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Public sitting

held on Friday 15 October 2010, at 4 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 16 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: I now turn to the second round of oral argument of Colombia. I give the floor to the first speaker, Mr. Rodman Bundy, to make his presentation.

Mr. BUNDY:

THE LEGAL INTEREST REPRESENTED BY THE 1977 TREATY AND NICARAGUA'S FAILURE TO TAKE THAT INTEREST INTO ACCOUNT

1. Thank you very much, Mr. President, Members of the Court. The presentations of all three States before you this week have devoted considerable attention to the delimitation agreements that have been concluded in this part of the Caribbean Sea, particularly the 1977 Treaty between Colombia and Costa Rica. That is as it should be. These treaties are important elements of the historical relationships of the States concerned that are relevant to Costa Rica's Application for permission to intervene.

2. From what we heard this afternoon, Nicaragua appears to take the view that these are matters more appropriate for the merits. But I would suggest that our colleagues on the Nicaraguan side of the Bar simply review their own pleadings from Wednesday where all three delimitation agreements in this part of the Caribbean, including the tripoint, were extensively discussed. They are relevant for the merits but they are particularly relevant also at this stage with respect to Costa Rica's Application.

Having listened to Nicaragua's first round presentation on Wednesday, and Costa Rica's rebuttal yesterday, I would like first like to take up a number of points of detail relating to the 1977 Treaty in order to set the record straight. Afterwards, I will turn to the key issue of principle bearing on Costa Rica's Application — the reason why the 1977 Treaty in and of itself constitutes an interest of a legal nature sufficient to justify Costa Rica's request for permission to intervene. Lastly, I will briefly comment on how Nicaragua's claims do not take that interest into account.

3. I will be followed by Professor Crawford and he, in turn, will be followed by Colombia's Agent, who will present Colombia's closing remarks.

4. It is a fact that the western segment of the 1977 Treaty line was stated to proceed in a due north direction along the 82° 14' W meridian until it reaches its delimitation with a third State, which was Nicaragua. Colombia has pointed out that this shows that Costa Rica envisaged that the

eventual tripoint with Nicaragua would be located somewhere along the prolongation of this line to the south-west of the San Andrés archipelago. I realize that yesterday, Mr. Lathrop placed this "notional tripoint" far to the north. In reality, it is likely to be situated much further south as Colombia explained on Wednesday. Indeed, as Costa Rica itself explained earlier this week, on Monday, the 1977 line would be prolonged until it meets its delimitation with a third State, which Costa Rica indentified on Monday as "Nicaragua" [CR 2010/12, p. 34, para. 11]. Nonetheless, regardless of how far south that tripoint is, Colombia accepts that Costa Rica does have an interest of a legal nature in where the eventual tripoint would be situated.

5. In their oral pleadings this week, Colombia and Nicaragua have both noted that the 1977 Treaty line was not based on the 82° meridian, a line that was indeed referred to in the 1928/1930 Treaty, but is not referred to in the 1977 Treaty between Colombia and Costa Rica.

6. Nicaragua, however, went further in its intervention on Wednesday. According to the distinguished Agent of Nicaragua, in 1977 Costa Rica was aware that Nicaragua did not accept the 82° meridian as a line of delimitation (although it does represent the western limit of the archipelago), and that it did not accept that Colombia had sovereignty over all the islands, banks and cays in the south-west Caribbean. To support this contention, the Agent referred on Wednesday to a diplomatic Note that had been sent by Mr. Facio, the then Foreign Minister of Costa Rica, to Nicaragua on 18 October 1972 in which the Minister, Mr. Facio, had stated that his Government "considers that the cays and islets of Quitasueño, Roncador and Serrana are located in the continental shelf of Nicaragua" [CR 2010/13, p. 14, para. 16, (Argüello Gómez)] — those are features not particularly relevant to today's proceedings dealing with the south, but this was the document that the Agent referred to.

7. Unfortunately, that reference does not put the matter in its proper context. In the first place, the Costa Rican Foreign Minister's statement was made at a time when Nicaragua was trying to drum up support in the region for opposition to the 1972 agreement reached between the United States and Colombia; that was the agreement pursuant to which the United States formally renounced its claims to sovereignty to Quitasueño, Roncador and Serrana. As was clear from the 1928/1930 Treaty itself, the dispute over those three islands had been between the United States and Colombia; Nicaragua did not suggest that it had any interest in those islands at the time.

Notwithstanding this, just one month after the United States and Colombia signed the 1972 Treaty resolving that matter, Nicaragua sent Notes to all of the regional States trying to enlist opposition to that agreement, and two such Notes were sent to Costa Rica, and Mr. Facio's Note of October 1972 was in response to those two Notes.

8. Mr. Facio was the same individual who, five years later, signed the 1977 Colombia-Costa Rica treaty on behalf of Costa Rica. As we have seen, that Treaty evidenced Costa Rica's recognition that the southern islands of the San Andrés archipelago, including the Alburquerque cays and others, belonged to Colombia and were entitled to full effect for delimitation purposes. It also evidenced Costa Rica's acceptance of the Colombia-Panama agreement that did the same thing, given that the two agreements met up in the east.

9. Nicaragua, on Wednesday, elected not to refer to another important statement made by Mr. Facio to the Diplomatic Corps in Costa Rica on 22 August 1998 [CMC, Ann. 217], which referred both to Nicaragua's position vis-à-vis the 1928/1930 Treaty and it referred to Colombia and Costa Rica's position with respect to the 1977 Treaty and where sovereignty over the San Andrés archipelago was vested. I would suggest that several passages from Mr. Facio's 1998 address to the Diplomatic Corp are worth recalling.

10. Having expressed the view that Nicaragua's argument that the 1928/1930 Treaty was a nullity was unsustainable, Mr. Facio went on to explain Costa Rica's position with respect to the 1977 Treaty it had entered into with Colombia. These were his words:

> "In view of the above" [that was in view of the nullity of the nullity argument], "there is no reason whatsoever why the Legislative Assembly should not approve the Fernandez-Facio Treaty that duly delimited the boundaries in the Atlantic Ocean between the republics of Colombia and Costa Rica, on the premise that the San Andrés Archipelago belonged to Colombia."

Mr. Facio then continued with respect to Colombia:

> "That republic has no reason to abide by the statement of the Nicaraguan Government declaring the nullity of a valid treaty and, with or without it, Colombia will continue to exercise the sovereignty it has always exercised over the San Andrés Archipelago, for over a century prior to the recognition of that legal fact by the Government of Nicaragua by the 'Bárcenas-Esguerra' Treaty.
>
> Consequently, the Government of Nicaragua cannot reproach us [Costa Rica] with anything since, on signing the Fernandez-Facio Treaty of 1977, we acted in accordance with the existing legal situation that has the San Andrés Archipelago as an integral part of the Colombian territory."

11. From Nicaragua's presentation this week, it appears that Nicaragua in fact does not reproach Costa Rica for concluding the 1977 Treaty. Nor does it reproach Colombia. As was confirmed by Mr. Sergio Ugalde yesterday, Nicaragua did not protest that agreement [CR 2010/15, p. 22, para. 14]. Nor did it protest the Panama-Colombia agreement or the Costa Rica-Panama agreement. And in light of that fact — no Nicaraguan protests over any of those three agreements — it was a little bit surprising to hear earlier this afternoon complaints about what Nicaragua alleges is a practice that is somehow trying to prevent Nicaragua from enjoying its maritime rights. If anything, in these proceedings Nicaragua has relied on the 1977 agreement for purposes of arguing that Costa Rica does not have an interest of a legal nature that may be affected by a decision in the case.

12. Nicaragua cannot approbate and reprobate with respect to the 1977 Treaty at the same time. To the extent that Nicaragua not only relies on the 1977 agreement, but also emphasizes that it has been respected in practice for over 30 years, it must also accept the fact that the Treaty recognized Colombia's sovereignty and gave full effect to the islands. What is actually significant this week is that we have heard for the first time during these proceedings that all three States — Colombia, Costa Rica and Nicaragua — agree that the 1977 Treaty has been complied with and respected by all concerned for over a quarter of a century.

13. This brings me to a second point of detail relating to the 1977 Treaty — the reason for its non-ratification by Costa Rica.

14. As Colombia pointed out on Wednesday, there are numerous statements emanating from senior Costa Rican officials evidencing Costa Rica's intention to ratify the Treaty, the statement of Mr. Facio's that I cited a few minutes ago being just one such example.

15. The Court will recall that, on Monday, counsel for Costa Rica indicated that Costa Rica had abstained from ratifying the Treaty because of Nicaragua's request that Costa Rica not do so until the Nicaragua-Colombia dispute was resolved. On Wednesday, counsel for Nicaragua responded by saying "this is news to Nicaragua" [CR 2010/13, p. 41, para. 41, (Reichler)].

16. In feinting surprise at Costa Rica's explanation, Nicaragua once again appears to have suffered a case of amnesia. I would simply recall that it was Nicaragua itself, in its Written Statement of January 2004 at the Preliminary Objections phase of the case, that referred to the fact

that Costa Rica would not ratify the boundary treaty with Colombia whilst Colombia had not settled its differences with Nicaragua. [WSN, 26 Jan. 2004, p. 64, para. 2.33.] That was "news" to Nicaragua this week?

17. There was also a suggestion made by the distinguished Agent of Nicaragua that *the reason* why Costa Rica agreed to give full effect to Colombia's islands in the 1977 Treaty was due to some kind of horse-trading, some kind of malicious motives, if I can borrow from Mr. Sergio Ugalde's words of yesterday [CR 2010/15, p. 22, para. 14]. Nicaragua's argument was that Costa Rica received full effect for a small island located in the Pacific in its delimitation with Colombia in return for according the Alburquerque Cays belonging to Colombia full effect in the Caribbean [CR 2010/13, p. 15, para. 20, (Argüello Gómez)]. Counsel for Nicaragua put the point somewhat differently. He asserted, that in return for Colombia's blessing of its maritime claims, Costa Rica entered into an agreement with Colombia in which it recognized Colombia's jurisdiction over maritime areas also claimed by Nicaragua [*ibid.*, p. 11, para. 42].

18. Neither of those arguments has any basis in fact. The Colombia-Costa Rica Treaty dealing with the delimitation agreement in the Pacific was signed in 1984 — seven years after the 1977 Treaty. Clearly, both agreements were not simultaneously negotiated as part of some kind of package deal. Each stood on its own merits. Moreover, the Pacific delimitation involved the adoption of a median or equidistance line between two islands — del Coco belonging to Costa Rica and Malpelo belonging to Colombia. Use of equidistance methodology in those circumstances obviously produced an equitable result. In 1977 when the 1977 Treaty was signed, moreover, Nicaragua had no — announced no — maritime claims in this part of the sea.

19. As the Court has heard, equidistance was the underlying basis of delimitation in the Caribbean, not simply in the 1977 Treaty, but also in the 1976 Colombia-Panama Treaty and the 1980 Costa Rica-Panama Treaty. In each case, the concerned States deemed equidistance to produce an equitable solution and Nicaragua voiced no objection.

20. And that really brings me to the heart of the matter — the reason why the 1977 Treaty is relevant to the present proceedings in so far as it embodies an interest of a legal nature concerning Costa Rica — and, I might add, Colombia — that may be affected by a decision in the case.

21. On Monday, Costa Rica's Agent responded to a Nicaraguan argument that had been made in the Written Observations in which it had been suggested that Costa Rica assumes that a decision of the Court in the main case is a reason for Costa Rica not to respect its existing treaties [CR 2010/12, p. 19, para. 18, (Ugalde Álvarez)]. Costa Rica's Agent explained that this was not at all Costa Rica's intention. Yesterday, he repeated the point when he confirmed that Costa Rica has given no reasons to interpret its object as being aimed at ignoring its international obligations, particularly the 1977 Treaty with Colombia [CR 2010/15, p. 28, para. 9 (Ugalde Álvarez)]. To the contrary, Costa Rica's concern as expressed this week is that a decision of the Court could result in the elimination of the *relation de voisinage* presently existing between Colombia and Costa Rica and thus render the 1977 Treaty "without purpose" — something that without any doubt — without any doubt — would give rise to an impact on the legal interests that Costa Rica possesses in this part of the sea [CR 2010/12, p. 19, para. 18 (Ugalde Alvarez); *ibid.*, p. 36, para. 15 (Lathrop)].

22. In his presentation yesterday, Mr. Lathrop developed the point further. He observed that, if Nicaragua's claims in this case were somehow to prevail, it would have an impact on the bilateral and trilateral relationships existing in this area. Colombia would no longer have such relationships with Costa Rica and Panama because they would be eliminated by Nicaragua's presence [CR 2010/15, p. 13, para. 9]. In Costa Rica's point of view, Costa Rica would be subject to the "outright elimination of a long-standing boundary relationship with Colombia" [CR 2010/15, p. 15, para. 12 (Lathrop)]. This, as counsel for Costa Rica stressed, *is not* an outcome that Costa Rica has pursued or that Costa Rica desires [*ibid.*].

23. I would suggest that the concerns expressed by Costa Rica's Agent and by counsel are understandable in the light of Nicaragua's extreme claims which seek to enclave Colombia's islands. While Nicaragua's Written Observations asked the rhetorical question: "Why should a ruling of the Court 'render' their 1977 agreement 'without purpose'" [WON, para. 24], the answer is really straightforward if Nicaragua's delimitation position is deemed to have any merit. The plain fact is that Nicaragua's claims in this case do have the effect of eliminating the coastal relationship between the San Andrés archipelago and Costa Rica's coast — a relationship that has formed the entire predicate for the 1977 Treaty. And that most certainly does affect an interest of a legal nature possessed by Costa Rica. That legal interest is not simply a line, as was suggested

earlier this afternoon, it is an overall legal relationship between two coastal States in a broader context, a coastal relationship. And that is the main reason why Colombia believes that Costa Rica possesses an interest of a legal nature that could be affected by a decision in the case, and consequently why Colombia considers that Costa Rica has satisfied the requirements of Article 62 of the Statute.

24. In 1977, Costa Rica and Colombia proceeded on the basis that they were maritime neighbours and that the entitlements generated by the San Andrés archipelago and the Costa Rican coast required delimitation. And that is what they achieved in their treaty and that is the treaty over which Nicaragua voiced no protest.

25. It should also be recalled that the 1977 Treaty does far more than simply delimit a maritime boundary. The Treaty, if one goes back to its provisions, contains a number of separate provisions relating to co-operation between the two countries for the protection of the living resources at sea, the safeguarding of the marine environment, the encouragement of international navigation in the region, marine scientific research and other matters.

26. The maritime relations of Colombia and Costa Rica have been guided, and governed, by the undertakings laid out in the treaty for over 30 years. That relationship has produced benefits not simply for both of the signatory parties, but for the international community at large with respect to the maintenance of peace and security in the region. And the same can be said about the Costa Rica-Panama boundary agreement and the Colombia-Panama agreements. These, too, were agreed on the basis of international law applying the same equidistance principles, and have unquestionably contributed to stability in the region.

27. And it is, I have say, Nicaragua's claims in the present case that seek to disrupt this situation. The positions graphically illustrated by the map that now appears on the screen, which was figure 1, the very first figure in Nicaragua's Memorial. Although Nicaragua's counsel repeatedly argued that Nicaragua's claims do not trespass on areas appertaining to third States, including Costa Rica, [CR 2010/13, p. 31, para. 11, pp. 32-33, para. 16, p. 32, para. 19 (Reichler)] the map shows otherwise. This map was produced by Nicaragua in order to show what it considered was the area to be delimited between itself and Colombia on an equal division basis.

28. Because the Court will recall that, at the Memorial stage, and even at the Application stage, Nicaragua was arguing for a single maritime boundary to be delimited by means of a mainland-to-mainland median line. Now in its Reply, Nicaragua was forced to abandon that position because, as Colombia had pointed out, and the matter is really quite obvious, there cannot possibly be a single maritime boundary line lying between coasts which are more than 400 nautical miles apart.

29. And one would have thought that as a result of that demonstration, and the abandonment of Nicaragua's claim that it had put forward in the Application and the Memorial, that this delimitation area you see on the screen would suffer the same fate as the mainland-to-mainland median line; in other words, that it too would be abandoned. But that did not happen. Remarkably, Nicaragua has produced almost the same delimitation area in its Reply at figure 3.1.

30. How the figure on the screen can be reconciled with Nicaragua's confident assertion that its claims do not trespass on the actual or potential rights of third States is impossible to understand. Nicaragua's "Delimitation Area" cuts right across the coastal fronts of Costa Rica and Panama and even creeps up to the Panamanian coast in the east. It impinges on the 1977 Colombia-Costa Rica line, as well as on the 1976 Colombia-Panama line and the 1980 Costa Rica-Panama line and the tripoint which Nicaragua's counsel spent so much time on, on Wednesday. It overturns the coastal relationships of those three States that are subject to existing legal instruments, one of those coastal relationships being that of Costa Rica to Colombia as embodied in the 1977 Treaty. Clearly, there are interests of third States that are not only affected, but fundamentally prejudiced, by this depiction of what Nicaragua considers the area to be delimited in the present case.

31. Mr. President and Members of the Court, it is for this reason that Colombia has suggested that, but for the Nicaraguan claims in the main proceedings, we probably would not be here today. As Professor Crawford will presently explain, in these circumstances there are compelling reasons, including compelling policy reasons, why Costa Rica's Application should be considered to have met the requirements of Article 62 of the Statute.

32. Since these are matters that Professor Crawford will now take up, I ask, Mr. President, if you would be good enough to give the floor to him. Thank you to the Court.

The PRESIDENT: I thank Mr. Rodman Bundy for his presentation. I now invite Professor James Crawford to the floor.

Mr. CRAWFORD:

TREATIES IN MARITIME DELIMITATION AND THE ROLE OF INTERVENTION

Introduction

1. Mr. President, Members of the Court, in this brief submission I will make four general points. These concern first, the relative effects of treaties; second, the role of agreement in maritime delimitation; thirdly, the issue of over-claiming as it impacts on intervention; and finally, the proper judicial policy of the Court in dealing with intervention in maritime delimitation — all this in response to Nicaragua's presentations this week.

Nicaragua cannot rely on renunciations of maritime claims made vis-à-vis Colombia

2. Mr. President, one of my enduring memories of this case will be of Mr. Reichler for Nicaragua defending against Costa Rica the validity of the 1977 Treaty between Colombia and Costa Rica[1]. After all, the terms "valid treaty" and "Nicaragua" are not closely associated in the public mind. The Court will recall Nicaragua's challenge to the validity of the Treaty of Limits with Costa Rica before President Cleveland[2]. It will recall the alleged invalidity of the Arbitral Award of the King of Spain[3]. It will recall the challenge to the validity of the 1928-30 Treaty in the present case, on grounds which cast doubt on the validity of all of Nicaragua's treaties for more than a decade[4]. So it was refreshing, momentarily, to see counsel for Nicaragua actually arguing for the validity of a treaty.

3. But only momentarily. For there were several problems with the argument. The first is that the 1977 Treaty is not a treaty with Nicaragua. The second is that Nicaragua had long and

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[1]CR 2010/13, pp. 38-9, paras. 31-33 (Reichler).

[2]*Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua)*, Judgment of 13 July 2009, para. 20.

[3]*Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras* v. *Nicaragua), Judgment, I.C.J. Reports 1960*, p. 192.

[4]*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 857, paras. 74-75.

actively campaigned *against* its ratification by Costa Rica — we are now apparently to understand that this is because it is valid without having been ratified. The third is that Nicaragua actually *wants* the treaty to be invalid, or at any rate inoperative, as a treaty between Colombia and Costa Rica. It simply wants the advantage of the treaty in terms of Costa Rica's renunciation of maritime claims to the north and east of the treaty lines, without the inconvenience of having itself to comply with the treaty in terms of its recognition of Colombian sovereignty over, and the full maritime effect of, the islands and cays of the San Andrés archipelago.

4. On Wednesday, Nicaragua made three arguments for what we may term the *erga omnes* effect of the 1977 Treaty. The first was made by the Agent, who said:

> "The quick way of covering this subject is fairly simple without submitting the Court to a scholarly dissertation. [Something of course, at all cost to be avoided.] An agreement between third States [he said] is a *res inter alios acta* for a State not Party to the agreement in the sense that that agreement cannot be imposed on that third State. But good faith and the conduct subsequent to that treaty can have definite effects *erga omnes*." [CR 2010/13, pp. 15-16, para. 22 (Argüello Gómez).]

The good faith was evidently that of Costa Rica. The subsequent conduct was unspecified, but if it was intended to be conduct of Costa Rica, the conduct entirely favours Colombia. If it was intended to refer to conduct of Nicaragua, curiously that too favours Colombia; the 1977 Treaty was not protested, and Nicaragua has been conspicuous by its total absence from the areas affected by the 1977 Treaty.

5. Now a treaty is to be performed in good faith, but that does not convert bilateral commitments into multilateral legitimate expectations. I believe that you, Mr. President, are a man of your word, and that you will certainly keep the promise that you made to the Vice-President yesterday. But that does not make me a beneficiary of your promise, or give me any right whatever to your performance of it. There is no commitment *erga omnes*.

6. Similarly the performance of the maritime delimitation treaty is in principle a bilateral performance; it is the parties to the treaty who can be said to perform it. Of course, if pursuant to a treaty I assert jurisdiction over third parties such as foreign fishing vessels, that can produce further results in terms of consolidating my jurisdiction as the relevant coastal State over the EEZ thereby recognized. But Nicaragua has never exercised any jurisdiction over the areas it now claims under the Colombian treaties with third States, nor is it disposed to recognize the *erga omnes* effects that

the exercise of jurisdiction by Colombia will have had. Its reliance on those treaties is factitious and opportunistic.

7. Then there was Mr. Reichler, who accepted the *pacta tertiis* principle but sought to qualify it as follows:

> "Our point is a different one. It is that the Treaty and Costa Rica's consistent conduct thereunder demonstrate what Costa Rica's perception of its own legal interests truly are. Costa Rica cannot simply invent new legal interests to suit its present purposes, and particularly in order to intervene in these proceedings under Article 62. After 33 years of maintaining a consistent and public view of its legal interests, and conducting itself in strict accordance with that view in all respects, the Court should treat with some caution Costa Rica's sudden effort to throw the entire historical and geographical record out the window in order to claim a new, expanded set of interests in regard to Nicaragua alone." [CR 2010/13, p. 40, para. 38.]

8. But a State which performs a bilateral treaty is not thereby making beneficiaries of the world, still less of third States which later form designs to subvert the treaty. And it is worthwhile stressing that, at the time the 1977 Treaty was concluded, Nicaragua had made no claims in the south, only to Quitasueño, Roncador and Serrana. The thought that it was, or could become, an undisclosed beneficiary of a boundary treaty between two other States affecting areas to which at the time it made no claim is completely unreal.

9. Then, finally and rather desperately, Mr. Reichler complained of discriminatory conduct by Costa Rica [CR 2010/13, pp. 40-41, para. 40], as if the delimitation provisions of UNCLOS came with a most-favoured-nation clause attached.

10. The consequences of these conclusions for Costa Rica's application are clear. It accepts, expressly now, that it is obliged by the 1977 Treaty vis-à-vis Colombia, and that its claims are correspondingly limited to the areas defined by that Treaty. I refer to statements made yesterday [see CR 2010/15, p. 14, para. 11 (Lathrop); *ibid.*, p. 28, para. 9 (Ugalde)]. But that position obtains only as between the parties to the 1977 Treaty, which Nicaragua is not. Costa Rica is not limited, vis-à-vis Nicaragua, to the 1977 Treaty lines, though it is so limited vis-à-vis Colombia.

The role of agreement in maritime delimitation

11. Mr. President, Members of the Court, I turn to my second point — the cardinal rule of agreement in maritime delimitation. The cardinal rule of maritime delimitation — 65 years after

the Truman Proclamation — is no different from what it was articulated as being when that Proclamation was made. And I quote:

> "In cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles."[5]

In the common language of Articles 74 and 83 of the 1982 Convention, "delimitation . . . between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law . . . in order to achieve an equitable solution".

12. On Wednesday the Agent of Colombia traced the process of treaty making in the western Caribbean. A remarkable series of agreements was concluded in the years between 1976 (Panama) and 1993 (Jamaica)[6]. As we have seen, Nicaragua's general response was silence, even though, from 1980 it maintained a claim to the archipelago as a whole with all its features. These treaties have been actively and extensively implemented as between the parties. For the most part there has been no Nicaraguan protest over the treaties.

13. Yet now it is suggested that not merely is Colombia to be denied all rights and benefits of this network of agreements — this of course is a matter going to the merits — but that the other States parties to these treaties, specifically Costa Rica, have no legal interest — no interest of a legal nature, in terms of Article 62 — in their continuation. Articles 74 and 83 of the 1982 Convention lay emphasis on agreements publically concluded as a modality of maritime boundary making, yet if Nicaragua is right, all those agreements are fragile and provisional in the face of a radically inconsistent claim by one coastal State. In the circumstances it is Nicaragua, not Costa Rica, which makes what counsel for Nicaragua described as a "sudden effort to throw the entire historical and geographical record out the window in order to claim a new, expanded set of interests" [CR 2010/13, p. 40, para. 38 (Reichler)].

Nicaragua's fluctuating claims

14. Mr. President, Members of the Court, on Wednesday I showed the drastic changes to Nicaragua's maritime claim, as its itinerant claim line steadily headed east, enabling it to say to the

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[5]For text, see (1946) 40 *AJIL* Supp. 45.

[6]See CR 2010/14, p. 11, paras. 7-9 (Londoño).

Court, as Mr. Reichler said again today, that its claim line was so far way from Costa Rica as to exclude the possibility of any legal interest to intervene. Yet it also plays hide-and-seek with the Court; it seeks a claim line far away, but it hides the claim that that claim line bounds. Mr. Bundy showed you this afternoon the two graphics of Nicaragua's relevant area, each as extreme as the other[7]. I note that Nicaragua showed you neither of them, and when charged with impacting on third States, it took refuge in a definitional disclaimer, as a spotted child in hide-and-seek might take refuge in a tree: of course, it said, we make no lateral claim against Costa Rica, we promise we do not![8]

15. Nicaragua's response to Costa Rica's claim of overlapping potential maritime entitlements is to assert that the Nicaraguan maps from which Costa Rica derives Nicaragua's "potential EEZ entitlement" "do not imply, under any possible reading, a claim to the entirety of the areas thus roughly described"[9].

16. To this there are several points to be made. The *first* is one of simple denial: one "possible reading" of these Nicaraguan maps, in a pleading verified by Nicaragua's Agent, is that the areas depicted as arguably Nicaraguan are in fact claimed by Nicaragua. If it does not claim them, then:

(a) Why does it not say so now and tell us what it does claim, instead of making negative and equivocal statements ("do not imply . . . a claim to the entirety of the areas")? It is now nearly nine years since Nicaragua's Application, and still it is coy as to the actual extent of its maritime claims.

(b) And secondly, why does it depict in its pleadings areas as relevant on its side of its claim line, which it apparently does not claim, more especially when its initial claim was in effect to an equal share of that area?

17. A further point by way of rejoinder is that to say an area is "roughly described" is no excuse. "Roughly described" in a Reply? The function of a *Memorial* is to set out with precision

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[7]MN, fig. 1; RN, fig. 3.1.

[8]CR 2010/13, p. 31, para. 11 (Reichler).

[9]WON, para 32.

the extent and rationale for a claim, but Nicaragua's *Reply* fails to do so. In fact, the Nicaraguan claim apparently gets rougher as the case proceeds.

Issues of judicial policy in relation to intervention under Article 62

18. Mr. President, Members of the Court, I turn finally, and with great respect, to the basic question of judicial policy presented in this case: what is the role of intervention in maritime delimitation?

19. The first point is that Article 62 coexists in the Statute with Articles 59 and 63 and that each of these has its own role to play. Colombia is second to none in its emphasis on the importance of Article 59. But the fact that the Court, acting in accordance with Article 59, will protect a third party which does not intervene — as Sao Tome and Principe did not intervene in *Cameroon/Nigeria* — is no reason to discourage States which do comply with the requirements of Article 62 of the Statute.

20. In this regard I note the tendency of Nicaragua to define the requirements for intervention in terms which imply that these requirements can never be satisfied. Thus:

(a) If an applicant does not give enough detail, it has not demonstrated a legal interest to justify intervention; if it gives a lot of detail, it is told that it has accomplished its purpose and the intervention is without object[10].

(b) It is said that this Court *cannot* in the nature of things affect a third State in a maritime delimitation[11]. That, in effect, is to read Article 59 as trumping Article 62 — yet there is no textual basis for this at all. The Nicaraguan Agent inveighs against what he calls universal intervention[12], yet Nicaragua commits the opposite fallacy, exclusion of intervention by definition. The truth lies in the middle, permission to intervene in appropriate cases.

21. In *El Salvador/Honduras*, Nicaragua made the mistake of imprecision in the identification of interest. The once and future Agent, Mr. Argüello Gómez, then said "we have considered it unnecessary to allege or claim a specific right inside the Gulf"; the whole passage is

[10]CR 2010/13, p. 31, para. 10 (Reichler).

[11]CR 2010/13, p. 30, para. 8 (Reichler).

[12]CR 2010/13, p. 12, para. 9 (Arguello).

cited by the Chamber at paragraph 60 of the Judgment[13], and the Chamber went on to say that "[a] general apprehension is not enough" (*I.C.J. Reports 1990*, p. 118, para. 62). Yet it is as well to record that the trend of professional opinion is with Judge Oda's separate opinion in that case[14]. It also rather favours the dissenters in the Italian intervention, one is tempted to call it a free ride, for Italy, in *Libya/Malta*[15]. In any event, that was a long time ago.

22. Among more recent cases, Professor Remiro explained Equatorial Guinea's permission to intervene in *Cameroon/Nigeria* as dependent on consent of the parties, and as embodied in a mere order[16]. But it is reasonable to infer — I put it no higher — that the parties were advised in that case that the requirements of Article 62 were met; the Court certainly thought it did and it is up to the Court to decide, whether it decides in a judgment or an order is immaterial.

23. The Philippines failure to get leave to intervene in *Ligitan and Sipadan* was, as you may recall, due to an unfortunate excess of information; because counsel for the Philippines blithely made it clear that they did not claim the two islands in dispute, they claimed more or less the rest of the coastline of Sipadan but not those two islands. So that collateral attack in that case failed[17].

24. Now, of course, each case depends on its own facts; as Rosenne of blessed memory states: there is no general or unfettered discretion[18]. But it is respectfully suggested that a State which does demonstrate an interest of a legal nature in the subject of the dispute, which is acting for a legitimate purpose and which does decide to intervene should be permitted to do so, if necessary for specified purposes limited to the interest shown.

Mr. President, Members of the Court, this concludes my presentation. Mr. President, I would ask you to call on the Agent, Ambassador Londoño, to conclude Colombia's presentation.

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[13] *I.C.J. Reports 1990*, p. 117, para. 60.

[14] *Ibid.*, p. 140.

[15] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene, Judgment, I.C.J. Reports 1984*, dissenting opinions, p. 71 (Vice-President Sette Camara), p. 90 (Oda), p. 115 (Ago), p. 131 (Schwebel), p. 148 (Jennings).

[16] CR 2010/13, p. 25, para. 22 (Remiro Brotons).

[17] *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Application to Intervene, Judgment, I.C.J. Reports 2001*, p. 603, paras. 81-83, and see declaration of Judge Kooijmans at p. 626.

[18] Shabtai Rosenne, *The Law and Practice of the International Court, 1920-2005*, Vol. III, 2006, p. 1452.

The PRESIDENT: I thank Professor James Crawford for his presentation. I now invite His Excellency Ambassador Mr. Julio Londoño Paredes, Agent of Colombia, to take the floor.

Mr. LONDOÑO:

1. Thank you, Mr. President. Mr. President, distinguished Judges, in its Application of 26 February 2010, as well as during these hearings, Costa Rica has requested the Court for permission to intervene in the case concerning *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, in order to inform the Court of its interests and rights that may be affected by a decision of the Court in the instant case, pursuant to Article 62 of the Statute of the Court.

2. Colombia's position in that regard was stated in the Written Observations submitted to the Court on 26 May 2010, and has been elaborated during these present hearings.

3. The essential function of international treaties, particularly those concerning maritime and land delimitations between States, is that of preserving peace and coexistence between the Parties, as well as promoting co-operation and good neighbourliness. That is probably what Costa Rica and Colombia have been doing for 33 years, with the 1977 Treaty.

4. In Colombia's view Costa Rica possesses an interest of a legal nature that may be affected by a decision in this case. The reasons for this have been explained by counsel for Colombia. Let me simply make some brief general points.

5. The 1977 Treaty between Colombia and Costa Rica, in addition to establishing their maritime boundary, also refers to their co-operation in the protection of resources; the preservation of highly migrant species, taking into account the recommendations of appropriate international organizations; the promotion of the exploitation and use of living resources through the exchange of scientific and technical information and the formation of mixed enterprises; the application of measures to impede, reduce and control any pollution of the marine environment; and the promotion of the development of international navigation in their respective areas.

6. The maritime delimitation treaties concluded by Colombia and the rest of the agreements concluded by other States in the Caribbean have been the result of detailed negotiation processes, applying the equidistance method and recognizing full effect to islands.

7. Faithful observance of international treaties concluded by Colombia and other States in the Caribbean ensure the region's peace and stability. This compliance supports good neighbourliness and co-operation between States.

Conclusions

8. Mr. President, in light of the considerations stated during these proceedings, my Government wishes to reiterate what it stated in the Written Observations it submitted to the Court, to the effect that, in Colombia's view, Costa Rica has satisfied the requirements of Article 62 of the Statute and, consequently, that Colombia does not object to Costa Rica's request for permission to intervene in the present case as a non-party.

Mr. President, I wish to express, on my behalf and that of all the Colombian delegation, our deepest appreciation to you, and to each of the distinguished judges, for the attention you have kindly given to our presentation.

May I also offer our thanks to the Court's Registrar, his staff and to the interpreters.

Thank you, Mr. President.

The PRESIDENT: I thank you, Your Excellency Ambassador Julio Londoño Paredes, the Agent of Colombia, for his conclusions. That concludes the second round of oral argument of Colombia. I shall now give the floor to Judges Bennouna and Donoghue who have questions to the Parties and Costa Rica. Judge Bennouna first, if you please.

Judge BENNOUNA : Je vous remercie, Monsieur le président. Ma question s'adresse au Costa Rica.

Le Costa Rica a indiqué à la Cour qu'il n'a toujours pas ratifié le traité de délimitation maritime dans la mer des Caraïbes, qu'il a signé avec la Colombie, le 17 mars 1977, «dans le souci de conserver de bonnes relations avec le Nicaragua, lequel n'a pas cessé de lui demander de n'en rien faire tant que le différend n'a pas été réglé avec la Colombie» (traduction du CR 2010/12, du 11 octobre 2010, p. 14, par. 8, M. Brenes).

Est-ce que le Costa Rica a différé la ratification du traité du 17 mars 1977, en attente du jugement de la Cour au fond, dans l'affaire pendante devant elle, opposant le Nicaragua à la Colombie ?

En d'autres termes, est-ce que le Costa Rica attend le jugement de la Cour au fond pour clarifier certaines hypothèses, mentionnées dans le même compte rendu (traduction du CR 2010/12, p. 28, par. 13, M. Lathrop), hypothèses à partir desquelles le traité de 1977 aurait été négocié et signé ?

I am now going to put my question addressed to Costa Rica in English.

Costa Rica has indicated to the Court that it has still not ratified the maritime delimitation treaty in the Caribbean Sea, which it signed with Colombia on 17 March 1977, "in consideration of Nicaragua's continuous requests that Costa Rica not ratify the treaty until the dispute with Colombia has been resolved . . . [and] acting out of good neighbourliness" (CR 2010/12, p. 22, para. 8 (Brenes)).

Has Costa Rica postponed ratification of the Treaty of 17 March 1977 pending the Court's judgment on the merits, in the case before it, between Nicaragua and Colombia?

In other words, is Costa Rica waiting for the Court's judgment on the merits for clarification of certain notions mentioned in the same verbatim record (CR 2010/12, p. 35, para. 13 (Lathrop)), on the basis of which the 1977 Treaty was supposedly negotiated and signed?

Thank you, Mr. President.

The PRESIDENT: Thank you, Judge Bennouna. Now I invite Judge Donoghue to ask her question. Judge Donoghue, you have the floor.

Judge DONOGHUE: Thank you, Mr. President. My question is addressed to Nicaragua, and it is as follows:

Nicaragua has made written and oral submissions to the Court regarding Costa Rica's Application to intervene. It has raised concerns about Costa Rica's Application but its submissions, with respect to this particular Application, do not expressly state that Nicaragua opposes the granting of permission to intervene. Therefore, the question is: Does Nicaragua oppose intervention by Costa Rica? Thank you, Mr. President.

The PRESIDENT: Thank you, Judge Donoghue. Now the written text of these questions will be sent to the Parties and Costa Rica as soon as possible. The Parties and Costa Rica are invited to provide their written replies to the questions no later than Friday 22 October 2010. I would add that any comments a Party or Costa Rica may wish to make in accordance with Article 72 of the Rules of Court on the replies by the others, if there are any, must be submitted by Friday 29 October 2010.

That brings us to the end of this week's hearings devoted to the oral argument of Costa Rica and of the Parties, namely, Nicaragua and Colombia. The Court has taken note of the conclusions submitted by Costa Rica and the Parties. I should like thank the Agents, counsel and advocates for their statements. In accordance with practice, I shall request the Agents of the Parties and the Agent of Costa Rica to remain at the Court's disposal to provide any additional information it may require. With this proviso, I now declare closed the oral proceedings on the Application of Costa Rica for permission to intervene in the case concerning the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*. The Court will now retire for deliberation. The Agents of the Parties and the Agent of Costa Rica will be advised in due course of the date on which the Court will deliver its decision. As the Court has no other business before it today, the sitting is closed.

The Court rose at 5 p.m.

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