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**Cour internationale
de Justice**

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**International Court
of Justice**

THE HAGUE

ANNÉE 2010

Audience publique

tenue le jeudi 21 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 Honduras à fin d'intervention

COMPTE RENDU

YEAR 2010

Public sitting

held on Thursday 21 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 Honduras for permission to intervene

VERBATIM RECORD

Présents : M. Owada, président

MM. Koroma

Al-Khasawneh

Simma

Abraham

Keith

Sepúlveda-Amor

Bennouna

Cançado Trindade

Yusuf

Mmes Xue

Donoghue, juges

MM. Cot

Gaja, juges *ad hoc*

M. Couvreur, greffier

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

Registrar Couvreur

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comme agent et conseil ;

S. Exc. M. Samuel Santos,

ministre des affaires étrangères du Nicaragua ;

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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 the Republic of Honduras. Before giving the floor to Honduras, I note that Vice-President Tomka, for reasons which have been explained to me, will be unable to be present at the sitting of the Court today and tomorrow. I shall now give the floor to Sir Michael Wood to make his presentation.

Sir Michael WOOD:

**HONDURAS HAS SATISFIED THE REQUIREMENTS FOR INTERVENTION AS A PARTY
AND AS A NON-PARTY**

1. Thank you very much, Mr. President. Mr. President, Members of the Court, our purpose today is to respond to what our colleagues from Nicaragua and Colombia said in the first round. We shall not attempt to reply on all points, in particular not those we already covered in detail in the first round. But we shall seek to identify points of agreement, and then deal with some of the more significant points that still appear to divide the Parties.
2. It cannot be overemphasized that we are at the permission stage. It is not the time for any of us to get deep into the merits of Honduras's intervention, still less the merits of the main proceedings between Nicaragua and Colombia.
3. The structure of our statements in this second round will be as follows.
4. I shall address what Nicaragua and Colombia said about the three matters referred to in Article 81 of the Rules of Court: the interest of a legal nature; the object of the intervention; and jurisdiction.
5. Professor Boisson de Chazournes will then respond to what was said about the law and practice of intervention, and the legal considerations that govern this institution.
6. Finally, the Agent will make some concluding remarks and read out our formal submissions.
7. Mr. President, there does seem to be a degree of common ground among all three States on some important points.

8. First, there seems to be agreement that Article 62 of the Statute covers both intervention as a party and intervention as a non-party. Nicaragua and Colombia have each been explicit on this point¹.

9. Second, it does not seem to be questioned that, for each form of intervention, the key requirement is that the intervening State considers that it has an interest or interests of a legal nature that may be affected by the decision of the Court in the main case².

10. Third, the precise object of each of Honduras's two separate requests to intervene, as a party and as a non-party, seems to be well understood³.

11. Fourth, it is clear that, there is a jurisdictional link among the three States under Article XXXI of the Pact of Bogotá.

12. As we made clear during the first round, since Honduras has demonstrated that the necessary conditions are met, the Court should permit intervention, and in the form chosen by the State seeking to intervene. To refer to Article 62 as "discretionary intervention", as some authors do, is in our view misleading⁴.

13. Mr. President, the first of the three matters referred to in Article 81 of the Rules, the interest of a legal nature, is the same both for intervention as a party, and for intervention as a non-party. Yesterday Professor Crawford wondered aloud whether there might be differences depending on the form of intervention⁵. We do not think there are. No distinction is made in Article 62 of the Statute, or Article 81 of the Rules, or in the case law.

14. The second matter, the precise object of the intervention, by definition varies depending on whether the State seeks to intervene as a party — or as a non-party.

15. And the third requirement, jurisdiction, is chiefly relevant to intervention as a party.

¹ Written Observations of Nicaragua (WON), para. 32; CR 2010/19, p. 14, para. 5 (Pellet).

² CR 2010/19, pp. 14-15, paras. 6-7 (Pellet); CR 2010/20, pp. 16-17, para. 9 (Bundy).

³ CR 2010/20, pp. 14-15, para. 3 (Bundy); CR 2010/19, p. 13, paras. 2-3 (Pellet).

⁴ See, for example, S. Rosenne, *The Law and Practice of the International Court 1920-2005*, Vol. III, p. 1440.

⁵ CR 2010/20, p. 18, para. 43 (Crawford).

(i) Interest of a legal nature

16. I turn then to the interest of a legal nature. I set out on Monday the interests of a legal nature that Honduras considers may be affected by the Court's decision in the main case. In reply, counsel for Nicaragua reverted, and at some length, to their *res judicata Leitmotif*. But he said nothing particularly new⁶. He did, however, introduce what is perhaps a new thought by describing part of the reasoning of your Judgment as “*très res judicata*”⁷, “very *res judicata*”. I must say, I am not convinced that there can be degrees of *res judicata*.

17. I need not really say much in response to Professor Pellet, since he did not seek to engage with our arguments. Indeed, he avoided altogether dealing with the important points we made concerning the actual wording of the *dispositif*, including the inclusion of the words “until it reaches the area where” [“la zone”], dismissing it all as merely playing with words⁸. I would recall that the operative part (*dispositif*) of your Judgment, at paragraph 321 (3), provides that “From point F, [the boundary line] shall continue along the line having the azimuth of 70° 14' 41.25” until it reaches the area where the rights of third States may be affected.” (*I.C.J. Reports 2007 (II)*, p. 763.) Professor Pellet conveniently omitted to address the words “until it reaches the area where”; just as he conveniently omitted to address the words “*may* be affected”.

18. In addition, Professor Pellet expressly refrained from examining in any detail the earlier paragraphs of the Judgment on which Nicaragua relied in its Written Observations. One can only assume that this was because, as I explained on Monday, they do not say what Nicaragua says they say. One thing he did do, however, was to have a go at redrafting paragraph 316 of the Judgment to suit his argument, changing the tense from the conditional to the present — “*serait*” to “*est*”⁹, “*would do*” to “*does*”. And we are grateful to him for reading out a passage from the *Anglo-French Continental Shelf* decision¹⁰, in which the Court of Arbitration considered “it to be well settled that in international proceedings the authority of *res judicata*, that is the binding force

⁶CR 2010/19, pp. 15-17, paras. 8-33 (Pellet).

⁷*Ibid.*, p. 20, para. 17 (Pellet).

⁸*Ibid.*, p. 18, para. 15 (Pellet).

⁹*Ibid.*, p. 21, para. 19 (2) (Pellet).

¹⁰*Ibid.*, p. 22, para. 21 (Pellet).

of the decision, *attaches in principle only to the provisions of its dispositif and not to its reasoning*”¹¹ It goes on, of course, to say:

“In the opinion of the Court, it is equally clear that, having regard to the close links that exist between the reasoning of a decision and the provisions of its *dispositif*, recourse may in principle be had to the reasoning in order to elucidate the meaning and the scope of the *dispositif*.¹²”

We would agree with that.

19. We heard yesterday in the clearest possible terms, from the representatives of Colombia, that the azimuth “reaches the area where the rights of third States may be affected” at the point where it touches the 82nd parallel. After quoting the wording of the *dispositif*—“until it reaches the area where the rights of third States may be affected”—the Agent of Colombia said “Colombia is such a third State and does have rights in the area situated immediately east of the 82nd meridian”¹³.

20. Since it is a crucial issue, which has been contested by Nicaragua, I must explain again what Honduras considers to be its interests of a legal nature that may be affected by the decision in the present case, and why indeed our intervention “actually relates to the subject-matter of the pending proceedings”¹⁴. In brief, we consider that, in so far as Nicaragua’s claimed “delimitation area” overlaps the rectangle described in our Application¹⁴, our rights in that area recognized under the 1986 Treaty with Colombia may be affected. Since the “delimitation area” which Nicaragua is inviting the Court to delimit includes a substantial part of the rectangle, it is plain that Honduras has interests of a legal nature that may be affected by the Court’s decision.

21. Mr. President, could I invite the Members of the Court to look at the sketch-map marked MW6, which I think should be at tab 8 in your folders? It was handed in this morning. This sketch-map shows, the area in pink — the “*zona rosa*” —, which Nicaragua now considers to be the area to be delimited in the present proceedings. This, of course, is the area shown in Figure 3.1 in Nicaragua’s Reply¹⁵, with which you are already well familiar.

¹¹ Decision of 14 March 1978: United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XVIII p. 295, para. 28; emphasis added.

¹²CR 2010/20, p. 11, para. 7 (Londoño); see, also, *ibid.*, p. 21, para. 27 (Bundy).

¹³*Haya de la Torre (Colombia/Peru), Judgment, I.C.J. Reports 1951*, p. 76.

¹⁴Application for permission to intervene by the Government of Honduras, para. 17.

¹⁵Reply of Nicaragua (RN), 3.7, and Part II, Fig. 3.1 (reproduced at tab 4 in the folders).

22. The map also shows, as a shaded rectangle, the area which Honduras indicated, in its Application, was the area in which its interests of a legal nature were at stake in the present proceedings. As the Application made clear, and as counsel for Colombia rightly surmised¹⁶, the description of this rectangle in the Application was only approximate. It is certainly not our intention to cast doubt on the 1986 Treaty line. As you will see from the sketch-map, there is a considerable area of overlap, some 17,700 sq km in fact, between Nicaragua's claimed "delimitation area" and the rectangle described in our Application.

23. The map also shows Colombia's latest median line claim, with an arrow touching the southern limit of the shaded rectangle, the 15th parallel, which is of course the 1986 Treaty line, and which confirms Colombia's interests in the area east of the 82nd meridian. It also shows, and I hope Professor Pellet is pleased with this, the delimitation line determined by the Court in the *dispositif* of the 2007 Judgment, which was illustrated on sketch-maps Nos. 7 and 8 — sketch-maps included in the Judgment and "prepared for illustrative purposes only". Counsel for Nicaragua tried to score a point yesterday by referring to the fact that on Monday we only produced sketch-map No. 8, and not sketch-map No. 7¹⁷. We could have produced either — they are of course essentially the same — but we chose No. 8 since it is the one that includes an arrow. I note in passing that Nicaragua itself saw fit to annex sketch-map No. 7, twice, and not sketch-map No. 8, to its Written Observations¹⁸. Apparently not satisfied with the Court's sketch-map No. 7, yesterday Nicaragua sought to improve it by adding an arrow, a flashing arrow no less, at the eastern end of the dotted line. But, Mr. President, I will avoid the temptation to quibble about Nicaragua's maps, as they sought to do at very considerable length about ours¹⁹. I am confident that Members of the Court will not be misled by the sketches that Nicaragua has prepared, even though they were projected on large screens around the Great Hall of Justice. A last word on maps: yesterday Professor Pellet cited Napoleon²⁰, with evident enthusiasm. What in fact the Emperor

¹⁶CR 2010/20, p. 23, para. 32 (Bundy).

¹⁷CR 2010/19, p. 24, paras. 25-26 (Pellet).

¹⁸WON, Anns. A and B.

¹⁹CR 2010.19, pp. 24-27, paras. 24-33 (Pellet).

²⁰*Ibid.*, p. 28, para. 38 (Pellet).

actually seems to have said was perhaps even more apt — as far as I can tell he said “*Un bon croquis vaut mieux qu’un long discours*” — “A good sketch is better than a long speech.”

24. Mr. President, Members of the Court, I now turn to the 1986 Treaty between Honduras and Colombia, and its relevance to our interests of a legal nature in the present case. Nicaragua, in its Written Observations and orally, claimed that the Treaty was amply discussed in the 2007 Judgment²¹. But in reality, in its 2007 Judgment, the Court did not find it necessary to discuss the Treaty at length since it underscored that the Judgment would not prejudice the Treaty in any way. Nor could it, as Colombia was not a party to the proceedings, and thus the Court refrained from passing judgment on its treaty rights and obligations. Such an exercise would have been futile, as the representatives of Colombia said yesterday, as the Judgment would not have any binding force on Colombia, under Article 59 of the Statute²².

25. Nicaragua further contends that the 2007 Judgment rendered the 1986 Treaty invalid, and no longer in force²³. As I have just made clear, the Court did no such thing. It is Nicaragua — and Nicaragua alone — that has purported unilaterally to strip the Treaty of its validity, as if the Treaty were its own to dispose of as it likes. Colombia, on the other hand, has made clear that it respects the 1986 Treaty, as does Honduras²⁴. The Treaty, as you will recall, allocates the area north of the 15th parallel, east of the 82nd meridian, and west of the eastern arm of the 1986 Treaty line to Honduras, while providing for the cross-border exploitation of resource deposits. As we have seen, some of the areas allocated to Honduras and Colombia under the Treaty fall within Nicaragua’s claimed “delimitation area”.

26. Hence, for the Court to determine the allocation of the “delimitation area” proposed by Nicaragua, it would inevitably have to decide whether the 1986 Treaty is in force and whether it does or does not accord Colombia rights in the area in dispute between Colombia and Nicaragua. It is in the present case that the status and substance of the 1986 Treaty are at stake. This point was made by the representatives of Colombia yesterday²⁵. Yet, the Court could only determine the

²¹WON, para. 17.

²²CR 2010/20, p. 13, para. 17 (Londoño); *ibid.*, p. 45, para. 29 (Crawford); *ibid.*, p. 24, para. 35 (Bundy).

²³CR 2010/19, p. 31, para. 46 (Pellet).

²⁴Written Observations of Colombia, sixth para.

²⁵CR 2010/20, p. 11, para. 8 (Londoño); *ibid.*, p. 24, para. 38 (Bundy).

status and substance of the Treaty between Honduras and Colombia, relating to an area that the Treaty allocates to Honduras, if Honduras were a party to the proceedings. It is thus clear that our intervention “actually relates to the subject-matter of the pending proceedings”²⁶.

27. It is important to note that the Court may not be able to avoid determining the effect of the 1986 Treaty at the merits phase of the present case, as it was able to do in 2007. This is because of an important difference between the two cases. In 2007, the area to be delimited was not allocated under the 1986 Treaty to an absent third party²⁷. In the present case, however, part of the delimitation area proposed by Nicaragua is allocated to a third party, to Honduras, which is currently not a party to the case. As things stand, the Court would have to refrain from delimiting the area covered by the Treaty in which the rights of Honduras may be affected. Yet Honduras wishes to intervene as a party, and is willing to accept the binding decision of the Court on the area covered by the 1986 Treaty, to which — as was made clear yesterday — all three States claim title.

28. To this let me add, Mr. President, that even if Nicaragua were correct in asserting that the Treaty cannot stand and is without force at present, it is the Court that must make such a decision, not a State which is not even a party to the Treaty. For the Court to consider this question, both Honduras and Colombia must be parties to the proceedings.

29. One final point on the 1986 Treaty, Mr. President. I cannot refrain from pointing out that, although it claims that the 1986 Treaty is invalid and without force, Nicaragua has not hesitated to rely upon it when it found the Treaty served its objectives. Thus, it relies on the Treaty when it claims that the Treaty demonstrates the absence of Colombian rights north of the 15th parallel²⁸. Nicaragua does so although it has consistently claimed that the Treaty is without force, ever since its conclusion, back in 1986²⁹. By doing so, Nicaragua is attempting to arrogate to itself an area allocated to Honduras under the Treaty, claiming that Colombia has renounced its rights to that area in the Treaty itself, even though Nicaragua at the same time asserts that the Treaty is invalid.

²⁶*Haya de la Torre, (Colombia/Peru), Judgment, I.C.J. Reports 1951*, p. 76.

²⁷*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007 (II)*, pp. 758-759, para. 316.

²⁸Figs. 6-7 annexed to Nicaragua’s Reply in the present case.

²⁹See, e.g., *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Memorial of Nicaragua (MN), Vol. II, Ann. 70.

30. Mr. President, I drew attention on Monday to important uncertainties for Honduras arising from the present state of the proceedings between Nicaragua and Colombia. Among these was puzzlement at just what Nicaragua now claims in respect of the water column. Professor Pellet feigned annoyance that I had only partially quoted Mr. Reichler on the consequences for the water column of the adoption by the Court of Nicaragua's claimed continental shelf boundary, and I have then asked "What does that mean?" He read more from Mr. Reichler³⁰. I still have to ask "What does that mean?" I am none the wiser.

31. In this connection, Mr. President, I would recall that you heard much over these two weeks about the "relative" or "relational" effect of agreements on maritime delimitation³¹. It is, of course, true that in principle a bilateral maritime delimitation treaty, like virtually all treaties, does not, of itself, create rights and obligations for third States³². But, at the end of the day, and absent specific treaty provision, there can only be one coastal State with "title"³³ to any particular area of continental shelf or exclusive economic zone.

32. It is uncertainties such as these that reinforce the concerns of Honduras, and reinforce the importance we attach to being able to intervene, and to intervene as a party in the current proceedings. In any event, granting permission to Honduras to intervene as a party would mean that the Court could avoid grappling with difficult issues of "relativity", since it would be able to decide, with binding force, these matters for all the States concerned.

33. Mr. President, Members of the Court, I can deal much more briefly with the other two matters that are required to be set out in an application to intervene, since our position on these does not seem to have been contested by our colleagues.

(ii) Precise object of the intervention

34. As I said at the beginning, Mr. President, it is when we come to the object of the intervention that we see the first of the two major differences between intervention as a party, and

³⁰CR 2010/19, pp. 25-26, para. 31 (Pellet).

³¹See, for example, CR 2010/16, p. 22, para. 15 (Reichler); CR 2010/20, pp. 26-27, para. 46 (Bundy).

³² Vienna Convention on the Law of Treaties, Arts. 34-38.

³³ The term used by the Court in the Judgment of 3 February 2009, *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, I.C.J. Reports 2009, p. 89, para. 77 (available at <http://www.icj-cij.org/docket/files/132/14987.pdf>).

intervention as a non-party. In seeking to intervene in the present proceedings, as a party, Honduras's purpose is a very practical one. We want the Court to decide, with binding force, on the basis of international law, the course of the maritime boundary between Honduras and Nicaragua, from the end of the line decided by the Court in 2007, which we say is the 82nd meridian, to the tripoint between Honduras, Colombia and Nicaragua. Only if the Court is able to do so shall we achieve a final and binding determination of our sovereign rights and jurisdiction in this area of the Caribbean, a determination based on international law.

35. As we are only at the permission stage, it would not be appropriate to go into more detail, as that would take us deep into the merits. But I must say one thing: on Wednesday, counsel for Nicaragua asserted that the Court could not in any event determine the whole line because of Jamaica's absence from the proceedings³⁴. That, in our view, is simply wrong. It is obvious from a glance at the map we have produced today, MW6 at tab 8, that fixing a tripoint between Honduras, Colombia and Nicaragua would in no way touch upon the interests of Jamaica.

36. Intervention as a non-party, which is only a subsidiary request in our Application, would have a quite different object. It would be the familiar one of informing the Court of our interests of a legal nature that may be affected by the decision in the case, and thereby protecting them.

(iii) Jurisdiction

37. The third matter referred to in Article 81 of the Rules is the basis of jurisdiction. I referred on Monday to Article XXXI of the 1948 Pact of Bogotá, to which Honduras, Nicaragua and Colombia are all parties. This is the basis for jurisdiction in the current proceedings instituted by Nicaragua against Colombia. Honduras is equally a party to the 1948 Treaty. The existence of this basis of jurisdiction has not been contested, and so I think I need say no more about it.

38. Mr. President, in conclusion, one is left asking what the alternative would be if Honduras were not permitted to intervene in this case as a party? An alternative course open to Honduras, under Article XXXI of the Pact of Bogotá, would be to use that basis of jurisdiction to commence new proceedings against Nicaragua and Colombia. Having done that, Honduras could seek to have them joined to the current case, which the Court could also do *proprio motu*. But that would hardly

³⁴CR 2010/19, p. 30, para. 34 (Pellet).

be an efficient way to proceed. For that reason the Statute and Rules of Court do provide for intervention as a party, where the intervening State so wishes, and where there is a basis, or bases, of jurisdiction linking all the States concerned.

39. Mr. President, Members of the Court, that concludes my statement, and I shall be grateful if you would invite Professor Boisson de Chazournes to address you.

Mme BOISSON de CHAZOURNES :

1. Je vous remercie, Monsieur le président. Ainsi que vient de l'exposer mon collègue sir Michael Wood, il ne fait pas de doute que le Honduras a bel et bien un intérêt d'ordre juridique susceptible d'être affecté dans l'instance pendante entre le Nicaragua et la Colombie. A ce titre, le Honduras devrait être autorisé par la Cour à intervenir en tant que partie ou, à titre subsidiaire, en tant que non-partie en vertu de l'article 62 du Statut.

2. En réponse aux exposés du Nicaragua lors du premier tour de plaidoiries, je souhaiterais me concentrer sur deux points. Tout d'abord, je mettrai en relief les contradictions du Nicaragua quant à l'admissibilité de la requête à fin d'intervention du Honduras. Puis, je mettrai l'accent sur l'étendue du pouvoir d'appréciation de l'Etat qui souhaite intervenir sur la base de l'article 62 du Statut.

I. Les contradictions du Nicaragua quant à l'admissibilité de la requête à fin d'intervention du Honduras

3. Le professeur Alain Pellet notait mercredi, avec le talent qu'on lui connaît, que les «requêtes à fin d'intervention se suivent et ne se ressemblent pas»³⁵. Qu'il me soit permis d'en dire tout autant de certains arguments du Nicaragua. Toutefois, en plus de se suivre sans se ressembler, certains des arguments du Nicaragua ont pour caractéristique de s'entremêler, de se contredire, voire de se neutraliser. Le Nicaragua a tout d'abord tenté de remettre en cause — sans y parvenir — la «vraisemblance suffisante»³⁶ des intérêts d'ordre juridique du Honduras en avançant que la Cour a déterminé «*toute* la frontière»³⁷ entre le Nicaragua et le Honduras. Autrement dit, le Nicaragua a purement et simplement — je devrais dire radicalement — nié l'existence d'un intérêt

³⁵ CR 2010/19, p. 13, par. 2 (Pellet).

³⁶ *Ibid.*, p. 15, par. 6 (Pellet).

³⁷ *Ibid.*, p. 17, par. 14 (Pellet).

d'ordre juridique *in casu*. Je cite le Nicaragua : «le Honduras ne peut faire valoir *aucun* intérêt d'ordre juridique qui pourrait être affecté par l'arrêt à intervenir dans l'affaire entre le Nicaragua et la Colombie»³⁸.

4. Mais cela était sans compter sur les volte-face auxquelles nous avait déjà habitués le Nicaragua dans ses observations écrites jointes en réponse à la requête du Honduras. En effet, soudainement, l'intérêt d'ordre juridique du Honduras n'est plus un intérêt *inexistant* mais un intérêt *inopérant*. Peut-être que des intérêts existent au nord du 15^e parallèle, selon l'aveu tacite du Nicaragua, mais ils ne sont sûrement pas en cause dans l'instance pendante entre le Nicaragua et la Colombie. Pourquoi ? Selon mon aimable contradicteur, car les prétentions du Nicaragua dans ladite instance ne concerneraient que le sud de la frontière maritime entre le Nicaragua et le Honduras³⁹, frontière imaginaire — nous le savons — et ne reflétant point la *res judicata* du jugement de 2007⁴⁰. Je précise au détour que le Nicaragua s'arroge le droit de donner des leçons au Honduras sur ce qui est en jeu ou non dans l'instance pendante avec la Colombie, alors que comme nous le savons cet Etat n'a pas hésité à modifier les demandes contenues dans sa requête introductory d'instance⁴¹ et n'hésite pas à admettre dans la présente procédure qu'il n'a pas (encore ?) «formulé [de] conclusion»⁴² sur les limites horizontales de la zone qui figure en rose sur le croquis n° 3.1 de la réplique du Nicaragua. Considérant qu'aucun intérêt du Honduras n'est «en jeu» dans l'instance pendante, le Nicaragua en déduit que la Cour ne devrait pas autoriser le Honduras à intervenir.

5. Je me permets de réitérer la question que j'avais posée au Nicaragua lors du premier tour de plaidoiries dans la présente procédure et à laquelle aucune réponse précise n'a encore été apportée : les intérêts du Honduras sont-ils existants ou inexsistants ? Ou alors sont-ils existants mais inopérants ? Ou encore, pour paraphraser notre contradicteur, sont-ils «vraisemblablement suffisants» ou «vraisemblablement insuffisants» ? Le jeu de «miroirs déformants» auquel se prête le Nicaragua témoigne de la réalité des incertitudes juridiques dans la zone maritime concernée par

³⁸ CR 2010/19, p. 20, par. 18 (Pellet).

³⁹ *Ibid.*, p. 31, par. 48 (Pellet).

⁴⁰ Voir la requête du Honduras à fin d'intervention, par. 5. Voir également CR 2010/20, p. 21, par. 25 (Bundy).

⁴¹ CR 2010/20, p. 22, par. 29 (Bundy).

⁴² CR 2010/19, p. 25, par. 31 (Pellet).

la requête à fin d'intervention du Honduras et à propos desquelles mon collègue sir Michael Wood est revenu il y a un instant.

6. Mesdames et Messieurs les juges, bien que le professeur Pellet se soit gardé d'avoir de la «sympathie pour Napoléon»⁴³, il n'y a pas plus napoléonienne que la stratégie du Nicaragua. Ce dernier, non satisfait de se lancer à la conquête d'un espace maritime qui lui aurait été — *quod non* — reconnu et attribué par le jugement de la Cour d'octobre 2007, se lance maintenant à la conquête du droit d'intervention des Etats tiers. Il soutient sans complexe et avec un regard rétrospectif que la Colombie n'avait pas besoin d'intervenir à l'époque dans le différend entre le Nicaragua et le Honduras dans la mesure où le Honduras avait «amplement informé la Cour [des droits] de la Colombie»⁴⁴. Mieux, le Nicaragua considère sans ambages que ce n'est pas le Honduras, «défenseur trop zélé des intérêts colombiens»⁴⁵, qui doit intervenir dans l'instance pendante entre le Nicaragua et la Colombie, mais la Jamaïque. En d'autres termes, seule la Jamaïque serait un Etat tiers dont les intérêts juridiques seraient susceptibles d'être affectés par un jugement de la Cour. Et, en outre, si la Cour devait encore douter de l'esprit «conquérant» du Nicaragua, je l'invite à méditer les paroles suivantes du Nicaragua : «le Nicaragua entend que les droits des tiers soient pleinement préservés dans la présente affaire»⁴⁶. Quel grand protecteur !

7. Les velléités napoléoniennes du Nicaragua poussent encore ce dernier à prétendre pouvoir se substituer au Honduras et à d'autres Etats tiers pour décider de l'opportunité ou non d'exercer leur droit d'intervention en vertu de l'article 62 du Statut, c'est-à-dire pour «estimer» si des intérêts d'ordre juridique sont *pour eux* en cause dans l'instance entre le Nicaragua et la Colombie. Ce n'est pas le Honduras qui a une appréciation subjective de l'article 62 mais bien le Nicaragua.

8. Mesdames et Messieurs les juges, du fait de l'approche du Nicaragua consistant à ignorer la lettre et l'esprit de l'article 62 du Statut, voire à réinterpréter ses conditions, je me propose de faire quelques remarques et précisions sur l'étendue du pouvoir d'appréciation de l'Etat qui souhaite intervenir sur la base de l'article 62 du Statut.

⁴³ CR 2010/18, p. 17, par. 13 (Wood).

⁴⁴ CR 2010/19, p. 20, par. 18 (Pellet).

⁴⁵ *Ibid.*, p. 21, par. 19 (Pellet).

⁴⁶ *Ibid.*, p. 26, par. 31 (Pellet).

II. L'étendue du pouvoir d'appréciation de l'Etat qui souhaite intervenir en vertu de l'article 62 du Statut

9. L'article 62 du Statut prévoit que c'est à l'Etat qui *estime* qu'un intérêt d'ordre juridique est *pour lui* en cause dans une instance pendante de décider «d'exercer [ou non son] droit à intervention» (*Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria), exceptions préliminaires, arrêt, C.I.J. Recueil 1998, p. 324, par. 116.*). Or, ce que le Nicaragua a prôné tout au long de ses plaidoiries du premier tour mais aussi dans ses observations écrites, c'est la possibilité pour les Etats parties à une instance pendante de se substituer à l'Etat qui souhaite intervenir pour déterminer si ledit Etat a ou non un intérêt d'ordre juridique qui pourrait être affecté par un jugement de la Cour. Monsieur le président, si la Cour elle-même ne peut se substituer à l'Etat qui souhaite intervenir⁴⁷, comment des parties à une instance pendante pourraient-elles s'arroger une telle prérogative ?

10. Se réfugiant derrière une interprétation fictive et téméraire de la *res judicata* du jugement d'octobre 2007, le Nicaragua considère que le principe de la *res judicata* annihilerait en l'espèce toute possibilité pour le Honduras de recourir à l'avenir à l'article 62 du Statut. Cela, car la réponse aux arguments du Honduras se trouve «entièrerie, complète et limpide»⁴⁸ dans l'arrêt de la Cour d'octobre 2007 ou encore parce que le Honduras aurait «amplement informé la Cour de ses propres droits et intérêts»⁴⁹.

11. Mais, Monsieur le président, «qui ne dit mot consent». Le Nicaragua n'a à aucun moment réfuté que l'article 62 du Statut n'engendre pas une impossibilité pour le Honduras d'intervenir dans une instance pendante devant la Cour au motif que le Honduras aurait déjà informé la Cour de la nature de ses intérêts juridiques dans une *autre instance*, à savoir celle ayant opposé le Nicaragua et le Honduras, qui a porté sur un *autre différend* et a impliqué d'autres parties⁵⁰.

⁴⁷ *Différend frontalier terrestre, insulaire et maritime (El Salvador/Honduras), requête à fin d'intervention, arrêt, C.I.J. Recueil 1990, p. 118, par. 61.*

⁴⁸ CR 2010/19, p. 16, par. 11 (Pellet).

⁴⁹ *Ibid.*, p. 20, par. 18 (Pellet).

⁵⁰ CR 2010/18, p. 24, par. 10 (Boisson de Chazournes).

12. L'article 62 prévoit qu'un Etat tiers est en mesure de décider où, quand et comment exercer sa prérogative juridique tant qu'il se conforme aux dispositions du Statut et du Règlement de la Cour. C'est à l'Etat qui souhaite intervenir et à lui seul de décider de son exercice tant qu'il se conforme aux dispositions du Statut et du Règlement de la Cour. La répétition ou insistance, Monsieur le président, ne relève pas d'un acte inconscient, lequel peut jouer des tours, sauf bien sûr au royaume de Zen.

13. Cette insistance vise à démontrer que le Honduras s'accorde avec le Nicaragua pour considérer que l'article 62 n'est pas entièrement «laissé à l'appréciation subjective» de l'Etat qui souhaite intervenir. Le Honduras a toujours considéré que c'est à la Cour d'autoriser une demande d'intervention lorsqu'elle considère que les conditions objectives, ou ce que le professeur Pellet appelle la «condition de l'article 62»⁵¹, sont réunies. Il convient de faire la part du subjectif et celle de l'objectif dans le contexte de l'article 62. En réalité, cette distinction est très simple à opérer à l'aune de la construction de l'article 62 en deux paragraphes.

14. Le premier paragraphe de l'article 62 repose sur une appréciation subjective du titulaire du droit. Les Etats parties à une instance pendante ne peuvent se substituer à l'Etat qui souhaite intervenir. Le mot à mot de l'article 62 est clair : «Lorsqu'un Etat *estime* que, dans un différend, un intérêt d'ordre juridique est *pour lui* (on pourrait dire aussi pour *elle*) en cause, il peut adresser à la Cour une requête, à fin d'intervention». Le pouvoir d'appréciation de l'Etat désirant intervenir est double. Non seulement c'est à lui d'estimer si un de ses intérêts d'ordre juridique est en cause dans un différend. C'est également à lui d'estimer s'il est bénéficiaire d'un tel intérêt d'ordre juridique. C'est comme ça qu'il faut comprendre le membre de phrase «est *pour lui* en cause». La version anglaise de l'article 62 du Statut confirme une telle lecture puisqu'il est y dit «Should a State consider that *it has*». La version anglaise ne dit pas «Should a State consider that *an interest of a legal nature*».

15. La Cour décidera alors, sur la base du deuxième paragraphe de l'article 62, de la réalité de l'intérêt d'ordre juridique que l'Etat qui demande à intervenir déclare avoir dans une instance pendante. Si cet intérêt est réel, comme c'est le cas avec le Honduras, la Cour n'a pas de «pouvoir

⁵¹ CR 2010/19, p. 14, par. 5 (Pellet).

discretionnaire» (*Plateau continental (Tunisie/Jamahiriya arabe libyenne), requête à fin d'intervention, arrêt, C.I.J. Recueil 1981*, p. 12, par. 17) pour ne pas autoriser l'intervention.

16. Mesdames et Messieurs les juges, derrière le langage de l'article 62 se dessine un souci de protéger au maximum les Etats dont les intérêts d'ordre juridique sont susceptibles d'être affectés par un jugement de la Cour. Il y a aussi un souci de garantir leur faculté d'intervenir dans une instance pendante⁵². Cette protection s'avère d'autant plus nécessaire dans les cas de délimitation maritime impliquant plusieurs Etats.

17. Toutes les parties dans la présente procédure s'accordent pour ne pas considérer que l'article 59 du Statut serait suffisant pour protéger les intérêts d'ordre juridique du Honduras puisque ni le Nicaragua ni la Colombie ne l'ont invoqué. Cela prouve que tous les Etats ici présents s'accordent pour reconnaître que la protection en vertu de l'article 62 est plus importante et plus appropriée pour préserver les droits des Etats tiers en matière de délimitation maritime.

18. Ce qui rend la protection en vertu de l'article 62 appropriée, c'est que l'Etat intervenant est en mesure d'informer la Cour sur l'existence d'un intérêt d'ordre juridique, cela afin de protéger et sauvegarder cet intérêt ou de demander à la Cour de déterminer ses droits et intérêts. Un jugement rendu à la suite d'une intervention en vertu de l'article 62 prend alors nécessairement en compte les intérêts d'ordre juridique de l'Etat intervenant et, dès lors, ce dernier est sûr qu'il n'affectera pas ses intérêts. En d'autres termes, Monsieur le président, l'article 62 garantit toujours et nécessairement que les intérêts d'ordre juridique d'un Etat tiers à une instance pendante seront protégés, conservés et sauvegardés.

19. Mais se pose alors la question de savoir comment faire en sorte que l'article 62 du Statut puisse avoir un effet utile et effectif. La réponse est la suivante : il s'agit de donner à l'Etat qui demande à intervenir la possibilité d'«être entendu». La Chambre constituée pour connaître de la requête à fin d'intervention du Nicaragua dans l'affaire *El Salvador c. Honduras*, a déclaré que le «but de l'intervention» consiste pour l'intervenant à «informer[r] la Cour de ce qu'il considère

⁵² CR 2010/18, p. 21, par. 5 (Boisson de Chazournes).

comme ses droits et intérêts, afin de veiller à ce qu'aucun intérêt d'ordre juridique ne puisse être «affecté» *sans que l'intervenant ait été entendu*» (*Différend frontalier terrestre, insulaire et maritime (El Salvador/Honduras), requête à fin d'intervention, arrêt, C.I.J. Recueil 1990*, p. 130, par. 90 ; les italiques sont de nous).

20. *In fine*, ce qui compte c'est donc que l'Etat intervenant puisse bénéficier de la protection en vertu de l'article 62 par le fait qu'il a pleinement et dûment été «entendu» par la Cour. A lui de décider quelle forme il souhaiterait donner à son intervention. Et à la Cour d'autoriser ou non l'intervention sous l'une de ses formes, en tant que partie ou en tant que non-partie.

21. Au stade de la procédure orale portant sur la demande en intervention, l'Etat qui demande à intervenir n'est pas censé «complètement débatt[re]» (*Ambatielos (Grèce c. Royaume-Uni), exception préliminaire, arrêt, C.I.J. Recueil 1952*, p. 45) de toute la substance de ses intérêts d'ordre juridique. C'est au stade du fond de l'instance pendante que l'Etat intervenant à titre de partie ou en tant que non-partie pourra exposer toutes ses vues sur les points pour lesquels il aura été autorisé par la Cour à intervenir. Ces aspects sont importants. La procédure d'intervention, telle qu'elle a été conçue, a pour objet de sauvegarder les intérêts d'ordre juridique d'un Etat tiers à une instance pendante devant la Cour, en réservant la décision au fond jusqu'à ce que la Cour ait pleinement entendu chacune des parties au différend ainsi que les Etats intervenants sur les différents droits et intérêts en cause⁵³. C'est là la nature incidente de la procédure du «*droit de demander à intervenir*»⁵⁴.

22. Mesdames et Messieurs les juges, il apparaît clairement des plaidoiries du Nicaragua et de la Colombie que la portée des intérêts d'ordre juridique du Honduras et leur impact dans l'instance pendante sont un pan important du différend entre le Nicaragua et la Colombie, du fait notamment de la question du traité de 1986. Si la Cour en venait, comme le Nicaragua le souhaite, à exclure dès à présent l'existence d'intérêts d'ordre juridique du Honduras sans que ce dernier ne soit «entendu» au cours de la procédure au fond dans l'instance pendante, cela conduirait la Cour à préjuger au stade d'une procédure incidente de certaines questions juridiques faisant l'objet du différend entre le Nicaragua et la Colombie.

⁵³ CR 2010/18, p. 25, par. 12 (Boisson de Chazournes).

⁵⁴ CR 2010/19, p. 14, par. 6 (Pellet).

23. Je remercie la Cour de son attention et vous prie, Monsieur le président, de donner la parole à l'agent du Honduras pour les conclusions du deuxième tour de plaidoiries du Honduras.

Le PRESIDENT : Je remercie Mme le professeur Laurence Boisson de Chazournes pour son intervention. Now I invite H. E. Ambassador Carlos López Contreras, the Agent of Honduras, to give his concluding remarks.

Mr. LOPEZ CONTRERAS:

CONCLUDING REMARKS AND SUBMISSIONS

1. Thank you, Mr. President. Mr. President, Members of the Court, first of all, I would like to express our appreciation to the Court for the tribute that was paid to the memory of Professor Luis Ignacio Sánchez Rodríguez at the beginning of these proceedings. Our delegation is deeply touched. I also wish to convey our sympathy to our Nicaraguan friends for the untimely loss of Sir Ian Brownlie, who is much missed by all of us.

2. I shall now, Mr. President, conclude our oral presentation concerning the Application for permission to intervene in the pending case between Nicaragua and Colombia, filed pursuant to Article 62 of the Statute of the Court. The purpose of the Honduran Application was and continues to be to enable the Court to settle definitively the overlapping maritime claims between Honduras, Nicaragua and Colombia in the area of concern.

3. I wish to reiterate that Honduras has never challenged the authority of the *res judicata* of an international decision as others might have done in the past. I reaffirm what I said on Monday that “[w]e honour our commitment under the United Nations Charter and the Statute of the Court to accept [the 2007] decision as binding and final”⁵⁵.

4. Should the Court accept Honduras's Application to intervene, it would be in a position to remove two major uncertainties resulting from the claims of these three States over sovereign rights and jurisdiction within the maritime area in dispute in the pending case. The first uncertainty relates to the determination of sovereignty and jurisdiction over the area east of the 82nd meridian and north of the 15th parallel. The second concerns the need to identify the tripoint between

⁵⁵CR 2010/18, p. 16, para. 12 .

Honduras, Colombia and Nicaragua, taking into consideration the 1986 Treaty. These sovereign rights and jurisdiction need to be determined by the Court with the participation of the three States.

5. The Honduran Application to intervene meets the requirements provided for in Article 62 of the Statute. Honduras has demonstrated that it has interests of a legal nature which may be affected by the decision of the Court. The interests that Honduras seeks to protect concern the maritime area east of the 82nd meridian and north of the delimitation line of the 1986 Treaty. Should the Court not permit our intervention, Honduras's interests of a legal nature will inevitably be affected. In that case, failing to accept Honduras's intervention would lead the Court to prejudge at an incidental stage of the proceedings some aspects of the merits of the dispute between Nicaragua and Colombia.

6. In addition, Honduras has shown that it satisfies the condition of jurisdiction required for intervention as a party, and has identified the precise object of its intervention, as laid down in Article 81 (c) of the Rules of Court. The basis of jurisdiction existing among the three States is the Pact of Bogotá.

7. Honduras, Mr. President, having satisfied the conditions, expects to be entitled to benefit from the power conferred to the Court by the Statute to decide to permit the intervention, either as a party or, in the alternative, as a non-party.

Mr. President, pursuant to Article 60 of the Rules of Court, I shall now read the final submissions of the Government of the Republic of Honduras.

Having regard to the Application and the oral pleadings,

May it please the Court to permit Honduras:

- (1) to intervene as a party in respect of its interests of a legal nature in the area of concern in the Caribbean Sea (paragraph 17 of the Application) which may be affected by the decision of the Court; or
- (2) *in the alternative*, to intervene as a non-party with respect of those interests.

A signed copy of the written text of our final submissions has been communicated to the Court and transmitted to the other parties.

To conclude our participation in this stage of the oral proceedings, on my behalf and that of all the Honduran delegation, I wish to express our deepest appreciation to you, Mr. President, and to each of the distinguished Judges, for the attention you have kindly given to our presentation. We thank our friends from Colombia and Nicaragua for their courtesy during these proceedings.

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

Thank you very much, Mr. President.

The PRESIDENT: I thank you Your Excellency Ambassador Carlos López Contreras, the Agent of Honduras, for his statement. The Court will meet again tomorrow at 3 p.m. to hear the second round of oral argument of Nicaragua and Colombia.

The sitting is adjourned.

The Court rose at 3.50 p.m.
