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CR 2015/24

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2015

Public sitting

held on Wednesday 30 September 2015, at 4 p.m., at the Peace Palace,

President Abraham presiding,

***in the case concerning* Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua *v.* Colombia)**

Preliminary Objections

VERBATIM RECORD

ANNÉE 2015

Audience publique

tenue le mercredi 30 septembre 2015, à 16 heures, au Palais de la Paix,

sous la présidence de M. Abraham, président,

***en l'affaire relative à des* Violations alléguées de droits souverains et d'espaces maritimes dans la mer des Caraïbes (Nicaragua c. Colombie)**

Exceptions préliminaires

COMPTE RENDU

Present:	President	Abraham
	Vice-President	Yusuf
	Judges	Owada
		Tomka
		Bennouna
		Cançado Trindade
		Greenwood
		Xue
		Gaja
		Sebutinde
		Bhandari
		Robinson
		Gevorgian
	Judges *ad hoc*	Daudet
		Caron
	Registrar	Couvreur

Présents : M. Abraham, président
M. Yusuf, vice-président
MM. Owada
Tomka
Bennouna
Cançado Trindade
Greenwood
Mme Xue
M. Gaja
Mme Sebutinde
MM. Bhandari
Robinson
Gevorgian, juges
MM. Daudet
Caron, juges *ad hoc*

M. Couvreur, greffier

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Le PRESIDENT : L'audience est ouverte. La Cour se réunit aujourd'hui pour entendre le second tour de plaidoiries de la Colombie. J'indique d'abord que, pour des raisons dont elle m'a dûment fait part, la juge Donoghue n'est pas en mesure de siéger aujourd'hui. Je donne à présent la parole à Sir Michael Wood.

Sir Michael WOOD: Thank you, Mr. President.

FIRST PRELIMINARY OBJECTION: ARTICLE LVI OF THE PACT OF BOGOTÁ

1. Mr. President, Members of the Court, the order of speakers in Colombia's second round, responding to what Nicaragua said yesterday, will be as follows.

2. I shall address Colombia's first objection to jurisdiction, based on Article LVI of the Pact of Bogotá.

3. Professor Reisman will follow on the non-existence of a dispute between the Parties.

4. Mr. Valencia-Ospina will address Colombia's alternative argument, that the dispute is not one which, in the opinion of the Parties, could not have been settled by direct negotiations.

5. Professor Treves will then deal with the supposed inherent jurisdiction.

6. ***Mr.*** Bundy will then offer some concluding remarks.

7. And he will be followed by the Agent of Colombia, who will read out Colombia's final submissions.

8. Mr. President, in this short intervention, I will respond to what Professor Remiro Brotóns had to say yesterday concerning Colombia's first objection to jurisdiction.

Correct approach to the interpretation of Article LVI

9. The Parties agree on two important points. First, that the core issue is the proper interpretation of Article LVI. Second, that the applicable rules of treaty interpretation are those set forth in the Vienna Convention.

10. Despite the common understanding that the issue of concern is the interpretation of Article LVI, Nicaragua continues to ignore half of its text. That is hardly a good faith interpretation. In an effort to avoid ~~***interpreting***~~ the ordinary meaning of Article LVI, taken as a

whole, Professor Remiro Brotóns yesterday followed the same methodology as that found in Nicaragua's written pleadings. He began with the first paragraph of Article LVI, and only the first paragraph[1]. He then moved straight to Article XXXI, thus concluding Nicaragua's ***interpretation*** of the applicable texts[2]. He even said that the consent to the jurisdiction of the Court is based on Article XXXI and the first paragraph of Article LVI[3]. He then supported his conclusion, reached on the basis of Article XXXI and the first paragraph of Article LVI, by referring to his subjective view of the object and purpose of the Pact and of the principle of good faith. And only at this point, he moved on to consider the *travaux préparatoires*, and it was only then that he acknowledged that Article LVI consists of two paragraphs. Rather than interpreting all the elements of Article LVI as a whole, in an effort to reach a harmonious interpretation — ***he*** acknowledged Colombia had done[4] — Nicaragua prefers to contrast the second paragraph of the article with its first paragraph and with Article XXXI in an attempt to deprive the second paragraph of any real meaning. Professor Remiro Brotóns only tells the Court what the second paragraph *cannot* do: for Nicaragua it cannot override Nicaragua's understanding of the first paragraph.

11. Nicaragua has nowhere explained what the purpose of the second paragraph is. The only thing the learned Professor had to say about the second paragraph was that "its *raison d'être* is to protect ongoing proceedings"[5]. Precisely, but the whole question is which procedures are protected by the second paragraph? The answer, we say, is clear — the second paragraph protects procedures initiated prior to the moment of transmission of the notification, not procedures initiated thereafter. This is the only reading of the text that harmonizes its various elements, and ensures that each of the paragraphs has effect.

12. Our colleagues opposite scarcely referred to the actual text of Article LVI, but when they did so they were mistaken. For example, Professor Remiro Brotóns' reliance on the word "*préavis*" in the French version of the article — "notice" in English — seeks to attach a significance to the word that it simply does not bear. Moreover, the thesis advanced by the learned

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[1]CR 2015/23, pp. 20-21, paras. 4-6 (Remiro Brotóns).

[2]*Ibid.*, p. 21, para. 6 (Remiro Brotóns).

[3]*Ibid.*, pp. 22-23, para. 10 (Remiro Brotóns).

[4]*Ibid.*, pp. 23-24, para. 13 (Remiro Brotóns).

[5]*Ibid.*, p. 27, para. 26 (Remiro Brotóns).

Professor that the specific provision in the second paragraph cannot override what he curiously called the "general rule of intertemporal law" in the first paragraph is contrary to established rules concerning *lex specialis* and *lex generalis*. To accept this thesis would be to deprive more specific rules in treaties of any meaning or purpose.

13. In short, Mr. President, Nicaragua's approach to the interpretation of Article LVI is fundamentally flawed. We set out the correct approach in our written pleadings[6], and I described it again on Monday[7] and I shall not repeat now what I said then.

Object and Purpose

14. Mr. President, Members of the Court, my colleague opposite sought to bolster his interpretation by referring to the object and purpose of the Pact. Yes, the Pact aimed to advance the peaceful settlement of disputes as compared with prior treaties in the Americas. As the Court said in its 1988 Judgment, in the *Nicaragua* v. *Honduras* case "the purpose of the American States in drafting [the Pact] was to reinforce their mutual commitments with regard to judicial settlement"[8]. But the Pact advanced that cause within the limits of the consent of the Parties given in the Pact, neither more nor less. You cannot use the general object and purpose of a treaty on pacific settlement to interpret away conditions and safeguards contained therein. Treaties conferring jurisdiction are neither to be interpreted restrictively nor broadly. They are to be interpreted, like any other treaty, in accordance with the Vienna rules. It does not further the cause of judicial settlement to ignore the limits that States place on their consent. Without the assurance that the limits of the consent will be respected, parties will not consent in the first place. It is by no means uncommon for States to denounce a particular treaty setting out procedures for the peaceful settlement of disputes. That in no way diminishes their commitment to the fundamental principle, set out in the United Nations Charter, that disputes must be settled by peaceful means.

15. We see this, for example, with the optional clause. The optional clause undoubtedly serves the object and purpose of the peaceful settlement of disputes. On Monday I drew attention

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[6]Preliminary Objections of Colombia (POC), Vol. I, Chap. 3.

[7]CR 2015/22, pp. 19-30 (Wood).

[8]*Border and Transborder Armed Actions (Nicaragua* v. *Honduras*), *Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988,* p. 89, para. 46.

to the reservations, frequently included in declarations under the optional clause, of the right to withdraw with immediate effect. This may be seen in recent practice. Since 2011, new declarations have been made by Ireland[9], Italy[10], Lithuania[11] and Romania[12], and revised declarations have been made by Greece[13] and the United Kingdom[14]. Each one of these declarations reserves the right to withdraw consent with immediate effect.

16. In the 2014 *Handbook on accepting the jurisdiction of the International Court of Justice: model clauses and templates*[15] — that is, United Nations document ***A-68/93***, which may be found through the Court's website — that Handbook includes the following text as one option for a termination clause in an optional clause declaration:

> "This Declaration will remain in force until notice is given to the Secretary-General of the United Nations withdrawing the declaration, with effect as from the moment of such notification."

17. Professor Remiro Brotóns sought to argue that because, as he claimed, all denunciation clauses in dispute settlement treaties only take effect at the end of the period of notice. Article LVI had to be interpreted in the same way[16]. That, with respect, is a *non sequitur*, but in any event it seems to be based on a false assumption. Thus, Article 72 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the ICSID Convention) provides that notice of denunciation (which takes effect six months later) pursuant to Article 71 shall not affect rights or obligations of a State arising out of consent to the jurisdiction of the Court

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[9]Declaration Recognizing as Compulsory the Jurisdiction of the Court by Ireland, http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=1&code=IE (last visited: 29 September 2015).

[10]Declaration Recognizing as Compulsory the Jurisdiction of the Court by Italy, http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=1&code=IT (last visited: 29 September 2015).

[11]Declaration Recognizing as Compulsory the Jurisdiction of the Court by Lithuania, http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=1&code=LT (last visited: 29 September 2015).

[12]Declaration Recognizing as Compulsory the Jurisdiction of the Court by Romania, http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=1&code=RO (last visited: 29 September 2015).

[13]Declaration Recognizing as Compulsory the Jurisdiction of the Court by Greece, http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=1&code=GR (last visited: 29 September 2015).

[14]Declaration Recognizing as Compulsory the Jurisdiction of the Court by United Kingdom, http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=1&code=GB (last visited: 29 September 2015).

[15] Letter dated 24 July 2014 from the Permanent Representative of Switzerland to the United Nations addressed to the Secretary-General, http://www.un.org/ga/search/view_doc.asp?symbol=A/68/963 (last visited: 29 September 2015).

[16]CR 2015/23, pp. 30-31, para. 35 (Remiro Brotóns).

given before such notice was received by the depositary[17]. This means that jurisdiction is preserved only for proceedings that were initiated before the transmission of the notice of denunciation.

Article by Jiménez de Aréchaga and the Court's 1988 Judgment

18. Mr. President. In seeking to justify its position, Nicaragua relied in its written proceedings rather heavily on an article published in 1989 by Eduardo Jiménez de Aréchaga[18]. This was referred to again yesterday by Professor Remiro Brotóns[19]. We have included the full text of this article in your folders at tab 39[20], though I do not think you need turn to it, because the short passage relied upon by our friends opposite has to be read in context. Nicaragua relies on the statement that under the Pact "the withdrawal of the acceptance of compulsory jurisdiction as soon as the possibility of a hostile application looms in the horizon has been severely restricted"[21]. Restricted, perhaps, but not excluded — the distinguished author chose his words carefully. He did not say that jurisdiction persisted throughout the one-year period following transmission of the notification. The context was the distinction between an agreement under Article 36, paragraph 1, of the Statute and the optional clause. The point being made was that when the obligation is "contractualized", to use the author's word, it is not sufficient simply to withdraw a declaration — as under the optional clause. The State has to go much further, it has to denounce an agreement, as in this case, the Pact of Bogotá as a whole. That is politically a much more significant step, a step that States do most certainly not take lightly. In this sense, "contractualization" does indeed place restrictions on States.

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[17]Article 72 reads:

> "Notice by Contracting State pursuant to Articles 70 or 71 shall not affect the rights or obligations under this Convention of that State or of any of its constituent subdivisions or agencies or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary."

[18]Written Statement of Nicaragua (WSN), para. 2.33.

[19]CR 2015/23, p. 28, para. 29 (Remiro Brotóns).

[20]E. Jiménez de Aréchaga, "The Compulsory Jurisdiction of the International Court of Justice under the Pact of Bogotá and the Optional Clause", *International Law at a time of perplexity: Essays in honour of Shabtai Rosenne*, Martinus Nijhoff, 1989, pp. 356-360.

[21]*Ibid.*, p. 357.

19. It was in this context that Professor Remiro Brotóns again cited the Court's statement in the 1988 *Nicaragua* v. *Honduras* case, and he claimed that "the Court itself has recognized that a State's consent to compulsory jurisdiction under Article XXXI of the Pact of Bogotá 'remains valid *ratione temporis* for as long as that instrument itself remains in force between those States'"[22].

20. In its 1988 Judgment this Court was not considering the effect on consent to jurisdiction of the transmission of a notification of denunciation. That question simply did not arise in the case before it. What the Court was actually addressing were arguments put forward by Honduras in an attempt to import the conditions, including the temporal conditions, of its optional clause declaration into its consent to jurisdiction under Article XXXI of the Pact. The Court in 1988 simply did not address Article LVI of the Pact in any way[23].

The various provisions of the Pact of Bogotá

21. Mr. President, Members of the Court, Professor Remiro Brotóns next tries to attack Colombia's interpretation of Article LVI by claiming that the provisions of the Pact of Bogotá are inseparable and that without jurisdiction over procedures initiated under Chapters II through V after the transmission of the notification of denunciation, the Pact would remain an empty shell, as he put it, during the one-year period of notice. He does so by selectively canvassing the articles of the Pact.

22. Mr. President, this argument distorts both the content of the Pact and Colombia's argument. As Colombia demonstrated in its written[24] and oral[25] presentations, a significant number of substantive obligations continue to apply to the denouncing State during the one-year period, even though new procedures cannot be initiated against it.

23. First, Professor Remiro Brotóns conveniently overlooked several important provisions of the Pact. For example, he did not mention Article L on the steps to be taken in the case that a contracting Party fails to carry out a decision of this Court. He did not mention Article LI on

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[22]WSN, para. 2.11; see also MN, para. 1.23.

[23]*Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 84, paras. 33-34.

[24]POC, Vol. I, paras. 3.5-3.7; see also Appendix to Chapter 3 (Pact of Bogotá).

[25]CR 2015/22, pp. 21-23, paras. 10-23 (Wood).

requests for advisory opinions. He summarily dismissed the relevance of Article I on refraining from the threat or use of force and the peaceful settlement of disputes, two very fundamental obligations under the Pact adopted in 1948, just three years after the United Nations Charter. Moreover, Article I in fact contains an obligation to refrain from "any other means of coercion" which is not contained, in terms at least, in the United Nations Charter.

24. Second, the learned professor is wrong to assert that other articles would become redundant. The principles contained in some of them would continue to carry substantive obligations for the denouncing Party and are clearly separable from the procedures in Chapters II to V of the Pact. Article II provides that "[t]he High Contracting Parties recognize the obligation to settle international controversies by regional procedures before referring them to the Security Council of the United Nations" — this is not limited ***to*** procedures under Chapters II to V of the Pact. But Article II further provides that,

> "[c]onsequently . . . the parties bind themselves to use the procedures established in the present Treaty, in the manner and under the conditions provided for in the following articles, or, alternatively, such special procedures as, in their opinion, will permit them to arrive at a solution"[26].

This reference to "special procedures" is likewise clearly separable from Chapters II to V.

25. Furthermore, many "procedural" provisions of the Pact will still be in effect after the transmission of ***the*** notification of denunciation: they continue to govern any procedures initiated before the transmission and their content and applicability are independent of the ability to initiate new procedures during that period. Moreover, the reservations of Argentina and the United States when signing the Pact, which exclude the applicability of the majority of the procedures under the Pact**,** demonstrate that the various elements of the Pact can be separated one from another[27].

Travaux préparatoires

26. Mr. President, Members of the Court, Professor Remiro Brotóns finally turned to the *travaux préparatoires* of Article LVI[28]. He asserted that there was "not an element, not a single

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[26]CR 2015/22, pp. 21-23, paras. 10-23 (Wood).

[27]Reservations of the Pact of Bogotá by United States, http://www.oas.org/juridico/english/sigs/a-42.html#United States (last visited: 29 September 2015); Reservations of the Pact of Bogotá by Argentina, http://www.oas.org/juridico/english/sigs/a-42.html#Argentina (last visited: 29 September 2015).

[28]CR 2015/23, pp. 29-31, paras. 31-35 (Remiro Brotóns).

element" which supported Colombia's interpretation, and that this had explained our brevity on the subject on Monday[29]. To the contrary, we were brief because we had set out the preparatory work fully in our written pleadings[30], and Nicaragua, in its Written Statement in response, had said hardly anything[31]. The learned professor asserts that in 1948 there was no debate in the relevant Commission, no explanation, etc.[32] Well, it may be that the records are limited — not unusual for conferences of that date, or even now, and certainly not unusual in relation to the final clauses of a treaty, or for matters discussed in a drafting committee. But, in fact, as we have shown at length in our written pleadings, the *travaux* do confirm that the drafters of the Pact consciously chose to word Article LVI as they did so as to limit with immediate effect the initiation of new procedures upon the transmission of the notification of denunciation.

27. Nicaragua accepts that the original draft of Article LVI was based on Article 9 of the General Treaty of Inter-American Arbitration of 1929. Yet despite the change, despite the additional sentence, introduced in 1938 to the text which eventually became Article LVI, Nicaragua continues to assert that the meaning of the article remained the same[33]. The change is obvious from tab 9, which is now on the screen, where the two provisions are set out side-by-side.

28. In support of his wholly untenable position, Professor Remiro Brotóns now relies upon one sentence from the records of the 1948 Conference[34]. The Rapporteur of the Third Commission, Mr. Enriquez from Mexico, in his report to the Conciliation Committee said: "We decided that the best drafting would consist on replicating Article 16 [he actually meant Article 9 — it was Article 16, I think, in the Conciliation Treaty — Article 16, *Article 9*] of the 1929 Treaty." Mr. Enriquez then read out both paragraphs of Article LVI (which was then numbered LV). Colombia did not ignore this, as the learned professor claimed[35]. We included what Mr. Enriquez said, in full, and in an English translation, at Annex 31 of our preliminary objections. But it is

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[29]CR 2015/23, p. 29, para. 31 (Remiro Brotóns).

[30]POC, paras. 3.33-3.52.

[31]WSN, paras. 2.35-2.39.

[32]CR 2015/23, p. 29, para. 31 (Remiro Brotóns).

[33]WSN, para. 2.39.

[34]CR 2015/23, pp. 29-30, paras. 32-34 (Remiro Brotóns).

[35]*Ibid.*, p. 30, para. 33 (Remiro Brotóns).

hardly a sentence of great import — Mr. Enriquez's statement — since it is clear that Mr. Enriquez was referring to the first paragraph of Article LVI, which does indeed follow Article 9 of the 1929 Treaty. He simply could not have been referring to the second paragraph. The second paragraph was clearly new, having been introduced in 1938 — as I said on Monday — upon a proposal by the United States of America[36]. When the new text was introduced, in 1938, the then Legal Adviser to the State Department, Mr. Green Hackworth, emphasized orally that there was a new addition to the draft. And the addition was italicized to draw further attention to the alteration of the text[37].

29. Professor Remiro Brotóns suggested yesterday that the additional paragraph in Article LVI *must be interpreted* so as not to be "regressive" compared with the 1929 General Treaty of Inter-American Arbitration, or indeed other treaties, which the Pact of Bogotá was to replace[38]. That, with great respect, is a false argument. The Pact of Bogotá and the 1929 Treaty, and the other treaties, are wholly different instruments. As its name suggests, the 1929 Treaty was only concerned with a particular form of arbitration. It contained no provisions referring, for example, to the jurisdiction of the then Permanent Court of International Justice.

30. Mr. President, Members of the Court, that concludes my response to what Professor Remiro Brotóns said yesterday.

31. I thank you for your attention and I would ask you to invite Professor Reisman to the podium.

Le PRESIDENT : Merci. Je donne à présent la parole au professeur Michael Reisman.

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[36]POC, Vol. II, Ann. 25: Delegation of the United States of America, Report of the Meetings of Sub-Committee 1 of Committee I, Consolidation of American Peace Instruments and Agreements, 19 Dec. 1938, p. 5.

[37]*Ibid*, Ann. 24, Art. XXII, p. 203.

[38]CR 2015/23, p. 30, paras. 34-35 (Remiro Brotóns).

Mr. REISMAN:

ABSENCE OF A DISPUTE

1. Mr. President, Members of the Court, I am grateful for the opportunity to return to Colombia's discussion of the "absence of dispute" in order to correct some of Nicaragua's misstatements.

2. This is a proceeding on jurisdiction. Colombia's principal contention is that its consent to jurisdiction ended with immediate effect upon the transmission of its denunciation of the Pact of Bogotá on 27 November 2012. Thus Nicaragua's Application is out of time by one year. But, for the sake of argument, let me assume Nicaragua's contention that Pact Article LVI requires that a year must run for jurisdictional purposes from the date of denunciation; on that assumption, other things being equal, Nicaragua's Application of 26 November 2013, would be admissible because it was lodged one day before Colombia's consent to jurisdiction lapsed.

3. In Nicaragua's view, its Application was admissible but the "critical date" for the Application was one day before the expiration of Colombia's consent to jurisdiction under the Pact. That means that in order to fall within the Court's jurisdiction, events that constituted Nicaragua's grievance must have occurred before that date and, as *Peace Treaties* said, in "a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations" [39].

4. How does one determine the objective existence of such a dispute? Yesterday, Professor Lowe cited the *Hostages* case as authority against Colombia's submission that international law requires some modality of communication of a claim to the other party as a means of confirming the objective existence of a dispute. But he only quoted what the Court said about the *Hostages* case in the *Headquarters Agreement* case, namely — and this is the *Headquarters Agreement* summary: "The Court saw no need to enquire into the attitude of Iran in order to establish the existence of a 'dispute'."[40] With respect, Professor Lowe ignored the actual holding

[39] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74.

[40] CR 2015/23, p. 40, para. 42 (Lowe).

and the context of the *Hostages* case in which modalities for establishing the existence of a dispute were fully and amply complied with by the United States. I quote the Court:

> "From the outset of the attack upon its Embassy in Tehran, the United States protested to the Government of Iran both at the attack and at the seizure and detention of the hostages. On 7 November a former Attorney-General of the United States, Mr. Ramsey Clark, was instructed to go with an assistant to Iran to deliver a message from the President of the United States to the Ayatollah Khomeini." [41]

5. The Court went on to note that it was Iran's leader who forbade members of the Revolutionary Council and all the responsible officials to meet the United States representatives[42]. Quoting the Court again:

> "Subsequently, despite the efforts of the United States Government to open negotiations, it became clear that the Iranian authorities would have no direct contact with representatives of the United States Government concerning the holding of the hostages."

6. But there was more. The Court quoted the Security Council "resolution 457 (1979) calling on Iran to release the personnel of the Embassy immediately, to provide them with protection and to allow them to leave the country" [43].

And the Court concluded:

> "In the present instance, neither of the parties to the dispute proposed recourse to either of the two alternatives, [in the 1955 bilateral treaty] before the filing of the Application or at any time afterwards. On the contrary, the Iranian authorities refused to enter into any discussion of the matter with the United States, and this could only be understood by the United States as ruling out, *in limine*, any question of arriving at an agreement to resort to arbitration or conciliation under Article II or Article III of the Protocols, instead of recourse to the Court."[44]

Mr. President, the existence of the dispute was established beyond a shadow of doubt.

7. The Pact of Bogotá, Nicaragua's principal basis of jurisdiction, is particularly relevant in this regard. Under its Article II, not every dispute can be submitted to the Court. As Mr. Valencia-Ospina explained the day before yesterday, Article II preconditions access to Article XXXI's judicial procedure to the demonstration that the parties were of the opinion that the

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[41] *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980,* p. 15. para. 26.

[42] *Ibid.*

[43] *Ibid.,* p. 16. para. 28.

[44] *Ibid.,* p. 26. para. 49.

relevant dispute or disputes "cannot be settled by direct negotiations through the usual diplomatic channels".

8. Now, Mr. President, the Parties' opinion on the possibility of resolving the dispute through "the usual diplomatic channels" presupposes knowledge of the other Party's legal position. Hence the Pact requires a positive communication of the claim before a dispute can be brought to the Court on its basis.

9. Article II of the Pact refers specifically to negotiations through "the usual diplomatic channels". The Nicaraguan Foreign Ministry is well aware that "the usual diplomatic channels" include such modalities as sending a formal diplomatic Note. The fact that Nicaragua even cared to belatedly send a formal Note on 13 September 2014[45] (almost ten months after the Application was filed) alleging infringement of their sovereign rights as well as the purported use of force by Colombia, means that they were well aware of the meaning of the need for recourse to the "usual diplomatic channels".

10. Now, in the case before you, what events, which are alleged to have occurred before the critical date, can be deemed to constitute "a situation in which the two sides hold clearly opposite views concerning the question of the performance . . ." of a legal obligation and which cannot be settled through "the usual diplomatic channels"? The evidence adduced by Nicaragua to answer this question is selective and contradictory. On 14 August 2013, President Ortega announced that "the Naval Force of Colombia . . . has been respectful and there has not been any kind of confrontation between the Colombian and Nicaraguan Navy . . ."[46]. Eight days before the submission of Nicaragua's Application, Nicaraguan Admiral Corrales Rodriguez declared that "we have not had any problems with the Colombian Naval forces . . ."[47]. Now, nine months later, nine months after having submitted its Application, the Nicaraguan Ministry of Foreign Affairs asked the Admiral for an inventory of "any incidents that may have taken place between the Colombian Navy and the Nicaraguan Navy"[48]. This time, for some reason, the Admiral reported ten low-level

[45]POC, Vol. II, Ann. 17.

[46]POC, Vol. II, Ann. 11, p. 118.

[47]POC, Vol. II, Ann. 43, p. 355.

[48]Memorial of Nicaragua (MN), Ann. 23 A, p. 281.

incidents allegedly occurring up to the critical date. Far be it from me to impugn the good faith of Admiral Corrales but it is striking that not one of those events was deemed, at the time of its occurrence, important enough to protest, or otherwise to bring to the attention of the Colombian Government, let alone to Nicaraguan President Ortega.

11. Similarly selective is Nicaragua's presentation of President Santos' speech to the nation on the evening the 2012 Judgment was handed down. The theory that statements by Colombian officials may constitute per se a dispute led Nicaragua to pick out sentences and to read them in ways that create an impression of a defiant non-compliance and repudiation of the Judgment. But the President's statement, for example, that he "emphatically rejects this aspect of the decision" meant absolute disagreement, not an intention of non-compliance. And, incidentally, the disagreement was only with that part of the Judgment dealing with maritime enclaves, not with the whole maritime delimitation. And, indeed, shortly after this sentence in the speech, the President stated: "Therefore, we will not discard any recourse or mechanism available to us in international law"[49] and he went on to inform his countrymen about the method by which Colombia would implement the decision. Mr. President, this is not a declaration of non-compliance.

12. Counsel yesterday said, rightly, that to rely on the first days' reaction of Colombian officials to the Judgment would be "a cheap shot" but he then carefully ignored later statements and the judgment of the Constitutional Court, all of which manifest the intention to comply by means of the conclusion of a treaty. Nor could Nicaragua's Agent resist taking that "cheap shot": the Agent, selecting passages from the President's statement on the day of the Judgment, asserted that it showed "the existence of a serious dispute between the parties" as of the day of the delivery of the Judgment, as purported evidence that "quite obviously . . . Colombia does not accept the delimitation carried out by the Court"[50]. And, Mr. President, I am not sure this goes into the "cheap shot" category, but I note that Nicaragua's propensity is not to quote President Ortega's statement of satisfaction with the comportment of Colombia's President Santos.

13. So, having cited *Hostages* as his authority, we are baffled by Professor Lowe's conclusion that "it is evident from the record in this case that what international law does

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[49]POC, Vol. II, Ann. 6, p. 89.

[50]CR 2015/23, p. 17, para. 29 (Argüello).

require — the clear presentation of positions, so that each side can understand what the disagreement is — is abundantly satisfied"[51]. Quite the contrary. By contrast to *Hostages*, not once did Nicaragua protest or otherwise indicate to Colombia that it had grievances or complaints of fact and law that amounted to an objective dispute with Colombia, not once. It simply initiated this case before the Court. Considering that some of Nicaragua's claims involve allegations of threats to use force, its failure to timely protest by any modality renders the existence of that dispute even more doubtful. Nicaragua's efforts to demonstrate the existence of a dispute on these matters at the critical date thus fail***s***.

14. Nicaragua, conscious of the insubstantiality of proving the existence of its claimed dispute before the critical date, argues that the objective existence of the dispute can be proved by reference to events occurring *after* the submission of its Application. In this regard, it sweeps in, again selectively, speeches and events occurring, in some instances almost two years after 26 November 2013, the date of its Application and the crucial date for the purpose of jurisdiction. Now, it may certainly be argued that when consensual jurisdiction continues, there may be a basis in law for sometimes adducing evidence occurring *after* the date of the application. But in this case, such events are inadmissible because the critical date and the end of jurisdiction, even on Nicaragua's reading of the Pact, are only one day apart. Hence no jurisdiction exists after 27 November 2013, the end of the one year period after Colombia's denunciation of the Pact. So, wholly apart from the substantive failure of th***e***se various post-Application events to demonstrate an objective dispute, they are also without a basis for jurisdiction.

15. Mr. President, Members of the Court, Nicaragua claims that it is a small State compared to Colombia and, apparently, is entitled to special treatment with respect to the brevity of the period between its Application and the cessation of jurisdiction under the Pact. But it was not a short period: Ambassador Argüello stated that Nicaragua had known of a serious dispute since the delivery of the Judgment[52]. The consequences of Nicaragua's delay and concealment of its action are its own responsibility. Nicaragua has used the Court more than any other Member of the United Nations and it is wise in its ways. It needs and deserves no special treatment, no matter

[51]CR 2015/23, p. 41, para. 44 (Lowe).

[52]CR 2015/23, p. 17, para. 28 (Argüello).

how large the respondent State may be. Legally, Mr. President, the Charter teaches that all States are equal.

16. Mr. President, there are compelling reasons for insisting on a demonstration of the objective existence of a dispute as a condition for an otherwise valid basis of jurisdiction. Parties at the international level should know of claims against them and have the opportunity to react to them and to look for ways to resolve them without litigation in order to avert an unnecessarily frictive political — and economic — transaction which can leave in its wake decades if not generations of hostility. The objective existence standard also protects international judicial processes from being exploited with adjudication becoming a tactical device for pressuring a State. And it facilitates the litigation process. In *Certain Property*, where there had been bilateral consultations between Germany and Liechtenstein, you said:

> "The Court thus finds that in the present proceedings complaints of fact and law formulated by Liechtenstein against Germany are denied by the latter. In conformity with well-established jurisprudence . . ., the Court concludes that '[b]y virtue of this denial, there is a legal dispute' between Liechtenstein and Germany."[53]

17. In this case, nothing prevented Nicaragua from communicating its claims and grievances to Colombia through the usual diplomatic channels or by any other modality at any time prior to the termination of jurisdiction under the Pact. Not only did it not protest or otherwise communicate: to the contrary, at the highest levels, it assured Colombia of its satisfaction with its comportment. Recall President Ortega's statement of 14 August 2013 that "there has not been any kind of confrontation between the Colombian and Nicaragua Navy"[54]. Having failed to communicate any "complaints of fact and law", to borrow your language from *Certain Property*, indeed, from expressing at the highest political level, the opposite until the critical date, Nicaragua must bear the responsibility and cannot evade it by claiming to be a "small" country. Now, Mr. President, Members of the Court, that may seem to be a matter of rules, but the rule of law is comprised of rules which are applied to all equally. It is the hallmark of the law.

18. Before concluding, I must comment on Nicaragua's tendency to malign a State that dares to criticize a judgment, or part of a judgment, of the Court while burnishing its own appreciation.

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[53] *Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005,* p. 19, para 25.

[54] POC, Vol. II, Ann. 11.

There is no violation of international law when a State — or a scholar — criticizes a decision of the Security Council, or of the General Assembly or of a judgment of the Court. When, however, a party that has not prevailed undertakes the arduous process of implementing a deeply unpopular judgment, it demonstrates all the more its commitment to international law.

19. Mr. President, yesterday, Professor Lowe mused whether there is really a dispute or "whether we are all here as a result of some ghastly misunderstanding". The Court will surely have realized by now that it is indeed the latter; we are here as the result of a ghastly misunderstanding and none of us should really be here. As a result of Nicaragua's filing of an entirely artificial application, we have been compelled to appear before you to respond to frivolous claims without a jurisdictional base, which are said to constitute a phantom dispute, the subject-matter of which was entirely unknown to Colombia until it was informed by the Registry that, once again, proceedings had been instituted against it. Ghastly, indeed, Mr. President.

20. Mr. President, Members of the Court, I thank you for your attention and ask that Mr. Valencia-Ospina be invited to address you.

Le PRESIDENT : Merci, Monsieur le professeur. Je donne à présent la parole à M. Valencia-Ospina.

Mr. VALENCIA-OSPINA:

THIRD PRELIMINARY OBJECTION: THE COURT LACKS JURISDICTION BECAUSE THE PRECONDITION OF ARTICLE II OF THE PACT OF BOGOTÁ HAD NOT BEEN FULFILLED AT THE TIME OF THE FILING OF THE APPLICATION

Introduction

1. Mr. President, Members of the Court, after having heard Nicaragua's first round of oral pleadings, it becomes necessary to shed more light on the Applicant's misguided interpretation of the applicable law and appreciation of the facts relevant for the third objection.

2. In so doing, I shall concentrate on the objective assessment of the opinion of the Parties. During the first round, Colombia dealt extensively with the interpretation of Article II of the Pact of Bogotá, a question that Nicaragua largely neglected at that round. In this respect I will, therefore, limit myself to highlighting four of the many additional points that could be made.

— First, Nicaragua has now gone as far as to suggest that, "the judgment of the negotiability of the dispute is a matter . . . not for a third party"[55]. In other words, the Applicant argues that the Court — contrary to what it stated in the 1988 Judgment[56] — is not entitled to make an objective assessment of the opinion of the Parties but only to take note of what Nicaragua says.

— Second, the fact that the Inter-American Juridical Committee's Rapporteur moved an amendment to Article II of the Pact did not imply that for him the proper interpretation of that provision was the one suggested by the French text. On the contrary, as he explained in his report: "[n]either party is legally in a position to invoke the Pact at the time when, in its individual judgment, a controversy can no longer be settled by diplomatic means"[57]. He thus confirmed the view he had expressed four years earlier that Article II enshrined "a qualified obligation to have recourse to the peaceful means of settlement only when there is a concurrent opinion of the State Parties"[58]; and most significantly, that the terminology in the opinion of the parties "was not a mistake in drafting technique"[59].

— Third, Nicaragua seeks to strengthen its reading of Article II by drawing attention to Article 26 of the OAS Charter which also uses the expression "in the opinion of one" of the Parties[60]. However, the reliance of Article 26 on the term in the singular is virtually effaced by that article's injunction that the "Parties [in the plural] shall agree on some other peaceful procedure that will enable them to reach a solution". In other words, what matters according to Article 26 is in the end the opinion of both Parties since one of them cannot unilaterally determine the procedure to be used.

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[55]CR 2015/23, p. 42, para. 47 (Lowe).

[56]*Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 95, para. 65.

[57]Opinion of the Inter-American Juridical Committee on the American Treaty on Pacific Settlement (Pact of Bogotá), Organization of the American States doc. OEA/SER.G, CP/Doc. 1603/85, 3 Sep. 1985, English Text, Ann. 23 of Nicaragua's Counter-Memorial in the *Border and Transborder Armed Actions* case *(Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 461.

[58]Galo Leoro, F., "La Reforma del Tratado Americano de Soluciones Pacíficas o Pacto de Bogotá", *Anuario Jurídico Inter-Americano*, 1981, p. 48, para. 93.

[59]Galo Leoro, F., "La Reforma del Tratado Americano de Soluciones Pacíficas o Pacto de Bogotá", *Anuario Jurídico Inter-Americano*, 1981, p. 51, para. 106.

[60]WSN, para. 4.28.

— Fourth, counsel for Nicaragua stated that "it is enough if one of [the Parties] holds the view that there is no prospect of a negotiated settlement"[61]. Colombia has rejected this proposition, which, in any event, would be inapplicable in the present case given the repeated statements by the President of Nicaragua emphasizing that negotiations were possible.

The opinion of the Parties

3. Yesterday, the Agent of Nicaragua stated that, "President Ortega has repeatedly reiterated Nicaragua's willingness to initiate conversations on different topics related to the implementation of the judgment"[62]. In fact, he stressed — as if Colombia had reasons to think otherwise — that "[t]hese are not empty words"[63].

4. Colombia certainly appreciates that Nicaragua has recognized on several occasions the many subject-matters over which the Parties are in agreement concerning the possibility to negotiate. Already in its Written Statement, Nicaragua asserted that, "it ha[d] kept the door open to talking about the treaty Colombia wants, including on issues like fishing and environmental protection"[64], that "there were . . . subjects on which negotiations might eventually be had"[65] and that "both Parties had expressed willingness to consider" certain issues[66]. These are correct depictions of the situation at the time of the seisin of the Court.

5. However, in the same Written Statement, Nicaragua proceeded to downplay the value of its assertions. In those pleadings, Nicaragua indeed argued that the subject-matter of the claims it had brought before the Court was different from "the subject matter of the negotiations both Parties had expressed willingness to consider"[67]. In other words, for Nicaragua the alleged violations of its sovereign rights and maritime zones had nothing to do with the implementation of the 2012 Judgment.

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[61]CR 2015/23, p. 42, para. 47 (Lowe).

[62]*Ibid.*, p. 12, para. 12 (Arguëllo).

[63]*Ibid.*, p. 12, para. 12 (Arguëllo).

[64]WSN, para. 4.7.

[65]WSN, para. 4.56.

[66]WSN, para. 4.59.

[67]WSN, para. 4.59.

6. In fairness, it must be acknowledged that Nicaragua has not repeated this argument in the first round. Nicaragua must have realized that arguing that the Parties are willing to negotiate issues related to the implementation of the 2012 Judgment but not the alleged violations of its maritime zones resulting from that Judgment is artificial and deceptive.

7. Nicaragua has likewise avoided reasserting its argument that, "pending the decision of the Constitutional Court, Colombia was of the opinion that no negotiation was even possible"[68]. In fact, Nicaragua made no mention during the first round of the statements made by the President and Foreign Minister of Colombia on 15 and 18 September 2013[69]. Similarly, Nicaragua has failed to rebut the statements made on 9 and 10 September 2013 by Colombia's Executive that expressed Colombia's willingness to negotiate[70].

8. Instead, for Nicaragua now, what rendered negotiations futile was the enactment of Colombian Decree 1946, a decree that was not protested by Nicaragua prior to the critical date. To quote the Agent of Nicaragua, "the possibility of successful negotiations became clearly closed when Colombia enacted the 1946 Decree"[71]. But this is implausible to say the least. For if the words of the President of Nicaragua "are [to be considered as] not [being] empty"[72], what about his statements made in September 2013, January and May 2014? After all, the Agent of Nicaragua does refer to them in his speech as being instances in which Nicaragua has expressed "willingness to initiate conversations"[73]. Indeed, at the same time he recognizes that the words of his President must be taken seriously, the Agent cites passages from the Memorial that explicitly refer to the September and May statements[74]. The Memorial rightfully emphasizes that the September declaration was made "the day after President Santos introduced Decree 1946 establishing the Colombian 'ICZ'"[75]. How can Nicaragua then demonstrate that the Decree had rendered

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[68]WSN, para. 4.46 and paras 4.38-4.52, Anns. 12 and 39.

[69]POC, Anns. 13 and 42.

[70]POC, paras 4.68 and 4.69, Anns. 12 and 39; CR 2015/22, p. 55, para. 24 (Valencia-Ospina).

[71]CR 2015/23, p.17, para. 31 (Arguëllo).

[72]*Ibid.*, p. 12, para. 12 (Arguëllo).

[73]*Ibid.*, p. 12, para. 12, fn. 9 (Arguëllo); MN, paras 2.53-2.63.

[74]CR 2015/23, p. 12, para. 12 (Arguëllo); MN, paras 2.58 and 2.60.

[75]MN, para. 2.58.

negotiations futile if on the very next day, and the following months, its President had continued to express such bona fide willingness?

9. The elements of conduct adduced by Colombia "[t]o measure the validity of the Applicant's assumption that the complaint to the Constitutional Court made negotiations useless", are equally relevant to dispose of the new Nicaraguan argument based on the adoption of the Decree[76]. Contrary to what Counsel for Nicaragua stated, these declarations by the Executive of Nicaragua certainly do not support the contention that by the critical date "it quickly bec[a]me evident that a deadlock [had been] reached"[77]. In spite of what Nicaragua would have us believe, it is Colombia and not the Applicant that takes with the utmost seriousness the words of the Nicaraguan President.

10. As it turns out, Nicaragua has itself defeated its own proposition that it had seised the Court because in its opinion direct negotiations were impossible. Rather, its motives were purely opportunistic. For as the Agent of Nicaragua stated, after having recognized that "unilateral recourse" to the Court would be impossible after 27 November 2013[78], Nicaragua "reluctantly took the decision to come to the Court before the denunciation of the Pact of Bogotá came into force"[79]. What the Agent thus emphasizes is Nicaragua's will to preserve the jurisdictional avenue, not the futility of negotiations. Counsel for Nicaragua also stated, in terms that are illuminating, that Nicaragua "had to make [a] judgement (sic) call"[80]. What he meant, of course, is that Nicaragua took this decision not on the basis of whether negotiations were, in the opinion of the Parties, possible, but because it faced the last possible opportunity in which to do so.

11. In this respect, I want to stress that the Agent of Nicaragua's query as to whether it is "reasonable to suppose that Nicaragua had to continue attempting to negotiate before attempting procedures which would cease to be in effect one day later" is simply beside the point[81]. The coming into effect of Colombia's denunciation of the Pact of Bogotá did not relieve an informed

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[76]CR 2015/22, pp. 55-57, paras 25-29 (Valencia-Ospina).

[77]CR 2015/23, p. 44, para. 58 (Lowe).

[78]*Ibid.*, p. 15, para. 22 (Arguëllo).

[79]*Ibid.*, para. 23 (Arguëllo).

[80]*Ibid.*, pp. 42-43, para. 52 (Lowe).

[81]*Ibid.*, p. 16, para. 27 (Arguëllo).

Applicant from its duty to fulfil the preconditions for the Court's jurisdiction. It cannot trump the positive statements made by the President of Nicaragua immediately before and after the filing of the Application. In light of those explicit statements, the unsubstantiated assertion by Counsel for Nicaragua that "[a]t the time of the Application, there seemed [to be] no hope of a negotiated settlement"[82] could not be further removed from the truth.

12. Also beside the point is Nicaragua's reference to the case law of the Court, according to which negotiations and recourse to judicial settlement can be pursued *pari passu*[83]. For obviously that is only relevant when the Court's jurisdiction is not limited by a clause such as Article II of the Pact. Indeed, in the 1978 Judgment in the *Aegean Sea Continental Shelf* case, the Court did not uphold the argument that in general "the existence of active negotiations in progress constitutes an impediment to the Court's exercise of jurisdiction"[84]. It so acted because under general international law the governing principle is the free choice of means[85]. Had Turkey and Greece been parties to a treaty such as the Pact, the situation would have been very different. In this respect, counsel for Nicaragua's reference to the 1998 Judgment in the *Cameroon* v. *Nigeria* case[86] is also totally irrelevant because the applicable law was likewise general international law and not a treaty in which the parties had agreed to incorporate a precondition of unavailability of negotiations. Nicaragua is well aware that that precedent confirms Colombia's argument since in the very paragraph quoted by the Applicant, the Court also dealt expressly with the question of the special clauses embodied in treaties, which it significantly termed "precondition[s]" and distinguished it from the situation under general international law[87].

13. In fact, as the Court stated in its 2011 Judgment in *Georgia* v. *Russia*, referring to a provision similar to Article II of the Pact, preconditions pertaining to negotiations are "conditions precedent to the seisin of the Court even when the term is not qualified by a temporal element"[88].

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[82]CR 2015/23, p. 43, para. 54 (Lowe).

[83]*Ibid.*, p. 17, para. 30 (Arguëllo).

[84]*Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, p. 12, para. 29.

[85]Article 33 of the United Nations Charter.

[86]CR 2015/23, p. 42, para. 49 (Lowe).

[87]*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 303, para. 56.

[88]*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 124, para. 130.

Moreover, as Colombia has already stressed during the first round, the precondition of Article II of the Pact had to be met at the time of the filing of the Application, also for an additional reason specific to this case. Due to the fact that the jurisdiction under the Pact had, even on Nicaragua's theory, lapsed at the latest on 27 November 2013, it would be impossible for Nicaragua to bring fresh proceedings after that date.

14. For all these reasons, the Applicant must demonstrate that the precondition was met ***at the*** latest by the time of the seisin of the Court. Whether the precondition under Article II has been fulfilled later, which in any event it has not been, is irrelevant once jurisdiction under the Pact has expired.

Conclusion

15. Mr. President, Members of the Court, by manufacturing a deadlock which Nicaragua attributes to the authorities of Colombia, the Applicant has made a desperate attempt at diverting the attention of the Court from the analysis of the statements of its own Executive. Yet, as Nicaragua itself admits when quoting the *Georgia* v. *Russia* case, "primary attention" should be "given to statements made or endorsed by the Executives of the two Parties"[89].

16. Consequently, would it not be more appropriate for Nicaragua to objectively assess its own opinion on the basis of all the statements made by its Executive that explicitly recognized that negotiations were the way to proceed? Instead Nicaragua seeks to establish its opinion from an inconclusive element of tacit conduct, namely, the filing of its Application which neither mentioned Article II of the Pact nor referred to the opinion of the Parties concerning the viability of negotiations.

17. Finally, Nicaragua has stated during the first round that it "has been — and still remains — willing to conclude a treaty implementing the Court's judgment" and that it is "open to make some adaptations to the régime applicable in the areas recognized by the Court to belong to it"[90]. For the purpose of this third objection, what really matters is that these assertions confirm what has been stated by the Parties all along, namely, that negotiations are in the opinion of both

[89]WSN, para. 4.53.

[90]CR 2015/23, p. 44, para. 58 (Lowe).

Parties still possible. The fact that a treaty has not yet been reached cannot evidence that the precondition under Article II had been met at the relevant time.

18. Mr. President, having arrived at the end of my presentation, may I express my thanks to you and the Members of the Court for your courteous attention and respectfully ask that you call on my colleague, Mr. Treves.

Le PRESIDENT : Merci. Je donne à présent la parole au professeur Tullio Treves.

M. TREVES :

LA COUR N'A PAS UN POUVOIR INHÉRENT POUR JUGER DES DEMANDES DU NICARAGUA (QUATRIÈME ET CINQUIÈME OBJECTIONS PRÉLIMINAIRES)

1. Merci, Monsieur le président. Monsieur le président, Mesdames et Messieurs les juges, ma tâche est aujourd'hui de démontrer que la compétence de la Cour à se prononcer sur la demande du Nicaragua ne saurait trouver sa base sur un pouvoir inhérent qu'aurait la Cour. Pour ce faire, je vais répondre aux arguments, pourtant brillants, soumis par mon collègue et ami Alain Pellet à l'audience d'hier matin.

2. Le leitmotiv de l'argumentation du professeur Pellet est que l'allégué pouvoir (ou compétence) inhérent de la Cour «découle de l'existence même de la Cour»[91] expression utilisée dans les arrêts sur les *Essais nucléaires*, ou, selon une formule que le professeur Pellet utilise aussi, «de la qualité d'organe judiciaire de la Cour»[92]. Ainsi, du simple fait que la Cour est un organe judiciaire (et personne n'en doute), elle serait automatiquement compétente à se prononcer sur toute demande relative à l'inexécution d'un arrêt.

3. Une affaire conclue par un jugement qui l'a tranchée en portant ainsi à exhaustion la compétence de la Cour, donnerait — comme par parthénogénèse — naissance à la compétence à juger sur une autre affaire portant sur la responsabilité internationale découlant des obligations qui incombent à un autre Etat aux termes d'un arrêt de la Cour.

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[91] CR 2015/23, p. 48, par. 12 (Pellet) citant *Essais nucléaires (Australie c. France), arrêt, C.I.J. Recueil 1974*, p. 259, par. 23 et *Essais nucléaires (Nouvelle-Zélande c. France), arrêt, C.I.J. Recueil 1974*, p. 463, par. 23.

[92] CR 2015/23, p. 46, par. 5 (Pellet).

4. Chacun voit qu'il s'agit d'une idée qui manque de cohérence avec le principe consensuel de la compétence de la Cour. En acceptant cette compétence sur la base de n'importe quel titre prévu par le Statut, les parties acceptent que la Cour se prononce sur l'objet de la demande ou de la question qu'elles soumettent par compromis et non sur une question ayant un objet différent, tel qu'est la prétendue non-exécution de l'arrêt qui a mis fin à l'affaire.

5. Un argument important visant à exclure l'existence d'un pouvoir inhérent qui, à lui seul, fonderait la compétence de la Cour, que la Colombie fait valoir est que les cas d'invocation de pouvoirs inhérents qu'on trouve dans la jurisprudence de la Cour sont tous basés sur la prémisse que la compétence de la Cour soit établie.

6. C'est ce qu'a dit la Cour dans les arrêts sur les *Essais nucléaires* et encore dans l'arrêt *LaGrand* de 2001, dans des passages dûment cités dans ma plaidoirie d'avant-hier[93]. Pour mémoire, dans les affaires des *Essais nucléaires*, la Cour a dit que ses pouvoirs inhérents pouvaient être exercés «si sa compétence au fond est établie»[94] ; dans l'arrêt *LaGrand*, la Cour a dit que son pouvoir de juger sur l'inexécution d'une ordonnance portant mesures conservatoires pouvait s'exercer «lorsque la Cour a compétence pour trancher un différend»[95].

7. Le professeur Pellet semble ne donner aucune importance à ces affirmations de la Cour. Il s'attache à démontrer, toutefois, l'existence de cas envisagés par la Cour où la compétence de celle-ci trouve sa base dans un pouvoir inhérent même en l'absence d'une compétence établie.

8. Ainsi, fait-il valoir que, dans les arrêts sur les *Essais nucléaires*, la Cour, après avoir dit qu'elle possède un pouvoir inhérent l'autorisant à prendre toute mesure voulue «*d'une part* pour faire en sorte que, si la compétence au fond est établie, l'exercice de cette compétence ne se révèle pas vain» dit que cette compétence vaut «*d'autre part* pour assurer le règlement régulier de tous les points en litige ainsi que le respect des «limitations inhérentes à l'exercice de la fonction

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[93] CR 2015/22, p. 62-63, par. 12 et p. 63, par. 14 (Treves).

[94] *Essais nucléaires (Australie c. France), arrêt, C.I.J. Recueil 1974,* p. 259, par. 23 et *Essais nucléaires (Nouvelle-Zélande c. France), arrêt, C.I.J. Recueil 1974,* p. 463, par. 23.

[95] *LaGrand (Allemagne c. Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 2001,* p. 484, par. 45.

judiciaire»»[96]. Cela indiquerait, d'après M. Pellet, qu'existent des pouvoirs inhérents pour l'exercice desquels la présence d'une compétence établie ne serait pas nécessaire[97].

9. On ne saurait trop lire dans la structure de la phrase que l'on vient de citer. Il n'en reste pas moins que les pouvoirs mentionnés après l'expression «d'autre part» n'ont rien à voir avec une possible compétence sur le fond d'une affaire. En effet, ils ont trait à la régularité procédurale et au fait que la Cour ne saurait se prononcer sur une requête ne correspondant pas à la notion même de la fonction judiciaire. Tel serait un arrêt, comme celui envisagé dans l'affaire du *Cameroun septentrional*, qui n'aurait pas des «conséquences pratiques» ne pouvant pas «affecter les droits ou obligations juridiques existants des parties»[98]. Partant, la Cour est loin d'affirmer un pouvoir inhérent la rendant compétente pour se prononcer sur l'inexécution d'un arrêt.

10. Pour ce qui est de l'arrêt *LaGrand*, invoqué par M. Pellet, il faut souligner d'abord que la décision de la Cour de se prononcer sur l'inexécution d'une ordonnance portant mesures conservatoires adoptée dans le cadre du même procès, ne fut pas prise en accueillant l'argument «accessoire et subsidiaire» de l'Allemagne que la compétence était comprise dans un pouvoir inhérent. La Cour, comme déjà souligné avant-hier[99], n'accepta pas cet argument et affirma que la conclusion de l'Allemagne relative à l'inexécution de l'ordonnance indiquant des mesures conservatoires portait «sur des questions qui découlent directement du différend opposant les Parties devant la Cour, à l'égard desquelles la Cour a déjà conclu qu'elle était compétente»[100].

11. La Cour réaffirme ensuite l'arrêt sur l'affaire de la *Compétence en matière de pêcheries* en soulignant que lorsque la Cour

> «a estimé que, afin de considérer le différend sous tous ses aspects, elle pouvait aussi connaître d'une conclusion qui «se fonde sur des faits postérieurs au dépôt de la requête mais découlant directement de la question qui fait l'objet de cette requête…» (*Compétence en matière de pêcheries (République fédérale d'Allemagne c. Islande), fond, arrêt, C.I.J. Recueil 1974*, p. 203, par. 72)»[101].

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[96] *Essais nucléaires (Australie c. France), arrêt, C.I.J. Recueil 1974*, p. 259, par. 23 et *Essais nucléaires (Nouvelle-Zélande c. France), arrêt, C.I.J. Recueil 1974*, p. 463, par. 23 — les italiques sont de nous.

[97] CR 2015/23, p. 49, par. 13 (Pellet).

[98] *Cameroun septentrional (Cameroun c. Royaume-Uni, exceptions préliminaires, arrêt, C.I.J. Recueil 1963*, p. 34.

[99] CR 2015/22, p. 63, par. 14 (Treves).

[100] *LaGrand (Allemagne c. Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 2001*, p. 483, par. 45.

[101] *Ibid.*, p. 484, par. 45.

12. C'est sur cette base — et non sur l'idée du pouvoir inhérent — que la Cour affirma que

> «[l]orsque la Cour a compétence pour trancher un différend, elle a également compétence pour se prononcer sur des conclusions la priant de constater qu'une ordonnance en indication de mesures rendue aux fins de préserver les droits des Parties à ce différend n'a pas été exécutée»[102].

M. Pellet affirme que : «Il s'agit là encore d'un pouvoir inhérent, déduit de la qualité d'organe judiciaire de la Cour et nullement d'une compétence prévue expressément par le Statut**…**»[103]

13. Il semble oublier que c'est un pouvoir inhérent que la Cour n'exerce que quand elle a établi sa compétence et seulement quand elle l'a établie, d'autant plus que les mesures conservatoires sont, par définition, provisoires. C'est pourquoi la transposition de l'affirmation de la Cour relative à sa compétence à se prononcer sur l'inexécution d'une ordonnance portant mesures conservatoires à la compétence pour se prononcer sur l'inexécution d'un arrêt n'est pas soutenable. Ce ne serait pas faire un raisonnement *a fortiori* comme le voudrait M. Pellet[104]. Ce serait suivre un raisonnement possible dans le cadre d'une affaire où la compétence est établie, qui n'est pas admissible pour établir une compétence sur une affaire où une telle compétence n'existe pas.

14. En somme : reste valable l'affirmation faite par le juge Guillaume dans son article «De l'exécution des décisions de la Cour internationale de Justice». En se référant à l'exécution des arrêts de la Cour, l'éminent juge s'exprime ainsi :

> «Par ailleurs, tout différend relatif à cette exécution doit être regardé comme un différend distinct de celui réglé par le jugement. La Cour ne saurait dès lors s'en saisir sans un nouvel accord des parties.»[105]

15. Ces deux phrases, citées dans les plaidoiries orales de la Colombie, sont les seules omises dans la citation faite par M. Pellet de la demi-page de l'article de M. Guillaume qui les suit immédiatement[106]. Elles donnent néanmoins un sens précis à la phrase suivante d'après laquelle la Cour a

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[102] *LaGrand (Allemagne c. Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 2001*, p. 484, par. 45.

[103] CR 2015/23, p. 50, par. 14 (Pellet).

[104] *Ibid.*, p. 62, par. 43 (Pellet).

[105] Gilbert Guillaume, «De l'exécution des décisions de la Cour internationale de Justice» (1997), dans *La Cour internationale de Justice à l'aube du XXI^e^ siècle, Le regard d'un juge*, Pédone, Paris, 2003, p. 178-179 (références omises).

[106] CR 2015/23, p. 51, par. 16 (Pellet).

> «jugé à plusieurs reprises qu'elle ne pouvait, ni ne devait envisager l'inexécution de ses arrêts et ne s'est-elle prononcée sur cette exécution que dans les cas où les Parties lui avaient donné spécifiquement compétence à cet effet»[107].

16. Le sens qu'il faut tirer de cette affirmation est que pour juger d'un différend portant sur l'inexécution d'un arrêt de la Cour, un titre spécifique de compétence est nécessaire, que ce soit un accord *ad hoc* des parties ou une autre forme de consentement.

17. Le professeur Pellet semble confondre la possibilité abstraite de la Cour de se prononcer sur l'inexécution d'un arrêt avec la possibilité concrète de le faire qui requiert un titre spécifique de compétence qui ne saurait être le simple fait que l'objet du différend est une question de responsabilité pour inexécution d'un arrêt déjà adopté. Quand il se demande — et il s'agit évidemment d'une question rhétorique — sur quelle base la Cour a pu adopter les paragraphes 60 et 63 des arrêts de 1974 sur les affaires des *Essais nucléaires*[108], le professeur Pellet donne un exemple de pouvoir inhérent dans l'abstrait — un pouvoir qui ne fonde pas une compétence de la Cour mais qui peut s'exercer à la condition que la Cour soit saisie d'un différend sur lequel sa compétence est établie, ce qui était le cas dans les affaires des *Essais nucléaires.*

18. Monsieur le président, Mesdames et Messieurs les juges, l'invitation que le Nicaragua dirige à la Cour de suivre d'autres juridictions internationales, qui se considèrent investies du pouvoir de juger sur l'inexécution de leurs décisions, peut paraître attrayante dans l'optique d'une hypothétique «fonction judiciaire internationale» dont feraient partie toutes les cours et tous les tribunaux internationaux.

19. L'invitation devient moins attrayante et juridiquement moins persuasive si l'on considère les différences entre votre Cour et les cours et tribunaux internationaux qui se sont déclarés compétents pour juger sur l'exécution de leurs décisions. Il s'agit notamment des cours dont la compétence concerne la protection des droits de l'homme, des tribunaux administratifs internationaux et de la cour très spéciale (quasi domestique) qui était la Cour des communautés européennes. Ni les unes ni les autres ne basent leur compétence sur le consentement des parties.

20. Il faut ajouter que les cours et tribunaux internationaux qui se considèrent investis du pouvoir de juger de l'inexécution de leurs jugements sont moins nombreux que ce qu'il apparaît de

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[107] Gilbert Guillaume, «De l'exécution des décisions de la Cour internationale de Justice» (1997), dans *La Cour internationale de Justice à l'aube du XXI^e siècle, Le regard d'un juge*, Pédone, Paris, 2003, p. 179 (références omises).

[108] CR 2015/23, p. 62, par. 64 (Pellet).

la plaidoirie de M. Pellet. En effet, la position de la Cour européenne des droits de l'homme ne correspond pas à celle de la cour interaméricaine comme on pourrait le croire en écoutant M. Pellet. Dans l'arrêt *Meltex* du 21 mai 2013, la Cour européenne dit en effet :

> «la Cour souligne continuellement qu'il ne relève pas de ses compétences de vérifier si une partie a rempli les obligations que lui impose un des jugements de la Cour. Par conséquent, elle refusa d'examiner des requêtes relatives au manquement des Etats d'exécuter ses jugements, en déclarant de telles requêtes inadmissibles *ratione materiae*.»[109]

21. En outre, contrairement à ce que le Nicaragua a soutenu avant-hier[110], l'arrêt *Saiga II* du Tribunal international du droit de la mer n'a pas utilisé un pouvoir inhérent quand il s'est prononcé sur une demande relative à l'inexécution de son arrêt antérieur portant sur la prompte mainlevée du navire. Le Tribunal était en effet investi d'une demande portant sur la violation d'un ou plusieurs articles de la convention sur le droit de la mer. Et il était compétent pour toute affaire portant sur l'interprétation ou l'application des dispositions de celle-ci[111].

22. Le pas franchi par les cours et tribunaux internationaux dont la compétence est indépendante du consentement des parties aux procès qui se déroulent devant elles est infiniment plus modeste du pas que le Nicaragua invite la Cour à faire en se déclarant pourvue d'un pouvoir inhérent à juger de l'exécution de ses arrêts. Un tel pas, si la Cour devait le faire, pourrait décourager les Etats qui envisagent d'accepter la compétence de la Cour.

23. Non seulement la sagesse d'un tel pas serait ainsi contestable. Sa compatibilité avec le Statut le serait aussi. Comment considérer cohérente avec un Statut qui base la compétence de la Cour sur le consentement des parties à la soumission à la Cour de différends bien définis, la revendication d'un pouvoir «inhérent» de juger de différends portant sur la responsabilité internationale pour violation des obligations contenues dans un arrêt, dont la base serait cet arrêt et que les Etats peuvent considérer avoir définitivement réglé une affaire ?

24. Monsieur le président, Mesdames et Messieurs les juges, nonobstant les arguments portés par le Nicaragua à l'audience d'avant-hier, la Colombie continue à penser que l'article L du pacte

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[109] Cour européenne des droits de l'homme (CEDH), *Meltex Ltd. c. Arménie*, application n° 45199/09, jugement du 21 mai 2013, par. 28.

[110] CR 2015/23, p. 56, par. 26 (Pellet).

[111] Tribunal international du droit de la mer (TIDM), arrêt du 1er juillet 1999, *Affaire du navire «SAIGA» (No. 2) (Saint-Vincent-et-les Grenadines c. Guinée)*, par. 30.

de Bogotá a une importance dans notre affaire. Lu conjointement à l'article 52, paragraphe 2, de la Charte des Nations Unies (les deux apparaissent sur l'écran), cet article indique que en tout cas d'alléguée inexécution d'un arrêt de la Cour les Etats américains parties au pacte s'obligent à entreprendre tout effort possible pour obtenir une solution pacifique au niveau régional. Pour donner plein effet à ces deux articles, l'obligation de «faire tous leurs efforts» au niveau régional et, notamment, pour les Etats parties au pacte de Bogotá, d'investir la réunion de consultation des ministres des relations extérieures des Etats parties au pacte, doit comprendre non seulement les cas où une partie envisage de recourir à l'article 94, paragraphe 2, de la Charte, mais aussi les cas où elle envisage de recourir à la Cour pour soutenir que l'alléguée inexécution a causé une responsabilité internationale. Or, le Nicaragua n'a entrepris aucun pas au niveau régional avant de recourir à la Cour. La Colombie soumet respectueusement ce fait à la considération de la Cour.

25. Les quatrième et cinquième exceptions préliminaires de la Colombie sont ainsi confirmées.

26. Monsieur le président, Mesdames et Messieurs les juges, je vous remercie pour votre patience. Je vous prie bien, Monsieur le président, de donner la parole à M. Bundy.

Le PRESIDENT : Merci, Monsieur le professeur. Je donne à présent la parole à M. Bundy.

Mr. BUNDY:

CONCLUDING REMARKS

1. Thank you very much, Mr. President, Members of the Court. Having heard my colleagues address Nicaragua's contentions advanced yesterday with respect to each of Colombia's preliminary objections, it falls to me to make some brief concluding remarks.

2. Nicaragua has advanced two bases of jurisdiction for its claims. The first is Article XXXI of the Pact of Bogotá[112]. Now, that was the basis of jurisdiction for the case decided by the Court's Judgment of 19 November 2012. And the second, which Nicaragua put forward as an alternative basis of jurisdiction in its Application, is grounded on a novel theory, which counsel for Nicaragua admitted is nowhere authorized in the Court's Statute, in the Rules of Court or even in the Pact of

[112]Application of Nicaragua, paras. 16-17.

Bogotá[113] and that theory is that, even though the case was fully and finally decided in 2012, and was thereafter removed from the List of pending cases before the Court, and I quote from Nicaragua's Application: "the jurisdiction of the Court lies in its inherent power to pronounce on the actions required by its Judgments"[114].

3. Colombia, for its part, has raised five preliminary objections. The first three — the absence of jurisdiction *ratione temporis*, the lack of a dispute, and the failure of Nicaragua to fulfil the [pre]conditions of Article II of the Pact, concern the absence of jurisdiction under the Pact of Bogotá.

4. To be clear, if the Court decides that there is no jurisdiction *ratione temporis* under Article LVI of the Pact, as Colombia believes to be the case, it does not need to reach the question whether, objectively, there was a dispute between the Parties over the subject-matter of Nicaragua's claims as of the critical date — the date of Nicaragua's Application — and similarly, the Court would not need to decide whether Nicaragua had satisfied the requirements of Article II of the Pact prior to instituting these proceedings. However, if the Court were to subscribe to Nicaragua's reading of Article LVI, including the all-important second paragraph, that would still not be the end of the matter, for the Court would still need to decide whether there really was objectively a dispute between the Parties as to the allegations advanced by Nicaragua in its Application, as of the critical date, and whether, if so, the facts show that the Parties were of the opinion, as of 26 November 2013, that such dispute could not be settled by direct negotiations through the usual diplomatic channels. If either of those requirements were not met, there would still be no jurisdiction under the Pact.

5. Colombia's fourth and fifth objections are interrelated and are directed to Nicaragua's alternative theory of jurisdiction. The fourth objection is that the Court has no "inherent jurisdiction" to pronounce on the actions required by one of its previous judgments and the fifth objection is centred on the principle that the Court has no post-adjudication enforcement jurisdiction.

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[113]CR 2015/23, p. 48, para.11 (Pellet).

[114]Application, para. 18.

6. I think it is pretty evident that Nicaragua has advanced its alternative basis of jurisdiction because it realizes the fragility of its arguments that there is jurisdiction under the Pact of Bogotá. If Nicaragua were as confident as it professes to be that jurisdiction vests under the Pact, there would have been no need for it to conjure up its novel and far-reaching "inherent jurisdiction" theory. As Professor Treves has explained, Nicaragua's alternative basis of jurisdiction does not save Nicaragua because such "inherent jurisdiction" does not exist in the circumstances of this case.

7. I should also add that all of Colombia's preliminary objections have an exclusively preliminary character. In other words, all of them can be decided on the basis of the facts that have been adduced relevant to jurisdiction.

8. That being said, there is one common factor that has a bearing on each of Colombia's objections and that concerns the timing of Nicaragua's Application. I trust that the significance of the fact that Nicaragua lodged its Application on 26 November 2013 — the very last day it could under *its* interpretation of Article LVI of the Pact — will not be lost on the Court.

9. That date had nothing to do with whether a dispute genuinely existed between the Parties at the time. Nor did it have any relation with the question whether, if a dispute actually existed, the Parties — or even Nicaragua alone — considered that the dispute was one that could not be settled by negotiations. No, Mr. President; the date of 26 November 2013 was chosen for pure reasons of expediency. As Nicaragua's Agent acknowledged: "After this last date Nicaragua would be left without clear recourse to the instruments of peaceful resolution of conflicts which was at the heart of the Pact of Bogotá."[115] And it is precisely because there are a host of reasons why there is no jurisdiction under the Pact as of the critical date that Nicaragua had to invent its "inherent jurisdiction" alternative.

10. With respect to the question whether the Court has jurisdiction *ratione temporis*, I would only add one point to what Sir Michael Wood has already said.

11. As Sir Michael explained, the addition of the second paragraph to Article LVI was new in the Pact. The fact that it was a new addition to what had been provided for in previous treaties

[115]CR 2015/23, p. 15, para. 22 (Argüello Gómez).

was deliberate, and it was highlighted during the *travaux*. The negotiating States obviously considered the situation where dispute resolution procedures might have been instituted before a party to the Pact denounced it, and they wanted to ensure that such procedures survived the particular notice of denunciation and that is what the second paragraph of Article LVI does. In contrast though, what it does not do and what it does not say is that denunciation shall have no effect with respect to procedures initiated *after* the transmission of the particular notification. The negotiators could perfectly easily have provided for that outcome, but they did not do so.

12. On the screen, you will see the text of the second paragraph of Article LVI, which you are familiar with. "The denunciation shall have no effect with respect to pending procedures initiated *prior to the transmission of the particular notification*." [Emphasis added.]

13. For Nicaragua's interpretation to be valid, what the second paragraph should have said is the following. "The denunciation shall have no effect with *respect* to pending procedures initiated *prior to the date when the Pact ceases to be in force with respect to the State denouncing it*." [Emphasis added.] But that obviously did not happen, and it fundamentally undermines Nicaragua's interpretation of the provision.

14. Then there is the question whether there was a dispute between the Parties concerning the allegations in Nicaragua's Application and, if so, whether it could not be settled by negotiations.

15. According to Nicaragua's Agent and Professor Lowe, the existence of a dispute had been public knowledge since the very day that the Judgment was rendered — 19 November 2012 — as a result of President Santos's remarks that were made really just a few moments after the Judgment was read out[116]. But, as Professor Reisman has shown, that allegation is completely contradicted by what Nicaragua's President and what Nicaragua's highest military commanders said over the next twelve months. The Court will not find a single accusation on the record from these senior State representatives that they considered that a dispute had emerged — you won't find it — whether as a result of President Santos's remarks or otherwise.

[116]CR 2015/23, p. 17, para. 28 (Argüello Gómez); p. 42, para. 52 (Lowe).

16. I respectfully invite the Court to look at the record as a whole. There is a consistent pattern of statements emanating from President Ortega that show just the opposite of what our colleagues on the other side contend. I referred to many of these on Monday and counsel for Nicaragua studiously avoided mentioning any of them yesterday. Sometimes, Mr. President, it is instructive to listen to the silences.

17. We also heard yesterday that the Nicaraguan navy did not attempt to interfere with what are alleged to be illegal Colombian patrols in Nicaraguan waters, and that this is the reason there was no confrontation[117]. Apparently, Nicaragua wishes to take credit for the fact that the situation at sea was calm and without incident, as was repeatedly confirmed by Nicaragua's highest military officials. But let us not forget that it was President Ortega himself, on 13 August 2013, who credited *Colombia's* President Santos with the lack of any confrontations in the pacific situation[118].

18. And let us also not forget that, not simply on this occasion, but also on many others right up to the time the Application was filed, both President Ortega and President Santos had confirmed that they welcomed having negotiations, and that Foreign Minister Holguín had expressly stated that Colombia's doors were always open to negotiate a treaty[119]. I hope that responds to my good friend, Mr. Lowe's question whether Colombia ever responded to Nicaragua's offers[120]. It did.

19. Mr. President, Members of the Court: in the light of the factual context, the timing of Nicaragua's Application was artificial. It was lodged when it was because Nicaragua thought it was about to run out of time to institute proceedings under the Pact. But, at that time, there was not a shred of evidence that the Parties had a dispute over the allegations that appeared for the first time in the Application, or that they could not settle any issues relating to the implementation of the Judgment by negotiations. That is, as I said, why we have this far-fetched alternative theory of

[117]CR 2015/23, p. 14, para. 20 (Argüello Gómez).

[118]Preliminary Objections of Colombia (POC), Ann. 11; and see CR 2015/22, pp. 33-34, para. 11 (Bundy).

[119]CR 2015/22, p. 34, para. 11 (Bundy), and Written Statement of Nicaragua (WSN), Ann. 8, and Memorial of Nicaragua (MN), Ann. 40.

[120]CR 2015/23, p. 43, para. 56 (Lowe).

inherent jurisdiction expounded by Professor Pellet yesterday. It is supposed to act as some kind of safety net in the event Nicaragua cannot show that it satisfied the conditions for instituting proceedings under the Pact. But, as innovative as Professor Pellet's exposé was, it does not create a basis of jurisdiction where none otherwise exists.

20. Mr. President, Members of the Court, Colombia firmly believes that jurisdiction must be grounded on the fundamental principle of consent, which includes any conditions that are attached to that consent. We have shown that Colombia's consent to jurisdiction in this case does not exist under the Pact of Bogotá, and that there is no basis for implying consent with respect to Nicaragua's theory of "inherent jurisdiction".

Mr. President, that concludes my remarks. I thank the Court for its attention, and I would ask if the floor could now be given to Colombia's Agent. Thank you.

Le PRESIDENT: Merci, Monsieur Bundy. Je donne à présent la parole à S. Exc. M. Carlos Gustavo Arrieta, agent de la Colombie.

Mr. ARRIETA:

1. Mr. President, Members of the Court, as this will be our final presentation in this case and since Nicaragua has made some accusations about Colombia's position purportedly challenging your authority and rejecting your Judgment of 19 November 2012, I wish to stress two very important points before presenting our final submissions:

— *First*, Colombia firmly rejects Nicaragua's tendency to distort Colombian officials' declarations and statements. As Nicaragua recognized yesterday, what they have tried to do is nothing less than a "cheap shot". We believe it is not even that; it has been an outright misrepresentation of those statements. Mr. President, let me say something. It is true that Colombian public opinion does not agree with some aspects of the Judgment; Colombia is, after all, a democracy, and Nicaragua seems to forget that democratic debate about a Court decision is very different from defiance of it. Then, having a dualist system on boundaries is not a sin, we are proud of our constitutional system; but what should be clear, first, is that Colombia is, above all, a law-abiding country, and, second, that we are committed to the

Judgment's implementation. Our Constitutional Court, whose decisions are final, has held that judgments of the International Court of Justice are binding, that they have to be incorporated through treaties in case they affect our boundaries, and that it is our duty to negotiate them. That is the rule of law. And that is the way domestically for us to proceed; it is not, as Nicaragua has misstated, our use of domestic law to justify non-compliance.

— *Second*, as Colombia has made abundantly clear since November 2012, negotiations are the way to proceed for implementation of the Judgment. Now, last, Nicaragua's delegation seems to have fallen in line with President Ortega's declarations. Colombia wishes to confirm to them and to you what we have always said: we are willing to sit at any moment, with Nicaragua, and however many times it should prove necessary, to negotiate a treaty for the implementation of the Court's decision. This has been our position from the very start. I am glad Nicaragua's delegation has accepted it, and hope that they will show the Court that their position regarding negotiations is not purely rhetorical.

2. Mr. President, Members of the Court, I now have the honour formally to read Colombia's final submissions, which are as follows:

> "For the reasons set forth in our written and oral pleadings on preliminary objections, the Republic of Colombia requests the Court to adjudge and declare that it lacks jurisdiction over the proceedings brought by Nicaragua in its Application of 26 November 2013 and that said Application should be dismissed."

3. A copy of the written text of Colombia's final submissions is now being communicated to the Court and transmitted to the Agent of Nicaragua.

4. Mr. President, Members of the Court, before I conclude let me express, on behalf of all the members of the Colombian delegation, our thanks to you, Mr. President, and to the Members of the Court, for your attention and for the efficient manner in which these proceedings have been prepared and conducted. We are very grateful to all concerned: to the Registrar and his staff, to the interpreters, to the translators and to all those who have worked so hard behind the scenes to make this hearing possible.

5. That, Mr. President, concludes Colombia's case. Thank you.

Le PRESIDENT : Excellence, je vous remercie. La Cour prend acte des conclusions finales dont vous venez de donner lecture au nom de la Colombie. Le Nicaragua présentera son second tour de plaidoiries le vendredi 2 octobre, à 10 heures.

L'audience est levée.

L'audience est levée à 17 h 45.

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