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)[1]

(El Salvador v Honduras)[2]

I. INTRODUCTION[3]

On 10 September 2002, El Salvador had requested the International Court to revise the judgment that the Chamber of the Court had delivered on 11 September 1992 concerning *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening).*[4] A new Chamber was therefore established to deal with the present requests of El Salvador asking the Court to adjudge and declare that:

1. its application was admissible under Article 61 of the Court's Statute because of the existence of new facts; and
2. the nature of the new facts would permit revision under that provision; and
3. when the request was admitted, the Chamber could revise the Original Judgment to fix a new boundary line in the sixth disputed sector of the land boundary between the parties.

II. JURISDICTION AND CIRCUMSTANCES OF THE CASE[5]

Under Article 61 of the Court's Statute, the Court has to find that an application for revision is admissible before it can deal with the merits of the case under Article 99 of the Rules of Court. Further, every condition contemplated by Article 61 must be satisfied. If not, the application would be dismissed. The conditions are:

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[1] [2003] International Court of Justice Reports (to be published); see International Court of Justice, Case Summary 2003/03, 18 December 2003 at <www.icj-cij.org/>. This is the third time in the Court's history that such an application for revision had been lodged.

[2] Summary of the Judgment, International Court of Justice, Case Summary 2003/03, 18 December 2003 at <www.icj-cij.org/> (Judgment of the Court).

[3] See generally ibid paras 1-14.

[4] [1992] International Court of Justice Reports 351 (Original Judgment).

[5] Judgment of the Court paras 15-22.

1. the application must be based upon the "discovery" of a "fact";
2. the fact must be "of such a nature as to be a decisive factor";
3. the fact must have been "unknown" to the Court and to the party claiming revision when the judgment was given;
4. ignorance of this fact must not be "due to negligence"; and
5. 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.[6]

The present Chamber found that El Salvador seemed to have argued *in limine* that there was no need for the Chamber to consider whether the conditions had been satisfied since "Honduras [had] implicitly acknowledged the admissibility of El Salvador's Application". In this respect, the Chamber held that regardless of the parties' views on the admissibility of an application for revision, it was for the Court when seised of such an application to ascertain whether the admissibility conditions had been met. This was because revision was not available merely by the parties consenting; instead, it was dependant on the fulfilment of the conditions found in Article 61.

(a) The New Facts

The new facts relied upon by El Salvador in its application for revision had two bases: (i) the avulsion of the River Goascorán and (ii) new copies of the "Carta Esférica" and of the report on the 1794 expedition by the vessel *El Activo.*

(i) Avulsion of the River Goascorán[7]

El Salvador
First, El Salvador claimed that contrary to what it understood the Original Judgment to be, it now possessed certain scientific, technical and historical evidence showing that the Goascorán had changed its bed in the past, and that the change was abrupt, probably the result of a 1762 cyclone. It argued that such evidence constituted "new facts" for the purposes of Article 61.

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[6] Note that El Salvador had filed its application one day before this limitation period expired.
[7] Judgment of the Court paras 23-40.

Secondly, El Salvador contended that the evidence it could present now established the existence of an old bed of the Goascorán debouching in the Estero La Cutú and the avulsion of the river in the mid-18th century; or at the very least it justified deeming the avulsion as plausible. As a result, they constituted "new facts" for the purposes of Article 61, which were also decisive because the considerations and conclusions of the Original Judgment were founded on the Chamber's rejection of an avulsion in the original case.

Finally, El Salvador maintained 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 advanced concerning the course of the Goascorán was not due to negligence.

Honduras

First, Honduras argued that with regard to Article 61, it was "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, the evidence submitted by El Salvador could not be the basis for revision.

Secondly, Honduras claimed that El Salvador had not shown the existence of a new fact. Instead, El Salvador was seeking "a new interpretation of previously known facts" and was asking the Chamber for a "genuine reversal" of the Original Judgment.

Thirdly, Honduras maintained that the facts El Salvador had relied upon, even if assumed to be new and established, were not of such a nature as to be decisive factors in respect of the Original Judgment.

Finally, Honduras argued that the scientific and technical studies and historical research that El Salvador was now relying on could have been performed before 1992.

The Present Chamber

The Chamber stated that unless every condition laid down in Article 61 was satisfied, an application for revision would not be admissible and would be dismissed. The Chamber therefore had to ascertain whether

the alleged facts, supposing them to be new facts, had the nature of decisive factors in respect of the Original Judgment. In this regard and to understand properly El Salvador's contentions, the Chamber had to refer to the reasoning in the Original Judgment concerning the sixth sector of the land boundary.

The original Chamber had held that the boundary should 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".[8] However, the present Chamber noted that "the *uti possidetis juris* position c[ould] be qualified by adjudication and by treaty". It reasoned from this that the question was "whether it c[ould] be qualified in other ways, for example, by acquiescence or recognition". It therefore concluded that "[t]here seemed to be no reason in principle why these factors should not operate, where there [was] sufficient evidence to show that the parties ha[d] in effect clearly accepted a variation, or at least an interpretation, of the *uti possidetis juris* position".[9]

The present Chamber then considered El Salvador's contention that a former bed of the Goascorán formed the *uti possidetis juris* boundary. In this respect, the Chamber observed that as a question of fact, this contention depended on the assertion that the Goascorán had formerly run in that bed, and that at some date it abruptly changed its course to its present position. On this basis, El Salvador had argued that in law, where the course of a river had formed a boundary and the stream had suddenly left its old bed forming a new one, this process of 'avulsion' did not change the boundary, but continued to follow the old channel.[10]

The Chamber added that there was no record of such an abrupt change of course having been brought to the Chamber's attention. However, if it was satisfied that the river's earlier course was so radically different from the present, then an avulsion could reasonably be inferred.[11] In any event, there was no scientific evidence that the previous course of the Goascorán was such that it debouched in the Estero La Cutú instead

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[8] Ibid para 28.
[9] Ibid para 67.
[10] Original Judgment para 308.
[11] Ibid.

of in any of the other neighbouring inlets on the coastline, such as the Estero El Coyol.[12]

On El Salvador's claim "in law" on the avulsion of the Goascorán, the present Chamber observed that El Salvador had suggested that the change had occurred in the 17th century.[13] The Chamber held that in this respect, the international law on the question of the shifting of rivers forming frontiers became irrelevant, and the problem was mainly one of Spanish colonial law.[14]

After considering the conclusions and the supporting reasons in the Original Judgment, the present Chamber held:[15]

> [A]ny 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.

The Chamber added that in 1992, its predecessor had rejected El Salvador's claims that the 1821 boundary did not follow the course of the river then based on El Salvador's conduct in the 19th century. Accordingly, the Chamber concluded that it was irrelevant whether there was an avulsion of the Goascorán. Even if avulsion were proven now, and even if the legal consequences were as inferred by El Salvador, findings to that effect would provide no basis for calling into question the Original Judgment on wholly different grounds. This was because the facts asserted by El Salvador in this regard were not "decisive factors" in relation to the Original Judgment.

(ii) New copies of the "Carta Esférica" and 1794 El Activo expedition report[16]

The present Chamber then examined this second "new fact" El Salvador had presented to support its application for revision, namely, the discovery in the Ayer Collection of the Newberry Library in of a further copy of the "Carta Esférica" and a further copy of the report of

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[12] Ibid para 309.
[13] Ibid para 311.
[14] Ibid.
[15] Ibid para 312.
[16] Judgment of the Court paras 41-55.

the expedition of the *El Activo,* which supplemented the copies from the Madrid Naval Museum referred to in paragraphs 314 and 316 of the Original Judgment. The Chamber also noted that Honduras had denied that the production of the documents found in Chicago could be characterised as a new fact. Honduras had contended that this was 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 present Chamber then determined whether the alleged facts concerning the "Carta Esférica" and the report of the *El Activo* expedition were of such a nature to be decisive factors in respect of the Original Judgment. In this regard, the Chamber stated that the original Chamber had considered "the evidence made available to it concerning the course of the Goascorán in 1821" after finding El Salvador's claims on the old course of the Goascorán to be inconsistent with the previous history of the dispute.[17]

The original Chamber had given particular attention to the chart prepared by the captain and navigators of *El Activo* around 1796, described as a "Carta Esférica", which Honduras had found in the archives of the Madrid Naval Museum. That Chamber had concluded from this that the report of the 1794 expedition and the 'Carta Esférica' left "little room for doubt that the river Goascorán in 1821 was already flowing in its present day course".[18]

In this regard, the present Chamber found that the two copies of the "Carta Esférica" held in Madrid and the copy from Chicago differed only on certain details, such as the placing of titles, the legends, and the handwriting. These differences reflected the conditions under which the documents were prepared in the late 18th century, and they afforded no basis for questioning the reliability of the charts produced to the original Chamber. The present Chamber also noted that the Estero La Cutú and the mouth of the Goascorán were shown on the copy from Chicago, just as on the copies from Madrid, at their current location. Accordingly, the new chart produced by El Salvador did not overturn the conclusions of the original992 Chamber but, instead, bore them out.

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[17] Original Judgment para 313.
[18] Ibid para 316.

In relation to the new version of the *El Activo* expedition report found in Chicago, it had differed from the Madrid version only in terms of certain details, such as the opening and closing indications, spelling, and placing of accents. Moreover, the text was the same especially when identifying the mouth of the Goascorán. In any event, the new document produced by El Salvador had borne out the conclusions of the original Chamber. Consequently, the Chamber concluded 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 were not "decisive factors" in respect of the Original Judgment.

(b) The Court's Final Observations[19]

Next, the current Chamber dealt with El Salvador's further contention that proper contextualisation of the alleged new facts "necessitate[d] consideration of other facts that the Chamber weighed and that [we]re now affected by the *new facts*".

The Chamber stated that it agreed with El Salvador's claim 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 fell within the provisions of Article 61, they should be placed in context, which the Chamber had done. However, the Chamber recalled that under Article 61, revision of a judgment could only occur 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 unknown to the party claiming revision, always provided that such ignorance was not due to negligence". Since El Salvador itself did not allege this, the Chamber could not hold El Salvador's application for revision admissible.

III. CONCLUSION

For the above reasons, by 4:1 votes the present Chamber found El Salvador's application inadmissible (in favour Guillaume P; Rezek, Buergenthal JJ; Torres Bernárdez J *ad hoc;* against Paolillo J *ad hoc*).

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[19] Judgment of the Court paras 56-59.

In the sole dissenting judgment,[20] Paolillo J *ad hoc* stated that significantly more extensive and reliable information was now available to the Court than in the original proceedings, and the applicant had fulfilled all the conditions for revision. As a result, justice would be better served by a new decision on the merits. By denying the application, he added that the Court had "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 of Article 61 of the Statute of the Court".[21]

[20] Judgment of the Court, Annex to Summary 2003/3 at <http://212.153.43.18/icj www/idocket/iesh/iesh_summaries/iesh_isummary_20031218.htm> (visited February 2004).
[21] Ibid.