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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2007

Public sitting

held on Monday 4 June 2007, at 10.10 a.m., at the Peace Palace,

President Higgins presiding,

***in the case concerning the* Territorial and Maritime Dispute**
(Nicaragua *v.* Colombia)

VERBATIM RECORD

ANNÉE 2007

Audience publique

tenue le lundi 4 juin 2007, à 10 h 10, au Palais de la Paix,

sous la présidence de Mme Higgins, président,

***en l'affaire du* Différend territorial et maritime**
(Nicaragua c. Colombie)

COMPTE RENDU

Present:	President	Higgins
	Vice-President	Al-Khasawneh
	Judges	Ranjeva
		Shi
		Koroma
		Parra-Aranguren
		Buergenthal
		Owada
		Simma
		Tomka
		Abraham
		Keith
		Sepúlveda-Amor
		Bennouna
		Skotnikov
	Judges *ad hoc*	Fortier
		Gaja
	Registrar	Couvreur

Présents : Mme Higgins, président
M. Al-Khasawneh, vice-président
MM. Ranjeva
Shi
Koroma
Parra-Aranguren
Buergenthal
Owada
Simma
Tomka
Abraham
Keith
Sepúlveda-Amor
Bennouna
Skotnikov, juges
MM. Fortier
Gaja, juges *ad hoc*

M. Couvreur, greffier

The Government of Nicaragua is represented by:

H.E. Mr. Carlos José Argüello Gómez, Ambassador of the Republic of Nicaragua to the Kingdom of the Netherlands,

as Agent and Counsel;

Mr. Ian Brownlie, C.B.E., Q.C., F.B.A., member of the English Bar, Chairman of the International Law Commission, Emeritus Chichele Professor of Public International Law, University of Oxford, member of the Institut de droit international, Distinguished Fellow, All Souls College, Oxford,

Mr. Alex Oude Elferink, Research Associate, Netherlands Institute for the Law of the Sea, Utrecht University,

Mr. Alain Pellet, Professor at the University Paris X-Nanterre, Member and former Chairman of the International Law Commission,

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

as Counsel and Advocates;

Ms Irene Blázquez Navarro, Doctor of Public International Law, Universidad Autónoma, Madrid,

Ms Tania Elena Pacheco Blandino, Counsellor, Embassy of the Republic of Nicaragua in the Kingdom of the Netherlands,

Ms Nadine Susani, Doctor of Public Law, Centre de droit international de Nanterre (CEDIN), University of Paris X-Nanterre,

as Assistant Advisers.

The Government of Colombia is represented by:

H.E. Mr. Julio Londoño Paredes, Ambassador,

as Agent;

H.E. Mr. Guillermo Fernández de Soto, Ambassador of Colombia to the Kingdom of the Netherlands; member of the Permanent Court of Arbitration and former Minister for Foreign Affairs,

as Co-Agent;

Mr. Stephen M. Schwebel, member of the Bars of the State of New York, the District of Columbia, and the Supreme Court of the United States of America; member of the Permanent Court of Arbitration; member of the Institute of International Law,

Sir Arthur Watts, K.C.M.G., Q.C., member of the English Bar; member of the Permanent Court of Arbitration; member of the Institute of International Law,

Le Gouvernement du Nicaragua est représenté par :

S. Exc. M. Carlos José Arguëllo Gómez, ambassadeur de la République du Nicaragua auprès du Royaume des Pays-Bas,

comme agent et conseil ;

M. Ian Brownlie, C.B.E., Q.C., F.B.A., membre du barreau d'Angleterre, président de la Commission du droit international, professeur émérite de droit international public (chaire Chichele) à l'Université d'Oxford, membre de l'Institut de droit international, *Distinguished fellow* au All Souls College d'Oxford,

M. Alex Oude Elferink, *research associate* à l'Institut néerlandais du droit de la mer de l'Université d'Utrecht,

M. Alain Pellet, professeur à l'Université de Paris X-Nanterre, membre et ancien président de la Commission du droit international,

M. Antonio Remiro Brotóns, professeur de droit international à l'Universidad autónoma de Madrid,

comme conseils et avocats ;

Mme Irene Blázquez Navarro, docteur en droit international public, Universidad autónoma de Madrid,

Mme Tania Elena Pacheco Blandino, conseiller à l'ambassade du Nicaragua aux Pays-Bas,

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comme conseillers adjoints.

Le Gouvernement de la Colombie est représenté par :

S. Exc. M. Julio Londoño Paredes, ambassadeur,

comme agent ;

S. Exc. M. Guillermo Fernández de Soto, ambassadeur de la République de Colombie auprès du Royaume des Pays-Bas, membre de la Cour permanente d'arbitrage, ancien ministre des affaires étrangères,

comme coagent ;

M. Stephen M. Schwebel, membre des barreaux de l'Etat de New York, du district de Columbia et de la Cour suprême des Etats-Unis d'Amérique, membre de la Cour permanente d'arbitrage, membre de l'Institut de droit international,

Sir Arthur Watts, K.C.M.G., Q.C., membre du barreau d'Angleterre, membre de la Cour permanente d'arbitrage, membre de l'Institut de droit international,

Mr. Prosper Weil, Professor Emeritus, University of Paris II; member of the Permanent Court of Arbitration; member of the Institute of International Law; member of the Académie des Sciences Morales et Politiques (Institut de France),

as Counsel and Advocates;

Mr. Eduardo Valencia-Ospina, member of the International Law Commission,

Mr. Rafael Nieto Navia, former Judge of the International Tribunal for the former Yugoslavia; former Judge of the Inter-American Court of Human Rights; member of the Permanent Court of Arbitration; member of the Institute of International Law,

Mr. Andelfo García González, Professor of International Law, Deputy Chief of Mission of the Colombian Embassy at Madrid, former Deputy Minister for Foreign Affairs, Republic of Colombia,

Mr. Enrique Gaviria Liévano, Professor of Public International Law; former Ambassador of Colombia and Deputy Permanent Representative to the United Nations; former Chairman of the Sixth Committee of the United Nations General Assembly; former Ambassador of Colombia to Greece and to the Czech Republic,

Mr. Juan Carlos Galindo Vacha, former Deputy Inspector-General before the Council of State, National Head of the Civil Registry,

as Advocates;

Ms Sonia Pereira Portilla, Minister Plenipotentiary of the Embassy of the Republic of Colombia in the Kingdom of the Netherlands,

Mr. Juan José Quintana, Minister Counsellor, Ministry of Foreign Affairs of Colombia,

Ms Mirza Gnecco Plá, Counsellor, Ministry of Foreign Affairs of Colombia,

Mr. Julián Guerrero Orozco, Counsellor, Embassy of the Republic of Colombia in the Kingdom of the Netherlands,

Ms Andrea Jiménez Herrera, First Secretary, Ministry of Foreign Affairs of Colombia,

Ms Daphné Richemond, member of the Bars of Paris and the State of New York,

as Legal Advisers;

Mr. Scott Edmonds, Cartographer, International Mapping,

as Technical Adviser;

Ms Stacey Donison,

as Stenographer.

M. Prosper Weil, professeur émérite de l'Université de Paris II, membre de la Cour permanente d'arbitrage, membre de l'Institut de droit international, membre de l'Académie des sciences morales et politiques (Institut de France),

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M. Eduardo Valencia-Ospina, membre de la Commission du droit international,

M. Rafael Nieto Navia, ancien juge du Tribunal pénal international pour l'ex-Yougoslavie, ancien juge de la Cour interaméricaine des droits de l'homme, membre de la Cour permanente d'arbitrage, membre de l'Institut de droit international,

M. Andelfo García González, professeur de droit international, chef adjoint de mission à l'ambassade de Colombie au Royaume d'Espagne, ancien ministre adjoint des affaires étrangères,

M. Enrique Gaviria Liévano, professeur de droit international, ancien ambassadeur de Colombie, ancien ambassadeur et représentant permanent adjoint auprès de l'Organisation des Nations Unies, ancien président de la Sixième Commission de l'Assemblée générale de l'Organisation des Nations Unies, ancien ambassadeur de Colombie en Grèce et en République tchèque,

M. Juan Carlos Galindo Vacha, ancien inspecteur général adjoint auprès du Conseil d'Etat de la République de Colombie, chef du bureau de l'état civil,

comme avocats ;

Mme Sonia Pereira Portilla, ministre plénipotentiaire à l'ambassade de Colombie aux Pays-Bas,

M. Juan José Quintana, ministre-conseiller, ministère des affaires étrangères,

Mme Mirza Gnecco Plá, conseiller, ministère des affaires étrangères,

M. Julián Guerrero Orozco, conseiller, ambassade de Colombie aux Pays-Bas,

Mme Andrea Jiménez Herrera, premier secrétaire, ministère des affaires étrangères,

Mme Daphné Richemond, membre des barreaux de Paris et de l'Etat de New York,

comme conseillers juridiques ;

M. Scott Edmonds, cartographe, International Mapping,

comme conseiller technique ;

Mme Stacey Donison,

comme sténographe.

The PRESIDENT: Please be seated.

The Court meets today to hear the oral statements of the Parties on the Preliminary Objections raised by the Respondent in the case concerning the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia*).

I note that since the Court does not include upon the Bench a judge of the nationality of either of the Parties, both Parties have availed themselves of the right, under Article 31, paragraph 2, of the Statute, to choose a judge *ad hoc*. Nicaragua originally chose Mr. Mohammed Bedjaoui. Following the resignation of the latter, Nicaragua chose Mr. Giorgio Gaja and Colombia chose Mr. Yves Fortier.

Article 20 of the Statute provides: "Every Member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously " Pursuant to Article 31, paragraph 6, of the Statute, that same provision applies to judges *ad hoc*. Although both Mr. Fortier and Mr. Gaja have been judges *ad hoc* and made a solemn declaration in previous cases, Article 8, paragraph 3, of the Rules of Court provides that they must make a further solemn declaration in the present case.

In accordance with custom, I shall first say a few words about the career and qualifications of each judge *ad hoc* before inviting him to make his solemn declaration.

Mr. Yves Fortier, of Canadian nationality, holds degrees from the University of Montreal, McGill University and Oxford University. He is a distinguished jurist and has pursued a career as both diplomat and lawyer. In particular, he served as Canada's Ambassador and Permanent Representative to the United Nations in New York from 1988 to 1992 and, in that capacity, served as Vice-President of the General Assembly and President of the Security Council. Mr. Fortier is well known to the Court since he was chosen as judge *ad hoc* in the *Qatar* v. *Bahrain* case and appeared before the Court as counsel in the *Gulf of Maine* case. He has also pleaded a number of important arbitration cases and has sat as arbitrator in many cases, including as a Member of the Permanent Court of Arbitration.

Mr. Giorgio Gaja, of Italian nationality, is Professor at the Faculty of Law of the University of Florence. He has held numerous other teaching posts around the world including at the

European University Institute and the University of Paris I, and has also taught at The Hague Academy of International Law. Mr. Gaja has been a Member of the International Law Commission since 1999 and is a member of the Institut de droit international. He has represented his Government on a number of occasions including before this Court as counsel in the *Elettronica Sicula S.p.A. (ELSI)* case. Mr. Gaja was also chosen as judge *ad hoc* in one of the cases concerning *Legality of Use of Force*, namely the *Serbia and Montenegro* v. *Italy* case, and in the case concerning *Maritime Delimitation between Nicaragua and Honduras in the Caribbean Sea*.

In accordance with the order of precedence fixed by Article 7, paragraph 3, of the Rules of Court, I shall first invite Mr. Fortier to make the solemn declaration prescribed by the Statute, and I would request all those present to rise.

M. FORTIER: Merci, Madame le président.

> "Je déclare solennellement que je remplirai mes devoirs et exercerai mes attributions de juge en tout honneur et dévouement, en pleine et parfaite impartialité et en toute conscience."

The PRESIDENT: Thank you. I shall now invite Mr. Gaja to make the solemn declaration prescribed by the Statute.

Mr. GAJA: Thank you.

> "I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously."

The PRESIDENT: Thank you. Please be seated. I take note of the solemn declarations made by Mr. Fortier and Mr. Gaja and declare them duly installed as judges *ad hoc* in the case concerning the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*.

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I shall now recall the principal steps of the procedure so far in this case.

On 6 December 2001, the Republic of Nicaragua filed in the Registry of the Court an Application instituting proceedings against the Republic of Colombia in respect of a dispute

consisting of a group of "related legal issues subsisting" between the two States "concerning title to territory and maritime delimitation" in the western Caribbean.

In its Application, Nicaragua founded the jurisdiction of the Court first on the provisions of Article XXXI of the American Treaty on Pacific Settlement signed on 30 April 1948, known as the "Pact of Bogotá", and secondly on the declarations made by the Parties accepting the Court's jurisdiction.

By an Order dated 26 February 2002, the Court fixed 28 April 2003 as the time-limit for the filing of the Memorial of Nicaragua and 28 June 2004 as the time-limit for the filing of the Counter-Memorial of Colombia. Nicaragua filed its Memorial within the time-limit so prescribed.

Pursuant to the instructions of the Court under Article 43 of the Rules of Court, the Registrar addressed to all States parties to the Pact of Bogotá the notifications provided for in Article 63, paragraph 1, of the Statute. In accordance with the provisions of Article 69, paragraph 3, of the Rules of Court, the Registrar moreover addressed to the Organization of American States the notification provided for in Article 34, paragraph 3, of the Statute. The Registrar subsequently transmitted to that organization copies of the pleadings filed in the case and asked its Secretary-General to inform him whether or not the OAS intended to present observations in writing within the meaning of Article 69, paragraph 3, of the Rules of Court. The Registrar was informed that the OAS did not intend to submit such observations.

On 21 July 2003, within the time-limit set by Article 79, paragraph 1, of the Rules of Court, Colombia raised preliminary objections to the jurisdiction of the Court. Consequently, by an Order dated 24 September 2003, the Court, noting that by virtue of Article 79, paragraph 5, of the Rules of Court, the proceedings on the merits were suspended: it fixed 26 January 2004 as the time-limit for the presentation by Nicaragua of a written statement of its observations and submissions on the preliminary objections made by Colombia. Nicaragua filed such a statement within the time-limit so prescribed, and the case thus became ready for hearing on the Preliminary Objections.

Pursuant to Article 53, paragraph 1, of the Rules of Court, the Governments of Honduras, Jamaica, Chile, Peru, Ecuador and Venezuela asked to be furnished with copies of the pleadings and documents annexed produced in the case. In accordance with the same provision, having ascertained the views of the Parties, the Court granted these requests.

Having ascertained the views of the Parties, the Court decided, pursuant to Article 53, paragraph 2, of its Rules, that copies of the pleadings and the documents annexed would be made accessible to the public on the opening of its oral proceedings. Further, in accordance with Court practice, the pleadings without their annexes will be put on the Court's new website today.

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I note the presence at the hearing of the Agents, counsel and advocates of both Parties. In accordance with the arrangements on the organization of the procedure which have been decided by the Court, the hearings will comprise of first and second round of oral argument. Colombia, which raised the preliminary objections, will be heard first.

The first round of oral argument will begin today. Each Party will dispose of one three-hour session. Colombia will present its arguments today and the Court is aware that we start with an overrun on your time and will take due notice of that: and Nicaragua, tomorrow, will begin at 10 a.m. The second round of oral argument will begin on Wednesday and each Party will dispose of one two-hour session. Colombia will present its second round of oral arguments on Wednesday at 4 p.m. and Nicaragua on Friday at 10 a.m.

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I now give the floor to His Excellency Mr. Londoño Paredes, the Agent of Colombia.

Mr. PAREDES:

1. Madam President and distinguished judges. It is a great honour for me to address the Court, as Agent for the Republic of Colombia in these hearings on the Preliminary Objections submitted by my country, in the case brought by Nicaragua against Colombia by Application on 6 December 2001. If I may, Madam President, I should now like to briefly set out the salient facts:

2. A dispute existed between Colombia and Nicaragua since 1838 over the Mosquito Coast, and since 1890 over the Corn Islands. In 1913, Nicaragua extended the dispute by advancing, for the first time ever, claims over the Archipelago of San Andrés. The Archipelago had by then, for a

century, been part of one of the provinces of the Republic of Colombia and had been under its jurisdiction like any other part of its national territory. Despite this fact, a lengthy negotiation then began over the whole of the dispute, which was to end with the conclusion on 24 March 1928 of the Esguerra-Bárcenas Treaty.

3. By the terms of the Treaty, Colombia recognized Nicaragua's sovereignty over the Mosquito Coast and the Corn Islands, while Nicaragua recognized Colombia's sovereignty over the islands of San Andrés, Providencia, Santa Catalina, and all the other islands, islets and cays that form part of the Archipelago of San Andrés. Both Parties also expressly stipulated that sovereignty over three of the archipelago's cays — Roncador, Quitasueño and Serrana — was in dispute between Colombia and the United States of America.

4. The Treaty was discussed and approved by the two chambers of Congress in each country. The agreement reached by the Parties establishing the 82º W meridian as their maritime boundary was embodied in the Treaty's Protocol of Exchange of Ratifications, of 5 May 1930. The 1928 Treaty along with its 1930 Protocol was registered with the League of Nations by Colombia on 16 August 1930, and two years later by Nicaragua, on 25 May 1932.

5. Colombia continued, in a public, peaceful and uninterrupted manner, to exercise its sovereignty over the entire Archipelago of San Andrés and its jurisdiction over the appurtenant maritime areas up to the 82° W meridian boundary.

6. Now Nicaragua, in the present case, not only would have the Court validate its attempts to disavow a territorial and boundary treaty, in force for over three quarters of a century, but would also have the Colombian Archipelago of San Andrés delivered to it on a silver platter, despite the terms of the Treaty and despite the fact that Nicaragua has never exercised jurisdiction over the archipelago. Likewise, Nicaragua would have the Court ignore the maritime boundary established by the 1928/1930 Treaty. In fact, what Nicaragua would like, is for this Court to endorse a flagrant violation of the governing principle of international relations, *pacta sunt servanda.*

7. Colombia's unwavering practice has been that of respect for treaties and international agreements. Colombia has entered into 17 treaties and agreements on territorial issues, land or maritime delimitation with 12 States. It equally resorted to arbitration with Costa Rica before the President of France; and arbitrations with Venezuela before the King of Spain and the Swiss

Confederation. Several of these treaties and arbitral awards are linked to the present case, in so far as they directly or indirectly relate to the Archipelago of San Andrés and its appurtenant maritime areas.

8. For its part, Nicaragua has endeavoured to disown established boundaries with all its neighbours, whether defined by an arbitral award, or in treaties that it signed and ratified. Nicaragua has also presumed to question other territorial treaties and agreements in force, on delimitation and other matters, signed by Colombia with other States in the area. Nicaragua's approach carries grave consequences for the stability of the region.

9. Madam President and distinguished judges, Colombia and Nicaragua are parties to the Pact of Bogotá which provides for several procedures of pacific settlement of disputes. Nicaragua would have the Court ignore an essential provision of that instrument, Article VI. It provides that the Pact's procedures do not apply to matters already settled by arrangement between the parties, or that are governed by agreements or treaties in force on the date of its conclusion, 30 April 1948. All of the claims raised by Nicaragua relate to matters so settled or governed.

10. Nicaragua also wishes the Court to disregard a provision of the Pact aimed at preventing one of the parties from attempting to have any of its settlement procedures — including recourse to the Court — applied to matters expressly excepted by the Pact itself. Article XXXIV provides that disputes relating to matters such as those included in Article VI are to be declared ended.

11. Nicaragua also invokes declarations under the optional clause as an additional title of jurisdiction. But prior to the filing of Nicaragua's Application, Colombia had terminated its 1937 declaration with immediate effect.

12. Nicaragua would have the Court disregard Colombia's will, manifested by its letter of termination, and disregard as well the concordant practice of both States, evidenced by the fact that Nicaragua had at the time recently modified its 1929 declaration also with immediate effect.

13. In any event, Nicaragua would have the Court ignore the reservation in the Colombian declaration that excluded controversies arising out of facts prior to 6 January 1932 from the Court's jurisdiction. But all the matters raised by Nicaragua in its Application arise out of such facts.

14. Nicaragua's wish to avoid these limitations upon the Court's jurisdiction is evident: but, Madam President, wishing does not make it so. The fact is that, as Colombia will show over the

course of the present proceedings, both under the Pact of Bogotá and in the context of the optional clause, the Court is without jurisdiction to hear this case.

15. Madam President, pursuant to the Pact of Bogotá, it falls to the Court to determine that, in the circumstances of the case, the conditions set forth in Article VI of the Pact are fulfilled. Those conditions are:

— that the 1928 Treaty and its Protocol of Exchange of Ratifications of 1930 were in force on 30 April 1948, the date of the Pact's conclusion;

— that the Treaty and Protocol settled the matter of sovereignty over the Archipelago of San Andrés; and

— that the limit between both States was determined in the agreement embodied in the Protocol of Exchange of 1930.

Having established this, it is for the Court, in application of Article XXXIV of the Pact, to find that it is without jurisdiction to hear the controversy and to declare the controversy ended.

16. Moreover, Colombia terminated its acceptance of the Court's compulsory jurisdiction and thus, under Article 36, paragraph 2, of the Statute, does not consent to the Court's jurisdiction on that basis.

17. Even under the 1937 declaration, if it applied, the Court would in any event lack jurisdiction to hear the case, by virtue of the very terms of that instrument. This is so, because the controversy raised by Nicaragua regarding sovereignty over the Archipelago of San Andrés and the establishment of the 82° W Meridian limit, arises out of facts prior to 6 January 1932.

18. In short, Madam President, both because of the termination of Colombia's declaration and because of its terms, Article 36, paragraph 2, simply does not apply.

19. Madam President and distinguished judges, in its Written Statement of 2004, Nicaragua maintains that Colombia has not been firm and consistent with regard to its defence of the 82° W Meridian as the maritime boundary between both countries, contending that there were what Nicaragua calls "rounds of negotiations" over it. It is simply not true, and Colombia calls the Court's attention to the significant fact that Nicaragua itself so acknowledges in its Written

Statement[1] that Colombia has always upheld the maritime limit established by agreement of the two countries in 1930.

20. Nicaragua also advances the insupportable allegation that Colombia acted in bad faith in the period leading up to the withdrawal of its declaration under the optional clause.

21. Not only does Nicaragua misstate the facts, but its contentions are said to be supported by affidavits fabricated years after the event. These self-serving affidavits do not reflect the truth of the matter. My Government strenuously rejects Nicaragua's claims and affidavits. My Government trusts that the Court will give them no credit.

22. Madam President and distinguished judges, from its Written Statement Nicaragua's strategy appears crystal clear: to induce the Court to declare that Colombia's objections do not possess, in the circumstances of the case, an exclusively preliminary character. It attempts to achieve this objective by raising itself at every turn matters that would properly belong to the merits and distorting Colombia's position by accusing it of doing the same. In so acting, Nicaragua ignores the provisions of Article 79 of the Rules as well as Practice Direction VI. For its part, Colombia will adhere to those provisions and will thus confine its statements to those matters that are relevant to the objections.

23. Colombia respectfully invites the Court to uphold the Preliminary Objections it has submitted, thus putting an end to Nicaragua's attempt to have Colombian territories and waters transferred to Nicaragua.

24. I am grateful to the Court for having allowed me the privilege of opening Colombia's oral argument in these proceedings. If the Court pleases, Sir Arthur Watts shall continue with the presentation of Colombia's preliminary objections, beginning with an explanation of the pertinent background and general aspects. Then, Professor Prosper Weil shall analyse the objection submitted by Colombia based on the Pact of Bogotá. And thereafter Mr. Stephen Schwebel shall deal with the objection raised by Colombia concerning the declarations under the optional clause. May I now invite you, Madam President, to give the floor to Sir Arthur Watts.

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[1]Written Statement of Nicaragua (WSN), p. 19, para. 1.22.

The PRESIDENT: I thank the Agent of Colombia and I now give the floor to Sir Arthur Watts.

Sir Arthur WATTS: Thank you, Madam President. Madam President and Members of the Court, it is an honour for me to address the Court today, as counsel for the Republic of Colombia.

1. Could I just say at the outset that my colleagues and I will not read out the footnote references which are included in the written texts of our statements, but we hope the Court will find them helpful when reading the compte rendu.

2. Madam President, let me — just for a moment — leave aside the details of this case, and look instead at the heart of the matter.

3. Nearly 200 years ago the Spanish Empire in the Americas broke up. It was not a tidy process. There were many uncertainties. They included the geographical extent of the newly independent States. There were disputes — inevitably.

4. There were disputes between Colombia and Nicaragua. They flared up from time to time — long ago, in the nineteenth century, and the early years of the twentieth century. There were negotiations, lengthy negotiations. Eventually — in 1928 and 1930 — a treaty settlement was agreed.

5. That treaty settlement was applied. For the next five years there were no problems; ten years; 15; 20 — half a century in fact. It was not until 1980 that Nicaragua first raised problems about that treaty settlement — 50 years after the event!

6. And now Nicaragua comes to this Court. For what, Madam President? Nicaragua asks the Court to adjudicate to Nicaragua territories and maritime areas which, even since before Nicaragua emerged as an independent nation, have always belonged to Colombia, as was confirmed by the 1928-1930 treaty settlement.

7. In short, let us be clear, Nicaragua asks the Court to set aside a 75-year-old treaty settlement: Nicaragua asks the Court to rewrite history.

8. Madam President, let me now turn to the case in more detail. Colombia has raised two preliminary objections. The first is that the dispute which Nicaragua seeks to bring before the Court was settled 75 years ago in the Esguerra-Bárcenas Treaty of 1928-1930, and that,

accordingly, under the terms of the Pact of Bogotá the Court has no jurisdiction to consider the merits of that dispute.

9. Colombia's second objection is that the Court lacks jurisdiction under the declarations of acceptance of the Court's compulsory jurisdiction.

10. The scope of what was settled in the Esguerra-Bárcenas Treaty is crucially important. It may therefore help the Court if I first outline the background to that Treaty, and then explain the terms of the settlement reached all those years ago.

HISTORICAL BACKGROUND

11. I can outline the historical background quite briefly[2], particularly since in any event the dispute which emerged from those historical circumstances has already been settled.

12. That dispute had its origins in the circumstances surrounding the break up of the Spanish Empire in the Americas in the early nineteenth century. The essential geography of that old dispute is shown on the sketch-map at tab 2 in the judges' folders, and now on the screen. In briefest summary, the situation was this.

(1) At the beginning of the nineteenth century, the Vice-Royalty of Santa Fe[3] (i.e., mostly present-day Colombia) included part of the Mosquito Coast in present-day Nicaragua and the Archipelago of San Andrés (which included at that time the Corn Islands).

(2) As regards the Mosquito Coast, Colombia's historical and legal title was derived from Spain. Nevertheless Colombia, once independent, had to defend its rights through diplomatic means, first against Great Britain which occupied that Coast, and subsequently against Nicaragua.

(3) In 1890 the dispute with Nicaragua extended to the Corn Islands, which Nicaragua had forcefully occupied, despite protests from the islanders and the Colombian Government.

(4) Those differences over the Mosquito Coast and the Corn Islands became sharper in 1913. In that year Nicaragua and the United States signed a treaty whereby Nicaragua purported to lease the Corn Islands to the United States: Colombia protested, and in reply Nicaragua repeated its

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[2]For a fuller treatment see Preliminary Objections of Colombia (POC), Introduction, pp. 6-8, paras. 9-13; pp. 29-32, paras. 1.22-1.32.

[3]POC, p. 29, para. 1.22, footnote 18.

alleged rights over the Mosquito Coast and the Corn Islands and, for the first time, asserted claims to sovereignty over certain islands of the Archipelago of San Andrés.

13. Nicaragua's appetite for acquiring territory at Colombia's expense is abundantly clear.

1913-1928: THE NEGOTIATIONS

14. Colombia and Nicaragua then embarked on some 15 years of negotiations. This led to the Esguerra-Bárcenas Treaty of 1928 and its Protocol of Exchange of Ratifications of 1930. The two States settled their differences in that Treaty and Protocol.

15. The settlement which was then agreed involved three clear and simple elements:

— first, Colombia recognized Nicaragua's sovereignty over the Mosquito Coast and the Corn Islands;

— second, Nicaragua recognized Colombia's sovereignty over the Archipelago of San Andrés; and

— third, Colombia and Nicaragua mutually agreed on the 82º W meridian as their boundary.

16. That settlement is illustrated on the sketch-map at tab 6 in the judges' folders, and now on the screen. *That* is the treaty settlement which the two States agreed; and *that*, Madam President and Members of the Court, is the agreed settlement which Nicaragua, in these present proceedings, seeks to disavow.

THE 1928-1930 ESGUERRA-BÁRCENAS TREATY

1928: The signing of the Treaty

17. Let me now look more closely at that settlement. The Treaty signed in 1928 is short and simple. Its translation into English is at tab 7 *(b)* in the judges' folders.

18. It contains only one substantive Article, which is now on the screen and at tab 7 *(a)* in the judges' folders. It is in effect in three parts.

— The first part of Article I stipulates that Colombia recognizes the full and entire sovereignty of Nicaragua over "the Mosquito Coast between the Cape Gracias a Dios and the San Juan River, and over the Mangle Grande and Mangle Chico islands, in the Atlantic Ocean (Great Corn Island and Little Corn Island)". This was Colombia's concession to Nicaragua, by way of the diplomatic compromise which was negotiated.

— The second part of Article I incorporates Nicaragua's recognition of Colombia's full and entire sovereignty over "the islands of San Andrés, Providencia, Santa Catalina and all the other islands, islets and cays that form part of the said Archipelago of San Andrés". In the context of the present proceedings, this formulation is particularly important and it is highlighted in tab 7 *(a)* of the folders and is now on the screen. It makes it clear that the Archipelago consists of *more* than the three islands named, that is San Andrés, Providencia and Santa Catalina: it comprises *other* "islands, islets and cays". And it is "all" these other islands, islets and cays which also form part of the Archipelago over which Colombia's sovereignty is so fully recognized by Nicaragua.

— The third part of Article I deals with the special situation of three of the Archipelago's cays — Roncador, Quitasueño and Serrana. It says that those three cays "are not considered to be included in this Treaty, sovereignty over which is in dispute between Colombia and the United States". Nicaragua argues that it means that these three cays do not form part of the Archipelago of San Andrés. But on the contrary, the provision is *only* explicable on the basis that they *are* part of the Archipelago: only on that basis was it necessary to put them beyond the reach of the principal "recognition of sovereignty" provision in Article I to which they would otherwise be subject. Given that the Archipelago was one element in the dispute which the Parties were resolving, there was no reason for including a provision regarding the three cays if they were not part of the Archipelago.

19. Article I also necessarily implies that Nicaragua itself did not have any claim to sovereignty over the three cays. Nicaragua accepted that sovereignty over them "is in dispute between Colombia *and the United States*" — no mention of any dispute involving any Nicaraguan claim or right. It is not conceivable that, had Nicaragua had any claim to the three cays, Nicaragua would have refrained from at least mentioning it. But there was no such mention — because there was no such claim. And indeed, over several decades after the Treaty's entry into force, Nicaragua never purported to claim any rights over those three cays. In fact, the Colombia-United States

dispute referred to has now long since been settled, as explained in Colombia's Preliminary Objections[4].

20. In short, as between Colombia and Nicaragua, the position of the three cays was settled by Article I and from then on it has been governed by that provision: the Parties acknowledged that the cays formed part of the Archipelago, and that Nicaragua had no claim to them.

21. So, Madam President and Members of the Court, that was how the Esguerra-Bárcenas Treaty settled and governed the dispute between Colombia and Nicaragua over the *whole* Archipelago of San Andrés, and the Mosquito Coast.

22. The islands, islets and cays forming the Archipelago of San Andrés which have always been under Colombia's sovereignty and jurisdiction, have long been well understood in the region: they are set out in Colombia's preliminary objections[5], in the long-repeated form used in the official texts and maps[6]. There is nothing new about that. For instance, in 1896 Colombia's then Foreign Minister, Jorge Holguin when referring to the occupation of the Corn Islands by — as it happens — Nicaragua, stated that the Archipelago of San Andrés was formed by three groups of islands that spread from the coasts of Central America, facing Nicaragua, to the cay of Serranilla: the first of these groups being formed by the islands of Providencia and Santa Catalina and the cays of Roncador, Quitasueño, Serrana, Serranilla and Bajo Nuevo; the second being formed by the islands of San Andrés and the cays of Albuquerque, Courtown Bank and others of less importance; and the third by the islands of San Luis de Mangle, such as Mangle Grande, Mangle Chico and the cays of Las Perlas[7].

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[4]POC, pp. 55-56, paras. 1.82-1.88.

[5]*Ibid.*, p. 25, paras. 1.7-1.9.

[6]*Ibid.*, Vol. III, Map 4, 4*bis*, 5, 5*bis*, 6, 6*bis*, 7, 7*bis*, 8, 8*bis*, 9, 9*bis*, 10, 10*bis*, 11, 11*bis*.

[7]The 1896 Report to Congress appears in the *Anales Diplomáticos y Consulares de Colombia* (Diplomatic and Consular Records of Colombia), Vol. IV — 1914, Imprenta Nacional, Bogotá, 1914, p. 719. A translation of the chapter containing the relevant text has been furnished to the Court's Registry. This is a publication in the public domain which is readily available and may be found on the Internet at

http://www.lablaa.org/blaavirtual/historia/andicoiv/mem1896e.pdf. (the pertinent excerpt),

http://www.lablaa.org/blaavirtual/historia/andicoiv/indice.htm. (the entire text of volume IV).

It is also available in the following libraries: Peace Palace Library, The Hague, Systematic code 452, Request number P 138; the Library of Congress of the United States of America, LC Classification (Call Number) JX553.A3, LC Control No. 12027366; and the Library of the United Nations Office at Geneva, under Call Number 986.1:327 A532 Stack L, online database: UNOG Catalog 1987-Today, United Nations Office at Geneva Library (pre-1987).

1928-1930: The approval and ratification process

23. In Colombia the Treaty was approved by Congress on 17 November 1928, about nine months after its signature[8].

24. In Nicaragua[9] the Treaty was approved on 5 April 1930, about two years after its signature. It was submitted to Congress in December 1928. The next year the Senate set up a special Study Commission to examine the Treaty and make a recommendation to the plenary as to its approval.

25. Members of Nicaragua's Government and Congress considered it important that a provision be added fixing the 82º W meridian "as the limit in the dispute with Colombia"[10]. Given that the 1928 text had already been approved by the Colombian Congress, this proposal required further negotiations between Nicaragua and Colombia[11].

26. Colombia accepted the Nicaraguan proposal, but adding that the provision about the 82º W meridian being the boundary should be included in the Protocol of Exchange of Ratifications[12]. And this was accepted by Nicaragua.

27. The Nicaraguan Senate's Study Commission accepted this additional agreed provision — "understanding that the Archipelago of San Andrés mentioned in the first clause of the Treaty does not extend west of Greenwich meridian 82"[13]. The Nicaraguan Senate unanimously approved the treaty on 6 March 1930, with the additional provision proposed by Nicaragua and agreed with Colombia.

28. A month later the Chamber of Deputies approved the Treaty, along with that addition[14]. In the congressional approval decree the 82º W boundary was expressly stated[15]. Nicaragua's President signed the Treaty into law on 5 April 1930[16].

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[8]POC, pp. 39-40, paras. 1.48-1.50.

[9]*Ibid.*, pp. 40-49, paras. 1.51-1.68.

[10]POC, p. 40, para. 1.52.

[11]*Ibid.*, pp. 40-41, paras. 1.52-1.58.

[12]*Ibid.*, p. 40, para. 1.54.

[13]*Ibid.*, p. 42, para. 1.59.

[14]*Ibid.*, p. 48, para. 1.66.

[15]*Ibid.*, p. 48, para. 1.67.

[16]*Ibid.*, p. 49, para. 1.68; Vol. II, Ann. 10, pp. 69-73.

29. Nicaragua's attitude during this approval process is particularly important, since the adoption of the 82º W meridian as a dividing line was Nicaragua's own proposal. As it was stated in the Senate, that proposal was made because it was considered that the "demarcation of the dividing line of the waters in dispute . . . was . . . indispensable for the question to be at once terminated for ever"[17].

30. The Nicaraguan Foreign Minister similarly expressed before the Senate the view that the question in dispute could only be completely settled if the boundary was fixed[18].

31. Moreover, when the Foreign Minister testified before the Senate on 5 March 1930, he referred to the earlier agreement between the Senate's Study Commission and the Ministry of Foreign Affairs "to accept the 82º west Greenwich meridian . . . as the boundary in this dispute with Colombia"[19], as "the geographical boundary between the archipelagos in dispute"[20].

32. Nicaragua now seeks to avoid these historical facts by referring dismissively to Colombia's reliance on "words used by some Nicaraguan Senators during the ratification discussions"[21]. But, Madam President and Members of the Court, these are not informal observations made by peripheral members of a legislative body — we are talking of formal ratification debates, and of speeches by Senators belonging to the Study Commission and the Foreign Affairs Commission, in the plenary of the Nicaraguan Senate, dealing specifically with the inclusion of the 82º W meridian in the Treaty. And we are not just talking of Senators — we are talking of what the Foreign Minister of Nicaragua himself officially said, when summoned to the Senate precisely to explain the scope of the provision agreed with Colombia. And the Court has already treated formal statements by Foreign Ministers before Congress as part of a pattern of conduct on which a State cannot subsequently go back (*Arbitral Award Made by the King of Spain on 23 December 1906, Judgment, I.C.J. Reports 1960*, p. 213)[22].

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[17]*Ibid.*, p. 44, para. 1.61.

[18]*Ibid.*, p. 47, para. 1.63.

[19]POC, p. 45, para. 1.62.

[20]*Ibid.*, p. 47, para. 1.63.

[21]Written Statement of Nicaragua (WSN), p. 36, para. 1.55; also similarly p. 36, para. 1.56 and p. 37, para. 1.58.

[22]In the case concerning the *Arbitral Award Made by the King of Spain on 23 December 1906* the Court included statements made by the Foreign Minister in a report to the Assembly among the items which in the Court's view showed that Nicaragua had "by express declaration and by conduct, recognized the Award as valid and it is no longer open to Nicaragua to go back upon that recognition and to challenge the validity of the Award".

33. The inclusion of the 82º W meridian boundary in the Treaty, before it was proposed to Colombia and considered by the Nicaraguan Congress, was analysed carefully by its Foreign Minister and his advisers, and by the members of the Foreign Affairs Commission of the Senate. The words used by them in the course of the approval debates were clearly no accident: they knew perfectly well what they referred to when using terms such as "boundary between the archipelagoes" and "dividing line of the waters in dispute" [23].

34. Therefore, Nicaragua — which itself initiated the proposal to refer to the 82º W meridian — cannot now disown the views then expressed by its own legislative bodies, as well as by its Foreign Minister, at the very time that its own proposal was being adopted and agreed to by its own Parliament, Government and President.

35. In short, Madam President and Members of the Court, it is clear from the history of this matter that the 82º W Meridian was understood by both States as a boundary.

1930: The Protocol of Exchange of Ratifications

36. The agreement on the 82º W meridian was embodied in the 1930 Protocol of Exchange of Ratifications[24]. In that Protocol the Nicaraguan Foreign Minister and the Colombian Minister in Managua declared "that the Archipelago of San Andrés and Providencia, which is mentioned in the first clause of the referred to Treaty, does not extend west of the 82 Greenwich meridian". That formulation was substantially the same as that on the basis of which the Nicaraguan Congress approved the inclusion of the 82º W meridian as an essential and integral part of the agreement.

37. The Protocol referred to the Treaty as having been concluded "to put an end to the question pending between both Republics" concerning the Archipelago and the Mosquito Coast, an outcome which the Nicaraguan Foreign Minister regarded as necessary for the good of both countries[25]. But I draw attention to an important difference between the language used in the Protocol and the equivalent language in the preamble to the Treaty itself. The two texts are on the screen, and at tab 8 in the judges' folders. In the Treaty the parties — before having added the 82º W meridian boundary — recorded that they were "desirous of putting an end to the *territorial*

[23] *Ibid.*, p. 44, para. 1.61; and p. 46, para. 1.63.

[24] POC, Vol. II, Ann. 1a, p. 3.

[25] POC, p. 47, para. 1.63.

dispute between them". In the Protocol they refer to putting an end to "the question" pending between them. In other words they "deterritorialized" the nature of their dispute and this is entirely consistent with the additional maritime scope of their settlement resulting from the Treaty's approval process.

38. And that, Madam President, is the crux of the matter. One must ask, what was the intention of the Parties? And the answer is clear. In agreeing the limit of the archipelago — a concept combining seas and islands — they intentionally gave their agreement a maritime dimension. Nicaragua, the initiator of the proposal, knew full well that the meridian agreed upon was to constitute — to use their own words — the "dividing line of the waters" and a "boundary".

39. Ratification instruments were exchanged and the Treaty entered into force on 5 May 1930. As from that date the matters falling within the scope of the Treaty were clearly governed by it, and the dispute which had occasioned the conclusion of the Treaty was definitively settled. And "settled", Madam President, means "settled".

40. In Colombia's official maps the 82º W meridian was always depicted as the boundary between the two countries, from the year immediately following the Treaty's entry into force, that is 1931, onwards. Likewise, the 1934 and 1944 official publications of the Colombian Foreign Affairs Ministry regarding Colombia's borders, entitled *Limits of the Republic of Colombia*, expressly referred to that meridian as the border between Colombia and Nicaragua[26]. Nicaragua made no reservation or objection to these publications which were public knowledge and widely circulated.

1930-1932: REGISTRATION WITH THE LEAGUE OF NATIONS

41. Nicaragua not only signed, approved and ratified the Treaty, and then brought it into force with the exchange of ratifications, but it actually went further. On 16 August 1930 Colombia registered the Treaty and its associated Protocol of Exchange of Ratifications with the League of Nations[27]. Although that procedure was sufficient for registration, the Nicaraguan Foreign Minister registered it again, on his own initiative, two years later[28]. Nothing could more clearly demonstrate

[26] POC, pp. 69-70, para.1.115.

[27] *Ibid.*, p. 52, para. 1.74.

[28] *Ibid.*, p. 52, para. 1.75.

the commitment of Nicaragua, as well as of Colombia, to the settlement arrived at by the conclusion of the 1928-1930 Treaty.

1948: STATUS OF THE 1928-1930 ESGUERRA-BÁRCENAS TREATY

42. Let me now move on to 1948. By that time both Parties had complied with the Treaty for nearly 20 years: Nicaragua had raised no objection, no question about the Treaty's scope or validity.

43. In April 1948 the Pact of Bogotá was concluded. That treaty — being both *lex posterior* and *lex specialis* — governs the Court's jurisdiction in this case. And — as Professor Weil will explain — its Article VI stipulates that the procedures set out in the Pact, including that of judicial settlement, do *not* apply to matters "already settled" between the parties or "governed by . . . treaties in force on the date of the conclusion of the [Pact]".

44. The Court has therefore to put itself in the position of 1948. It is evident that the Esguerra-Bárcenas Treaty was in force in 1948. Both Parties had consistently conducted themselves on the basis that that Treaty was in force at that time. If, in 1948, the question had been asked of Nicaragua whether the Treaty was in force, the only conceivable answer would have been "Yes, of course it is in force" — for that is the fact of the matter.

45. Nicaragua, on signing and ratifying the Pact of Bogotá entered a reservation. But it had nothing to do with the Treaty of 1928-1930[29]. So Nicaragua was well aware of the possibility of making a reservation; and Nicaragua knew — of course — of the Treaty and its Protocol and knew that the 82º W meridian limit was depicted as such in Colombia's official publications and maps, such as that of 1931[30] — yet Nicaragua made no reservation in that context. Nothing could show more clearly Nicaragua's acceptance in 1948 that the Treaty was in force.

1980 AND 2003: NICARAGUA'S UNAVAILING ATTEMPT TO DISAVOW THE 1928-1930 TREATY SETTLEMENT

46. Let me now "fast forward" another 32 years, to 4 February 1980. Nicaragua, by an outrageous statement of the newly-installed provisional revolutionary Junta, unilaterally purported

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[29]It related instead to the validity of a 1906 arbitral award concerning the border with Honduras: POC, p. 81, para. 2.19.

[30]POC, Vol. III, maps 4 and 4 *bis*.

to declare the Treaty null and void. It was a desperate challenge, devoid of any substance and lacking any legal effect. It was Nicaragua's first challenge ever to the Treaty, made half a century after its entry into force.

47. Madam President, the Court has been here before. In the case concerning the *Arbitral Award Made by the King of Spain on 23 December 1906* (*Judgment, I.C.J. Reports 1960*, p. 192), this Court was similarly faced with an attempt by Nicaragua to undo an earlier territorial settlement with Honduras. That case involved an arbitral award. Nicaragua had recognized the Award as valid. The Court held that

> "it is no longer open to Nicaragua to go back upon that recognition and to challenge the validity of the Award. Nicaragua's failure to raise any question with regard to the validity of the Award for several years after the full terms of the Award had become known to it further confirms the conclusion at which the Court has arrived." (*Ibid*., p. 213.)

In that case it was "several years" — six, in fact — which the Court regarded as too late. Even more so is it too late when, as in the present case, over half a century has elapsed.

48. Nicaragua's suggestion, after all these years, that it was at the time of the Treaty's conclusion effectively deprived of its treaty-making capacity, and its official declaration that it was only in July 1979, when the revolution succeeded, that it "recovered its national sovereignty . . ."[31] are equally unconvincing and, indeed, utterly preposterous. Following Nicaragua's reasoning, does Nicaragua now consider null and void all other Nicaraguan treaties or other international acts, which pre-date the 1979 "recovery of national sovereignty"? In particular, are the two instruments on which it has based the jurisdiction of the Court in the present case also null and void, namely, its optional clause declaration of 1929, which was contemporary with the 1928-1930 Treaty, and the Pact of Bogotá which it ratified in 1950?

49. No less absurd is the further argument — advanced for the very first time in its pleadings in this case — that the Treaty has been terminated because Colombia acted in breach of it in 1969. Nicaragua is thus acknowledging that the Treaty was *in force* in 1969 (for otherwise there could have been no breach of it), but more importantly, that it also was in force on 30 April 1948, the

[31]Nicaragua's White Paper on the case, *Libro Blanco sobre el caso de San Andrés y Providencia*, Ministerio de Relaciones Exteriores de la Republica de Nicaragua, Managua, 4 February 1980, quoted at POC, p. 59, para. 1.94.

date of the conclusion of the Pact of Bogotá. As set out in Colombia's preliminary objections[32], Nicaragua's assertions in this regard are groundless both in law and in fact.

50. In any event Nicaragua — again — raises the argument too late in the day: only in its Memorial, in April 2003, did Nicaragua "discover" this consequence of a breach alleged to have occurred over 30 years previously. There is no need for Colombia — or, Colombia respectfully suggests, the Court — to waste time over such a manifestly insubstantial argument.

2004: THE ALLEGED "ROUNDS OF NEGOTIATIONS" TO DEFINE A NEW MARITIME BOUNDARY BETWEEN COLOMBIA AND NICARAGUA

51. In its Written Statement Nicaragua puts forward a new and even more extravagant assertion[33] regarding alleged "rounds of negotiations" to establish a maritime limit different from the agreed 82º W meridian. Nicaragua seeks to show that the 82º W line is not "settled" but still under negotiation; and to that end Nicaragua misrepresents Colombia's position.

52. Colombia totally rejects Nicaragua's assertion of continuing negotiations. Since 1930 Colombia has firmly and consistently maintained that the issue is "settled". No boundary negotiations ever took place thereafter. Moreover, Nicaragua has itself so stated on several occasions, both through its highest officials and in its pleadings in the present proceedings. In fact, one need not go further than the Introduction to its Memorial to find the following admission: "Colombia for her part has consistently rejected any dialogue on this matter . . ."[34]

53. States regularly hold discussions with their neighbouring countries for the purpose of promoting co-operation, preventing incidents and taking joint actions of several kinds in the bordering land or maritime areas. Colombia, which has land boundaries with five States and maritime boundaries with nine, including Nicaragua, is naturally no exception to this. But such discussions in no way amount to "rounds of negotiations".

54. Magnifying a brief encounter requested by the Foreign Minister of Nicaragua — I repeat, of Nicaragua — with his Colombian counterpart, during a recess of a multilateral meeting in 2001, Nicaragua also says that the latter suggested to his Nicaraguan colleague that "the filing of

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[32]POC, pp. 68-72, paras. 1.112-1.119.

[33]WSN, pp. 40-48, paras. 1.67-1.84.

[34]Memorial of Nicaragua (MN), Introduction, p.9, para. 21.

Nicaragua's Application" i.e., to this Court "be postponed in order to give an opportunity for negotiations on the territorial and delimitation questions pending between their respective countries"[35]. Nicaragua goes on to say that "the real purpose" of the request was to gain time to complete the "required" legal and political steps to withdraw Colombia's optional clause declaration[36]. All of this is utterly false, and Colombia forcefully rejects it. More to the point, its premise is wrong: no special internal legal or political steps were required for the withdrawal of Colombia's optional clause declaration.

55. Also, Nicaragua fails to mention that any delay in filing the Application was due to its own budget constraints, not to any request by Colombia. As Nicaragua's President and Foreign Minister publicly stated[37], the budget provision to allow the Application to be filed was only made in late 2001: the Application was eventually filed in December that year.

56. Nicaragua's assertions are supported, it is claimed, by self-serving affidavits made by Nicaraguan officials years after the alleged facts — one of them 26 years later — and in the aftermath of the filing of Colombia's Preliminary Objections. In this dubious way Nicaragua tries — but in vain — to show that negotiations took place on the matters already settled by the 1928-1930 Treaty.

57. In this respect, it may be recalled that in a recent Judgment (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, Judgment of 19 December 2005), the Court reaffirmed the scant evidentiary value of this type of material. Indeed, in assessing an affidavit by a member of the military of one of the Parties in that case, prepared "in view of the forthcoming case before" (*ibid.*, para. 65; para. 129) the Court, the Court recalled that "it has elsewhere observed that a member of the government of a State engaged in litigation before this Court . . . 'will probably tend to identify himself with the interests of his country'(*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United*

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[35]WSN, pp. 128-129, paras. 3.95-3.96.

[36]*Ibid.*, p.129, para. 3.97.

[37]See press statements by Nicaraguan President, Arnoldo Aleman, and Foreign Minister, Francisco Aguirre in October 2001, in "Lista demanda contra Colombia: Canciller Aguirre afirma que será introducida en La Haya a finales de este año" (Suit against Colombia ready: Foreign Minister Aguirre states that it will be filed at The Hague by year's end), *La Prensa* (newspaper), Ed. No. 22516, Managua, Tuesday, 9 October 2001. Found at http://www.laprensa.com.ni/archivo/2001/octubre/09/politica/politica-20011009-02.html

States of America), Merits, Judgment, I.C.J. Reports 1986, p. 43, para. 70)". The Court added that "while in no way impugning the honour or veracity" of such a person, the Court should "treat such evidence with great reserve" (*loc. cit.*, para. 65).

58. Likewise, with regard to another affidavit rendered by a high government official of a Party in that same case, the Court noted that "[w]hile a notarized affidavit is entitled to a certain respect, the Court must observe that it is provided by a party in the case and provides at best indirect 'information' that is unverified" (*ibid.*, para. 129).

59. Madam President and Members of the Court, this is what the case raised by Nicaragua is truly about: an attempt to ignore a bilateral treaty, valid and in force for over 75 years; and an attempt to institute proceedings on settled matters that Colombia has not consented to submit to the Court.

60. Nicaragua's Written Statement provides no grounds for concluding that the matters which were in express terms dealt with in the Esguerra-Bárcenas Treaty were other than validly settled, once and for all, by that Treaty. Furthermore, these matters have never ceased to be governed by that Treaty. Given the provisions of the Pact of Bogotá, and both the terms and timely withdrawal of Colombia's optional clause declaration, Colombia submits that the Court is without jurisdiction to rule on the merits of the matters which Nicaragua seeks to place before the Court.

61. Madam President and Members of the Court, I thank you for the patience and courtesy with which you have listened to my statement on behalf of the Republic of Colombia. Might I invite you, Madam President, now to call upon Professor Prosper Weil to continue the presentation of Colombia's arguments, unless, of course, you were to think that this might be a convenient moment for a short recess.

The PRESIDENT: Thank you, Sir Arthur. We will call Professor Weil and perhaps he might be, in turn, ready for a pause after about 15 or 20 minutes.

Oui, si vous voulez commencer maintenant et peut-être après quinze ou vingt minutes, vous ferez une pause.

M. WEIL : Madame le président, Messieurs les juges, permettez-moi de dire à la Cour combien je me sens honoré de prendre la parole devant elle pour exposer la position de la

Colombie. Permettez-moi aussi d'exprimer au Gouvernement colombien ma gratitude pour la confiance qu'il me témoigne en m'associant à la défense de ses droits.

1. Madame le président, à l'appui de sa demande, le Nicaragua invoque deux titres de juridiction : l'article XXXI du pacte de Bogotá et les déclarations facultatives d'acceptation de la juridiction obligatoire de la Cour déposées par le Nicaragua en 1929 et la Colombie en 1937. Ces deux titres de juridiction, le Nicaragua les met sur le même plan ; il n'établit entre eux aucune hiérarchie[38].

2. Cette thèse du double degré de juridiction, le Nicaragua l'avait déjà soutenue il y a quelques années face au Honduras dans l'affaire des *Actions armées frontalières et transfrontalières (Nicaragua c. Honduras) (compétence et recevabilité, arrêt, C.I.J. Recueil 1988,* p. 82, par. 26), et la réponse de la Cour avait été ferme, claire, sans équivoque : «[L]es relations entre les Etats parties au pacte de Bogotá sont régies par ce seul pacte…» (*Ibid.,* p. 82, par. 27.) avait-elle affirmé. La déclaration facultative de l'article 36, paragraphe 2, avait-elle expliqué, a été

> «incorporée au pacte de Bogotá en tant qu'article XXXI. Dès lors elle ne saurait être modifiée que selon les règles fixées par le pacte lui-même. Or l'article XXXI n'envisage à aucun moment que l'engagement pris par les parties au pacte puisse être amendé par voie de déclaration unilatérale…» (*Ibid.*, p. 84, par. 34.)

La Cour posait ainsi le principe de la primauté du titre de juridiction du pacte de Bogotá — instrument complémentaire de l'Organisation des Etats américains, comme l'indique son article 26, et pilier fondamental de cette organisation — sur le titre de juridiction de l'article 36, paragraphe 2, du Statut. Cette primauté du pacte de Bogotá a été analysée de manière lumineuse par Eduardo Jiménez de Aréchaga dans une étude intitulée *The Compulsory Jurisdiction of the International Court of Justice under the Pact of Bogotá and the Optional Clause*. L'ancien et très regretté président de la Cour a montré dans cette étude qu'en raison des liens historiques et culturels qui les unissent les Etats latino-américains parties au pacte de Bogotá ont reconnu la juridiction obligatoire de la Cour d'une manière plus forte — on much stronger terms, a-t-il écrit — que celle qui résulterait du simple jeu des déclarations optionnelles de l'article 36, paragraphe 2, du

[38] Requête introductive d'instance du Nicaragua, par. 1 ; mémoire du Nicaragua, p. 1-2, par. 3 ; observations écrites du Nicaragua, p. 4, par. 8 ; et p. 141, par. 1.

Statut[39]. Entre les Etats parties au pacte de Bogotá, a-t-il expliqué, l'article XXXI du pacte crée une véritable treaty relationship — un lien contractuel qui «absorbe» (c'est le mot qu'il emploie) le lien plus lâche né des déclarations optionnelles.

3. Madame le président, dans l'affaire des *Actions armées*, la Cour a décidé que le titre de juridiction tiré du pacte de Bogotá de 1948 prévaut sur les déclarations optionnelles *postérieures*. A plus forte raison, dans notre affaire, le titre de juridiction tiré du pacte de Bogotá prévaut-il sur le titre de juridiction *antérieur* qui résulte des déclarations d'acceptation du Nicaragua de 1929 et de la Colombie de 1937.

4. La situation juridique dans notre affaire est en conséquence la suivante. Lorsque le 6 décembre 2001, le Nicaragua a déposé sa requête introductive d'instance, les Parties n'étaient plus liées par des déclarations facultatives de l'article 36 du Statut, pour une raison très simple, c'est que la Colombie avait retiré sa déclaration la veille, le 5 décembre, avec effet immédiat (la note colombienne du 5 décembre est reproduite sous les onglets 12 et 13 du dossier que nous avons préparé à l'intention des membres de la Cour). Seules faisaient droit entre les Parties le 6 décembre 2001, jour où le Nicaragua a déposé sa requête, les dispositions pertinentes du pacte de Bogotá. Mais même si le 6 décembre 2001 les Parties avaient encore été liées par des déclarations facultatives de l'article 36 du Statut — ce qui, je le répète, n'est pas le cas — ce serait quand même la *lex* à la fois *specialis* et *posterior* du pacte de Bogotá qui ferait droit dans notre affaire. En un mot, Madame le président, *c'est le pacte de Bogotá qui constitue le titre de juridiction de la Cour dans notre affaire, et c'est donc dans le cadre et en application des dispositions pertinentes du pacte de Bogotá que la Cour doit établir et exercer sa compétence.*

Souhaitez-vous que je m'arrête maintenant ou que je continue encore un petit peu ?

The PRESIDENT: Si vous voulez continuer peut-être pour 10 minutes.

[39] «[T]he Latin-American States which have accepted the Pact of Bogotá have established, in their mutual relations, and in view of the close historical and cultural ties between them, the compulsory jurisdiction of the Court on much stronger terms than those resulting from the network of declarations made under Article 36 (2) of the Statute.» In Y. Dinstein (ed.), *International Law at a Time of Perplexity. Essays in Honour of Shabtai Rosenne*, Kluwer, 1989, p. 355 et suiv.

M. WEIL :

5. Madame le président, en juillet 2003, la Colombie a présenté deux exceptions préliminaires. Par la première, elle demande à la Cour de dire et juger qu'en vertu des dispositions du pacte de Bogotá sur la base desquelles elle doit établir et exercer sa compétence dans notre affaire elle est «incompétente pour juger le différend» et doit déclarer le différend «terminé». C'est à cette exception que sera consacré mon exposé.

6. Une question surgit alors immédiatement : Quelles sont, parmi les dispositions du pacte de Bogotá, celles qui font droit dans la présente affaire ? Pour le Nicaragua une seule, une seule disposition est à prendre en considération, celle de l'article XXXI, qui reprend les termes de l'article 36, paragraphe 2, du Statut de la Cour[40]. Madame le président, cette lecture réductrice du pacte, n'est pas compatible avec son article II, qui dispose que, «au cas où surgirait, entre deux ou plusieurs signataires, un différend …, les parties s'engagent à employer les procédures établies dans ce traité sous la forme et dans les conditions prévues *aux articles suivants*…»[41] — «aux articles suivants», et non pas, comme voudrait le lire le Nicaragua, «à l'article XXXI», au seul article XXXI. Cette lecture réductrice du pacte ramenée à un seul article, la Cour l'a condamnée dans son arrêt de 1988 en l'affaire des *Actions armées,* elle a observé que «[c]ertaines dispositions du traité restreignent par ailleurs la portée de l'engagement pris» (*Actions armées frontalières et transfrontalières (Nicaragua c. Honduras), compétence et recevabilité, arrêt, C.I.J. Recueil 1988*, p. 84-85, par. 35) — *«certaines dispositions»*, au pluriel, pas seulement l'article XXXI. Ainsi, écrit la Cour dans le texte français qui fait foi de l'arrêt,

«[c]es procédures [prévues au pacte] ne s'appliqueront pas …

> «aux questions déjà réglées au moyen d'une entente entre les parties, ou d'une décision arbitrale, ou d'une décision d'un tribunal international, ni à celles régies par des accords ou traités en vigueur à la date de la signature du présent pacte»»,

c'est-à-dire en vigueur au 30 avril 1948. L'article XXXIII du pacte précise par ailleurs que, «[a]u cas où les parties ne se mettraient pas d'accord sur la compétence de la Cour au sujet du litige, la

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[40] Requête introductive d'instance, par. 1 ; mémoire du Nicaragua, p. 1-2, par. 3 ; observations écrites du Nicaragua, p. 4, par. 8.

[41] Les italiques sont de nous.

Cour elle-même décidera au préalable [shall *first decide, decidirá previamente*] de cette question». Et l'article XXXIV ajoute que, «[s]i pour les motifs indiqués aux articles V, VI et VII de ce traité, la Cour se déclarait incompétente pour juger le différend, celui-ci sera déclaré terminé» (such controversy shall be declared ended, *se declarará terminada la controversia*).

7. Madame le président, comme nous l'avons indiqué dans nos écritures[42], l'un des objectifs du pacte de Bogotá a été de décourager toute tentative d'un gouvernement partie au pacte de rouvrir un différend auquel une solution aurait été précédemment apportée par un traité ou par une sentence judiciaire ou arbitrale. L'article XXXIV du pacte — qui, je le répète, dispose que si la Cour se déclare incompétente pour juger le différend, celui-ci sera déclaré terminé — donne effet au principe, énoncé à l'article VI du pacte, de l'intangibilité du règlement apporté à un différend par la voie conventionnelle ou par la voie judiciaire ou arbitrale, en mettant ce règlement à l'abri de toute tentative ou de toute tentation de s'en échapper. Les déclarations que nous avons citées dans nos exceptions des représentants du Pérou, du Chili et de Cuba au cours de la négociation du pacte — celles, notamment, du Péruvien Victor Belaúnde — sont significatives quant à l'objet et au but de ces dispositions clés du pacte que sont ses articles VI et XXXIV. Un différend réglé est un différend réglé, un différend clos est un différend clos, et les mécanismes de règlement des différends institués par le pacte ne peuvent pas et ne doivent pas servir à rouvrir une querelle close et réglée : tel est le sens de ces dispositions, qui sont au cœur même du pacte de Bogotá. La Cour s'opposera — nous en sommes confiants — à ce que les mécanismes de règlement pacifique du pacte de Bogotá soient utilisés aujourd'hui, pour rouvrir un différend qui a été «réglé» par le traité de 1928 et qui depuis lors, depuis trois quarts de siècle est régi par ce traité.

8. Madame le président, je diviserai mon exposé en trois parties :

— *Premièrement :* le différend soumis à la Cour par le Nicaragua en 2001 sur la question de la souveraineté sur les territoires insulaires et la détermination des frontières maritimes porte sur des questions qui sont «déjà réglées au moyen d'une entente entre les parties» et qui sont «régies par des accords ou traités en vigueur à la date de la signature» du pacte de Bogotá, à

[42] Exceptions préliminaires, p. 76 et suiv., par. 2.10 et suiv.

savoir le traité Esguerra-Bárcenas de 1928 avec son protocole d'échange des ratifications de 1930.

— *Deuxièmement :* en conséquence, conformément aux articles VI et XXXIV du pacte de Bogotá, la procédure judiciaire ne peut pas «s'appliquer» (may not be applied, *tampoco podrán aplicarse*), la Cour doit se déclarer «incompétente pour juger le différend» (without jurisdiction to hear the controversy ; *incompetente para conocer de la controversia)*, et elle doit déclarer le différend «terminé» (such controversy shall be declared ended ; *se declarará terminada la controversia*).

— *Troisièmement*, et enfin : c'est au présent stade des exceptions préliminaires que la Cour a compétence pour faire cette déclaration et qu'elle est tenue de la faire.

Souhaitez-vous, Madame le président…

The PRESIDENT: Yes, this could be convenient… Je vous remercie. Nous faisons une petite pause café et nous serons avec vous dans 5 à 7 minutes.

M. WEIL : Merci.

The PRESIDENT: Merci bien. The Court now rises.

The Court adjourned from 11.45 a.m. to noon.

The PRESIDENT: Please be seated. Monsieur Weil, vous avez la parole.

M. WEIL : Merci, Madame le président.

A. LE DIFFEREND SOUMIS A LA COUR PAR LE NICARAGUA PORTE SUR DES «QUESTIONS DEJA REGLEES AU MOYEN D'UNE ENTENTE ENTRE LES PARTIES» ET QUI SONT «REGIES PAR DES ACCORDS OU TRAITES EN VIGUEUR A LA DATE DE LA SIGNATURE» DU PACTE DE BOGOTA

Le règlement du différend par le traité Esguerra-Bárcenas de 1928 et son protocole d'échange des ratifications de 1930

9. Madame le président, sir Arthur Watts vient de rappeler comment les divergences apparues entre les deux pays au sujet de la côte de Mosquitos, des îles Mangles (ou Corn) et de l'archipel de San Andrés ont été résolues par le traité du 24 mars 1928. Par ce traité, le Nicaragua

a, je le rappelle, reconnu explicitement «la pleine et entière souveraineté» de la Colombie sur les îles de San Andrés, Providencia, Santa Catalina et sur toutes les autres îles, cayes et îlots qui font partie de l'archipel.

10. C'est, il faut le rappeler, au cours de l'examen du traité par le Gouvernement du Nicaragua et la commission des affaires étrangères du Sénat nicaraguayen qu'était apparue l'idée que pour régler le problème définitivement — *para siempre* — il était nécessaire de prolonger le règlement territorial par un règlement maritime. Sans une disposition destinée à établir «la limite géographique entre les archipels disputés» — *el limite geográfico entre los archipiélagos en disputa* —, avait expliqué le ministre nicaraguayen des affaires étrangères, le conflit ne serait pas entièrement terminé : une *limite entre los archipiélagos*, une frontière entre des archipels, Madame le président, peut-elle être autre chose qu'une limite en mer, une frontière maritime ? La proposition du Nicaragua avait été acceptée par la Colombie ; toutefois, étant donné que la ratification du traité avait déjà été votée par le Congrès colombien, le gouvernement de Bogotá avait demandé que le règlement maritime fût repris dans le protocole d'échange des ratifications — ce qui fut fait.

11. Madame le président, c'est, je le répète, à l'initiative du Nicaragua que la disposition destinée à faire du méridien de 82° *la línea divisoria de las aguas en disputa* — en clair : la frontière maritime — a été introduite dans le protocole d'échange des ratifications de 1930. C'est le Nicaragua qui a demandé cette adjonction, une adjonction que la Colombie a acceptée. De cela les écritures nicaraguayennes ne font pas mystère[43].

12. Le traité une fois approuvé par le Congrès du Nicaragua, la limite du méridien de 82° fut incorporée au protocole de ratification de 1930 ; et c'est accompagné de ce protocole que le traité sera publié dans les Journaux officiels des deux pays[44], enregistré à la demande de la Colombie auprès de la Société des Nations en 1930, publié au *Recueil des traités* de la Société des Nations[45], et enfin enregistré une nouvelle fois auprès de la Société des Nations, à la demande du Nicaragua

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[43] «[T]hat restricted the Archipelago of San Andrés to areas East of the 82° meridian of longitude West», mémoire du Nicaragua, p. 149, par. 2.193. Cf. p. 146 et suiv., par. 2.189 et suiv.

[44] Exceptions préliminaires, p. 51, par. 1.73.

[45] *Op. cit.*, p. 52, par. 1.74.

cette fois-ci, en 1932. Le protocole d'échange des ratifications, avec sa référence explicite au méridien de 82°, est — le Nicaragua le reconnaît — partie intégrante du traité.

13. En résumé, Madame le président, Messieurs les juges : c'est à la suite d'une initiative *nicaraguayenne* — pas colombienne —, et au cours du processus de ratification à *Managua* — pas à Bogotá —, que l'idée apparut et fut débattue, avant d'être soumise à la Colombie, qui l'accepta, de compléter l'arrangement territorial par un arrangement maritime sans lequel la question des limites n'aurait pas été entièrement réglée et sans lequel le germe aurait été semé de nouveaux conflits. Prétendre, comme le fait le Nicaragua dans son mémoire, que le traité de 1928/1930 ne régit pas les espaces maritimes[46], prétendre cela est une négation de l'évidence.

La composante maritime du règlement de 1928/1930 : le méridien de 82°, frontière maritime

14. Madame le président, le Nicaragua a déployé de formidables efforts dans ses écritures pour réduire le méridien de 82° à une ligne d'attribution de souveraineté sur des îles, sur des territoires, et pour lui dénier le caractère de frontière maritime : «The Treaty — écrit-il en toutes lettres — simply recognizes sovereignty over territory and no mention is made of maritime delimitation.»[47] Le Nicaragua voudrait convaincre la Cour que le règlement de 1928/1930 est de caractère terrestre, qu'il n'a pas de portée maritime et qu'en conséquence il appartient à la Cour de procéder à la délimitation en faisant application du droit régissant la délimitation maritime aujourd'hui. Ce thème est repris encore et encore par le Nicaragua, indéfiniment[48].

15. Madame le président, les échanges diplomatiques qui ont précédé la conclusion du traité Esguerra-Bárcenas et les débats parlementaires qui ont conduit à sa ratification dans les deux pays ne laissent place à aucun doute : par leurs accords de 1928/1930 le Nicaragua et la Colombie ont entendu mettre fin définitivement et complètement à leur conflit, sur mer autant que sur terre. La fixation de la limite maritime au méridien de 82° constituait un élément fondamental, une

[46] Mémoire du Nicaragua, p. 175, par. 2.249 et p. 181, par. 2.263.

[47] Observations écrites du Nicaragua, p. 34, par. 1.50.

[48] Mémoire du Nicaragua, p. 175, par. 2.249 ; p. 181, par. 2.23 ; p. 185 et suiv., par. 3.1 et suiv. ; observations écrites du Nicaragua, p. 33, par. 1.46 et 1.48 ; p. 34, par. 1.50 ; p. 35, par. 1.54 ; p. 48, par. 1.86 ; p. 67, par. 2.41-2.42 ; p. 69, par. 2.44.

composante essentielle, de la solution d'ensemble au même titre, et sur le même pied, que le règlement territorial.

16. Comme nous l'avons relevé dans nos exceptions préliminaires[49], un an à peine après l'entrée en vigueur du traité, en 1931, le méridien de 82° a été représenté sur la carte officielle colombienne intitulée *Mapa de la República de Colombia*, actuellement sur l'écran. Dans l'angle droit en haut de la carte il y a un encart intitulé *Cartela del Archipielago de San Andrés y Providencia perteneciente a la República de Colombia* — je ne le vois pas ici mais il est sur la carte — (la carte et son encart figurent sous le numéro 10 du dossier de la Cour). La Cour constatera que l'archipel défini comme *perteneciente a la República de Colombia* comprend, outre les îles de Providencia, San Andrés et Santa Catalina, les cayes de Quitasueño, Serrana, Serranilla, Roncador, Bajo Nuevo, Albuquerque et Est-Sud-Est. La limite de l'archipel est constituée — je le vois ici aussi — par le *Meridiano 82° al W. de Greenwich*. Sur la gauche de cette mention vous pouvez lire en lettres majuscules les mots *República de Nicaragua*, ce qui implique que les îles, îlots et cayes, ainsi que les espaces maritimes, à droite de la ligne, c'est-à-dire à l'est, font partie du territoire colombien.

17. C'est postérieurement à la publication de cette carte colombienne — une carte officielle, je le répète — que le 25 mai 1932 le Nicaragua demanda l'enregistrement du traité de 1928 et de l'acte de ratification de 1930 auprès du Secrétariat de la Société des Nations.

18. La carte officielle colombienne de 1931 allait être suivie de nombreuses, de très nombreuses autres cartes, qui décriront elles aussi le méridien de 82° comme la frontière maritime et territoriale entre les deux pays. La Cour en trouvera des exemples sous l'onglet 11 du dossier que nous avons eu l'honneur de lui remettre. Madame le président, si ces cartes officielles colombiennes, qui s'étendent sur près d'un demi-siècle — et dont le Nicaragua reconnaît dans ses observations écrites avoir eu connaissance[50] —, avaient contredit ou mal interprété le traité de 1928/1930, le Gouvernement du Nicaragua aurait-il gardé le silence ?

19. Aucun doute n'est permis, je le répète : c'est comme une frontière maritime que les parties au traité de 1928/1930 ont conçu le méridien de 82°. C'est en application de ce traité, et

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[16] Exceptions préliminaires de la Colombie, p. 18, par. 46 ; p. 57-8, par. 1.92 ; p. 69, par. 1.115 ; p. 94, par. 2.47.

[50] Observations écrites du Nicaragua, p. 75, par. 2.55.

conformément à ses dispositions, que la Colombie a exercé de manière constante et pacifique ses droits sur les espaces maritimes relevant de l'archipel à l'est du méridien de 82°. C'est en application de ce traité, et conformément à ses dispositions, que la Colombie a protesté en 1969 contre l'octroi par le Nicaragua de concessions pétrolières à l'est du méridien. Et lorsque, au cours des débats de ratification à Managua, on se référa à une démarcation de la ligne divisoire des eaux, à une limite entre les archipels *(una demarcacion de la linea divisoria de las aguas, el limite entre los archipiélagos)*, à quoi donc les autorités nicaraguayennes auraient-elles pu penser si ce n'est à une frontière maritime ? Madame le président, lorsque dans un traité deux gouvernements se réfèrent à un méridien qui passe en mer, entre le territoire de l'un des Etats et le territoire de l'autre, et lorsque ce méridien est décrit comme la «ligne divisoire des eaux», de quoi donc pourrait-il s'agir si ce n'est d'une limite maritime ? Le Nicaragua s'appuie sur l'affaire de la *Frontière maritime entre la Guinée et la Guinée-Bissau* dans laquelle le tribunal arbitral avait conclu que «tout indique que ces deux Etats [la France et le Portugal] n'ont pas entendu établir une frontière maritime générale entre leurs possessions de Guinée»[51]. Dans notre affaire, au contraire, tout indique que la Colombie et le Nicaragua ont entendu établir la *linea divisoria de las aguas*, le *límite entre los archipiélagos* — en d'autres termes et en clair : la frontière maritime entre les deux pays.

20. Madame le président, nos adversaires objectent que c'est une «absurdité historique» — c'est le mot qu'ils emploient : a historical absurdity — de prétendre qu'en 1930, quinze ans avant la proclamation Truman de 1945, le Nicaragua et la Colombie auraient revendiqué des limites maritimes situées, écrivent-ils, «à près de 60 milles marins du territoire le plus proche du Nicaragua et à des douzaines de milles marins de l'archipel de San Andrés»[52]. Je remarquerai au passage, mais sans insister là-dessus, que la distance entre le méridien de 82° et l'île la plus occidentale de l'archipel de San Andrés ne dépasse pas 9 milles marins. Ceci est un détail. Cela dit, pour faire justice de l'argument du Nicaragua, il me suffira de me référer aux passages bien connus de l'avis consultatif de 1971 relatif à la *Namibie* et de l'arrêt de 1978 en l'affaire du *Plateau continental de la mer Egée*.

[51] Mémoire du Nicaragua, p. 171, par. 2.243.

[52] Observations écrites du Nicaragua, p. 34, par. 1.51.

21. Dans l'avis relatif à la Namibie, la Cour a déclaré — et vous me pardonnerez, Madame le président, de citer le passage un peu longuement mais il mérite d'être cité :

> «Sans oublier la nécessité primordiale d'interpréter un instrument donné conformément aux intentions qu'ont eues les parties lors de sa conclusion, la Cour doit tenir compte de ce que les notions consacrées [par cet instrument] … n'étaient pas statiques mais par définition évolutives… On doit donc admettre que les parties … les ont acceptées comme telles... De plus, tout instrument international doit être interprété et appliqué dans le cadre de l'ensemble du système juridique en vigueur au moment où l'interprétation a lieu… Dans ce domaine comme dans les autres, le *corpus juris gentium* s'est beaucoup enrichi et, pour pouvoir s'acquitter fidèlement de ses fonctions, la Cour ne peut l'ignorer.» (*Conséquences juridiques pour les Etats de la présence continue de l'Afrique du Sud en Namibie (Sud-Ouest africain) nonobstant la résolution 276 (1970) du Conseil de sécurité, avis consultatif, C.I.J. Recueil 1971*, p. 31-32, par. 53.)

22. Quant à l'arrêt relatif à la *Mer Egée*, on y lit que lorsqu'un instrument juridique se réfère à une notion générique (un generic term, dans le texte anglais, qui fait foi, de l'arrêt) — il s'agissait en l'espèce de la notion et du terme de statut territorial —, «il faut nécessairement présumer que son sens était censé évoluer avec le droit et revêtir à tout moment la signification que pourraient lui donner les règles en vigueur» (*Plateau continental de la mer Egée (Grèce c. Turquie), arrêt, C.I.J. Recueil 1978*, p. 32, par. 77 ; p. 33, par. 78).

23. C'est dire que lorsque deux Etats procèdent à une délimitation maritime, leur accord doit être interprété et appliqué à la lumière de l'évolution du droit international et en tenant compte de cette évolution. Comme l'a écrit sir Ian Sinclair dans son ouvrage souvent cité *The Vienna Convention on the Law of Treaties*, l'évolution et le développement du droit international peuvent exercer une influence décisive sur le sens à donner à des expressions qui se réfèrent à des notions évolutives, tels les concepts de «mer territoriale» ou de «plateau continental»[53]. A moins que les parties n'aient manifesté une intention contraire, ces expressions peuvent être interprétées «par référence au droit international en vigueur au moment de l'interprétation» (by reference to international law in force at the time of the interpretation)[54].

24. Peut-être, Madame le président, c'est possible, peut-être le tracé du méridien de 82° ne coïncide–t-il pas avec le tracé de la frontière maritime auquel conduirait l'application des principes et règles du droit de la délimitation maritime d'aujourd'hui. Et alors ? So what *?*, ai-je envie de

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[53] Manchester University Press, 2e éd., 1984, p. 139.

[54] Ian Sinclair, *op. cit.*, p. 139.

dire. Il est à peine besoin de rappeler que le tracé d'une frontière, qu'il s'agisse d'une frontière maritime ou d'une frontière terrestre, ne devient pas caduc pour la simple raison que la pratique conventionnelle ou la jurisprudence aurait évolué depuis qu'il a été défini. Serait-il concevable que, sous le prétexte que le droit de la délimitation maritime a changé entre-temps, qu'il a évolué, on considère comme caducs tous les accords de délimitation maritime conclus au cours de ces cinquante dernières années — et plus particulièrement ceux conclus avant les conventions de Genève de 1958 ou la convention de 1982 sur le droit de la mer, ou avant les grands arrêts de la Cour et les sentences arbitrales qui ont façonné le droit moderne de la délimitation maritime ? On imagine, Madame le président, le danger qu'une telle solution présenterait pour la stabilité des relations internationales. Et comment ne pas songer aussi à la disposition de l'article 62 2) *a)* de la convention de Vienne sur le droit des traités qui exprime le principe de droit international coutumier selon lequel un changement fondamental de circonstances ne peut pas être invoqué comme motif pour mettre fin à un traité ou pour s'en retirer «s'il s'agit d'un traité établissant une frontière». En un mot, ce n'est pas parce que le droit de la mer et le droit de la délimitation maritime ont évolué depuis 1930 que la *línea divisoria de las aguas*, la limite entre les archipels, convenue en 1930 par le Nicaragua et la Colombie, au terme de longues négociations et de débats parlementaires approfondis, serait à regarder comme caduque. L'établissement d'une frontière, a décidé la Cour dans l'affaire *Libye/Tchad*, a «une existence juridique propre, indépendante du sort du traité» qui l'a établie. Et la Cour continue : «Une fois convenue, la frontière demeure, car toute autre approche priverait d'effet le principe fondamental de la stabilité des frontières, dont la Cour a souligné à maintes reprises l'importance.» (*Différend territorial (Jamahiriya arabe libyenne/Tchad), arrêt, C.I.J. Recueil 1994*, p. 37, par. 72.) Oui, Madame le président, *«la frontière demeure»*.

25. Madame le président, des années et des années se sont écoulées sans que le Nicaragua ne soulève le moindre doute à l'encontre du traité de 1928/1930, sans qu'il n'élève la moindre protestation à l'encontre des nombreuses cartes officielles colombiennes qui, à partir de 1931, ont exprimé graphiquement les solutions convenues par les parties, tant sur mer que sur terre[55]. Venir

[55] Voir Exceptions préliminaires de la Colombie, p. 18, par. 46 ; p. 57, par. 1.91-1.92 ; p. 69, par. 1.112 et suiv.

aujourd'hui, trois quarts de siècle après la conclusion du traité Esguerra-Bárcenas — trois quarts de siècle —, remettre en cause le règlement territorial et maritime adopté en 1928/1930 «pour toujours», *para siempre*, comme il a été dit au cours du débat de ratification à Managua, c'est lire «toujours» comme signifiant «quelques années» ; c'est méconnaître le pacte de Bogotá ; c'est ne pas tenir compte des préoccupations de stabilité ou de permanence qui sont au cœur du droit international tel qu'il s'est forgé au cours des siècles ; c'est ne faire aucun cas du principe de l'inviolabilité des traités — *pacta sunt servanda* ; c'est violer le principe selon lequel il faut savoir mettre un point final à un différend — *ut finis sit litium*. Ces maximes et ces principes reflètent des nécessités sociales fondamentales, communes à tous les systèmes juridiques et à toutes les époques. Madame le président, près de deux siècles d'exercice ininterrompu par la Colombie de sa souveraineté sur l'archipel ; quinze années de négociations pour résoudre le conflit ; cinquante années d'application paisible de la solution adoptée au terme de ces négociations ; et puis, soudainement, en 1980, une déclaration unilatérale de nullité dépourvue de toute justification et de fondement : voilà, résumé en quelques dates, le tableau de l'affaire que le Nicaragua a portée devant la Cour.

26. Madame le président, si la Colombie revendiquait aujourd'hui la souveraineté sur la côte de Mosquitos ou les îles Mangles, le Nicaragua dirait — et il aurait raison de le dire — que cette question est «réglée», settled, *resuelta*, depuis le traité de 1928/1930, qu'elle est «régie», governed, *regida*, par ce traité. En avançant les thèses qu'il avance, le Nicaragua joue avec le feu, puisqu'il mine les fondements de sa propre souveraineté sur une partie de son propre territoire national.

27. Ce que le Nicaragua demande à la Cour, Madame le président, c'est de retenir du règlement de 1928/1930 les éléments favorables au Nicaragua et de rejeter les éléments favorables à la Colombie. On pense au passage bien connu et souvent cité de l'arrêt dans l'affaire du *Temple de Préah Vihéar* dans lequel la Cour a déclaré que «[l]a Thaïlande ne peut aujourd'hui, tout en continuant à invoquer les bénéfices du règlement et à en jouir, contester qu'elle ait jamais été partie consentante au règlement» (*Temple de Préah Vihéar (Cambodge c. Thaïlande), fond, arrêt, C.I.J. Recueil 1962*, p. 32). Le règlement de 1928/1930 constitue un tout indivisible, dont le Nicaragua ne peut prétendre aujourd'hui retenir certaines composantes et en rejeter les autres.

28. Madame le président, j'en ai ainsi terminé avec le premier pôle de cette affaire, à savoir le principe posé à l'article VI du pacte de Bogotá, selon lequel la procédure de règlement judiciaire prévue par le pacte «ne pourr[a] pas … s'appliquer … aux questions déjà réglées au moyen d'une entente entre les parties … ni à celles régies par des accords ou traités en vigueur à la date de la signature du présent pacte». J'espère, Madame le président, avoir réussi à montrer que le différend que le Nicaragua a porté devant la Cour en 2001 au sujet du titre sur des territoires insulaires et de la détermination de frontière maritimes était depuis longtemps «déjà réglé», already settled, *ya resuelto*, et régi par des accords en vigueur, et qu'en conséquence les procédures prévues au pacte de Bogotá — y compris la procédure judiciaire devant la Cour à laquelle le Nicaragua a recouru — ne peuvent pas «s'appliquer», may not be applied, *tampoco podrán aplicarse*. De cette première constatation découle une seconde, à savoir qu'en application de l'article XXXIV de ce même pacte de Bogotá la Cour doit se déclarer «incompétente pour juger le différend» et que «celui-ci sera déclaré terminé», ended, *terminado*.

B. LA PROCEDURE JUDICIAIRE NE PEUT PAS «S'APPLIQUER», LA COUR DOIT SE DECLARER «INCOMPETENTE POUR JUGER LE DIFFEREND» ET ELLE DOIT DECLARER LE DIFFEREND «TERMINE»

29. Madame le président, nous avons montré dans nos écritures[56] que l'un des objectifs du pacte de Bogotá a été d'étouffer dans l'œuf toute tentative de recourir aux mécanismes prévus par ce pacte pour rouvrir un différend auquel une solution avait été précédemment apportée par un traité ou par une sentence judiciaire ou arbitrale. Comme les représentants du Pérou, du Chili et de Cuba l'ont souligné au cours de la négociation du pacte, la fonction stabilisatrice des articles VI et XXXIV du pacte aurait été compromise si, pour mettre en mouvement les mécanismes de règlement institués par le pacte, il avait suffi à une partie de faire revivre un différend auquel une solution avait été précédemment apportée. C'est pourquoi il a paru nécessaire d'ajouter aux mécanismes curatifs destinés à résoudre un conflit déjà né une disposition de caractère préventif destinée à décourager toute tentation ou toute tentative de remettre en cause devant le juge international un règlement antérieur qui aurait cessé de plaire. Les articles VI et XXXIV du pacte de Bogotá assurent l'intangibilité du règlement apporté à un différend par la voie conventionnelle

[56] Exceptions préliminaires de la Colombie, p. 76 et suiv., par. 2.10 et suiv.

ou par la voie judiciaire ou arbitrale, en mettant ce règlement à l'abri de toute tentative de le contester. C'est ce qu'explique le commentaire officiel du pacte publié par l'Organisation des Etats américains dont nous avons reproduit un extrait dans nos exceptions préliminaires[57]. La Cour n'acceptera pas, nous en formulons l'espoir, que les mécanismes de règlement du pacte de Bogotá servent à rouvrir aujourd'hui un différend qui a été «terminé», *terminado,* ended, par la voie conventionnelle il y a trois quarts de siècle.

30. Le Nicaragua tente de s'évader de cette évidence en soutenant que puisque le différend actuellement devant la Cour est apparu après 1948, après la conclusion du pacte de Bogotá, la compétence de la Cour n'est pas écartée par l'article VI du pacte et que l'article XXXIV du pacte ne fait pas obligation à la Cour de déclarer le différend «terminé»[58]. Madame le président, ce n'est pas un différend apparu postérieurement à 1948, après la conclusion du pacte de Bogotá, que le Nicaragua a porté devant la Cour et qui est aujourd'hui devant la Cour. C'est un différend qui remontait à 1838 et qui avait été «réglé» entre-temps par le traité Esguerra-Bárcenas de 1928/1930 — exactement le même différend — que le Nicaragua cherche aujourd'hui à rouvrir devant la Cour. La Cour, nous l'espérons, fera échec à cette tentative de remettre en cause non seulement les accords de 1928/1930 entre la Colombie et le Nicaragua, mais aussi, par-delà ces accords, l'ensemble des mécanismes du pacte de Bogotá auquel de si nombreux Etats sont parties.

31. Madame le président, la Colombie prie respectueusement la Cour de donner effet à ces deux piliers du pacte de Bogotá que sont ses articles VI et XXXIV. Déclarer «terminé», *terminado, ended,* ce différend réglé depuis de si longues années et régi par un accord en vigueur, et refuser qu'il soit aujourd'hui rouvert : c'est là la mission qui incombe à la Cour en vertu des articles VI et XXXIV du pacte de Bogotá.

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[57] Exceptions préliminaires de la Colombie, p. 82, par. 2.21.

[58] Observations écrites du Nicaragua, p. 59-61, par. 2.19-2.25.

C. C'EST AU PRESENT STADE DES EXCEPTIONS PRELIMINAIRES QUE LA COUR PEUT ET DOIT «SE DECLARER INCOMPETENTE POUR JUGER LE DIFFEREND» ET QU'ELLE DOIT DECLARER LE DIFFEREND «TERMINE»

32. Madame le président, Messieurs les juges, que c'est maintenant, au présent stade des exceptions préliminaires, que la Cour a le pouvoir et le devoir de déclarer le différend «terminé», cela ressort de l'article 79, alinéa premier, du Règlement de la Cour qui prévoit que :

> «Toute exception à la compétence de la Cour ou à la recevabilité de la requête ou toute autre exception *sur laquelle le défendeur demande une décision avant que la procédure sur le fond se poursuive* doit être présentée par écrit dès que possible, et au plus tard trois mois après le dépôt du mémoire.»[59]

33. J'ai à peine besoin de rappeler qu'à l'occasion de la refonte de son Règlement, en 1972, la Cour a élargi le concept d'exceptions préliminaires. Elle a analysé, en détail, les raisons et l'objet de cette réforme dans ses arrêts de 1984 et 1986 en l'affaire des *Activités militaires au Nicaragua et contre celui-ci* (*Activités militaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), compétence et recevabilité, arrêt, C.I.J. Recueil 1984*, p. 425, par. 76 ; *Activités militaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), fond, arrêt, C.I.J. Recueil 1986*, p. 14, p. 29 et suiv., par. 37 et suiv.), et elle est revenue sur ce problème un peu plus tard, en 1998, dans les affaires *Lockerbie* (*Questions d'interprétation et d'application de la convention de Montréal de 1971 résultant de l'incident aérien de Lockerbie (Jamahiriya arabe libyenne c. Etats-Unis d'Amérique), exceptions préliminaires, arrêt, C.I.J. Recueil 1998*, p. 131 et suiv., par. 46 et suiv. ; *Questions d'interprétation et d'application de la convention de Montréal de 1971 résultant de l'incident aérien de Lockerbie (Jamahiriya arabe libyenne c. Royaume-Uni), exceptions préliminaires, arrêt, C.I.J. Recueil 1998*, p. 26 et suiv., par. 47 et suiv.). Comme la Cour l'a observé dans ces dernières affaires, le champ d'application *ratione materiae* de l'article 79 n'est plus limité aujourd'hui aux seules exceptions d'incompétence ou d'irrecevabilité mais couvre toute exception dont l'objet est «d'empêcher *in limine* tout examen de l'affaire au fond».

34. Que c'est maintenant, au stade des exceptions préliminaires, que la Cour peut et doit se déclarer incompétente pour juger le différend et qu'elle doit déclarer le différend «terminé», cela ressort du pacte de Bogotá, dont l'article XXXIII dispose que : «Au cas où les parties ne se

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[59] Les italiques sont de nous.

mettraient pas d'accord sur la compétence de la Cour au sujet du litige, la Cour elle-même décidera au préalable de cette question.»

«Au préalable», selon la version française du pacte ; first, selon la version anglaise du pacte ; *previamente*, selon la version espagnole du pacte — autrement dit, à titre préliminaire, avant tout examen de l'affaire au fond.

35. Madame le président, l'exception soulevée par la Colombie consiste à prier la Cour, respectueusement, de constater, comme le lui demande et l'y habilite le pacte de Bogotá, que les questions soulevées par la requête du Nicaragua sont «déjà réglées au moyen d'une entente entre les Parties», qu'elles sont «régies par des accords ou traités en vigueur à la date de la signature du … pacte» et, en conséquence, de déclarer le différend «terminé», ended. Cette exception a «pour objet d'empêcher *in limine* tout examen de l'affaire au fond» : ce sont là, je le rappelle, les expressions de la Cour elle-même. Cette exception, que nous avons présentée, possède un caractère exclusivement préliminaire.

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36. Madame le président, Messieurs les juges, en application de l'article XXXIII du pacte de Bogotá et de l'article 79 du Règlement de la Cour, la Colombie prie respectueusement la Cour de décider «au préalable», «avant que la procédure sur le fond se poursuive» — c'est-à-dire au présent stade des exceptions préliminaires — que, puisque la question soumise à la Cour par le Nicaragua est «déjà réglée au moyen d'une entente entre les Parties» et qu'elle est «régie par des accords ou traités en vigueur à la date de la signature» du pacte de Bogotá, les procédures prévues par ce pacte «ne pourront [pas]… s'appliquer» (article VI du pacte), et qu'en conséquence la Cour doit se déclarer «incompétente pour juger le différend» et doit déclarer le différend «terminé» (article XXXIV du pacte).

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Madame le président, Messieurs les juges, je vous prie de vouloir bien excuser la longueur de mes développements, et je vous remercie de votre attention. Je vous prie, Madame le président,

de donner la parole à M. Schwebel, dont l'intervention terminera la présentation colombienne du premier tour. Merci, Madame le président.

The PRESIDENT : Thank you, Professor Weil. We now call Mr. Schwebel to the Bar.

Mr. SCHWEBEL:

1. Madam President and Members of the Court, I appreciate the honour of representing the Government of the Republic of Colombia and the privilege of addressing the Court on its behalf. My task is to show that the Court is without jurisdiction under the optional clause of its Statute to entertain the claims advanced by the Government of Nicaragua.

BECAUSE "THE CONTROVERSY SHALL BE DECLARED ENDED" THERE IS NO SUBSISTING DISPUTE

2. A paramount submission of Colombia is that, pursuant to the terms of the Pact of Bogotá, the Court is bound to declare the dispute "ended". It follows that there is no subsisting dispute to which the Court's jurisdiction under the optional clause can attach.

3. As the Court declared in *Border and Transborder Armed Actions*, where a party relies on the Pact of Bogotá as a title of jurisdiction, and also invokes declarations under the optional clause, the Pact, "in relations between the States parties to the Pact . . . is governing" (*Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 82, para. 27). Nicaragua, however, argues that, since the Court in that case declared that jurisdiction afforded by the Pact is "an autonomous commitment" (*ibid.*, p. 85, para. 36), if the Court should declare the controversy ended, it is ended "only as concerns the possibility of invoking the Pact as a basis of jurisdiction"[60].

4. Nicaragua's contention is unpersuasive. The application of the Pact requires the Court to declare the controversy ended, not only for the purposes of the Court's jurisdiction under the Pact, but for all purposes.

5. That this is so follows from the terms of the Pact. Article VI specifies that the procedures of peaceful settlement provided for in the Pact, including recourse to the Court, may not be applied

[60]Written Statement of the Government of Nicaragua (WSN), p. 83, para. 2.67.

to matters already settled by arrangement between the parties or governed by treaties in force on the date of the Pact's conclusion. Article XXXIII provides that, if the parties fail to agree as to whether the Court has jurisdiction over the controversy, "the Court itself shall first decide that question." Now if Nicaragua is correct when it argues that Article XXXIV means no more than that "the controversy is ended only as concerns the possibility of invoking the Pact as a basis of jurisdiction", it follows that Article XXXIV of the Pact means no more than does Article XXXIII. Under Nicaragua's interpretation, both Articles XXXIII and XXXIV simply import that the Court may declare itself without jurisdiction under the Pact. Nicaragua's construction thus renders Article XXXIV superfluous, because its meaning is found wholly in Article XXXIII.

6. That construction transgresses a cardinal rule of the interpretation of treaties, to which this Court has lent its authority (*Jurisdiction of the European Commission of the Danube, 1927, P.C.I.J., Series B, No. 14*, p. 27; *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, pp. 179, 184; *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 24; *South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, pp. 319, 335 ff.), namely, that each and every provision of a treaty should be interpreted to give it meaning and to render it effective. Accordingly Article XXXIV must be interpreted not as equating with the Court's power to decide upon its own jurisdiction affirmed by Article XXXIII but rather as requiring the Court to go further and, having found itself without jurisdiction to hear the controversy, to declare — as the terms of Article XXXIV prescribe — the controversy to be "ended".

7. It follows that, once the controversy between the parties has been declared by the Court to be ended, there is no controversy outstanding to which jurisdiction could attach under any other title, including that of the declarations of the parties under the optional clause.

8. But in any event, Madam President, Colombia maintains that the Court lacks jurisdiction under the declarations of acceptance of the Court's compulsory jurisdiction for two reasons. The first is that Colombia terminated its 1937 declaration of acceptance of the Court's jurisdiction with immediate effect before the filing of Nicaragua's Application. The second is that, even if Colombia's declaration is treated as having been in force on the date of Nicaragua's Application, the Court lacks jurisdiction under the optional clause to pass upon the merits of the Application

because the terms of the Colombian declaration apply "only to disputes arising out of facts subsequent to 6 January 1932". My argument will develop these two submissions.

BECAUSE THE COLOMBIAN DECLARATION WAS NOT IN FORCE, THERE IS NO JURISDICTION UNDER THE OPTIONAL CLAUSE

9. The Parties differ on whether the reference in a judgment of the Court to "a reasonable time" for termination or modification of declarations under the optional clause to take effect was *obiter dicta* or not. Colombia submits that this reference was *obiter*, for the reasons set out in its Preliminary Objections[61]. In its view, the Court decided as it decided in that case because the optional clause declaration in question contained a six months' notice proviso. But as the Court stated, "the United States retained the right to modify the contents of the 1946 declaration or to terminate it, a power which is inherent in any unilateral act of a State . . ." (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 419, para. 61).

10. In any event, what is dispositive in the case now before the Court is that both Parties in practice have treated their declarations as subject to termination or modification[62] with immediate effect. As is well known, in another case involving Nicaragua the Court treated modification as tantamount to termination (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, pp. 419-421, para. 65).

11. Now, Nicaragua denies this, both as regards the acts and intentions of Colombia and its own acts and intentions. But its denial does not comport with the facts.

12. On 5 December 2001, Colombia terminated its 1937 declaration with immediate effect. While Nicaragua in its Written Statement maintains that "there is no evidence that the intention . . . was to terminate . . . the pertinent declaration with immediate effect"[63], and that Colombia on 5 December 2001 made "no statement . . . clarifying the legal position"[64], the fact is that Colombia

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[61]POC, p. 114-118, paras. 3.14-3.21.

[62]POC, Vol. I, paras. 3.22 ff, pp. 118 ff.

[63]WSN, p. 103, para 3.26.

[64]*Ibid*, p. 103, para 3.30.

notified the Secretary-General on 5 December 2001 of the termination of its 1937 declaration "with effect from the date of this notification"[65], as shown in the judges' folders, at tab 12, and on the screen.

13. The Court's *Yearbook 2001-2002* accordingly records that: "On 5 December 2001, Colombia notified the Secretary-General of its decision to withdraw, with immediate effect, the declaration which it had deposited on 30 October 1937."[66] (At tab 13, and on the screen.) Consequently, while in the *Yearbook 2000-2001* the subsistence of seven declarations made under the Permanent Court of International Justice Statute was recorded, the *Yearbook 2001-2002* states: "There are now six such declarations."[67] Moreover, in a footnote to the foregoing, the declaration of Colombia for the first time is included in the enumeration of declarations which "have expired, been withdrawn or been terminated without being subsequently replaced"[68].

14. The force to be given to such attestations in the Court's *Yearbook* was earlier described by Nicaragua itself in these terms: "The most authentic public record of the acceptances of the compulsory jurisdiction of the Court is the Yearbook of the Court . . ." (*I.C.J. Pleadings, Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Memorial of Nicaragua, Questions of Jurisdiction and Admissibility,* Vol. I, p. 374, para. 54.)

15. Nicaragua in its Written Statement rightly emphasizes that "the test is the intention of the respective States"[69], citing the Court's seminal analysis in the *Anglo-Iranian Oil Company* case[70]. But Nicaragua maintains that here there is "no evidence that the intention in each case was to terminate . . . the pertinent declaration with immediate effect"[71], that, "when Nicaragua notified the Secretary-General of the inclusion of a reservation in the Nicaraguan declaration of 1929, the notification, dated 7 November 2001, contained no reference to the question of its having

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[65]C.N. 1401.2001.Treaties-1 (Depositary Notification), Preliminary Objections of the Government of Colombia, p. 114, para. 3.13.

[66]*I.C.J. Yearbook 2001-2002,* p. 117.

[67]*Ibid.*

[68]*Ibid.*, footnote 1.

[69]WSN, p. 103, para. 3.27.

[70]*Ibid.*, p. 103, para. 3.27.

[71]*Ibid.*, p. 103, para. 3.26.

immediate effect"[72], and that "there is no proof of a pattern of clear and consistent conduct which could, in law, amount to a practice binding upon Nicaragua"[73].

16. Madam President, Members of the Court, these statements of Nicaragua do not withstand scrutiny. There is conclusive proof that Nicaragua's true intention was to modify its 1929 declaration with immediate effect. The letter by which the Foreign Minister of Nicaragua informed the Secretary-General of the modification of its declaration, reproduced in Colombia's Preliminary Objections and in the judges' folder at tab 14 and on the screen, is based expressly and squarely on Presidential Decision No. 335 2001 of 22 October 2001, issued by the President of Nicaragua.

17. The Presidential Decision dated 22 October 2001, published in *La Gaceta*, the Official Journal of Nicaragua[74], reproduced in the judges' folders at tab 15, and on the screen, reads as follows:

> "To communicate . . . the Reservation that the Republic of Nicaragua, as of this date, makes to its Declaration, the text of which is as follows: 'Nicaragua will not accept, as of 1 November 2001, the jurisdiction or competence of the International Court of Justice in relation to any matter or claim based on interpretations of Treaties or Arbitral Awards, having been signed and ratified or rendered, respectively, prior to 31 December 1901."[75]

18. It is thus clear, Madam President, that the true intention of Nicaragua was to amend its declaration with immediate effect — that is, to take effect "as of this date" of issuance of 22 October — or, at the latest, "as of 1 November 2001". As Managua's *La Prensa* reported in its edition of 23 October 2001, "The President of the Republic issued a presidential decree in which he discards *from now on* accepting any resolution that the International Court of Justice may issue . . . in light of possible proceedings being brought against Nicaragua by Costa Rica . . ."[76]

19. Costa Rica — the State most directly affected by the amendment of Nicaragua's declaration — so understood the intention of Nicaragua at the time and consequently, its Note

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[72] *Ibid.*, p. 103, para. 3.29.

[73] *Ibid.*, p. 104, para. 3.31.

[74] *La Gaceta* (Official Journal of Nicaragua), No. 206, of 30 October 2001. *La Gaceta* is in the public domain and particularly chargeable to the knowledge of the Government of Nicaragua.

[75] *La Gaceta*, No. 206, of 30 October 2001.

[76] *La Prensa*, Managua, 23 October 2001 (emphasis supplied). *La Prensa* is in the public domain. Its internet source is http://www.laprensa.com.ni/archivo/2001/octubre/23/politica/politica-20011023-05.html . A translation into English has been filed with the Registry.

Verbale of 9 January 2002[77], circulated as a United Nations document, which objects to Nicaragua's decision, rests on the Nicaraguan amendment having taken effect as of 1 November.

20. Nicaragua presents the agreement it concluded with a successor Government of Costa Rica on 26 September 2002 to refrain from bringing the border dispute over the San Juan River to the Court for three years as "cogent" evidence "that in her practice Nicaragua does not accept that declarations are subject to modification or termination on notice"[78].

21. Madam President, it is nothing of the kind. When the Government of Costa Rica announced that it would bring a case in the Court against Nicaragua over the régime of the San Juan River, the Nicaraguan Government proceeded to amend its 1929 declaration with immediate effect in order to forestall Costa Rica's Application. Costa Rica then objected to Nicaragua's action as just described.

22. But shortly thereafter, elections were held in Costa Rica and a new president took office. The new Government signed an agreement with Nicaragua providing that Nicaragua "commits itself to maintain the legal situation as it exists at present for a period of three years . . . as concerns its declaration of acceptance of the jurisdiction of the International Court of Justice"[79], a period in which Costa Rica undertook not to commence a case before the Court against Nicaragua. But in fact neither Colombia nor any other party to the Statute has been notified by the depositary of any decision by Nicaragua that provides that its reservation to its optional clause declaration notified to the Secretary-General in October 2001 would not take effect for three years. On the contrary, the Court's *Yearbook 2001-2002* reproduces the reservation of Nicaragua *as effective* as of 24 October 2001[80]. Please see the judges' folders, tab 16.

23. The Government of Colombia, Madam President, wishes to bring to the Court's attention this critical fact: the crucial consideration that led the Colombian Government to take its decision to terminate its 1937 declaration with immediate effect in December 2001 was Nicaragua's

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[77]Note Verbale dated 9 January 2002 from the Permanent Mission of Costa Rica to the United Nations addressed to the Secretary-General, United Nations doc. A/56/770, issued on 11 January, 2002, Annex dated 18 December 2001.

[78]WSN, p. 104, para. 3.32.

[79]*Ibid*.

[80]International Court of Justice, *Yearbook 2001-2002*, p. 146, reproduces the text of Nicaragua's reservation as effective on 24 October 2001 and footnotes the text of Nicaragua's letter to the Secretary-General referring to Presidential Decision No. 335-2001 of 22 October 2001 as well as Costa Rica's formal objection to Nicaragua's reservation.

modification in October 2001 of its optional clause declaration with immediate effect. If Nicaragua could modify its declaration with immediate effect, so could Colombia terminate its.

24. Madam President, Members of the Court, Colombia submits that this striking subsequent, concordant practice of Nicaragua and Colombia regarding their entitlements in respect of declarations under the optional clause, constitutes, between them, an agreed interpretation of their rights and obligations of whose legal effect the Court should take account.

IN ANY EVENT, THE TERMS OF COLOMBIA'S 1937 DECLARATION EXCLUDE NICARAGUA'S CLAIMS, BECAUSE THE DISPUTE ARISES OUT OF FACTS PRIOR TO 6 JANUARY 1932

25. Madam President, I turn now to the conclusive reason why, in any event, there is no jurisdiction under the optional clause.

26. Colombia's 1937 declaration "applies only to disputes arising out of facts subsequent to 6 January 1932", a fact that Nicaragua herself "fully accepts"[81]. As I shall shortly show, Nicaragua's Application falls well outside the scope of Colombia's declaration.

27. Nicaragua's Memorial itself asserts, correctly, that "the dispute now before the Court is longstanding [and] dates back to the first years after the Independence from Spain"[82] — well prior to 6 January 1932. The facts giving rise to the dispute between Nicaragua and Colombia over the Mosquito Coast date back to the mid-nineteenth century — well prior to 6 January 1932. The facts giving rise to the dispute between Colombia and Nicaragua over the Corn Islands run back to 1890 — well prior to 6 January 1932. Nicaragua first advanced its claims to the Archipelago of San Andrés in 1913 — well prior to 6 January 1932.

28. In its Application, Nicaragua, based on its singular construction of facts well prior to 6 January 1932, contends that the Treaty by whose terms it recognized the sovereignty of Colombia over the San Andrés Archipelago, and by whose terms Colombia recognized Nicaragua's sovereignty over the Mosquito Coast and Corn Islands, lacks legal validity. However questionable Nicaragua's construction of those facts is, those facts incontestably antedate 1932. The Treaty was signed in 1928 and ratified in 1930 — prior to 6 January 1932. Nicaragua equally challenges the

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[81]WSN, p. 113, para. 3.56.

[82]MN, Vol. I, Introduction, p. 2, para. 4.

82° West Greenwich meridian established as a limit between the two countries in the Protocol of Exchange — prior to 6 January 1932.

29. Madam President, subtract Nicaragua's claims to the San Andrés Archipelago made as from 1913, subtract the 1928 Treaty that settled those claims, subtract the 1930 Protocol that established the limit at the 82° West meridian, and what is left? How can it be seriously maintained that the dispute before the Court between Nicaragua and Colombia arises *not* out of those facts but "out of facts subsequent to 6 January 1932"?

30. Colombia therefore respectfully requests the Court, in the event that its 1937 declaration should be found to be in force on the date of the filing of Nicaragua's Application, to give full and faithful effect to the reservation embodied in that declaration, limiting the Court's jurisdiction to disputes arising out of facts subsequent to 1932. Colombia's intention as the depositing State must prevail, as the Court held in its Judgment in the *Fisheries Jurisdiction* case (*Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998,* pp. 453-455; *Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74*, p. 24; *Anglo-Iranian Oil Co., Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 107; *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, p. 29). Nicaragua's arguments run contrary to the clear text and express intention of Colombia's declaration.

31. In *Phosphates in Morocco,* the seminal case whose continuing force was recently reaffirmed by the Court (*Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 135)[83], the Permanent Court construed the equivalent French reservation as one concerning facts "which must be considered as being the source of the dispute" (*Phosphates in Morocco*, *loc. cit.*, p. 23). The Court held that the facts which form the subject of the reservation *ratione temporis* have to be considered from the viewpoint of their connection "with the birth of the dispute" (*ibid*., p. 24). It is clear in our case that the real source of the dispute that Nicaragua has raised turns on the issue of sovereignty over the Archipelago of San Andrés, a matter that was determined by the 1928 Treaty, and on the issue of the delimitation determined by the 1930 Protocol of Exchange of Ratifications of that Treaty.

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[83]See the other similar references assembled in the Preliminary Objections of the Government of Colombia, p. 135, note 192.

32. Can it seriously be doubted that the facts of "the birth of the dispute" pre-date 1932? The Court in *Phosphates in Morocco* observed that the object of the French reservation was to deprive the acceptance of compulsory jurisdiction of "any retroactive effects in order . . . to avoid . . . the revival of old disputes . . ." (*ibid.*, p. 24). How pertinent that observation is to the current case and to the intent of the Pact of Bogotá.

33. The compelling case law of the Court in this sphere has been reaffirmed and refined as recently as February 2005 in the Judgment of the Court in the case concerning *Certain Property*. Liechtenstein based the Court's jurisdiction on the European Convention for the Peaceful Settlement of International Disputes, Article 27 *(a)* of which provides: "The provisions of this Convention shall not apply to . . . disputes relating to facts or situations prior to the entry into force of this Convention as between the parties to the dispute." (*Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005,* para. 18.)

34. Germany filed a preliminary objection maintaining that all the relevant facts occurred before the entry into force of the European Convention as between the parties, that is, prior to 18 February 1980, the relevant facts being the Beneš decrees and a Settlement Convention entered into by Germany. Liechtenstein argued that, in so far as there was a change of position by Germany, the decisions of the German courts in the *Pieter van Laer Painting* case and the "positions taken by the Government of Germany, in the period after 1995" gave rise to the dispute (*ibid.*, para. 33).

35. The Court emphasized that, in determining the facts or situations with regard to which a dispute has arisen, only those facts or situations that can be considered "as being the source of the dispute, its real cause" (*ibid.*, para. 44) are relevant. It found that while the post-1980 decisions of German courts "triggered the dispute" between Liechtenstein and Germany, "the source or real cause of the dispute" was to be found in the Settlement Convention and the Beneš decrees, events well antedating 1980 (*Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005,* para. 52). The Court accordingly upheld Germany's preliminary objection and decided that the Court lacked jurisdiction *ratione temporis* to decide the dispute.

36. Now, Madam President, if we apply the teaching of this case, and seek to establish the source or real cause of the instant dispute, the place to turn is the Application of Nicaragua, for, as

the Court has held, it is the Application that initially defines the dispute (*Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998,* pp. 447-449, paras. 29-32). Nicaragua there asks the Court to adjudge and declare that Nicaragua has sovereignty over the Archipelago of San Andrés and, in the light of the determinations of title requested, to determine the course of the maritime boundary between Nicaragua and Colombia.

37. However, Nicaragua's Written Statement endeavours — on second thought — to elude the constraints imposed by the temporal limitation of Colombia's declaration by attempting radically to narrow the extent of the dispute as framed by its own Application. It now argues that the real dispute between it and Colombia is not over sovereignty over the Archipelago after all. Perhaps also apprehending the extravagance of its claims to sovereignty over the Archipelago, Nicaragua now contends that "the facts which are the source of the dispute, from which the dispute arises, are constituted by the decisions of Colombia of 1969, subsequently maintained, to deny any sovereign rights of Nicaragua over the continental shelf (and an exclusive economic zone) east of the 82nd meridian"[84].

38. But, Madam President, this convenient retreat of Nicaragua is not enough to satisfy the terms of Colombia's reservation *ratione temporis*. The question is not, "When did the dispute between Nicaragua and Colombia arise?" The question rather is, "Does the dispute arise out of facts subsequent to 6 January 1932?"

39. It is plain that it does not, because the essential fact on which the alleged dispute would turn, the essential fact from which it would arise — the true "source" and "real cause of the dispute" between Nicaragua and Colombia (to use the terminology of the Court in *Electricity Company of Sofia and Bulgaria, Judgment, 1939, P.C.I.J., Series A/B, No. 77*[85] on which Nicaragua places such reliance, so recently reaffirmed in the case concerning *Certain Property*) — the true source and real cause would be the establishment in 1930 of the 82° West meridian as the limit in the sea between the two countries, and 1930 antedates 1932!

40. Nicaragua tries to recast the dispute described in its Application as one over a Colombian diplomatic Note sent to remind Nicaragua of Colombia's rights to the east of the 82° West meridian

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[84]WSN, p. 122, para. 3.79.

[85]As relied on in the Written Statement of the Government of Nicaragua, pp. 118-122, paras. 3.73-3.78.

when, in 1969, Nicaragua for the first time granted oil exploration permits in these areas. That Note simply reaffirmed Colombia's long-standing, public, peaceful, and routine exercise of sovereignty and jurisdiction over the Archipelago and its appurtenant maritime areas up to the specified meridian.

41. As in the *Certain Property* case, the diplomatic Notes of 1969 might be argued to have "triggered" the dispute, just as the actions by the German courts in the 1990s did in that case. But "the source or real cause" of the dispute before the Court would have to be found in the 1930 Protocol, a legal instrument that in the present case plays essentially the same role that the Settlement Convention and the Beneš decrees played in that case.

42. In the light of the events leading up to the adoption of the 1930 Protocol as recounted by Professor Weil, and its continued legal force for over 70 years, Nicaragua cannot now be heard to contend that the dispute that she submitted to the Court is not a dispute arising out of the limit established by the 1930 Protocol. Nicaragua's contrived contentions as to the outbreak of a dispute in 1969 are in the submission of Colombia profoundly unpersuasive.

43. Madam President, Members of the Court, for all the reasons just set out, Colombia respectfully submits that the Court lacks jurisdiction over the claims advanced in the Application of the Government of Nicaragua. Colombia's 1937 declaration was not in force on the date of the filing of Nicaragua's Application. But even if Colombia's declaration were to be deemed then to have been in force, Nicaragua's claims nevertheless are excluded from the Court's jurisdiction by the very terms of Colombia's declaration.

44. That concludes, Madam President, the argument of the Government of Colombia for the first round. My colleagues and I are grateful for the attention of the Court.

The PRESIDENT: Thank you, Mr. Schwebel. That brings to an end the first round of oral argument by Colombia. The Court will meet again tomorrow at 10 a.m. to hear the first round of oral argument of Nicaragua. The Court now rises.

The Court rose at 1.10 p.m.