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Summary
Not an official document

Summary 2003/5
18 December 2003

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)

Summary of the Judgment delivered by the Chamber on Thursday 18 December 2003

History of the proceedings and submissions of the Parties (paras. 1-14)

On 10 September 2002 the Republic of El Salvador (hereinafter "El Salvador") submitted a request to the Court for revision of the Judgment delivered on 11 September 1992 by the Chamber of the Court formed to deal with the case concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) (I.C.J. Reports 1992, p. 351).

In its Application, El Salvador requested the Court "To proceed to form the Chamber that will hear the application for revision of the Judgment, bearing in mind the terms that El Salvador and Honduras agreed upon in the Special Agreement of 24 May 1986."

The Parties having been duly consulted by the President, the Court, by an Order of 27 November 2002, decided to grant their request for the formation of a special chamber to deal with the case; it declared that three Members of the Court had been elected to sit alongside two ad hoc judges chosen by the Parties: President G. Guillaume; Judges F. Rezek, T. Buergenthal; Judges ad hoc S. Torres Bernárdez (chosen by Honduras) and F. H. Paolillo (chosen by El Salvador).

On 1 April 2003, within the time-limit fixed by the Court, Honduras filed its Written Observations on the admissibility of El Salvador's Application. Public sittings were held on 8, 9, 10 and 12 September 2003.

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At the oral proceedings, the following final submissions were presented by the Parties:

On behalf of the Government of the Republic of El Salvador,

"The Republic of El Salvador respectfully requests the Chamber, rejecting all contrary claims and submissions to adjudge and declare that:

1. The application of the Republic of El Salvador is admissible based on the existence of new facts of such a nature as to leave the case open to revision, pursuant to Article 61 of the Statute of the Court, and

2. Once the request is admitted that it proceed to a revision of the Judgment of 11 September 1992, so that a new judgment fixes the boundary line in the sixth disputed sector of the land boundary between El Salvador and Honduras as follows:

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

On behalf 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."

Basis of jurisdiction and circumstances of the case (paras. 15-22)

The Chamber begins by stating that, under Article 61 of the Statute, revision proceedings open with a judgment of the Court declaring the application admissible on the grounds contemplated by the Statute, and that Article 99 of the Rules of Court makes express provision for proceedings on the merits if, in its first judgment, the Court has declared the application admissible.

The Chamber observes that, at this stage, its decision is thus limited to the question whether El Salvador's request satisfies the conditions contemplated by the Statute. Under Article 61, these conditions are as follows:

(a) the application should be based upon the "discovery" of a "fact";

(b) the fact the discovery of which is relied on must be "of such a nature as to be a decisive factor";

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

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

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

The Chamber observes that "an application for revision is admissible only if each of the conditions laid down in Article 61 is satisfied. If any one of them is not met, the application must be dismissed."

However, El Salvador appears to argue in limine that there is no need for the Chamber to consider whether the conditions of Article 61 of the Statute have been satisfied, since, by its attitude, "Honduras implicitly acknowledged the admissibility of El Salvador's Application".

In this respect, the Chamber observes that regardless of the parties' views on the admissibility of an application for revision, it is in any event for the Court, when seised of such an application, to ascertain whether the admissibility requirements laid down in Article 61 of the Statute have been met. Revision is not available simply by consent of the parties, but solely when the conditions of Article 61 are met.

The new facts alleged by El Salvador concern on the one hand the avulsion of the river Goascorán and on the other the "Carta Esférica" and the report of the 1794 El Activo expedition.

Avulsion of the river Goascorán (paras. 23-40)

"In order properly to understand El Salvador's present contentions", the Chamber first recapitulates part of the reasoning in the 1992 Judgment in respect of the sixth sector of the land boundary.

The Chamber then indicates that in the present case, El Salvador first claims to possess scientific, technical and historical evidence showing, contrary to what it understands the 1992 decision to have been, that the Goascorán did in the past change its bed, and that the change was abrupt, probably as a result of a cyclone in 1762. El Salvador argues that evidence can constitute "new facts" for purposes of Article 61 of the Statute.

El Salvador further contends that the evidence it is now offering establishes the existence of an old bed of the Goascorán debouching in the Estero La Cutú, and the avulsion of the river in the mid-eighteenth century or that at the very least, it justifies regarding such an avulsion as plausible. These are said to be "new facts" for purposes of Article 61. According to El Salvador, the facts thus set out are decisive, because the considerations and conclusions of the 1992 Judgment are founded on the rejection of an avulsion which, in the Chamber's view, had not been proved.

El Salvador finally maintains that, given all the circumstances of the case, in particular the "bitter civil war [which] was raging in El Salvador" "for virtually the whole period between 1980 and the handing down of the Judgment on 11 September 1992", its ignorance of the various new facts which it now advances concerning the course of the Goascorán was not due to negligence.

The Chamber states that Honduras, for its part, argues that with regard to the application of Article 61 of the Statute, it is "well-established case law that there is a distinction in kind between the facts alleged and the evidence relied upon to prove them and that only the discovery of the former opens a right to revision". Accordingly, in the view of Honduras, the evidence submitted by El Salvador cannot open a right to revision.

Honduras adds that El Salvador has not demonstrated the existence of a new fact. In reality, El Salvador is seeking "a new interpretation of previously known facts" and asking the Chamber for a "genuine reversal" of the 1992 Judgment.

Honduras further maintains that the facts relied on by El Salvador, even if assumed to be new and established, are not of such a nature as to be decisive factors in respect of the 1992 Judgment.

Honduras argues lastly that El Salvador could have had the scientific and technical studies and historical research which it is now relying on carried out before 1992.

Turning to consideration of El Salvador's submissions concerning the avulsion of the Goascorán, the Chamber recalls that an application for revision is admissible only if each of the conditions laid down in Article 61 is satisfied, and that if any one of them is not met, the application must be dismissed; in the present case, the Chamber begins by ascertaining whether the alleged facts, supposing them to be new facts, are of such a nature as to be decisive factors in respect of the 1992 Judgment.

In this regard, the Chamber first recalls the considerations of principle on which the Chamber hearing the original case relied for its ruling on the disputes between the two States in six sectors of their land boundary. According to that Chamber, the boundary was to be determined "by the application of the principle generally accepted in Spanish America of the uti possidetis juris, whereby the boundaries were to follow the colonial administrative boundaries" (para. 28 of the 1992 Judgment). The Chamber did however note that "the uti possidetis juris position can be qualified by adjudication and by treaty". It reasoned from this that "the question then arises whether it can be qualified in other ways, for example, by acquiescence or recognition". It concluded that "There seems to be no reason in principle why these factors should not operate, where there is 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" (para. 67 of the 1992 Judgment).

The Chamber then considered "The contention of El Salvador that a former bed of the river Goascorán forms the uti possidetis juris boundary". In this respect, it observed that:

> "[this contention] depends, as a question of fact, on the assertion that the Goascorán formerly was running in that bed, and that at some date it abruptly changed its course to its present position. On this basis El Salvador's argument of law is that where a boundary is formed by the course of a river, and the stream suddenly leaves its old bed and forms a new one, this process of 'avulsion' does not bring about a change in the boundary, which continues to follow the old channel." (Para. 308 of the 1992 Judgment.)

The Chamber added 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." (Ibid.)

Pursuing its consideration of El Salvador's argument, the Chamber did however note: "There is no scientific evidence that the previous course of the Goascorán was such that it debouched in the Estero La Cutú . . . rather than in any of the other neighbouring inlets in the coastline, such as the Estero El Coyol" (para. 309 of the 1992 Judgment).

Turning to consideration as a matter of law of El Salvador's proposition concerning the avulsion of the Goascorán, the Chamber observed that El Salvador "suggests . . . that the change in fact took place in the 17th century" (para. 311 of the 1992 Judgment). It concluded that "On this basis, what international law may have to say, on the question of the shifting of rivers which form frontiers, becomes irrelevant: the problem is mainly one of Spanish colonial law." (Para. 311 of the 1992 Judgment.)

Beginning in paragraph 312 of the 1992 Judgment, the Chamber turned to a consideration of a different ground. At the outset, it tersely stated the conclusions which it had reached and then set out the reasoning supporting them. In the view of the Chamber, "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." (Para. 312 of the 1992 Judgment.)

In the present case, the Chamber observes that, whilst in 1992 the Chamber 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.

The Chamber concludes that, in short, it does not matter whether or not there was an avulsion of the Goascorán. Even 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. The facts asserted in this connection by El Salvador are not "decisive factors" in respect of the Judgment which it seeks to have revised.

Discovery of new copies of the "Carta Esférica" and report of the 1794 El Activo expedition (paras. 41-55)

The Chamber then examines the second "new fact" relied upon by El Salvador in support of its Application for revision, namely, the discovery in the Ayer Collection of the Newberry Library in Chicago of a further copy of the "Carta Esférica" and of a further copy of the report of the expedition of the El Activo, thereby supplementing the copies from the Madrid Naval Museum to which the 1992 Chamber made reference in paragraphs 314 and 316 of its Judgment.

The Chamber points out that Honduras denies that the production of the documents found in Chicago can be characterized as a new fact. For Honduras, this is simply "another copy of one and the same document already submitted by Honduras during the written stage of the case decided in 1992, and already evaluated by the Chamber in its Judgment". The Chamber proceeds first, as it did in respect of the avulsion, to determine first whether the alleged facts concerning the "Carta Esférica" and the report of the El Activo expedition are of such a nature as to be decisive factors in respect of the 1992 Judgment.

The Chamber recalls in this regard that its predecessor in 1992, after having held El Salvador's claims concerning the old course of the Goascorán to be inconsistent with the previous history of the dispute, considered "the evidence made available to it concerning the course of the river Goascorán in 1821" (para. 313 of the 1992 Judgment). The 1992 Chamber paid particular attention to the chart prepared by the captain and navigators of the vessel El Activo around 1796, described as a "Carta Esférica", which Honduras had found in the archives of the Madrid Naval Museum. That Chamber concluded from the foregoing "that the report of the 1794 expedition and the 'Carta Esférica' leave little room for doubt that the river Goascorán in 1821 was already flowing in its present-day course" (para. 316 of the 1992 Judgment).

In the present case, the Chamber observes in this connection, that the two copies of the "Carta Esférica" held in Madrid and the copy from Chicago differ only as to certain details, such as for example, the placing of titles, the legends, and the handwriting. These differences reflect the conditions under which documents of this type were prepared in the late eighteenth century; they afford no basis for questioning the reliability of the charts that were produced to the Chamber in 1992. The Chamber notes further that the Estero La Cutú and the mouth of the Rio Goascorán are shown on the copy from Chicago, just as on the copies from Madrid, at their present-day location. The new chart produced by El Salvador thus does not overturn the conclusions arrived at by the Chamber in 1992; it bears them out.

As for the new version of the report of the El Activo expedition found in Chicago, it differs from the Madrid version only in terms of certain details, such as the opening and closing indications, spelling, and placing of accents. The body of the text is the same, in particular in the

identification of the mouth of the Goascorán. Here again, the new document produced by El Salvador bears out the conclusions reached by the Chamber in 1992.

The Chamber concludes from the foregoing that the new facts alleged by El Salvador in respect of the "Carta Esférica" and the report of the El Activo expedition are not "decisive factors" in respect of the Judgment whose revision it seeks.

Final observations (paras. 56-59)

The Chamber takes note of El Salvador's further contention that proper contextualization of the alleged new facts "necessitates consideration of other facts that the Chamber weighed and that are now affected by the new facts".

The Chamber states that it agrees with El Salvador's view that, in order to determine whether the alleged "new facts" concerning the avulsion of the Goascorán, the "Carta Esférica" and the report of the El Activo expedition fall within the provisions of Article 61 of the Statute, they should be placed in context, which the Chamber has done. However, the Chamber recalls that, under that Article, revision of a judgment can be opened only by "the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence". Thus, the Chamber cannot find admissible an application for revision on the basis of facts which El Salvador itself does not allege to be new facts within the meaning of Article 61.

The full text of the dispositif (para. 60) reads as follows:

"For these reasons,

THE CHAMBER,

By four votes to one,

Finds that the Application submitted by the Republic of El Salvador for revision, under Article 61 of the Statute of the Court, of the Judgment given on 11 September 1992, by the Chamber of the Court formed to deal with the case concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), is inadmissible.

IN FAVOUR: Judge Guillaume, President of the Chamber; Judges Rezek, Buergenthal; Judge ad hoc Torres Bernárdez;

AGAINST: Judge ad hoc Paolillo."

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Judge ad hoc PAOLILLO appends a dissenting opinion to the Judgment of the Chamber.

Dissenting opinion of Judge ad hoc Paolillo

In Judge Paolillo's opinion, it is clear that the ratio decidendi of the 1992 Judgment in respect of the sixth sector of the land boundary between El Salvador and Honduras lies in the fact that El Salvador was unable to prove its allegations concerning an avulsion of the river Goascorán. In 1992, the Chamber, after having considered El Salvador's argument from the legal perspective, stated that no document proving a sudden change in the course of the Goascorán had been produced by El Salvador and that there was no scientific evidence proving that the river in its earlier course debouched in the Estero La Cutú. In the absence of proof of El Salvador's claim, the Chamber therefore upheld Honduras's submissions. The present Chamber has indicated — incorrectly, in Judge Paolillo's view — that the ratio decidendi of the 1992 Judgment related to the "novelty" of El Salvador's claim and to its "inconsistency" with the previous history of the dispute. Judge Paolillo notes, however, that it was only after considering El Salvador's claim and the evidence produced in support of it that the Chamber in 1992 referred to the previous history of the dispute, as an argument accessory to the main ground, rather than as a decisive conclusion concerning the course of the boundary in the sixth sector.

He points out that Honduras's conduct during the present proceedings shows that, in Honduras's view as well, the ratio decidendi of the 1992 Judgment related to the object of the dispute concerning the sixth sector and not its previous history. In the initial phase of the proceedings, Honduras opposed El Salvador's Application for revision on the ground that the new facts alleged by El Salvador did not meet the conditions laid down by Article 61 of the Statute of the Court. It was only during the last public sitting, at which stage El Salvador no longer had an opportunity to respond to Honduras's argument, that Honduras maintained that the historical considerations set out in paragraph 312 of the Judgment rendered in the original proceedings constituted the ratio decidendi of that decision.

In the present Judgment, the Chamber has concluded that the course of the boundary line in the sixth sector was decided in 1992 by the Chamber on the basis of reasoning analogous to that which it adopted in respect of the first sector, i.e., by application of the principle uti possidetis juris, as qualified by acquiescence or recognition by the parties. According to Judge Paolillo, there is however nothing in the 1992 Judgment to suggest that the Chamber adopted that approach; the Chamber did not say so explicitly, as it did in respect of the first sector, nor is there any evidence that El Salvador had "clearly accepted", by acquiescence or recognition, a modification of the position resulting from the uti possidetis juris in the sixth sector. The absence of any explicit reference to the old course of the Goascorán during the negotiations prior to 1972 can in no way be interpreted as a waiver by El Salvador of its claim that the boundary should be drawn along the old course of the river.

The new facts relied upon by El Salvador in support of its Application for revision consist of a group of documents containing scientific, technical and historical information produced or discovered after 1992 and proving the occurrence of an avulsion and the existence of an old bed of the river Goascorán, which, pursuant to the principle uti possidetis juris, should thus form the boundary line between the two Parties in the sixth sector. After considering these new facts, Judge Paolillo arrived at the conclusion that they satisfy the conditions laid down in Article 61 of the Statute, including the requirement that they must be of such a nature as to be a decisive factor. Given that a majority of the Members of the Chamber were of the view that the 1992 decision, as far as the sixth sector was concerned, was based on considerations relating to the previous history of the dispute and not to the object of the dispute, the Chamber concluded that the new facts relied upon by El Salvador were not of such a nature as to be a decisive factor in respect of the Judgment which it sought to have revised. As the requirements of Article 61 of the Statute of the Court are cumulative, the Chamber refrained from considering whether or not the new facts alleged by

El Salvador satisfied the other conditions laid down. Judge Paolillo believes, however, that if the Chamber had so considered them, it would have concluded that the new facts met those conditions.

He observes that, as a result of the inadmissibility of the Application for revision, the second phase of the proceedings, during which the Chamber would have been called upon to rule on the merits of the request, cannot take place. He finds this unfortunate because a new consideration on the merits of the dispute would have enabled the Chamber to uphold or revise the 1992 Judgment in respect of the sixth sector and to do so on the basis of significantly more extensive and reliable information than that available to the Chamber in the original proceedings. He believes that the interests of justice could have been better served by a new decision on the merits than by the 1992 Judgment, since the better informed a court is, the greater the likelihood that it will adopt just decisions.

In Judge Paolillo's view, the Chamber has thus missed the opportunity to declare admissible, for the first time in the history of the Court, an application for revision which met all the conditions required by Article 61 of the Statute of the Court.

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