DISSENTING OPINION OF JUDGE *AD HOC* CARON

Disagreement with dismissal by the Court of Colombia's second preliminary objection — Requirement that there be a "dispute" as a general limitation to the contentious jurisdiction of the Court — Specific requirement for a "dispute" under the Pact of Bogotá — Meaning of "dispute" — Unprecedented character of the present case — Contention by Colombia that there is no dispute between the Parties resting on the allegation that no "claim" was made by Nicaragua that was capable of being "positively opposed" by Colombia — No capacity for Court to infer the existence of a "claim" giving rise to a dispute — To have jurisdiction, Court must find that Nicaragua made a "claim" on those points of law or fact to which the present proceedings relate — Evidence as to the existence of a "dispute" — No basis for a finding that there was a dispute between the Parties as to the subject-matter now before the Court prior to the filing of the Application.

Disagreement with dismissal by the Court of Colombia's third preliminary objection — Negotiation as a condition precedent to recourse to Court — Court's characterization of circumstances in which negotiation may be dispensed with — Disagreement that those circumstances pertain in the present case — Evidentiary record does not support conclusion that settlement not possible or contemplated by the Parties — Interrelationship between second and third preliminary objection — Importance of negotiations to defining the subject-matter of the dispute ultimately brought for judicial settlement.

I. Introduction

1. I respectfully dissent in respect of the Court's finding on Colombia's second and third preliminary objections inasmuch as the Court's reasoning departs from its own jurisprudence and is not supported by the evidence before it. Beyond the particulars of this case, it is of great concern that in finding that it possesses jurisdiction, the Court's reasoning undermines in my opinion broader concepts underlying the peaceful settlement of disputes.

2. The Court's Judgment addresses its jurisdiction over the claims of Nicaragua that base the Court's competence first and foremost on Article XXXI of the Pact of Bogotá. It is important to recall that the full title of that Treaty is the "American Treaty on Pacific Settlement". The Treaty promotes the pacific settlement of disputes by setting forth various means of doing so. The means set forth in the treaty begins with the "general obligation to settle disputes by pacific means" (Chapter One, Articles I to VIII), proceeds to "procedures of good offices and mediation" (Chap-

ter Two, Articles IX to XIV), sets forth a "procedure of investigation and conciliation" (Chapter Three, Articles XV to XXX), and lastly reaches in Chapter Four Article XXXI a "judicial procedure" of reference to this Court, assuming that the parties have not provided instead for arbitration (Chapter Five, Articles XXXVIII to XLIX). The Treaty is careful to point out that the "order of the pacific procedures . . . does not signify the parties may not have recourse to the procedure which they consider most appropriate . . . or that any of them have preference over others except as expressly provided" (Article III). But the phrase "except as expressly provided" is important. The exceptions expressly provided in each means of settlement are important and are the bedrock of my dissent to the Court's Judgment in respect of the second and third preliminary objections.

3. There may not be a regimented staircase of procedures in the Pact of Bogotá, but peaceful settlement within the scheme of the Pact carefully climbs from dialogue in which each State's concerns are voiced to each other, upwards to the various means by which settlement may be negotiated and finally to the power of the Court or a tribunal to decide "disputes of a juridical nature". A disagreement is more than a pattern of conduct that might imply a difference in views. As the Pact recognizes, communication is essential because a disagreement cannot be settled unless there is a dialogue that defines what is in dispute. Indeed, unless a dispute in this sense "exists", then it is difficult to envision what is to be negotiated.

4. I dissent from the Court's Judgment because it fundamentally weakens this scheme, reducing the complexity of the scheme for the settlement of disputes set out in the American Treaty on Pacific Settlement into essentially a simple acceptance of the Court's jurisdiction. The Judgment in profoundly shifting the requirement that there be a dispute holds that the Applicant to the Court need not have engaged in dialogue, and need not have expressed its concerns to the other State. Without such dialogue, the Parties will not have had the opportunity to define the dispute, refine the dispute, and — one can hope — narrow or even settle the dispute. As critically, if the Applicant need not have engaged in dialogue with the other Party, then any duty to negotiate as a practical matter is substantially weakened. International disputes are complex and boundary disputes are amongst the most difficult to resolve. The law gives answers, but not necessarily the most nuanced answers, in such complex situations. It is essential that the Court or a tribunal possess the jurisdiction to give the answer to a dispute when necessary or when called upon by both parties. But it is only necessary when the dispute between two States "cannot be settled by direct negotiations" — language in the Pact of Bogotá that the Court's jurisprudence holds to be a precondition to jurisdiction under the Pact. It is regrettable that the present Judgment in its holdings regarding the second and third preliminary objections formally reaffirms, yet sub-

stantively negates, the requirement that a dispute exists and the obligation to pursue negotiations.

II. The Second Preliminary Objection as to the Existence of a Dispute

1. The Requirement that a Dispute Exist

5. The Court reaffirms in its Judgment that the existence of a dispute is a precondition to the Court's exercise of jurisdiction over this, and indeed any, case. The Court, however, simultaneously also departs from its own jurisprudence on this requirement. That jurisprudence indicates the importance of initiating an assessment of the existence of a "dispute" with identification of both a "claim" and "positive opposition" to that claim by the States party to the Court's proceedings. Applying the Court's previous jurisprudence as to the meaning and existence of a dispute, I am unable to see how a "dispute" as to the subject-matter invoked by Nicaragua in its Application existed at the requisite date. In these circumstances, I am unable to agree with the Court's claim to jurisdiction over the present proceedings.

6. The requirement of a dispute between the parties is a general limitation to the contentious jurisdiction of the Court. In the *Nuclear Tests* cases, where partway through the proceedings the basis of the dispute was found to have become moot, the Court stated: "the existence of a dispute is the primary condition for the Court to exercise its judicial function" (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, pp. 270-271, para. 55; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 476, para. 58). Mootness involves the situation where a dispute no longer exists. Ripeness asks whether a dispute exists, that is, whether it has come into being. It is this latter situation that is at issue in the second objection.

7. In addition to the requirement that a dispute exist as a general limitation on the contentious jurisdiction of the Court, this limitation may also arise from the particular instrument asserted to be the basis of the Court's jurisdiction. Thus, in this case, the Court's Judgment refers also to Article XXXI of the Pact of Bogotá, where the parties to the Pact accept the Court's jurisdiction in respect of "disputes of a juridical nature . . ." (Judgment, paras. 15 and 50). The particular instrument may place additional limitations on the jurisdiction of the Court, but these further requirements are best viewed as additional requirements rather

than a change in the meaning of the term "dispute" itself. Such reasoning is implicit in the *Mavrommatis* case where the Permanent Court of International Justice (PCIJ) wrote:

> "Before considering whether the case of the Mavrommatis concessions relates to the *interpretation of application* of the Mandate and whether consequently its nature and subject are such as to bring it within the jurisdiction of the Court as defined in the article quoted above, it is essential to ascertain whether the case fulfils all the other conditions laid down in this clause. Does the matter before the Court constitute a dispute between the Mandatory and another Member of the League of Nations? Is it a dispute which cannot be settled by negotiation?" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11; emphasis in the original.)

See also *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 84, para. 29 (holding that "consistency of usage suggests that there is no reason to depart from the generally understood meaning of 'dispute' in the compromissory clause contained in Article 22 of CERD").

8. The meaning of the term "dispute" is set forth reasonably fully in the Court's jurisprudence. In its Judgment in 1924 in the *Mavrommatis* case, the PCIJ held that: "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons." (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11.) This Court's later jurisprudence concerning the elements of a dispute adds detail and precision to the view of the PCIJ. The Court in the *South West Africa* cases held:

> "[I]t is not sufficient for one party to a contentious case to assert that a dispute exists with the other party. A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence. *Nor is it adequate to show that the interests of the two parties to such a case are in conflict*." (*I.C.J. Reports 1962*, p. 328; emphasis added.)

If a mere conflict of interest as suggested in *Mavrommatis* is not "adequate", the Court refined the intensity element required of the dispute by holding repeatedly that the claim of one State must be "positively opposed" by another (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 40, para. 90; *Application of the International Convention on the Elimination of All Forms of*

Racial Discrimination (Georgia v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, pp. 84-85, para. 30).

9. Publicists examining the Court's jurisprudence have elaborated upon what in practice it means to require that the claim of one State is "positively opposed" by another. Professor J. G. Merrills writes that: "A dispute may be defined as a specific disagreement concerning a matter of fact, law or policy in which a claim or assertion of one party is met with *refusal, counter-claim or denial* by another." (J. G. Merrills, *International Dispute Settlement*, 2nd ed., 1993, p. 1; emphasis added.) The idea that "positive opposition" entails a rejection or denial by the opposing party is implicit in the meaning of the word "opposed". Likewise, in a leading Commentary on the Statute of the ICJ, Professor Christian Tomuschat writes that a dispute presupposes opposing views: "the Court has consistently proceeded from the assumption that an applicant must advance a legal claim" (Christian Tomuschat, "Article 36", Andreas Zimmermann, Christian Tomuschat, Karin Oellers-Frahm and Christian J. Tams (eds.), *The Statute of the International Court of Justice. A Commentary*, 2nd ed., 2012, p. 642). Thus, the claim of legal violation by one party must be positively opposed by the other party through that party's rejection or denial of the claim of legal violation.

10. In a minority of cases, the applicant's claim of legal violation was not met with "refusal", but rather with silence. In such instances, the Court has been practical rather than formalistic and indicated flexibility as to how positive opposition is to be established. In 1927, for example, the PCIJ observed that:

> "In so far as concerns the word 'dispute', [. . .] according to the tenor of Article 60 of the Statute, the manifestation of the existence of the dispute in a specific manner, as for instance by diplomatic negotiations, is not required." (*Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, p. 10.)

11. Similarly, the Court more recently in *Georgia* v. *Russian Federation* summarizing its jurisprudence on the requirement stated:

> "As the Court has recognized (for example, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 315, para. 89), the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for." (*Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 84, para. 30.)

12. The practice of the Court in inferring opposition from "the failure of a State to respond to a claim where a response is called for" reinforces

the conclusion that "positive opposition" generally requires a rejection or denial by the other party. If this were not necessary, then the inference made in the several cases of silence would not have been needed. In the *Hostages* case, for example, the claim of legal violation by the Applicant, the United States, was met with silence from the Respondent, Iran. The Court in evaluating whether a dispute existed did not merely indicate that the two Parties possessed different views or a conflict of interests. Rather, the Court sifted through the statements of the United States so as to justify the necessary inference that Iran, despite its silence, positively opposed the claim of the United States (*United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980*, p. 25, para. 47).

13. The requirement that a dispute exist may thus be met where: (1) there is a claim of legal violation by a State and such a claim is positively opposed, that is, rejected, by another State; or (2) there is a claim of legal violation by a State where positive opposition may be inferred from the failure of another State to reply to the first State's claim of legal violation where such a response is called for.

2. The Unprecedented Character of the Present Case

14. To the best of my knowledge, the way in which the requirement as to the existence of a dispute arises in this case is unprecedented in the Court's history. In all of the cases cited in the Court's Judgment and in this opinion, the case involved a situation where the applicant State has stated clearly its claim of legal violation to the respondent State prior to the date of its Application. The issue in those cases was primarily whether the respondent State positively opposed, that is, rejected, the claim of legal violation by the applicant State.

15. For example: the claims of Greece, and as a secondary matter its national, were formal and unequivocal in the *Mavrommatis* case. Similarly, in the *Hostages* case, the claim of legal violation by the United States was abundantly clear through its despatch of a special emissary, the views expressed by its chargé d'affaires in Tehran, and its representations before the United Nations Security Council (*ibid.*, p. 25, para. 47).

16. In *Georgia* v. *Russian Federation*, the Court was confronted with the question of whether the particular requirement for the existence of a dispute under Article 22 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination ("CERD") was met ("[A]ny dispute between two or more States parties with respect to the interpretation or application of this Convention"). The issue in that case was not whether Georgia had made a claim of legal violation at all but

precisely when in a long series of statements or letters it could be said that such a claim was made to the Russian Federation "with respect to the interpretation or application" of CERD. The Court had no difficulty in ultimately finding that statements by the Georgian President in a Press Conference held on 9 August 2008, the statement of the Georgian Representative to the United Nations Security Council on 10 August 2008, a published statement of the Georgian Foreign Minister on 11 August 2008, and a televised interview with the Georgian President on 11 August 2008 "expressly referred to alleged ethnic cleansing by Russian Forces". On that basis, the Court concluded that those actions constituted "claims [that] were made against the Russian Federation" (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 120, para. 113).

17. In the present proceeding, Colombia's second preliminary objection does not reach the point of arguing that it did not positively oppose a claim of Nicaragua. Colombia's second preliminary objection argues a more fundamental point, namely, that Nicaragua never made a claim which Colombia could oppose.

18. This difference is significant. However, it is a difference not addressed by the Judgment. It is appropriate for the Court to infer positive opposition to a claim. It is not in my view appropriate to infer the assertion of the claim. First, such an inference eviscerates the requirement that there be a dispute. Second, what does it mean for the requirement that the respondent positively oppose a claim when the claim is not clear, not to mention not explicit? An inferred claim is not a claim. It is not asking much of the applicant that they have formulated and communicated in some fashion a claim. Third, to infer the claim itself leaves both vague and unclear what the dispute is about. I agree that it is for the Court to objectively determine what is in dispute and that it may thus itself add clarity. For such an objective determination to be based upon an assessment of the protests made, letters exchanged and later pleadings is one thing. It is quite another matter for a court, however, to objectively determine the existence of the dispute not from the articulation of a claim by the applicant and response by (including unjustified silence of) the respondent, but rather to infer it from the overall context in which the parties co-exist. Such an attempt at objective determination is, in my opinion, fraught with potential pitfalls for the parties and the Court and could easily shade into an abuse of discretion. The dangers are evident in the Court's Judgment in this case.

19. The Court's Judgment does not address the unprecedented character of the present case. The Court reiterates at paragraph 50 of its Judgment that it "must be shown that the claim of one party is positively

opposed by the other", citing the *South West Africa* cases. The Court's Judgment, however, immediately adds a statement to the above quoted text, that for the circumstances of this case, profoundly changes the applicable law and masks the significant departure from its jurisprudence that follows. The Court states that it "does not matter which one of them [i.e., the parties] advances a claim and which one opposes it". Whether this statement is correct depends upon the situation presented. It is starkly incorrect for the situation presented in this case.

20. The overwhelming majority of contentious cases have involved disputes where there has been a significant exchange of diplomatic protests and letters between the parties concerning the subject of the dispute before the Court. Even within those cases where a preliminary objection is raised as to whether a dispute exists, that preliminary objection can nevertheless be assessed against a factual background comprised of such statements and protests. To the extent that the assertion in paragraph 50 refers to the situations just described, then I agree that it does not matter in determining whether a dispute came into existence whether it is the party who ultimately is applicant or respondent that initiated the exchange of diplomatic protests and letters. All that matters is that the factual record evidences that one party positively opposed the claim of the other. But — critically — that is far from the situation presented in this case.

21. In particular, where one side has not positively opposed the claims of the other but rather remained silent, it is the applicant who bears the onus of demonstrating that that silence should nevertheless be taken as an opposition to those claims. In cases involving such silence, it is always, then, the applicant which will have made the requisite "claim" capable of giving rise to a "dispute". That is the situation presented by this case.

22. Before reviewing the outcome of the assessments by the Court of the existence of the disputes that are the basis of Nicaragua's claims, I emphasize that Nicaragua does not dispute directly Colombia's assertion that there was no claim of legal violation as such by Nicaragua, not to mention a formal claim by Nicaragua, prior to Nicaragua filing its Application. Rather, Nicaragua argues that it is "obvious" that there is a dispute. Nicaragua argues in its written statement at paragraph 3.5 that "[i]t is perfectly obvious that Colombia and Nicaragua are in disagreement on various points of law, and have a conflict of legal views and interests". Nicaragua, however, does not refer to evidence of a claim of legal violation by it in any form. Rather, Nicaragua at paragraph 3.15 of its written statement to the preliminary objections of the Republic of Colombia writes: "one might ask why Colombia considers that the onus was on Nicaragua . . .". But this is a different way of stating precisely what is unprecedented about this case. The issue in this case is not that presented to the Court by other cases. If this case were like the others, the issue would be whether the Respondent — Colombia — positively opposed or rejected the claim of Nicaragua. This case does not reach that question.

The question in this case is whether the Applicant, having been bound by Article 40 (1) of the Statute and Article 38 (2) of the Rules of Court to state the "subject of the dispute" in its Application, ever communicated the related claim of legal violation *in any form* so that it might be positively opposed by the Respondent, thus establishing the existence of a dispute.

23. In light of the above, it is my view that a dispute cannot be taken to have arisen between the Parties unless Nicaragua made a "claim" capable of rejection by Colombia and communicated it to Colombia in some way. That is, Nicaragua must have — prior to filing its Application — asserted against Colombia its views on those points of law or fact forming the subject of the claims now before the Court.

3. What the Court Holds

24. The Judgment of the Court begins correctly by asking what are the disputes that Nicaragua asserts are the subject of the proceeding; recognizing that it is for the Court to objectively assess and specifically articulate the subject-matter of the dispute. Looking to the Application and Memorial of Nicaragua, the Court identifies two claims, each of which rests on a distinct dispute. In the Application, the "Subject of the Dispute" is described as first, "violations of Nicaragua's sovereign rights and maritime zones declared by the Court's Judgment of 19 November 2012" and second, "the threat of the use of force by Colombia in order to implement these violations" (Application of Nicaragua, p. 2, para. 2). The submissions in the Memorial of Nicaragua confirm that these two claims are the subject of this proceeding. Having identified two claims, the Judgment of the Court proceeds to assess whether a dispute existed with respect to either or both of them at the time of the Application.

25. As to whether a dispute existed as to the sovereign rights and maritime zones of Nicaragua, the Court at paragraphs 69 to 74 concludes that a dispute as to Nicaragua's rights in the relevant maritime zones existed at the time of the Application. In reaching this conclusion, the Court's Judgment refers to two specific items of evidence. What is striking and deserving of emphasis at this point is the contrast with *Georgia* v. *Russian Federation* where the Court — in seeking to identify at what point in time it could be said that a claim had been made by Georgia which the Russian Federation could have positively opposed — the Court reviewed over 50 specific items of evidence, comprising letters, statements, decrees and filings by the Applicant, Georgia.

26. As to whether a dispute existed as to the threat of the use of force, the Court at paragraphs 75 to 78 concludes that a dispute did not exist.

The Court does not state that a dispute did not exist because Nicaragua failed to claim, protest or object to a threat of the use of force by Colombia. It could have done so because there is no such claim, protest or threat in the record. But it does not. Rather, the Judgment refers to two pieces of evidence in which representatives of the Nicaraguan Government described the situation at sea as calm.

27. The above holdings that one dispute existed while the other did not are both flawed. Before laying out this critique, this dissent first must do what the Court does not do; that is, engage fully with the evidence.

4. Assessing the Evidentiary Record

28. In assessing the evidence in this case, it is important at the outset to point out what is not included. There is no diplomatic letter of protest prior to the lodgment of Nicaragua's Application. Although both sides acknowledge there were meetings of the two Heads of State, there are no minutes of those meetings nor are there any witness statements as to what transpired at those meetings. Given that the requirement that a dispute exists necessarily examines the claim of the applicant and the rejection or denial of the respondent, it is particularly curious and telling that the evidentiary record contains only a very limited number of statements from Nicaraguan officials. In fact, there are only a handful of such statements cited by the Parties. Moreover, the bulk of those derive from contemporaneous press reporting. The Court therefore is not presented here with the possibility it had in *Georgia* v. *Russian Federation* of limiting its search for a "claim" by the Applicant to statements made by that State in "official documents and statements" (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russia Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 86, para. 33). Indeed, only a small number of documents in the present proceedings have been proffered as a possible source of any such "claim".

29. In addition, it is important to observe that, temporally, the statements made by Nicaraguan officials prior to the filing of the Application fall into two sets: a first set covers the three months immediately following the issuance of the Court's November 2012 Judgment; and a second set commences six months later and spans less than two months in the period leading up to the filing of Nicaragua's Application in these proceedings. In the following paragraphs, I assess whether any of the statements disclose a "claim" which Colombia could "positively oppose" such as to give rise to a "dispute" between the Parties. I furthermore assess

whether any such "claim" related to the subject of the claims now before the Court.

30. On 21 November 2012, press reporting disclosed that President Ortega had welcomed the 2012 Judgment as a "national victory", the reporting further indicating that President Ortega had "urged the South American nation to respect the high court's decision" (Memorial of Nicaragua, Annex 26, "International court gives Nicaragua more waters, outlying keys to Colombia", *Dialogo*, 21 November 2012, pp. 355-356). I am unable to see in these statements any "claim" against Colombia of a breach of its obligations, let alone a "claim" with respect to a breach of those rights now invoked by Nicaragua in these proceedings.

31. On 26 November 2012, President Ortega made an address to "the people of Nicaragua" (Memorial of Nicaragua, Annex 27, "Message from President Daniel [Ortega] to the people of Nicaragua", *El 19 Digital*, 26 November 2012, pp. 359-362). In that address, the President referred again to the 2012 Judgment to note "our concerns for the manner in which [the President of Colombia] was reacting by rejecting the ruling of the Court", further noting that

> "[d]uring the days following the ruling, President Santos toughened his position by adding to his words, the mandate to the naval forces of the Colombian armada to multiply their surveillance activities in territories awarded by the International Court of Justice as maritime territories to Nicaragua" (*ibid.*, p. 359).

In that address, President Ortega went on to note that in response to these words and acts "the Government of Nicaragua reacted very calmly" and was "waiting and expect[s] the Government of Colombia to decide, once and for all, to comply with the ruling of the Court". He went on to refer to Nicaragua's desire to establish "new Conventions with Colombia to combat drug trafficking and organized crime" and on "matters of fisheries".

32. Again, there is no claim in these statements concerning any threat of the use of force by Colombia. There is, furthermore, no claim in respect of a breach by Colombia of Nicaragua's sovereign rights and maritime spaces. At most, the statements made by President Ortega in this address could constitute a claim in respect of Colombia's implementation of the 2012 Judgment. As Nicaragua itself attests, however, the dispute it invokes before the Court in the present proceedings "is not 'a difference of opinion or views between the parties as to the meaning or scope of a judgment rendered by the Court'" (Memorial of Nicaragua, p. 17, para. 1.33).

33. On 29 November 2012, President Ortega reportedly indicated — in the lead-up to a meeting between the two Presidents in Mexico — that he wished to "shake hands with President Santos and say that I and the peo-

ple of Nicaragua want to fix this situation as fraternally as brothers" (Memorial of Nicaragua, Annex 31, "Santos and Ortega will meet this Saturday in Mexico City", *La República*, 29 November 2012). There is no official record of the exchanges between the Presidents at the meeting on 1 December 2012. Colombia cites a press statement of President Santos that discloses some of what was discussed at that meeting, indicating that President Santos had stated that:

> "We — the Minister of Foreign Affairs and I — gathered with President Ortega. We explained in the clearest way our position: we want the Colombian rights, those of the *raizales*, not only with respect to the rights of the artisanal fishermen but other rights, to be re-established and guaranteed. He [President Ortega] understood.
>
> . . . . . .
>
> We will keep looking for the mechanism that both the International Court of The Hague and the international diplomacy have at their disposal to re-establish the rights infringed by the Judgment. That does not exclude these channels of communication with Nicaragua. I believe that those channels of communication are an important complement.
>
> In this sense we will continue — and we said this clearly to President Ortega — looking for the re-establishment of the rights that this Judgment breached in a grave matter for the Colombians." (Preliminary Objections of the Republic of Colombia, Annex 9, "Declaration of the President of the Republic of Colombia", 1 December 2012, pp. 109-110.)

34. A separate press report dated 3 December 2012 reports that President Santos, after the meeting:

> "announced that as a result of this meeting with the Nicaraguan President, the two Governments will manage the matter of the ruling by the Court in The Hague with forethought and discretion. 'We are going to manage this with prudence, with discretion, no insults by the news media. If there is a problem, we will call each other', he stated." (Written Statement of the Republic of Nicaragua to the Preliminary Objections of the Republic of Colombia, Annex 5, "Government of Colombia will not implement ICJ judgment until the rights of Colombians have been restored", *El Salvador Noticias.net*, 3 December 2012, p. 103.)

35. Nicaragua observes that by this meeting it sought to "engage in a constructive dialogue over implementation of the 19 November Judgment" (Memorial of Nicaragua, para. 2.7). It further surmises that the discussions between the Presidents at the meeting indicated that "President Santos's position was that his country would not abide by the Judgment until 'we see that Colombians' rights, that have been violated, are

re-established and guaranteed in the future'" (CR 2015/23, p. 12, para. 9 (Arguëllo); Memorial of Nicaragua, para. 2.7). Nicaragua does not, however, tender any evidence as to the position taken by the Nicaraguan President in the meeting, beyond asserting that:

> "President Ortega stated Nicaragua's position that, while the Judgment of the Court had to be respected by both States, there was room for discussion in regard to the manner of its implementation, and at all events the matter had to be resolved peacefully and without confrontation." (Memorial of Nicaragua, para. 2.7, citing a press report written before the meeting: "Santos and Ortega will meet this Saturday in Mexico City", *La República*, 29 November 2012; *ibid.*, Annex 31, p. 379.)

36. In such a circumstance, it is impossible to infer that Nicaragua made at that meeting any "claim" capable of giving rise to a "dispute" between the Parties. Moreover, the contemporaneous public statements by the Presidents focus upon Colombia's compliance with the 2012 Judgment. Any "claim" arising out of these statements, therefore, would pertain to a subject-matter different to the alleged breach of Nicaragua's sovereign rights and maritime zones and of Colombia's obligations in respect to the use of force that Nicaragua invokes in these proceedings.

37. On 5 December 2012, the Chief of Nicaragua's army, General Avilés, confirmed that Nicaragua was in communication with the Colombian authorities, and that "there has been no boarding to fishing vessels" (CR 2015/22, p. 33, para. 10 (Bundy)). On the same date, President Ortega held further discussions with President Santos. Press reporting of that meeting indicated that:

> "President Ortega also said that the Nicaraguan Navy has been instructed to not detain any Colombian fishermen during what he calls 'the period of transition in the zone'.
>
> 'We have to do this gradually until there is full compliance with the Court's sentence, without affecting the reserve and without affecting the fishermen and businesses on San Andres Island', Ortega said." (Memorial of Nicaragua, Annex 33, "Nicaragua: no oil concessions in Seaflower", *Nicaragua Dispatch*, 6 December 2012, p. 387.)

Again, there is no indication in any of these statements of Nicaragua claiming a breach by Colombia of its legal obligations, let alone a breach of its obligations in respect of the use of force or of Nicaragua's sovereign rights and maritime zones.

38. The two Presidents met again in February 2013. Contemporaneous press reporting indicates that:

> "Ortega said that it is necessary to find mechanisms for consensus through dialogue that will enable closer relations between the two nations instead of confronting them. 'I propose to the Government of Colombia, to President (Juan Manuel) Santos, that the sooner the better, we should organize these commissions to work so that they can demarcate all of this in regard to the area where the Raizal peoples can fish according to their historical rights'. . . Ortega said that the issue has been manipulated in Colombia for 'electoral' purposes and that 'there are powerful interests' in having an armed confrontation between Nicaragua and Colombia, in the waters granted to his country by The Hague. ['I am certain that President Santos and the People of Colombia know that the solution to the ruling by the International Court of Justice is not the use of force; it is not the deployment of warships in the area, but rather to follow the path to organize the ruling of the Court, organize it in terms of its implementation, how to organize it, how to apply it', he stated. Ortega said that both in Mexico, during the takeover by President Enrique Peña Nieto, and in the recent Summit of Latin American States in Chile, he had the opportunity to discuss the issue with the Colombian President and that they have always spoken of taking joint measures. He said that his country has no interest in a confrontation with anyone, and that the only thing its coast guard boats do is 'to enforce the ruling by The Hague 'very firmly and with serenity'', always watching 'so that the dialogue comes first''." (Memorial of Nicaragua, Annex 35, "Nicaragua asks Bogotá to form The Hague Commissions", *La Opinion*, 22 February 2013, pp. 395-396.)

This is the first statement on the record addressing the possibility of an armed confrontation between the States. Two observations are, however, in order. First, it is not the President who refers to such a possibility, but the reporter. The President appears on the contrary to recognize that "the People of Colombia know that the solution to the ruling by the International Court of Justice is not the use of force". Second, the President makes no specific allegation against Colombia of a breach of Nicaragua's sovereign rights or maritime zones or of Colombia's obligations in respect of the use of force. The statements simply cannot be read as a legal "claim" against Colombia on these matters.

39. These statements make up the first set of evidence (November 2012 to February 2013). The second group of statements occur some five months subsequent to the first group, in the lead-up to the filing of Nicaragua's Application in these proceedings (August 2013 to November 2013).

40. A number of these statements indicate Nicaragua's continued view that the situation at sea was calm, disclosing no "claim" that Colombia was violating Nicaragua's sovereign rights and maritime zones or threat-

ening the use of force against Nicaragua. On 14 August 2013, for example, President Ortega stated that:

> "[W]e must recognize that . . . the Naval Force of Colombia, which is very powerful, that certainly has a very large military power, has been careful, has been respectful and there has not been any kind of confrontation between the Colombian and Nicaraguan Navy" (Preliminary Objections of Colombia, Annex 11, "Declaration of the President of the Republic of Nicaragua", 14 August 2013, p. 118).

On 18 November 2013, the Chief of Nicaragua's naval forces, Admiral Corrales Rodríguez, further stated that "[t]here have not been any conflicts and that is why I want to highlight that in one year of being there we have not had any problems with the Colombian Navy" (*ibid.*, Annex 43, "Patrolling the recovered sea", *El Nuevo Diario*, 18 November 2013, p. 355).

41. Other statements in this period pertain to the implementation of the 2012 Judgment. On 23 August 2013, for example, press reporting indicated that:

> "Nicaragua . . . say[s] that the ruling is already being implemented and that a decision by the Colombian Government not to abide by it makes no sense. 'The judgment of the ICJ has been in effect since 19 November 2012. What has happened is that Colombia has hired a number of law firms to analyse the resources in the territory', said Mauricio Herdocia, the lawyer representing Nicaragua in this case. 'In the end all questions will be resolved by the ICJ, and according to the Rules of the Court, when a State is preparing an appeal the judgment must be respected', added Herdocia." (Memorial of Nicaragua, Annex 38, "World Court ruling on maritime borders unenforceable in Colombia: Vice-President", *Colombia Reports*, 23 August 2013, pp. 407-408.)

42. This is not a statement stemming from the Nicaraguan Executive, but in any case does not comprise any particular "claim" about Colombia's conduct capable of rejection by that State.

43. On 10 September 2013, President Ortega reportedly stated that:

> '"The call that I make to President Santos, to the Government of Colombia, to some Central American Governors that are throwing out declarations talking about expansionism, is that these are times in which law, and not force, must prevail . . . Going for force would mean to go back to the Stone Age. If we take the lawful route that would mean the strengthening of peace, if we go for force it would mean to feed more wars in the world, if we go for law it would make wars go away and to promote the peace in the world', he assured. In that sense he reaffirmed that Nicaragua is committed to peace, just like the countries of Latin America and the Caribbean." (Memorial of Nicaragua,

Annex 39, "Daniel: 40 years from the martyrdom of Allende, peace must prevail", *El 19 Digital*, 11 September 2013, p. 411.)

44. In response to Colombia's insistence on the negotiation between the two States of a treaty to implement the 2012 Judgment, President Ortega further stated that:

> "We understand the position taken by President Santos, but we cannot say that we agree with the position of President Santos . . . We do agree that it is necessary to dialogue, we do agree that it is necessary to look for some kind of agreement, treaty, whatever we want to call it, to put into practice in a harmonious way, like brother peoples, the Judgment of the International Court of Justice . . ." (Memorial of Nicaragua, Annex 39.)

He also stated:

> "The Court's decisions are obligatory . . . They are not subject to discussion. It's disrespectful to the Court. It is as if we decided not to abide by the ruling because we didn't receive 100 percent of what we asked, which in this case was the San Andrés archipelago.
>
> . . . . . .
>
> Nicaragua wants peace . . . We have no expansionist aims . . . we only want what the Court at The Hague granted us in its ruling." (Written Statement of the Republic of Nicaragua to the Preliminary Objections of the Republic of Colombia, Annex 7, "Colombia will Challenge Maritime Border with Nicaragua", *ABC News*, 10 September 2013, p. 115.)

45. Three points are striking about these 10 September remarks. First, President Ortega, in discussing the preference of Nicaragua for "peace" does not make any allegation against Colombia that Colombia is threatening that "peace" nor any claim that Nicaragua's legal rights were being infringed by Colombia. Second, the statements were made a day after Colombia passed Decree No. 1946, yet that Decree is not referred to by President Ortega even though it now forms a core part of the "dispute" said to have arisen before the two Parties at this time (Memorial of Nicaragua, pp. 26-33). Third, to the extent that these statements disclose any "claim" by Nicaragua or disagreement between the Parties, it would appear only to relate to the actions necessary for the Parties to give effect to the 2012 Judgment and specifically, as Nicaragua notes, the "legal requirement for a treaty in order to make the November 2012 Judgment effective or binding on the Parties" (*ibid.*, para. 2.59). They do not, however, disclose any "claim" in respect of an alleged violation by Colombia of Nicaragua's sovereign rights or maritime zones nor any threat of the use of force.

46. On 12 September 2013, the National Assembly of Nicaragua declared "its full endorsement of the position of the Government of Nicaragua for a peaceful solution through a treaty implementing the Judgment" (Memorial of Nicaragua, para. 2.59 and Annex 40, "Assembly of Nicaragua supports dialogue with Colombia", *El Universal*, 12 September 2013). It furthermore "urge[d] Colombia to comply with international law and to abide by the ruling of the International Court of Justice, which is final and of unavoidable compliance". This declaration, at most, could imply a claim that Colombia had yet to comply with the 2012 Judgment, but does not indicate any "claim" that Colombia was breaching Nicaragua's sovereign rights or maritime zones nor threatening the use of force as a result of any such alleged non-compliance.

47. On 13 September 2013, President Ortega reiterated his call for the creation of a commission to oversee implementation of the 2012 Judgment, stating:

> "We are ready, we are willing to create the corresponding commission to meet with a commission from our brother country Colombia, from the Colombian Government, and that together we can work to make possible the implementation of the Court's Judgment, and this will be supported, ratified; because the Judgment has been delivered already, it is just about laying it down, so that it will be laid down in what will be a treaty between Colombia and Nicaragua . . . In that treaty, Colombia and Nicaragua will be proceeding with the Judgment's compliance, with the ICJ's Judgment. This is the Peace path, the Unity path, the Fraternity path." (Preliminary Objections of Colombia, Annex 41, "Ortega says that Nicaragua is ready to create a Commission to ratify the Judgment of the ICJ", *La Jornada*, 13 September 2013, p. 345.)

48. This is the last statement of President Ortega cited by the Parties prior to the filing of Nicaragua's Application on 26 November 2013.

49. None of the above statements is — either alone or collectively — capable of being read to constitute a "claim" capable of rejection by Colombia. What is telling is the silence in these statements, and the statements which have not been adduced. Two points bear emphasizing.

50. First, there is no evidence that Nicaragua ever framed claims against Colombia's acts by reference to the legal rights now before the Court. In fact, the statements made by Nicaraguan officials were generally vague and unspecific. To the extent that they *were* specific, they referred not to the subject-matter of the claims now before the Court but rather to the steps necessary to ensure compliance with the 2012 Judgment.

51. Second, a number of the statements tend to indicate the opposite

conclusion: that the Parties did not consider that their claims were "positively opposed", rather indicating their constructive attempts to implement the 2012 Judgment.

52. While it might be appropriate, as I stated earlier, to infer that a respondent's conduct impliedly rejected claims raised by an applicant, the converse cannot be true. It is not possible for Colombia to reject — either expressly or impliedly — claims that were never raised. In the circumstances of this case, it is difficult to see how any of the above statements constituted a "claim" capable of being "positively opposed" by Colombia, or capable of resulting in a "disagreement on a point of law or fact" between the Parties in relation to the rights now in dispute.

53. I conclude from my review of the factual record that, prior to filing its Application, Nicaragua made no claim that Colombia had breached its sovereign rights or maritime spaces or had unlawfully threatened the use of force. In such a circumstance, there could be no "dispute" between the Parties with respect to these matters at the requisite date. To the extent that any dispute *did* arise, that dispute could only be characterized as relating to the Parties' interpretation of, or compliance with, the 2012 Judgment. That is not a matter brought by Nicaragua before the Court for determination in these proceedings.

5. The Court's Analysis Is Contradicted by the Evidentiary Record

54. Having assessed the evidentiary record before the Court, I return to the Court's holdings, summarized above, that one dispute existed while the other did not.

55. The Court begins its analysis of whether a dispute existed as to Nicaragua's sovereign rights and maritime spaces in paragraph 69 by observing that:

> "following the delivery of the 2012 Judgment, the President of Colombia proposed to Nicaragua to negotiate a treaty concerning the effects of that Judgment, while the Nicaraguan President, on a number of occasions, expressed a willingness to enter into negotiations for the conclusion of a treaty to give effect to the Judgment, by addressing Colombia's concerns in relation to fishing, environmental protection and drug trafficking".

A logical conclusion of this circumstance in my opinion would be that following the delivery of the 2012 Judgment there was no dispute between the Parties as regards Nicaragua's sovereign rights and maritime spaces. Oddly, in my view, the Court, anticipating its conclusion, concludes in paragraph 69 that "the fact that the Parties remained open to a dialogue does not by itself prove that, at the date of the filing of the Application, there existed no dispute between them".

56. As stated at paragraph 25 (above), the Court proceeds in paragraph 69 to refer to two pieces of evidence. One is a 1 December 2012 statement of President Santos of Colombia and the other is a 10 September 2013 statement of President Ortega of Nicaragua. These are the only pieces of evidence the Court references to support its conclusion that "[i]t is apparent from these statements that the Parties held opposing views on the question of their respective rights in the maritime areas covered by the 2012 Judgment" and therefore that a dispute existed. In particular, it reaches the conclusion that "the Parties held opposing views" by juxtaposing the December 2012 statement of President Santos of Colombia with the September 2013 reported statement of President Daniel Ortega of Nicaragua. Three deficiencies in the Court's reasoning need to be emphasized:

— First, jurisprudentially, the question is whether Nicaragua ever stated a claim which Colombia could have positively opposed. In this sense, only one of the two pieces of evidence is relevant. The question is not whether statements by two States separated by almost a year should be read to suggest a conflict of interests.

— Second, the statements cited at most suggest a conflict of interests as to compliance with the 2012 Judgment. But non-compliance with the 2012 Judgment is a matter that both Nicaragua and the Court repeatedly state is not the dispute before the Court. The statements of President Ortega (there are two on 10 September 2013), as quoted fully and discussed at paragraphs 43 to 45 above, in discussing the preference of Nicaragua for "peace" does not make any allegation against Colombia that Colombia is threatening that "peace" nor make any claim that Nicaragua's legal rights were being infringed by Colombia. In addition, the statements were made a day after Colombia passed Decree No. 1946, yet that Decree is not referred to by President Ortega even though it now forms a core part of the "dispute" said to have arisen before the two Parties at this time (Memorial of Nicaragua, pp. 26-33). The 10 September 2013 statements do not communicate any "claim" in respect of an alleged violation by Colombia of Nicaragua's sovereign rights or maritime zones nor any threat of the use of force.

— Third, it is striking that the Court chooses to juxtapose two statements made almost a year apart. Arguably more relevant than the 1 December 2012 statement of President Santos (made only days after the delivery of the Judgment) is the interview that took place with the Colombian Minister for Foreign Affairs on 15 September 2013 shortly after President Ortega's statement of 10 September 2013. Minister María A. Holguín's views are reported as follows:

"*María A. Holguín speaks about the four pillars for the defence of National sovereignty in the Caribbean.*

The Minister of Foreign Affairs María Angela Holguín explained to *El Tiempo* the scope of the 'integral strategy' to defend the Colombian sovereignty in the Caribbean Sea. She stated that the Government does not disregard the Court of The Hague's Judgment — in which this Tribunal recognized greater rights to Nicaragua over those waters, but that the country 'is facing a legal obstacle' to apply it.

. . . . . .

How and when would you dialogue with Nicaragua to sign a border treaty?

Colombia is open to a dialogue with Nicaragua to sign a treaty that establishes the boundaries and a legal regime that contributes to the security and stability in the region. The Government has said that it awaits the decision of the Constitutional Court before initiating any action." (Preliminary Objections of Colombia, Annex 42, "The Minister of Foreign Affairs explains in detail the strategy vis-à-vis Nicaragua", *El Tiempo*, 15 September 2013, p. 349.)

The Court fails to engage with these contemporaneous statements by Minister Holguín. The above statements contextualize the earlier statements of President Santos, and indicate that Colombia was not "opposing" the implementation of the 2012 Judgment, nor contesting its binding character, but rather questioning the legal steps necessary to apply it.

57. In paragraph 70 of the Judgment, referring to "Colombia's proclamation of an 'Integral Contiguous Zone'", the Court writes that "the Parties took different positions on the legal implications of such action in international law". In so asserting, however, the Court does not cite any evidence indicating in what form or by which means those "different positions" were expressed. And nor could it: such evidence is simply not in the record before the Court.

58. The Court in paragraph 72 observes that a "formal diplomatic protest" is not a prerequisite. I agree. However, the problem in the instant case is that there also is not an informal protest or any statement that is a claim by Nicaragua of violation of a legal right. The Judgment does not address Colombia's objection that there was no such claim or complaint in any form. Instead, the Judgment — again without reference to the record — states that:

"in the specific circumstances of the present case, the evidence clearly indicates that . . . Colombia was aware that its enactment of Decree 1946 and its conduct in the maritime areas declared by the

> 2012 Judgment to belong to Nicaragua were positively opposed by Nicaragua" (Judgment, para. 73).

This statement by the Court turns completely on its head its jurisprudence as to the requirement that a dispute exist at the time an Application is filed. In this case, the Court does not ask whether the Applicant — Nicaragua — made in any form a claim of legal violation prior to the lodgment of the Application. Rather, it infers that the Respondent must have been "aware" that the Applicant positively opposed actions that the Respondent had taken. With all due respect, this reasoning misapprehends the Court's jurisprudence regarding the requirement that a dispute exist. This reasoning through its silence does not accurately represent the record. This holding in practice signals the end of the application of a reasoned requirement that a dispute exist.

59. Turning to the assessment by the Court of whether a dispute existed as to the threat of the use of force, the Court does not state that a dispute does not exist because Nicaragua failed to claim, protest or object to a threat of the use of force by Colombia. It could have done so because there is no such claim, protest or threat in the record. But it does not. Rather, the Judgment refers to evidence in which representatives of the Nicaraguan Government described the situation at sea as calm. A statement of the President of Nicaragua on 14 August 2013 that "there has not been any kind of confrontation" between the naval forces of the two States. A statement by the Chief of the Nicaraguan Naval Force on 18 November 2013 that there were neither problems nor conflicts with the Colombian navy. Surprisingly, the Judgment does not discuss whether there was a claim of legal violation in the first instance. The Judgment confuses the identification of a claim of legal violation by the Applicant with the perhaps necessary inference of a positive opposition to such a claim by the Respondent. Putting aside why statements that the situation is calm or that there are no conflicts are relevant to an asserted dispute as to the *threat* of force, the fact is that there is no claim, in any form, by Nicaragua prior to the lodgment of the Application objecting to a threat of the use of force by Colombia.

60. If the Judgment had found that there was no dispute as to the threat of the use of force because there was no claim of legal violation in that regard by Nicaragua, then the same reasoning should lead to the same conclusion that there was no dispute in regard to Nicaragua's rights in the relevant maritime zones.

III. The Third Preliminary Objection as to the Possibility of Negotiations

61. Article II of the Pact of Bogotá provides in part that "in the event that a controversy arises between two or more signatory States which, in the opinion of the parties, cannot be settled by direct negotiations through the usual diplomatic channels, the parties bind themselves to use the procedures established in the present Treaty . . .". The Court in its Judgment proceeds from the basis of its 1988 holding that the reference to direct negotiation in Article II of the Pact "constitutes . . . a condition precedent to recourse to the pacific procedures of the Pact in all cases" (*Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 94, para. 62). In so proceeding, the Court in paragraph 95 holds that the test for determining whether settlement is not possible is "whether the evidence provided demonstrates that, at the date of Nicaragua's filing of the Application, neither of the Parties could plausibly maintain that the dispute between them could be settled by direct negotiations through the usual diplomatic channels" (Judgment, para. 95).

62. The Court finds that "[n]o evidence submitted to the Court indicates that, on the date of Nicaragua's filing of the Application, the Parties had contemplated, or were in a position, to hold negotiations to settle the dispute concerning the alleged violations by Colombia of Nicaragua's rights in the maritime zones" and on that basis rejects Colombia's third preliminary objection (*ibid.*, paras. 100-101).

63. I agree with the Court that an obligation to negotiate is satisfied if there is no prospect of settlement. The PCIJ in *Mavrommatis* articulated such an exception to the negotiations requirement present in that case as follows:

> "Negotiations do not of necessity always presuppose a more or less lengthy series of notes and despatches; it may suffice that a discussion should have been commenced, and this discussion may have been very short; this will be the case if a dead lock is reached, or if finally a point is reached at which one of the Parties definitely declares himself unable, or refuses, to give way, and there can therefore be no doubt that *the dispute cannot be settled by diplomatic negotiation*." (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 13.)

64. The Court's conclusion in paragraph 100, however, that "[n]o evidence" indicates that "the Parties had contemplated, or were in a position, to hold negotiations to the settle the dispute" (Judgment, para. 100) is not only not supported by the evidence, it is *contradicted* by the evidence.

65. The Court at the outset of its reasoning observes that "through

various communications between the Heads of State of the two countries since the delivery of the 2012 Judgment, each Party had indicated that it was open to dialogue to address some issues raised by Colombia as a result of the Judgment" (Judgment, para. 97). This statement is a correct reflection of the evidence.

66. The Court also observes that

> "[t]he issues that the Parties identified for possible dialogue include [1] fishing activities of the inhabitants of San Andrés, Providencia and Santa Catalina in waters that have been recognized as appertaining to Nicaragua by the Court, [2] the protection of the Seaflower Biosphere Marine Reserve, and [3] the fight against drug trafficking in the Caribbean Sea" *(ibid.)*.

This statement is also a correct reflection of the evidence.

67. As an initial matter therefore, the Court's statement that there is "[n]o evidence" to indicate that the Parties contemplated negotiation is inconsistent with the record.

68. The Court's holding, however, is more subtly worded, focusing as it does on there being no evidence that the Parties contemplated negotiations *"to settle the dispute"* (*ibid.*, para. 100; emphasis added).

69. Examined more closely, the Court's reasoning relies upon its view that, although the Parties expressed a willingness to discuss substantive issues, they had each imposed certain preconditions to any such negotiations that were so diametrically opposed that the Parties did not contemplate, or were not in a position to negotiate, a settlement. The Court constructs these preconditions in paragraph 98 of the Judgment.

70. Regarding Nicaragua's asserted preconditions, the Court in paragraph 98 appears to refer to its own characterization of what it has held to be Nicaragua's dispute. The Court writes "for Nicaragua, such negotiations had to be restricted to the modalities or mechanisms for the implementation of the [2012] Judgment". It does not rely on any statement of Nicaragua. Indeed, it offers no citation to any piece of evidence.

71. Regarding Colombia's asserted preconditions, the Court in paragraph 98 states that Colombia did not "define" the subject-matter of the negotiations in the same way. In doing so, it quotes the interview with the Colombian Minister for Foreign Affairs María A. Holguín on 15 September 2013 that is reproduced in full at paragraph 56 above. The Court at paragraph 98 uses the Minister's statement that Colombia is open to a dialogue with Nicaragua to "sign *a treaty that establishes the boundaries*" to make its point that while the two nations may have been open to dialogue they held quite different views about the content of such dialogue that made the prospects for settlement extremely unlikely.

72. The Court's juxtaposition of negotiating objectives is unfounded both in the record and in law.

— First, the Court repeatedly, and with good reason, in the Judgment elsewhere refers to the importance of examining substance and not

form. Yet in this holding its reasoning rests on formalities of negotiation rather than their substance. As described above, the Parties repeatedly indicated they were open to discuss many areas of substance with fishing rights being a particularly significant one. Settlement of any of the substantive areas may have resolved matters. Settlement of any of the substantive areas certainly would have narrowed matters. Preconditions (if there were any) themselves may be simply a part of a negotiating stance and for this reason need to be appraised carefully.

— Second, perhaps a juxtaposition of negotiating preconditions could indicate that the chances of a negotiated settlement were remote if there were clear statements indicating that a party was open to dialogue *only if* the particular issue of concern was resolved first. But that is not the case here. There are no such statements in the record by Colombia (or Nicaragua) in the relevant months leading up to the filing of the Application of Nicaragua.

— Third, and most strikingly, the record directly contradicts the Court's holding. It is true that the Colombian Foreign Minister's statement did "define" in some sense an aim of the negotiations from Colombia's perspective. But it did not do so in a way different from that of Nicaragua and certainly did not do so in the way the Court suggests. The Court quotes this statement to support the idea that Colombia sought a treaty that would re-establish the boundaries it had prior to the 2012 Judgment. It is that assertion which would be incompatible with the Court's unsupported construction of Nicaragua's negotiating position in the same paragraph. But that assertion also is flatly contradicted by the record. The Foreign Minister's statement clearly does not seek to re-establish the boundaries that existed before the Judgment but rather to establish the boundaries of the Judgment through an implementing treaty that will satisfy the internal legal requirements of Colombian constitutional law. She states:

> "[T]he Government does not disregard the Court of The Hague's Judgment — in which this Tribunal recognized greater rights to Nicaragua over those waters —, but that the country 'is facing a legal obstacle' to apply it.
>
> . . . . . .
>
> Colombia is open to a dialogue with Nicaragua to sign a treaty that establishes the boundaries and a legal regime that contributes to the security and stability in the region. The Government has said that it awaits the decision of the Constitutional Court before initiating any action." (Preliminary Objections of Colombia, Annex 42, "The Minister of Foreign Affairs Explains in Detail the Strategy vis-à-vis Nicaragua", *El Tiempo*, 15 September 2013, p. 349.)

73. Having reaffirmed the obligation to pursue negotiations under Article II of the Pact of Bogotá, the Court finds contrary to the statements of the Parties that there was no prospect of settlement. I dissent. This conclusion is not supported by the evidence, and is more broadly of concern, for the Court in so doing undermines the centrality of a duty to negotiate both as a part of the peaceful settlement of disputes and specifically as a part of the scheme set out by the Pact of Bogotá. It is important to recall the insights of the PCIJ in this respect:

> "The Court realizes to the full the importance of the rule laying down that only disputes which cannot be settled by negotiation should be brought before it. It recognizes, in fact, that before a dispute can be made the subject of an action at law, its subject-matter should have been clearly defined by means of diplomatic negotiations." (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 15.)

IV. Concluding Observation

74. The Court in objectively determining the subject-matter of the disputes before it can be called upon to make fine distinctions. In the present case, it has distinguished very finely between a claim for non-compliance with a judgment of the Court and a claim for violation of the rights granted by such judgment. This dissent makes clear that the Court is not nearly as adept at distinguishing whether a certain piece of evidence bears on non-compliance with the 2012 Judgment or on a violation of sovereign rights and maritime spaces defined in the 2012 Judgment. The ease with which these two claims overlap and the difficulty the Court has in assessing the evidence will likely complicate the Court's task at the merits phase of this case.

(*Signed*) David D. Caron.