DISSENTING OPINION OF JUDGE PAOLILLO

[Translation]

Need for the Court to verify compliance with the conditions of admissibility laid down by Article 61 of the Statute; no role played by the Parties' views on the matter — Disagreement as to the main ground for rejection by the Chamber in the original proceedings on El Salvador's claims in respect of the sixth sector of the land boundary — True ratio decidendi *of the 1992 Judgment in respect of the sixth sector of the boundary — Belated presentation by Honduras of its argument in this regard — Implicit acknowledgment by the Chamber that documentary evidence may constitute "facts" within the meaning of Article 61 of the Statute — New facts alleged by El Salvador largely satisfying the conditions laid down by Article 61 of the Statute — Decisive nature of evidence demonstrating the fact of avulsion — Doubts as to the reliability of the copies of the "Carta Esférica" and the report of the brigantine* El Activo *on which the Chamber based its 1992 decision regarding the sixth sector of the land boundary — No negligence on the part of El Salvador in presenting the new evidence.*

1. I regret that the Chamber has missed the opportunity to declare admissible, for the first time in the Court's history, an application for revision which, to my mind, satisfied all the conditions laid down by Article 61 of the Statute of the Court. My disagreement with the majority of the Chamber is based on a difference of opinion as to the reasoning which led the Chamber hearing the original proceedings in 1992 to reject El Salvador's claims regarding the course of the land boundary between its territory and that of Honduras in the sixth sector. I cannot share the view of a majority of the Chamber's Members on what constituted the *ratio decidendi* of the decision rendered by the Chamber in 1992 in respect of that sector.

2. In the reasoning of its decision holding El Salvador's Application for revision inadmissible, the present Chamber maintained that the material presented by the latter as "new facts" did not constitute "'decisive factors' in respect of the Judgment which it seeks to have revised" (paras. 40 and 55), in other words that those facts had no impact on the *ratio decidendi* of the Judgment in question. The Chamber reached that conclusion because it considers that the *ratio decidendi* in respect of the sixth sector of the land boundary between El Salvador and Honduras is explained in paragraph 312 of the 1992 Judgment, in which the Chamber, referring to El Salvador's contention that the *uti possidetis juris* defined the boundary in that sector as following an old course that the river Goascorán had left following an avulsion, states that "[i]t is a new claim and inconsistent with the previous history of the dispute".

3. Viewed in the general context of the 1992 Judgment, this statement, which follows the detailed reasoning contained in paragraphs 308, 309 and 310 concerning evidence of the phenomenon of avulsion as alleged by El Salvador, seems to me to be an ancillary argument in relation to the main ground invoked by the Chamber in 1992 for its rejection of El Salvador's claims. This main ground, in my view, was that El Salvador had been unable to demonstrate that, on a specific date in the seventeenth century, the river Goascorán had suddenly changed its course. It is this view of the *ratio decidendi* of the 1992 Judgment in respect of the sixth sector of the land boundary — a view that conflicts with that of a majority of Members of the present Chamber — which prompts me to draw an equally different conclusion regarding the admissibility of El Salvador's Application for revision.

4. I fully agree with the Chamber's statement in paragraph 22 of the present Judgment that "it is in any event for the Court, when seised of . . . an application [for revision], to ascertain whether the admissibility requirements laid down in Article 61 of the Statute have been met", regardless of the parties' views on the matter. In ascertaining whether these conditions have been satisfied, the Chamber's assessment will necessarily depend on the terms of the Judgment whose revision is sought and the Chamber must act in conformity with the findings in that Judgment. This is particularly important for purposes of ascertaining whether the new facts presented by the party seeking revision are "of such a nature as to be a decisive factor". That phrase has to be construed as meaning that, if the facts had been known previously, the Chamber would have taken a different decision. The new facts must, as noted by the present Chamber, be "'decisive factors' in respect of the Judgment which [the Applicant] seeks to have revised" (paras. 40 and 55), that is to say in relation to the ground that led the Chamber to take its decision in the original proceedings. Hence, the trickiest part of the process of considering an application for revision of a judgment consists in correctly identifying the real *ratio decidendi* of the judgment. In the case before us, the Chamber identified as *ratio decidendi* of the 1992 Judgment an observation by the Chamber, to my mind of secondary importance, related to the previous history of the dispute but not to its object or to the rights claimed by the Parties.

5. The dispute between the Parties regarding the sixth sector of their land boundary focused on the course of the boundary on the basis of the application of the principle of *uti possidetis juris* to that sector. In 1992, the Chamber's sole task consisted in establishing where this boundary line lay. Should it follow the course of the Goascorán in 1821 (Honduras's position) or the course of the river prior to the avulsion alleged by El Salvador? Those were the terms in which the Chamber stated the problem in 1992. In the first paragraph of the section of the Judgment dealing with the sixth sector, it described the crux of the dispute in very simple and straightforward terms:

> "The dispute between the Parties in this sector is simple. Honduras contends that in 1821 the river Goascorán constituted the boundary between the colonial units to which the two States have succeeded, that there has been no material change in the course of the river since 1821, and that the boundary therefore follows the present stream, flowing into the Gulf north-west of the Islas Ramaditas in the Bay of La Unión. El Salvador however claims that it is a previous course followed by the river which defines the boundary, and that this course, since abandoned by the stream, can be traced, and it reaches the Gulf at Estero La Cutú." (1992 Judgment, para. 306.)

6. This was the issue that the Chamber had to resolve with respect to the sixth sector of the land boundary and which it addressed in the paragraphs of the Judgment dealing with that sector. In its description of the dispute, the Chamber made no reference to the incompatibility of El Salvador's claim with the previous history of the dispute.

7. In its 1992 decision, the Chamber, having examined the evidence presented by the Parties, rejected El Salvador's claim "[f]or the reasons set out in the present Judgment, in particular paragraphs 306 to 322 thereof" (para. 430). And the reasons in question were set out clearly in paragraphs 308 and 309. In the former it stated that:

> "No record of such an abrupt change of course having occurred has been brought to the Chamber's attention, but were the Chamber satisfied that the river's course was earlier so radically different from its present one, then an avulsion might reasonably be inferred."

In the latter, it indicated that "[t]here is no scientific evidence that the previous course of the Goascorán was such that it debouched in the Estero La Cutú . . .".

8. The *ratio decidendi* of the decision rendered by the Chamber in 1992 in respect of the sixth sector is in effect contained in paragraphs 308 and 309. The reasoning in the subsequent paragraphs is subject to the conclusion reached by the Chamber in those two paragraphs regarding the avulsion alleged by El Salvador. I am convinced that this was also the Chamber's perception of the matter in 1992, not only because this is what emerges from its discussion of El Salvador's claim in paragraphs 307 to 321 of its decision but also because the Chamber itself expressly states as much in paragraph 321. This last part of that paragraph reads as follows:

> "*Having been unable to accept the contrary submissions of El Salvador* as to the old course of the Goascorán, and in *the absence of any reasoned contention of El Salvador in favour* of a line to the south-east of the Ramaditas, the Chamber considers that it may

uphold the Honduran submissions in the terms in which they were presented." (Emphasis added.)

9. All these passages show that in 1992 the Chamber's reasoning focused on what constituted the crucial — and sole — point of dispute between the Parties with respect to the sixth sector, namely what was the course of the Goascorán which, by application of the *uti possidetis juris*, defined the boundary in the sixth sector. As El Salvador was unable to prove its allegation in the original proceedings, the Chamber rejected its claim.

10. It was only in paragraph 312 of the Judgment, after a relatively detailed analysis of the extent to which El Salvador had substantiated the fact of the avulsion, that the Chamber described El Salvador's claim as "new . . . and inconsistent with the previous history of the dispute". This brief, isolated and indeed ambiguous statement (what is meant by "inconsistent with the previous history of the dispute"?) seems to have been inserted after the Chamber's discussion of the evidence of El Salvador's allegations as an additional or supplementary line of argument rather than a decisive finding in the case.

Yet the Chamber, in paragraph 40 of the present Judgment, asserts that

> "while the Chamber in 1992 rejected El Salvador's claims that the 1821 boundary did not follow the course of the river at that date, it did so on the basis of that State's conduct during the nineteenth century";

it accordingly concludes that

> "[e]ven if avulsion were now proved, and even if its legal consequences were those inferred by El Salvador, findings to that effect would provide no basis for calling into question the decision taken by the Chamber in 1992 on wholly different grounds".

11. As I see it, the Chamber, in so stating, overlooks what was said in paragraphs 308 and 309 of the 1992 Judgment, which suggest, on the contrary, that if El Salvador had provided the Chamber during the original proceedings with satisfactory evidence of the fact that the Goascorán had suddenly changed course by avulsion, the Chamber's decision regarding the sixth sector of the boundary would have been different (see paragraph 17 below).

12. If the ground for the Chamber's dismissal of El Salvador's claims in 1992 was that the claim concerning the sixth sector was new and "inconsistent with the previous history of the dispute", one may well ask (to cite the language of paragraph 38 of the present Judgment) why it proceeded to "consideration as a matter of law" of that State's proposition concerning the avulsion of the Goascorán. The fact is that, having considered El Salvador's claim and the evidence adduced to substantiate it, the Chamber concluded that no record of a sudden change in the course of the river had been brought to its attention (1992 Judgment,

para. 308) and that there was no scientific evidence that the previous course of the Goascorán was such that it debouched into the Estero La Cutú (1992 Judgment, para. 309). The Chamber could certainly have spared itself the trouble of assessing the weight of the evidence presented if the grounds on which it then rejected El Salvador's claim were its newness and its inconsistency with the previous history of the dispute.

13. I therefore find little justification for today's assertion that in 1992 "the Chamber did not take any position on the existence of an earlier course of the Goascorán which might have debouched into the Estero La Cutú, or on any avulsion of the river" (para. 38). Inasmuch as it examined El Salvador's allegations concerning the avulsion of the Goascorán and the existence of an old riverbed, and concluded that those allegations had not been proved, the Chamber unquestionably did not confine itself in 1992 "to defining the framework in which it could possibly have taken a position on these various points" *(ibid.)*. Granted that in 1992 the Chamber "did not take a position on the consequences that any avulsion, occurring before or after 1821, would have had on provincial boundaries, or boundaries between States, under Spanish colonial law or international law" (para. 24). But what purpose would it have served for the Chamber to take a position on the consequences of an avulsion after finding that no such avulsion had been proved?

14. Relying solely on paragraph 312 of the 1992 Judgment, the present Chamber concludes that El Salvador's claims that the 1821 boundary defined by application of the *uti possidetis juris* principle did not follow the course of the river at that date were rejected by the Chamber in 1992 on the basis of "that State's conduct during the nineteenth century" (para. 40). In so doing, it appears to attach no importance to the points made in the preceding paragraphs, especially paragraphs 308 and 309, which, to my mind, contain the real grounds for the Chamber's rejection of El Salvador's claims in the sixth sector.

15. It is on the basis of this alleged "inconsistency" of El Salvador's claim with the previous history of the dispute that the present Judgment indicates that in 1992

> "applying the general rule which it had enunciated in paragraph 67 of the Judgment, the Chamber proceeded, in paragraph 312, concerning the sixth sector of the land boundary, by employing reasoning analogous to that which it had adopted in paragraph 80 in respect of the first sector" (para. 40).

In other words, a majority of the Members of the present Chamber view the course of the land boundary between El Salvador and Honduras in the sixth sector, as defined in the 1992 Judgment, as a further instance of modification, by acquiescence or acknowledgment of the Parties, of a situation resulting from *uti possidetis juris*.

16. Yet I see nothing in paragraph 312 of the 1992 Judgment, or in any other paragraph thereof, from which it might be inferred that the Chamber wished to apply to the sixth sector of the boundary the same criterion as it had applied to the first sector. In my opinion, the present Chamber is attributing to the 1992 Chamber more than it wished to say in paragraph 312 of its decision. All the Chamber did in that passage was to draw attention to certain aspects of the previous history of the boundary dispute in support of the conclusions it had reached in the preceding paragraphs, namely that El Salvador had not substantiated its claims concerning the land boundary in the sixth sector.

17. In 1992 the Chamber did not even imply that evidence of an avulsion was irrelevant by virtue of the fact that El Salvador, in the sixth sector of the boundary, had accepted a change in the position resulting from the application of *uti possidetis juris*. On the contrary, the Chamber proceeded to consider the claims of the two Parties and concluded that El Salvador had been unable to substantiate its argument. Moreover, it added that if it had been satisfied that the river's course was earlier so radically different from its present one, "then an avulsion might reasonably be inferred" (1992 Judgment, para. 308). The Chamber thus implied that this would have led it to draw different legal conclusions from those reached in its decision, for its function would not normally involve simply determining whether the phenomenon of avulsion had in fact occurred: its role is not to take a position on the occurrence of hydrological phenomena without drawing legal inferences from them.

18. Moreover, even if analogies may be drawn between the *uti possidetis juris* positions in respect of the first and sixth sectors, and even if it may be inferred in principle from these analogies that the same criterion should be applied in the both cases, it is clear, in my view, that the Chamber did not adopt that approach. First, because if, as assumed in the present Judgment, the Chamber had in 1992 applied the same criterion to the sixth sector as it had applied to the first, it would have done so expressly, as in paragraph 80 of its decision. Furthermore, acknowledgment of a modification of the *uti possidetis juris* position or acquiescence in such a modification is far more difficult to infer in the case of the sixth sector than in that of the first. It should be borne in mind in this regard that, as the Chamber stated in 1992 in paragraph 67 of its Judgment, such a modification must be based on "sufficient evidence to show that the parties have in effect *clearly accepted* a variation, or at least an interpretation, of the *uti possidetis juris* position" (emphasis added).

19. I have not found such evidence in respect of the application of the *uti possidetis juris* principle to the sixth sector. The lack of an express reference to the old course of the Goascorán during the negotiations that took place prior to 1972 does not constitute sufficient evidence to show

that El Salvador "clearly accepted" a variation of the *uti possidetis juris* position. Construing this lack of a reference as a waiver by El Salvador of its claim to have the boundary follow the old riverbed by application of the *uti possidetis juris* principle would be giving undue weight to, and drawing unduly far-reaching legal consequences from, the silence of the Parties. This silence cannot imply "clear acceptance" of a modification of the application of the principle in question.

20. Even if one infers from El Salvador's conduct during the Saco negotiations that it accepted settlement formulas establishing the present course of the Goascorán as the boundary between the territories of the two countries, it does not follow that El Salvador thus definitively waived its claim to base the boundary line on the course of the old riverbed. There is no evidence to demonstrate beyond doubt that El Salvador's intention was to waive its right to application of the *uti possidetis juris* without variation.

21. During the Saco negotiations, the two States tried to find a *political* solution to their boundary dispute, and it was natural, indeed necessary, in the circumstances in which the negotiations took place, to make concessions by waiving rights at the political level that they could have asserted at the judicial level. Moreover, the Saco negotiations "were unsuccessful" (Written Observations of Honduras, para. 3.54) and the conference records say nothing about the precise location of the point in the Bay of La Unión into which the Goascorán flows, a question on which the Parties have never agreed.

22. The contention that the "newness" of El Salvador's claim cannot be the *ratio decidendi* of the Chamber's 1992 decision is borne out by the fact that Honduras's claim in respect of the boundary line to the northwest of the Islas Ramaditas was also first asserted during the Antigua negotiations of 1972. In any case, are these negotiations not part of the "previous history of the dispute"? In what way is El Salvador's claim "inconsistent" with the previous history of the dispute? In the light of these negotiations, can El Salvador's claim be described in 1992 or in 2003 as a "new claim"?

23. Honduras's approach to the question of revision was clearly based on the same understanding of the *ratio decidendi* of the 1992 Judgment as is set forth in this opinion, at least prior to the final public sitting of the Chamber on 12 September 2003. Honduras's opposition to El Salvador's Application for revision was based on the premise that the Chamber had rejected El Salvador's claim on the ground that that State had not provided sufficient evidence of the avulsion. It follows that, in the view of Honduras, the *ratio decidendi* of the decision was unrelated to the historical pertinence of the claim. This premise represents the substance of Honduras's Written Observations and also of the statements of its Agents and counsel, who occasionally express it in explicit terms (see, for example, the statements by the Agent, Mr. López Contreras,

on 9 September (C6/CR 2003/3, p. 12, para. 1.20) and by a counsel, Mr. Jiménez Piernas, on the same day (C6/CR 2003/3, p. 35, para. 15)).

24. As the Chamber stated in 1992, "[f]or Honduras the norm of international law applicable to the dispute is simply the *uti possidetis juris*" (1992 Judgment, para. 40). During the present proceedings, Honduras not only reiterated this view but made it the cornerstone of its Written Observations in response to El Salvador's Application for revision. Honduras stated that

> "in general a fact can be of such a nature as to be a decisive factor for the purposes of an application for revision of a final, binding judgment bearing the sacrosanct authority of *res judicata* only if that fact is the discovery of a title, or of additional colonial *effectivités* in cases where title is either non-existent or indeterminate" (Written Observations, para. 3.9).

It added that "[i]t must in all events be kept in mind that the dispute decided by the Judgment of 11 September 1992 very specifically concerns the *uti possidetis* of 1821" (*ibid.*, para. 3.10) and that "[t]he [new] fact must be important *per se* . . . in proving the *uti possidetis*" (*ibid.*, para. 3.11). Honduras did not explicitly address the issue of the "inconsistency" of El Salvador's claim with the previous history of the dispute.

25. It was only at a late stage, at the last public sitting on 12 September 2003 during the second round of oral argument (El Salvador, the applicant State, thus had no opportunity to respond), that Honduras asserted that the Chamber's brief reasoning in paragraph 312 of the 1992 Judgment concerning the historical pertinence of El Salvador's claim constituted the *ratio decidendi* of the decision or, in other words, that it was on the basis of that reasoning that the Chamber had defined the boundary of the sixth sector as following the present course of the Goascorán. It was only at this stage in its oral argument that Honduras alleged for the first time that "the material presented by El Salvador to that subject is irrelevant to the operative factual determination" (Mr. Philippe Sands, C6/CR 2003/5, pp. 9-10, para. 5). To paraphrase the Chamber's words in 1992, I would say that Honduras's last-minute line of argument is incontestably "new and inconsistent with the previous history" of the case.

26. This unexpected last-minute change of strategy by Honduras had the unfortunate consequence of preventing El Salvador from expressing its opinion on the questions thus raised.

27. The late presentation of a new argument would not appear, under the circumstances, to have been consistent with sound procedural practice or with the principle of equality of the Parties.

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28. The new facts on which El Salvador based its Application for revision consist of a series of items of documentary evidence (scientific

studies, technical reports, cartographic material, publications) discovered or produced after 1992 which, according to El Salvador, were unknown both to itself and to the Chamber and are alleged to be of such a nature as to be a decisive factor.

29. The Chamber did not ask itself whether or not this documentary evidence could be regarded as "new facts" within the meaning of Article 61 of the Statute of the Court. It concluded that it failed to satisfy one of the conditions laid down by that Article (being of such a nature as to be a decisive factor), which is tantamount to an implicit acknowledgment of its status as "new facts". The Chamber thus confirms that the production of such documents may substantiate an application for revision provided that they meet the criteria laid down by Article 61 of the Statute.

30. The proposition that documents may be put forward as "new facts" has not always been accepted. A minority view in the literature, seeking to restrict recourse to revision proceedings, has opted for a narrow interpretation of Article 61, arguing that the term "facts" does not cover documents or other evidence[1]. This position stems from a negative perception of the institution of revision, which is viewed as a means of breaching the sacrosanct principle of *res judicata*. According to this view, revision is a substitute for appeal and as such represents a threat to legal certainty. This fear seems to be shared by Honduras, which cautioned the Chamber in the following terms:

> "[i]f this Application for revision were to be held admissible, the unfortunate precedent which this would create would come to be seen in future as an encouragement to any State dissatisfied with a judgment of the Court to apply for its revision . . ." (Written Observations, para. 1.19)[2].

31. Honduras also put forward a narrow interpretation of the terms of Article 61 of the Statute of the Court. It argued that "the objective reality of a fact must be distinguished from the interpretation which . . . [one] seeks to place upon it, and from inferences or other new 'intellectual constructs' " (*ibid.*, para. 2.17). According to Honduras, there is "a distinction in kind between the facts alleged and the evidence relied upon to prove them, and only the discovery of the former opens a right to

[1] See Daniel Bardonnet, "De l'équivoque des catégories juridiques: la revision des sentences arbitrales pour 'erreur de fait' ou 'fait nouveau' dans la pratique latino-américaine", in *Liber Amicorum "In Memoriam" of Judge José Maria Ruda*, C. A. Armas Barea *et al.* (eds.), p. 199; Simpson and Fox, *International Arbitration — Law and Practice*, 1959, p. 245.

[2] Time has shown, however, that this fear is unfounded. No application for revision has been filed under the Hague Conventions, none was filed before the Permanent Court of International Justice, and this Court has dealt with only three applications for revision (including that filed by El Salvador) during the 60 years of its existence and has declared all three inadmissible.

revision" (Written Observations, para. 2.20). Honduras claimed to be relying on "well-established case law", although it merely cited the Advisory Opinion of the Permanent Court of International Justice on the delimitation of the boundary between Serbia and Albania at the Monastery of Saint Naoum, which states that "fresh documents do not in themselves amount to fresh facts"[3].

32. While it is true that an application for revision is by its very nature and object exceptional and hence that "the conditions in which it is exercised are . . . necessarily limited"[4] and that it is admissible only when all the — very strict — conditions of Article 61 of the Statute are satisfied, the restrictive nature of the conditions governing its exercise cannot be extended to the manner in which the language of those conditions is interpreted. To say that the admissibility of an application for revision is subject to strict conditions is one thing; to argue that the provisions governing the use of such an application must therefore be narrowly interpreted and applied is quite a different matter. There is no justification for applying a narrow interpretative criterion to the terms of Article 61 of the Statute of the Court, by virtue of which documents are not to be regarded as "facts" within the meaning of Article 61. The Article should be interpreted in accordance with general rules of interpretation, which require that terms should be given their ordinary meaning. And there can be no doubt whatsoever that the ordinary meaning of the term "facts" includes documents[5].

33. The discussions that preceded the adoption of Article 59 of the Statute of the Permanent Court of International Justice (which subsequently became Article 61 of the Statute of this Court) show that, in the minds of the drafters of the Article, documents constituted "facts"[6]. This opinion also prevails in the literature[7] and in that, albeit scant, corpus of

[3] *Advisory Opinion, 1924, P.C.I.J., Series B, No. 9*, p. 22.

[4] Michel Dubisson, *La Cour internationale de Justice*, 1964, p. 250.

[5] What is true, real; what really exists (Larousse); what constitutes the substance of something known (Lalande, *Vocabulaire technique et critique de la philosophie) [translations by the Registry]*. See also Jean Salmon, "Le fait dans l'application du droit international", *Recueil des cours de l'Académie de droit international de La Haye (RCADI)*, Vol. 175 (1982), p. 273.

[6] A proposal by Italy to insert the word "document" in the text of the Article was withdrawn after Mr. Politis pointed out that "the discovery of a document was included in the discovery of a fact" (League of Nations, *Minutes I-VIII of the Third Committee, First Assembly, Records*, p. 375).

[7] See, for example, M. Scerni, "La procédure de la Cour permanente de Justice internationale", *RCADI*, Vol. 65 (1938), p. 672; Paul Reuter, "La motivation et la revision des sentences arbitrales à la conférence de la paix de La Haye (1899) et le conflit frontalier entre le Royaume-Uni et le Vénézuela", *Mélanges offerts à Juraj Andrassy*, pp. 243, 245; P. Lalive, *Questions actuelles concernant l'arbitrage international*, I.H.E.I., Cours 1959-1960, pp. 100, 101; W. M. Reisman, *Nullity and Revision. The Review and Enforcement of International Judgments and Awards*, pp. 38, 210; E. Zoller, "Observations sur la revision et l'interprétation des sentences arbitrales", *Annuaire français de droit européen*, Vol. XXIV (1978), pp. 331, 351; D. V. Sandifer, *Evidence before International Tribunals*, 1975, p. 453.

international jurisprudence. It is the approach that the Court adopted in the past in interpreting the requirement of discovery of a "new fact" as grounds for an application for revision[8]. In its Judgment of 10 December 1985 (*Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/ Libyan Arab Jamahiriya) *(Tunisia* v. *Libyan Arab Jamahiriya)*), the Court, while refraining from taking an explicit position on this point, nevertheless treated the documents presented by Tunisia in support of its Application for revision as "facts". The Court declared the Application inadmissible because those facts did not satisfy two of the conditions for admissibility laid down in Article 61: that ignorance of the new fact by the Applicant must not be due to negligence and that the new fact must be of such a nature as to be a decisive factor[9]. This conclusion implies that the Court acknowledged that the documents constituted "facts" within the meaning of Article 61.

34. By refraining from expressly addressing the issue of the admissibility of documents or other evidence presented in support of an application for revision, the present Chamber also seems to endorse a broad interpretation of what may constitute a "fact" within the meaning of Article 61 of the Statute of the Court. On this point I find the Chamber's Judgment, with which I am regrettably unable to associate myself, a positive development in jurisprudence of which I am pleased to take note.

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35. I have come to the conclusion that, taken overall, the material and information that El Salvador presented in these proceedings as "new facts" largely satisfy the conditions laid down by Article 61 of the Statute of the Court. Given that the *ratio decidendi* of the 1992 Judgment in respect of the sixth sector of the land boundary is, in my opinion, explained in paragraphs 308, 309 and 321 of that decision (no evidence of an abrupt change of course of the river; lack of scientific evidence that the previous course of the river was such that it debouched in the Estero

[8] Other similar decisions by international tribunals may be cited. See, for example, the *Heim et Chamant c. Etat allemand* case, *Recueil des décisions des tribunaux arbitraux mixtes*, Vol. 3, pp. 54-55; more recently Inter-American Court of Human Rights, *Genie Lacayo* case, decision of 13 September 1997, para. 12. In its Judgment on the *Application for Revision of the Judgment of 11 July 1996 in the Case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections (*Yugoslavia* v. *Bosnia and Herzegovina*), the Court took no position on this point, but the judges who produced separate or dissenting opinions addressed the issue and took it as self-evident that newly produced evidence, including documentary evidence, could constitute new facts within the meaning of Article 61 of the Statute; see, for example, the separate opinion of Judge Koroma (*I.C.J. Reports 2003*, p. 34, para. 2); dissenting opinion of Judge Dimitrijević (*ibid.*, pp. 54 and 55, paras. 6 and 9).

[9] *I.C.J. Reports 1985*, pp. 206 and 213, paras. 28 and 39.

La Cutú), any evidence demonstrating the fact of the Goascorán avulsion may be of such a nature as to be a decisive factor.

36. During the present proceedings, El Salvador produced technical evidence that irrefutably demonstrates, in its view, the existence of the old bed, which the Goascorán allegedly left following an avulsion and which debouched into the Cutú inlet. El Salvador also produced scientific evidence contained in an expert report which states categorically that an abrupt change in the course of the river occurred after the Spanish colonial authorities had defined the boundary between the Alcaldía Mayor de Tegucigalpa and the municipality of San Miguel as following the riverbed, and that the Cutú inlet and its distributory channels were the primary outlets of the Goascorán at the time when the old course was abandoned.

37. To this new evidence should be added the copies of the "Carta Esférica" and of the report of the expedition of the brigantine *El Activo* recently discovered in the Ayer Collection of the Newberry Library in Chicago, by means of which El Salvador seeks to weaken the probative force of the only evidence on which the Chamber based its determination of the course of the boundary in the sixth sector in 1992, namely copies of the same documents held at the Madrid Naval Museum and produced by Honduras in the original proceedings. In the absence of other evidence, it was exclusively on the basis of these copies that the Chamber decided that the boundary line should follow the present course of the Goascorán as far as its mouth in the Gulf of Fonseca, north-west of the Islas Ramaditas.

38. The copies produced by El Salvador in these proceedings differ in many respects from those of the Madrid Naval Museum (different dates, conflicting data — especially as regards the general configuration of the coast, differences in presentation, type of characters, calligraphy and symbols used). A majority of the Members of the Chamber hold that these discrepancies "afford no basis for questioning the reliability of the charts that were produced to the Chamber in 1992" (Judgment, para. 52). It is possible that, considering in isolation, each such discrepancy would not appear to be of great importance. However, one is justified in questioning the reliability of the documents and the accuracy of the information they contain when the discrepancies are viewed as a whole. If we add to this the fact that during the present proceedings El Salvador presented other evidence designed to show that an avulsion phenomenon effectively shifted the mouth of the Goascorán from the Estero La Cutú to the Estero Ramaditas, the question arises whether the Chamber may not in 1992 have relied as the basis for its decision on a document having no evidential value. If the reliability of this evidence is now brought into question by the discovery of a new document, there are then grounds to believe that the decision taken by the Chamber in 1992 in respect of the sixth sector of the land boundary between El Salvador and Honduras was perhaps not entirely correct.

39. Any assessment of the terms "diligence" and "negligence" is likely to be highly subjective owing to their abstract content. It is thus generally not possible to determine *a priori* whether conduct has been diligent or negligent. The degree of diligence or negligence involved must be assessed on a case-by-case basis, having regard to the context. In examining an application for revision, each individual situation must be considered, taking into account, in particular, the nature of the facts presented as "new facts", the means of access to these "facts" by the party applying for revision, and the conduct of the parties.

40. The arguments employed by El Salvador to demonstrate its diligence, or at least its lack of negligence, in presenting the new evidence that it produced in support of its Application for revision seemed to me, in any event, to be persuasive (except for the arguments concerning the material that it characterizes as "historical evidence", which in reality consists of two geographical works by Honduran authors published in Honduras). The unstable social and political situation in El Salvador resulting from the violent civil war raging on its territory during the Court's examination of the case, the unavailability of technical facilities that would have enabled that State to obtain certain important evidence to substantiate its allegations, difficulties in gaining access to some of the new material and, in the case of the "Carta Esférica" and the logbook of the *El Activo* expedition, the impossibility of consulting all existing sources of cartographic information, go a long way towards explaining, in my opinion, why the evidence on the basis of which El Salvador sought to have the 1992 Judgment revised was not presented sooner.

41. I do not know whether the Chamber, had it been aware in 1992 of the information produced by El Salvador during these proceedings, would *necessarily* have taken a different decision from that actually taken. At this stage, the present Chamber is merely required to rule on the admissibility of the Application for revision without taking a position on the merits. I have therefore confined myself to ascertaining whether the material that El Salvador presented as "new facts" satisfied the conditions laid down by Article 61 of the Statute of the Court. On this point, I reached an affirmative conclusion: the conditions were satisfied and the Application for revision was therefore admissible.

42. Having concluded, erroneously in my view, that the *ratio decidendi* of the 1992 Judgment in respect of the sixth sector of the land boundary was not related to the substance of the dispute but to its previous history, and that the new facts presented during the proceedings were therefore not of such a nature as to be a decisive factor, the Chamber decided that the Application for revision filed by El Salvador was inadmissible. It follows that the second stage of the revision proceedings, during which the Chamber would have had to rule on the merits of the Application, cannot commence. This is regrettable, since a fresh examination of the merits

of the dispute — limited, of course, to the sixth sector of the land boundary — would have allowed the Court to confirm or revise the 1992 Judgment on the basis of considerably more abundant and reliable information than had been available to the Chamber during the original proceedings. A new decision on the merits, relating to the sixth sector, might have better served the cause of justice than the 1992 Judgment, inasmuch as the better informed a court is, the greater are its chances of adopting correct decisions. To my great regret, and for the reasons mentioned in this opinion, I have no choice but to express my disagreement with the present decision holding inadmissible the Application for revision filed by El Salvador.

(Signed) Felipe H. PAOLILLO.