INTERNATIONAL COURT OF JUSTICE

TERRITORIAL AND MARITIME DISPUTE

(NICARAGUA v. COLOMBIA)

WRITTEN OBSERVATIONS

OF THE REPUBLIC OF NICARAGUA

ON THE APPLICATION FOR PERMISSION TO INTERVENE

FILED BY THE REPUBLIC OF COSTA RICA

26 MAY 2010

WRITTEN OBSERVATIONS OF THE REPUBLIC OF NICARAGUA

1) In accordance with Article 83 of the Rules of Court and within the time-limit of 26 May 2010 fixed by the Court for this purpose, as communicated to the undersigned Agent by a letter (ref. 135670) from the Registrar on 25 February 2010, the Republic of Nicaragua (Nicaragua) furnishes these written observations to the Application for permission to intervene in the case concerning the Territorial and Maritime Dispute (Nicaragua v. Colombia), filed by the Republic of Costa Rica (Costa Rica) on 25 February 2010 referring to Article 62 of the Statute of the Court.

I. GENERAL OBSERVATIONS

2) The present case has been before the Court since 6 December 2001 when Nicaragua filed its Application against the Republic of Colombia (Colombia). Not only have copies of this Application been in the public domain for more than 8 years but the pleadings, including Nicaragua's Memorial and the documents annexed, were made accessible to the public on 4 June 2007 upon the opening of the oral proceedings on the question of the Preliminary Objections raised by Colombia.[1] Costa Rica requested to be furnished copies of all the pleadings in September 2008 and the Court granted this request with the consent of Nicaragua.

[1] See Judgment, Preliminary Objections, 13 December 2007, par. 9 and CR 2007/16, p. 11.

3) It would thus seem that Costa Rica has waited an inordinate amount of time before submitting its Application for permission to intervene, which, as required by article 81 of the Rules of Court, must state precisely and clearly:

(a) the interest of a legal nature which the State applying to intervene considers may be affected by the decision in that case;

(b) the precise object of the intervention;

4) However, as shown below, notwithstanding the amount of time Costa Rica has taken before submitting its Application, it has failed to clearly identify any interest it may have of a legal nature that might be affected by the decision in this case, or the precise object of its purported intervention.

5) Instead, the Application of Costa Rica to intervene in the present case is apparently based on an assumption that the days when intervention under Article 62 had not yet been granted by the Court, as reflected in the well known cases of the Applications of Malta and Italy[2], are over and that nowadays the exceptional procedure of intervention on the basis of Article 62 may be accomplished by third parties with only the vague object of "informing" the Court of their supposed rights and interests, and therefore "protecting" them.

6) Costa Rica attempts to discharge the obligation contained in Article 81 (a) by pointing out that this case involves a maritime delimitation in its neighborhood. As will be shown below, Costa Rica has no claims to the areas where Nicaragua is requesting delimitation with Colombia. In fact, it admits as much. The mere fact

[2] Case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* Application by Malta for Permission to Intervene, I.C.J. Reports 1981, p 3, and the case concerning the Continental *Shelf (Libyan Arab Jamahiriya/Malta)*, Application to Intervene, Judgment, I.C.J. Reports 1984, p. 3.

that the delimitation requested of the Court is in the vicinity of Costa Rica does not, by itself, establish the existence of a Costa Rican legal interest that might be affected by the decision. If it were otherwise, virtually every maritime delimitation case would invite multiple interventions by neigbouring States.

7) As discussed below, there are only two cases in which intervention has been granted by the Court on the basis of Article 62, and neither supports Costa Rica's Application.

8) Costa Rica's Application raises other general issues. One is that Article 84 of the Rules of Court indicates that if an objection is filed to an application for permission to intervene, the Court shall hear the State seeking to intervene and the parties before deciding. This procedure cannot be interpreted to mean that the application for permission to intervene may be filed without a clear explanation and the backing of solid evidence. If the Court cannot decide on a request for intervention without opening up the expensive and time consuming process of public hearings, then a State could interrupt any case solely by filing an application for intervention without further ado. To affirm that a delimitation between States with opposite coasts – which is the case of the delimitation between Nicaragua and Colombia – will affect a State with an adjacent coast, must be proven at least *prima facie* with some type of evidence and clear arguments before opening the door to public hearings and the consequent delays to the main proceedings.

9) Another issue is the particularity of the present Application by Costa Rica in that it is the first request to intervene by a State that has an independent basis of jurisdiction *vis a vis* both Parties in litigation. Costa Rica has available the

jurisdiction of the Court with respect to both Nicaragua and Colombia, at least by invoking the Pact of Bogota, to which all three States are Parties. The significance of this is that Costa Rica is not only protected against any decision of the Court in this case by Article 59 of the Statute, but also by its ability to file an independent claim against either or both Parties, in the event its legal interests so require.

10) The comments that follow will be addressed to the crux of the matter in respect of Costa Rica's Application, that is, whether the alleged interest of a legal nature it considers might be affected by the decision in the present proceedings is clearly explained and fulfills the requirements set out in Article 81 of the Rules of Court.

II. COSTA RICA'S ALLEGED INTEREST OF A LEGAL NATURE THAT MIGHT BE AFFECTED BY THE NICARAGUA v. COLOMBIA CASE

11) The Costa Rican Application seeks intervention in this case simply because delimitation is taking place in the vicinity of its possible claims. Thus par. 9 of its Application alleges that "the prolongation of their maritime boundary (Nicaragua's and Colombia's) will eventually run into maritime zones in which third States have rights or interests. As Nicaragua's adjacent neighbor to the south, Costa Rica is one of those third States". As indicated above, if this thesis - that "nearness" of a delimitation constitutes grounds for intervention under Article 62 - were to be sustained, then there would be few delimitations in the world that could be carried out without intervention by third parties.

12) In the El Salvador/Honduras case[3], Nicaragua was denied intervention in the delimitation within the Gulf of Fonseca, notwithstanding that it, like the Parties to that case, has a coastline along the Gulf and rights in the adjacent waters. The Court (Chamber) in that case pointed out:

> "it occurs frequently in practice that a delimitation between two States involves taking account of the coast of a third State; but (this)...in no way signifies that by such an operation itself the legal interest of a third riparian State of the Gulf, Nicaragua, may be affected." [4]

13) Costa Rica's interests of a legal nature that it alleges might be affected by the decision of the Court are set out in paragraphs 11-22 of its Application. These claims fail to justify an intervention on the basis of Article 62 of the Statute.

<u>To begin with, certain facts must be recalled and clarified</u>.

14) First, Costa Rica has signed two maritime delimitation Treaties in the Caribbean. One Treaty was with Colombia on 17 March 1977, which has not yet been ratified, and another with Panamá on 2 February 1982, which is in force.

15) This last Treaty, which is in force, stipulates in Article I that Costa Rica and Panamá have decided to establish as the boundary between their maritime areas:

> "(1) In the Caribbean: The median line every point of which is equidistant from the nearest points on the baselines from which the breath of the territorial sea of each state is measured in accordance with public

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[3] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras),Application to I0ntervene, Judgment, I.C.J. Reports 1990, p. 92*

[4] Ibid. par. 77.

international law; from the termination of the land boundary between the two countries, at a point located in the mouth of the Sixaola River, latitude 09° 34′ 16″ North, longitude 82° 34′ 00″ West, along a straight line to a point located at latitude 10° 49′ 00″ North, longitude 81° 26′ 08.2″ West, where the boundaries of Costa Rica, Colombia, and Panamá intersect."[5] (Underline added)

16) In this Treaty Costa Rica acknowledges that it has no claims to the areas further east from this end point located at latitude 10° 49′ 00″ North, longitude 81° 26′ 08.2″ West.

17) This same understanding is reflected in the Treaty signed by Costa Rica with Colombia on 17 March 1977 which in its Article I states that the parties have agreed:

"To delimit their respective marine and submarine waters which are established or may be established in the future[6] by the following lines:

A. From the intersection of a straight line, drawn with azimuth 225° (45° SW) from a point located at lat. 11° 00′ 00″ N. and long. 81° 15′ 00″ W., with the parallel 10° 49′ 00″ N. West along the said parallel to its intersection with the meridian 82° 14′ 00″ W.

B. From the intersection of the parallel 10° 49′ 00″ N. and the meridian 82° 14′ 00″ W., the boundary shall continue north along the said meridian to where delimitation must be made with a third State."[7]

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[5] Counter Memorial of Colombia, Vol II-A, Annex 6, p.35.

[6] The 1977 Treaty was concluded when the Third UN Conference of the Law of the Sea (UNCLOS) that had been convened in late 1973 was in progress. In 1977, the year of the signature of the Colombia/Costa Rica Treaty, the Conference adopted the Informal Composite Negotiating Text that allowed, among other novelties, for the establishment of a 12 nautical-mile territorial sea, a 24-nautical-mile contiguous zone and the EEZ.

[7] Ibid. Annex 5, p. 31.

18) Although this Treaty with Colombia has not been ratified, Costa Rica has not given any indication of an intention of not ratifying it. On the contrary, in paragraph 12 of its Application Costa Rica states that it "has, in good faith, refrained from acts which would defeat the object and purpose of this agreement". Therefore, the Application does not imply any reversal of the position of Costa Rica as reflected in that Treaty to the effect that Costa Rica has no maritime claims further east than the line of the meridian 82° 14' 00" W.

19) Second, in par. 12 of its Application Costa Rica also states: "Costa Rica has not agreed a maritime boundary with Nicaragua, although Costa Rica and Nicaragua have engaged in negotiations to this end." Nicaragua does not recall any negotiations on maritime delimitation with Costa Rica in the Caribbean that involved specific claims to maritime areas or even methods of delimitation. On the contrary, it was understood that negotiations in the Caribbean would await solution to the dispute between Nicaragua and Colombia. Thus, Costa Rica has not approached Nicaragua with any specific claims to areas east of the meridian 82° 14' 00" W, or to any areas near the area where the delimitation with Colombia is sought by Nicaragua.

20) Third, Costa Rica has not made any claims to an extended continental shelf in the Caribbean, as has been done by Nicaragua. Costa Rica, as a Party to UNCLOS, has submitted preliminary information on its claims to an extended continental shelf to the United Nations pursuant to Article 76 of the 1982 Convention.
Significantly, it claimed an extended continental shelf *only in the Pacific*, not in the Caribbean.[8]

[8] See: http://www.un.org/Depts/los/clcs_new/submissions_files/preliminary/cri2009informacion_preliminar.pdf

21) In par. 13 of its Application, Costa Rica claims that:

> "The 1977 agreement between Costa Rica and Colombia, defining the limit separating their maritime areas in the Caribbean Sea, is predicated on the notion that the negotiating States have overlapping maritime entitlements the division of which requires agreement. This notion arises, in Costa Rica's view, from two basic assumptions: first, that Colombia has an agreed maritime boundary with Nicaragua along the meridian 82°W longitude leaving Colombia free to negotiate maritime limits with its other neighbors in the area east of 82°W; and second, that Colombian insular territory in the southwestern Caribbean Sea is entitled to full weight, or effect, in a delimitation."

22) The statement in the Application that Costa Rica "assumed" that "Colombia has an agreed maritime boundary with Nicaragua along the meridian 82°W longitude" is not correct. Costa Rica was aware of the fact that, since 1969 when Colombia first made the claim that the 82nd meridian was a line of delimitation, Nicaragua had contested this claim. Furthermore, Costa Rica was also well aware that Nicaragua had claims over certain keys and over the continental shelf in the area. There is a note to this effect dated 18 October 1972 from the Foreign Minister of Costa Rica at the time (5 years before Costa Rica signed the Treaty with Colombia) in which he clearly supports the Nicaraguan claim against Colombia and states that the keys of Quitasueño, Serrana and Roncador, which are located considerably to the east of the 82nd meridian, are on the continental shelf of Nicaragua and that thus Nicaragua exercises sovereignty over all that area.[9] So it is incorrect for the Application to assert that Costa Rica entered the Treaty with Colombia in 1977 under "two basic assumptions" that the 82nd

[9]. Annex 36 Nicaraguan Memorial

meridian was the line of delimitation and that the keys were Colombian and had to be given full weight in the delimitation.

23) Furthermore, two additional documents contradict the assertion that Costa Rica "assumed" that Colombia's rights extended up to the 82nd meridian. One is the Treaty of Costa Rica with Colombia which follows a delimitation line that is west of the 82nd meridian at 82° 14' 00" W longitude. The other document is the Treaty of Costa Rica with Panamá that has a line of delimitation lying east of the 82nd meridian and ends at a point located at latitude 10° 49' 00" North, longitude 81° 26' 08.2" West. Thus, it is difficult to understand the Application's reference to the meridian as having any relevance to Costa Rica at all.

24) Finally, it is not clear why Costa Rica claims in paragraph 13 "that the Court's ruling on the maritime boundary between Nicaragua and Colombia could affect these assumptions and, in practical terms, render the 1977 agreement between Costa Rica and Colombia without purpose." Costa Rica seems to assume that a ruling by the Court, in a case involving third parties, is reason to disown or modify its existing treaties. Why should a ruling of the Court "render" their 1977 agreement "without purpose"? The fact that Nicaragua can claim maritime areas which Costa Rica has recognized as being beyond her maritime boundaries with Panamá and Colombia does not *ipso facto* mean that Costa Rica can ignore its commitments to those States. In any event, that would be an entirely voluntary decision by Costa Rica which cannot serve as a valid basis for intervention under Article 62.

Against this background, the requirements of Article 81.2 (a) of the Rules of Court must be taken into account.

25) Costa Rica, quite distinctly from the procedure followed by Equatorial Guinea[10], did not attach documents or any clear elements of proof of its contentions. This lack of supporting documentation, or even illustrations, makes it even more difficult to determine exactly what are the legal interests claimed by Costa Rica. With this caveat, the following observations are made to the several claims of Costa Rica that its legal interests would be affected by the decision of the Court.

26) In par. 14 of the Application, Costa Rica claims "-at a minimum- to lateral equidistance boundaries drawn from the mainland coasts of Costa Rica and its adjacent neighbors" which naturally includes Nicaragua. As indicated above, Costa Rica has never made a formal claim to this form of delimitation in the Caribbean, a question or claim on which Nicaragua generally reserves its rights, but more importantly any well drawn technical equidistance boundary between Nicaragua and Costa Rica would not affect or involve the areas claimed by Nicaragua in the present case. Significantly, Costa Rica has abstained from supplying documents identifying the area supposedly affected by this claim.

27) Costa Rica has not furnished any illustration or given any coordinates of what a "lateral equidistance" line would concretely imply, or where "the area thus delineated" (abstractly) would be located. In view of this omission, Nicaragua would point out that the line of delimitation it seeks with Colombia is located substantially east of the furthest 200 n m EEZ claim of Costa Rica. It is also true that the boundary described in the Treaty between Colombia and Panamá

[10] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening), Judgment. I. C. J. Reports 2002*, p. 303

(which the Treaty between Costa Rica and Panamá uses to determine the tripoint with Colombia) blocks any attempt by Costa Rica to reach anywhere near the areas in which Nicaragua seeks the delimitation with Colombia.

28) In particular, the 20 November 1976 Treaty of Colombia and Panamá[11] stipulates in Article I that:

> "...the median line in the Caribbean Sea shall be constituted by straight lines joining the following points:
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> ... 2. From the point at latitude 12°30'00" north and longitude 78°00'00" west the delimitation of the marine and submarine areas belonging to each State shall be constituted by a series of straight lines joining the following points:
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> Point H: 12°30'00" N 78°00'00" W
>
> Point I: 12°30'00" N 79°00'00" W
>
> Point J: 11°50'00" N 79°00'00" W
>
> Point K: 11°50'00" N 80°00'00" W
>
> Point L: 11°00'00" N 80°00'00" W
>
> Point M: 11°00'00" N 81°15'00" W"

29) It is easily demonstrable that point K, located at 11°50'00" N 80°00'00" W, is well over 200 miles from any point on Costa Rica's coast and precludes any claims that Costa Rica might presume to have east of that point, especially as Costa Rica

[11] CM Colombia, Vol. II-A, Annexes, Annex 4, p. 25

has made no claim to an extended continental shelf. Furthermore, this point K (accepting Costa Rica's argument of "nearness" only for purposes of illustration) is closer to the Nicaraguan mainland than any point on Costa Rica's mainland. If we consider the base points along the Nicaraguan mainland and the pertinent islands off Nicaragua, this can be confirmed by simply looking at a map without even need of a ruler or compass.

30) Paragraphs 16 to 18 of the Application, which also address the alleged effects on the legal interests of Costa Rica, are an exercise in generalities. For example, par. 16 points out that "Costa Rica understands that these figures (in Nicaragua's pleadings) are not meant to show the maritime area claimed by Nicaragua, but instead are meant to show the area in which the delimitation should occur according to Nicaragua" . In that case, what is the effect on Costa Rica's legal interests?

31) The next paragraph, 17, claims issues that are "of more concern" to Costa Rica, namely "The depictions of Nicaragua' s area of 'potential EEZ entitlement' showing an even more aggressive southern limit can be found at Reply Figures 4-5, 6-5, 6-9, 6-10, and 6-11. Here too Nicaragua appears to claim maritime area that overlaps significantly with Costa Rica's area of maritime entitlement." As the Court will observe, all these figures in the Reply refer to the general area of the "potential EEZ entitlement", and do not imply, under any possible reading, a claim to the entirety of the areas thus roughly sketched.

32) In paragraph 18 Costa Rica makes this assertion:

> "In its Reply, Nicaragua modified its boundary claim against Colombia moving the new line far to the east of its original median line and beyond any area to which Costa Rica claims an entitlement. (See Reply figure 3-11) However, Nicaragua's claim to a boundary line implies entitlement to the area bounded by that line. Costa Rica is concerned that the area claimed on the basis of Nicaragua's line overlaps significantly with Costa Rica's maritime area not least because the southernmost point of this new claim line is still closer to Costa Rica than to Nicaragua."

33) This paragraph contains an important admission that the delimitation line claimed by Nicaragua is located "beyond any area to which Costa Rica claims an entitlement". This admission in itself should be enough to dismiss the Application of Costa Rica without further time-consuming and expensive procedures. The comment that "Nicaragua's claim to a boundary line *implies* entitlement to the area bounded by that line" is irrelevant. First, it would be stretching to a new breadth the rights available to third parties under Art. 62, if mere potential "implications" of boundary claims could form the basis for intervention. More concretely, however, Nicaragua is not claiming any lateral delimitation with Colombia that might affect Costa Rica's interests or claims. There is no trace of any claim to a line of delimitation with Colombia that would run from the continental shelf boundary requested by Nicaragua to its mainland, and even less to the neighborhood of its land boundary with Costa Rica.

34) One final point must be made on the section of Costa Rica's Application purporting to establish that the proceedings in the case between Nicaragua and

Colombia might affect its interests. This claim is contained in the curious paragraph 21 of the Application which must be read in full to be appreciated:

> "21. It will be clear to the Court that Nicaragua and Colombia are not in the best position to protect Costa Rica's legal rights and interests, And, while article 59 of the Statute of the Court provides that "the decision of the Court has no binding force except between the parties and in respect of that particular case," the Court will appreciate that it would be difficult for a small, non-militarized country like Costa Rica to implement this legal principle in practice."

35) It is surprising that a State that prides itself on, and studiously promotes its image of not having an army should even suggest that the use of military force would be required to ensure its legal rights pursuant to Article 59 of the Statute of the Court. It should be evident that a State like Nicaragua that has repeatedly had recourse to the Court, including in a prior boundary dispute with Costa Rica, is not one that is considering using non-peaceful means of dispute resolution.

36) In any event, Nicaragua considers that Costa Rica's statement in paragraph 21 could not possibly refer to Nicaragua because the security budget of Costa Rica more than doubles the defense budget of Nicaragua. Nicaragua also notes that, despite the fact that Costa Rica does not choose to call its ample security forces by the name of "army", it does have a fully equipped police force which alone has a budget higher than the total defense budget of Nicaragua.

Decisions of the Court referring to Article 62 of the Statute

37) Intervention based solely on art. 62 has never been granted to a State in a maritime delimitation case when the Parties oppose the application. The first two attempts at intervention - those of Malta in the Tunisia/Libya case and Italy in the Malta/Libya case- were denied by the Court. Costa Rica invokes not these cases, but two others – the only two in which intervention was granted. Neither of these cases supports Costa Rica's Application.

38) Costa Rica relies heavily on the Nicaraguan intervention in the El Salvador/Honduras case not only for the obvious reason that it involved Nicaragua, but also because this was the first successful intervention under art. 62. But it affords no support for Costa Rica. In that case Nicaragua was denied intervention in the delimitation inside and outside the Gulf of Fonseca. It was only allowed to intervene on the narrow question of the status of the Gulf: whether it was a condominium or enjoyed some other special juridical status as claimed by the Parties. Costa Rica's Application cannot benefit from a decision in which the Court denied Nicaragua's request and did not allow it to intervene in a delimitation that was not only "in its neighbourhood" but directly adjacent to its coastline inside a small gulf whose closing mouth separates the coasts of Nicaragua and El Salvador by less than 20 miles. The case only serves to emphasize the hollowness of Costa Rica's Application, in which it requests something –intervention- that in more compelling circumstances was denied to Nicaragua.[12]

39) The only other case in which intervention was allowed under Article 62 involved the Application of Equatorial Guiana in the Cameroon/Nigeria case. But there the

[12] Nicaragua has maintained its traditional position on the questions involving the Gulf of Fonseca and the maritime delimitation of the area. The Judgment was not res judicata for Nicaragua.

request for intervention was not opposed by either Party.[13] Moreover, the Court had already anticipated in a prior phase of that case (8th preliminary exception) that one of the requests made by Cameroon, which involved the extension of the delimitation line beyond a certain point, could involve rights of third parties and this might be taken into consideration by the Court in limiting its decision on the merits.[14] The Costa Rican request is different because, apart from the question of opposition by a Party, the delimitation requested by Nicaragua does not consist of a single line that cannot be drawn because it would involve third parties along its whole length, like the extension seawards of point "g" requested by Cameroon. In that case it was only this extension seaward that the Court felt might be difficult to determine absent third States. And the Court did not indicate that this circumstance could block its decision on the rest of the maritime delimitation that was *sub judice*. In this respect it must be recalled that Italy was denied permission to intervene in the Libya/Malta case were its legal interests in an around Malta more or less enveloped three points of the compass around the island and not just a small and distinct part of the delimitation.

40) For the sake of completeness, the last case in which intervention was attempted based on art. 62 involved the Application of the Philippines in the Indonesia/Malaysia case. The request was different than the previous cases in the sense that the Philippines' interest at stake had more to do with interpretation of certain treaties and colonial agreements invoked by the Parties than with the area of the delimitation or the entitlement to islands. For present purposes the important point is that the Application was opposed and intervention was denied by the Court.

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[13] See Judge Oda's dissenting opinion in this case, in which he states that "The Court granted the request for permission to intervene solely because the parties to the principal case did not object...", par. 12, p. 617.

[14] "In the light of this virtual invitation to intervene, it is not surprising that Equatorial Guinea chose to do so and that the full Court unanimously accepted Equatorial Guinea's request." Comment by Chinking in *The Statute of the International Court of Justice*, eds. Zimmermann et al, Oxford Univ. Press, 2006) p. 1350, par. 46. referring to the Court's Judgment in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections* (Nigeria v. Cameroon)

III CONCLUSION

41) For these reasons, Nicaragua submits that the Application filed by Costa Rica requesting permission to intervene fails to comply with the Statute and the Rules of Court. Nicaragua leaves it to the discretion of the Court to adjudge and determine whether Costa Rica has complied with the legal requirements necessary to base a right to intervene in the present proceedings and, hence whether the request of Costa Rica should be granted.

The Hague, 26 May 2010

Carlos Argüello Gómez

Agent of the Republic of Nicaragua