International Court of Justice — Procedure — Finality of judgment — Application for revision of a judgment — Statute of the Court, Article 61 — Admissibility of request — Discovery of "new fact" — Whether new fact of such a nature as to be a decisive factor

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)[1]

International Court of Justice. 18 *December* 2003

(Guillaume, *President of the Chamber*; Rezek and Buergenthal, *Judges*; Torres Bernárdez[2] and Paolillo,[3] *Judges* ad hoc)

Summary: *The facts*:—On 10 September 2002, the Republic of El Salvador filed an Application in the International Court of Justice for revision of the Judgment of the Chamber of the Court of 11 September 1992 in the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening)*.[4] The Chamber of the Court had decided the course of the land boundary between El Salvador and Honduras in six disputed sectors as well as the legal status of various islands in the Gulf of Fonseca and waters in the Gulf and outside it. El Salvador sought revision of the judgment, under Article 61 of the Statute of the Court, in respect of the sixth sector of the land boundary between Los Amates and the Gulf of Fonseca. Article 61 provided in relevant part that an Application for revision:

. . . may be made only when it is based upon 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.

[1] The Republic of El Salvador was represented by Mr Antonio Remiro Brotóns and Mr Maurice Mendelson, *as Counsel and Advocates*; and Mr Mauricio Alfredo Clará and Mr Domingo E. Acevedo, *as Counsel*. The Republic of Honduras was represented by Mr Pierre-Marie Dupuy, Mr Luis Ignacio Sánchez Rodríguez, Mr Philippe Sands, Mr Carlos Jiménez Piernas and Mr Richard Meese, *as Counsel and Advocates*; and HE Mr Aníbal Quiñónez Abarca, HE Mr Policarpo Callejas and Mr Miguel Tosta Appel, *as Counsel*. The names of the Parties' representatives at the oral hearings appear at para. 11 of the Judgment.

[2] Judge *ad hoc* nominated by Honduras.

[3] Judge *ad hoc* nominated by El Salvador.

[4] 97 *ILR* 266.

The Chamber had determined that the boundary between the two States followed the present course of the river Goascorán flowing into the Gulf northwest of the Islas Ramaditas in the Bay of La Unión. No record of an abrupt change in the course of the Goascorán had been brought before the Court. In coming to that conclusion, the Chamber had examined in particular a chart described as a "Carta Esférica" of the Gulf of Fonseca and a report of the 1794 *El Activo* expedition that surveyed the Gulf.

In its Application for revision, El Salvador relied on facts that it considered to be new within the meaning of Article 61 of the Statute. The first consisted of scientific, technical and historical evidence showing the avulsion of the river Goascorán. The second related to the discovery of a further copy of the "Carta Esférica" and the report of the *El Activo* expedition, which El Salvador considered to differ from those before the Court in 1992, thus compromising their evidentiary value. El Salvador maintained that these were new facts which constituted decisive factors and that the fact that they had not been known in 1992 was not due to negligence. Accordingly, El Salvador submitted that the conditions required by Article 61 of the Statute were satisfied and the application was admissible. El Salvador also argued that proper contextualization of the new facts required reconsideration of other facts that were affected by the new facts.

Honduras challenged the admissibility of El Salvador's application. In relation to the scientific, technical and historical evidence, Honduras argued that there was a distinction between facts alleged and the evidence relied upon to prove them and that evidence could not constitute new facts for the purposes of Article 61 of the Statute. Honduras also argued that El Salvador was seeking a new interpretation of previously known facts and that the facts were not of such a nature as to be decisive in respect of the original judgment. As regarded the production of documents, Honduras challenged their characterization as a new fact and contended that there were only insignificant differences between the copies. With respect to the facts on which El Salvador now relied, it was the view of Honduras that El Salvador's ignorance of them in 1992 was due to its negligence. Honduras also challenged El Salvador's claim relating to the reconsideration of other facts, arguing that this would undermine Article 61 of the Statute.

Held (by four votes to one):—The application was inadmissible.

(1) In order for an application for revision to be admissible, each of the conditions laid down in Article 61 of the Statute of the Court had to be met (paras. 17-22).

(2) The new facts relating to avulsion were not "decisive factors" in respect of the 1992 Judgment. Even if avulsion were now proved to have taken place and its legal consequences were those put forward by El Salvador, this would not call the 1992 decision into question for it was taken on wholly different grounds (paras. 36-40).

(3) The new facts concerning the "Carta Esférica" and the report of the *El Activo* expedition were not decisive factors for the purposes of the 1992

Judgment. The copies of the "Carta Esférica" differed only in relation to certain details such as the placing of titles, legends and handwriting; the reliability of the Charts before the Court in 1992 was not in question. The new chart also supported the conclusion of the Chamber in 1992. The same was true of the new version of the report of the *El Activo* expedition (paras. 49-55).

(4) Revision of a judgment could be opened only in accordance with Article 61 of the Statute. Accordingly, an application for revision on the basis of facts not contended to be new facts within the meaning of Article 61 of the Statute could not be admissible (para. 58).

(5) It was not necessary to consider whether the other Article 61 conditions were satisfied (para. 59).

Dissenting Opinion of Judge ad hoc *Paolillo*: All the conditions laid down in Article 61 of the Statute were satisfied. The true *ratio decidendi* of the 1992 Judgment as regarded the sixth sector of the land boundary was that El Salvador had been unable to demonstrate a sudden change in the course of the river Goascorán, thus any evidence that demonstrated avulsion of the river Goascorán might have been of such a nature as to have been a decisive factor. The new copies of the "Carta Esférica" and the report of the *El Activo* expedition differed from those the Chamber of the Court considered earlier. When the discrepancies were considered as a whole, the reliability of the earlier documents might be questioned. There was no negligence on the part of El Salvador (pp. 23-36).

The following is the text of the judgment of the Court:

[394] 1. On 10 September 2002 the Republic of El Salvador (hereinafter "El Salvador") filed in the Registry of the Court an Application instituting proceedings dated the same day, whereby, citing Article 61 of the Statute and Articles 99 and 100 of the Rules of Court, it 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) (ICJ Reports 1992*, p. 351).

2. Pursuant to Article 40, paragraph 2, of the Statute, the Registrar communicated a certified copy of the Application to the Republic of Honduras (hereinafter "Honduras") on 10 September 2002. A copy of the Application was also communicated to the Republic of Nicaragua for information purposes, since that State had been authorized, pursuant to Article 62 of the Statute, to intervene in the original proceedings. In accordance with Article 40, paragraph 3, of the

Statute, all States entitled to appear before the Court were notified of the Application.

3. In its Application, El Salvador, citing Article 100, paragraph 1, of the Rules of Court, 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".

4. The Parties, duly consulted by the President of the Court on 6 November 2002, expressed their wish for the formation of a new Chamber of five members, of whom two would be judges *ad hoc* to be chosen by them pursuant to Article 31, paragraph 3, of the Statute. By a letter of 7 November 2002 the Agent of El Salvador informed the Court that his Government had chosen HE Mr Felipe H. Paolillo to sit as judge *ad hoc*; and by a letter of 18 November 2002 the Agent of Honduras informed the Court that his Government had chosen Mr Santiago Torres Bernárdez to sit as judge *ad hoc*.

5. By an Order of 27 November 2002 the Court, acting pursuant to Article 26, paragraph 2, of the Statute and Article 17 of the Rules of Court, decided to accede to the request of the Parties that a special Chamber be formed to deal with the case; it declared that, at an election held on 26 November 2002, **[395]** President Guillaume and Judges Rezek and Buergenthal had been elected to form a Chamber to deal with the case, together with the above-named judges *ad hoc*, stating further that the said Chamber as so composed had accordingly been duly constituted pursuant to that Order. In accordance with Article 18, paragraph 2, of the Rules of Court, Judge Guillaume, who held the office of President of the Court when the Chamber was formed, was to preside over the Chamber.

6. By the same Order, the Court, acting pursuant to Articles 92, paragraph 2, and 99, paragraph 2, of the Rules of Court, fixed 1 April 2003 as the time-limit for the filing of Written Observations by Honduras on the admissibility of the Application, and reserved the subsequent procedure for further decision.

7. On 1 April 2003, within the time-limit fixed, Honduras filed in the Registry its Written Observations on the admissibility of El Salvador's Application.

8. In a letter of 8 April 2003 the Agent of El Salvador, referring to the Written Observations of Honduras, contended that the latter had submitted new documents with corresponding arguments, and that these required a response from El Salvador, accompanied by the necessary documents, and to that end requested authorization for his Government to submit new documents. In a letter of 24 April 2003

the Co-Agent of Honduras opposed that request. Following a meeting held by the President of the Chamber with the Parties' Agents on 28 April 2003, the Chamber decided that the filing of additional written pleadings was not necessary in the circumstances, that the written proceedings were accordingly closed, and that, if El Salvador wished to submit new documents, its request would then be considered in accordance with the procedure laid down in Article 56 of the Rules of Court. The Registrar advised the Parties of this decision by letters dated 8 May 2003.

9. By a letter of 23 June 2003 El Salvador sought authorization to produce new documents pursuant to Article 56 of the Rules of Court. Those documents, having been filed in the Registry that same day, were transmitted to Honduras in accordance with paragraph 1 of that Article. By a letter of 10 July 2003 Honduras informed the Chamber that it objected to the production of those documents. El Salvador and Honduras were authorized to submit further observations on the matter, which they did by letters of 17 and 24 July 2003 respectively. After examining the views thus expressed by the Parties, the Chamber decided, in accordance with Article 56, paragraph 2, of the Rules of Court, to authorize the production of only some of the documents submitted by El Salvador. The Chamber further noted that a new document attached by Honduras to its Observations of 10 July 2003 was admissible only if authorized pursuant to the same provision of the Rules, and decided not to authorize its production. By letters of 29 July 2003, the Deputy-Registrar informed the Parties of these decisions, advising them that, pursuant to Article 56, paragraph 3, Honduras was authorized to comment by not later than 19 August 2003 on the documents which the Chamber had authorized El Salvador to produce, and to submit documents in support of its comments. On 19 August 2003, within the time-limit thus fixed, Honduras filed its comments in the Registry together with four supporting documents.

10. Pursuant to Article 53, paragraph 2, of the Rules of Court, the Chamber, having ascertained the views of the Parties, decided to make accessible to the **[396]** public, with effect from the opening of the oral proceedings, copies of Honduras's Written Observations on the admissibility of El Salvador's Application and of the documents annexed to those Observations, together with all new documents subsequently produced by the Parties with the Chamber's authorization.

11. Public sittings were held on 8, 9, 10 and 12 September 2003, at which the Chamber heard the oral arguments and replies of:

For El Salvador: HE Ms María Eugenia Brizuela de Ávila,
Mr Maurice Mendelson,
Mr Antonio Remiro Brotóns,
Mr Gabriel Mauricio Gutiérrez Castro.
For Honduras: HE Mr Carlos López Contreras,
Mr Pierre-Marie Dupuy,
Mr Carlos Jiménez Piernas,
Mr Richard Meese,
Mr Luis Ignacio Sánchez Rodríguez,
Mr Philippe Sands.

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12. In its Application, El Salvador made the following requests:

For all the foregoing reasons, the Republic of El Salvador requests the Court:

(a) 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;
(b) To declare the application of the Republic of El Salvador admissible on the grounds of the existence of new facts of such a character as to lay the case open to revision under Article 61 of the Statute of the Court; and
(c) Once the application is admitted, to proceed to the revision of the Judgment of 11 September 1992, so that a new Judgment will determine the boundary line in the sixth disputed sector of the land frontier between El Salvador and Honduras to be as follows:

> Starting from the old mouth of the Goascorán river in the inlet known as the La Cutú Estuary situated at latitude 13°22′00″N and longitude 87°41′25″W, the frontier follows the old course of the Goascorán river for a distance of 17,300 metres as far as the place known as the Rompición de los Amates situated at latitude 13°26′29″ N and longitude 87°43′25″W, which is where the Goascorán river changed its course.

13. In its Written Observations, Honduras made the following submission:

In view of the facts and arguments presented above, the Government of the Republic of Honduras requests the Chamber to declare inadmissible the Application for revision presented on 10 September 2002 by El Salvador.

[397] 14. 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.

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15. By a Judgment of 11 September 1992, the Chamber of the Court formed to deal with the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* decided the course of the land boundary between El Salvador and Honduras in six disputed sectors of that boundary. By the same Judgment the Chamber settled the dispute between the Parties over the legal status of various islands in the Gulf of Fonseca and the legal status of waters in the Gulf and outside it.

16. El Salvador has submitted an Application to the Court for revision of the 1992 Judgment in respect of the sixth sector of the land boundary, lying between Los Amates and the Gulf of Fonseca. During the original proceedings, it was the contention of Honduras that in that sector "the boundary . . . follows the present stream [of the River Goascorán], flowing into the Gulf north-west of the Islas Ramaditas in the Bay of La Unión". El Salvador however claimed that the boundary was defined by "a previous course followed by the river . . . and that this

course, since abandoned by the stream, can be traced, and it reaches the Gulf at Estero La Cutú" (Judgment, para. 306). In the Judgment revision of which is **[398]** now sought, the Chamber unanimously upheld the submissions of Honduras (Judgment, paras. 321, 322 and 430).

17. In its Application for revision of the 1992 Judgment, El Salvador relies on Article 61 of the Statute, which provides:

> 1. An application for revision of a judgment may be made only when it is based upon 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.
>
> 2. The proceedings for revision shall be opened by a judgment of the Court expressly recording the existence of the new fact, recognizing that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground.
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> 3. The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision.
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> 4. The application for revision must be made at latest within six months of the discovery of the new fact.
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> No application for revision may be made after the lapse of ten years from the date of the judgment.

18. Article 61 provides for revision proceedings to open with a judgment of the Court declaring the application admissible on the grounds contemplated by the Statute; 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.

Thus the Statute and the Rules of Court foresee a "two-stage procedure". The first stage of the procedure for a request for revision of the Court's judgment should be "limited to the question of admissibility of that request" (*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), Judgment, ICJ Reports 1985*, p. 197, paras. 8 and 10; *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), Judgment, ICJ Reports 2003*, p. 11, para. 15).

19. Therefore, at this stage, the present Chamber's decision is 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;
[399] *(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.

20. The Chamber observes lastly 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." (*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), Judgment, ICJ Reports 2003*, p. 12, para. 17.)

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21. 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. According to the Applicant,

> Honduras implicitly acknowledged the admissibility of El Salvador's Application when, by letter dated 29 October 2002, it informed the distinguished President of the Court that, pursuant to Article 61, paragraph 3, of the Statute, it would ask that the Court require previous compliance with the 1992 Judgment as a condition precedent to the admissibility of the Application for revision.

In El Salvador's view, "The back step that Honduras took with its letter of 24 July 2003", by which it decided not to ask for prior compliance with the judgment, "does nothing to diminish [the] acknowledgment [of the admissibility of the Application], and instead serves to confirm it." The Chamber is consequently requested to "adjudge and decide accordingly".

22. The Chamber observes first that, in its letter of 29 October 2002, Honduras informed the President of the Court that it would "request that the Court make the admission of the proceedings in revision conditional on previous compliance with the judgment" and that accordingly it would "submit a formal petition" to that effect. However, Honduras never submitted that request and stated in its observations of 24 July 2003 (see paragraph 9 above) that it had "decided, on reflection, not

to ask the Chamber to require prior compliance with the terms of the Judgment". Thus, Honduras's conduct cannot be construed as implying a tacit acceptance of the admissibility of El Salvador's Application for revision.

Further, paragraph 3 of Article 61 of the Statute and paragraph 5 of Article 99 of the Rules of Court afford the Court the possibility at any time to require previous compliance with the terms of the judgment whose revision is sought, before it admits proceedings in revision; accordingly, even if Honduras had submitted a request to the Court to require previous compliance without awaiting the Chamber's decision on the **[400]** admissibility of El Salvador's Application, the request would not have implied recognition of the admissibility of the Application.

Finally, the Chamber notes 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.

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23. In order properly to understand El Salvador's present contentions, it is necessary to recapitulate at the outset part of the reasoning in the 1992 Judgment in respect of the sixth sector of the land boundary.

El Salvador admitted before the Chamber hearing the original case that the river Goascorán had been adopted as the provincial boundary during the period of Spanish colonization. It argued, however, that

> at some date [the Goascorán] abruptly changed its course to its present position. On this basis El Salvador's argument of law [was] 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.)

That was claimed to be the rule under both Spanish colonial law and international law. Thus, according to El Salvador, the boundary between the two States should be established not along the present stream of the river, flowing into the Bay of La Unión, but along the "previous course ... since abandoned by the stream", probably during the seventeenth century, emptying into the Estero La Cutú (paras. 306 and 311).

24. After setting out this argument by El Salvador, the Chamber stated in its Judgment of 11 September 1992 that "No record of such an abrupt change of course having occurred has been brought to the