have been different if the Chamber had been aware of the so-called new evidence which El Salvador is now submitting.

In reality, what the Applicant is thereby addressing is the decisive nature of the alleged fact.

B. Meaning and scope of the "novelty" of the fact alleged

23. It is generally said that the opening of proceedings for revision is dependent on the production of a "new" fact by the applicant. Article 61 of the Statute itself uses the expression

[17] *Monastery of Saint-Naoum, Advisory Opinion, P.C.I.J., Series B, No. 22*, p. 22. See the discussion of this case in the dissenting opinion of Judge Jessup in the Judgment of 18 July 1966, *South West Africa, Second Phase, I.C.J. Reports 1966*, p. 339.

"new fact"; not in its first paragraph, but in paragraph 2: "the proceedings for revision shall be opened by a judgment of the Court expressly recording the existence of the new fact . . .".

However, the same provision itself defines what is meant by this: a new fact is a fact which the Court can recognize as having "such a character as to lay the case open to revision". Paragraph 2 of Article 61 thus uses the adjective "new" to describe a fact which has been "discovered" by the party claiming revision.

What is effectively "new" is not the fact but the knowledge of it. The fact itself already existed previously. It existed both before and after the Judgment on the merits, but had been unknown to the Court and to the Parties. To cite the language used by Judge Mahiou "it is not the

24 fact itself which is inherently or objectively new; it is the knowledge of that fact which must be new to the party relying upon it or to the Court which handed down the Judgment".

However, the Chamber was already aware in 1992 of El Salvador's claim that the Goascorán River flowed into the sea at Estero La Cutú. That claim is not new but simply emphasized — though in no way strengthened — by the speculations set out in the Application and in yesterday's oral presentations. To use Professor Mendelson's rather perilous metaphor, we are still awaiting the results of the DNA test showing that the Rio Goascorán ran where El Salvador claims that it did at the relevant time. . . !

24. The International Court of Justice itself clearly stated in its Judgment of 10 December 1985 concerning the *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)*: that the "new fact" is "the fact the *discovery* of which is relied on to support the Application for revision . . ."[18]. Furthermore, the fact thus discovered must be decisive.

C. The "decisive" nature of the fact alleged

25. The Court itself had occasion to restate this in substance in its Judgment of 1985:

> "What is required for the admissibility of an application for revision is not that a new fact relied on might, had it been known, have made it possible for the Court to be

[18] *I.C.J. Reports 1985*, p. 203, para. 21; emphasis added.

> more specific in its decision; it must also have been a 'fact of such a nature as to be a decisive factor'."[19]

Would the Court have reasoned otherwise than as it did if it had been aware, prior to its judgment, of facts (and not merely intellectual constructs or purported evidence) of which it only became aware subsequently? That was the approach followed by the Court in the 1985[20] Judgment just cited. In so doing the Court observed *inter alia* that "[a]ny 'new fact' discovered . . . is . . . not necessarily to be regarded as a decisive factor . . . "[21].

25 26. In the present case, I shall return later to the reasoning followed by the Chamber in reaching its 1992 Judgment. At this stage, however, two points may be noted. First, there is no new fact but, at best, the production of elements to which probative value is attributed by the Applicant. However, my colleagues will show you again later that those elements of information were already accessible to the Applicant at the time of its pleadings on the merits; secondly, El Salvador is no more able today than it was in the past to demonstrate that the course of the Goascorán River in fact ran where it claims that it did *in 1821*, the critical date in the case that was quite rightly adopted, in law, by the Chamber in its 1992 Judgment. It is one thing to say that everyone, both the Court and the Parties, knew that in this region watercourses sometimes tend to change direction and that this was probably the case for the Rio Goascorán at a still undetermined time. But it is something else to prove that the river flowed where El Salvador claims that it did specifically in 1821, the date of the end of the colonial period and hence the only admissible critical date in international law.

27. I will pass very quickly over the reference to the *uti possidetis* applicable to this dispute and my colleague Professor Sánchez Rodríguez will return to that later. But once again, as I have just said, there are two important consequences attaching to the application of that principle: *(a)* first, what counts is the manifestation of the legal *title* possessed by either of the Parties; *(b)* secondly, as I have already stressed, it is to the critical date of 1821 that reference must be made. However, El Salvador has not adduced any new evidence of legal title to the portion of

---

[19] *I.C.J. Reports 1985*, p. 213-214, para. 39.

[20] *Ibid.*, *interalia* paras 30-35.

[21] *Ibid.*, p. 23, para. 25.

territory that it now covets and as for its dating of the supposed avulsion, it remains speculative, arbitrary, hypothetical, brief and uncertain.

D. Previous ignorance of the fact alleged must not be due to the applicant's negligence

28. This is a most fundamental condition that the Advisory Committee of Jurists added to those previously established by the two Hague Conferences in the 1899 and 1907 Conventions.

29. In 1920, the Advisory Committee of Jurists found that those first conditions were not sufficient and added a further condition. The two previous ones allowed cases: "on the ground of the discovery of some new fact calculated to exercise a decisive influence upon the Award and

26 which was unknown to the Tribunal and party which demanded the revision". An additional condition was added by the Advisory Committee:

> "An improvement was introduced whereby the Committee, not content as in Art. 55 of 1899 (Art. 83 of 1907), with ignorance of the fact on the part of the party requesting revision, stipulates that such ignorance must not be due to a failure on the part of the Party to use due diligence in the conduct of the case."[22]

30. This explains why the production of new, purportedly probative documents is not regarded as a "new" fact according to the meaning already explained. *A fortiori*, a claimant cannot use documents already used previously, or indeed mere information not produced in the pleadings but readily accessible to any diligent party. Yet this is what El Salvador has done a number of times both in its Application and in oral argument. At this stage I will confine myself, to take but one example, to pointing out its use of a document produced in the annexes to the Honduran Counter-Memorial, a document in fact published by the Honduras Geographical and Historical Society[23], and thus readily accessible to any diligent researcher.

31. The Court's jurisprudence is particularly clear in regard to the requirement of absence of negligence on the part of the Applicant. In its 1985 Judgment rejecting Tunisia's Application for revision, the Court carefully considered whether the Applicant could have been aware, even indirectly, of the facts on the basis of which it sought to secure revision of the Judgment of 24 February 1982. In particular, the Court considered whether a resolution of the Libyan Council of Ministers dated 28 March 1968, although not produced by either of the Parties in the

[22] *Procès-verbaux* of the Committee, 16 June-24 July 1920, p. 744.

[23] Application for revision, pp. 24-25, paras. 56-60.

proceedings resulting in the 1982 Judgment, could have been known to Tunisia. The Court found that the Libyan resolution had been published in the Libyan *Official Gazette* of 4 May 1968 as well as in the *Middle East Economic Survey* of 9 August 1968[24]. Following this finding, and in light of Tunisia's failure to act, the Court observed that "the reasonable and appropriate course of action to be taken by Tunisia, in 1976 at the latest, would have been to seek to know the co-ordinates of the

27 Concession so as to establish the precise extent of the encroachment on what it regarded as Tunisian continental shelf"[25].

32. Similarly, when the Court considered Yugoslavia's arguments in regard to the consequences which it claimed should be drawn from its admission to membership of the United Nations on 1 November 2000, Judge Mahiou particularly emphasized in his separate opinion that the uncertainties surrounding Yugoslavia's situation vis-à-vis the United Nations between 1992 and 1996 were in no way unknown to the Applicant. Indeed, as he points out:

> "In any event, there were enough substantial, troublesome indices to alert Yugoslavia and to prompt it to reflect upon its position vis-à-vis the United Nations. Under other circumstances, more favourable indeed to the Applicant in some respects, the Court has not hesitated to reject the contention that the fact relied upon was unknown and to draw inferences from the lack, or insufficiency, of diligence in becoming aware of the fact."[26]

33. Applying the facts just illustrated to the present case, it is, to say the least, surprising in the case of a State the essence of whose titles is based on the application of the principle of *uti possidetis*, that it should have such imperfect knowledge of the administrative practices, and in particular the cartographic practices, current in the colonies of the Spanish Crown. It is this ignorance which underlies the totally erroneous conclusions that it draws in particular from the "discovery" of a log and chart long available in the Chicago Newberry Library, just as the corresponding documents have always been available to it or to any other researcher in the Madrid Naval Museum.

---

[24] *I.C.J. Reports 1985*, p. 205, para. 24.

[25] *Ibid.*

[26] Separate opinion of Judge *ad hoc* Mahiou, *op. cit.*, p. 3, para. 9.

34. It is in any event clear that the Court, in practice, interprets in a strict and rigorous manner the requirement that ignorance of a fact cannot be the result of the Applicant's own negligence.

It follows that an application for revision cannot confine itself to producing new documents, which is in any case not the same thing as the discovery of facts hitherto unknown. Furthermore, a

28 State submitting to the Court facts previously unknown must also provide at least one piece of evidence: that its ignorance of those facts was not the result of its own lack of diligence.

35. I shall conclude by recalling that there is one fundamental principle which we consistently find among the "rules generally laid down in statutes or law issued for courts of justice", as the Court noted, following the Permanent Court of International Justice[27], in its Advisory Opinion concerning the *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*[28], namely the principle that the burden of proof is on the applicant. This is true of all legal proceedings and it is particularly essential in the case of an application seeking to reverse a decision having the authority of *res judicata*. On this point too, the Judgment rejecting the Tunisian Application in 1985 is particularly clear.

36. However, as subsequent speakers will tell you, in the present case the Republic of El Salvador continues for the most part to make mere assertions without providing any of the evidence required by proceedings as exceptional as an application for a revision of a judgment of the Court. At this point, I will confine myself to posing a number of questions that still remained unanswered yesterday:

— Mr. President, Members of the Chamber, where are the evidence and explanations as to why El Salvador waited until the very end of the ten-year deadline for revision claims for filing its application?

— Where are the evidence and explanations as to why El Salvador did not proceed earlier than in the last six months prior to expiry of the deadline to consult the documents which it produces today in support of its Application for revision?

---

[27] *Certain German Interests in Polish Upper Silesia*., PCIJ series A, No. 7

[28] *Advisory Opinion, I.C.J. Reports 1954*, p. 55.

— Where are the evidence and explanations as to why El Salvador did not act earlier to commission the scientific and technical studies which it now seeks to use in order to establish the phenomenon of avulsion which it claims to have affected the lower course of the River Goascorán?

29 — Where are the evidence and explanations as to why El Salvador was unable to gain access earlier than in the last six months prior to expiration of the ten-year deadline to the series of documents produced in its Annexes II, IV, XIV, XV and XVI?

Where, in other words, are the evidence and explanations capable of convincing the Court that El Salvador exercised all due diligence before, during and after the proceedings culminating in the Judgment of 11 September 1992 in order to demonstrate the correctness and relevance of its argument? They were not presented yesterday, any more than they were in El Salvador's written pleadings.

37. It should be noted in particular that the only semblance of an argument put forward by El Salvador to justify its inability to gather the relevant documentation and information is quite unacceptable. This is the contention that the endemic domestic turbulence and disturbances which characterized the political and social life of El Salvador at that time prevented it from deploying all the necessary means to secure such information. Yet, Mr. President, unless I am mistaken, El Salvador did not hesitate to adopt a freely negotiated special agreement with Honduras to submit their dispute to a chamber of the Court. El Salvador has proved itself to be perfectly capable of filling hundreds and hundreds of pages of written pleadings, and of diligently supplying the Chamber of the Court with cartographic, historical, technical and scientific annexes. That is to say that it considered itself able to undertake lengthy, difficult and costly international litigation with all the necessary resources. It is difficult to see how it can now rely on its own negligence in order to justify its waiting until the final day of the final year in which it could seek revision of the Judgment in order to submit to the Chamber documents or information in respect of which it has been unable to demonstrate either their "novelty" or their decisive nature. With its apparent propensity for criminal law analogies, El Salvador is seemingly seeking to plead mitigating circumstances for its failure to produce probative documents within the required time-limit. This is another claim that is certainly not provided for in your Statute or by your case law.

38. No, Mr. President and Members of the Chamber, a fact does not become new because a party belatedly attempts to bring its knowledge of the subject approximately up to date, thereby
30 hoping to delay the deadline by which it will finally have to decide to implement a judicial decision that it regards as erroneous because the Court refused to uphold arguments of whose correctness that party had failed to convince it ten years earlier.

It must be said, Members of the Chamber, that this case does not relate merely to a portion of territory to the west of La Unión Bay. It challenges the very legal security which must attach to the decisions of the International Court of Justice.

Thank you, Mr. President, and I would now ask you to call upon my colleague and friend, Professor Carlos Jiménez Piernas.

Le PRESIDENT : Je vous remercie Monsieur le professeur. Je donne maintenant la parole à Monsieur le professeur Carlos Jiménez Piernas.

Mr. JIMÉNEZ PIERNAS: Mr. President, Members of the Chamber.

1. Allow me to begin, Members of the Chamber, by saying what a great honour it is for me to appear for the first time before the Court, in order to defend the legitimate interests of the Republic of Honduras.

2. My colleague, Professor Pierre-Marie Dupuy, has examined the law applicable to this case, namely, the various legal conditions on which the Statute and Rules of Court make the revision of a judgment of the Court conditional, and the role of *uti possidetis juris.*

3. His Excellency Carlos López Contreras has entrusted me with the task of applying the requirements of the Statute and Rules to the arguments presented by El Salvador to justify its Application for revision. Specifically, I shall analyse those arguments, which seek to attain an objective that is by definition unattainable: namely, to discredit and render worthless as evidence the Spherical Chart and logbook of the expedition of the brigantine *El Activo*, documents on which the Chamber relied in 1992 to assess a geographical fact, namely, the location of the mouth of the Goascorán River in 1821, the critical date in the colonial succession. My remarks will focus specifically on these two documents.

4. El Salvador's purpose is none other than to cast doubt on the authenticity of the evidence submitted at the time by Honduras, evidence accepted and evaluated by the Chamber in its 1992 Judgment. To that end, El Salvador is relying before the Chamber on the alleged discovery in
31 the Newberry Library in Chicago of other copies of the Spherical Chart and logbook. Thereafter, it compares them with the copies preserved in the Madrid Naval Museum. That comparison leads it to the illusory conclusion that neither set of copies can be regarded as reliable, that the documentation as a whole lacks credibility, on the grounds of a series of alleged — albeit purely imaginary — differences between the copies. Yesterday El Salvador confirmed its position, but did so while modifying its arguments. The seriousness and temerity of such affirmations call into question, quite without basis, the value of the documentary and cartographic resources of two institutions highly respected in this field, the Madrid Naval Museum and the Newberry Library in Chicago, thereby bringing unjustifiable and gratuitous discredit upon them.

5. It should be pointed out that the documents submitted by El Salvador in no way meet the conditions referred to in paragraph 1 of Article 61 of the Statute of the Court. Those conditions — those I shall be discussing with you — include the absence of any negligence in the submission of new facts, and the possibility of describing them as genuinely new facts decisive for the decision in the case. Those conditions are very difficult to satisfy, as the Court's jurisprudence confirms. I shall deal with these two points separately. First I shall show that El Salvador fails to satisfy the condition of absence of negligence in the submission of the new facts. Secondly, I shall demonstrate the impossibility of describing the documents submitted by El Salvador as new and decisive facts.

Failure by El Salvador to satisfy the condition of absence of negligence in the submission of allegedly new facts

6. El Salvador claims to satisfy the first condition, namely the absence of negligence, by invoking as an excuse the internal conflict that that country was undergoing throughout the course of the proceedings on which the Chamber ruled in 1992. Yet El Salvador has offered no credible evidence that that conflict constituted an insurmountable obstacle to obtaining the documents that it is now submitting. They come from a very well known United States library — the Newberry Library in Chicago — whose cartographic resources and collection of Spanish maps and charts are

frequently consulted; and also from the National Archives of Mexico. I fail to see how that internal conflict could have impeded the conducting of such research outside the territory of El Salvador, and specifically in the United States of America and the United Mexican States. Furthermore, the Chamber took into consideration, and in its 1992 Judgment pronounced on, the effects of the internal conflict during the proceedings. I cite paragraph 63 of the Judgment[29]:

32

> "The Chamber fully appreciates the difficulties experienced by El Salvador in collecting its evidence, caused by the interference with governmental action resulting from acts of violence. It cannot however apply a presumption that evidence which is unavailable would, if produced, have supported a particular party's case; still less a presumption of the existence of evidence which has not been produced."

7. The Chamber already knows that the copies of the Spherical Chart and of the logbook that El Salvador is now producing have been listed in the Newberry Library catalogue since 1927 at the latest, and were made available to the public in a publication of the same date which itemizes the resources of one of the most prestigious collections, the Edward E. Ayer collection. You will also recall that in its Counter-Memorial Honduras submitted to the Chamber for consideration, during the written stage of the proceedings, an extract from the logbook accompanied by two copies of the Spherical Chart drawn up on the occasion of that cartographic expedition[30], without eliciting any reaction in the Reply of El Salvador. During the oral pleadings Honduras recalled that it had provided those documents; El Salvador did not respond by seeking to rebut them or countering the Honduran arguments. We are thus dealing here with facts already known and taken into account by the Chamber in its 1992 Judgment. We are dealing with facts on which El Salvador had the opportunity to pronounce at the appropriate time, during both the written and oral stages of the case decided in 1992.

8. At the time, El Salvador failed to discharge its duty of diligence by submitting to the Chamber the third copy preserved in the Newberry Library in Chicago which it is now proposing as one of the two grounds for its Application for revision. That Application is based merely on the discovery of another copy of the logbook and another copy of the Spherical Chart, no less than

---

[29] *I.C.J. Reports 1992*, p. 399, para. 63.

[30] Memorial of the Government of the Republic of Honduras, Anns., Vol. 5, Ann. XIII.1.1, pp. 2209-2218; and Vol. VI, Cartographic Annex, pp. 5-6 and map A.2. See also the Counter-Memorial, Vol. II, pp. 579-580, para. 90.

75 years after the publicization of the cartographic resources of the Newberry Library in a publication which mentions the documents that El Salvador is now submitting.

33 9. Furthermore, at the time, El Salvador neither legally evaluated nor drew to the attention of the Chamber the few small — but not pertinent — differences between the Madrid Naval Museum copies of the Spherical Chart submitted to the Chamber by Honduras. El Salvador now alleges insignificant differences between those copies, to which it did not draw attention at the opportune time in the proceedings. Only now, ten years later, does it see fit to enumerate them with a view to challenging their authenticity.

10. In these circumstances, it is clear that El Salvador was manifestly and unjustifiably negligent in failing to mention these documents and study them with due attention at the opportune time in the proceedings. El Salvador cannot now, in light of the terms of the Court's Judgment dismissing the Application for revision by Tunisia, escape the consequences of that negligence, that Judgment having established a presumption *iuris et de jure* in that regard. I cite paragraph 19 of the Court's 1985 Judgment[31]:

> "Article 61 of the Statute provides that an application for revision of a judgment may be made only when it is based upon the discovery of a fact 'which was, when the judgment was given, unknown to the Court and also to the party claiming revision'. So far as knowledge of the fact in question could be derived from the pleadings and material submitted to the Court in the proceedings leading up to the original judgment, anything which was known to the Court must equally have been known to the party claiming revision. The Court must be taken to be aware of every fact established by the material before it, whether or not it expressly refers to such fact in its judgment; similarly, a party cannot argue that it was unaware of a fact which was set forth in the pleadings of its opponent, or in a document annexed to those pleadings or otherwise regularly brought before the Court."

11. El Salvador, aware now of its grave and irremediable negligence at the time, produced new documents on 23 June 2003 with the surprising intention of justifying the very late submission of allegedly new facts introduced into its Application for revision of 10 September 2002. That objective quite clearly results from El Salvador's intention to change, *de facto*, the revision procedure into an appeal or disguised cassation procedure, attempting to introduce a sort of second round of written proceedings through this written submission or pseudo-Reply. The argument is

[31] *I.C.J. Reports 1985*, para. 19.

still the same one: the internal conflict. But in its decision of 29 July 2003 the Chamber did not authorize the production of these new documents, and accordingly I shall not respond to them.

34 12. In sum, the Salvadoran Application for revision of the 1992 Judgment constitutes the best possible evidence of El Salvador's habitual negligence in its extremely late submission of certain documents in the case that were or should have been known to it, and which should have been divulged and utilized by it at the opportune time in the proceedings, which is patently not the present moment in time.

Before I comment on the second point, Mr. President, if you so wish, perhaps this would be an appropriate moment to break for coffee?

Le PRESIDENT : Je vous remercie de votre suggestion, Monsieur le professeur. La Cour suspend son audience pour une dizaine de minutes.

Mr. JIMÉNEZ PIERNAS: Merci, Monsieur le président.

The Court adjourned from 11.25 a.m. to 11.35 a.m.

Le PRESIDENT : Veuillez vous asseoir. La séance est reprise et je donne immédiatement la parole au professeur Carlos Jiménez Piernas.

Mr. JIMÉNEZ PIERNAS: Merci, Monsieur président.

It is impossible to characterize any of the documents produced by El Salvador as a new and decisive fact

13. With your permission, I now turn to the blatant failure by El Salvador to meet the other, equally crucial, condition, namely the possibility of characterizing any of the new documents it has produced as a new fact, as is claimed, and, furthermore, as a fact having a decisive or determining influence on the substance of the case.

14. El Salvador maintains that the alleged differences between the copies, not the discovery of the new copies, truly constitute the new fact. Furthermore, according to our opponent, these differences are sufficient to establish a new and decisive fact that the Chamber should take into consideration. Accordingly, El Salvador has no hesitation in claiming that the copy of the logbook

preserved in the Madrid Naval Museum is incomplete. In order to put an end to El Salvador's gratuitous speculations, Honduras finally submitted a complete copy of the logbook preserved in

35 Madrid. However, in its Application, El Salvador never questioned the technical content of the two copies of the logbook (the Madrid Naval Museum copy and the Newberry Library copy), in which the exact position of the Goascorán River is indicated[32]. Clearly, our opponent's attack is reduced exclusively to what might be called, if I may be permitted to put it that way, a "half-fact". That is, El Salvador is attempting to question the reliability of the cartography of the hydrographic survey derived from the logbook, but not the content of the logbook itself.

15. Furthermore, the two technical reports submitted by Honduras — the archival report and the cartographic report on the logbook and the Spherical Chart — amply demonstrate the high technical quality of the hydrographic survey carried out by the *El Activo* expedition. Moreover, the identical content of all the existing copies — those in the Madrid Naval Museum and those in the Newberry Library — fully confirms the *ratio decidendi* of the 1992 Judgment. But then, in order to implement its intentions, El Salvador can only fall back on the presentational and calligraphic differences between these copies, which in any case have no legal relevance.

16. Moreover, Honduras has explained the presentational and calligraphic differences between the copies in considerable detail in its Written Observations. From that study of the documentation, one conclusion can be drawn: there is no decisive difference between the versions. All the differences are minor and such as are to be expected in documents of this type and period.

17. I shall now reply to a number of arguments put forward by El Salvador:

(a) With regard to the imagined contradiction between the dates of the letter from Commander Meléndez Bruna to the Marquis de Branciforte and the date of his signature at the end of the logbook, which El Salvador has attempted to turn into irrefutable evidence of the fraudulent nature of the manuscript of the logbook preserved at the Madrid Naval Museum, Honduras has replied by demonstrating that the difference between the dates was simply the result of a delay in the preparation of the copies of the results of the expedition, a delay attributable to the fact that its Commander had been seriously ill. Commander Meléndez Bruna himself expressly

[32] *Application for Revision of the Judgment of 11 September 1992*, Vol. II (Documental Annexes), pp. 656-657 (the Newberry Library copy), pp. 683-684 and 706 (the Madrid Naval Museum copy).

36 refers in his letter to the duplicates or copies being prepared. There could be no better proof of the authenticity of these copies — copies which El Salvador appears to find so surprising.

(b) With regard to the incomprehensible doubts that El Salvador has sought to sow by means of the mysterious revelation of three copies of the Spherical Chart and two copies of the logbook of the *El Activo* expedition, Honduras has replied by demonstrating that these constituted one and the same cartographic exercise, derived from one and the same source, and that several copies existed for historical and archival reasons that it has justified and that were common practice in such cases.

(c) With regard to El Salvador's erroneous and incomprehensible assertion that the harbour charts (portolans) that appear on the Chicago copy do not appear on the Madrid Naval Museum copies, Honduras has responded by demonstrating that they were duly catalogued and that as many as three copies showing each anchorage have been preserved.

(d) With regard to the imagined and irrelevant difference El Salvador alleges to exist in the position of the Farallones Blancos in one of the copies of the Spherical Chart (the Naval Museum copy numbered 12-E-5), Honduras has replied by demonstrating that that imagined difference is due simply to an eastward shift of two arc minutes in the course of the line of the meridian of longitude, shown on the map as meridian 32' instead of 30'. Evidently, the Farallones Blancos (today known as the Farallones de Cosigüina) have always been situated at the same co-ordinates. The difference affects only the drawing of the meridian and is obvious on the copy itself. Lastly, the Farallones Blancos are situated at the same distance from Punta Rosario and Meanguera Island on all three copies[33].

(e) Lastly, with regard to the insignificant differences in the presentation, calligraphy and symbols of the copies of the Spherical Chart, of which El Salvador seeks to make so much, Honduras has replied by demonstrating that they were entirely to be expected, given that the Commander, the navigator and his assistants worked as a team to produce the copies. Furthermore, the file in the Newberry Library describing the Spherical Chart states (I cite

[33]Written Observations of the Government of Honduras, 1 April 2003, Vol. I, para. 3.45.

37 page 162 of the second volume of the Written Observations of Honduras)[34]: "Survey carried out by the commander and navigators [*in the plural*] of Brigantine *El Activo*".

I would note, for information, that Don Juan Pantoja, the expedition's navigator, officially "qualified to draw up maps and charts" with the assistance of two "naval gunners seconded to the navigator"[35], had become the person responsible for cartography when his hierarchical superior, Commander Mélendez Bruna, fell seriously ill. In fact, it was Don Juan Pantoja, the navigator, who took responsibility for ensuring that the purpose of the expedition was fulfilled[36]. Don Juan Pantoja was a prominent seaman, renowned for having charted much of the Pacific coast of North America in the service of the Spanish Crown[37].

In the case with which we are concerned, two assistants were appointed to assist the navigator in his navigational tasks and in the physical preparation of the cartography, if need be with the assistance of scribes. This accounts for the existence of different calligraphies in the copies of the Spherical Chart and the logbook. Needless to say, the intellectual authority of a map or chart is established by the competence of the person who compiles and prepares the scientific and mathematical data that have made it possible, and not necessarily by his calligraphy. One cannot call into question the intellectual authorship of a scientific work on the grounds that the handwriting is not that of its author. Its authorship cannot be attributed to the scribe. Thus, the document concerning Juan Pantoja's handwriting, produced yesterday by El Salvador, is factitious and without value.

In any case, we are looking at slight variations in calligraphy which affect neither the accuracy nor the veracity of the cartography, which are vital for the safety of navigation and guarantee that all the copies are skilled originals, drawn by hand and not traced. To dispel any doubt in that regard, Honduras has compared the copies of the Spherical Chart with two contemporary maps — one British and the other from the United States — drawn up two centuries

---

[34]Written Observations of the Government of Honduras, Vol. II, Ann. 4, p. 162.

[35]*Application for Revision of the Judgment of 11 September 1992*, Vol. II (Documental Annexes), Ann. XIV, p. 558. The Spanish text of the two quotations is: *"avilitado para el establecimiento"* and *"artilleros de mar agregados al pilotage"*. This document is also produced by El Salvador in the final document of the judges' folder of 9 September 2003.

[36]Written Observations of the Government of Honduras, Vol. II, Ann. 4, p. 151 (paras. 9-10).

[37]Written Observations of the Government of Honduras, Vol. I, para. 3.43.

later. The conclusion is clear: the general configuration of the coasts is very similar, as is the

38 relative position of a number of key geographical features in the Gulf of Amapala. I refer in particular — lest this be forgotten — to the mouth of the Goascorán River, which was situated at the time, as it still is today, opposite Perico Island and Punta de Perico[38].

18. Clearly, given the force of the arguments submitted by Honduras in its Written Observations and the annexes thereto, El Salvador attempted to conceal its grave negligence and a lack of solid legal arguments by producing new documents on 23 June 2003. Honduras promptly objected to their production for obvious reasons indicated in detail in its Observations dated 10 and 24 July 2003 and accepted by the Chamber in its decision of 29 July.

19. It should be stressed, *ad abundantia,* that none of the so-called differences — artificially alleged by El Salvador in the various stages of the procedure — between the copies of these documents in any way affects the position of the mouth of the Goascorán River and the information regarding it that can be found in the logbook and on the Spherical Chart. In that regard there is no difference between the three copies of the Spherical Chart, or between them and the logbook.

20. In sum, Honduras has indisputably proved in its Written Observations:

(a) that there are no discrepancies between the three copies of the Spherical Chart, only anecdotal differences with no cartographical value;

(b) that these insignificant differences in no way contradict the content of the logbook on which the entire cartography of the expedition is based;

(c) that, furthermore, they do not affect the legal issues underpinning the Chamber's *ratio decidendi* in its 1992 Judgment regarding the course of the Goascorán River as the boundary between the two countries;

(d) that, furthermore, these minuscule differences explicitly demonstrate the authenticity of the manuscript copies that were prepared on the basis of that cartographic survey. What might give grounds for suspicion would be precisely the opposite scenario, namely, the enormous and incredible coincidence that all the manuscript copies of these documents (which, furthermore, were prepared by several hands) should be identical;

---

[38]Written Observations of the Government of Honduras, Vol. I, paras. 3.44 and 3.46.

39 *(e)* lastly, that these are absolutely reliable documents that coincide as to the substance.

In conclusion, the Chamber has before it not a new and decisive document, but another copy of one and the same document already submitted by Honduras during the written stage of the case decided in 1992, and already evaluated by the Chamber in its Judgment.

21. The arguments put forward yesterday by counsel for El Salvador, on the occasion of its presentation to the Chamber, partake of the same artificiality and clumsiness as the theses put forward by El Salvador in the written proceedings. Honduras has never claimed to discuss whether the Spherical Chart was an original document (it has always spoken of the copies) or an official document. That is an entirely new, but also a contrived, debate. The real debate turns on whether there are pertinent differences between the three copies of this same cartographical study, such as to establish the decisive new fact alleged by El Salvador in its written pleadings. In the view of Honduras, there are not.

22. I cannot conclude this presentation without pointing out that the burden of proof of the alleged new facts that would permit a revision of the case decided in 1992 rests with the Party alleging them. But El Salvador has been unable to prove, in its arguments, the presence of any new and decisive fact to justify reconsidering the merits of the case, as required by Article 61, paragraph 1, of the Statute and Article 99 of the Rules of Court. Nor has El Salvador proved that its ignorance of alleged new facts was not due to manifest and unjustified negligence on its part. Yesterday, El Salvador did not offer that evidence. Accordingly, the Application for revision should now be dismissed.

23. Allow me, distinguished Members of the Chamber, to express my gratitude to you for your attention throughout this presentation. Thank you, Mr. President.

Le PRESIDENT : Je vous remercie Monsieur le professeur, et je donne maintenant la parole à Maître Richard Meese.

Mr. MEESE: Mr. President, Members of the Court,

1. It is an honour to represent Honduras before this Chamber formed in order to determine the admissibility of a request for revision of a judgment clothed with the authority of *res judicata* and rendered in a dispute between Honduras and El Salvador more than ten years ago; and, it is my

intention that, in so doing, I shall contribute to ensuring that judgments of the Court are final, binding and without appeal.

40 2. It is my task, following on from Professor Carlos Jiménez Piernas, to continue with the presentation whereby Honduras is seeking to show that El Salvador's claims do not satisfy the conditions laid down by Article 61 of the Statute of the Court. Mr. Carlos López Contreras has kindly asked me to address three points: (1) the great eruption of Cosigüina volcano and the emergence of the Farallones de Cosigüina; (2) the Saco negotiations; (3) the alleged evidence regarding the so-called Goascorán delta and its purported various mouths. These three points relate to the same issue, namely whether, at the date closest to 1821, the River Goascorán, which formed the administrative boundary between the two Spanish provinces, flowed into the sea at the Estero La Cutú or at Estero Ramaditas.

3. May I begin by making a point of order. Over ten years ago, El Salvador did not succeed in proving to the Chamber that the River Goascorán flowed into the sea anywhere else than at the Estero Ramaditas. At the time, it attempted, unsuccessfully, to show that the Goascorán took a course debouching into the Estero La Cutú and that this constituted the administrative boundary between the two Spanish provinces during the colonial period. El Salvador relied on an alleged abrupt change in the mouth of the River Goascorán some decades before the colonial succession of 1821 in order to contend that the course of that river did not represent the administrative boundary and international frontier in 1821. Your Chamber is aware of what the then Chamber decided after hearing and evaluating the arguments and evidence, both of Honduras and of El Salvador. This is perfectly well illustrated by the very terms of the 1992 Judgment. The Chamber decided, unanimously, that the River Goascorán flowing into the sea at the Estero Ramaditas constituted the boundary in 1821. Not a single judge appended any declaration or separate opinion in respect of that sector.

4. But that outcome, or rather that *dispositif*, of the 1992 Judgment is unacceptable to El Salvador. It has therefore instituted appeal or cassation proceedings in respect thereof — procedures excluded by your Statute — in the guise of a request for revision, which is itself governed by cumulative and restrictive conditions that I propose to examine here in relation to El Salvador's claim (now resubmitted by it on the occasion of its request for revision) that the

boundary constituted by the River Goascorán flowed into the sea in 1821 through the Estero La Cutú. As you know, that claim was rejected by the Chamber in 1992.

41 5. El Salvador is seeking today to present supplementary evidence and arguments with a view to persuading the Chamber that the 1821 boundary followed the River Goascorán flowing into the Estero La Cutú. That attempt must fail. Quite simply, there is no new fact, and the cumulative and restrictive conditions of the Statute are not fulfilled.

I. The facts today relied on by El Salvador were not unknown to the Court or to the Party requesting revision, and El Salvador was negligent in being unaware of them. El Salvador's lack of diligence in failing to present its evidence and arguments at the appropriate stage of the proceedings is proven

6. What is clear to me on rereading the written and oral pleadings of the Parties at the time of the 1992 Judgment is that the facts relied on today by El Salvador were addressed by the Chamber in 1992 and that hence, in now revisiting those same facts, El Salvador demonstrates its lack of diligence in failing to present its evidence and arguments at the appropriate stage of the proceedings.

The great eruption of the Cosigüina volcano and the creation of the Farallones de Cosigüina

7. What the Parties could not agree upon before the then Chamber was the consequence of the great eruption of the Cosigüina volcano in 1835, which, according to El Salvador today, resulted in the creation of the Farallones de Cosigüinas. For Honduras, that creation is much older, as documents prior to the date in question demonstrate. It was the Honduran Counter-Memorial which provided the Chamber with the "Carta Esférica" and the logbook of the brigantine *El Activo*[39]. That produced an extremely succinct reply from El Salvador: "this map contains no line whatever showing the course of the Goascorán River"[40]. That, you will agree, is no reply to the evidence produced by Honduras of the existence of this group of rocks as far back as 1794. That was all El Salvador had to say on the subject at the time. It did not see fit to provide the necessary rebuttal.

[39]Counter-Memorial of Honduras, p579, para. 90.

[40]CR 91/29, p. 20.

8. What divides the Parties appearing today before your Chamber is the issue of the date of the creation of this group of rocks. El Salvador now produces documents in the public domain all dating from before 1992. In its "Documental Annexes" appended to the Application for revision, document XVII is dated 1993, but, as this is a second edition, there is every reason to believe that

42 the first edition of this document published in Costa Rica was issued prior to 1992; document XVIII, published in London but also to be found in the library of the Supreme Court of El Salvador, dates from 1836, while document XIX, probably published in London, dates from 1846 and is also to be found in the library of the Supreme Court; document XX, published in Honduras in 1934, is also to be found in the archives and library of El Salvador's Directorate-General for Sovereignty and Boundaries; document XXI was published in 1857 in New York and again in Honduras in 1960; Cartographic Annex 11, published in London, dates from 1707, while maps 12 to 14, published in Madrid, date from 1740, 1750 and 1775 respectively; map 15, published in London, dates from 1816; map 16 was published in Paris in 1827 and map 17 in London in 1838. You will agree that neither the Supreme Court of El Salvador, nor London, nor New York, nor Tegucigalpa, nor Madrid — or indeed Paris — were located in the Goascorán boundary sector at the time of the internal armed conflict which El Salvador invokes as the reason for its having been unable to submit its purported evidence. That is not a valid excuse, and El Salvador could have submitted these documents before 1992, as well as the arguments made by it today on the basis thereof.

The Saco negotiations

9. What divided the Parties before the then Chamber was the issue of whether the documents from the Saco negotiations (1880-1884) between the Parties indicated the mouth of the River Goascorán. In its Counter-Memorial, El Salvador contended that "it was not determined which mouth of the River Goascorán was to be taken into account and, given that no claim was made by Honduras in this sector, there was recognized as such the old mouth of the River Goascorán"[41]. That was an over-hasty conclusion[42]. The Honduran Reply then pointed out that "El Salvador is

[41]Counter-Memorial of El Salvador, pp. 66-67, para. 3.124-3.125.

[42]Counter-Memorial of Honduras, pp. 596-601 and pp. 790-791, para. 84. For the oral arguments see CR 91/27, pp. 19 and 42, and CR 91/29, p. 21.

43 not entitled to claim before the Chamber that the silence of the Honduran and Salvadoran negotiators at the territorial discussions conducted between 1880 and 1888 on the location of the mouth of the Goascorán in the Bay of La Union" logically implied "a reference to 'the old mouth of the River Goascorán' . . ."[43]. You know what the Chamber decided in the operative part of its Judgment. I am not going to repeat it. I would simply quote two sentences from the reasoning of the Judgment: "there is no reference to where [the river Goascorán] flows into the Gulf of Fonseca", and "it is evident that [the delegates] were not aware of any claim by El Salvador that the 1821 boundary was not the 1821 course of the river, but an older course, preserved as provincial boundary by a provision of colonial law."[44]

10. What still today divides the Parties appearing before the present Chamber is once again the same issue of whether the location of the mouth of the Goascorán in 1821 was raised in the course of the Saco negotiations (1880-1884). El Salvador provides no new fact in support of its claim but merely documents in the public domain, all moreover dating from before 1992. El Salvador produces in "Documental Annex XXII" minutes of the Saco negotiations of 1880 and 1884 taken from a work published in El Salvador in 1985 — minutes which had already been produced by Honduras in Annex III.I 24 to its Memorial of 1 June 1988. Then comes a quite extraordinary statement by El Salvador: "These [Minutes] were also used *bona fide* by the Republic of El Salvador itself in its claims. Unfortunately, the Republic of El Salvador noticed subsequently that the texts submitted by Honduras not always matched their original."[45] This comment — I have no idea whether it is justified or not — but it comes 14 years too late. The remainder of the Annex, containing other purported evidence, is only produced now. El Salvador also presents in Cartographic Annex 20 a map dating from 1904, already produced in June 1988 by Honduras as a cartographic annex [A.3].

The so-called Goascorán delta and its various mouths

11. When I received El Salvador's Application for revision, I immediately reread the 1992 Judgment. I was overwhelmed by a sense of déjà vu. I then immersed myself in the written

[43] [Reply] of Honduras, p. 793, para. 87.

[44] *I.C.J. Reports 1992*, p. 548, para. 312.

[45] Application, Vol. I, p. 51, footnote 61.

pleadings of Honduras and El Salvador in order to check. It all came rushing back to me, despite the years that have passed. In particular, the reconnaissance *in situ* of the Goascorán sector carried out by Professor Daniel Bardonnet, who argued the dispute on that sixth sector before the Chamber, as well as his account of it to me on his return from an exhausting trip. Hours in an army truck bumping along unmade tracks, or in a boat among the mosquitoes of Las Ramaditas. But I believe he enjoyed this kind of thing. He told me about the measurements he had taken in the channel at El Rompición de Los Amates, and of his *barco* trip through the mangroves of the Estero Las Ramaditas, mouth of the River Goascorán. All done to avoid any negligence on Honduras's part in failing to discover and notifying to the Chamber the relevant facts for purposes of its decision in this sector of the land boundary. All of you here are aware of the precision and rigorous style of the Professor, for whom I confess my profound admiration. He would not have given his views on an issue without taking the greatest pains to check, both on the ground and elsewhere, the facts underpinning his speech to the judges of the Chamber.

44

12. What divided the Parties before the then Chamber was the issue of whether in 1821 the mouth of the Goascorán formed a delta. For Honduras, this was not the case. There was only one mouth, located at the Estero Las Ramaditas since at least 1794. For El Salvador the River Goascorán had abruptly changed course in 1762, having previously flowed into the Estero La Cutú. On at least three occasions, Honduras begged El Salvador to produce geographical or geological evidence in support of its "*petitio principii*" that the Estero La Cutú could have corresponded to the former mouth of the Goascorán. It begged El Salvador to demonstrate, on the basis of documents capable of establishing the fact alleged, the course followed by the River Goascorán in the latter part of the seventeenth century from Los Amates up to the point where it flowed into the Gulf of Fonseca.

El Salvador never produced any such evidence. At one point El Salvador referred to the "Dionysus Flood", but it failed to give any further particulars or to pursue the matter; nor did it conduct any documentary researches thereon, even though, as I stated just now, Annexes XVIII and XIX dealing with the eruption of the Cosigüina volcano were sitting in the library of the Supreme Court of El Salvador. Since when, El Salvador has not ventured to state. Later it would contradict itself and abandon the argument of the "Dionysus Flood". The change in the course of

the river was said to be due to "sudden and violent increases in the volume of water in and the level of the river which periodically occur"[46]. There was no longer any question of the "Dionysus

45 Flood". In conclusion, what clearly emerges from the documents before the Chamber in 1992 is that El Salvador and Honduras presented their arguments and evidence on this point and that the Chamber evaluated them. I note further that "no record of such an abrupt change of course having occurred has been brought to the Chamber's attention . . ."[47]. At no time, was El Salvador willing to take up the Honduran challenge in the judicial duel over this sector.

13. What still divides the Parties today before the present Chamber is again this same question of the mouth of the Goascorán at the date closest to 1821. The purported scientific and technical evidence contained in Annexes II and IV produced by El Salvador could have been so produced before 1992. Geography, hydrology, geology, aerial photography and satellite imaging existed and had already been used before the International Court of Justice, for example in the *Continental Shelf* case between Libya and Tunisia, decided in 1982. Such studies could have been carried out before 1992 by El Salvador, which has produced in 2002 satellite images purchased abroad in order to observe what is going on in its neighbour's yard. With your permission, I will read the following passage: "Radar imagery [available from the early 1970], with its ability to penetrate vegetative cover, could have been used to examine land forms under a thick tropical rainforest canopy in lieu of topographic changes."[48] Furthermore, the documents on which the report in Annex II is based were already available before 1992 in El Salvador and elsewhere.

> "Materials and supporting technologies germane to the main argument for the age and character of the feature were available long before 1992 . . . Poor documentation of sources and little discussion of the source material (the reference cited lists virtually no indigenous sources). Lastly, an overall lack of strong, independent evidence for the postulated date of the shifting of the flow of the Goascorán River, or that changes in the spatial characteristics of principal elements of the Goascorán River system during the period of historical record have been anything than minor."

This quotation is from the Kearney Report produced by Honduras in response to the report by Coastal Environment, Inc., produced by El Salvador[49].

---

[46]CR 91/27, pp. 65 and 66.

[47]1992 Judgment, para. 308.

[48]WOH, Ann. 14, p. 233, para. 13.

[49]WHO, Ann. 4, p. 230.

The other documents — all moreover in the public domain — were available before 1992, as for example "Documental Annex 11", the *Geographia de Honduras*, published in 1916 in an
46 edition of 2,000 copies. El Salvador claims to have discovered it only on 17 July 2002 at Managua in Nicaragua! It does not state how long this book has been in Managua. Another historical document, the Monograph of the *Departamento de Valle* by Bernardo Galindo y Galindo, published in 1933 in Honduras, was produced by the latter in Annex VIII.I to its Counter-Memorial of 10 February 1989. El Salvador failed at the time to make use of this alleged evidence. Yet it is the internal conflict that is put forward as its excuse for having failed to make a proper defence before the Chamber. Who is going to believe that?

14. However, now, by the very fact of El Salvador's request for revision, the issue which we currently have to address is that of the evidence and explanations on which El Salvador relies today in order to persuade the Chamber that it exercised all due diligence before and during the period leading up to the Judgment of 11 September 1992 in order to demonstrate the correctness and pertinence of its argument concerning the location of the mouth of the River Goascorán in 1821, and in order to show that that location constituted the administrative boundary between the two Spanish provinces during the colonial period.

It is clear from my preceding remarks that El Salvador did not conduct itself before 1992 with the due diligence required of it by the Statute. What we are bound to note in relation to the admissibility of the Application for revision is that El Salvador is seeking to make good today its failure to exercise due diligence before 1992 by invoking the existence of alleged new facts, by means of a variety of artifices:

(1) by citing documents and annexes already produced before 1992; which is unacceptable in admissibility proceedings on a request for revision;

(2) by citing the same facts that Honduras or El Salvador had produced to the Chamber almost 14 years ago; which is unacceptable in admissibility proceedings on a request for revision;

(3) by having recourse to documents sitting quietly in archives outside El Salvador — and perhaps even within El Salvador — simply waiting to be visited by it over 14 years ago; which is unacceptable in admissibility proceedings on a request for revision;

Further, as regards this third point, the so-called Goascorán delta and its various mouths:

47 (4) in blaming the internal armed conflict" or sporadic acts of violence" in the Estero de la Cutú sector as alleged justification for its failure to produce before 1992 the two scientific and technical reports which it produces today in the illegal circumstances already discussed; which is unacceptable in admissibility proceedings on a request for revision, all the more so in that the Chamber had already considered this issue in paragraph 63 of the 1992 Judgment;

(5) in producing reports which are not in themselves objective new facts, but alleged additional evidence created and compiled for purposes of the revision; which is unacceptable in admissibility proceedings on a request for revision.

II. The documents produced today by El Salvador do not satisfy the requirements for characterizing their content as a new and decisive fact on the substance of the Judgment. There is no discovery of a new fact, but merely the presentation of supplementary evidence or arguments inadmissible in revision proceedings

15. The alleged new facts regarding *the great eruption of Cosigüina volcano and the creation of the Farallones de Cosigüina* do not satisfy the conditions of the Statute, for the existence of this group of rocks was well known before 1835. These facts are mentioned in the 1992 Judgment. El Salvador provides no conclusive evidence that this group of rocks did not exist before that date. It is possible that the 1835 eruption may have changed the aspect, the size, the number, and even the name, of this group of rocks. *"La erupción de tipo convulsivo . . . dio origen a las actuales farallones du Golfe.* [The convulsive type of eruption . . . gave rise to the present cliffs of the Gulf]."[50] If the author of this work submitted by our opponents uses the word "present", that clearly demonstrates that they had previously existed. El Salvador appears implicitly to admit this when it states: "all [historical records and charts of the Gulf] that predate 1835 . . . records the existence of an isolated island at the approximate site where the Farallones now stands"[51]. For Honduras, it is impossible to draw any reliable conclusion from the very confused and often indirect accounts of a handful of travellers or explorers, combined with a **48** collection of maps prior and posterior to 1794. There is no new fact regarding the mouth, but merely supplementary evidence and arguments without legal relevance for purposes of revision proceedings.

[50]Application, Documental Annex XXI, Vol. II, p. 790.

[51]Application, Vol I, para. 105

16. The alleged new facts concerning the *Saco negotiations* do not satisfy the conditions of the Statute either. Discussions on the boundary constituted by the course of the River Goascorán, as it is now and as it already was both in 1880 and in 1821, did indeed take place in 1880 and 1884. Those facts are mentioned in the 1992 Judgment. El Salvador ventures today to construct an entire argument derived from a one-sided reading or rereading of the discussions on the draft maritime delimitation at that time in order to conclude: "the mouth of the Goascorán could not possibly have been where the Judgment determined it to have been"[52]. That argument is not persuasive. Furthermore, it contains no new fact decisive of the location of the mouth, but merely supplementary evidence and arguments drawn from documents in the public domain dating from before 1992 and legally irrelevant for purposes of revision proceedings.

17. The alleged new facts concerning the *so-called Goascorán Delta and its various mouths* do not demonstrate the existence of a former course of the River Goascorán flowing into the Gulf of Fonseca at the Estero La Cutú and do not satisfy the conditions of the Statute. These facts were cited in the 1992 Judgment. There is no new fact decisive of the location of the mouth. El Salvador merely produces today supplementary evidence or arguments on the avulsion of the River Goascorán, a fact already known before 1992, and these, too, are without any legal relevance.

The historical sources produced by El Salvador are not decisive in themselves and El Salvador's interpretation of them is unpersuasive.

The two reports containing information of a scientific and technical character in support of an alleged abrupt change in the final course, and hence the mouth, of the River Goascorán some decades before the colonial succession cannot be regarded as "objective facts". The reports emanate from El Salvador in 2002. El Salvador produces no new facts but new documents, produced and obtained moreover in many cases in violation of international law: observations *in*

49 *situ* on foreign territory in violation of territorial sovereignty; aerial photographs taken in violation of the airspace of a foreign State.

Moreover, Annex II cannot be regarded as a fact of such a nature as to be a decisive factor on the settlement of the dispute for purposes of revision. It contains no evidence that the mouth of

[52]Application, Vol. I, para. 138.

the River Goascorán was different from that as determined by the 1992 Judgment and that there existed a different mouth constituting the colonial boundary which, as a result of independence, became the international boundary with Honduras.

The Kearney report indicates that no firm conclusion can be drawn from the work carried out by El Salvador in 2002 and that it is irremediably flawed by defects and lacunae. "The crux of the argument concerning whether the whole of the 'Goascorán delta' is actually deltaic is not addressed."[53] Moreover Annex II fails to answer the question, "when did the Ramaditas Branch become the dominant distributor over the Cutú Branch?" Kearney poses the question: "if the Ramaditas Branch has shifted . . . when did it shift, and at what rate?"[54] He goes on: "the evidence presented suggesting that it occurred 50 years prior to 1794 is very inferential and hardly scientifically conclusive"[55]. He continues: "The whole argument [of the Dionysus Flood of 1762], in essence, exists in the nature of the possible, but not in the realm of the highly probably."[56] He concludes: "the CEI report does not really tie down with any precision the date of the switching (if it is actually occurred in the last 250 years) of the main flow, or discharge of, the Goascorán River from the Cutú Branch to the Ramaditas Branch"[57].

By contrast, the Kearney Report, in reply to the report in Annex II seeking to show that the River Goascorán is constantly changing its bed, recognizes that the river has a number of alluvial channels at times of flood and emphasizes the stability of the Goascorán river system. In the absence of any better evidence, since 1821 — or indeed since 1774 — the course of the River Goascorán has not varied. The last time when it is claimed to have shifted, according to El Salvador today, though it has provided no proof of this, was as a result of the "Dionysus Flood",

50 claimed to have occurred in 1762, namely 241 years ago. The Chamber will note that for at least two centuries, and indeed still today, the River Goascorán has had its mouth in the Estero Las Ramaditas.

---

[53] *Ibid.*, p. 234, para. 16.

[54] *Ibid.*, para. 18

[55] *Ibid.*, p. 235, para. 21.

[56] *Ibid.*, para. 23.

[57] *Ibid.*, para. 24.

18. On the time-scale of modern boundaries, I would call that stability. And it is essential that not only such stability, but also the inviolability of the 1821 boundary, be preserved. Just as the *res judicata* authority of the Court's judgments must be respected. None of the supplementary evidence and arguments of El Salvador can have any decisive effect whatever on what led the Chamber to decide what it decided in 1992. El Salvador's scientific, technical and historical reports do not show that in 1821 the River Goascorán followed a course other than that established and recognized by the Judgment of the Chamber. El Salvador can at most claim to have furnished additional evidence on facts already known to the Chamber but without relevance to the admissibility of a request for revision of the Judgment.

19. In overall conclusion, El Salvador has failed to show that the existence of a former course of the River Goascorán was a determining or decisive factor. It has failed to show that that course ran and debouched in 1821 where El Salvador claims it to have done in its Application for revision, and that it also constituted the administrative boundary between the two Spanish provinces during the colonial period. The request for revision must be declared inadmissible.

20. Allow me, Members of the Chamber, to express my thanks to you for having kindly listened to this presentation. I would now ask you to be kind enough to give the floor to Professor Luis Ignacio Sánchez Rodríguez so that he may continue with Honduras's presentation.

Thank you, Mr. President.

Le PRESIDENT : Je vous remercie Maître et je donne maintenant la parole à M. le professeur Luis Sànchez Rodríguez

The PRESIDENT: Thank you, Mr. Meese. I shall now give the floor to Professor Luis Sánchez Rodríguez.

Mr. SÁNCHEZ RODRÍGUEZ:

1. Please allow me, Members of the Chamber, to begin my statement by expressing the honour which I feel in appearing before the Chamber today for the purpose of representing once again the interests of Honduras. I shared that honour over ten years ago with my friend Professor Daniel Bardonnet. What you are hearing today was heard by the Chamber and the result was the 1992 Judgment, a decision made in full knowledge of the facts.

51

2. My friends Professors Pierre-Marie Dupuy and Carlos Jiménez Piernas and Maître Richard Meese have examined respectively the characteristics of and conditions for a new fact and applied the requirements of the Statute and the Rules of Court to the copies of the "Carta Esférica" and log of the brigantine *El Activo*, as well as addressing the issue of the mouth of the Goascorán in 1821. The task entrusted to me by the Agent of Honduras is that of analysing the other alleged facts put forward by El Salvador in its Application for revision, facts which are claimed to be relevant for purposes of "corroborating" or "contextualizing" other facts — facts which are no such thing, but which are nevertheless relied on in support of the primary claim[58].

El Salvador's other facts, allegations and "evidences and proofs"

3. The first statement which I feel compelled to make is that these facts are covered by neither the letter nor the spirit of the Statute and Rules of Court. They are simply the product of the fertile imagination which informs the entire Salvadoran Application, an imagination which ultimately leads to a serious distortion of the requirements for a "new fact", because those requirements are strict, cumulative and restrictive. The other Party even goes so far as to characterize them as "evidences and proofs", which is the best implicit confession on its part of the true nature of those facts taken separately and of the Salvadoran Application as a whole: disguised appeal or cassation proceedings against the 1992 Judgment. That is because these facts are nothing, either in nature or content, other than an unremitting criticism of the *ratio decidendi* of the 1992 Judgment in the Goascorán sector, and yet that Judgment is one of the longest, most painstaking and most detailed in the entire history of the Court. Extraordinary!

4. El Salvador attempts in vain to rewrite history and reinvent geography, knowing that the historical aspects and geographical considerations were the object of long, intense debate before the Court — in both written and oral phases — prior to the Judgment of 11 September 1992. Thus, it

52

is clear — and this must be emphasized — that one must firmly reject as from that date any notion that "the fact" that one or two books from the last century, or a lecture given several decades ago in which a senior official made known his views, or various historical documents presented by Honduras in its Counter-Memorial, could in any sense be strictly characterized as a new fact, or

[58] Application for revision, Documental Anns., III to XIII, XX to XXIV.

even as an alleged "corroborating", "explanatory", or "contextualizing" fact, or as any other kind of new, non-existent or imaginary "fact". Article 61 of the Statute of the International Court of Justice and Article 99 of the Rules of Court should have been afforded greater respect by the other Party, who cannot manipulate or distort their respective provisions without seriously breaching the principle of procedural good faith. A book which is already known is not a new fact of decisive importance, either from a technical or legal perspective or indeed from the common-sense standpoint of the layman.

5. Not only does such an exaggerated and bizarre characterization raise questions about the true intentions of the person making it, it also presupposes contempt on the part of the other Party and an insult to the high-quality work of this Chamber of the Court. But in addition — and most seriously — such characterization constitutes a direct attack on the *res judicata* authority of the judgments of the International Court of Justice or, and this amounts to the same thing, on the entire international judicial system.

The question of the alleged evidence obtained illegally

6. It is impossible to call by any other name the production of unacceptable "technical evidence" obtained in July 2002 in grave violation of the sovereignty and territorial integrity of Honduras and without that country's consent. How is it possible to submit to the Court with a view to revision alleged "evidence" obtained by illegal means? How is it possible to flout the *res judicata* authority of the Court's judgments to such an extent? How is it possible moreover to do so gratuitously, in that such "evidence" proves nothing in respect of revision? Just what is the limit to the audacity of an opponent which produces such material to a court?

7. In this connection, the Court's statement in the *Corfu Channel* case (merits) is clearly relevant, *mutatis mutandis*:

> "The Court cannot accept such a line of defence. The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law . . . The Court cannot accept this defence either. Between independent States, respect for territorial sovereignty is an essential foundation of international relations . . . But to ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty." (*I.C.J. Reports 1949*, p. 35.)

53

Members of the Chamber, any comment on what this Court affirmed in 1949 as it relates to El Salvador's conduct in obtaining alleged evidence by illegal means would be superfluous.

I should add that, while these documents do indeed date from within the six-month period prescribed by Article 61 of the Statute, that date is unacceptable for purposes of the present proceedings since the information contained therein was gathered by illegal means. It therefore cannot have been discovered within the six months preceding the expiry of the ten-year period in which an application for revision is possible. Moreover, as alleged evidence of the sudden change in the boundary river, El Salvador offers two reports which it commissioned itself at a date of its choosing, occurring outside of a high-water period. All it needed to do was to plan them so as to file its Application within the deadline. Thus it assigned the date which it desired to those reports, knowing that it would have to file the Application within six months thereafter.

The nature of these "facts" and the requirements for a new fact

8. All these facts, whether singular or multiple in nature, which El Salvador dares to submit in support of its Application for revision and which in quantitative terms account for the bulk of its documentary annexes, clearly have one characteristic trait in common: none of these documents fulfils any of the cumulative, restrictive conditions or — by virtue of the very nature of the procedure — any of the specific requirements laid down by Article 61 of the Statute of the Court. According to the rules recently established by the Court in its Judgment of 3 February 2003 on the *Application for Revision of the Judgment of 11 July 1996*, those conditions are as follows:

> "*(a)* the application should be based upon the 'discovery' of a 'fact'".

According to Judge Mahiou's separate opinion in that case, a fact is an "event which occurred" or, according to the definition given by Judge Vereshchetin, "something that actually exists". Consequently, none of the documentary annexes I am referring to concerns facts falling within this specific meaning for purposes of revision.

54

> "*(b)* the fact, the discovery of which is relied on, must be 'of such a nature as to be a decisive factor'".

But every one of the Salvadoran documents is merely indirect, polemical, tangential and peripheral for purposes of revision. They have no substance. They are nothing.

"*(c)* the fact should have been 'unknown' to the Court and to the party claiming revision when the judgment was given".

The Chamber is perfectly familiar with the positions and historical and geographical arguments presented by the Parties, and they can be found in the documentary annexes to the written pleadings which El Salvador persists in reciting today. It is self-evident that our opponent was aware of them also.

"*(d)* ignorance of this fact must not be 'due to negligence'".

It is truly extraordinary and surprising that El Salvador should be ignorant of its own lack of rigour, its habitual lack of diligence, its completely passive conduct and the deficiencies in its evidence. For during the written phase preceding the 1992 Judgment our opponent could and should have produced all the documents which it is now presenting. If all of this is happening today, it is because of its own want of care. It now seeks to raise that want of care against Honduras as a ground for revision. How can El Salvador claim that the failure to produce old books, in widespread, public, free circulation throughout Central America, was due to internal armed conflict, secrecy allegedly imposed by Honduras or sweeping sequestration in all libraries? How can El Salvador claim ignorance of documents published in the official journal of Honduras? Its allegations run afoul of common sense and procedural good faith.

"*(e)* the application for revision must be 'made at latest within six months of the discovery of the new fact' and 'before ten years have elapsed from the date of the judgment'"[59].

Members of the Chamber, I have just explained to you that the documentary annexes concerning the "contextualizing" or "corroborating" facts do not satisfy any of the conditions set by Article 61

55 of the Statute of the Court. I must now take back what I said. In fact, the Salvadoran Application satisfies one and only one of those conditions, namely the ten-year deadline from the date of the Judgment of the Court, albeit with just a few hours to spare.

9. Clearly, compliance with the second of the deadlines set, that is, the six-month period from the discovery of the new fact, can in no way, absolutely no way, be determined based on the documents submitted by El Salvador. Submitting is not proving. All of them could have and

[59] *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, para. 16.

should have been obtained by the other Party before the critical deadline of 10 March 2002. It is totally inexplicable and illogical that the reference works, books, historical documents, illegal surveys, technical reports and legislative texts subject to mandatory official publication should have been discovered only in the period immediately after 10 March 2002. No court in the world could accept a Salvadoran argument so extraordinary that it simply defies common sense. In March 2002 was the internal conflict in El Salvador ongoing? Did March 2002 see the lifting of the official secrecy imposed by the Honduran authorities on all books on the isthmus? In March 2002 was the confiscation and sequestering of all official Honduran documents continuing? In March 2002 did it become possible to conduct illegal surveys? Was satellite imagery technology invented in March 2002? Were the prophetic claims of fluvial avulsions advanced in March 2002? Was the fertile imagination of a fortune-teller first applied to the forensic arts in March 2002? The answer to all these questions is the same: "no".

10. The task undertaken by El Salvador since the oral phase of these proceedings concerning the admissibility of the Application for revision is every bit as illusory as it is frustrating, and for two fundamental reasons. The first is that, as is well known, the conditions laid down by the Statute are cumulative. If any one of them is lacking, the Application must be rejected. The truth is that only one condition has been fulfilled, and even then with bare hours to spare.

11. The second reason, just as fundamental, concerns an aspect which the other Party has totally ignored: the essential problem of the burden of proof. El Salvador persists in disregarding the fact that it must prove everything it asserts. Please excuse me once again, Members of the

56

Chamber, for I am going to repeat in summary form the elements to be proved by the other Party. First, that these are facts, in other words, events which occurred or something which actually exists; second, that these facts have a decisive, substantial or fundamental influence; third, that they were not known to the Court or to the Party invoking them before the Judgment was given; fourth, that there has been no error, negligence or absence of due diligence; fifth, that the alleged facts were not known to El Salvador before 10 March 2002. El Salvador should have proved, cumulatively, fulfilment of the five conditions which I have just mentioned. El Salvador has proved nothing, nothing at all, absolutely nothing. This is another decisive reason for rejecting the Application for

revision, artificially created by that country, which persists in disregarding all of the conditions governing it.

12. In my view, Members of the Chamber, the main problem which El Salvador is incapable of surmounting not only concerns the procedural requirements laid down by Article 61 of the Statute but also raises a preliminary and decisive issue: the manipulation of the concept of revision in order to get round the impossibility of instituting appeal or cassation proceedings against the Judgment of 11 September 1992. None of the "corroborating", "explanatory" or "contextualizing" documents now presented by El Salvador represents anything other than sleight of hand intended to support its old, familiar argument — an argument that was moreover rejected — concerning the avulsion of the Goascorán River. That is a well-known fact, amply debated and painstakingly addressed by the Court in 1992[60]. All the documents which El Salvador is now seeking to produce highlight its old strategy of moving the mouth of the Goascorán River to La Cutú. It all boils down to an attack on the *res judicata* authority of the Judgment. It all consists in rejecting the *ratio decidendi*. It is all confined, since 1992, to an implicit affirmation of an error *in iudicando*.

13. The Judgment of 11 September 1992 is based on the application of the *uti possidetis juris* as the legal principle applicable to the settlement of the dispute[61]. Accordingly, any claim of a new fact of decisive importance must, by definition, relate to proof of that principle. Does any document put forward by El Salvador prove the existence of an *uti possidetis* different from that decided by the Chamber? None. Absolutely none. Neither directly nor remotely.

57 14. We must not forget that, as indicated in the 1992 Judgment[62], El Salvador must prove not only where the alleged other mouth of the Goascorán River was located in 1821 but that this other mouth formed the Spanish boundary between the provinces of Honduras and El Salvador at that date. Yet none of the Salvadoran annexes to which I have just referred proves, or is capable of proving, these two points.

15. The best proof of El Salvador's hidden agenda is, as always, provided by El Salvador, the Applicant, itself. In the "submissions" in the Application (p. 71), El Salvador quite irrationally

---

[60] *I.C.J. Reports 1992*, pp. 543 *et seq.*, paras. 306 *et seq.*

[61] *I.C.J. Reports 1992*, pp. 380 *et seq.*, paras. 27 *et seq.*, pp. 386 *et seq.*, paras. 40 *et seq.*

[62] *Ibid,*. pp. 543 *et seq.*, paras. 306 *et seq.*

asks the Chamber, as if the Application for revision had already been accepted by it, to draw a new boundary line in the Goascorán sector. This request is identical with that made by El Salvador in the oral proceedings in 1991[63]. Our opponents are asking the Chamber in 2002 to decide as they had requested over ten years ago — a request denied on properly reasoned grounds. But as unreasonable as this claim may be in procedural terms, there is something which neither Tunisia nor Yugoslavia dared request and which very clearly shows, once again, the other Party's covert agenda: to flout the *res judicata*, to reject the *ratio decidendi*, to claim a non-existent error *in iudicando*, to present an artificial request and flagrantly to fail to respect the requirements of the Statute of the Court. Basically, it is the same old story, the interminable Salvadoran saga, which is also the key to its failure to execute the 1992 Judgment. That story continues today in the form of an attempt to appeal, or seek cassation, before this Chamber. I shall now proceed to rebut certain of El Salvador's oral arguments.

Rebuttal of El Salvador's oral arguments

16. Until now I have confined myself in my statement to analysing the extraordinary arguments and worthless annexes presented by El Salvador in connection with its Application for revision; I shall now continue by considering the argument made yesterday before this Chamber by the advocates and counsel for that country.

58 17. Yesterday I listened with the greatest interest to the other Party's perception of the *uti possidetis juris* in this case. As far as I am concerned, the 1992 Judgment said it all concerning the application of this principle in Central America. I shall therefore not return to this, but confine myself to a number of general observations.

First, the Salvadoran argument concerning avulsion as it relates to *uti possidetis* is irreparably flawed in two respects. First, El Salvador offers no evidence of such avulsion. Second, what then is the precise, or at least plausible, date of this alleged avulsion, which remains a purely conjectural event having occurred at some time in the eighteenth century? We are thus given no specific date.

[63] *Ibid,*. pp. 375.

Second, these Salvadoran arguments on avulsion and the history of the application of Spanish colonial law in the present case are known and were addressed in the Chamber's decision in 1992[64]. They are accordingly without relevance to the admissibility of an application for revision.

Third, the critical date in law for the *uti possidetis* is that of independence. Another Chamber said so clearly. This principle "applies . . . to the 'photograph' of the territorial situation then existing . . . [It] freezes the territorial title; it stops the clock but does not put back the hands . . ."[65]. Contrary to what our opponents contend, the only date which counts is that of 1821, not any earlier date. Despite its desperate efforts, El Salvador has been unable to demonstrate the existence of a Spanish decision fixing the boundary along the Rio Goascorán at the mouth of the Estero La Cutú at a specific earlier date.

Fourth, the 1992 Judgment considered that the Saco negotiations in 1880 recognized the international frontier as running "from its mouth in the Gulf of Fonseca, Bay of La Unión, upstream in a *north-easterly direction* . . ."[66], not in a north-south direction.

Thus, you can only share my conclusion that (1) the *uti possidetis in 1821* placed the boundary river at the Las Ramaditas mouth, as the 1992 Judgment rightly decided, and (2) that

59 none of El Salvador's efforts yesterday to situate the boundary at the Estero La Cutú has any basis whatsoever in the *uti possidetis in 1821*. In reality, El Salvador is once again, under cover of revision, seeking to appeal or overturn paragraph 430 of the Judgment of the Chamber.

18. Members of the Chamber, I shall conclude this statement of the position of the Government of Honduras by asking, on the basis of all the facts and arguments which its delegation has presented, by repeating the request that your Chamber declare inadmissible El Salvador's Application for revision.

Members of the Chamber, Mr. President, I shall close this first round of oral argument by thanking you for your kind attention. Thank you very much.

---

[64]Judgment, p. 547, para. 310.

[65]1986 Judgment, *I.C.J. Reports 1986*, p. 568, para. 30.

[66]*I.C.J. Reports 1992*, p. 548, para. 312; emphasis added.

The PRESIDENT: Thank you, Professor Sánchez Rodríguez. Your statement on behalf of the Republic of Honduras brings to a close the first round of oral argument. The Court is thankful to the Parties for their statements before it. It will meet again tomorrow, Wednesday 10 September 2003, at 3 p.m. to hear the second round of oral argument by the Republic of El Salvador. The sitting is closed.

The Chamber rose at 1 p.m.