C6/CR 2003/5

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2003

Public sitting of the Chamber

held on Friday 12 September 2003, at 10 a.m., at the Peace Palace,

Judge Guillaume, President of the Chamber, presiding,

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

VERBATIM RECORD

ANNÉE 2003

Audience publique de la Chambre

tenue le vendredi 12 septembre 2003, à 10 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

———————

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

Mr. Gabriel Mauricio Gutiérrez Castro,

as Agent;

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

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

as Co-Agents;

Lt. Agustín Vásquez Gómez,

as Deputy-Agent;

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

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

as Counsel and Advocates;

Mr. Mauricio Alfredo Clará,

Mr. Domingo E. Acevedo,

as Counsel;

Licda. Beatriz Borja de Miguel,

Ms Patricia Kennedy,

Ms Ana Mogorrón Huerta,

as Advisers;

Lic. César Martínez,

Ms Lilian Overdiek,

Ms Cecilia Montoya de Guardado,

as Assistants.

The Government of Honduras is represented by:

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

as Agent;

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

M. Gabriel Mauricio Gutiérrez Castro,

comme agent;

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

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

comme coagents;

M. Agustín Vásquez Gómez,

comme agent adjoint;

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

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

comme conseils et avocats;

M. Mauricio Alfredo Clará,

M. Domingo E. Acevedo,

comme conseils;

Mme Beatriz Borja de Miguel,

Mme Patricia Kennedy,

Mme Ana Mogorrón Huerta,

comme conseillers;

M. César Martínez,

Mme Lilian Overdiek,

Mme Cecilia Montoya de Guardado,

comme assistants.

Le Gouvernement du Honduras est représenté par :

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

comme agent;

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

as Co-Agent;

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

as Counsel.

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

comme coagent;

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

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

M. Philippe Sands, Q.C., professeur de droit à l'University College de Londres,

M. Carlos Jiménez Piernas, professeur de droit international à l'Université d'Alcalá, Madrid;

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 réunis aujourd'hui pour entendre le second tour de plaidoirie de la République du Honduras 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)). Je vais immédiatement donner la parole pour la République du Honduras à M. Philippe Sands.

Mr. SANDS:

1. Mr. President, Members of the Chamber, it is a privilege for me to appear before you this morning to present the second round of oral arguments on behalf of Honduras.

2. As is customary at this stage of the proceedings I will use the time available to us in this second round to address issues which have emerged in particular in this oral phase as dividing the Parties. We have noted the comments made on Wednesday afternoon, suggesting that somehow Honduras had not engaged with the arguments put forward by El Salvador. Let me be clear, that comment is without foundation. In the time available Honduras has addressed all the relevant arguments put by the other Party in its first round. It has done so in accordance with a structure and approach of its own choice. The fact that we have chosen not to address certain points raised on Monday, or on Wednesday, does not indicate our agreement with them, merely that we consider them not to be relevant or material to the very narrow set of issues that we say this Chamber has to decide at this stage of these proceedings.

3. The other side has sought to create a great fog. If their view is right, even at this admissibility stage of proceedings you are being asked to express views on a wide range of exotic issues — erupting volcanoes, devastating floods, eighteenth century expeditions, disappearing islands, and so on and so forth. But we are not at the movies. We are before a court of law — the world's principal judicial organ — and it is appropriate that we return to the real legal issues. What was the factual basis of the Chamber's *ratio decidendi* in 1992 in relation to the sixth sector? What facts which were unknown to the Chamber then has El Salvador now discovered? What are the strict conditions imposed by Article 61 of the Statute and were they satisfied so as to allow you to decide that the Application in this exceptional procedure is admissible? In this presentation I will

try to draw together the threads of this case. They are woven around three sets of documentary materials: the 1992 Judgment; Article 61 of the Statute; and the items variously included in the annexes to El Salvador's Application.

(1) The 1992 Judgment

4. I start with the 1992 Judgment. Judging by yesterday's display El Salvador would have done well to re-read that part of the Judgment that deals with the sixth sector of the land boundary, that is paragraphs 306 to 322. It is in those paragraphs that one finds the factual basis for the Chamber's 1992 decision, on the question of whether the boundary followed the River Goascorán or an old course of the river. The importance of the essential factual basis of the Chamber's Judgment became very clear to us on Wednesday afternoon, when Professor Remiro Brotóns referred back to the negotiations at Saco. I am grateful to him for directing us, inadvertently perhaps, to what is really the key issue in this case, the factual basis for the Chamber's decision. Professor Brotóns noted first that the negotiators took the mouth of the Goascorán as it was at that time (that is to say, 1884)[1]. But he then went on to say: *"Les comptes rendus des négociations ne contiennent rien qui analyse la thèse selon laquelle l'embouchure du Goascorán était a l'époque la même que celle qui fut retenue dans l'arrêt de 1992."*[2] Let there be no doubt about what he is doing on behalf of El Salvador: he is here reopening the very issue which it argued in 1992 and lost, but he has no evidence to support his case.

5. These passages of the Judgment bear very careful scrutiny. In our submission the most relevant passage of the Judgment is paragraph 312, which is worth quoting in relevant part: "In the Chamber's view, however, any claim by El Salvador that the boundary follows an old course of the river abandoned at some time before 1821 must be rejected. It is a new claim and inconsistent with the previous history of the dispute." We say that this is the "operative clause" of the 1992 Judgment, in the sense described by the Court in its first revision case in the 1985 Judgment[3]. Honduras considers that it is absolutely clear from this paragraph that the Chamber's rejection of El Salvador's argument had nothing to do with any theory of "avulsion" or of any findings of fact

[1] C6/CR 2003/4, p. 34, para. 28.

[2] *Ibid.*

[3] *I.C.J. Reports 1985*, p. 208, paras. 32-33.

in that regard, and that the material presented by El Salvador to that subject is irrelevant to the operative factual determination. Paragraph 312 makes it abundantly clear that El Salvador's argument was rejected on the basis of the Chamber's finding of fact that from 1880, during the Saco negotiations, until 1972 El Salvador had treated the boundary as being based on the 1821 course of the river. The Chamber concluded that El Salvador's actions in that period had legal consequences: they precluded El Salvador from raising what the Chamber called a new claim or acting inconsistently with its previous actions. That, we say, is the essential fact.

6. Having then rejected the "old course of the river" argument on that basis the Chamber went on to find, as a fact, that in 1821 the River Goascorán emerged in the Estero at Ramaditas at paragraph 322. That fact is not now in dispute, as confirmed by Professor Remiro Brotóns on Wednesday[4].

7. For its part, El Salvador bases this Application on a different fact. It proceeds on the premise that the Chamber's 1992 decision rejecting El Salvador's argument on the old course of the river leading to Cutú was based on a finding of fact that "avulsion" had not been established. As Professor Remiro Brotóns put it on Wednesday: *"Les paragraphes qui suivent doivent toujours être considerées à partir de cette premisse"*[5]. The premise is central to El Salvador's case. Without it El Salvador simply has no case at all. Plainly, the Chamber was not persuaded by El Salvador's contention on that point in 1992. It said that "no record of such an abrupt change" had been brought to its attention (para. 308), that there was no "scientific evidence" to support the assertion, and it was not persuaded by the one piece of evidence available, namely a study contained in a 1933 publication (para. 309). But it is equally clear, in our submission, that the Chamber does not anywhere in these paragraphs or anywhere in its Judgment indicate that its decision to reject El Salvador's claim on this part of the case was based on the finding of fact in relation to the "avulsion" argument. The rejection was clearly based on the reasons set forth in paragraph 312, and the facts they indicate. Avulsion is not mentioned in that part of the Judgment.

8. It is worth noting, at this point, that the second round presentation by Professor Remiro Brotóns — in response to the advocacy of Professor Sánchez Rodríguez — is of singular

[4]10 September 2003, C6/CR 2003/4, p. 26, para. 2.

[5]10 September 2003, C6/CR 2003/4, p. 26, para. 3.

importance. Paragraphs 2 and 3 of the Professor's pleadings merit particular attention. Professor Brotóns confirmed that El Salvador had no difficulty in accepting that if there had been no "avulsion" between the fixing of the provincial boundaries in the Spanish colonial period and 1821, then the *uti possidetis juris* of 1821 was in the current course of the river[6]. This is the first time that El Salvador has made this point in express terms. It contradicts directly the approach taken in the Application for revision, in which El Salvador states "what really mattered was not 'the course of the river in 1821' but the provincial boundary at that time"[7]. The point is an important one, for two reasons. First, it means that El Salvador now recognizes that to succeed on its case — which we say is wholly misconceived anyway and based on an erroneous reading of the 1992 Judgment — then it has to prove an "avulsion" during the Spanish colonial period. And second, it means that if Honduras is correct in its view that the reasons for the Judgment of 1992 are set out factually on paragraph 312 and not 308 then El Salvador's Application for revision collapses completely. I would add, for the avoidance of any doubt, that Honduras has never accepted the application of the claimed Spanish colonial law in respect of "avulsion".

9. El Salvador has proceeded on its own particular view as to the factual basis upon which the Chamber reached its Judgment in 1992. That view is the premise of the present Application; we say it is the wrong premise. Getting the factual premise of the 1992 Judgment right is absolutely crucial, because it provides the reference point — the sole reference point — to consider the application of the conditions strictly set out in Article 61 of the Statute. In particular it provides the key to answering the question whether the "new fact", if there is one, is of such a nature as to be a decisive factor.

(2) The Article 61 conditions

10. I turn now to the Article 61 conditions themselves which, of course, all have to be satisfied if the Application is to be declared admissible. The Court has recently addressed these conditions in its Judgment of 3 February 2003, and has usefully referred to them at paragraph 16 of that Judgment. The Article 61 conditions give rise to five questions, each of which El Salvador

---

[6]10 September 2003, C6/CR 2003/4, p. 26, para. 2.

[7]Application, p. 29, para. 71.

must persuade the Chamber is to be answered in the affirmative. If El Salvador fails to persuade the Chamber on any of those questions then her Application must fail.

11. Question 1 in relation to Article 61 is this: *is El Salvador's Application based upon the "discovery" of a "fact"?* We say the answer to that question is plainly "no". Professor Dupuy explained the reasons on Tuesday morning. I do not need to repeat his arguments. Yesterday El Salvador did not respond to the points made by Professor Dupuy. It merely restated its earlier arguments.

12. Let me put the matter in a different way: what fact does El Salvador have to establish in order to meet this first Article 61 condition? By reference to paragraph 312 it has the burden of establishing to the satisfaction of this Chamber that between 1880 and 1972 it — El Salvador — did not treat the boundary as being based on the 1821 course of the river *and* that in 1821 the river entered the Estero elsewhere than at Ramaditas. It has introduced no material to establish those facts, indeed it has not even sought to do so. The Application — if we are right on paragraph 312 — falls at this first hurdle. In our submission the Application is misconceived because it is based on the wrong factual premise.

13. If we are wrong on that — but only if we are wrong on that — does the Chamber need to consider the Application by reference to the factual premise proposed by El Salvador. On its argument — the paragraph 308 argument — it has to establish two matters: first, that an "avulsion" occurred, and second, that it occurred on a precise date during the Spanish colonial period, i.e., at some point between approximately 1765 and 1821. In the 1992 proceedings El Salvador did not introduce a "record" of an "avulsion", and it has not introduced any "record" of such "avulsion" in these proceedings. The discovery of a "record" which establishes the occurrence of an "avulsion" could conceivably be a "fact" within the meaning of Article 61. But there is no record before this Chamber. Instead, El Salvador has introduced material, the great majority of which it has created itself, that it variously refers to as "information", "evidence", "proof", "arguments"; and its materials fall into three categories, referred to by El Salvador as the "scientific evidence", the "technical evidence", and the "historical evidence".

14. It is worth recalling that Article 61 does not refer to the discovery of new "evidence". If the drafters of the Statute had intended to include new evidentiary material they could have done so

expressly: the drafters used the word "evidence" in Article 52 of the Statute, and contrary to the drafters of the Statute of the International Criminal Court they did not provide for revisions on the grounds of "discovery of new evidence". In our submission it is far from established that a "fact" in the sense of Article 61 can ever include evidentiary material in support of an argument, or an assertion, or an allegation.

15. I turn to the first item, the so-called "scientific evidence"; a report produced by Coastal Environments. Actually, it is a statement concerning the opinion of three American consultants, which may or may not be authoritative, but it is not decisive; I will say more about that shortly. The simple point is that it is an opinion, and it is that opinion upon which El Salvador relies. Professor Mendelson suggested that a report containing an opinion can be a fact: and, of course, we are bound to agree that the physical existence of a report is a fact, but the opinion which it contains is not a fact, at least within the meaning of Article 61 of the Statute. In her separate opinion to the Court's 1985 Judgment Judge Bastid noted that Tunisia had not presented the report of an independent expert as a new fact[8]. Moreover, we say, this "scientific evidence" is not a fact within the meaning of Article 61 because it has not been "discovered". It was *commissioned* by El Salvador, it has been self-created. I would say also that there is clear authority for the proposition that an opinion cannot be a fact for the purpose of revision proceedings, for example, before the European Court of Justice.

16. The second item produced by El Salvador is the so-called "technical evidence". That is perhaps a generous appellation for Annex IV of El Salvador's Application, which principally comprises some 40 or so photographs or composite photographs. That they exist as photographs is plainly a "fact". But whether the information it is said by El Salvador they contain, constitutes another "fact" within the meaning of Article 61 is quite another matter. The vast majority of the photographs are undated and not authenticated. I will say more about that later. But how do we know what those photographs demonstrate? If you take the photographs that were displayed on the screen on Monday, what did they actually show? Did any of them establish that an "avulsion" occurred during the colonial period? Could you look at those photographs and say to yourself: of

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

course, how could I have missed it, plainly an "avulsion" occurred in 1794, or some other date, which dramatically transformed the direction of the river. Of course you could not reach that conclusion. We were presented, for example, with a picture of a pile of stones. They could come from anywhere. The legend attaching to that particular photograph states: "Close up of the soil in the area identified is the original bed of the river."[9] Which river? Identified by who? On what date? In precisely what location? What caused them to be there? The technical annex so called is really another opinion, but this time it is anonymous. It is unsigned, it is uncertified, and is apparently drawn up by photographers with no expertise in the subject-matter. Moreover, it is not newly "discovered". It has been obtained, commissioned by El Salvador in circumstances described to us by Professor Mendelson which, if accurate, raise very serious concerns about legality and in respect of which Honduras felt bound to issue a formal diplomatic Note of protest. If the Chamber rules that these photographs and this so-called "technical evidence" constitutes a fact or facts, within the meaning of Article 61 of the Statute, then it will be giving, quite simply, a green light to the self-commissioning of new factual material long after the case is over and permitting their presentation under conditions which are inconsistent with the most elementary principles for the provision of evidence and the establishment of proof. I am bound to say that it is a matter of some interest that counsel appearing before this Chamber of the Court should purport to establish the authenticity and probative value of materials in the way in which that was done earlier in the week. Mr. President, Members of the Chamber, in our submission the "technical evidence" so-called is not what the drafters had in mind when they inserted Article 61 into the Statute.

17. That leaves the "historical evidence". Does any of it constitute a fact which establishes "avulsion" if we are dealing with Honduras's thesis as to paragraph 3.08? In our submission, absolutely not. Beyond the self-evident difficulty that much of this material could or should have been known to El Salvador in the original proceedings — and indeed some of it was, as El Salvador now accepts — none of it establishes the new fact which El Salvador must prove if it is to succeed on its Application. Indeed, quite the contrary may be said. The copy of the "Carta Esférica" located in the Newberry Library shows the mouth of the River Goascorán to be precisely

[9]Honduras Written Observations, Ann. IV, p. 103.

where it is located in the two charts introduced by Honduras in the earlier proceedings and relied upon by the Chamber acting unanimously in 1992. There is no inconsistency in these charts. That is confirmed by independent experts of the highest authority in the world whose reports in Honduras's annexes are unchallenged by any Salvadoran expertise whatsoever. All these issues were fully argued in 1992, as Professor Jiménez Piernas described on Tuesday[10]. The point was met with silence from El Salvador.

18. In sum, none of the material put forward by El Salvador constitutes a "fact" within the meaning of Article 61 of the Statute, and the great majority of it again has been created by El Salvador itself, by way of commission, it cannot have said to have been discovered.

19. I turn then to question 2: *is the fact the discovery of which is relied upon both by El Salvador, "of such a nature as to be a decisive factor"?* This may well be the decisive basis upon which the Chamber disposes of this Application, as we say it must. Even assuming that some or all of the material constitutes a "fact", which we do not accept, none of it is at all relevant to paragraph 312 and it cannot be said to be decisive to El Salvador's purported paragraph 308 fact.

20. Assuming there is a fact, whether it has a "decisive" character depends on the meaning of the operative clause of the 1992 Judgment. The Court said this clearly in its 1985 Judgment[11]. The operative clause of the 1992 Judgment is paragraph 312, so the fact be to "decisive" it would have to undermine the Chamber's factual determination that between 1880 and 1972 El Salvador treated the boundary as being based on the 1821 course of the river *and* that in 1821 the course of the river debouched at Ramaditas. For the reasons already explained, none of the material introduced by El Salvador can do that. It does not purport to do it. The Chamber's factual findings on these points and its reasoning — reflected in paragraphs 312 and 322 in particular — are "wholly unaffected" by the material introduced by El Salvador. To the contrary, in respect of the location of the mouth of the river, as I said, the Chamber's 1992 finding is confirmed. In 1992 the Chamber relied on two maps, now they can rely on three maps.

21. The material introduced by El Salvador is directed exclusively to paragraph 308 of the 1992 Judgment. For the sake of argument, if El Salvador is correct that that is the operative

---

[10] 9 September 2003, C6/CR 2003/3, p. 32, para. 7.

[11] *I.C.J. Reports 1985*, p. 208, paras. 32.

clause — and we say it is not— then the question to be asked is this: is an "avulsion" established on a precise date during the colonial period?

22. Before addressing that question let me touch briefly on the question of the burden and standard of proof at this admissibility stage. The Parties do appear to agree that the burden of proof is on El Salvador to establish the new fact and indeed all of the conditions set forth in Article 61 having been satisfied. Where the Parties disagree is on the standard of proof. El Salvador argues that all it has to do is establish that the new fact is "plausible", or, if I understood Professor Mendelson correctly, "possible"[12]. In support of that standard — which is almost as low as one could conceive in any court — it offers no judicial authority from this Court and no judicial authority from any other court. It relies on a particular reading of Article 61 which, for my part, is entirely unpersuasive. In our submission, the standard of proof has to be connected to the nature of the revision process, which is broadly recognized to be both *exceptional* (given its implications for *res judicata*) and subject to the *strict* fulfilment of the Article 61 conditions. In her separate opinion in the 1985 Judgment Madam Bastid noted "*la gravité d'une demande en revision quand à l'importance de ses conséquences"* she went on to write that "*il parait indispensable de s'assurer, dès la requête, que chacune de ces conditions se trouve satisfaites"*[13]. And that implies a rather higher standard than El Salvador may wish. Indeed it makes clear that the Court, and Madam Bastid in particular, proceeded on the basis on a high standard in terms of burden of proof. We say that is the right standard, given the need to avoid absolutely the possibility that the door to revision is opened any wider than it must be to let in those tiny number of exceptional cases which may justify the invocation of the revision process to avoid genuine risk of injustice.

23. Has El Salvador established that an "avulsion" occurred at the material date in Spanish colonial times? We say it has not. There is not a single reference in the "historical evidence" presented by El Salvador which refers to "avulsion" as having been established or occurred within the colonial period. None of the historical material indicates in any way how the river did change its course, if indeed it did. The material takes us no further than the 1992 Judgment. The same may be said of the "technical evidence". On their face the pictures and the maps are entirely

---

[12] 10 September 2003, C6/CR 2003/4, p. 14, para. 15 (Prof. Mendelson).

[13] *I.C.J. Reports 1985*, p. 248, para. 3.

inconclusive and could provide evidence of a multitude of different facts. They cannot establish that an "avulsion" occurred, they absolutely cannot establish that an "avulsion" occurred in Spanish colonial period or indeed at any point with any degree of precision. For the avoidance of any doubt, I should add here that, contrary to the assertion of the Agent of El Salvador on Wednesday[14], Honduras does not accept that at some point during the colonial period the River Goascorán flowed into Cutú.

24. All El Salvador is left with on this important point of its case is the CEI Report. But the Report is opinion, it is not fact. And it is tentative opinion at that: should you read the report carefully, you see that it is replete with words that fall very far short of establishing with any degree of certainty that an "avulsion" occurred, or when it occurred. "Indicates" and "suggests" are words which abound throughout this tentative opinion. Professor Kearney — an independent authority in the field notes the Report's "questionable interpretations" and concludes that "the CEI Report does not really tie down within any precision the date for the switching (if it actually occurred in the last 250 years)"[15]. Professor Kearney also concludes that it appears that "no fundamentally new technologies only available since 1992 played any real role in the analysis", and "all the most important analyses could have been undertaken . . . long before 1992"[16]. There is simply no evidence before the Chamber to contradict these authoritative and independent conclusions. On the novelty point, are these new technologies? Professor Mendelson sought to draw an analogy with rules governing the introduction of new evidence in relation to scientific developments in the field of DNA. There is no analogy here which assists the Salvadoran cause. The types of proceedings to which he was referring are in the field of criminal law, altogether different from proceedings such as these and subject to their own very specific rules, which of course vary from national legal system to national legal system. Moreover, a point worth mentioning, is that DNA evidence is capable of establishing facts to a standard of certainty, if not near certainty — as near to 100 per cent as is possible, which only serves to highlight, by contrast, the very limited evidence of this Report. But the DNA analogy is inapposite for another reason: in

[14]10 September 2003, C6/CR 2003/4, p. 40.

[15]Honduras Written Observations, Annexes, Vol. II, p. 236, paras. 22, 24.

[16]*Ibid.*, p. 233, para. 15.

English law — that is the only domestic legal system I am still able to address — the introduction of new DNA evidence is part of a procedure of criminal appeal (not of revision) and it is subject to very particular criteria concerning the introduction of fresh evidence: if the criminal appeal is successful and the conviction is quashed, there is no middle ground, it is not a question of revision or modification[17]; the whole judgment goes, the conviction goes, the sentence goes, and you start again.

25. In sum, the Chamber is not here faced with a situation in which a new fact having a decisive character has been identified. Even if any of this material can be considered to be factual in character, the operative clause of the 1992 Judgment is "wholly affected" by any of it. This applies whether the operative clause is paragraph 312, as *we* say, or paragraph 308, as El Salvador seems to believe.

26. I turn now to questions 3 and 4 which arise from Article 61. It may be sensible to take them together, since they are rather closely related. Question 3 is this: *was the fact "unknown" to the Court and to El Salvador when the Judgment was given?* And Question 4: *can it be said that ignorance of the fact was not "due to negligence" on the part of El Salvador?*

27. If the material presented by El Salvador is factual in character — and we say that is a very big "if" — then it has to persuade the Chamber that it was unaware of each and every item and, also in respect of each and every item, that its ignorance was not due to negligence. In Honduras's submission El Salvador comes nowhere near overcoming these two hurdles.

28. As to the absence of knowledge, even by its own account El Salvador knew of the existence of certain material it has now represented. This is the case, for example, of the book by Galindo y Galindo and some of the photographs used in the scientific and technical reports[18]. In our submission no account whatsoever can be taken of that material. Other material — for example photographs taken before 1992 and included in the "technical evidence" — is now admitted by El Salvador to have originated from its own sources, such as its own National Institute of Geography[19]. El Salvador has to confirm that this material was not known to it in 1992. In the

[17]See Criminal Appeal Act 1968, espec. Sections 2 and 23 (2).

[18]8 September 2003, C6/CR 2003/2, p. 30, para. 15.

[19]8 September 2003, C6/CR 2003/2, p. 29, para. 11.

absence of any formal certification — and there is none to that effect — an explanation as to the basis upon which material held by the Government was unknown to it, that material is simply not admissible, no account can be taken of it. Yet other material has been commissioned by El Salvador, apparently for the purposes of this litigation. Although such material of course cannot be said to have been known by El Salvador in 1992, it certainly knew that it was open to it to have obtained an independent opinion on whether or not an "avulsion" occurred. The possibility that scientific evidence could have been put before the Chamber is expressly alluded to in the 1992 Judgment[20]. Having decided not to commission an opinion in the 1992 proceedings, it is simply not open to El Salvador to now rely on an opinion on scientific evidence which *it* commissioned nearly ten years after the Judgment and to then say that it did not, in 1992, know of the contents of the opinion or the possibility of commissioning such a document.

29. Has El Salvador demonstrated the absence of negligence? Last Tuesday Honduras comprehensibly demonstrated El Salvador's failure to exercise due diligence in the preparation of its arguments, including the obtaining and presentation of proofs and evidence as strictly required by Article 52 of the Statute of the Court. The material which has been presented today could and should have been presented ten years ago. Some of the material was available to it in its own government departments, the rest could have been found if a systematic and diligent research had been carried out. There is simply no reason why El Salvador could not have obtained an independent opinion on scientific evidence ten years ago. Professor Kearney makes it absolutely clear that all the technologies used in the production of the report were then available. Pause here for a moment: it is said in the report that it was commissioned in July . . . it is dated 5 April. One asks whether in a period of a few days or weeks, what effort the drafters of that opinion went to to go about obtaining the benefit of "new technologies" — a very small period of time. Mr. Meese went through each and every item on Tuesday. We heard no response on this point from El Salvador on Wednesday. What we heard instead was a description from Professor Mendelson as to the manner in which three photographers entered Honduran territory on 9 July last and took various photographs now included in the "technical evidence"[21]. It is not apparent to us that

---

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

[21] 10 September 2003, C6/CR 2003/4, p. 20, para. 29.

Professor Mendelson accompanied those photographers; the account he gave is pure hearsay; there is no proof before this Chamber to support the assertion he made; and the account raises some very serious questions as to the manner in which one sovereign State went about seeking to obtain evidence for the use of international proceedings against another sovereign State. But the key point is this: those photographs could have been obtained in the course of the 1992 proceedings. The same goes for the mass of pre-1992 photographs contained in the Report of Coastal Environment Inc. (Annex IV) which includes aerial and/or satellite photographs taken in 1949 (figs. 4, 5, 7, 9), 1973 (figs. 5, 7, 10), 1982 (fig. 5). We have been provided with no explanation as to the failure to produce these in the 1992 proceedings. We have been provided with no evidence to support the contention that El Salvador was disabled by "civil war" from gathering and presenting other materials. It is simply not good enough for El Salvador's counsel to make bald assertions which are unsubstantiated by any proof or evidence. And it is totally unacceptable to suggest that the standards of due diligence in the preparation of a case and the obtaining of evidence are to be distinguished as between certain categories of countries. The argument as to lack of economic resources is wholly novel and — we would say — deeply dangerous for a rules-based system of international law which is based on the sovereign equality of States and the principle of equality of arms. The standard has to be the same for all States. Revision proceedings are of the utmost gravity for the authority of the Court, the integrity of the legal system, and the principle of *res judicata*. El Salvador has to prove its case as to the failure to produce these materials. It has not done so.

30. I come now to the fifth and final question: *was El Salvador's application for revision "made at the latest within six months of the discovery of the new fact"*? The response to this question is: we simply do not know.

31. In our submission, a properly pleaded application for revision would have included, in relation to each and every item submitted, a statement attesting to the fact that the item was first discovered on "such and such" date and the reasons for the failure to discover it earlier were "x, y or z". The technical evidence is undated. At page 669 of Volume II of its Annexes El Salvador includes a document from the Newberry Library, dated 30 July 2002, certifying that it holds a copy of the log book of 1794 of the *El Activo*. But there is no certification, there is no witness statement

or other proof as to the date on which El Salvador became aware of the existence of the log book. Revision is a very serious matter. The conditions have to be strictly applied. Proof has to be supplied in relation to each and every item. Now, El Salvador may say that this approach would create for them an impossible burden, since there is simply too much material. But that is the point. This appears to be the very first case for revision which is premised on such a mass of material. El Salvador may think that sheer quantity points to an overwhelming case. With respect, the approach has precisely the opposite effect: amongst this great mass of material can you say to yourself, is there as single, overwhelming fact which decisively undermines any part of the 1992 Judgment. If there was such an item, it could be properly certified and attested to. But there is none.

32. Mr. President, Members of the Chamber, we do not know when this material was discovered, even assuming any of it is factual in character. El Salvador has simply not met the requirements of Article 61 which it has the burden of establishing.

(3) Conclusions

33. I come now to some general conclusions. We say that paragraph 312 is the "operative clause", which is wholly unaffected by any of the material relied upon by El Salvador. We say that Article 61 establishes an exceptional procedure which necessarily requires that its conditions be strictly adhered to. The conditions are cumulative. This means, amongst other things, that each and every item must satisfy each and every one of the five conditions. Article 61 is not intended to create a process of quasi-appeal by which a losing State can, over a process of many years, gather material, develop a case and then present it as having crystallized in a manner which makes a mockery of the six-months' rule and which, frankly, undermines the obligations of States and their counsel to prepare a case fully and diligently for argument. Yet that is precisely what appears to have happened here, on the basis of El Salvador's misreading of the 1992 Judgment and the misunderstanding of Article 61.

34. El Salvador's approach is completely novel: it is unsupported by any authority. I have not been able to find a single case in which a request for revision has been made in the way

El Salvador now proposes. The cases cited by El Salvador's counsel provide no support whatsoever to its Application.

35. There is a very good reason why, as a matter of judicial policy, this Court — as well as all other international courts — in practice exercise a great deal of restraint and caution on matters of revision. The principle of *res judicata* can only be upset in exceptional circumstances and this, we say, is not such a circumstance. El Salvador has returned to the Chamber to reargue the very same points it made in 1992, speculative assertions not based on proven and established material. Only this time there is a very material difference. The Chamber has given a judgment and it is based on findings of fact from which legal consequences flow. The Judgment based on those findings has still not been implemented.

36. This is not a case on which El Salvador can or should succeed. There is no injustice. El Salvador may not like the Chamber's Judgment in relation to section 6 of the land frontier, but it cannot appeal it: it has to live with it. Revision is revision. It is not appeal. The revision conditions of Article 61 are manifestly not satisfied. There is no material before the Chamber which meets the conditions of Article 61. On a plain reading paragraph 312 is the "operative clause: nothing affects paragraph 312. If we run on that, as El Salvador argues, paragraph 308 is operative, similarly there is *no* material before the Chamber which establishes that the Goascorán River previously ran in a former bed which debouched at Estero La Cutú or that a process of "avulsion" occurred, or that it occurred on a particular date. There is simply no place for an "avulsion" claim in the framework of an *uti possidetis* argument in this case today, any more than there was ten years ago.

37. El Salvador's case — the Application — raises no prima facie case: it is not a plausible application. With the greatest respect, we would say that large parts of it simply are not even arguable. The Application should be declared inadmissible. If it is not, there is a real risk that it will open the door to further proceedings of this kind. It will encourage States and their counsel to be less diligent in the preparation of cases before the Court. Counsel such as myself will be on notice that if we fail to obtain the necessary evidence and proofs required in the run up to a case — the preparation of the pleadings — then the State for which we act could be free to return to the Court within ten years of its judgment with new material. That cannot be right. It would result in a

legal system which undermines the authority and stability of the Court's judgments or of *res judicata*.

38. Mr. President, Members of the Chamber, whilst the River Goascorán was flowing into the Gulf of Ramaditas, a well-known English playwright wrote a play which perfectly described the consequences of our distinguished opponent's case: *"Mucho Ruido Y Pocas Nueces"*. *"Beaucoup de Bruit Pour Rien"*. *"Much Ado About Nothing"*. I thank you for your attention, and now invite you to call to the Bar the distinguished Agent of Honduras.

Le PRESIDENT : Je vous remercie beaucoup, Maître Philippe Sands. Je donne maintenant la parole à Son Excellence l'ambassadeur Carlos López Contreras, agent de la République du Honduras.

Mr. LÓPEZ CONTRERAS: Mr. President, Members of the Chamber. First of all I would like to excuse Professor Pierre-Marie Dupuy for urgent private matters. He had to urgently leave The Hague and would have, very much, liked to be present at these oral pleadings.

1. In addition, Mr. President, to Professor Sands's remarks, I would like to close this presentation on behalf of Honduras with a few observations, in response to certain statements made on Wednesday afternoon by our learned opponents, reaffirming that Honduras stays firm in all its pleadings, written and verbal, presented to this Chamber and, of course, including the authenticity of the "Carta Esférica" and the journal of navigation of the brigantine *El Activo*.

2. I would begin, Sir, by noting that Honduras is free to determine for itself the manner in which it will respond to El Salvador. In particular, Honduras is free to choose the priority of the issues which it will address, as it is for the Chamber to determine which of the Parties made a sound choice and a convincing argument. We trust in your judgment.

3. By way of concluding remarks:

— I welcome the acceptance by El Salvador of the definitive and obligatory character of the 1992 Judgment, and the need to comply with it in full.

— For six years El Salvador made the land demarcation conditional on the signature of a treaty on the nationality and recognition of rights for the population affected by the delimitation, though the 1992 Judgment included no such requirement in its decision.

— In respect of the "civil war" matter that has been recently raised, we do not seek to "belittle the situation in El Salvador" in the 1980s and 1990s. My introductory observations on Tuesday merely referred to what the Chamber said at paragraph 63 of its Judgment.

— In connection with certain acts of violence that would have taken place during those years, it must be recalled that the Salvadoran population in the boundary areas *recognized as Honduran since 1821 by the 1992 Judgment*, fled their country complaining of what some qualified as unbearable political repression. They — this population — were hosted by Honduras with the support of the United Nations and other humanitarian organizations. Indeed, during the 1980s Honduras became the sanctuary for more than 100,000 refugees from several countries in Central America, including some 25,000 from El Salvador.

— In the Goascorán sector — according to the November 1993 Census carried out by the Binational Commission of El Salvador-Honduras — there were only 23 Salvadoran citizens; nine men and 14 women, of a total of 1,161. However, the "Convention on Nationality and Vested Rights" *(Convencion sobre Nacionalidad y Derechos Adquiridos)* signed by the Presidents Armando Calderón Sol of El Salvador and Carlos Roberto Reina from Honduras on 19 January 1998, has been in force for several years and its Article 7 entitles the population to opt for one of the two nationalities of origin; that is to say, to become nationals by birth, with no distinction in respect of the local population.

— Notwithstanding the treaty, from 1998 on the land demarcation of the boundary delimited by the 1992 Judgment only began to be demarcated until 2003, due to El Salvador's attitude.

— On the question of the claimed avulsion, if it were possible to prove — something that El Salvador has not been able to do — that the Goascorán River favoured the Cutú-Capulin channel "during most of the Holocene Period [that is, the last 11,000 years]" it is anybody's guess when the supposed avulsion might have taken place. Perhaps 5,000 years ago? Or maybe only 1,000?

— It is also worth mentioning Hurricane Mitch of October 1998, recognized to be the "deadliest Atlantic hurricane since 1780", because it did not change the course of the River Goascorán. According to an authoritative source from the United States of America, the hurricane was a "Category 5 Monster" [www.nhc.noaa.gov/1998mitch.html]. The hurricane remained in that

category for 33 consecutive hours with winds reaching 155 knots. "Total rainfall has been reported as high as 75 inches for the entire storm . . . The resulting floods and mud slides virtually destroyed the entire infrastructure of Honduras and devastated parts of Nicaragua, Guatemala, Belize, and El Salvador . . ." I sincerely believe that this is convincing proof that the course of the Goascorán River is stable and that the Salvadoran argument of the supposed avulsion lacks the basis for a serious consideration by this Chamber.

4. Mr. President, I have been personally involved in the process of the boundary delimitation with El Salvador through all its fundamental stages since 1979. As a result of that experience and first hand knowledge I can assure the Chamber that paragraph 312 of the 1992 Judgment is accurate and pertinently reflects the situation prevailing among the Parties when it says: "any claim by El Salvador that the boundary follows an old course of the river abandoned at some time before 1821 must be rejected. It is a new claim and inconsistent with the previous history of the dispute."

5. May I also restate, at this moment, the commitment of the Republic of Honduras in promoting its friendly and fraternal relations with its neighbours — the other countries of Central America — on the basis of the "good neighbourliness principle", aiming at regional integration through intense co-operation. This is particularly true in the Gulf of Fonseca region, of which the Chamber rightly observed in 1992 that it was shared by its three riparian countries.

SUBMISSIONS

6. Finally, Mr. President, it is my duty to the Chamber to express that El Salvador, save for the time-limit of ten years for presenting its Application, has not fulfilled any of the other strict and cumulative conditions established by the Statute of the Court for admissibility. I, therefore, have the honour to read the submissions of the Government of the Republic of Honduras: "In view of the facts and arguments presented above, the Government of the Republic of Honduras requests the Chamber to declare the inadmissibility of the Application for Revision presented on 10 September 2002 by El Salvador." Pursuant to Article 60, paragraph 2, of the Rules of Court, I have communicated to the Court the signed written text of these submissions.

7. It then, Mr. President, only remains for me to thank my distinguished opponents, led by Madam Minister for Foreign Affairs and the Agent, for the courteous manner in which these proceedings have been conducted. And to thank you, Sir, and honourable Members of the Chamber, for your attention and the assistance of the Court and its Registry. We wish you well in your deliberations. Thank you very much.

Le PRESIDENT DE LA CHAMBRE : Je vous remercie, Monsieur l'agent. La Chambre prend acte des conclusions finales dont vous avez donné lecture au nom de la République du Honduras, comme elle l'a fait mercredi pour les conclusions finales présentées par M. l' agent de la République d'El Salvador.

Je tiens à adresser mes remerciements, et ceux de mes collègues, aux agents, conseils et avocats pour leurs interventions et pour la courtoisie dont il a été ont fait preuve tout au long de cette procédure.

Conformément à la pratique, je prierai les deux agents de rester à la disposition de la Chambre pour tous renseignements complémentaires dont elle pourrait avoir besoin. Sous cette réserve, je déclare maintenant close la procédure orale dans l'affaire de la *Demande en revision de l'arrêt du 11 septembre 1992 en l'affaire du* Différend frontalier terrestre, insulaire et maritime (El Salvador/Honduras; Nicaragua (intervenant)) *(El Salvador c. Honduras)*.

La Chambre va maintenant se retirer pour délibérer. Les agents des Parties seront avisés en temps utile de la date à laquelle la Chambre rendra son arrêt.

L'audience est levée.

L'audience est levée à 11 h 5.

_____