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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2010

Public sitting

held on Friday 15 October 2010, at 3 p.m., at the Peace Palace,

President Owada presiding,

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

Application by Costa Rica for permission to intervene

VERBATIM RECORD

ANNÉE 2010

Audience publique

tenue le vendredi 15 octobre 2010, à 15 heures, au Palais de la Paix,

sous la présidence de M. Owada, président,

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

Requête du Costa Rica à fin d'intervention

COMPTE RENDU

Present:	President	Owada
	Vice-President	Tomka
	Judges	Koroma
		Al-Khasawneh
		Simma
		Abraham
		Keith
		Sepúlveda-Amor
		Bennouna
		Skotnikov
		Cançado Trindade
		Yusuf
		Xue
		Donoghue
	Judges *ad hoc*	Cot
		Gaja
	Registrar	Couvreur

Présents : M. Owada, président
M. Tomka, vice-président
MM. Koroma
Al-Khasawneh
Simma
Abraham
Keith
Sepúlveda-Amor
Bennouna
Skotnikov
Cançado Trindade
Yusuf
Mmes Xue
Donoghue, juges
MM. Cot
Gaja, juges *ad hoc*

M. Couvreur, greffier

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The PRESIDENT: Please be seated. The sitting is open. The Court meets today to hear the second round of oral argument of Nicaragua and Colombia. I shall first give the floor to His Excellency Ambassador Carlos Argüello Gómez, Agent of Nicaragua.

Mr. ARGÜELLO GÓMEZ:

1. Thank you Mr. President. Mr. President, Members of the Court, good afternoon. Last Wednesday we witnessed an unusual double round of pleadings. First came Nicaragua and devoted the time allotted to it in order to address the issue presently before the Court which is the question of the Application of Costa Rica for intervention in this case.

2. Next came Colombia and, whilst occasionally referring *en passant* to the Costa Rican Application, it devoted most of the time allotted to it in order to address the merits of the *Nicaragua* v. *Colombia* case. And it is evident that this was not a reaction to Nicaragua's presentation that had immediately preceded it because,apart from some rhetorical remarks on this presentation, the Colombian argument was based entirely on matters relating to the merits of the case and not this incidental proceeding.

3. At the opening of his statement the Agent for the Republic of Colombia avowed that "it is not my intention to discuss issues that do not form part of the subject-matter of Costa Rica's request to intervene"[1]. He then did just that, embarking on an overview of Colombia's views on the history of the political geography of the south-western part of the Caribbean. This certainly is not an issue that formed part of the subject-matter of Costa Rica's request to intervene. It had already been extensively discussed in Colombia's pleadings on Colombia's preliminary objections and again in Colombia's pleading on the merits. Mr. Bundy and Professor Crawford followed suit. Their presentations focused on the main elements of Colombia's case on the merits. Colombia apparently thinks that if it repeats itself often enough, its views on the merits acquire an appearance of credibility.

4. An application to intervene is an incidental proceeding and the pleadings should be addressed to the incidental matter before the Court and not enter into the merits of the case beyond

[1]CR 2010/14, p. 10, para. 3 (Londoño).

what is strictly necessary for that purpose. This is most imperative during the oral pleadings because they are by definition held before a public audience and States should not be goaded into extemporaneously responding to issues that are to be dealt during the merits.

5. Furthermore, as I pointed out in my first presentation, these proceedings represent a very costly exercise in time and resources especially for Nicaragua. It should also be added that this also is a very costly exercise in time and resources for the Court. It is unfortunate that it has been largely wasted by being perverted from incidental proceedings to pleadings on the merits.

6. Colombia has had a two-hour opportunity to argue on the merits of the case and Nicaragua will only have this hour to respond to both Costa Rica's arguments of yesterday and to Colombia's full force excursion into the merits last Wednesday. And again Colombia will still have the final say at the end of this afternoon. Under these circumstances it would be unrealistic for Nicaragua to attempt to defend the merits of its case in this brief afternoon session.

7. For this reason, Nicaragua generally reserves its position on all statements and claims made by Colombia on the merits of the case and would simply refer the matter to its written pleadings on the merits which address all the fundamental issues, except of course, the *plaisanteries* that occasionally adorned these pleadings.

8. With this said, Nicaragua will limit its reaction to Colombia's pleading of last Wednesday to pointing out and putting in true perspective some of the remarks — if not arguments — made by Colombia. Naturally Nicaragua can only reserve its position on what Colombia will plead later on this afternoon. Perhaps it might be shamed into limiting its pleading to the only question presently before the Court.

9. I will start with a comment on the historical record presented by the Agent of Colombia and very briefly put in true perspective the geography of the area that was described by Mr. Bundy.

10. Mr. President, the Court will forgive the time consumed in responding to the totally unnecessary presentation by the distinguished Colombian Agent of the historical record as viewed by Colombia. This matter is amply dealt with in Nicaragua's Memorial. But since this is a public hearing and it was presented publicly, it needs a public, if abridged, response.

11. The distinguished Agent of Colombia presented certain images to describe the evolution of historical title over territory since the early nineteenth century.

12. The first image (Graphic CAG 1) portrays Colombia as a sovereign not only over present day Panama but also over extensive areas of the Caribbean coasts of Nicaragua and Costa Rica and the islands off the Nicaraguan coast. This is not historically correct. The Vice-Royalty of Santa Fe, from which Colombia emerged, was a separate entity from the Captaincy General of Guatemala, of which present day Nicaragua and Costa Rica, and their islands, formed a part as portrayed on the screen before you (CAG 2).

13. The next image presented by Colombia (CAG 3) is supposed to describe the situation after President Loubet of France in his Arbitral Award on the questions of sovereignty submitted by Costa Rica and Colombia, determined on 11 September 1900, that the Caribbean coastline of Costa Rica was part of the territory of the country inherited from the Captaincy General of Guatemala. It is interesting to point out that Colombia asserted that it had been its intention all along during the nineteenth century to recognize this territory as part of Costa Rica. This is a historical distortion — if this had been so, then why the need of an arbitration? — and yet Costa Rica has accepted this distortion by its silence. The main point is that the Loubet Award shattered Colombia's claim to the Caribbean coast not only of Costa Rica but naturally to the whole question that this area was part of Colombia. The claim of Colombia to the Caribbean coast of Nicaragua was based on the same arguments and historical precedents as those over the Caribbean coast of Costa Rica. So in fact this Award resulted in erasing the green colour over the Caribbean coast of Nicaragua shown on this image and putting things back as they were in the colonial period: the *uti possidetis juris.* (CAG 4: CAG 2)

14. In the Loubet Arbitration, Colombia laid claim to the islands off the Nicaraguan coast. Since Costa Rica laid no claim to these islands the arbitrator naturally awarded them to Colombia. Nicaragua was not a party to that Arbitration and as soon as it became aware of Colombia's machinations, it immediately protested the award of the islands to Colombia. The Minister for Foreign Affairs of France, Theophile Delcassé, on behalf of President Loubet, responded on 22 October 1900 that "the rights of Nicaragua over these islands stand unaltered and intact as heretofore, the Arbiter by no means intended to decide a question not submitted to his judgment"[2].

[2]MN, p. 53, footnote 89.

15. It was only in 1928 that Nicaragua, then under military occupation, was constrained to sign a treaty ceding three islands to Colombia: San Andrés, Providencia and Santa Catalina which can be seen in the graphic. Title over all the other islets and cays was left intact. In its Judgment of 13 December 2007, the Court determined that it lacked jurisdiction to consider the question of sovereignty over these three islands, but that it had jurisdiction to determine the sovereignty over all the other features. This result is portrayed on the screen. (CAG 5)

16. That is the situation at present and Nicaragua's Reply and its submissions to the Court are addressed to the questions over which the Court decided it had jurisdiction.

17. Mr. President, Colombia also presented a distorted vision of the geographical area, particularly misrepresenting the size and impact of the archipelago of San Andrés and the other islets and cays in dispute. In the graphic on screen (CAG 6) Colombia portrayed these features as having a radial projection and impact as formidable as the continental landmass of Nicaragua. The reality is that the three islands of San Andrés, Providencia and Santa Catalina that are sometimes referred to as the San Andrés archipelago, have a landmass of approximately 40 sq km. And the landmass of all the other features — the cays of Roncador, Serrana, Serranilla and Bajo Nuevo — add up to approximately to 1 sq km. This can be more adequately appreciated in the graphic on the screen (CAG 7) that even yet portrays these features in a larger size in order to be seen at that scale.

18. Some other questions relating to the merits that were addressed during the pleadings of Colombia last Wednesday are as follows.

19. A first point concerns the relevant area for the delimitation between Nicaragua and Colombia. No less than four slides in the judges' folder of Colombia's first round of pleading depict this area as Colombia perceives it[3]. In Colombia's view the relevant area is located between the coast of Nicaragua and the islands of San Andrés and Providencia and the minor cays. This completely ignores the fact that the maritime zones of Nicaragua project a large distance to the east of these features. As can be appreciated on the figure on the screen (CAG 8), there is no opposite coast blocking this projection. The relevant area for the delimitation thus includes all of these

[3]Tabs 3, 4, 17 and 19.

maritime areas. In the case of the continental shelf it also includes the continental shelf of the mainland of Colombia, which overlaps with Nicaragua's continental shelf.

20. Colombia has not given a satisfactory explanation as to why it considers that the relevant area does not include those areas to the east of the islands of San Andrés and Providencia. Possibly, Colombia considers that the territorial sea and contiguous zone of the islands and cays — and apparently also the submerged bank of Quitasueño, which, however, does not generate any maritime zones — blocks the maritime projection of Nicaragua's coast. It should be noted that Colombia, which is not a party to the United Nations Convention on the Law of the Sea (UNCLOS) and had not previously claimed contiguous zones, only first argued the relevance of these zones in its Reply.

21. The territorial sea of San Andrés and Providencia also does not help Colombia in blocking Nicaragua from the areas to the east of them. The figure you have now before you (CAG 9) is from the Judgment in the case between Nicaragua and Honduras[4]. It shows the delimitation line established by the Court. The delimitation effected by the Court awarded a number of cays to Honduras at a 12-nautical-mile territorial sea enclave. As can be appreciated, that territorial sea does not block the maritime projection of the coast of Nicaragua seaward of those islands.

22. A second recurring theme in Colombia's pleading is the significance which it attributes to the islands of San Andrés and Providencia and also to the small cays in the area. In its Counter-Memorial, Colombia argued that these features have to be treated as a single unit, because they formed a continuous archipelago and were not widely dispersed or separated by long distances[5]. As was pointed out in its Reply the islands of San Andrés and Providencia are 83 km apart, as can be appreciated in the figure on the screen (CAG 10)[6]. That is, a much larger distance than that between the Ukrainian mainland and Serpents' Island, which is somewhat over 20 nautical miles. The Court in its Judgment in the *Black Sea* case held that Serpents' Island was an isolated island and did not constitute a part of the mainland coast of Ukraine (*Maritime*

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[4]Territorial *and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 761.

[5]CMC, Vol. I, p.350, para. 8.27; RC, p. 240, para. 7.10.

[6]RN, p. 110, para. 4.14.

Delimitation in the Black Sea (Romania v. *Ukraine), Judgment, I.C.J. Reports 2009,* pp. 109-110, para. 149). Serpents' Island was treated a separate unit. Likewise, San Andrés and Providencia and the other cays have to be treated as separate units in effecting a maritime delimitation between Nicaragua and Colombia.

23. In Wednesday's pleadings Colombia justified its treatment of San Andrés and Providencia and the other cays by arguing that they were "mid-oceanic islands"[7]. Counsel for Colombia has to be given credit for discovering that the Caribbean Sea is an ocean. However, the term mid-oceanic in general is reserved for islands which are in the middle of the open ocean. A good example is Chile's Easter Island in the Pacific Ocean, which is more than 3,500 km from the continent. Colombia is right in one respect. The prefix "mid" is aptly chosen. San Andrés and Providencia are right in the middle of Nicaragua's exclusive economic zone and continental shelf.

24. Other examples of isolated islands which have been given limited or no weight in a maritime delimitation abound. For instance the Norwegian island of Jan Mayen was given no weight in the delimitation of the 200-nautical-mile zones between Iceland and Norway[8]. The Court, in its decision in the *Jan Mayen* case, only gave limited weight to the island in the delimitation with the Danish territory of Greenland (*Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993,* p. 38). The continental shelf boundary agreement between Italy and Tunisia only accords a 13-nautical-mile semi-enclave to the Italian island of Pantelleria[9], which is 85 km from Italy's Sicily, about the distance between San Andrés and Providencia. In short, there is no merit to the claim of Colombia that because of their location, San Andrés and Providencia have to receive full weight in relation to Nicaragua's mainland coast and fringing islands.

25. Colombia — and in this case it is seconded by Costa Rica — submits that the continental shelf beyond 200 nautical miles cannot overlap with the 200-nautical-mile exclusive economic zone[10]. No authority was stated to support this proposition. Nicaragua certainly does not agree

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[7]CR 2010/14, p. 33, para. 13 (Crawford).

[8]Agreement between Iceland and Norway Concerning Fishery and Continental Shelf Questions of 28 May 1980.

[9]Agreement between the Government of the Republic of Tunisia and the Government of the Italian Republic concerning the delimitation of the continental shelf between the two countries of 20 Aug. 1971.

[10]CR 2010/14, p. 32, para. 10 (Crawford); CR 2010/12, p. 26, para. 23 (Brenes).

with it. And neither do some other States. In 1997, Australia and Indonesia concluded an agreement on the delimitation of their maritime zones in the Timor and Arafura Seas[11]. Under that agreement, Australia's continental shelf beyond 200 nautical miles extends to within 200 nautical miles of Indonesia. In 2009 China submitted preliminary information on the outer limits of its continental shelf beyond 200 nautical miles in the East China Sea in accordance with Article 76 of the United Nations Convention on the Law of the Sea. The entire East China Sea is within 200 nautical miles of the mainland and islands surrounding it.

26. A final example concerns the Russian Federation and Norway. The Russian Federation made its submission on the outer limits of its continental shelf beyond 200 nautical miles in December 2001. One of the areas concerned is the Barents Sea. In the Barents Sea, the Russian Federation defined the areas beyond 200 nautical miles by reference to its own 200-nautical-mile limit. That area in part is within 200 nautical miles of Norway. This year, Norway and the Russian Federation concluded an agreement on the delimitation of their maritime boundary in the Barents Sea and the Arctic Ocean[12]. That agreement places areas within 200 nautical miles of Norway on the Russian side of the maritime boundary. The agreement contains a provision on these areas[13]. That provision is only concerned with the exercise of exclusive economic zone jurisdiction by the Russian Federation. There is no need for a similar provision on continental shelf jurisdiction because the Russian Federation has a continental shelf beyond 200 nautical miles in that area. To sum up, practice of States which have made important contributions to the law of the sea indicates that the continental shelf beyond 200 nautical miles and the 200-nautical-mile exclusive economic zone co-exist.

27. Nicaragua's interest in the continental shelf beyond 200 nautical miles is evident from any map containing bathymetric data. The one on the screen (CAG 11) is a map of the regional bathymetry of Central America and the Caribbean Sea. It is evident why Panama and Costa Rica, and for that matter Colombia, have not claimed extensive continental shelf rights. They have none.

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[11]Treaty between the Government of Australia and the Government of the Republic of Indonesia establishing an exclusive economic zone boundary and certain seabed boundaries of 14 March 1997.

[12]Treaty between the Kingdom of Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean of 15 September 2010.

[13]Art. 3.

This is clearer in the graphic on the screen (CAG 12) which is a representation of the sea-bed morphology of the western Caribbean Sea. The green and light blue areas represent the shallower parts of the western Caribbean. Nicaragua's preliminary submission under Article 76 of the United Nations Convention on the Law of the Sea concerned the outer limits of its continental shelf beyond 200 nautical miles to the south-west of the Nicaraguan Rise and Lower Nicaraguan Rise, which are the natural prolongation of the Nicaraguan land territory.

28. The most egregious aspect of Colombia's first round of pleading is its treatment of the regional practice in the western Caribbean. All other States according to Colombia are conducting their business peacefully except for Nicaragua, which allegedly shows no respect for the rights of third States[14]. This stands things on their head. Colombia has done everything possible to prevent Nicaragua from enjoying the full benefits of its maritime zones. To that end, Colombia has for some 40 years sought to turn the 82nd meridian into a maritime boundary, even resorting to the use of its superior force in order to keep Nicaragua locked in. The Agent for Colombia this Wednesday stressed that Colombia has negotiated boundaries with its neighbours and Nicaragua remained on the side and now is seeking to affect the rights of Colombia's treaty partners[15]. Indeed, Colombia's grand scheme left Nicaragua no choice but to submit two of its maritime delimitations in the Caribbean Sea to this Court. Contrary to what Colombia is insinuating, there is nothing sinister about this. What is more, it was the only avenue left to Nicaragua to break out of the straightjacket of the 82nd meridian.

29. Mr. Reichler will address further the question of the Application to intervene by Costa Rica. At present some brief observations on this matter.

30. The applicant State has come to inform the Court that its legal interests may be affected by the decision of this case. One of its main legal interests turns out to be a Treaty it signed with Colombia in 1977 that has not been ratified because the Congress of Costa Rica throughout the past 30 years has refused to ratify it since it is perceived as damaging the interests of Costa Rica. Nicaragua has the congressional records that are publicly available and that give a most vivid picture of the heated debates on this issue. The most heated debates centred on the fact that the

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[14]CR 2010/14, p. 12, para. 11 (Londoño); pp. 28-29, para. 50 (Bundy); p. 31, para. 4 (Crawford).

[15]*Ibid.*, p. 11, paras 8-9 (Londoño); p. 29, para. 52 (Bundy).

Costa Rican Parliament has constantly considered that the Executive branch should not have accepted a Treaty that gives equal weight to the island of San Andrés and to the mainland of Costa Rica. It will be most interesting to hear the reaction when it becomes publicly known that it was not even the island of San Andrés that was given full weight but the insignificant cays of Albuquerque as was explained by Colombian counsel. We are not going to put before the Court the hundreds of pages of these records that are naturally well known to Costa Rica and presumably — since they are public records — to Colombia, the other party to that Treaty. But this Treaty that has proven unwanted in Costa Rica during the past 33 years is now portrayed as being at the heart of Costa Rican legal interests.

31. Aside from these internal issues in Costa Rica, the fact is that this case has no bearing on the existence of that Treaty. As I stated in my first pleading, if Nicaragua's claims prevail, this will not vitiate the Treaty. On the other hand, on a practical level, Nicaragua does not claim that small islands and cays have equal weight as continental landmasses and thus could hardly make claims on Costa Rica's maritime spaces that go beyond the limits of what the 1977 Treaty attributes to Costa Rica. If Nicaragua prevails against Colombia it could only be Costa Rica itself that would want to ignore the implications of that Treaty and try to negotiate a better deal with Nicaragua. But this will be its own doing and not as a consequence of any judgment of the Court on this case.

32. Finally, Mr. President, a personal note on the pleadings of Costa Rica. Both counsel for Costa Rica, Mr. Lathrop and Mr. Ugalde, referred to Nicaragua's pleadings in *Land, Island and Maritime Frontier Dispute* (between El Salvador/Honduras: Nicaragua intervening) searching for similarities between Nicaragua's arguments of 20 years ago and the present situation. I particularly thank Mr. Lathrop for reminding me and citing one of the arguments I made in order to justify that the Application of Nicaragua be admitted. Yes, Nicaragua was prodigious in its arguments but . . . the important thing for present purposes is that the Court was not satisfied with them and denied Nicaragua's request to intervene in the maritime delimitation. So reviving these arguments is flattering but they are old clothes already discarded by the Court.

33. Thank you, Mr. President, distinguished Members of the Court, for your kind attention.

34. I would now ask you, Mr. President, to call Mr. Reichler to the podium.

The PRESIDENT: I thank His Excellency Ambassador Carlos José Argüello Gómez for his presentation. And now I shall give the floor to Mr. Paul Reichler.

Mr. REICHLER:

COSTA RICA HAS FAILED TO SATISFY THE REQUIREMENTS OF ARTICLE 62

1. Mr. President, distinguished Members of the Court, good afternoon.

2. Nothing has changed since Nicaragua addressed you on Wednesday.

3. Costa Rica still can't show you how the decision in this case might affect their legal interests, whichever way they want to define those interests.

4. In fact, they all but admit it.

5. It was quite revealing how Mr. Lathrop began his speech yesterday. I am sure this was noted by the Court. But let me remind you exactly what he said:

> "It is not our intent at this stage, nor is it the purpose of these legal arguments, to inform the Court of the full extent of Costa Rica's interest. Informing the Court of those interests will occur in the second stage of the intervention process when — if Costa Rica is permitted to intervene — we will draft a Written Statement and make observations during the arguments on the merits. . . . Costa Rica's Application has the purpose, not of informing, but of requesting the permission of the Court to intervene. It will be during the intervention itself that Costa Rica informs the Court of the full extent of its legal interest."[16]

6. Now, that is quite a remarkable statement. And it is perfectly clear what it means. That is how a talented lawyer tells a court that he has no evidence to offer in support of the ruling he is requesting, but the court should rule in his client's favour anyway, based on a promise that, after the ruling, the Court will be provided with the evidence needed to support it. It's like trying to go to see a Wagner opera without having bought a ticket, by promising that you'll pay for it later, after the grand finale. Not as a lawyer, but as a parent, I've used the same technique. Eat all your broccoli now, Jessica — I would say to my daughter — and maybe later we'll go out for ice cream. Maybe later. She knew better than to accept that deal.

[16] CR 2010/15, p. 10, para. 3 (Lathrop)

[SLIDE 1: PSR 1]

7. Let's take a look at where Costa Rica's counsel ended up yesterday, in their final graphic[17]. Both Nicaragua and Colombia have argued that Costa Rica's real area of interest is the one coloured in cerulean blue, to the east of the delimitation line agreed in the 1977 Treaty between Costa Rica and Colombia. To be sure, Colombia says this is only Costa Rica's area of interest vis-à-vis Colombia itself, and that Costa Rica might have a bigger area of interest vis-à-vis Nicaragua. I will come to that bigger area in a moment.

8. It is apparent from this map — Costa Rica's map — that Nicaragua's boundary claims in this case against Colombia do not "pierce"[18] — that's Mr. Lathrop's word, and it's a good one — do not "pierce" Costa Rica's cerulean blue area of interest. According to Costa Rica's map, this area of interest is only pierced by Colombia's purported boundary claim. But we heard extensively from Colombia's counsel on Wednesday; and they have explained that the arrow at the end of their putative line is directional only, and not intended to indicate extension; and that Colombia intends for its line to respect Costa Rica's interests by stopping short of the putative equidistance line between Costa Rica and Nicaragua[19]. [Build 1.] So this arrow, again borrowing Mr. Lathrop's terminology, is a "pointing" arrow, not a "piercing" one. As such, nobody has any problem with it. Not Costa Rica, nor Colombia, and not Nicaragua. This line, Colombia's line, should the Court adopt it — and Nicaragua certainly believes it should not — does not enter into or affect Costa Rica's area of interest.

9. We come now to Costa Rica's expanded area of interest, which consists of the cerulean blue area plus the purple area adjacent to it. For the sake of this argument, let us, just for the moment, agree with Costa Rica and Colombia that this larger area is where Costa Rica has legal interests vis-à-vis Nicaragua. I spent the first half of my speech on Wednesday demonstrating that Costa Rica has failed to show that the decision in this case will have any effect on this expanded area[20]. Nothing has changed. After two rounds of oral pleadings, Costa Rica has still failed to

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[17]Costa Rica judges' folder, tab 18.

[18]CR 2010/15, p. 14, para. 10 (Lathrop).

[19]CR 2010/14, p. 35, paras. 17-19 (Crawford).

[20]CR 2010/13, pp. 32-36, paras. 14-26 (Reichler).

demonstrate at all — let alone demonstrate convincingly — that this area could be impacted by the Court's decision.

10. Costa Rica's counsel continue to argue that Nicaragua's boundary claims, if adopted by the Court, would impact this area. But how? They make no argument that the enclaves Nicaragua has placed around San Andrés or any other Colombian islands, encroach on their area of interest. And they make no argument that the claim line in Nicaragua's Reply impacts the area. Even if Nicaragua were still claiming the line requested in its Memorial, the arrow at the end serves the same purpose as the one at the end of Colombia's claim line. It shows direction, not extension. It was intended by Nicaragua to respect the agreed and existing boundaries not only of Costa Rica, but also of Panama. It, too, is a pointing arrow, not a piercing one.

[Slide 2: PSR 2]

11. This is from Nicaragua's Reply[21]. It shows Nicaragua's perception of the area of overlapping entitlements between Nicaragua and Colombia, as of the time it was filed. This is a Nicaraguan chart that Costa Rica's counsel and Colombia's counsel chose to ignore. You will note that, in the south and the east, Nicaragua took pains to exclude all areas claimed by Costa Rica and Panama under their respective maritime boundary treaties with Colombia. All treaty lines — between Colombia and Panama in blue, between Panama and Costa Rica in red, and between Costa Rica and Colombia in green — are fully respected in Nicaragua's chart. The argument by counsel this week that Nicaragua does not respect the rights of Costa Rica or other third States, or that it seeks a delimitation in areas claimed by those States, is just plain wrong. As Nicaragua recognized in its Memorial: "the Court lacks competence to make determinations which may affect the claims of third States"[22].

[Slide 3: PSR 3]

12. Until Costa Rica applied to intervene in this case, Nicaragua had no inkling that it claimed to have legal interests in areas beyond the 1977 Treaty line. Colombia appears to be just as surprised by this new claim. In regard to what Costa Rica now calls its "minimum area of legal interest", my very good friend and frequent colleague, Professor Crawford, said on Wednesday:

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[21]RN, Vol. II, figures 6-8.

[22]MN, para. 3.92.

"Nothing like it has been seen before."[23] Now that we have all been introduced to it, the apparent and unintended "piercing" caused by a boundary line Nicaragua is no longer claiming could easily be avoided — as a purely hypothetical matter since this no longer represents Nicaragua's claim — by retracting the directional arrow slightly to the north-east. [Build 2.]

13. In the second round, Costa Rica's counsel made clear that they are no longer arguing that any of these boundary lines claimed, or formerly claimed, by Nicaragua, pierce their expanded area of interest. Instead, they argued that it is Nicaragua's supposed claim to the waters between its Caribbean coast and its requested continental shelf boundary with Colombia that encroaches on Costa Rica's area of interest[24]. So, it is no longer any boundary *line* requested by Nicaragua that causes a problem for Costa Rica; it is the claim to the waters west of the continental shelf boundary line that causes the alleged problem.

14. This argument by Costa Rica's counsel is simply unsustainable. I cite no less an authority than Professor Crawford, who said *this* in the first round: "as we have seen, and it is fundamental to understanding the problem in front of the Court, maritime boundaries are established on a relative, relational basis, by each State *vis-à-vis* each other relevant coastal State"[25].

We agree.

15. And it is exactly in this context that Nicaragua claims that it is entitled to a maritime boundary vis-à-vis *Colombia* at the outer limit of its extended continental shelf, as set forth in the Reply, and as depicted by the easternmost black line on Costa Rica's map. The consequence of the adoption by the Court of this boundary *with Colombia*, is that, as between those two States *only*, the waters on the Nicaraguan, or western side of the boundary would appertain to Nicaragua not Colombia, except for the enclaved areas around Colombia's islands.

16. This boundary between Nicaragua and Colombia would not have any impact on the rights of Costa Rica, Panama or any other third State. It is "relational" — to use Professor Crawford's word — only to Nicaragua and Colombia; it is a boundary *relative* only to

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[23]CR 2010/14, p. 36, para. 21 (Crawford).

[24]CR 2010/15, p. 16, para. 16 *et seq.* (Lathrop).

[25]CR 2010/14, p. 37, para. 23 (Crawford).

Nicaragua and Colombia. Nicaragua has never intended it to be applicable to any third State, as it thought it had made perfectly clear in its written pleadings[26], and certainly emphasized in the first round, when it said that "it makes no claim in these proceedings, *vis-à-vis Costa Rica or any other third State*, of entitlement to the waters west of this proposed boundary line"[27]. Article 59, and the consistent practice of the Court in avoiding running into third States' interests, assure the relational nature of the delimitation in question in this case.

17. Counsel for all three States — Colombia, Costa Rica and Nicaragua — have agreed in these hearings that the Court has found ways in all prior maritime delimitation cases to avoid affecting the interests of third States[28].

18. This is what Mr. Lathrop said — and we agree with him: "[t]he Court, in the past, has been very careful to use only pointing arrows", rather than piercing ones[29]. His concern, he says, is with "the southern limit of Nicaragua's claimed area"[30]. The dispositive answer to this is that Nicaragua is not seeking the establishment of any southern limit in this case, and the Court is not called upon to provide one. Nicaragua is not claiming a boundary with Costa Rica, only with Colombia, and that boundary — all counsel agree — must necessarily follow a north/south direction, establishing limits only in the east for Nicaragua, and the west for Colombia[31]. A boundary with Costa Rica, by contrast, would necessarily follow an east/west direction, separating Nicaragua to the north from Costa Rica to the south. Neither Colombia nor Nicaragua seeks such a line in this case.

19. Costa Rica's counsel admit that the Court is fully capable of deciding this case in a manner that does not affect Costa Rica's legal interests.

> "When the Court delimits the boundary between the Parties somewhere within the disputed area, Costa Rica hopes that the line will end well short of the area in which Costa Rica has an interest of a legal nature. . . . From that endpoint, located

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[26]MN, para. 3.92 ("the only consistent principle to emerge from the case law is the principle that the Court lacks the competence to make determinations which may affect the claims of third States").

[27]CR 2010/13, p. 33, para. 16 (Reichler); emphasis added.

[28]See, e.g., CR 2010/12, pp. 43-44, paras. 41-42 (Lathrop); CR 2010/13, p. 30, para. 8 (Reichler); CR 2010/14, p. 16, para. 10 (Bundy), p. 40, para. 32 (Crawford); CR 2010/15, p. 14, para. 10 (Lathrop).

[29]CR 2010/15, p. 14, para. 10 (Lathrop).

[30]*Ibid.*, p. 16, para. 17 (Lathrop).

[31]CR 2010/12, p. 43, para. 39 (Lathrop); CR 2010/14, p. 33, para. 11 (Crawford).

> safely beyond Costa Rica's area of interest, an arrow could be used to indicate the further continuation of the boundary toward Costa Rica's area."[32]

Precisely! Nicaragua could not agree more. And it is not asking the Court for anything different.

20. So what is the problem? According to Costa Rica: "To be certain that this arrow will point and not pierce, the Court must first be aware of the full extent of that area and only Costa Rica can provide the information."[33] Well, here, on the map, Costa Rica's figure 18, is a graphic depiction of exactly how they defined their area of interest in the application to intervene. Nicaragua agrees that any delimitation line established by the Court should stop well short of the area of interest shown on this map, and terminate in an arrow pointing in the direction of Costa Rica's area. This, we submit, the Court would do in any event. Problem solved. There is no way the decision in this case would affect Costa Rica's legal interests.

21. So at the end of the oral pleadings by Costa Rica we are left with this. None of the boundary lines Nicaragua claims or has claimed have any impact whatsoever on the expanded area in which Costa Rica now claims a legal interest. Nicaragua's claim to maritime areas west of the proposed continental shelf boundary with Colombia is opposable only to Colombia, and not to Costa Rica or any other State. It, too, has no impact on Costa Rica's legal interests. Costa Rica has still failed to show how any of Nicaragua's claims would result in a decision by the Court that could affect its legal interests.

22. What we are ultimately left with, — *all* we are left with — is Mr. Lathrop's so-called "two stages of intervention"[34]. He says we are now only in "the first of two stages in the overall intervention process", and he assures us that "informing the Court of Costa Rica's interests will occur in the second stage of the process"[35]. Pay me now, and I will deliver the goods later, and I am sure you will like them. It would make intervention under Article 62 remarkably easy if a State could intervene first and then show how its interest could be affected by the decision later. The Court will note from the compte rendu that Costa Rica cited no authority in support of this interpretation of the rules.

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[32]CR 2010/15, p. 17, para. 18 (Lathrop).

[33]*Ibid.*

[34]*Ibid.*, p. 10, para. 2 (*Lathrop*).

[35]*Ibid.*, para. 3 (Lathrop).

23. Article 81 appears to say the opposite. It says that an *application* for permission to intervene under the terms of Article 62 of the Statute "*shall* set out . . . *the* interest of a legal nature which the State applying to intervene considers may be affected by the decision . . ."[36]. Article 81 does *not* say that the application can set out only a part of the interest that might be affected, or that the application need not set out the interest at all, leaving it to the discretion of the applicant State to wait until after it has been allowed to intervene to set out its full interest. Colombia's counsel agree that "the burden is on the applicant State to demonstrate that it has an interest of a legal nature that may be affected by a decision in the case within the meaning of Article 62 of the Statute"[37]. Counsel to Costa Rica agree that to satisfy this burden "Costa Rica must demonstrate *convincingly* that it has an interest of a legal nature that may be affected by a decision of this Court in this case."[38] If not now, when?

24. It is not as if Costa Rica needs more time to figure out what its legal interests are. Costa Rica was given the written pleadings in September 2008. They waited until February 2010 to submit their application to intervene. They have had ample time to develop their maritime claims — time enough to develop the claim they presented here, which more than doubles the area of interest that they were claiming for the past 33 years. If they wanted more, the Application was the place to show it.

25. Put simply they do not get another bite at the apple. There is no mythical "second stage"[39] to the intervention process where all truths, until then hidden, are finally revealed.

26. Nicaragua does not contend that, on an application to intervene, the applicant must give an exhaustive description of its argument. But more must be shown than a mere statement of an alleged legal interest, and an apprehension that it could be affected by the decision in the case. In dismissing Nicaragua's application to intervene in the *El Salvador/Honduras* case, the Chamber of the Court said that Article 62 required the applicant "to show *in what way* [its] interest may be

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[36]Rules of Court, Art. 81(2) *(a)*; emphasis added.

[37]CR 2010/14, p. 14, para. 3 (Bundy).

[38]CR 2010/15, p. 10, para. 2 (Lathrop); emphasis added.

[39]*Ibid.*, para. 3 (Lathrop).

affected[40]. And "there needs finally to be *clear identification* of any legal interests that may be affected by the decision on the merits. A general apprehension is not enough."[41] The full Court adopted the same standard for intervention under Article 62 in the most recent decision on this subject, in the *Indonesia/Malaysia* case (*Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Application to Intervene, Judgment, I.C.J. Reports 2001*, p. 598, para. 58).

27. The now generally accepted "*Oil-Platforms* test" may provide a useful analogy.

28. Just as when an applicant State seeks to establish the jurisdiction of the Court, it has to show that "the rights which it invokes in, and seeks to protect by, its request . . . have a sufficient connection with the merits of the case for the purposes of the current proceedings" (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, I.C.J. Reports 2007 (I)*, p. 11, para. 30)[42], similarly, a State applying to intervene should be held to show how the future judgment of the Court might have an impact on its alleged interest. This Costa Rica has not done. Furthermore, as a would-be intervener, Costa Rica must show that its alleged legal interest "may be affected by the decision *in the case*". And, clearly, this case can only be defined in relation to the claims of the Parties. In the *Arrest Warrant* case the Court recalled:

> "the well-established principle that 'it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions' (*Asylum, Judgment, I.C.J. Reports 1950*, p. 402)"[43].

Costa Rica has not shown that there is anything in the submissions of either Party that would call upon the Court to make a decision that might affect its interests.

29. Colombia, despite its effort to do so, is no more able to justify Costa Rica's application to intervene than Costa Rica is. On Wednesday, Colombia's counsel identified no boundary line claimed or formerly claimed by Nicaragua that pierces Costa Rica's alleged area of interest, broadly or narrowly defined. The best they could do was echo Costa Rica's argument that

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[40] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment, I.C.J. Reports 1990*, p. 118, para. 61; emphasis added.

[41] *Ibid*., para. 62; emphasis added.

[42] See, also, *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay*), *Provisional Measures*, separate opinion of Judge Abraham, *I.C.J. Reports 2006*, p. 140, para. 10; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 810, para. 16, and separate opinion of Judge Higgins, *ibid.*, p. 856.

[43] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 18, para. 43; see, also, separate opinion of Judge Koroma, *ibid.*, p. 59, para. 3.

Nicaragua's claim against Colombia in regard to the waters west of Nicaragua's continental shelf boundary were somehow opposable to Costa Rica, which it plainly is not, as I have already explained. For all intents and purposes, Colombia admits that Costa Rica cannot meet the established standard for intervention under Article 62, in the elegant phraseology of Professor Crawford. Here is how he tried to lower the bar so that Costa Rica could be admitted as an intervener in this case:

> "it is sufficient . . . that an interest of a legal nature may be affected by this decision: precisely how, and with what consequences, is not a matter to be decided in terms of the admissibility of an application to intervene but in terms of the merits"[44].

This is plainly inconsistent with the decision on intervention in the *El Salvador/Honduras* case, especially with the language I quoted, and in the *Indonesia/Malaysia* case, which relied on, and quoted approvingly, the same language.

30. Neither the real Article 62 standard reflected in these cases, nor the conveniently lower one advocated by my friend Professor Crawford, is met by Costa Rica here.

31. Costa Rica argues that a decision by the Court, if favourable to Nicaragua, "could well result in the disruption and, possibly, outright elimination of a long-time maritime boundary relationship with Colombia"[45]. But this allegation does not show that Costa Rica's area of legal interests would be affected by the decision. Costa Rica's legal interests are properly defined by its 1977 Treaty with Colombia, regardless of how the Court decides the boundary dispute between Nicaragua and Colombia. That Treaty cannot be vitiated by anything the Court decides in this case. As between Costa Rica and Colombia, it will continue to have whatever legal validity it has now.

32. Furthermore, Nicaragua maintains its assertion that Costa Rica's renunciation of entitlement to areas beyond the agreed boundary line in the 1977 Treaty with Colombia is *erga omnes* as to other States. I would think, Mr. President, that it is hardly necessary to recall that a treaty establishing a boundary gives birth to an objective situation, which becomes in a sense disconnected with the instrument that created it. The well-known dictum in *Libya/Chad* underscores in unambiguous terms this objective character:

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[44]CR 2010/14, p. 41, para. 36 (Crawford).

[45]CR 2010/15, p. 15, para. 12 (Lathrop).

> "A boundary established by treaty thus achieves a permanence which the treaty itself does not necessarily enjoy. The treaty can cease to be in force without in any way affecting the continuance of the boundary. . . . [W]hen a boundary has been the subject of agreement, the continued existence of that boundary is not dependent upon the continuing life of the treaty under which the boundary is agreed." (*Territorial Dispute (Libyan Arab Jamahiriya/Chad), I.C.J. Reports 1994*, p. 37, paras. 72-73.)[46]

33. Nicaragua submits that what is true for land boundaries ought to be equally true for maritime boundaries. In regard to the *erga omnes* character of such treaties, here is how the distinguished Arbitral Tribunal in the *Eritrea/Yemen* case put it:

> "Boundary and territorial treaties made between two parties are *res inter alios acta* vis-à-vis third parties. But this special category of treaties also represents a legal reality which necessarily impinges upon third states, because they have effect *erga omnes* . . ."[47].

34. The import of this is simply that Costa Rica cannot define now its legal interests as extending beyond the area delimited by its 1977 Treaty with Colombia, shown in cerulean blue on Costa Rica's figure 18.

35. Costa Rica argues that if Nicaragua were to prevail,

> "it would create a vacuum in the areas of the south-western Caribbean now under Colombian jurisdiction. Costa Rica is not precluded in any way from filling that vacuum to the fullest extent possible in accordance with principles of international law."[48]

That, presumably, is the maritime area described in its Application to intervene, and depicted in its figure 18, which encompasses the area shown in purple. Even if, *quod non*, Costa Rica could assert legal interests in this expanded area beyond its 1977 Treaty lines, it would make no difference in regard to its failure to meet the standards of Article 62. Even the expanded area of interest now claimed by Costa Rica would not — could not — be affected by the judgment of the Court in this case. Costa Rica has failed to meet its burden of showing that it would. Its Application to intervene must be denied.

36. Thank you Mr. President, distinguished Members of the Court, for your kind attention. It is always a great honour for me to appear before you, and this case is no exception. My only regret

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[46]The Court said further: "The establishment of this boundary is a fact which, from the outset, has had a legal life of its own, independently of the fate of the 1955 Treaty. Once agreed, the boundary stands, for any other approach would vitiate the fundamental principle of the stability of boundaries, the importance of which has been repeatedly emphasized by the Court (*Temple of Preah Vihear, I.C.J. Reports 1962*, p. 34; *Aegean Sea Continental Shelf, I.C.J. Reports 1978*, p. 36)." See, also, Art. 62 (2) *(a)* of the 1969 Vienna Convention on the Law of Treaties; and Arts. 11 and 12 of the 1978 Vienna Convention on Succession of States in respect of Treaties.

[47]*Eritrea/ Yemen, Territorial Sovereignty and Scope of the Dispute*, Award, 9 October 1998, para. 153.

[48]CR 2010/15, p. 16, para. 14 (Lathrop).

is that my dear friend and mentor, Ian Brownlie, was not here in his customary place beside us. In other ways he will always be with us. I ask that you call Ambassador Argüello to the podium for the presentation of Nicaragua's formal Submissions.

The PRESIDENT: I thank Mr. Paul Reichler for his presentation. Now I give the floor to His Excellency Ambassador Carlos José Argüello Gómez, Agent of the Republic of Nicaragua to present the Agent's conclusion.

Mr. ARGÜELLO GÓMEZ: Thank you Mr. President. I shall now read the final conclusions of the Government of the Republic of Nicaragua.

FINAL SUBMISSON

In accordance with Article 60 of the Rules of the Court and having regard to the Application for permission to intervene filed by the Republic of Costa Rica and oral pleadings, the Republic of Nicaragua respectfully submits that the Application filed by the Republic of Costa Rica fails to comply with the requirements established by the Statute and the Rules of the Court, namely, Article 62, and paragraph 2 *(a)* and *(b)* of Article 81, respectively.

Mr. President, to conclude our participation in this stage of the oral proceedings, I wish to express on behalf of the Republic of Nicaragua, of our distinguished counsel, the skilful advisers and counsellors, of all the members of our delegation our deepest appreciation to you, Mr. President, and to each of the distinguished Members of the Court for the attention you have kindly provided to our presentations. May I also offer our thanks, Mr. President, to the Court's Registry and to the team of interpreters and translators who have not only had to listen to and read our presentations but even repeat them. Our recognition is also extended to the delegations of Costa Rica and Colombia and their counsel for their contribution to these proceedings. Finally, I must personally and publicly thank the Nicaraguan team that has given its best in all this endeavour. Thank you, Mr. President.

The PRESIDENT: Thank you, Ambassador Carlos José Argüello Gómez. That concludes the second round of oral argument of Nicaragua.

The Court rose at 4.00 p.m.

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