C6/CR 2003/4

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2003

Public sitting of the Chamber

held on Wednesday 10 September 2003, at 3 p.m., at the Peace Palace,

Judge Guillaume, President of the Chamber, presiding,

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

VERBATIM RECORD

ANNÉE 2003

Audience publique de la Chambre

tenue le mercredi 10 septembre 2003, à 15 heures, au Palais de la Paix,

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

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

COMPTE RENDU

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

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

M. Couvreur, greffier

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

Mr. Gabriel Mauricio Gutiérrez Castro,

as Agent;

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

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

as Co-Agents;

Lt. Agustín Vásquez Gómez,

as Deputy-Agent;

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

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

as Counsel and Advocates;

Mr. Mauricio Alfredo Clará,

Mr. Domingo E. Acevedo,

as Counsel;

Licda. Beatriz Borja de Miguel,

Ms Patricia Kennedy,

Ms Ana Mogorrón Huerta,

as Advisers;

Lic. César Martínez,

Ms Lilian Overdiek,

Ms Cecilia Montoya de Guardado,

as Assistants.

The Government of Honduras is represented by:

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

as Agent;

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

M. Gabriel Mauricio Gutiérrez Castro,

comme agent;

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

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

comme coagents;

M. Agustín Vásquez Gómez,

comme agent adjoint;

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

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

comme conseils et avocats;

M. Mauricio Alfredo Clará,

M. Domingo E. Acevedo,

comme conseils;

Mme Beatriz Borja de Miguel,

Mme Patricia Kennedy,

Mme Ana Mogorrón Huerta,

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M. César Martínez,

Mme Lilian Overdiek,

Mme Cecilia Montoya de Guardado,

comme assistants.

Le Gouvernement du Honduras est représenté par :

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

comme agent;

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as Co-Agent;

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

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

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

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

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

as Counsel and Advocates;

H.E. Mr. Aníbal Quiñónez Abarca, Acting Minister for Foreign Affairs,

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

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

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

comme conseils et avocats;

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

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

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

comme conseils.

Le PRESIDENT DE LA CHAMBRE : Veuillez vous asseoir. La séance est ouverte.

Nous sommes aujourd'hui réunis pour entendre la République d'El Salvador dans son second tour de plaidoiries dans l'affaire de la *Demande en revision de l'arrêt du 11 September 1992 en l'affaire du* Différend frontalier terrestre, insulaire et maritime (El Salvador/Honduras ; Nicaragua (intervenant)) et je vais immédiatement donner la parole au professeur Maurice Mendelson au nom d'El Salvador.

Mr. MENDELSON: Je vous remercie, Monsieur le président.

1. Mr. President, distinguished Members of the Chamber, our presentations this afternoon will be divided thematically, rather than by strict reference to particular individuals amongst our learned opponents — not least because quite often what you heard from them was exactly the same tune, just sung by different voices. The voices were, indeed, beautiful but as the for the tune well, we will see in due course. In order of speaking, I shall be responsible mostly for the topics I dealt with in the first round; Professor Remiro Brotóns more specifically for *uti possidetis* and the *El Activo* materials; Her Excellency the Minister for Foreign Affairs for certain other issues, such as the allegations of bad faith and non-compliance; and finally, the Agent, Dr. Gabriel Mauricio Gutiérrez Castro, will address some concluding remarks to you, before presenting the formal conclusions of El Salvador. I should add that references will be given in the footnotes to the verbatim record, rather than orally and also, so as to avoid any misunderstandings, that we are going to focus on what we think are the most important points which we need to clarify in response to yesterday's arguments, not every single one of them.

A. The failure of Honduras to deal with El Salvador's oral arguments

2. I have to confess that yesterday's arguments by the distinguished representatives of Honduras left the Salvadoran representatives surprised, confused and embarrassed. Not in the sense that they left us ashamed of our arguments and overwhelmed by the cogency of theirs. No, our surprise and confusion is due to the fact that the pleadings of all five speakers, for all their elegance, failed virtually completely to respond to the points we made on Monday morning. At some points, I almost wondered whether we were inhabiting parallel universes: ours, in which we

had responded on Monday to the Honduras Written Observations to the best of our ability by detailed arguments of our own; and theirs, in which there was no Monday, or if there was, it was a Monday on which there had been no oral argument by El Salvador. Because in fact all that the Agent and, particularly, the counsel of Honduras, did was to serve up a reheated version of their original Written Observations. I was, eventually, relieved of my growing sense of unreality by the odd reference, very much *en passant*, to what one or other of us had said, but really it amounted to very little — was little more than a passing reference to the fact that we had been present.

3. I say this, not at all out of a sense of injured *amour-propre* on behalf of the Minister for Foreign Affairs, my friend Professor Remiro Brotóns, or myself; but because it gives rise to some serious issues.

4. We had understood the purpose of oral argument to be to address the issues which still divide the parties, and that the point of having two rounds is so that there can be a real engagement and debate. That, presumably, is why the Chamber exercised its discretion under Rule 99 (3) to give the parties a further opportunity, beyond the written pleadings, of presenting their views. Furthermore, Article 60 (1) of the Rules provides in pertinent part that the oral statements "shall be directed to the issues that still divide the parties, and shall not go over the whole ground covered by the pleadings, *or merely repeat the facts and arguments these contain*" (emphasis added). And, as Honduras knows full well, Practice Direction VI states in pertinent part that "The Court requires full compliance with these provisions . . .".

5. Hence our surprise and our confusion. But why our embarrassment? Well, because we for our part do not want to abuse the process of the Chamber or insult its intelligence. How do we respond, in this second round, to the counter-arguments of Honduras if it has not made any? If they do not answer us, how can we reply to them today?

6. We hope that the Chamber will appreciate the difficulty that our opponents have placed us in, not through the irrefutability of their responses to us, but their almost total absence, and we hope that it will understand if we therefore have to repeat ourselves a little in order to try, once more, to explain how our opponents have got completely the wrong end of the stick in so many respects. But I hasten to assure the Chamber that we shall not simply repeat what we said on Monday.

7. El Salvador also asks the Chamber to take note of Honduras's almost complete failure to deal with our oral arguments, in two particular respects. First, we ask the Chamber to note that Honduras has in effect conceded, by not answering our points, that it has no answer to them. Secondly, if Honduras by any chance tries to gain an unfair procedural advantage, by holding its response to our Monday observations in reserve until its second round, and in particular if it seeks to raise new points — which we will not of course have an opportunity then to reply to — we formally request the Court to prevent it from doing so, for this would be an infringement of the principle of the equality of the parties and an abuse of the process of the Chamber.

8. I turn now to a series of specific points where Honduras has misunderstood or misrepresented the position, in fact or in law, and whether or not it even purported to answer us. I begin with some observations on the nature of proceedings for the admission of a request for revision and the criteria to be applied — relatively *in abstracto*, as it were — before applying them to some of the specific facts of this case.

B. Cumulative nature of the conditions imposed by Article 61

9. I turn first to a point which one might have thought was merely trivial had it not come from the mouth of my distinguished friend and opponent, Professor Dupuy. In one of his few references to what had been said by El Salvador on Monday, he remarked on my failure to mention that the conditions of Article 61 are *cumulative*[1]. Mr. President, is this really meant as a serious point? It is true that I did not expressly use the word, but I venture to suppose that there was no Member of this honourable Chamber who was left in the slightest doubt that El Salvador accepted that the conditions were cumulative, in the sense that they all had to be fulfilled. After all, if they are not cumulative presumably they are alternative. But it would have been ludicrous to submit to this Chamber that they *were* alternative, in view of the clear meaning of the Statute and its drafting history, not to mention the express holding that each and every condition had to be fulfilled in the *Tunisia/Libya* revision case[2]. And if it *was* El Salvador's position that the conditions were alternative, instead of examining each condition in considerable, and I fear perhaps exhaustive and

[1] C6/CR 2003/3, p. 18, para. 10.

[2] *I.C.J. Reports 1985*, p. 207, para. 29.

exhausting, detail, why did we not just submit that, as it was not disputed that we had satisfied — at any rate — one of the six conditions, the ten-year rule, we were therefore "home and dry"? Because that would be the logic of there being alternative conditions. The answer is obvious, and I will spend no more time on this point.

C. Honduras's unwarranted extension of the time within which due diligence must be exercised

10. I do, however, have to return to the question of Honduras's unwarranted extension of the time during which due diligence has to be exercised. On Monday, I drew attention to the fact that, in its Written Observations, Honduras repeatedly asked why El Salvador had failed to find or bring to the Court's attention any new material during the period following the Judgment of 1992, until it finally did so in its Application of 2002. More than once, in different contexts, I pointed out that this was to misrepresent the Statute: what the Statute plainly requires is due diligence *before* judgment is given, not *afterwards.* A State can, and usually will, simply accept the judgment and react only if some new fact falls into its lap, so to speak, which tells it that the original judgment was based on a false factual premise. On the other hand, if it considers, for example, that fresh scientific developments give it a better chance of proving what it could not prove the first time around, then it can commission a new study, just as a convicted person can commission a DNA test, taking advantage of new technology. These and other options are open under the Statute, and there are sufficient safeguards against abuse by requiring that the fact should not have been known to the party or to the Court prior to the original judgment; that the lack of knowledge should not have been due to negligence; and that the application is made within six months of the discovery; and, lastly, that it, in any event, be made within ten years. So when, in his oral argument, Professor Dupuy[3] — echoed by Professor Sánchez Rodríguez[4] — asked rhetorically for the proofs and explanations of why El Salvador waited until the end of the ten-year period, when a number of such questions: why it could not have previously consulted the documents it relies on now, and could not have commissioned its technical and scientific studies and so on, he has already had his answer — they had already had their answer — on Monday, and we submit that that answer is

[3] C6/CR 2003/3, pp. 28-29, para. 36.

[4] *Ibid.*, p. 55, para. 9.

irrefutable. There is no obligation to continue to look for documents or to show any due diligence after the date of the original judgment. So this is merely a misunderstanding, deliberate or innocent on the part of Honduras, a mere rhetorical flourish perhaps.

D. The difference between revision on the one hand, and appeal or cassation on the other

11. Another, perhaps, mere rhetorical flourish, but we owe the respect to our opponents to take it seriously, is the difference which our opponents seek to draw between revision on the one hand and appeal or cassation on the other. Several of Honduras's counsel accused El Salvador of seeking to appeal or to obtain cassation of the original decision, under the guise of an application for revision. The basis for this extraordinary contention is apparently that we are challenging the original decision, and seek to have it reversed. This is nothing but a baseless rhetorical point. El Salvador is very well aware of the fact that — though the details and the terminology differ between legal systems — an appeal, or a proceeding in cassation, is essentially an attempt to get the former decision reversed on the grounds of error in the findings of law or fact, to which one might perhaps add, excess of jurisdiction. Revision, on the other hand, is not based on the premise that the original court made a mistake, or lacked jurisdiction; it is based on the principle that, in the interests of justice, a decision should not be allowed to stand where it was based on a factual premise which subsequent discovery has shown to be false. There is no criticism — no need for criticism — of the previous Chamber: it may well have adjudged matters correctly in the light of the information it had before it; and in general terms there is no criticism, no need for criticism, no implied criticism, when a party applies for revision of a judgment in any legal system. It is simply that the information that was relied on initially was wrong, and that is why all legal systems, civil as well as criminal, international as well as national, recognize a right of revision in such circumstances.

12. It is, of course, true, that the Applicant is seeking reversal of the previous decision. In that respect — the relief it seeks — is somewhat similar — though not formally, but in substance is similar — to what it might hope to achieve if it were able to apply for an appeal or cassation, or if it had chosen in some other theoretical universe where that was open to it, to seek that relief. But what of that? What of the fact that the result that we seek is similar to the result that would be

achieved if there were an appeal or cassation and we were successful. Whether the harm was done to the Party's interests by a mistake of law or fact, or by a decision which, whilst seemingly unimpeachable, has the latent defect of a false factual premise that only subsequent discovery can reveal, in each case what justice requires is for the decision to be changed, as those who drafted the Statute very well recognized. *Pace*, Professor Sánchez Rodríguez[5] and his colleagues, it also follows, as I pointed out already on Monday, that there is no impropriety or prematurity in El Salvador's putting its cards on the table now and indicating the judgment it will seek *if* its Application is held admissible. And the fact that the decision it seeks is the same as what it requested in the first round is nothing more sinister than the logical consequence that, if it can make good its claims regarding avulsion or the original course of the river and the inferences which the 1992 Chamber was prepared to draw from that: *if* it can make good its claims, it follows that the old course is where the Chamber should have placed the line — indeed, where it *would* have placed the line, as the 1992 Judgment tells us.

13. The reality is, Mr. President, Members of the Chamber, that so far from El Salvador's using revision as a smokescreen for appeal or cassation, it is Honduras which is raising this issue as a smokescreen to try and divert attention away from the real business of these proceedings, which is, as the Application made clear from its outset — it is printed on the cover of the Application itself — the admissibility of an application, the admission of a request for revision based on new facts.

E. The alleged apocalyptic consequences of admitting this Application

14. Likewise, the apocalyptic consequences for international law predicted by our distinguished opponents if this Application is declared admissible, or even if the request for revision is granted, is no more than a scare story. And all the less frightening when it is borne in mind that, following a very serious debate, participated in by very distinguished jurists, the Assembly of the League of Nations, accepting the advice of the Advisory Committee of Jurists, deliberately rejected the principle — which was espoused incidentally by Martens — of what I might call *fiat res judicata, ruat coelum* ("let *res judicata* prevail, though the heavens fall") in

[5]C6/CR 2003/3, p. 57, para. 15.

favour of a more balanced system, which permitted a right of revision in appropriate circumstances, because "*la justice a aussi ses légitimes revendications*"[6].

F. The question of the burden of proof

15. On Monday El Salvador argued that in proceedings for admissibility of an application for revision, the appropriate standard of proof was that the facts relied on (and, incidentally, their decisiveness), the appropriate standard should be *plausibility*. We put forward a reasoned argument on this, based on the language of three of the authentic texts of the Charter — I regret that my Russian was not good enough to add a fourth, and my Chinese is non-existent, but it would be surprising if they are different — we put forward a reasoned argument based on the language of the Statute, based on the object and purpose of the provisions on revision, and based on what we submit is a reasonable balance between the interests of expedition and the interests of the parties. Professor Dupuy and his colleagues first distort what we submitted by saying that we argued that the Chamber had to accept any kind of allegations, however baseless or unsubstantiated at the admissibility stage. That is not at all what we submitted — in fact, we specifically stated that we were *not* asking the Chamber to adopt such an approach. It might have been tempting to take that approach, but we thought that we should adopt a more responsible approach and a more realistic one. I refer especially to paragraphs 27 to 31, and 51 to 53 of the verbatim record of my speech[7]. What we said is that the evidence has to be reasonably plausible in the sense that it is reasonably capable of being believed. Now, Professor Dupuy and his colleagues attack this and say there are not two standards, one for the admissibility stage, and one for the stage of the merits. He says that the distinction between the two phases of revision proceedings regarding proof relates to what has to be proved, not to the standard of proof. But he does not explain then what has to be proved at the second stage. Nothing at all? If at the first stage an Applicant has to prove both the new facts on which it relies and its decisiveness to the full, what actually would be left for the second stage. Is it simply the drawing of conclusions that might be very obvious, and the formality of revising the original judgment? Is it a kind of rubberstamp once the not insignificant hurdle of admissibility has

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

[7]C6/CR 2003/2, pp. 33-34 and 41.

been overcome? This does not seem to be what the Statute and Rules envisage — nor would it be a very rational or economic use, if I may respectfully say so, of scarce judicial time. For in that case, out of fairness to *both* Parties there ought to be — and that is to say if the standard argued for by Professor Dupuy and his colleagues were the correct standards — a much fuller trial at the *first* stage, with lengthy exchanges of detailed expert reports, quite possibly oral examination and cross-examination of witnesses, and so on. Whereas a procedure which filters out obviously unmeritorious cases — as the other two revision cases before the Court were filtered out at the admissibility stage — but leaves in *possible, plausible* ones for further examination at the second stage, is more rational and more economical. Which is no doubt why this procedure was put into the Statute in the first place. Our submission is also broadly in line with the approach taken to the standard of proof at the admissibility stage in other international tribunals, such as the European Court of Human Rights[8].

16. Of course, as I said at the time, El Salvador is confident in the quality of its proof, of its evidence, and believes that it would meet the standard, even if the Respondent's more stringent standard of full proof were to be required, and I suppose that in this Court full proof is normally closer to "the balance of probabilities" than to "beyond all reasonable doubt". But we are satisfied that we could meet a more stringent standard; in which case the question we have just been examining would be moot. But we thought it appropriate to make submissions on what we understand to be the correct principles to apply — the more so since it would be presumptuous for us to *assume* anything about the Chamber's views on these questions of the criteria.

G. Honduras's continuing obfuscation of the concept of "(new) facts"

Remaining, for the moment, with the nature and criteria of revision, on Monday, my colleagues and I repeatedly drew attention to the tactics of Honduras, in its Written Observations to reduce all types of facts to non-facts, and also to characterize all new material as not really new. I, for my part, offered a detailed analysis of the concepts of "fact", "discovery" and "new fact"[9]. I placed particular emphasis on the difference between a *factum probandum* and a *factum probans*,

[8]See Article 35 (3).

[9]C6/CR 2003/2, esp. at pp. 36-50, paras. 35-50.

and drew from it particular conclusions. I will not try the Chamber's patience by repeating my reasoning; I am sure that it understands the points that I was trying to make, and the verbatim record sets them all out.

17. At the conclusion of this chain of reasoning I submitted on behalf of El Salvador that:

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

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

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

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

(e) to suggest that arguments rejected in the first hearing cannot be taken into account is, equally, simply wrong[10].

I also claimed on Monday that these conclusions were based on elementary principles of legal logic of universal validity.

18. It is therefore particularly surprising that none of Honduras's counsel yesterday addressed this reasoning, especially when these arguments went to the very heart of their written case. Now, of course they were perfectly entitled to disagree; but surely if they did disagree, if they thought there was some flaw in the reasoning, they owed a duty, not to me personally or even perhaps to El Salvador, but they owed a duty to this *Chamber* to explain exactly why they disagreed — to join issue with us on this topic, not just to repeat, in a sort of musical round, passed from one to other of their counsel what they had already said over and over again in their Written Observations. In the circumstances, we invite the Chamber to conclude from their silence that they have no answer to these points — which does not surprise us, since in our submission they actually are unanswerable. If, however, their silence is due to the fact that they felt they needed four days — until Friday — to concoct an answer, then we would respectfully repeat our request to the Chamber to ensure that there is no abuse of its process and of the principle of the equality of the

[10] *Ibid.*, pp. 40-41, para. 50.

parties, especially if they seek to introduce new arguments with which we will have no opportunity to deal.

19. So far as concerns the separate opinion of Judge *ad hoc* Mahiou in the *Yugoslavia/Bosnia and Herzegovina* case and his definition of a "new fact", so repeatedly relied on by Honduras in its Written Observations and in its pleadings yesterday, I already showed on Monday how that case is distinguishable from the present one, and that our submissions are consistent with his conclusion on the facts of that case. To take some particular words of his out of context in order to support a wider, but barely reasoned, Honduran definition of what constitutes a fact is unconvincing; and I should add that, although Professor Dupuy was careful to point out that Judge *ad hoc* Mahiou agreed with the majority, the majority did not adopt his language. So far as concerns Judge Vereshchetin's dissenting opinion, careful examination of paragraph 10 suggests that, so far from supporting Honduras's thesis, it actually contradicts it.

20. I turn now from questions about the character of proceedings relating to the admissibility of a request for revision and the criteria to be applied to some questions of fact. The first one I wish to address, with your permission, is that of El Salvador's alleged negligence in not finding or obtaining its various items of evidence earlier.

H. El Salvador's alleged negligence

21. There is in fact one specific point which arises out of what my learned opponents said about negligence yesterday to which I must refer. Both the Agent of Honduras and several of his counsel asserted that El Salvador gives the civil war as virtually its only excuse for all of its negligence in not obtaining its evidence before the 1992 Judgment.

22. In the first place, this is simply untrue. In the case of the documentary evidence, we also submitted in the first place that negligence — or, as our opponents put it, "culpable negligence" — cannot be inferred from the mere fact that a party fails to unearth a document. Hindsight is not present sight, it is not a matter of *res ipsa loquitur*. Secondly, we submitted that, particularly in a highly complex piece of litigation — and every international lawyer knows that the 1992 case was outstanding in its complexity, in the number and complexities of the issues involved — a typical State party to the Statute cannot, in a complex case of this sort, be accused of negligence merely

because it does not have the financial and human resources to pursue every conceivable path, however unlikely it is to find something valuable, some crock of gold, at the end of it. That is not the way litigation works. Thirdly, in the case of the documentary material, we relied on matters other than just the civil war, and in particular we relied on the relative unlikelihood, at the time, of finding key material in somewhere like the Newberry Library. Even by using the words "somewhere like the Newberry Library" of course puts the thing, in a way, in a false perspective, because if El Salvador were asked "what about the Newberry Library?", they may have gone to find it, but the question is really with the benefit of the knowledge that one had at the time, was El Salvador negligent in failing to scour every possible corner of the earth, every possible library that had any sort of holdings, however relatively small, relating to the colonial history of Spanish America. In the case of the scientific evidence we also relied on the fact that the relevant input data, technology, access to it, and knowledge of its applicability to a boundary dispute were all beyond the reach, at the time, of a country like El Salvador. So it is simply untrue to say that El Salvador blames the civil war for all of its alleged deficiencies.

23. I was also, I must confess, surprised to hear no fewer than two of Honduras's learned counsel refer, yet again, to what the Chamber said about the civil war in paragraph 63 of its Judgment, notwithstanding that we had carefully pointed out on Monday that the reasoning in that paragraph does not apply to the present Application, because we are not asking this Chamber to presume that evidence exists which we are unable to produce because of the civil war, still less are we asking you to presume that such hypothetical evidence, such evidence which we do not know exists at all, is favourable to us, which is what paragraph 63 was all about. Likewise, it was surprising to hear from one of Honduras's representatives that he would not go into the facts of the civil war, since the Chamber had declared inadmissible Part 2 of the bundle of New Documents proffered by El Salvador which dealt with the facts of the civil war. That argument completely ignores the fact that, availing ourselves of our right under the Rules, we made good this deficiency by citing *Keesing's Contemporary Archives*, a publication in wide circulation and regarded, moreover, as a highly reliable source by those interested in international relations. I might add, in

relation to another point that was made, that *Keesings* also reported, in addition to the matters I mentioned, the specific presence of guerrilla forces in the Goascorán area[11].

24. Nor did I just rely on the drain on financial and human resources to explain why El Salvador had failed to obtain certain information that might have been available at the time. I also pointed out, and documented, the real threat that the guerrilla forces presented to any helicopter or aircraft seeking to conduct an aerial survey, let alone any one who was brave enough to try and conduct a survey on the ground.

25. But neither does El Salvador apologize for invoking the particular circumstances of the particular party, in the form of the very severe strain on its human and financial resources, at the time. How many countries, having to spend practically half of their national income, and billions of dollars, to fight a civil war, would be able to find the qualified people or the funds to conduct international litigation — which we all know is very costly — to the high standards to which we all like to aspire? Few parties to the Statute of this Court, I venture to suggest. This is not an argument out of poverty like the one which the Court rejected in the *Libya* v. *Tunisia* case, but what we are submitting is that as was adumbrated by Judge Torres Bernárdez in his article, and as others have done, that the question of what is reasonable in all circumstances, what constitutes negligence, must depend on all circumstances. And we submitted on Monday those circumstances include the circumstances of the Parties to the litigation. If the boot had been on the other foot, it might have applied to Honduras too, although our situation was somewhat more extreme.

26. Finally, on this question of negligence and the civil war. After the moving words of Señora Brizuela de Ávila, in opening our case, about the effects of that war, it was all the more painful to El Salvador to hear the representatives of Honduras, who knew the history very well, belittling the suffering of its sister country in such an unhappy period.

I. Alleged illegal obtaining of evidence

27. I turn now to the question of the alleged illegality of the means by which the technical and part of the scientific evidence was obtained.

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[11] *Keesing's Contemporary Archives*, Vol. 29 (1983), 32425.

28. First of all, Members of the Chamber, our opponents are fond of telling you that the burden is on the applicant to prove everything. Actually, the rule is that he who alleges must prove it, particularly in matters like illegality and bad faith, which is not, as you know, to be presumed on the part of a State. True, in its Annex 6, Honduras included a protest against what it asserted was an illegal intrusion into its airspace and by land in July 2002. But it also included Annex 7, which is a denial on behalf of El Salvador that any illegality had occurred. What gives Honduras the right to say that its version is entitled to credence, and not El Salvador's. It has not discharged its burden of proof.

29. Lest it be thought that El Salvador is hiding something disreputable behind a technical rule of evidence, behind the rule about the burden of proof, let me add that on Monday, with the specific authority of the Government of El Salvador, I asserted to this Chamber that there had been no illegality in the collection of evidence. Satellite photography does not, of course, entail any breach of international law, and anyway the satellites would not have been El Salvador's. The older aerial photography, I pointed out, either emanated from the United States of America or was taken before the 1992 Judgment, and therefore at a time when the territory could by no means have been said to be indisputably Honduran — so there was no illegality in taking pictures then. The more recent aerial photography, I said, was all taken from the Honduran side, and I added that the land survey, though admittedly carried out on the Honduran side in part, was perfectly lawful. El Salvador wishes to be more specific. On 9 July three Salvadoran nationals, one of them a professional photographer, drove up the Central American Highway. At one of the standard border posts they displayed their identify cards and the driver his driving licence, and they filled in a form which is called, I am told, CA4, which stands for Central America 4. This, in pursuance with an agreement between El Salvador, Honduras, Guatemala and Nicaragua, facilitates transit between the countries concerned. The driver and his passengers were only asked the duration of their visit, to which they truthfully answered "one day". They were not asked the purpose of their visit, and they did not dissemble it.

30. And what did they do when they were there? As the Chamber has seen, they simply took pictures of the river and of its old course, in a way that any tourist could do, quite lawfully. They were not taking pictures of military installations or any other secret or sensitive site; they were

taking pictures of a river. So where was the infringement of territorial sovereignty, where the illicit exercise of sovereignty on the part of one State in the territory of another. To hear the lurid comparisons made yesterday with Operation Retail in the *Corfu Channel* case, one might have thought that three Salvadoran individuals, armed with nothing more than a camera, was the equivalent of a fleet of minesweepers "under the protection of an important covering force comprised of an aircraft carrier, cruisers and other war vessels"[12].

31. The fact is, Members of the Chamber, there was no forcible intrusion into the territory of another State, no infringement of its territorial sovereignty or political independence. It was not even espionage, and in any case the predominant view is that, in time of peace, espionage is not per se a breach of international law[13]. Not that there was espionage, but even if there were, it would not have been illegal.

32. Even if, purely *ex hypothesi* — and El Salvador strongly denies it, both as a matter of fact and a matter of law — there were illegal conduct, what consequences does Honduras want this honourable Chamber to draw from that alleged fact? The case is *not* like the *Corfu Channel* case, because there a special agreement had expressly conferred authority on the Court to rule on the legality not only of Albania's conduct but on the legality of the British Operation Retail. There was a jurisdictional title in that case for the Court to rule on the legality of the collection of evidence; there is no equivalent in the present case.

33. And finally, even if there were illegality, if there were a jurisdictional title, we know of no rule of public international law generally, or in the law and practice of this Court in particular, which would authorize the exclusion of illegally obtained evidence. It is not even a general principle of domestic law, as our opponents know very well.

34. This shows that the reference by Honduras to illegality and its repeated complaints, not only in its Written Observations but in its pleadings yesterday — in spite of what we had said about the legality of the collection — it is just another form of abuse directed at El Salvador, another attempt to prejudice the Chamber against El Salvador. It has no basis in fact, and even if it had, it is irrelevant to the issues before you.

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[12] *I.C.J. Reports 1949*, pp. 13 & 33.

[13] See e.g. Berhardt (ed.), *Encyclopedia of International Law*, Vol. 2, 116.

J. The scientific evidence

35. Having given a fairly full account of the scientific evidence on Monday — evidence which in any case speaks for itself, and having rebutted the main criticisms levelled against the CEI Report made by Honduras and by Assistant Professor Kearney, I will not presume on the patience of the Chamber by repeating myself today. I just want to take up very briefly a few points made by counsel for Honduras, and particularly perhaps by Mr. Meese.

36. But perhaps I should begin by drawing attention to what they did *not* do. Despite the fact that the CEI Report is long, highly detailed, and comes from a highly reputable source, there was no attempt at a systematic reply to the many points of detail, many of the arguments, for example, about the relative size of the two lobes; the much greater development of a three-level hierarchical system of branching distributaries on the Cutú side compared to the Ramaditas branch; the significance of the fact that the various distributaries in the former branch were of similar size; the evidence provided by the presence of a large deltaic platform in the former case — the Cutú side — but not the latter; the signs of a rapid change of course rather than a gradual one and so on. But in no serious discussion of this. So far as concerns the substance, Mr. Meese largely contented himself with a few brief quotations from the Report of Assistant Professor Kearney, such as that radar imagery with its ability to penetrate vegetative cover could have been used to examine land forms under a thick tropical rain forest canopy in lieu of topographic changes. We dealt on Monday with practically all of the criticisms of Professor Kearney. Those which we did not deal with, we omitted not because they were unanswerable but simply because they seemed too trivial to merit a detailed response. For example, he complains about the quality of the photography and that it is difficult to make a judgment. Now, it is true that regrettably there was a small deterioration in quality in the printing of the printed versions but first of all it was sufficient to enable judgments to be made in our submission and, secondly, a CD containing the original material, the original scientific report with its pictures and other accompanying data, was submitted along with the Application to the Registry when the Application was first submitted. Likewise, he says that there was no evidence that the change of course was anything other than minor — this is Mr. Kearney — well, the scientific report as a whole, almost all of it is devoted to showing that there must have been a change of course. That it had to have happened and if there was — we are talking about the

change of direction of 90°. Well, that is not minor by anybody's standards: and, indeed, the authors of the Report put forward what we submit is a very convincing case that avulsion had occurred. Mr. Meese also quotes Mr. Kearney as saying that there is no proof that this is a delta: but he also goes on to say, as I pointed out on Monday — Mr. Kearney goes on to say — that there are deltaic features; and at the end of the day this is merely a semantic quibble. But a more important issue — well, perhaps more important, one certainly of importance and which needs to be addressed, which we did address and which has not been dealt with adequately by our opponents — is the question of, if you like, the novelty of the Report, or, to be more precise, whether this was a report which could have been obtained before 1992, a report of this sort, and which the failure to obtain is evidence of negligence. This was dealt with in the Report. Clearly, Members of the Chamber will recollect, [it] made a number of unfounded assertions, such as that no satellite radar technology images have been used, whereas we have demonstrated that two had been used, one clearly labelled as radar. There is an important difference in satellite imagery and radar satellite imagery, which is a much more recent technology. And we pointed out that there were two images, one of which labels itself as being a radar satellite image and the other of which, to a scientist knowing his business, would clearly be composed partly of radar satellite technology.

The CEI Report first of all used new kinds of data, like radar satellite technology. Secondly, it used data which was *not readily available* to scientists in 1992 because it is only with the explosion, if I may so put it, of the Internet that it has become possible for scientists to acquire data from all sorts of different sources easily. Also, the technology which was applied was new. Now, some of it did exist in some senses in 1992. For example, Members of the Chamber will probably know that the United States of America, for example, had satellites which were capable — ten years ago — of producing pictures to a very high resolution, but they did not release those until quite recently for general public consumption because there was a security value which they attached to them. And so the fact that somewhere this technology existed is not the issue. The issue is: would it have been available to El Salvador, either to its own scientists or to those who could reasonably have been able to access it: and the Report itself says that this was technology which would not usually have been accessible to a country like El Salvador at the time, and that has

not been convincingly refuted either by Assistant Professor Kearney or those who commissioned him to write his report.

And finally, the application, the methodology, is a new one, because as the Report itself makes clear, this sort of methodology — the methodology that CEI has used — has in the past been used very successfully in the area of hydrocarbon exploration and in the area of coastal management. But it is not been declared before in litigation and certainly in 1992 it would not have been reasonable to expect El Salvador — perhaps any country, but certainly El Salvador, which is the one they address — to have realized that that type of approach was feasible and could help to determine what were the true facts about the history of this area. And so, for all these reasons, we submit that there was no negligence in failing to obtain this evidence before and that has not been convincingly refuted by our distinguished opponents.

Just a brief concluding remark, Mr. President, Members of the Chamber. The El Salvador team sees its function as to defend to the best of its ability the interests of and promote the interests of the Government which has honoured us by entrusting its case to us. But over and above that we see our function, if we may modestly say so, as being to try and assist this Chamber in reaching the right decision by making submissions in a contradictory manner, so that by that process, which is the process that those who drafted the Statute of the Court have chosen, the tribunal can get most easily to the truth. It does not, in our submission, assist the Chamber — it does not assist the process of the Chamber, it does not assist the interests of justice — if our opponents fail to engage in a contradictory manner with the submissions which we have endeavoured to put before you.

Mr. President, I ask you if you would kindly call upon my colleague, Professor Remiro Brótons.

Le PRESIDENT : Je vous remercie Monsieur le professeur. Je donne maintenant la parole au professeur Antonio Remiro Brotóns.

M. BROTÓNS : Monsieur le président, Messieurs les Membres de la Cour, bien qu'El Salvador, respectant le Règlement et les *Instructions de procédure* de la Cour, s'est efforcé de développer ses plaidoiries à la lumière des observations écrites du Honduras, la Partie adverse a épuisé son premier tour en répétant ce que nous avions déjà eu l'opportunité de lire dans lesdites

observations, étant jusqu'à présent très maigre la valeur ajoutée de ses plaidoiries. Quoiqu'en termes humains il soit possible d'expliquer que le Honduras n'ait pas répondu aux allégations faites par El Salvador, il ne devrait pas profiter du deuxième tour pour introduire des éléments nouveaux. Cela irait à l'encontre du *due process* et du principe de l'égalité des parties.

Ma plaidoirie aujourd'hui portera thématiquement sur les sujets que j'ai déjà abordés dans mon premier tour, à savoir, l'*uti possidetis juris* de 1821 et les documents d'*El Activo*, auxquels j'ajouterai une petite référence aux négociations de Saco. Mon intervention ne sera pas très étendue, compte tenu du caractère succinct et direct des exposés oraux prescrits par la Cour (art. 60, par. 1). Cela dit, je dois me ratifier sur les considérations faites dans la requête ainsi que sur les arguments exposés oralement au premier tour et que le Honduras n'a pas même essayé de démentir.

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I. L'*UTI POSSIDETIS JURIS* DE 1821

1. Le Honduras s'obstine en une confusion délibérée lorsqu'il se réfère à la date critique et au contenu de l'*uti possidetis juris* de 1821[14]. Le Honduras accuse El Salvador de prétendre sur ce point contredire l'arrêt de 1992[15]. Et il en profite, comme il est habituel dans ses interventions pour y voir un signe de plus selon lequel la demande d'El Salvador est une attaque contre la chose jugée[16], un recours d'appel ou de cassation travesti, *déguisé* disent ses avocats[17], rien de moins qu'une agression au système judiciaire international[18]. Le Honduras paraît abonné aux termes disqualificateurs et aux cadres catastrophiques de l'administration de justice dans lesquels la revision des arrêts apparaît comme une arme puissante de destruction massive.

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[14] C6/CR 2003/3, 9 septembre 2003, Dupuy, par. 26, 27; Meese, par. 14, 19; Sánchez Rodríguez, par. 13, 14, 17.

[15] *Ibid.*, par. 13.

[16] *Ibid.*, López Contreras, par. 1.19; Dupuy, 4, 5, 13; Sánchez Rodríguez, par. 5, 12, 15.

[17] *Ibid.*, Dupuy, par. 13; Jiménez Piernas, par. 11; Meese, par. 4; Sánchez Rodríguez, par. 3, 12, 15.

[18] *Ibid.*, Sánchez Rodríguez, par. 5.

2. Néanmoins, El Salvador n'a jamais contesté la date critique aux effets de l'*uti possidetis juris*, à savoir, le 15 septembre 1821. El Salvador n'a jamais prétendu qu'en 1821 le Goascorán coulait dans l'Estero La Cutú. Il n'a pas discuté non plus de ce que la Chambre décida la frontière dans le cours actuel du fleuve Goascorán estimant que ce dernier était le cours du fleuve en 1821. El Salvador n'a aucune difficulté à admettre que celui-ci serait l'*uti possidetis juris* de 1821, si une avulsion ne s'était produite avant cette date et postérieurement à la fixation dans le Goascorán de la limite entre des territoires qui aujourd'hui appartiennent au Honduras et à El Salvador, une avulsion, un changement brusque de cours qui est même resté enregistré dans la topographie locale dans le point qui est connu comme la Rompición (la rupture) de los Amates[19].

3. L'arrêt de 1992 fonde ses considérations et conclusions sur l'exclusion d'une avulsion qui, dit-il, n'a pas été prouvée. Les paragraphes de l'arrêt qui suivent doivent toujours être considérés à partir de cette prémisse. Si la Cour admet, avec les preuves maintenant apportées par El Salvador, qu'il y eut avulsion, la situation change radicalement.

4. C'est pour cela que nous parlons d'un fait *décisif*. Un fait, d'abord, qui l'est seulement une fois que l'avulsion a été prouvée. Le Honduras a tort lorsque, répétant ses observations écrites[20], il conclut que la Chambre connaissait déjà l'existence des faits invoqués à l'appui de la demande et, en particulier, que c'est précisément sur le même fait invoqué avant 1992 (l'existence d'un ancien cours du fleuve Goascorán) qu'El Salvador entend s'appuyer aujourd'hui.

5. Cette affirmation contredit les mêmes prémisses du Honduras à l'heure d'asseoir la notion de *fait* aux effets de revision. L'avulsion n'était pas avant 1992 un fait connu, mais une thèse d'El Salvador, ce que le Honduras appellerait une construction intellectuelle[21]. Le Honduras lui-même se réfère à l'avulsion du fleuve Goascorán comme une *thèse*[22], comme une *théorie*[23], comme l'un des *arguments* d'El Salvador[24]. Si cela eût été un fait vérifié, la Chambre aurait dû le tenir en compte comme présupposé de son raisonnement; elle ne le fit pas justement parce

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[19] *Ibid.*, Meese, par. 11.

[20] Observations écrites du Gouvernement du Honduras, par. 1.12, 2.19.

[21] C6/CR 2003/3, 9 septembre 2003, Dupuy, par. 25.

[22] *Ibid.*, Sánchez Rodríguez, par. 12.

[23] *Ibid.*, López Contreras, par. 1.19.

[24] Observations écrites du Gouvernement du Honduras, par. 2.17.

qu'El Salvador ne put prouver ce qui pour la Chambre n'était alors qu'une simple spéculation. L'avulsion apparaît comme un fait, et comme un *fait nouveau*, maintenant qu'El Salvador a compté sur les moyens de démontrer que le fait se produisit réellement. C'est la preuve obtenue qui transfère le fait, préexistant à l'arrêt, du domaine de ce qui est hypothétique au domaine de la réalité juridique.

6. Un fait, ajoutons-nous, décisif. Et il est assez surprenant que la Partie adverse, de façon réitérée, accuse El Salvador d'attaquer, d'aller contre la *ratio decidendi* de l'arrêt[25], pour fredonner de nouveau ses refrains si connus sur le manque de respect d'El Salvador à l'autorité de la chose jugée, ou le recours abusif à la demande en revision pour cacher un appel. Est-ce que ce ne sont pas les conditions mêmes établies par l'article 61 du Statut celles qui exigent du demandeur de détruire efficacement la *ratio decidendi*, non pas par une erreur *in iudicando*, mais précisément parce que l'on a découvert des faits nouveaux ?

7. El Salvador, néanmoins, était et est conscient que le fait physique et historique de l'avulsion du Goascorán ne suffit pas pour justifier son caractère déterminant aux effets de la reconsidération de l'arrêt de 1992. Si le fait de l'avulsion était dépourvu d'effets juridiques dans la localisation d'une frontière, considérant que cette dernière change en même temps que le fait le cours de la rivière, l'avulsion, fut-elle prouvée, ne serait pas un fait décisif.

8. Le caractère décisif de ce fait est donc lié à l'existence d'une règle dans le droit applicable, à savoir, le droit colonial espagnol, en vertu de laquelle la frontière reste dans l'*alveus derelictus* dans le cas d'une avulsion.

9. Si la Chambre admet la demande en revision, les Parties débattront ce point plus en profondeur; mais à présent El Salvador devait le présenter pour compléter la justification du caractère décisif du fait nouveau apporté à la Chambre.

10. S'il y eut avulsion, le cours du fleuve en 1821 et son éventuelle coïncidence avec le cours actuel sont insignifiants en eux-mêmes. El Salvador constate avec satisfaction que le Honduras n'objecte pas la norme du droit colonial espagnol applicable à l'avulsion et admet, par conséquent, que si un changement brusque du cours d'un fleuve survenait après que ce dernier eut été adopté

[25] C6/CR 2003/3, 9 septembre 2003, López Contreras, par. 1.19, 1.21; Sánchez Rodríguez, 3, 12, 15.

pour déclarer une limite territoriale, cette limite reste dans le lit abandonné et ne suit pas le nouveau cours de la rivière.

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II. LA «CARTA ESFÉRICA» D'*EL ACTIVO* ET SON JOURNAL DE BORD

1. Les circonstances de la découverte des documents de l'*Ayer Collection* ont été mentionnées dans la requête : «Le Gouvernement (salvadorien) a fouillé les bibliothèques les plus prestigieuses des Etats-Unis à la recherche de renseignements ..., mais en vain.» Finalement, en 2002, «il a appris que des documents se rapportant à la question ... se trouvaient à Chicago»[26].

2. El Salvador doit constater que la Partie adverse n'a pas même essayé de réfuter les considérations étendues et rigoureuses faites par El Salvador afin d'exclure qu'on puisse qualifier de *négligente* sa conduite pour avoir ignoré jusqu'en 2002 l'existence de copies des documents d'*El Activo* dans l'*Ayer Collection* de la Newberry Library de Chicago. Ces considérations démentent ce que le Honduras soutient contre dans ses observations écrites, le Honduras se limitant maintenant à se répéter[27].

3. En qualifiant fatalement de négligent le sujet qui *ose* poser une demande en revision, le Honduras attend que les préjugés finissent par s'emparer des jugements de valeur qui doivent concrétiser un concept indéterminé comme celui de négligence.

4. Si El Salvador, d'après le Honduras, doit prouver une absence de faute[28], c'est que, à son avis, la négligence se présume. Mais, où dispose-t-on une telle chose ? Il n'y a pas une charge de la preuve imposée à El Salvador, et moins encore s'agissant de la preuve d'un fait négatif, une absence de faute. *Negativa non sunt probanda.*

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[26] Requête en revision de l'arrêt du 11 septembre 1992, 10 septembre 2002, par. 84.

[27] C6/CR 2003/3, 9 septembre 2003, Jiménez Piernas, par. 6 et ss.

[28] *Ibid.*, par. 22; Sánchez Rodríguez, par. 11.

5. Le Honduras a affirmé qu'il est un principe fondamental, celui d'après lequel la charge de la preuve incombe au demandeur[29]. Mais le Honduras interprète mal le principe. L'adage *actori incumbit probatio* ne signifie pas que le demandeur doive toujours supporter la preuve et succomber en cas de doute; ce serait une position que l'on pourrait prêcher de celui qui formule une prétention, soit demandeur ou défendeur.

6. Dans une situation comme celle qui nous occupe, dans laquelle on prétend évaluer le comportement d'El Salvador, plus que de preuve ou de charge de la preuve on peut parler du devoir des Parties, des deux Parties, à apporter au juge les informations qui, à leur avis, avalisent l'évaluation qu'elles aspirent que le juge adopte.

7. A ce sujet, El Salvador a fait tout ce qui lui a été possible pour documenter que son ignorance avant 1992 des documents d'*El Activo* déposés à la Newberry Library n'a pas été *fautive*. Je ne crois pas que l'on puisse affirmer que le Honduras ait fait, non pas le même, mais le moindre effort pour documenter le contraire.

8. El Salvador constate aussi le silence du Honduras sur l'affirmation largement documentée qu'il n'y a aucune preuve que les documents d'*El Activo* soient les originaux et aient eu à un quelconque moment un caractère officiel. L'un des avocats du Honduras a dit, simplement, que le Honduras «n'a jamais prétendu débattre» ces questions, il les considère — on peut deviner le qualificatif — «artificielles»[30].

9. En réalité, le Honduras n'a pas voulu débattre ce qu'El Salvador a dû réfuter justement parce que dans ses observations, écrites au rythme du diapason de Mme Marín Merás, le Honduras a affirmé que les copies de Madrid étaient les *originaux* et les *officielles*, en tant que celles de Chicago étaient des copies *imparfaites*, *privées*[31]. Qui introduisit le débat sur cette question ? Qui a permis à El Salvador de chercher, de parler et de trouver des choses sur la procédure et découvre le document de la Couronne espagnole à caractère cartographique ? Est-ce que ceci est une invention, une autre manifestation de cette *imagination fertile* appréciée déjà par l'un des avocats

[29] Observations écrites du Gouvernement du Honduras, par. 2.33.

[30] C6/CR 2003/3, 9 septembre 2003, Jiménez Piernas, par. 21.

[31] Observations écrites du Gouvernement du Honduras, par. 2.18, 3.32, 3.40, 3.41; vol. II, annexe 4, p. 151, par. 12, et p. 154, par. 24.

du Honduras dans la requête d'El Salvador[32] ? Peut-être un rêve appartenant à cet *univers parallèle* évoqué par mon confrère, le professeur Mendelson ?

10. Le Honduras ne veut pas commencer à débattre l'authenticité et le caractère officiel des copies d'*El Activo*, parce qu'il sait que l'argumentation salvadorienne est irréfutable. Et la seule chose qui lui vient à l'esprit est d'invoquer le sacro-saint prestige d'une institution faillible, comme peuvent l'être les fonctionnaires qui la servent, aux fins de couper dogmatiquement la construction argumentée d'El Salvador[33].

11. Peut-être le Honduras comptait-il sur le fait qu'El Salvador serait incapable de défaire les simplifications couvertes par la prétendue autorité scientifique et professionnelle du chef de la cartographie du Musée naval, une autorité si rigoureuse que, à titre anecdotique, on pourrait mentionner que la référence des archives qu'elle fait dans la note 25 de son rapport aux *Instructions pour les travaux scientifiques* émises par le célèbre Alejandro Malaspina[34] correspond en réalité au *Journal d'infirmerie de la corvette* «Nautilus» dans son voyage d'instruction en Amérique du Sud entre le 16 octobre 1903 et le 4 mai 1904.

12. Incidemment, nous devons clarifier aussi, l'un des avocats du Honduras étant revenu sur se sujet[35], que si en la demande en revision El Salvador se référa au caractère incomplet du dossier d'*El Activo* du Musée naval, cela fut dû au fait que, bien que ce dossier eût été sollicité officiellement par El Salvador on ne lui remit que la partie relative au golfe.

13. Le Honduras évite le débat sur le manque d'authenticité et de caractère officiel des documents d'*El Activo* s'agissant de circonstances qui soulignent les déficiences des différentes copies au-delà de leurs différences que, comme il était à espérer, le Honduras nie ou minimise. Sur ce point El Salvador s'en tient à l'exposition étendue qu'il a faite dans sa requête, et il remarque que les différences entre lesdites copies acquirent toute leur signification et importance à partir de la découverte de la copie de Chicago.

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[32] C6/CR 2003/3, 9 septembre 2003, Sánchez Rodríguez, par. 3.

[33] C6/CR 2003/3, 9 septembre 2003, Jiménez Piernas, par. 4.

[34] Observations écrites du Gouvernement du Honduras, vol. II, annexe 4, p. 151, note 25.

[35] C6/CR 2003/3, 9 septembre 2003, Jiménez Piernas, par. 14.

14. En ce qui concerne la représentation des Farallones du Cosigüina, qui résultèrent de la grande éruption du volcan de ce nom en 1835, le Honduras affirme maintenant qu'il y avait un ensemble de rochers avant cette date, étant à la charge d'El Salvador de prouver le contraire[36]. C'est trop. Nous avons déjà observé qu'auparavant, selon une cartographie connue, ce qu'il y avait dans la position des Farallones était une île.

15. Le Honduras essaie maintenant d'enlever toute valeur à cette cartographie[37]. En premier lieu, celle de William Funnell, qui forma partie de l'expédition de Dampier pour se séparer de lui dans le golfe de Fonseca, où il fut en janvier et février 1704. Funnell publia en 1707 un récit de son *Voyage around the World*, accompagné d'une carte. Dans celle-ci, au lieu des Farallones blancos, apparaît une île.

16. Cette île apparaît aussi, sous le nom de Cullaquina, dans la carte de Jefferys Thomas (1775), dans la carte de Thompson-Alcedo-Arrowsmith (1816), dans la carte de Vandermaelen (1827)[38]. Le Honduras lui-même utilisa dans le passé, à ses propres fins, les cartes que, à présent, il met en doute. Ainsi, les cartes de Jefferys Thomas, Thompson-Alcedo-Arrowsmith et Vandermaelen furent utilisées par Mme Mary W. Williams, au service du Honduras, dans la médiation des Etats-Unis dans la question des limites entre le Honduras et le Guatemala (1918-1919)[39].

17. Las Farallones se répètent dans toutes les copies d'*El Activo*, oui, mais placées dans des positions différentes, ce qui ne fait que confirmer le manque absolu de fiabilité des copies. De nouveau, la découverte des documents de Chicago offrit la perspective nécessaire pour apprécier ces différences et approfondir dans la géographie historique de la région.

18. Probablement le fait que Juan Pantoja ait été considéré comme auteur des copies de la «Carta Esférica» est dû à l'intérêt du Honduras pour cacher ses insuffisances sous la signature d'un pilote et cartographe expérimenté, auteur des autres cartes manuscrites de cette expédition. Dans les observations écrites, le Honduras était catégorique : «Suite à une recherche exhaustive et à un

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[36] C6/CR 2003/3, 9 septembre 2003, Meese, par. 15.

[37] Observations écrites du Gouvernement du Honduras, par. 3.48; vol. II, annexe 5, p. 189, par. 36, 39.

[38] Requête, annexes cartographiques, annexes 14, 15 et 16.

[39] *Fronteras de Honduras. Límites con Guatemala,* Publicaciones de la Oficina de Estudios Territoriales, n° 9, t. III, novembre 1930, Tipografía Nacional, Tegucigalpa, p. 53-56.

examen minutieux des travaux cartographiques les cartes furent sans aucun doute réalisées par Juan Pantoja.»[40]

19. Ce fut cette surprenante affirmation qui induisit El Salvador, lequel, en toute logique, n'avait pas pu la deviner quand il était en train de rédiger la requête, à solliciter de la Chambre l'autorisation de la production de documents nouveaux conformément à l'article 56 du Règlement de la Cour. La pétition, à laquelle s'opposa le Honduras, ne fut pas admise sur ce point par la Chambre; probablement parce qu'elle considéra que, avec les documents déjà apportés, El Salvador, comme cela a été le cas, pouvait démentir l'affirmation hondurienne.

20. Maintenant le Honduras concède que, il se pourrait que les cartes d'*El Activo* sur le golfe de Fonseca eussent été réalisées par les assistants et scribes de Juan Pantoja, mais que celui-ci, étant le deuxième pilote et le commandant se trouvant malade, fut, Juan Pantoja, l'auteur intellectuel des cartes. En définitive, Juan Pantoja, l'auteur incontestable du reste des cartes élaborées par l'expédition d'*El Activo*, entre Acapulco et Sonsonate, serait le père spirituel des cartes du golfe faites à bord d'une petite embarcation locale par ses assistants et scribes innominés, auxquels le Honduras nie toute paternité[41]. Peut-être, sont-ils [inaudible] des mers.

21. A notre avis, on peut proposer que Juan Pantoja, tout simplement, abandonna la cartographie et la description géographique du golfe à d'autres mains, peu expérimentées, s'en tenant parmi d'autres circonstances à l'ordre du vice-roi Revilla-Gigedo, du 7 décembre 1793, qui disposait que le golfe devait être considéré comme «secondaire». Pantoja avait déjà assez de travail avec la tâche de dresser les cartes de la côte entre Acapulco et Sonsonate.

22. Si nous suivons la chaîne hiérarchique que le Honduras nous propose, l'auteur des cartes pourrait être à plus forte raison le commandant de l'expédition, Martinez Bruna, que le Honduras considère malade pour certaines choses et non moins actif que son brigantin pour d'autres. Et, déjà dans cette route, pourquoi ne pas considérer le vice-roi Branciforte comme responsable des cartes, compte tenu de sa liberté pour les corriger et pour déterminer ce qu'il devait en faire ?

23. Compte tenu que la même reconstruction historique de l'expédition d'*El Activo* doit faire face à de grosses difficultés par le fait que, peu mentionnée et appréciée, elle a laissé des traces

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[40] Observations écrites du Gouvernement du Honduras, par. 3.43.

[41] C6/CR 2003/3, 9 septembre 2003, Jiménez Piernas, par. 17 *e).*

documentaires très rares, comment le Honduras ose-t-il développer tout un essai littéraire sur l'identité de l'auteur des cartes et du journal de bord d'*El Activo* ?

24. Le Honduras ne constate pas de différences non plus entre les deux copies du journal de bord.

25. Mais toute personne qui se donnera la peine de comparer les deux copies pourra constater que la copie de Chicago est plus complète, car elle a huit pages de plus. La copie de Madrid n'a pas les pages numérotées, est mal assemblée et rend difficile sa lecture dans quelques parties par le manque de pages, paragraphes et lignes de texte. Une chose encore plus importante que cela est de constater que dans la copie de Madrid justement, les pages qui décrivent le golfe furent rédigées par des mains différentes à celles qui rédigèrent le reste du journal.

26. Dans notre premier tour, nous avons conclu que «à ce jour, on n'accorda aucun degré de fiabilité ou certitude tant à la description géographique qu'à la représentation cartographique du golfe de Fonseca provenant de l'expédition d'*El Activo*». Les copies de Chicago mirent en évidence l'inconsistance des documents de Madrid pour avaliser le fait géographique duquel se dégagèrent dans l'arrêt des conséquences si importantes pour la détermination de la souveraineté et la délimitation de la frontière terrestre dans le secteur du Goascorán. «La Chambre ne devrait pas se montrer moins exigeante avec les résultats de l'expédition d'*El Activo* que ne le furent les propres contemporains de cette expédition.»

Finalement, quelques mots sur les négociations de Saco.

III. LES NÉGOCIATIONS DE SACO

27. El Salvador a considéré d'une façon étendue les négociations de Saco dans sa requête[42], puisque la Chambre[43] leur attribua valeur de confirmation aux conclusions formulées à partir des documents d'*El Activo*, compte tenu que l'un des avocats du Honduras se référa à l'analyse d'El Salvador comme à une «relecture partisane» des négociations[44], El Salvador doit insister sur le fait que ladite analyse répond fidèlement aux faits tels qu'ils se produisirent.

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[42] Requête en révision de l'arrêt du 11 septembre 1992, 10 septembre 1992, par. 119-143.

[43] *C.I.J. Recueil 1992*, par. 317.

[44] CR 2003/3, 9 septembre 2003, Meese, par. 9 et suiv., 16.

28. Tous les documents produits au sujet desdites négociations permettent de conclure que leur objectif était uniquement de produire un accord sur la base des principes d'équité et de justice. Les négociateurs prirent l'embouchure du Goascorán telle qu'elle existait à l'époque, sans la mettre en rapport avec l'*uti possidetis juris*, dont on n'a fait aucune mention dans les négociations ni dans la convention adoptée en 1884, qui, finalement, ne fut pas ratifiée par le Honduras. De l'avis d'El Salvador, la ligne convenue ne reconnut implicitement qu'un seul fait, à savoir, que le fleuve Goascorán débouchait dans le golfe de Fonseca; l'endroit précis n'étant pas indiqué. Les comptes rendus des négociations ne contiennent rien qui analyse la thèse selon laquelle l'embouchure du Goascorán était à l'époque la même que celle qui fut retenue dans l'arrêt de 1992. La déclaration du 4 juin 1880, laquelle disait que, à partir de ladite embouchure, le Goascorán suivait en amont une direction nord-est, n'offrait pas la base nécessaire pour conclure qu'il s'agissait là de l'embouchure actuelle, étant donné que d'autres *esteros* suivent ou ont suivi la même direction.

29. D'un autre côté, la déclaration de 1880, loin de confirmer les conclusions tirées de la carte d'*El Activo*, contredit celles-ci, car sur la carte l'embouchure du Goascorán figure dans une direction nord-ouest.

30. Finalement, les négociations de Saco et la convention de 1884 firent mention aussi de la limite maritime d'une manière qui conforte l'idée selon laquelle l'embouchure du Goascorán n'était pas l'embouchure actuelle. Je m'en remets à ce qui est dit à ce propos dans la requête.

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

Je vous prie, Monsieur le président, de donner maintenant la parole à Mme le ministre des affaires étrangères d'El Salvador Maria Eugenia Brizuela de Ávila.

Le PRESIDENT : Je vous remercie Monsieur le professeur. Je donne maintenant la parole à S. Exc. Mme Maria Eugenia Brizuela de Ávila, ministre des affaires étrangères du Salvador.

Ms BRIZUELA de ÁVILA: Monsieur le président, Messieurs les Membres de la Chambre. Yesterday the distinguished Agent for our sister Republic of Honduras noted that my tone in my

remarks have been somewhat defensive. My conduct as Minister for Foreign Affairs has always been to defend the interests of my countrymen and my country. If we are accused of presenting an artificial Application, among others, I had the obvious obligation to give the honourable Chamber the explanations that will defend our position. Having complied with that obligation vis-à-vis the honourable Court, we shall now, with all due respect, address the Honduran representations' oral pleadings.

In the light of what we said in the first round, we thought that the subject of compliance with the Judgment was already exhausted and that the Honduran representation would engage in a serious discussion of the central issues in the matter.

But our learned opponents return to the fray and after citing certain articles from their Constitution, they assert that for the first six years following the 1992 Judgment, El Salvador made the land demarcation conditional upon the signature of a treaty on the nationality and recognition of rights of the population affected by the delimitation, though the 1992 Judgment included no such requirement.

We are gratified to hear in the Honduran Agent's accusations an acknowledgment to the efforts that El Salvador has made to ensure full respect for the human rights of Salvadorans and Hondurans affected by the Judgment.

But the Honduran representation fails to transcribe for us the full text of the constitutional clauses that concern the problem at hand. Even though it cites an article of the Constitution that describes Honduras as an international law-abiding country, which we naturally are very pleased to hear, they nevertheless, omit any reference to other provisions of the Constitution that are totally discriminatory for Central Americans and that complicated Hondurans' acceptance of rights such as ownership and possession in the case of Salvadorans whose property remained within the territory that the Judgment had awarded to Honduras.

Article 107 of their Constitution provides that the only ones that are permitted to possess or to acquire real estate property within 40 km of the border with neighboring States (that is El Salvador, Guatemala and Nicaragua) are citizens who are Honduran *by birth*. Although Article 24 declares that Central Americans who have had residence in Honduras for one year can become *naturalized* Honduran citizens, they, too, like aliens, are prohibited from owning such

property. The result of this is that the Salvadorans who found themselves on the Honduran side of the border as a result of the 1992 Judgment where caught in this provision.

The Honduran delegates alleged at that time that their Constitution would be violated if the Salvadorans in the areas affected by the Judgment were allowed to retain the right of possession and property and thus made the negotiation and signing of the treaty of nationality and acquired rights very difficult.

Eventually these problems were solved but only after protracted negotiations. Therefore, although there was some delay in giving effect to the Judgment, this was due to the necessity of ensuring protection for the basic human rights of Salvadoran citizens who found themselves on the Honduran side of the border. In this regard, we were seeking to comply with the strong indications given by the Chamber in paragraph 66 of its Judgment. El Salvador was all the more conscious of the necessity to protect the rights of these people in view not only of the suffering the whole nation experienced as a result of the civil war, but the fact that the people in the border areas had endured particular tribulations.

Negotiations with Honduran representatives on territorial questions have always been complicated, because their Constitution contains a provision whose features are such that it is sufficient to cite it here without any further elaboration:

> "Article 19.– No authority may enter into or ratify treaties or make concessions that adversely affect the territorial integrity, sovereignty and independence of the Republic. Whosoever does so shall be tried for the crime of treason to the Country. Responsibility for this case is not subject to the statute of limitations."

El Salvador, additionally, must not fail to note the tendency on the part of certain members of the Honduran representation to try to apply to this Application for revision the same axiological criteria, to attach the same assessments and to attribute the same consequences that the Chamber did when it took cognizance of the original case.

In our opinion, the assessments in question, however legitimate they were, were done in the context of the case under consideration and being adjudicated at that time; in other words, the Chamber reasoned in a certain way, taking into account the pleadings of the Parties and, above all, the evidence in existence at that stage of the proceedings.

Naturally, when the material facts upon which a chamber relies change, especially in cases such as this one, where the fundamental value added lies in the new facts discovered, it is basic logic that when the premises change the conclusions must necessarily change as well. Therefore, it is unreasonable to think that the present Chamber is obliged to think exactly as the previous Chamber did, since as we have already explained, the elements in the logical equation that the Chamber must now adjudicate have changed. Furthermore, while revision is not an appeal, it is a means by which to challenge a judgment.

The Chamber in 1992 was indeed unanimous and El Salvador is not attacking the Judgment or the judges of that time for the decision that they made in the light of the information then available to them. It is just that that information has proved to be defective, and therefore their decision, being based on false premises, must fall.

Mr. President, I would like to thank you for allowing me to address this Chamber of the Court. It has been a true privilege to speak on behalf of my President and my country. I again reiterate to the Republic and the people of Honduras my respect. I truly believe that as here in Europe, where borders are amongst the most developed regions, with high living conditions, congregating people of different nationalities in search of opportunities, we in Central America can transform our present borders that continue to be those areas with the highest poverty levels, underdevelopment and almost in oblivion.

What we seek, Mr. President and honourable Members of the Chamber, is that with your judgment we will continue, with judicial certainty, to build our borders into authentic poles of development and bridges of fraternity in which Central Americans can find the opportunities that will allow them to grow as nations and individuals.

Our Presidents — our current Central American Presidents — regard the rigorous integration process that we have embarked upon as the key that will open the door to our progress as a region. Therefore our Presidents have recognized the fact that border issues have to be encapsulated and discussed in the proper fora and they are pursuing their efforts to secure a better future for our people in all areas.

I would respectfully request, Mr. President, that you now call our Agent, Dr. Gabriel Mauricio Gutiérrez Castro to present our final considerations and submission. I thank you again.

Le PRESIDENT : Je vous remercie, Madame le Ministre et je donne maintenant la parole à l'agent de la République du Salvador, le docteur Mauricio Gutiérrez Castro.

Mr. GUTIÉRREZ CASTRO: Honourable Mr. President, distinguished judges, it is a great honour for me to address you today as Agent of the Republic of El Salvador.

The Chamber has ordered a second round to allow the Parties to reply. As part of El Salvador's response, I will offer some final thoughts and then, as El Salvador's Agent, read the final conclusions, pursuant to Article 60, paragraph 2, of the Rules of Court. I will do so in the language of my country, by virtue of the authority given under Article 39, paragraph 3, of the Statute, and after having complied with the requirements stipulated in Articles 70, paragraphs 2 and 3, and 71, paragraph 2, of the Rules of Court.

It was precisely one year ago today that El Salvador presented its Application for revision, thereby exercising the right established in Article 61 of the Court's Statute. It is a tribute to the honourable Court that it has reached this stage of the proceedings so swiftly, especially when one considers the scope of the case. It goes without saying that El Salvador's exercise of its statutory right cannot and must not be regarded as an abuse of judicial procedure. To the contrary, as our Minister for Foreign Affairs explained so well in her introductory remarks, it is no less than an expression of its faith in justice and in the persons who administer it. The ultimate purpose of any proceeding is to find the truth, and finding the truth can only do justice.

Juridical institutions do not come into being merely by their embodiment in law. They are born, thrive and grow by their practice. This was exemplified by the International Court of Justice's action in the original proceeding between El Salvador and Honduras, which the present Application for revision concerns. There, the Court acceded to Nicaragua's request to be permitted to intervene.

As to the specific subject of my remarks, the presentations given by the learned members of the Salvadoran delegation who preceded me have demonstrated beyond any reasonable doubt that El Salvador's Application is consistent with the law; that it satisfies the requirements established in Article 61 of the Statute and should therefore be admitted.

Honduras implicitly acknowledged the admissibility of El Salvador's Application when, by letter dated 29 October 2002, it informed the distinguished President of the Court that, pursuant to Article 61, paragraph 3, of the Statute, it would ask that the Court require previous compliance with the 1992 Judgment as a condition precedent to the admissibility of the Application for revision. It further informed the Court that it would file a formal request with the Chamber to that effect. With so large and learned a team of lawyers, Honduras would only make a decision of that nature because it knew that the Chamber could only honour the Honduran request by issuing a decision once El Salvador's Application was declared admissible. The back step that Honduras took with its letter of 24 July 2003, does nothing to diminish our worthy opponent's acknowledgment in its official communication to the Court, and instead serves to confirm it.

My predecessors have analyzed the requirements set out in Article 61 of the Statute, one by one and case by case. It would serve little purpose for me to repeat their persuasive arguments. The Application satisfies each condition, without exception leaving no doubt. Therefore, we have no objection to the exceptional and cumulative nature of the requirements, as we have fulfilled each and every one. Our request was made within the six-month time period following discovery of the new fact and within the ten-year time period from the date of the Judgment. The new fact is of such a nature as to be a decisive factor. These are facts that were unknown to the Chamber and to El Salvador when the Judgment was delivered, lack of knowledge that cannot be attributed to negligence.

Despite its repeated efforts, all calculated to attack matters of form, Honduras never succeeded in demonstrating that the new facts presented by El Salvador are not, in the sense they are defined in Article 61, paragraph 1, of the Statute. In fact, Honduras's arguments in key aspects of the debate concerning the new facts merely seem to confirm their existence. Indeed, much can be learned from what Honduras intentionally omitted or failed to prove than from what it said in this proceeding.

In this regard, in its submissions:

— Has Honduras ever denied the existence of a riverbed abandoned by the Goascorán River, extending from the Rompición de Los Amates to the Estero La Cutú?

— Has Honduras denied that the Goascorán River flowed through that riverbed for much of the colonial period?

— Has Honduras denied the existence of the Honduran works by Galindo y Galindo, Meza Cálix and Canales Salazar, all of which recognize a previous course of the Goascorán River debouching into the Estero La Cutú?

— Was Honduras able to deny that the Isla de Cuyaquina existed up until the time of the 1835 eruption?

— Has Honduras been able to provide a reasonable explanation for the profound differences between the Madrid and Chicago "Cartas Esféricas"*?*

— Has it been able to explain the differences between the two versions of the log of the brigantine *El Activo?*

— Has Honduras been able to demonstrate that the equal sign that appears on the Madrid version of the log of the brigantine *El Activo,* means "by order of"?

— Has it been able to show that the "Carta Esférica" of the *El Activo* is the same that appears on the official map of 1822 and, if so, has it given any reasonable explanation of why that map does not show the Goascorán River?

And so, esteemed judges, we could multiple these questions, because Honduras failed to prove any of its assertions, refused to enter into a discussion of the content of the evidence; and when it ventured into that realm, it produced an embarrassing spectacle as in the case of the truncated letter from Viceroy Revilla-Gigedo.

Once more, we regret that the Honduran strategy of consistently repeating the same and about purely formal and general aspects, impedes us from entering a discussion in itself about the value of the new invoked facts, and in this case prevents the emergence of a legitimate contradiction between parties that helps to illustrate the Chamber in its quest for the truth.

Mr. President, distinguished Members of the Chamber, I will now read the Republic of El Salvador's final submissions:

Now that the Court has acceded to the first request that El Salvador made in its Application by forming the present Chamber, El Salvador respectfully requests the Chamber, rejecting all contrary claims and submissions made adjudge and declare that:

1. The Application of the Republic of El Salvador is admissible based on the existence of new facts of such a nature as to leave the case open to revision, pursuant to Article 61 of the Statute of the Court, and
2. Once the request is admitted that it proceed to a revision of the Judgment of 11 September 1992, so that a new judgment fixes the boundary line in the sixth disputed sector of the land boundary between El Salvador and Honduras as follows:

> "Starting at the old mouth of the Goascorán River at the entry point known as the Estero de la Cutú, located at latitude 13 degrees 22 minutes 00 seconds north and longitude 87 degrees 41 minutes 25 seconds west, the border follows the old bed of the Goascorán River for a distance of 17,300 metres up to the place known as Rompición de Los Amates, located at latitude 13 degrees 26 minutes 29 seconds north and longitude 87 degrees 43 minutes 25 seconds west, which is where the Goascorán River changed course."

Pursuant to Article 60, paragraph 2, of the Rules of Court, a copy of the written text of the final submissions that I have read will be sent immediately to the Chamber, bearing my signature.

On behalf of El Salvador, the President of the Republic, the Honourable Francisco Flores, and the delegation that accompanies me, I would like to express my gratitude to you, Mr. President, and to the Members of the Chamber, for the attentiveness and courtesy with which you have listened to the arguments presented in support of the Application for revision that my country has submitted to you for consideration.

Le PRESIDENT : Je vous remercie Monsieur l'agent. La Cour prend acte des conclusions finales dont vous nous avez donné lecture au nom de la République du Salvador. Elle se réunira à nouveau le vendredi 12 septembre 2003 à 10 heures pour entendre le second tour de plaidoirie de la République du Honduras. La séance est levée.

L'audience est levée à 16 h 55.

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