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Cour internationale de Justice

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International Court of Justice

THE HAGUE

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Audience publique

tenue le vendredi 22 octobre 2010, à 15 h 55, 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 Friday 22 October 2010, at 3.55 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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S. Exc. M. Samuel Santos,

ministre des affaires étrangères du Nicaragua ;

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M. Walner Molina Pérez, conseiller juridique au ministère des affaires étrangères,

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The PRESIDENT: I now give the floor to Mr. Rodman Bundy to make his presentation on behalf of Colombia.

Mr. BUNDY:

THE QUESTION OF THE INTEREST OF A LEGAL NATURE THAT MAY BE AFFECTED BY A DECISION IN THE CASE

Introduction

1. Thank you very much, Mr.President, Members of the Court. It falls to me this afternoon to present Colombia's second round oral argument on Honduras's Application for permission to intervene. I will focus on the central issue whether Honduras has an interest of a legal nature that may be affected by a decision in the case sufficient to justify its request to intervene, at least as a non-party. On Wednesday, Professor Crawford discussed a number of elements relating to the question of party intervention that the Court may feel are relevant in considering that issue. We will not return to that issue today, and accordingly my presentation will be quite brief.

The interest of a legal nature

2. On Wednesday, Professor Pellet emphasized the fact that a State applying to intervene has to satisfy two conditions under Article 62 of the Statute: (i) that it has an interest of a legal nature, and (ii) that such an interest is one that may be affected by a decision in the case [CR 2010/19, p. 14, para. 5].

3. Colombia agrees. That is why, in my presentation earlier this week, I had suggested that there were two questions that must be answered before the question arises whether the appropriate mode for intervention is as a party or a non-party. And the two questions were:

(i) Whether Honduras can point to an interest of a legal nature within the relevant part of the rectangle that it has identified; and

(ii) If so, is the delimitation of any part of that area in dispute as between Colombia and Nicaragua such that a decision in the main case may or could affect Honduras's legal interest [CR 2010/20, p. 16, para. 9]?

4. With respect to the first condition, Honduras has identified its interest of a legal nature as being its rights and interests under the 1986 boundary Treaty with Colombia. The bilateral treaty relations between Colombia and Honduras were not at issue in the *Nicaragua* v. *Honduras* case, and the 2007 Judgment — I think all the parties in the room today are agreed in this — did not prejudice the Treaty in any way. As Sir Michael observed yesterday: "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." [CR 2010/21, p. 15, para. 24.]

5. Both Honduras and Colombia have acknowledged that the Treaty is in force and binding as between them. It is not somehow invalid, as Professor Pellet suggested just a few moments ago, as between the two parties to it — Colombia and Honduras — and there is no support whatsoever cited for Professor Pellet for that contention. It follows that Honduras continues to have a legal interest in the 1986 Treaty and the areas covered by it. For that reason, Colombia considers that Honduras has satisfied the first condition under Article 62 of the Statute, the interest of a legal nature.

6. Having said that, there is one point that Sir Michael mentioned yesterday that Colombia does not share. It was actually a threefold point but the points are all closely interrelated. First, Sir Michael argued that for the Court to determine the allocation of the "delimitation area" proposed by Nicaragua — that is, the pink area lying north of the 15° parallel — "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". Second, he contended that in the present case "the status and substance of the 1986 Treaty are at stake". Third, Sir Michael concluded by saying that: "It is thus clear that our intervention 'actually relates to the subject-matter of the pending proceedings'." [CR 2010/21, pp. 15-16, para. 26.]

7. With respect, Colombia does not agree. In delimiting areas situated to the north of the 15th parallel and east of the 82nd meridian *as between Colombia and Nicaragua*, the Court does not need to decide whether the 1986 Treaty is in force or what it accords to Colombia. While the Treaty is in fact in force, it is not invalid as between Colombia and Honduras. The Court's task at the merits phase is to delimit the maritime boundary between Colombia and Nicaragua, not to determine the status of Colombia and Honduras's treaty relations. Thus, the status and substance

of the 1986 Treaty are not issues that are at stake in the main case, and that Treaty does not relate to the subject-matter of the pending proceedings.

8. To be clear, that does not mean that, to the extent that the Court delimits areas lying north of the 15th° parallel between Colombia and Nicaragua — or at least indicates the direction of the boundary line in this area — Honduras does not have an interest of a legal nature that may be affected. Because Honduras's interest of a legal nature continues to lie in the 1986 Treaty, and that is a sufficient interest in Colombia's view to justify intervention. But the Court does not need to rule on the status of the 1986 Treaty to decide the main case.

Which may be affected by a decision in the case

9. Now that brings me to the second condition under Article 62: whether Honduras's rights and interests in areas covered by the 1986 Treaty may be affected by a decision in the case.

10. On Wednesday, Professor Pellet argued that there are no such interests that could be affected by a decision in the case because the 2007 Judgment (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), I.C.J. Reports 2007 (II)*, Judgment of 8 October 2007) determined that the maritime areas lying south of the bisector and north of the 15th° parallel as belonging to Nicaragua not Honduras, and he added, and this was repeated again a few moments ago, that Colombia can have no rights in these areas due to the fact that, in the 1986 Treaty, in Professor Pellet's words, Colombia recognized its legal interests to be limited to the 1986 line [CR 2010/19, p. 29, para. 43].

11. In our first round presentation we discussed at length the relative or relational aspect of bilateral treaties and why the 1986 Treaty in no way precludes Colombia from claiming areas north of the 15th° parallel as against Nicaragua [CR 2010/20, p. 26, para. 46 (Bundy); *ibid.*, pp. 31-34, paras. 12-31 (Kohen)]. I will not repeat those arguments. I would simply note that there is a tension between Nicaragua's arguments this week and those it advanced last week.

12. Last week, Mr. Reichler contended that the 1977 Colombia-Costa Rica Treaty created an objective situation on which Nicaragua could rely to preclude any Costa Rican claims extending beyond or to the north of the 1977 line. We responded to that argument and so did Costa Rica. But on Wednesday of this week, Professor Pellet argued that the 1986 Treaty did not create an

objective situation and was not opposable to Nicaragua in citing the *res inter alios acta* principle and Article 34 of the Vienna Convention [CR 2010/19, p. 31, para. 46]. Moreover, counsel for Nicaragua also cited Colombia's Counter-Memorial with approval, in which Colombia had stated: "The question of delimitation between Colombia and Nicaragua is the subject-matter of the present proceedings — a matter which the Colombia-Honduras agreement did not deal with." [CR 2010/19, p. 29, para. 42.] In the south, of course, there has been a pattern of consistent conduct lasting over three decades by Colombia, Costa Rica, and even Nicaragua respecting those treaties that are in place, that were discussed last week. In the north, on the other hand, Nicaragua protested the 1986 Treaty, and the area has been and continues to be in dispute.

13. As for the 2007 Judgment, counsel for Nicaragua accepted the proposition that that Judgment does not affect any rights of third States, among which he named Colombia [CR 2010/19, p. 28, para. 36] and the Agent for Nicaragua repeated the same point in his intervention this afternoon. Professor Pellet also emphasized that the authority of matters decided by the Judgment is relative and only obligatory for the Parties to the case and with respect to the matters decided [CR 2010/19, p. 29, para. 42]. Nonetheless, counsel went on to assert that the reason why the Court did not fix a precise endpoint to the Nicaragua-Honduras delimitation was because to do so would have implicated the rights of third States which he claimed on Wednesday and again this afternoon only involved Jamaica, not Colombia [CR 2010/19, p. 18, para. 15; *ibid.*, p. 30, para. 44].

14. Now that line of argument ignores the fact that Colombia has rights that come into play well before any potential interests of Jamaica that could be affected by the Court's 2007 Judgment, a point that appeared to be shared by Honduras yesterday [CR 2010/21, p. 18, para. 25 (Wood)]. Moreover, counsel's contention was advanced at the expense of ignoring, and I have to say with respect even distorting, what the Court actually said in its Judgment and how it illustrated its decision.

15. In the first place, counsel's argument cannot be reconciled with paragraph 321 (3) of the *dispositif*. There, as the Court is well aware it held that: "[f]rom point F, it [the line] shall continue along the line having the azimuth 70° 14' 41.25" until it reaches the area where the rights of third States may be affected", without specifying any particular third State.

16. Nicaragua also refashioned the Court's own illustrative sketches on Wednesday that appear in the Judgment. I pointed out at that time that the only sketch-map in the Judgment that has an arrow placed on it is sketch-map No. 8 (Judgment, p. 762). I did not say it was not the only valid map as I was accused of being said earlier this afternoon, I said it was the only map with an arrow and that is true. That arrow is placed at the 82nd meridian, not far to the east. While the Judgment also contains a further sketch-map depicting a dashed line extending seaward from that point, Nicaragua on Wednesday reconfigured that map by first of all turning the dashed line into a solid line and then placing an arrow on it at the end of the 80° meridian in the vicinity of the Joint Regime Area. Neither of those modifications reflects what appears in the Court's Judgment and the Court's own maps.

17. I would suggest that what Nicaragua has essentially sought to do is to rewrite the Court's *dispositif*. Instead of saying that from point F, the delimitation line shall continue along the azimuth until it reaches the area where the rights of third States may be affected, Nicaragua would have the *dispositif* read that "[f]rom the 80° meridian, it shall continue along the line having the azimuth until it reaches the area where the rights of a third State — Jamaica — may be affected". But that is not what paragraph 321 (3) says.

18. Earlier this afternoon counsel for Nicaragua, while making the same point that Jamaica was the only relevant third State, argued that the 1993 Treaty was irrelevant. He used figure AP 7 in the judges' folder to contend that the prolongation of the bisector passes to the north of the Joint Regime Area. That may be so, although even the Court's dashed line does not extend nearly as far as Professor Pellet's sketch, but I would ask the Court to recall that the 1993 Treaty in this area was a Joint Regime Area under which Colombia in no way renounced its maritime rights and entitlements to north of Serranilla and Bajo Nuevo as against Jamaica, let alone against any other State.

19. If we move further west, we have already explained why Colombia's maritime entitlements vis-à-vis Nicaragua are not limited by the 15th parallel, which was agreed with Honduras in the context of a completely different agreement taking into account completely different relevant circumstances. As against Nicaragua, Colombia's maritime entitlements do extend north of the 15th parallel and it is these entitlements that fall to be delimited with Nicaragua

at the merits stage of this case. In a passage from the Court's Judgment which counsel for Nicaragua did not address on Wednesday, the Court indicated, and this is paragraph 318, that it had considered certain interests of third States which result from bilateral treaties between countries in the region. But it added that its consideration of these interests "is without prejudice to any other legitimate third party interests which may also exist in the area" (Judgment of 8 October 2007, p. 759, para. 318), any other legitimate third party interest.

20. Now Colombia has such legitimate interests that do not arise from the 1986 Treaty and do not depend on it. As I said, Colombia's 200-nautical-mile entitlements generated by its islands extend to the north of the 15th parallel. These are legitimate entitlements under international law. So, also, is Colombia's median line claim in the present case an entirely legitimate claim. Colombia's position respects the "equidistance-special circumstances" rule that has been so clearly established by the Court's jurisprudence. And that median line projects into areas lying within Honduras's rectangle somewhat to the east of the 82nd meridian, which was the western limit of the San Andrés archipelago.

21. As counsel for Honduras noted yesterday, the median line claim "confirms Colombia's interests in the area east of the 82nd meridian" [CR 2010/21, p. 14, para. 23 (Wood)]. In other words, Colombia's claims extend into an area where the Court has expressly reserved third State rights by not fixing the terminal point of the Nicaragua-Honduras boundary. This is the area covered by the Court's dashed line. How can an equidistance-based claim, which by definition leaves on Colombia's side of the line maritime areas that are closer to its territory than to the territory of Nicaragua, not be considered to constitute a legitimate interest? Now I would note that even this afternoon Professor Pellet said that Colombia as a Respondent in this case can assert the rights that it thinks it has and those extend north of the 15th parallel as against Nicaragua.

22. The fact of the matter is that both Colombia and Nicaragua have overlapping entitlements in Honduras's rectangle north of the 15th parallel. This was acknowledged by Nicaragua's distinguished Agent himself when he referred to figure 3.1 of Nicaragua's Reply. As the Agent stated, and this was on Wednesday, figure 3.1

> "is an illustration of the delimitation area generated by the entire continental coasts of Nicaragua and Colombia. It naturally does not represent areas where Nicaragua has claims but the … area of potential entitlement generated by both continental coasts." [CR 2010/19, p. 11, para. 10.]

23. Now we do not, on our side of the Bar, accept the fact that the relevant area posited by Nicaragua — and I would note that this afternoon Nicaragua's figure 3.1 was changed from the delimitation area, now it is apparently called the geographic context — we do not accept that the relevant area posited by Nicaragua stretches anywhere near to Colombia's mainland coast, which is well over 400 nm from Nicaragua, and which is thus not a relevant coast for purposes of delimitation. Colombia believes that the relevant area for delimitation lies between the islands of the San Andrés archipelago, which generate their own maritime entitlements, and Nicaragua's coast — an area which the last two weeks have largely focused on. No doubt this is a matter that will be discussed when we get to the merits. But at least the Parties are in agreement that they do have overlapping entitlements north of the 15th parallel as illustrated on Nicaragua's figure 3.1. And given that such areas also overlap with part of Honduras's rectangle, which is where Honduras says it has interests of a legal nature under the 1986 Treaty, those interests may be affected by a decision in the case.

24. Nicaragua appears to consider that the Court, in its 2007 Judgment, already prejudged this aspect of the Nicaragua-Colombia case by excluding any Colombian claims vis-à-vis Nicaragua north of the 15th parallel. That cannot be right.

In light of the principle articulated by the Court itself in the same Judgment, that it "will not rule on an issue when in order to do so the rights of a third party that is not before it, have first to be determined" (2007 Judgment, p. 756, para. 312), and, of course the provisions of Article 59 of the Statute, Colombia does not believe that the Court either intended to, or did, prejudge the claims or the merits of the case between Colombia and Nicaragua as against each other existing in this area.

25. In his first round presentation on Wednesday, Professor Pellet stressed the fact that the boundary between Nicaragua and Colombia is "relational". In his words: "it is a boundary *relative* only to Nicaragua and Colombia", and he added that it would not have any impacts on the rights of third States [CR 2010/19, p. 26, para. 31]. By exactly the same reasoning, the 2007 Judgment is

also "relational" as between Nicaragua and Honduras: and it does not and cannot impact on any rights of Colombia.

26. What is clear is that areas lying north of the 15th parallel and east of the 82nd meridian are in dispute in the main case, and that these areas overlap with the areas within which Honduras has interests of a legal nature under the 1986 Treaty. From Colombia's perspective it follows that Honduras has also satisfied the second condition of Article 62 — that its interest of a legal nature *may* be affected by a decision of the Court in the case.

27. Now, in taking this decision, Mr. President, we are still being accused on our side of the Bar of being engaged in some sort of plot to hem in Nicaragua. We heard it last week in the south with respect to treaties that Nicaragua did not protest and we have heard it again in the north, despite the fact that the 1986 Treaty between Colombia and Honduras was the result of a very tough and lengthy negotiation. It was not some preordained result designed and aimed at a third party.

28. Apparently, because this afternoon Professor Pellet has effectively said that Colombia and Honduras are in bed together in these proceedings — are "buddies"— at least that was the translation provided by the interpreters — apparently, Colombia is damned if it does and damned if it does not! If we believe, as we do, that Honduras has satisfied the requirements of Article 62 of the Statute, at least for purposes of non-party intervention, we are accused of ganging up on Nicaragua. If we had come to the independent view that we did not think that Honduras had met those requirements, we would have been accused of ganging up on Honduras! What Colombia has done is to set forth for the Court's consideration its honest appreciation of where it feels the issue lies. And as I have said, Colombia takes the position that, with respect to non-party intervention, Honduras has satisfied the requirements of Article 62 of the Statute.

29. Mr. President, that concludes my presentation, and I would be grateful if the floor could now be given to Colombia's Agent to present his concluding remarks, and I thank the Court very much for its attention.

The PRESIDENT: I thank Mr. Rodman Bundy for his statement. Now I call Mr. Julio Londoño Paredes, the Agent of Colombia, to make his closing remarks.

Mr. LONDOÑO:

CLOSING STATEMENT AND CONCLUSIONS

1. Thank you, Mr. President. Mr. President and distinguished Judges, the present incidental proceedings are devoted solely to considering whether Honduras should be permitted to intervene in the case. The question of Nicaragua's claims against Colombia is one that can only be dealt with at the merits stage, not now.

2. Any decision the Court may take whether to permit the intervention of Honduras, either as a party or non-party, can in no way prejudice the decision that the Court may arrive at on the merits of the main case. Likewise, taking into account Article 59 of the Statute of the Court and the Court's jurisprudence, the 2007 Judgment in the *Nicaragua* v. *Honduras* case did not in any way prejudge the dispute between Colombia and Nicaragua, a matter that was not at issue in that case.

3. The *dispositif* of the Judgment of 2007 clearly stated that, starting on 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" (Judgment of 8 October 2007, p. 763, para. 321 (3)). Colombia is one such third State and cannot accept the statement made here that the only third State concerned is Jamaica.

4. In 1975, for the first time ever, Honduras claimed rights over Serranilla and its adjacent maritime areas. This claim and the overlapping maritime entitlements of Honduras's coast and the islands of the San Andrés archipelago, in particular Providencia, Serrana and Serranilla, led to the conclusion of the 1986 Treaty, a purely bilateral agreement. Indeed, these islands have full maritime entitlements extending north of the 15th parallel, in accordance with international law. Therefore, the rights over those areas remain intact vis-à-vis Nicaragua, as has been explained during these proceedings.

5. While the 1986 Treaty determined the maritime boundary between Honduras and Colombia, it also settled matters that are not at stake in the present proceedings. In matters related to territorial sovereignty, the 1986 Treaty does not leave room for any uncertainty. Colombia wishes to make clear that neither the validity of said Treaty, nor the question whether it is in force are at issue in the present case.

6. Thus, it is clear that other States, including Honduras in the north, have rights and interests in the same general area. To the extent that any one of these States can show that its interests may be affected by a decision in the case, it should be able to express its views by means of intervention in order to explain and protect its interests. While it is for each applicant State to make out its case, Colombia considers that the interest of a legal nature that may be affected by a decision in this case has been shown. That is why Colombia has not objected to Honduras's request.

7. By a treaty concluded in 1993 between Colombia and Jamaica, a Joint Regime Area was established between both countries. The area has been exploited and regulated by both States ever since. But the Joint Regime Area which was part of the 1993 agreement did not prejudice the continental shelf or exclusive economic zone rights of Serranilla and Bajo Nuevo.

8. In contrast to the 1986 Treaty, no protest from Nicaragua or any other State has ever been advanced against the 1993 Treaty or the activities carried out thereunder.

Conclusions

9. Mr. President, and distinguished Judges, out of consideration and respect for the Court, I will resist referring to the self-serving statement by the Agent and other high Nicaraguan officials concerning the case on different occasions.

Mr. President and Members of the Court,

In light of the considerations stated during these proceedings and within the framework described above, 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, Honduras has satisfied the requirements of Article 62 of the Statute and, consequently, that Colombia does not object to Honduras's request for permission to intervene in the present case as a non-party. As concerns Honduras's request to be permitted to intervene as a party, Colombia likewise reiterates that it is a matter for the Court to decide in conformity with Article 62 of the Statute.

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 Mr. Julio Londoño Paredes for his concluding statement.

That concludes the second round of oral argument of Colombia and brings us to the end this week of hearings devoted to the oral argument of Honduras and of the Parties, namely, Nicaragua and Colombia. The Court has taken note of the conclusions that the Agents of Honduras and the Parties have stated at the end of the second round of oral arguments. I should like to 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 Honduras 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 Honduras 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 Honduras will be advised in due course of the date on which the Court will deliver its judgment.

As the Court has no other business before it today, the sitting is closed.

The Court rose at 4.30 p.m.

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