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CR 2007/18

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2007

Public sitting

held on Wednesday 6 June 2007, at 4 p.m., at the Peace Palace,

President Higgins presiding,

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

VERBATIM RECORD

ANNÉE 2007

Audience publique

tenue le mercredi 6 juin 2007, à 16 heures, au Palais de la Paix,

sous la présidence de Mme Higgins, président,

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

COMPTE RENDU

Present:	President	Higgins
	Vice-President	Al-Khasawneh
	Judges	Ranjeva
		Shi
		Koroma
		Parra-Aranguren
		Buergenthal
		Owada
		Simma
		Tomka
		Abraham
		Keith
		Sepúlveda-Amor
		Bennouna
		Skotnikov
	Judges *ad hoc*	Fortier
		Gaja
	Registrar	Couvreur

Présents : Mme Higgins, président
M. Al-Khasawneh, vice-président
MM. Ranjeva
Shi
Koroma
Parra-Aranguren
Buergenthal
Owada
Simma
Tomka
Abraham
Keith
Sepúlveda-Amor
Bennouna
Skotnikov, juges
MM. Fortier
Gaja, juges *ad hoc*

M. Couvreur, greffier

The Government of Nicaragua is represented by:

H.E. Mr. Carlos José Argüello Gómez, Ambassador of the Republic of Nicaragua to the Kingdom of the Netherlands,

as Agent and Counsel;

Mr. Ian Brownlie, C.B.E., Q.C., F.B.A., member of the English Bar, Chairman of the International Law Commission, Emeritus Chichele Professor of Public International Law, University of Oxford, member of the Institut de droit international, Distinguished Fellow, All Souls College, Oxford,

Mr. Alex Oude Elferink, Research Associate, Netherlands Institute for the Law of the Sea, Utrecht University,

Mr. Alain Pellet, Professor at the University Paris X-Nanterre, Member and former Chairman of the International Law Commission,

Mr. Antonio Remiro Brotóns, Professor of International Law, Universidad Autónoma, Madrid,

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H.E. Mr. Guillermo Fernández de Soto, Ambassador of Colombia to the Kingdom of the Netherlands; member of the Permanent Court of Arbitration and former Minister for Foreign Affairs,

as Co-Agent;

Mr. Stephen M. Schwebel, member of the Bars of the State of New York, the District of Columbia, and the Supreme Court of the United States of America; member of the Permanent Court of Arbitration; member of the Institute of International Law,

Sir Arthur Watts, K.C.M.G., Q.C., member of the English Bar; member of the Permanent Court of Arbitration; member of the Institute of International Law,

Le Gouvernement du Nicaragua est représenté par :

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Mr. Andelfo García González, Professor of International Law, Deputy Chief of Mission of the Colombian Embassy at Madrid, former Deputy Minister for Foreign Affairs, Republic of Colombia,

Mr. Enrique Gaviria Liévano, Professor of Public International Law; former Ambassador of Colombia and Deputy Permanent Representative to the United Nations; former Chairman of the Sixth Committee of the United Nations General Assembly; former Ambassador of Colombia to Greece and to the Czech Republic,

Mr. Juan Carlos Galindo Vacha, former Deputy Inspector-General before the Council of State, National Head of the Civil Registry,

as Advocates;

Ms Sonia Pereira Portilla, Minister Plenipotentiary of the Embassy of the Republic of Colombia in the Kingdom of the Netherlands,

Mr. Juan José Quintana, Minister Counsellor, Ministry of Foreign Affairs of Colombia,

Ms Mirza Gnecco Plá, Counsellor, Ministry of Foreign Affairs of Colombia,

Mr. Julián Guerrero Orozco, Counsellor, Embassy of the Republic of Colombia in the Kingdom of the Netherlands,

Ms Andrea Jiménez Herrera, First Secretary, Ministry of Foreign Affairs of Colombia,

Ms Daphné Richemond, member of the Bars of Paris and the State of New York,

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Mr. Scott Edmonds, Cartographer, International Mapping,

as Technical Adviser;

Ms Stacey Donison,

as Stenographer.

M. Prosper Weil, professeur émérite de l'Université de Paris II, membre de la Cour permanente d'arbitrage, membre de l'Institut de droit international, membre de l'Académie des sciences morales et politiques (Institut de France),

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M. Juan José Quintana, ministre-conseiller, ministère des affaires étrangères,

Mme Mirza Gnecco Plá, conseiller, ministère des affaires étrangères,

M. Julián Guerrero Orozco, conseiller, ambassade de Colombie aux Pays-Bas,

Mme Andrea Jiménez Herrera, premier secrétaire, ministère des affaires étrangères,

Mme Daphné Richemond, membre des barreaux de Paris et de l'Etat de New York,

comme conseillers juridiques ;

M. Scott Edmonds, cartographe, International Mapping,

comme conseiller technique ;

Mme Stacey Donison,

comme sténographe.

The PRESIDENT: Please be seated. The Court meets today to begin hearing the second round of oral argument. Colombia will present its reply today and Nicaragua on Friday at 10 a.m. Each Party has two hours at its disposal.

I can I believe immediately give the floor to Professor Weil.

M. WEIL :

1. Madame le président, me conformant aux souhaits que vous avez exprimés, je me contenterai de répondre à quelques points spécifiques soulevés par nos adversaires.

2. Madame le président, Messieurs les juges, pour commencer, j'évoquerai l'argument du Nicaragua selon lequel les exceptions préliminaires de la Colombie appellent un examen au fond et ne sont donc pas recevables. Cet argument, qui figurait déjà en abondance dans les écritures du Nicaragua[1] est revenu à nouveau dans ses plaidoiries orales[2]. Je me vois donc contraint d'y revenir moi aussi — mais, rassurez-vous, je le ferai brièvement.

3. Madame le président, la Colombie ne demande à la Cour rien d'autre que de remplir la mission que lui confie le pacte de Bogotá. C'est le pacte de Bogotá lui-même, et non pas la Colombie, comme l'insinue la Partie adverse, qui prévoit que lorsqu'est en cause une question «déjà réglée au moyen d'une entente entre les parties» et régie «par des accords ou traités en vigueur à la date de la signature» du pacte (art. VI), la Cour doit se déclarer incompétente et doit déclarer le différend terminé (art. XXXIV). Que cette mission, la Cour peut et doit la remplir maintenant, au stade des exceptions préliminaires, cela est également prescrit en toutes lettres par le pacte de Bogotá en son article XXXIII. Il est à peine besoin d'ajouter que le Nicaragua a négocié, signé et ratifié toutes ces dispositions — en particulier je le répète les articles VI, XXXIII et XXXIV. Madame le président, Messieurs les juges, la Colombie n'a rien inventé : tout ceci est dans le pacte !

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[1] OEN, Introduction, p. 6, par. 11 ; p. 11, par. 1.1 ; p. 20, par. 1.23 ; p. 32-33, par. 1.46 ; p. 49, par. 1.88 ; p. 60-61, par. 2.23 ; p. 74, par. 2.54 ; p. 79, par. 2.62 ; p. 79-81, par. 2.63 ; p. 143, par. 4.6 ; p. 134-136, par. 4.8 ; p. 136, par. 4.9.

[2] CR 2007/17, p. 27, par. 17 ; p. 28, par. 18 (Pellet) ; p. 46, par. 61, 63 (Brotóns).

4. S'il était vrai, comme le soutient le Nicaragua[3], qu'en déclarant le différend terminé la Cour se prononcerait sur le fond, les articles XXXIII et XXXIV du pacte de Bogotá ne trouveraient jamais à s'appliquer : Comment, en effet, la Cour pourrait-elle jamais se prononcer «au préalable» sur l'existence d'un différend, comment pourrait-elle jamais déclarer un différend terminé si un tel prononcé devait, par lui-même, être regardé comme relevant du fond ? L'interprétation que propose le Nicaragua des articles VI, XXXIII et XXXIV du pacte revient à dénier toute substance à ces dispositions du pacte et à les rendre inopérantes.

5. Bien qu'il semble faire reproche à la Colombie que «les questions qui se posent à [la Cour] ne sont pas des problèmes de compétence mais de fond»[4], le Nicaragua consacre de longs développements à des problèmes de fond[5]. Cette distinction entre le fond et la forme dont il fait tant de cas, le Nicaragua la néglige à nouveau lorsqu'il énonce que «[s]i la Cour acceptait ce que la Colombie demande, en réalité, elle n'admettrait pas une exception préliminaire à sa juridiction, mais elle se prononcerait en faveur de la Colombie sur le fond du différend dont le Nicaragua l'a saisie»[6]. Madame le président, contrairement aux allégations de nos adversaires, les exceptions préliminaires de la Colombie portent sur la compétence et ne portent que sur la compétence.

6. Madame le président, je voudrais à présent m'arrêter un instant sur l'existence et la portée du différend — pour reprendre l'excellent intitulé du professeur Pellet. Dans chaque affaire portée devant le juge international, un moment arrive où l'on est amené à s'interroger sur le but stratégique poursuivi par la partie adverse, sur ce qu'elle recherche vraiment au travers de sa tactique judiciaire et au travers de ses arguments. Dans notre affaire, Madame le président, ce moment de vérité me semble arrivé. Nos adversaires, je dois l'ajouter, nous ont facilité la tâche en révélant petit à petit, morceau par morceau, ce qu'ils cherchaient à nous cacher au début — une partie de strip-tease intellectuel et juridique en quelque sorte, si je puis me permettre une comparaison aussi irrespectueuse.

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[3] CR 2007/17, p. 36, par. 17 (Brotóns).

[4] CR 2007/17, p. 31-32, par. 28 (Pellet).

[5] CR 2007/17, p. 38, par. 23 (Brotóns) ; p. 28 et suiv., par. 20 et suiv. (Pellet).

[6] CR 2007/17, p. 36, par. 18 (Brotóns).

7. Dans ses observations écrites relatives aux exceptions préliminaires soulevées par la Colombie, le Nicaragua reconnaît que le débat qu'il a ouvert autour de la souveraineté sur les îles est un rideau de fumée destiné à cacher le véritable enjeu de la bataille judiciaire qu'il a entamée, à savoir la délimitation maritime. Que c'est bien la délimitation maritime qui constitue l'objectif réel du Nicaragua, cela ressort d'innombrables passages de ses observations écrites : le paragraphe 1.46, par exemple (p. 32), ou le paragraphe 1.48 (p. 33), ou le paragraphe 1.50 (p. 34), ou le paragraphe 1.54 (p. 35), ou le paragraphe 1.55 (p. 36), ou le paragraphe 2.44 (p. 69). Et plus aucun doute n'est permis, plus le moindre doute n'est possible sur les objectifs réels du Nicaragua lorsqu'on lit au paragraphe 3.38 (p. 106) de ses observations écrites cet aveu formidable : «The core of the dispute relates to the maritime delimitation between the Parties.» On pourrait croire à un lapsus si on ne lisait pas quelques pages plus loin que «the issue of title is not the subject-matter of the dispute but a necessary prerequisite»[7] ; ou que, encore «the very subject-matter of the present dispute is the maritime delimitation of the respective maritime areas belonging either to Colombia or to Nicaragua»[8] ; ou encore, que «the very subject-matter of the dispute is the delimitation of the respective maritime areas on which Colombia and Nicaragua have jurisdiction»[9]. Et hier matin, mon ami le professeur Pellet a confirmé que la demande nicaraguayenne d'une délimitation maritime «implique et englobe toutes les autres», qu'elle est «centrale dans la requête et le mémoire du Nicaragua». Quant à la «question du titre territorial», a-t-il ajouté, elle n'est pas abordée dans les écritures nicaraguayennes «en tant que telle»[10]. «[L]es questions de souveraineté sur les îles et les rochers — a-t-il encore déclaré — sont à la fois l'accessoire et le préalable à celle de la délimitation maritime.»[11]

8. Madame le président, le Nicaragua demande à la Cour le rejet de ces exceptions préliminaires — espérant peut-être que dans une phase ultérieure consacrée au fond —, la Cour lui accorde une frontière maritime, plus favorable que celle du méridien de 82°, convenue en 1928-1930. Ce que le Nicaragua attend et espère de son action devant la Cour, me semble-t-il,

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[7] OEN, p. 108, par. 3.44.

[8] *Ibid.*, p. 112, par. 3.53.

[9] *Ibid.*, p. 115, par. 3.63.

[10] CR 2007/17, p. 22-23, par. 6-7 (Pellet).

[11] CR 2007/17, p. 24, par. 10 (Pellet).

c'est une frontière maritime autre que celle du méridien de 82° qu'il a fixée d'un commun accord avec la Colombie en 1930 et qui a été respectée par les deux parties pendant des années et des années.

9. Madame le président, Messieurs les juges, le Nicaragua a soumis à la Cour une thèse complexe et contradictoire, faite d'alternatives et de subsidiaires, de retraites successives. Les paragraphes 2.18 et suivants (p. 59 et suiv.) de ses observations écrites sont révélateurs à cet égard :

— Dès sa conclusion, soutient le Nicaragua, le traité de 1928 n'était pas valable.

— S'il était valable au moment de sa conclusion, continue le Nicaragua, il est devenu caduc depuis lors du fait de sa violation par la Colombie.

— De toute manière, poursuit le Nicaragua, ce traité ne couvre pas Roncador, Quitasueno, Serrana, Serranilla et Bajo Nuevo.

— Quoi qu'il en soit, continue toujours le Nicaragua, ce traité ne concerne que la terre, à l'exception de toute juridiction maritime.

— Les divergences qui font l'objet de la présente affaire, soutient le Nicaragua, n'étaient pas apparues à la date de la conclusion du pacte de Bogotá.

— Et, de toute façon, conclut le Nicaragua, les questions soulevées touchent au fond, et la Cour ne peut pas les résoudre au présent stade des exceptions préliminaires.

10. Madame le président, dans sa requête, le Nicaragua demande à la Cour de dire que le Nicaragua a la souveraineté sur l'archipel de San Andrés et de déterminer le tracé d'une frontière maritime unique[12]. La souveraineté n'a pas à être établie, elle a déjà été reconnue ; aucune ligne n'a à être tracée, elle est déjà tracée.

11. Ni la lettre ni l'objet du pacte de Bogotá ne peuvent conduire la Cour à rouvrir aujourd'hui un différend réglé il y a soixante-dix ans. Remettre en cause ce traité qui régit les relations des parties depuis soixante-dix ans constituerait un précédent dangereux pour la stabilité des relations internationales fondée sur le principe du respect des traités. Comme la Cour l'a déclaré dans l'affaire relative au *Projet Gabčíkovo-Nagymaros (Hongrie/ Slovaquie)* :

> «La Cour établirait un précédent aux effets perturbateurs pour les relations conventionnelles et l'intégrité de la règle *pacta sunt servanda* si elle devait conclure

[12] Requête du Nicaragua, par. 8.

> qu'il peut être unilatéralement mis fin, au motif de manquements réciproques, à un traité en vigueur entre Etats, que les parties ont exécuté dans une très large mesure et à un coût considérable pendant des années.» (*Arrêt, C.I.J. Recueil 1997*, p. 68, par. 114.)

12. Madame le président, la Cour sait que la question maritime a été discutée et réglée en 1928-1930 pour que soit mis fin complètement et définitivement à tout différend entre les deux pays, sur mer comme sur terre. La Cour sait qu'une disposition protectrice a été introduite en l948 dans le pacte de Bogotá en vue de parer à toute tentation ou à toute tentative d'utiliser les procédures du pacte pour rouvrir une controverse antérieurement réglée. La Cour n'acceptera pas, nous en sommes confiants, que la plus haute juridiction du monde moderne soit utilisée comme un instrument de déstabilisation des relations internationales. *Pacta sunt servanda*, me suis-je permis de rappeler — tout comme j'ai rappelé qu'il doit y avoir une fin à tout conflit — *ut finis sit litium*. Voilà, Madame le président, Messieurs les juges, le véritable enjeu de la présente affaire.

13. Madame le président, loin de chercher à se soustraire à la compétence de la Cour — comme l'en a accusé bien à tort l'agent du Nicaragua[13] — la Colombie demande respectueusement à la Cour de donner plein effet aux dispositions du pacte de Bogotá et d'exercer pleinement sa compétence et ses pouvoirs dans le cadre et dans les limites de ce qui est prévu par ce traité.

14. Madame le président, Messieurs les juges, arrivé au terme de mes observations dans la présente affaire, je voudrais vous dire ma très profonde gratitude pour la patience dont vous avez fait preuve à mon égard. Merci.

15. Je vous prie, Madame le président, de vouloir bien donner la parole à mon ami, M. Stephen Schwebel.

The PRESIDENT: Thank you, Professor Weil. I now call Mr. Schwebel.

[13] CR 2007/17, p. 17-18, par. 43 (Argüello).

Mr. SCHWEBEL:

PRELIMINARY OBJECTION CONCERNING DECLARATION UNDER THE OPTIONAL CLAUSE

1. Madam President and Members of the Court, it is my task this afternoon to reply to arguments made by the distinguished counsel of Nicaragua, Mr. Brownlie and Professor Pellet, that treat the second preliminary objection of Colombia.

Termination of optional clause declarations

2. In respect of the question that took up more than half of Mr. Brownlie's presentation, namely, whether the jurisprudence of the Court actually requires that a State terminating its adherence to the optional clause may do so only after a reasonable time, Colombia believes that there is no need to elaborate on what it said in its preliminary objections and, very briefly, in the opening round of these hearings. The question has been sufficiently canvassed. In any event, it is not of cardinal importance for the judgment that the Court will make on Colombia's preliminary objections.

The practice of the Parties

3. That is so, because the related issue that is of cardinal importance is whether, in point of fact and of law, both Colombia and Nicaragua have acted to terminate or modify their acceptances of the Court's compulsory jurisdiction on notice and without the lapse of a reasonable time. The evidence that they have so acted is substantial.

4. Now, did they so act because they were of the view that they were legally entitled to do so?

5. Speaking for Colombia, I can officially state that, in terminating its 1937 adherence to the Court's compulsory jurisdiction with immediate effect, Colombia in 2001 did so because it was convinced that it was entitled to do so, in accordance with the law of the matter. That conviction was heavily influenced by the fact that, a few months before, Nicaragua had modified its declaration with immediate effect.

6. While in this I can speak for Colombia, I cannot speak for Nicaragua. When, in 2001, Nicaragua modified its declaration with immediate effect, I cannot say whether it believed that it acted in accord or in disaccord with the law of the matter. But my Nicaraguan colleagues will not be offended if I say that it may be presumed that Nicaragua, in so acting, believed that it was acting lawfully.

7. Now as to this concordant practice of both Colombia and Nicaragua, Mr. Brownlie maintains that Colombia has constructed a "weak case resting on the alleged practice of the Parties". He maintains that "the evidence of the pertinent intention produced on behalf of Colombia is very weak indeed . . . The pattern of evidence is obscure and confused."

8. Really? The pertinent letter of the then Minister for Foreign Affairs of 5 December 2001, reproduced in the judges' folder at tab 12, states that Colombia's acceptance of the Court's compulsory jurisdiction as formulated in its declaration of 30 October 1937 is terminated "with effect from the date of this notification", that is, 5 December 2001.

9. What was obscure, weak or confused about that? It could hardly be clearer, stronger or more straightforward than it was and remains.

10. Moreover, the authors of the *Yearbooks* of the Court had no difficulty in understanding, and in correctly recording the import of the termination of Colombia's declaration with immediate effect, as I showed in my opening statement. What Mr. Brownlie found confusing did not confuse the Court's clear-minded Registry. In 1984, Nicaragua argued that the Court's *Yearbooks* contained: "The most authentic public record of the acceptances of the compulsory jurisdiction of the Court . . ." If Nicaragua maintains otherwise nowadays, it should explain why.

11. As for Nicaragua's practice, Mr. Brownlie finds it equally "inconclusive". He characterizes the Presidential Decree of 22 October 2001 as "inconclusive". As is shown at tab 15 of the judges' folder, that Decree of 22 October sets out the reservation that the Republic of Nicaragua "as of this date, makes to its Declaration, the text of which is as follows: 'Nicaragua will not accept, as of 1 November 2001, the jurisdiction or competence of the International Court of Justice . . .'".

12. Madam President, the only inconclusive aspect of the Presidential Decree is whether it is to take effect "as of this date" or "as of 1 November 2001", that is, as of 22 October or

1 November. But what is crystal clear is that its effect was meant by Nicaragua to be immediate or virtually so. Nicaragua's Presidential Decree cannot possibly be construed as to embody reasonable notice. Mr. Brownlie made much of the good faith inherent in reasonable notice. I leave it to him to inform the Court of whether or not Nicaragua in this case acted in good faith and in accordance with the law of the matter, and to explain why, if Nicaragua could validly modify its declaration with immediate effect, Colombia could not so terminate its declaration — and do so in good faith.

13. One last word on Mr. Brownlie's argument. He recalled that on 26 September 2002 Nicaragua and Costa Rica concluded their standstill agreement. He maintained that: "It is inconceivable that such an agreement would be concluded if the notification of 23 October had had immediate effect."

14. But, Madam President, far from it being inconceivable, it may readily be conceived why Nicaragua may have so acted. Colombia had terminated its declaration with immediate effect. Nicaragua knew perfectly well that it, Nicaragua, had modified its own declaration with immediate effect. Yet in view of the Application that it had filed against Colombia on 6 December 2001, it felt bound to challenge the effectiveness of Colombia's termination of its declaration. It may have belatedly dawned on Nicaragua that to sustain that challenge it would do well to cover the tracks of its own modification of its declaration with immediate effect — and hence the standstill agreement with Costa Rica.

The *ratione temporis* reservation

15. Madam President, I turn now to the argument of Professor Pellet on the temporal reservation to Colombia's 1937 declaration. For the purposes of analysing his able argument, I shall assume that Colombia's declaration remains in force, without prejudice of course to Colombia's position that its termination of its declaration took effect before the filing of Nicaragua's Application.

16. Colombia's declaration of 1937 provides that it applies "only to disputes arising out of facts subsequent to 6 January 1932".

17. Professor Pellet argues that the dispute before the Court actually arises not out of the fact of the 1928 Treaty, nor out of the fact of the 1930 Protocol of Ratification of the Treaty, but that the dispute arises in three, post-1932 ways. He contends, first, that the dispute arises over the validity of the 1928 Treaty, a problem which only arose in the 1970s when Nicaragua recovered its freedom of action. He argues, second, that a dispute arose over the interpretation of the 1928 Treaty in respect of the definition of the San Andrés Archipelago, notably certain insular or rocky features. And he argues, third, that a dispute arose over the meaning to be attributed to the 82º W meridian, a question that could not have been resolved or even conceived of before 1932 when the then law of the sea did not include the notions of a continental shelf or an exclusive economic zone.

18. Professor Pellet further argues that each of the cases in the Court's jurisprudence interpreting *ratione temporis* reservations is fact specific. In this he is certainly correct. Whether a dispute arises out of facts anterior to or subsequent to a particular date must depend on the facts specifically in point.

19. The Court's jurisprudence is constant in tying the facts of a case to the "real cause" of the dispute. Let us look at the three issues raised by Professor Pellet in this light.

20. First, as to the dispute over the validity of the 1928 Treaty. Does Nicaragua now challenge the Treaty's validity on the ground that it was only in the 1970s that the Sandinista revolution triumphed? Or does it challenge the Treaty's validity on the ground that, at the time it was concluded, its conclusion was, as argued yesterday, then "managed" by the United States? Surely the latter. Nicaragua's argument is that, in 1928, the United States was in a position to dominate the policy-making processes of the Nicaraguan Government and that it used its position to put through the 1928 Treaty for its own purposes. Quite apart from whether that argument is factually well grounded or not, it is an argument over the facts as they were, or are alleged to have been, in 1928 — which is anterior to 1932.

21. Second, Professor Pellet maintains that a dispute over the geographical reach of the 1928 Treaty arose in 1969, in particular over whether it includes certain insular or rocky features. But, even if Professor Pellet is correct in so contending, which Colombia does not accept, Professor Pellet in so arguing overlooks the critical consideration: that it is *not* when the dispute

arose that matters. What matters under the Colombian temporal reservation is whether the dispute arises out of *facts* anterior to 1932. The facts on *this* count certainly antedate 1932. The Treaty was agreed upon in 1928. It specifies its reach "over the islands of San Andrés, Providencia, Santa Catalina and all the other islands, islets and cays that form part of the said Archipelago of San Andrés" and provides that three named cays are not considered to be included in this Treaty, "sovereignty over which is in dispute between Colombia and the United States of America". These are the facts out of which any dispute as to the territorial and geographical reach of the 1928 Treaty must turn. And these facts are anterior to 1932.

22. Third, Professor Pellet argues that the dispute over the meaning of the limit of the 82º W meridian prescribed by the Protocol of Exchange of Ratifications is a dispute that could not have arisen before 1932, because the very concepts of the continental shelf and exclusive economic zone were then unknown. But again, it is not a question of when the dispute arose, but of whether the current dispute arises out of facts subsequent to 6 January 1932. The dispute surely arises out of the facts of Nicaragua's proposal — Nicaragua's proposal — to specify that the Archipelago does not extend beyond the 82º W meridian and Colombia's agreement to accept that proposal and entrench it in the Protocol of Exchange of Ratifications of the Treaty. If those facts did not exist, there could be no dispute about their meaning. The dispute about their meaning may — arguably — have been triggered in 1969, but it turns on and arises out of facts anterior to 1932.

The teaching of the *Liechtenstein* case

23. The Court, Madam President, has shed illuminating light on reservations of a temporal character in its Judgment of 2005 in the case concerning *Certain Property (Liechtenstein* v. *Germany).* The basis of jurisdiction invoked by the applicant was the European Convention for the Peaceful Settlement of Disputes. It provided that the Convention shall not apply to disputes "relating to facts or situations prior to the entry into force of this Convention as between the parties to the dispute". Germany contended that the key issue was not the date when the dispute arose, but whether the dispute related to facts or situations that arose before the critical date. Germany argued that, since the dispute related to facts or situations that pre-dated the 1980 entry into force of the

Convention, since its "real source" was such facts, the Court lacked jurisdiction. The Court upheld Germany's position and dismissed the case.

24. Liechtenstein maintained, as does Professor Pellet now, that the case of *Electricity Company of Sofia and Bulgaria* distinguished between the source of the rights relied on by the claimant and the source of the dispute and that that distinction was relevant. Germany argued that the distinction was not relevant, because none of the legal and factual situations that were the real cause of the alleged dispute involved acts taken after 1980.

25. After reviewing the Judgments in *Phosphates in Morocco, Electricity Company in Sofia and Bulgaria,* and the *Right of Passage* cases, the Court held that regard must be had to the facts or situations which must be considered as being "the source of the dispute", its "real cause". The case was "triggered" by latter-day decisions of German courts. But, the Court held, "the critical issue is not the date when the dispute arose, but the date of the facts or situations in relation to which the dispute arose" (para. 48). It concluded that, while the German court decisions "triggered" the dispute, "the source or real cause of the dispute" was to be found in the pre-1980 Settlement Convention and the Beneš Decrees. It accordingly upheld Germany's preliminary objection and dismissed the case.

26. Madam President, this most recent and searching examination of its jurisprudence on the question of reservations *ratione temporis* decisively sustains the position of Colombia. The true source and real cause of the current dispute, even as Nicaragua would narrow that dispute to one over maritime limits, is the establishment in 1930 of the 82º W meridian as the limit between Colombia and Nicaragua. And 1930 antedates 1932.

27. It may be that Colombia's 1969 Note protesting a Nicaraguan grant of oil exploration permits east of the meridian triggered what Nicaragua claims is a post-1932 dispute. But the source or real cause of the dispute remains and would have to be found in the 1930 Protocol, a legal instrument that in the instant case duplicates the role that the Settlement Convention and the Beneš Decrees filled in the *Liechtenstein* case (*Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005,* p. 6).

28. Professor Pellet's argument understandably said little of this case, presumably because its teaching is so hard to reconcile with his analysis. But in the submission of Colombia, the Court

was right to dismiss the claim of Liechtenstein. It would be as right now to dismiss the claim of Nicaragua.

Madam President, please give the floor to Sir Arthur Watts.

The PRESIDENT: Thank you, Mr. Schwebel. I now call Sir Arthur Watts.

Sir Arthur WATTS:

GENERAL NATURE OF COLOMBIA'S PRELIMINARY OBJECTIONS AND NICARAGUA'S COMMENTS ON THEM

1. Madam President and Members of the Court, it is as well, at this point, just to remind ourselves what this case is about. Counsel for Nicaragua told us yesterday[14] that it was about maritime delimitation. But it is not, Madam President.

2. The scope of this case is, as the Court has often held, defined by the terms of Nicaragua's Application. Nicaragua's concerns are reflected in its two requests to the Court: first, to declare that the San Andrés Archipelago belongs to Nicaragua; and second, to determine the maritime boundary between Nicaragua and Colombia.

3. Let me just also remind the Court of the early political geography of the area by referring to the sketch-map at tab 2 in the judges' folder, and now again on the screen.

The exclusively preliminary character of Colombia's objections

4. To the Application presented by Nicaragua Colombia has presented two preliminary objections. And these are "preliminary objections", i.e., objections which have to be disposed of before the Court addresses the merits.

5. Now Nicaragua suggested[15] that in some way it was inappropriate for Colombia to make preliminary objections, since it was simply a way of avoiding having disputes dealt with by the Court. But, Madam President, it is trite law that this Court's jurisdiction is based on consent. As the Court has said: "An essential point of legal principle is involved here, namely that a party should not have to give an account of itself on issues of merits before a tribunal which lacks

[14]CR 2007 / 17, p. 22, para. 5; p. 30, para. 26; p.31, para. 27 (Pellet).

[15]CR 2007 / 17, p. 8, para. 3; p.20, para. 50 (Argüello); p. 20, para. 1; p.32, para. 28 (Pellet).

jurisdiction in the matter . . ."[16] It is Colombia's right — and even duty — to draw to the attention of the Court circumstances which show that its consent is lacking. That is what Colombia's preliminary objections are — an exercise of legal rights in a context which is central to the Court's jurisdiction.

6. But what — in practice — does the making of preliminary objections mean for the way the parties plead to them, and for the way the Court has to address them?

7. So far as the parties are concerned, it does *not* mean — as Nicaragua frequently suggests[17] — that the parties are precluded from touching upon issues which may also need to be explored in greater detail in a merits phase, if there is one.

8. Preliminary objections cannot be — and in practice never are — argued in a void, removed from all factual context. And that factual context may well have to touch on issues the full exposition of which will come later when — and if — the merits phase is reached.

9. One example will suffice. States frequently raise objections *ratione temporis* — i.e., that the case submitted to the Court arises out of circumstances occurring before some significant date. Such objections are a regular feature of cases before the Court — very recently, Germany raised such an objection in a case brought by Liechtenstein[18], as Mr. Schwebel has recently reminded the Court, and Colombia raises such an objection in this case. Those objections cannot be argued, Madam President, without reference to the facts on which the case turns. And — as the Court's Judgment in *Liechtenstein* v. *Germany* clearly shows — the Court itself cannot dispose of the objection without reference to the underlying facts.

10. This need for parties to refer, at the preliminary objections phase, to matters which may also have to be developed at a later merits phase, if any, was expressly recognized by the Court's predecessor. The Permanent Court acknowledged that consideration of preliminary objections may necessitate "touch[ing] upon subjects belonging to the merits of the case"[19].

11. More recently, this Court has itself echoed this view. It has said

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[16] *Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972*, p. 56.

[17] CR 2007 / 17, p.8, para. 4 (Argüello); p.31, par.28 (Pellet); p.45, para. 60 (Remiro); p.61, para. 17 (Pellet). WSN, Introduction, para. 11, paras. 1.46, 1.88.

[18] *Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, p.6.

[19] *Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 15.

> "many cases before the Court have shown that although a decision on jurisdiction can never directly decide any question of merits, the issues involved may be by no means divorced from the merits. A jurisdictional decision may often have to touch upon the latter or at least involve some consideration of them"[20].

12. The same applies, Madam President, to Nicaragua's repeated suggestions that it is inappropriate at this stage to consider questions of treaty interpretation: such questions, it is said[21], are for the merits.

13. Well — sometimes, perhaps: but by no means necessarily, or always. There are many examples. Thus, this Court has frequently interpreted Article 36 of the Statute in the course of disposing of objections based on the terms of optional clause declarations. In the present case, the Court, as part of this preliminary objections phase, will have to form a view as to the meaning of the Pact of Bogotá. And perhaps in part the Esguerra-Bárcenas Treaty also. All of this is proper material for preliminary objections: none of it involves trespass on the merits.

14. Madam President and Members of the Court, the key to the proper scope of argument on preliminary objections lies in the Court's eventual decision. Article 79 of the Rules gives the Court three options — to reject the objections, to uphold them, or to "declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character" — i.e, it may join them to the merits.

15. The Permanent Court itself said that for an objection to be characterized as preliminary it must be "submitted for the purpose of excluding an examination by the Court of the merits of the case", and that it must be one "upon which the Court can give a decision without in any way adjudicating upon the merits"[22].

16. And it is with the foregoing judicial guidance in mind that Colombia approaches its task in arguing its preliminary objections. If they are upheld — as Colombia submits that they should be — the Court will be unable to proceed to a consideration of the merits of Nicaragua's claims: like it or not, that is how the international judicial system works.

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[20] *Appeal Relating to the Jurisdiction of the ICAO Council, I.C.J. Reports 1972*, p. 46, at p. 56.

[21] CR 2007/17, pp.30-31, para. 26 (Pellet).

[22] *Panevezys-Saldutiskis Railway, Preliminary Objections, P.C.I.J., Series A/B, No. 76*, p. 22.

Nicaragua's response to Colombia's preliminary objections

17. Let me go back, Madam President, to Nicaragua's Application, and Colombia's Objections.

18. The dispute submitted by Nicaragua as defined by its Application concerns sovereignty over the Archipelago of San Andrés, and the maritime boundary between Colombian and Nicaraguan territory.

19. Colombia's Objections are that both matters were settled and governed by the Esguerra-Bárcenas Treaty of 1928/1930 and that therefore the Court has no jurisdiction under the Pact of Bogotá; and, secondly, that the Court equally has no jurisdiction under the optional clause because Colombia's declaration has been terminated, and because in any event Nicaragua's Application concerned a dispute arising out of facts occurring before 1932.

20. Those Objections are clearly properly made as preliminary objections. And taken at face value, they are compelling. There *was* a Treaty of 1928/1930; it *did* settle and govern both the sovereignty and the maritime delimitation issues; and Colombia's optional clause declaration *was* withdrawn and the dispute *does* arise out of pre-1932 facts.

21. But, of course (and quite naturally), Nicaragua does not take Colombia's Objections at face value. Let me go quickly through — and demonstrate the inadequacy of — the steps by which Nicaragua seeks to avoid the "face value" conclusion to which Colombia's Objections inevitably lead. And in doing so, Madam President and Members of the Court, it will become apparent that all Nicaragua's contentions can be dismissed without trespassing on issues properly belonging to the merits.

22. Nicaragua's first recourse is to say that the 1928-1930 Treaty is null and void[23]. Originally two grounds for this conclusion were advanced — violation of Nicaragua's Constitution, and Nicaragua's lack of treaty-making capacity during the period of American occupation and control.

23. We heard little about the constitutional argument on Tuesday. That is just as well — a Constitution which did not identify particular territories and islands as part of Nicaragua can hardly be "manifestly" violated in the eyes of other States by a treaty dealing with some particular

[23]WSN, pp. 12-21, paras. 1.3-1.24; CR 2007/17, p. 22, para. 5 (Pellet); p. 13, paras. 23-25 (Argüello).

territories — especially when those territories are in the eyes of the other State part of *its* sovereign territory and not of Nicaragua's.

24. But we *did* hear more of the "American control" argument[24]. We were told that from the 1920s Nicaragua was effectively under the control of the United States and had no independent treaty-making capacity — until, that is, Nicaragua regained its full national sovereignty in 1979[25]. So, Madam President, no treaty-making capacity from the 1920s to 1979.

25. Really?! No United Nations Charter? No Statute of the Court? No Organization of American States Charter? No Pact of Bogotá? No optional clause declarations? No 1971 Treaty with the United States abrogating the Chamorro-Bryan Treaty? And so on, through all of Nicaragua's international acts over half a century? Those consequences of Nicaragua's "American control" argument are alone sufficient to show that the argument is totally untenable. There is no need to have a discussion on the merits in order to conclude that that argument is inherently flawed — and, moreover, has been advanced far too late in the day to be lawfully made — also a consideration which has nothing to do with the merits.

26. In fact, Madam President and Members of the Court, Nicaragua has painted itself into a corner with this argument. If "American control" deprived Nicaragua of the capacity to conclude the Esguerra-Bárcenas Treaty of 1928-1930, it also deprived Nicaragua of the capacity to have made its optional clause declaration of 1929 and to have become a party to the Pact of Bogotá — and as a consequence, the two titles on which Nicaragua relies as the basis for the Court's jurisdiction in this case must equally be null and void!

27. Nicaragua's next argument which we heard on Tuesday[26] was based on Colombia's alleged 1969 breach of the 1928-1930 Treaty, which is said to have given rise to a right for Nicaragua to terminate the Treaty. At least this argument admits that the Treaty was in force in 1969, and therefore also when the Pact of Bogotá was concluded in 1948.

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[24]CR 2007/17, p. 10, para. 14; p. 11, para. 15 (Argüello); p. 38, para. 23 (Remiro).

[25]WSN, pp. 15-21, paras. 1.15-1.24.

[26]CR 2007/17, pp. 13-14, paras. 26-27 (Argüello); p. 34, para. 10; p. 43, para. 46; p. 44, para. 49 (Remiro).

28. But on Tuesday Nicaragua said that the breach lay in Colombia having, out of the blue as it were, invented a maritime dimension to a treaty which was about territory[27]. Leaving aside the question whether a mere interpretation of a treaty can ever amount to a breach of the treaty giving rise to a right of termination[28], Nicaragua's argument is simply wrong in so far as its treats the 1928-1930 Treaty settlement as solely a territorial matter (and this is a recurring theme in Nicaragua's arguments).

29. Madam President, you will recall the texts which I put on the screen on Monday — tab 8 in the judges' folder and on the screen again now. The texts show the differences in the references to the dispute in the original Treaty and in the later Protocol of Exchange of Ratifications: territorial dispute in the former but question in the latter. Yes, the 1928 *Treaty* dealt only with territories, but the 1930 *Protocol* — an integral part of the whole settlement and registered along with the Treaty — specifies the necessary maritime dimension. And as has been explained very fully[29], the maritime element in that Protocol was added specifically at Nicaragua's initiative and to meet Nicaragua's wishes. Indeed — as our learned opponent, Professor Brotóns, reminded us just yesterday[30] — the Nicaraguan Congressional Decree approving the Treaty refers to it as putting an end to "the matter pending" between the two States[31].

30. It may be convenient for Nicaragua to forget about the 1930 Protocol, and Colombia can understand why Nicaragua might feel embarrassed by it, but it *was* agreed, at *Nicaragua's* initiative, and it is a very relevant *fact* which cannot simply be ignored as Nicaragua seems to wish.

31. Nicaragua also said that this Colombian interpretation of the Treaty as having a maritime dimension was not only a distortion of the essentially territorial treaty, but it was not revealed as being Colombia's view until 1969[32]. Colombia's view regarding the maritime line, however, was clear right from the time of the 1931 official map to which Nicaragua made no objection. And Colombia had *no* occasion to make its views known in writing before the events of 1969 simply

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[27]CR 2007/17, p. 13, para. 26; pp. 13-14, para. 27 (Argüello); pp. 38-45, paras. 26-45 (Remiro).

[28]POC, p. 70, para. 1.116.

[29]POC, pp. 40-51, paras. 1.51-1.71; pp. 92-104, paras. 2.41-2.62; CR 2007/16, pp. 21-23, paras. 25-35 (Pellet); pp. 35-36, paras. 10-13 (Remiro).

[30]CR 2007/17, pp. 40-41, para. 36 (Remiro).

[31]MN, Vol. II, Ann. 19, p. 55 [Nicaraguan translation into English].

[32]CR 2007/17, p. 11, para. 18 (Argüello).

because until then there had never been any Nicaraguan transgressions across the 82º W meridian, and thus no occasion for any written assertion of the line's boundary status. This fact demonstrates Nicaragua's acceptance until then of the line's status, and Nicaragua's "acquiescence" which precludes it from now invoking the breach (even if there were one — which there was not) as a ground for terminating the Treaty.

32. Nicaragua's claim that a Colombian breach of the Treaty gave Nicaragua a right to terminate the Treaty carries with it two consequences. First, any termination would operate only *in futuro*, not *ab initio*: so the Treaty's effectiveness up to at least 1969 is not in question. Second, while a breach may give rise to a right of termination, that right has to be exercised. Manifesting disagreement with the other party's interpretation is *not* the same as a formal notice of termination[33]. But Colombia has received no such formal notification of termination**.**

33. Nicaragua's next argument in its array of arguments seeking to extricate it from the compelling legal logic of Colombia's preliminary objections, is to say that, even if the Esguerra-Bárcenas Treaty were fully in force, it does not mean what Colombia says it means.

34. So, we are told[34], it was only a territorial treaty, not a maritime treaty at all. Madam President, I have already explained[35] why that argument is simply — on its face, and without any trespass on the merits — unfounded. If one wishes to ignore part of a treaty settlement, one is free to do so: but one must not then describe the remaining part of the treaty as if it were the whole treaty. The 1930 Protocol is there, it is part of the final treaty settlement, and its language, agreed to by Colombia, reflects Nicaragua's concerns.

35. We were also told[36] that the cays of Roncador, Quitasueño and Serrana were not part of the Archipelago. I will not repeat what Colombia has said elsewhere[37] to explain why precisely the opposite conclusion follows from the terms of Article I of the Treaty. It is again on the screen, and at tab 7 *(a)* in the judges' folder.

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[33]Cf. Vienna Convention on the Law of Treaties 1969, Art. 65.1.

[34]CR 2007/17, p. 39, para. 32 (Remiro).

[35]Paras. 27-30 above. See also CR 2007/16, p. 22, paras. 29, 31; p. 23, paras. 33, 37; p. 24, para. 38 (Pellet).

[36]CR 2007/17, p. 24, para. 10; p. 27, para. 17; p. 28, para. 20 (Pellet).

[37]POC, pp. 53-56, paras. 1.76-1.88; CR 2007/17, pp. 18-20, paras. 18-22 (Argüello).

36. I will, though, just ask a question: in a treaty which was dealing with outstanding territorial problems between Colombia and Nicaragua, and particularly with the Archipelago of San Andrés, why should those three islands be mentioned at all if they were not part of the Archipelago? And to answer my own question, they were mentioned simply to make clear that the parties were not purporting, in accordance with the rest of Article I, to allocate sovereignty over the islands as part of the Archipelago — which was something they could not do because, as they recognized, they were in dispute between the United States and *Colombia* — not, I emphasize, Nicaragua. The position of those three cays was clearly governed by the terms of Article I.

37. This argument about the inclusion of those three islands in the Archipelago is based, I would note, simply on the terms of the Esguerra-Bárcenas Treaty. No new argument on the merits is involved — the Treaty's terms dictate the conclusion which has to be drawn.

38. What else new does Nicaragua have to say about the Archipelago? Not much, although a point was made about Foreign Minister Holguín's description of the Archipelago as far back as 1896[38]. But the importance of his statement was the express inclusion in the Archipelago of the more distant cays which Nicaragua contends are not part of it. Thus he expressly mentioned as part of the Archipelago the cays of Serranilla and Bajo Nuevo, as well as Roncador, Quitasueño and Serrana. That has consistently been Colombia's public understanding of the extent of the Archipelago for over a century.

The non-existent alleged "rounds of negotiations"

39. Madam President, Nicaragua's final argument in its attempt to escape from Colombia's Preliminary Objections was developed at somewhat greater length than some of the others. It was designed to show that Colombia itself did not believe that the matters now in dispute had already been settled. Colombia, it was said, had been ready to negotiate on those matters, and had indeed made three attempts to do so[39].

40. Two considerations stand out. First, a willingness to negotiate on a given matter — even if there were such a willingness — does not mean that the matter is not already the subject of an

[38]CR 2007/17, p. 19, paras. 47-48 (Argüello).

[39]WSN, pp. 40-48, pp. 1.70-1.84. CR 2007/17, pp. 14-16, paras. 32-40 (Argüello).

agreed settlement. It could just as well mean — and in diplomatic practice often *does* mean — that the parties are willing to reconsider the earlier agreed settlement and see whether they can improve upon it. Nicaragua admits that none of what it alleges were attempts to reopen negotiations came to any conclusion: and this is fully consistent with the matter in question simply staying settled as it previously was.

41. But the second consideration is the more important. It is simply incorrect to say that there were any rounds of negotiations on matters which are now before the Court. Colombia consistently regarded the Esguerra-Bárcenas Treaty as having settled the matters it dealt with, and took no steps, and did nothing, to suggest that that settlement was anything other than a definitive agreed settlement of the matters then in dispute.

42. Nicaragua has presented a different story. Although Nicaragua is now setting aside the affidavits which it had submitted[40], it still constructs its version of events by other dubious means. I regret to say that it has done so by misrepresenting things said by Colombian representatives, by distorting records which it has placed before the Court in purported support of its views, and by giving only a partial account of the context in which certain events occurred. Let me substantiate this in more detail.

43. Nicaragua pretends that there were three so-called rounds of negotiations — in 1977, 1995 and 2001. Let us see what they amounted to.

44. The first alleged negotiations were said to have taken place in February 1977, between former Nicaraguan Foreign Minister Montiel Argüello and Mr. Julio Londoño, then an official in the Colombian Foreign Ministry[41].

45. Indeed, Mr. Londoño did travel to Managua in 1977. But only once and he stayed for just two days. And his purpose was to find ways to prevent the recurrence of incidents that had been taking place along the 82° W meridian, not at all to renegotiate that settled line. In fact, Mr. Londoño reiterated that the 82° W meridian was the maritime limit between the two countries and that Nicaragua should accept it. He never again met with Mr. Montiel Argüello.

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[40]CR 2007/17, p. 15, para. 32 (Argüello).

[41]CR 2007/17, p. 14, para. 32 (Argüello).

46. The Agent of Nicaragua went on to say[42] that the "nature and existence" of this alleged round of negotiations were verified by remarks made by the then President of Colombia, Mr. Alfonso López Michelsen in March 1977. And, for this, Nicaragua's Agent relied on part of a press statement made by President López at the end of a visit to a crafts fair in Costa Rica. He was answering questions posed by waiting journalists on a wide range of topics. The excerpt which Nicaragua submits to the Court reads as follows: "We aspire to reach agreements by direct negotiation on delimitations not only with Nicaragua but also with Venezuela which is more difficult . . ."[43]

47. But President López was referring to Nicaragua's purported disavowal, since 1969, of the 82° W Meridian established as a limit in the 1928/1930 Treaty. He was not saying that he wanted to negotiate a new limit. He was only saying that he hoped that the differences caused by Nicaragua's rejection of the limit established in 1930 at the 82° W Meridian, could be resolved by direct negotiations.

48. The distinguished Agent of Nicaragua next referred to certain discussions agreed to in 1995 by then Presidents Ernesto Samper and Violeta Barrios de Chamorro[44].

49. By way of an affidavit full of inaccuracies and misrepresentations by then Nicaraguan Foreign Minister Ernesto Leal, Nicaragua refers to certain discussions over lunch with the Colombian Foreign Minister Rodrigo Pardo in 1995. The Ministers had a varied agenda for the meeting they wanted to arrange, which included discussing the positions of the parties with regard to the 82° W meridian and recommending measures in order to prevent incidents along the boundary.

50. The purpose of the prospective meeting was explained in an op-ed article by Mr. Pardo published on 10 September 1995 in the Colombian newspaper *El Tiempo*. Unfortunately, Nicaragua omits to provide the Court with an English translation of the full version of Minister Pardo's article: instead it furnishes a mutilated translation as Annex 4 to its Written Statement.

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[42]CR 2007/17, p. 15, para. 33 (Argüello).

[43]WSN, Vol. I, p. 41, para. 1.68. The cited quote ends there, but in fact continues "because of the shape of the Gulf of Venezuela and the 'Monjes' Islands", Vol. II, Ann. 12, p. 31.

[44]CR 2007/17, p. 15, para. 34 (Argüello).

51. The full version shows that, on the 82° W meridian, Mr. Pardo stated:

> "Colombia has upheld that the meridian not only constitutes a reference with regard to sovereignty over the islands, cays and banks that are part of the Archipelago of San Andrés, but that it is also the maritime limit between the two states. Our country has peacefully and uninterruptedly exercised its jurisdiction and sovereignty up to the aforementioned meridian."[45]

52. On the intended scope for the contemplated discussions, he said:

> "*Naturally, it is not about analysing and discussing Colombia's sovereignty over the archipelago of San Andrés***,** backed by multiple historical and legal titles within the framework of international law, *nor about the maritime areas that correspond to it.*
>
> *Neither will the legal force or characteristics of the 1928 Treaty, by which Nicaragua recognised the evident fact that the archipelago of San Andrés belongs to Colombia, be discussed.*" (Emphasis added.)

53. Most importantly, however, Madam President, the proposed meeting never took place. The Colombian Government declined to participate in the contemplated discussions because of the tendentious declarations by Nicaraguan officials claiming that negotiations would be opened for an alleged maritime delimitation with Nicaragua. They were clearly falsifying the true purpose behind Colombia's willingness to hold discussions and in so doing, they indeed triggered, as the Agent of Nicaragua pointed, an "outcry in certain political-military sectors of Colombia that there should be no negotiations with Nicaragua"[46].

54. So much, then, for the non-negotiations of 1995.

55. As regards the alleged negotiations in 2001, the Agent of Nicaragua downplays their importance[47]. And it was, I must stress, a meeting requested by the Minister for Foreign Affairs of Nicaragua, and not by Minister Fernández de Soto. The last part of the meeting as described in the affidavit of Aguirre Sacasa was admitted by the Agent of Nicaragua to be just a personal opinion and not a "statement of fact"[48]. Colombia wishes to reaffirm that that account of the meeting is

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[45]WSN, Vol. II, Ann. 4, p. 13, contains the extracts selected and translated by Nicaragua. However, pursuant to Article 50, paragraph 2, of the Rules of Court, the complete original text in Spanish has also been furnished to the Court by Nicaragua and hence communicated to Colombia, in accordance with Article 52, paragraph 1, of the Rules of Court. It is to this latter text that Colombia refers.

[46]CR 2007/17, p. 16, para. 37 (Argüello).

[47]CR 2007/17, p. 17, para. 40 (Argüello).

[48]*Ibid.*

utterly false: Colombia forcefully rejects it, not just the "personal opinion" of Mr. Aguirre but also the "facts" adduced in the first part of that affidavit.

56. At that informal encounter, requested (I stress) by the Nicaraguan — not the Colombian — Foreign Minister, the Nicaraguan Foreign Minister informed the Colombian Minister that his Government had decided to bring the "matter" with Colombia before the International Court of Justice. For his part, Minister Fernández de Soto stated that the Government of Colombia was prepared, from the legal and political standpoint, to defend its legitimate rights. Nothing remotely in the nature of a negotiation upon an already-settled matter occurred.

57. So, Madam President, these three alleged rounds of negotiations prove to be no more than mirages. It is absurd to suggest that meetings of this character could be considered as "rounds of negotiations" to modify the common boundary, thereby showing (it is said) that Colombia itself did not regard it as settled. On the contrary, if anything, they show the consistency of Colombia's position in demanding compliance with what was established in the 1928-1930 Treaty with regard to the 82° W meridian.

58. Madam President, I submit for the Court's consideration the conclusion that, for the reasons I have given, Nicaragua's several attempts to escape the application of Colombia's Preliminary Objections are demonstrably unavailing.

59. Madam President and Members of the Court, I thank you for the patience and courtesy with which you have once again listened to my statement on behalf of the Republic of Colombia. Might I invite you, Madam President, now to call upon Colombia's Agent to conclude the presentation of Colombia's case.

The PRESIDENT: Thank you, Sir Arthur. I now call upon the Agent of Colombia.

Mr. LONDOÑO:

CLOSING STATEMENT AND FINAL SUBMISSIONS

1. Madam President, distinguished judges, of the 32 provinces that make up my country, the province of the Archipelago of San Andrés, because of its history, location and characteristics, is of vital importance for Colombia. The 80,000 Colombians thriving there work in trade, tourism,

agriculture and fishing. These activities have been governed by Colombian laws and regulations for the last 200 years.

2. Millions of my fellow countrymen and women and thousands of foreigners have visited the islands forming the Archipelago, its rural hamlets, the streets of its capital — also named San Andrés — and have enjoyed its modern tourist facilities.

3. Nicaragua's attempt to appropriate the Archipelago of San Andrés and its appurtenant maritime areas is deeply offensive to 43 million Colombians.

4. Were Nicaragua's attempt to reopen a controversy already settled and governed by a treaty to succeed, it would open Pandora's box: any State party to the Pact of Bogotá, dissatisfied with the boundary treaties in force on the date of its conclusion, would be given a licence to argue the emergence of a fabricated dispute after that date. This would render the Pact's provisions devoid of purpose, with grave implications for regional security and stability.

5. Colombia regrets the allusion, by the distinguished Agent of Nicaragua, to a statement made by the President of the Republic of Colombia, Mr. Alvaro Uribe, when asked about Colombia's reaction if Nicaragua were to begin oil explorations in the Archipelago's appurtenant maritime areas. The President did no more than to maintain that Colombia's sovereignty and jurisdiction would be protected and its laws upheld. Colombia, for its part, has spared the Court a statement of its complaints against the demeaning statements concerning our country and Government, made by former Nicaraguan Foreign Ministers and Heads of State.

6. Madam President and distinguished judges, in the written and oral pleadings of its Preliminary Objections, Colombia has shown that:

1. By the terms of Articles VI and XXXIV of the Pact of Bogotá, the procedure of judicial settlement set out in Article XXXI may not be applied to the controversy raised by Nicaragua, and the International Court of Justice lacks jurisdiction over it, because
   (a) the 1928-1930 Treaty was in force on 30 April 1948, the date of the Pact's conclusion;
   (b) sovereignty over the islands of San Andrés, Providencia and Santa Catalina and all the other islands, islets and cays that form part of the said Archipelago of San Andrés is a matter settled by and governed by the 1928-1930 Treaty;

(c) the maritime limit between Colombia and Nicaragua is a matter settled by and governed by the 1928-1930 Treaty;

and consequently, the Court must declare the controversy ended.

2. The Court is without jurisdiction under Article 36, paragraph 2, of the Statute to hear the merits of the dispute raised by Nicaragua because:

(a) the controversy had been declared ended, there is no dispute between the Parties to which Article 36, paragraph 2, can apply;

(b) the declaration of acceptance of the Court's compulsory jurisdiction submitted by Colombia in 1937 was not in force on the date of the filing of Nicaragua's Application; and

(c) in any event, by the terms of the reservation contained in that declaration, the Court lacks jurisdiction over the claims advanced by Nicaragua in its Application because:

(1) the dispute between Colombia and Nicaragua regarding sovereignty over the islands of San Andrés, Providencia and Santa Catalina and all the other islands, islets and cays that form part of the Archipelago of San Andrés, which was settled by and is governed by the 1928-1930 Treaty, arose out of facts prior to 6 January 1932;

(2) the establishment of the maritime limit between Colombia and Nicaragua by the 1928-1930 Treaty is a fact prior to 6 January 1932; and

(3) the existence of the 1928-1930 Treaty is a fact prior to 6 January 1932.

Final submissions

Madam President, I will now proceed to read the final submissions of Colombia, pursuant to Article 60 of the Rules of Court:

Having regard to Colombia's pleadings, written and oral, Colombia respectfully requests the Court to adjudge and declare that

(1) under the Pact of Bogotá, and in particular in pursuance of Articles VI and XXXIV, the Court declares itself to be without jurisdiction to hear the controversy submitted to it by Nicaragua under Article XXXI, and declares that controversy ended;

(2) under Article 36, paragraph 2, of the Statute of the Court, the Court has no jurisdiction to entertain Nicaragua's Application;

and that

(3) Nicaragua's Application is dismissed.

Madam President, I wish to express, on my behalf and that of the Co-Agent of Colombia and of all the members of our team, 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, Madam President.

The PRESIDENT: Thank you, Your Excellency. The Court takes note of the final submissions which the Agent has read on behalf of Colombia. The Court will meet again on Friday at 10 a.m. to hear the second round of oral argument of Nicaragua. The Court now rises.

The Court rose 5.30 p.m.