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tenue le mercredi 20 octobre 2010, à 10 h 40, au Palais de la Paix,

sous la présidence de M. Owada, président,

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

Requête du Honduras à fin d'intervention

COMPTE RENDU

YEAR 2010

Public sitting

held on Wednesday 20 October 2010, at 10.40 a.m., at the Peace Palace,

President Owada presiding,

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

Application by Honduras for permission to intervene

VERBATIM RECORD

Présents : M. Owada, président
M. Tomka, vice-président
MM. Koroma
Al-Khasawneh
Simma
Keith
Sepúlveda-Amor
Bennouna
Cançado Trindade
Yusuf
Mmes Xue
Donoghue, juges
MM. Cot
Gaja, juges *ad hoc*

M. Couvreur, greffier

Present:	President	Owada
	Vice-President	Tomka
	Judges	Koroma
		Al-Khasawneh
		Simma
		Keith
		Sepúlveda-Amor
		Bennouna
		Cançado Trindade
		Yusuf
		Xue
		Donoghue
	Judges *ad hoc*	Cot
		Gaja
	Registrar	Couvreur

Le Gouvernement du Nicaragua est représenté par :

S. Exc. M. Carlos José Argüello Gómez, ambassadeur du Nicaragua auprès du Royaume des Pays-Bas,

comme agent et conseil ;

S. Exc. M. Samuel Santos,

ministre des affaires étrangères du Nicaragua ;

M. Alex Oude Elferink, directeur adjoint de l'Institut néerlandais du droit de la mer de l'Université d'Utrecht,

M. Alain Pellet, professeur à l'Université de Paris Ouest, Nanterre-La Défense, membre et ancien président de la Commission du droit international, membre associé de l'Institut de droit international,

M. Paul Reichler, avocat au cabinet Foley Hoag LLP, Washington D.C., membre des barreaux de la Cour suprême des Etats-Unis d'Amérique et du district de Columbia,

M. Antonio Remiro Brotóns, professeur de droit international à l'Universidad Autónoma de Madrid, membre de l'Institut de droit international,

comme conseils et avocats ;

M. Robin Cleverly, M.A., D.Phil, C.Geol, F.G.S., consultant en droit de la mer, Admiralty Consultancy Services,

M. John Brown, R.D., M.A., F.R.I.N., F.R.G.S., consultant en droit de la mer, Admiralty Consultancy Services,

comme conseillers scientifiques et techniques ;

M. César Vega Masís, directeur, direction des affaires juridiques, de la souveraineté et du territoire, ministère des affaires étrangères,

M. Julio César Saborio, conseiller juridique au ministère des affaires étrangères,

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

Mme Tania Elena Pacheco Blandino, conseiller juridique au ministère des affaires étrangères,

comme conseils;

Mme Clara E. Brillembourg, cabinet Foley Hoag LLP, membre des barreaux du district de Columbia et de New York,

Mme Carmen Martinez Capdevila, docteur en droit international public à l'Universidad Autónoma de Madrid,

Mme Alina Miron, chercheur au Centre de droit international de Nanterre (CEDIN), Université de Paris Ouest, Nanterre-La Défense,

M. Edgardo Sobenes Obregon, premier secrétaire à l'ambassade du Nicaragua au Royaume des Pays-Bas,

comme conseils adjoints.

The Government of Nicaragua is represented by:

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

as Agent and Counsel;

H.E. Mr. Samuel Santos,

Minister for Foreign Affairs of Nicaragua;

Mr. Alex Oude Elferink, Deputy-Director, Netherlands Institute for the Law of the Sea, Utrecht University

Mr. Alain Pellet, Professor at the University Paris Ouest, Nanterre-La Défense, Member and former Chairman of the International Law Commission, associate member of the Institut de droit international,

Mr. Paul Reichler, Attorney-at-Law, Foley Hoag LLP, Washington D.C., Member of the Bars of the United States Supreme Court and the District of Columbia,

Mr. Antonio Remiro Brotóns, Professor of International Law, Universidad Autónoma, Madrid; Member of the Institut de droit international,

as Counsel and Advocates;

Mr. Robin Cleverly, M.A., DPh., CGEOL., F.G.S., Law of the Sea Consultant, Admiralty Consultancy Services,

Mr. John Brown, R.D., M.A., F.R.I.N., F.R.G.S., Law of the Sea Consultant, Admiralty Consultancy Services,

as Scientific and Technical Advisers;

Mr. César Vega Masís, Director of Juridical Affairs, Sovereignty and Territory, Ministry of Foreign Affairs,

Mr. Julio César Saborio, Juridical Adviser, Ministry of Foreign Affairs,

Mr. Walner Molina Pérez, Juridical Adviser, Ministry of Foreign Affairs,

Ms Tania Elena Pacheco Blandino, Juridical Adviser, Ministry of Foreign Affairs,

as Counsel;

Ms Clara E. Brillembourg, Foley Hoag LLP, Member of the Bars of the District of Columbia and New York,

Ms Carmen Martínez Capdevila, Doctor of Public International Law, Universidad Autónoma, Madrid

Ms Alina Miron, Researcher, Centre for International Law (CEDIN), University Paris Ouest, Nanterre-La Défense,

Mr. Edgardo Sobenes Obregon, First Secretary, Embassy of Nicaragua in the Kingdom of the Netherlands,

as Assistant Counsel.

Le Gouvernement de la Colombie est représenté par :

S. Exc. Julio Londoño Paredes, professeur de relations internationales à l'Université del Rosario de Bogotá,

comme agent ;

S. Exc. M. Guillermo Fernández de Soto, président du comité juridique interaméricain, membre de la Cour permanente d'arbitrage et ancien ministre des affaires étrangères de la République de Colombie,

comme coagent ;

M. James Crawford, S.C., F.B.A., professeur de droit international à l'Université de Cambridge, titulaire de la chaire Whewell, membre de l'Institut de droit international, avocat,

M. Rodman R. Bundy, avocat à la Cour d'appel de Paris, membre du barreau de New York, cabinet Eversheds LLP (Paris),

M. Marcelo Kohen, professeur de droit international à l'Institut de hautes études internationales et du développement de Genève, membre associé de l'Institut de droit international,

comme conseils et avocats ;

S. Exc. M. Francisco José Lloreda Mera, ambassadeur de la République de Colombie auprès du Royaume des Pays-Bas, représentant permanent de la Colombie auprès de l'OIAC, ancien ministre d'Etat de la République de Colombie,

M. Eduardo Valencia-Ospina, membre de la Commission du droit international,

S. Exc. Mme Sonia Pereira Portilla, ambassadeur de la République de Colombie auprès de la République du Honduras,

M. Andelfo García González, professeur de droit international, ancien ministre adjoint des affaires étrangères de la République de Colombie,

Mme Victoria E. Pauwels T., ministre-conseiller au ministère des affaires étrangères de la République de Colombie,

M. Julián Guerrero Orozco, ministre-conseiller à l'ambassade de la République de la Colombie aux Pays-Bas,

Mme Andrea Jiménez Herrera, conseiller au ministère des affaires étrangères de la République de Colombie,

comme conseillers juridiques ;

M. Thomas Fogh, cartographe, International Mapping,

comme conseiller technique.

The Government of Colombia is represented by:

H.E. Mr. Julio Londoño Paredes, Professor of International Relations, Universidad del Rosario, Bogotá,

as Agent;

H.E. Mr. Guillermo Fernández de Soto, Chair of the Inter-American Juridical Committee, Member of the Permanent Court of Arbitration and former Minister for Foreign Affairs of the Republic of Colombia,

as Co-Agent;

Mr. James Crawford, S.C., F.B.A., Whewell Professor of International Law, University of Cambridge, Member of the Institute of International Law, Barrister,

Mr. Rodman R. Bundy, *avocat à la Cour d'appel de Paris*, Member of the New York Bar, Eversheds LLP, Paris,

Mr. Marcelo Kohen, Professor of International Law at the Graduate Institute of International and Development Studies, Geneva; associate member of the Institut de droit international,

as Counsel and Advocates;

H.E. Mr. Francisco José Lloreda Mera, Ambassador of the Republic of Colombia to the Kingdom of the Netherlands, Permanent Representative of Colombia to the OPCW, former Minister of State,

Mr. Eduardo Valencia-Ospina, Member of the International Law Commission,

H.E. Ms Sonia Pereira Portilla, Ambassador of the Republic of Colombia to the Republic of Honduras,

Mr. Andelfo García González, Professor of International Law, former Deputy Minister for Foreign Affairs of the Republic of Colombia,

Ms Victoria E. Pauwels T., Minister-Counsellor, Ministry of Foreign Affairs of the Republic of Colombia,

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

Ms Andrea Jiménez Herrera, Counsellor, Ministry of Foreign Affairs of the Republic of Colombia,

as Legal Advisers;

Mr. Thomas Fogh, Cartographer, International Mapping,

as Technical Adviser.

Le Gouvernement du Honduras est représenté par :

S. Exc. M. Carlos López Contreras, ambassadeur, conseiller national au ministère des affaires étrangères,

comme agent ;

Sir Michael Wood, K.C.M.G., membre du barreau d'Angleterre, membre de la Commission du droit international,

Mme Laurence Boisson de Chazournes, professeur de droit international à l'Université de Genève,

comme conseils et avocats ;

S. Exc. M. Julio Rendón Barnica, ambassadeur, ministère des affaires étrangères,

S. Exc. M. Miguel Tosta Appel, ambassadeur, président de la commission hondurienne de démarcation au ministère des affaires étrangères,

S. Exc. M. Sergio Acosta, chargé d'affaires a.i. à l'ambassade du Honduras au Royaume des Pays-Bas,

M. Richard Meese, avocat à la Cour d'appel de Paris,

M. Makane Moïse Mbengue, docteur en droit, maître de conférences à l'Université de Genève,

Mlle Laurie Dimitrov, élève-avocat, barreau de Paris, cabinet Meese,

M. Eran Sthoeger, faculté de droit de la New York University,

comme conseils ;

M. Mario Licona, ministère des affaires étrangères,

comme conseiller technique.

The Government of Honduras is represented by:

H.E. Mr. Carlos López Contreras, Ambassador, National Counsellor, Ministry of Foreign Affairs,

as Agent;

Sir Michael Wood, K.C.M.G., member of the English Bar, member of the International Law Commission,

Ms Laurence Boisson de Chazournes, Professor of International Law at the University of Geneva,

as Counsel and Advocates;

H.E. Mr. Julio Rendón Barnica, Ambassador, Ministry of Foreign Affairs,

H.E. Mr. Miguel Tosta Appel, Ambassador, Chairman of the Honduran Demarcation Commission, Ministry of Foreign Affairs,

H.E. Mr. Sergio Acosta, Chargé d'affaires a.i. at the Embassy of Honduras in the Kingdom of the Netherlands,

Mr. Richard Meese, *avocat à la Cour d'appel de Paris*,

Dr. Makane Moïse Mbengue, Senior Lecturer at the University of Geneva,

Miss Laurie Dimitrov, pupil barrister, Paris Bar, Cabinet Meese,

Mr. Eran Sthoeger, Faculty of Law, New York University,

as Counsel;

Mr. Mario Licona, Ministry of Foreign Affairs,

as Technical Adviser.

The PRESIDENT: We now come to the first round of oral argument of Colombia and I give the floor to His Excellency Ambassador Julio Londoño Paredes, the Agent of Colombia.

Mr. LONDOÑO: Thank you, Mr. President.

1. Mr. President and distinguished Judges, it is a great honour for me to address the Court, as Agent for the Republic of Colombia in these hearings on the Application for permission to intervene submitted by the Republic of Honduras on 10 June 2010, in the case concerning *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, within the framework of Article 62 of the Statute of the Court, and also invoking Article 36, paragraph 1, thereof.

2. In its Application,

> "Honduras seeks the Court's permission to intervene as a party in the current proceedings in order to settle conclusively, on the one hand, the dispute over the delimitation line between the endpoint of the boundary fixed by the Judgment of 8 October 2007 and the tripoint on the boundary line in the 1986 Maritime Delimitation Treaty, and, on the other hand, the determination of the tripoint on the boundary line in the 1986 Maritime Delimitation Treaty between Colombia and Honduras."[1]

In the alternative, Honduras requests to be allowed to intervene as a non-party, so as to inform the Court of its rights and legal interests that may be affected by a decision of the Court in the present case.

3. During the first round presentation in the present proceedings, Honduras requested to be authorized to intervene as a Party, in order to achieve "a final settlement, based on international law, to [the outstanding] maritime delimitation dispute" with Nicaragua[2]. Honduras also maintained, in the alternative, its request to be allowed to intervene as a non-party, so as to inform the Court of its rights and legal interests that may be affected by a decision in the present case.

4. Pursuant to the Court's communication, my Government submitted its Observations with regard to the Application on 2 September 2010.

5. At the outset, Colombia has taken note that the Application expressly excludes the territorial aspect of the dispute before the Court and is limited to the maritime delimitation in so far

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[1]Application of Honduras, para. 36.

[2]CR 2010/18, p. 45, para. 47 (Wood).

as it concerns areas located north of parallel 14° 59' 08" and west of the meridian 79° 56' 00" and west of the rest of the line established in the 1986 Treaty.

6. Honduras's request to be accepted as a party raises matters concerning the Judgment of 8 October 2007 that are exclusively related to its bilateral relationship with Nicaragua. Since Colombia was not a party to that case, it will not express any views on those issues.

7. However, Honduras's request also refers to the *dispositif* of the 2007 Judgment, according to which: "From point F, [the boundary line] shall continue along the line having the azimuth of 70° 14' 41.25" until it reaches the area where the rights of third States may be affected." (*I.C.J. Reports 2007 (II)*, p. 763.) Colombia is such a third State and does have rights in the area situated immediately east of the 82nd meridian.

8. As for Honduras's request to be admitted to intervene as a non-party, in light of the fact that it is evidently bound by a valid international treaty in force, concluded with Colombia in 1986, Colombia considers that the rights resulting from this Treaty constitute an interest of a legal nature that may be affected by the decision in this case and that therefore Honduras has satisfied the requirements of Article 62 of the Statute.

Colombia's sovereignty and jurisdiction over the cays and maritime areas north of the 15th parallel

9. As explained in detail in Colombia's written pleadings in the case, since the nineteenth century Colombia has been exercising peaceful and uninterrupted sovereignty over each and every of the islands and cays of the San Andrés archipelago, including Serranilla Cays.

10. That jurisdiction likewise continued to be exercised over the adjacent economic zone and continental shelf areas, including those located north of the 15th parallel due to the entitlements of Providencia Island and the other islands and cays of the San Andrés archipelago.

The Treaty of 2 August 1986

11. In the late 1970s Honduras claimed rights to maritime areas located north of the aforesaid parallel. With the purpose of settling their differences, following a negotiation process, Honduras and Colombia signed a maritime delimitation treaty on 2 August 1986, establishing a line starting at the 82º W meridian, along parallel 14°59' 08" N up to meridian 79° 56' 00" W where the

boundary continues to the north until reaching the 12-nautical-mile territorial sea generated by Serranilla Cays. It continues along the border of a 12-mile arc of circle, corresponding to the western section of the territorial sea of Serranilla Cays, until it reaches the parallel at latitude 16º 04' 15" N.

12. The Treaty was approved by the Honduran Assembly on 30 November 1999 and by the Colombian Congress on 13 December of the same year. The exchange of ratification instruments took place in New York on 20 December 1999. The Treaty was registered with the United Nations Secretary-General on 21 December of that year and has been strictly complied with by both Colombia and Honduras since the very moment of its signature in 1986.

13. The basic and essential procedure foreseen in international law to effect maritime delimitations between States is the agreement of the parties. In the 1986 Treaty, vis-à-vis Honduras, Colombia agreed to limit its continental shelf and exclusive economic zone entitlements generated by Providencia Island and the other islands and cays of the San Andrés archipelago. Obviously, such concession was predicated on bilateral issues negotiated between the parties to the Treaty and is not applicable vis-à-vis Nicaragua.

The observance and legal force of treaties

14. Taking into account that the observance of treaties is the cornerstone of peace and stability in international relations, let this be an opportunity to reiterate once again, the well-known and unwavering position of Colombia throughout its existence as an independent nation, of the faithful observance of international treaties.

The Court's Judgment of 8 October 2007 and its lack of effects on Colombia's rights

15. Colombia understands that the Court, by the references included in paragraph 316 of its Judgment of 8 October 2007, has in no way purported to prejudice Colombia's rights north of the 15th parallel[3] and west of meridian 79° 56' 00" W, also fully recognized in the 1986 Treaty, an instrument concluded within the framework of international law.

[3]The 1986 Treaty actually refers to latitude 14° 59' 08", but the Parties' arguments in that case generally referred to the 15th parallel.

16. Evidently, the Court, ever vigilant in its judgments to avoid affecting the rights of third States, only referred in the Judgment of 8 October 2007 to the obligations of Nicaragua and Honduras, since they were the only Parties involved in that case.

17. Colombia further understands that the Court has in no way prejudiced its rights with respect to Nicaragua in the present case, since they are also protected under Article 59 of the Statute of the Court.

The Judgment of 2007 vis-à-vis Nicaragua

18. Within the framework of its unwavering conduct with regard to the respect for international treaties, Colombia has stated its respect for the 1986 Treaty concluded with Honduras.

19. Indeed, since in the 1986 Treaty Colombia and Honduras only agreed to establish a maritime delimitation between the two of them, Colombia is not precluded from upholding its rights vis-à-vis Nicaragua and claim its rights north of the 15th parallel and west of meridian 79° 56' 00" and west of the rest of the line fixed in that Treaty.

20. The Colombian presentation continues with Mr. Rodman Bundy who will address the Court with the purpose of clarifying certain aspects of the legal interests that Honduras considers may be affected by a decision of the Court, the historical context, the existing treaties and agreements in the area and some issues regarding the Judgment of October 2007. Mr. Bundy will be followed by Professor Kohen who will discuss the impact of the 1986 Treaty on Honduras's request to intervene, and by Professor Crawford who will deal with Honduras's Application to intervene as a party.

I thank the Court for having allowed me the privilege of opening Colombia's oral argument in these proceedings on behalf of my Government. I would now ask you, Mr. President, to give the floor to Mr. Rodman Bundy.

The PRESIDENT: Thank you, Your Excellency Ambassador Julio Londoño Paredes. Before I call the next speaker on the side of the Republic of Colombia, namely, Mr. Rodman Bundy, I believe it is an appropriate time for the Court to have a short break for coffee of about 10 minutes.

Thank you.

The Court adjourned from 11 a.m. to 11.15 a.m.

The PRESIDENT: Please be seated. Now I give the floor to Mr. Rodman Bundy.

Mr. BUNDY:

THE CONTEXT WITHIN WHICH HONDURAS'S APPLICATION ARISES AND THE QUESTION OF ITS LEGAL INTEREST

A. Introduction

1. Thank you very much, Mr. President, Members of the Court. I have the honour to continue with Colombia's first round oral presentation on the Application to intervene submitted by Honduras.

2. Now in its Application Honduras makes two alternative requests. Its principal request is to be permitted to intervene as a party in order to settle what Honduras says is the dispute that exists over the delimitation line between the terminal point of the boundary between itself and Nicaragua resulting from the Court's 2007 Judgment and the tripoint involving Colombia. Subsidiarily, and in the event the Court does not accede to Honduras's request to intervene as a party, Honduras requests permission to intervene as a non-party in the case (Application of Honduras, para. 36).

3. These matters have a bearing on the manner in which Honduras has described the precise object of its intervention in its Application, which Honduras says is threefold (Application, para. 33).

(i) The first is to protect, generally, the rights of Honduras in the Caribbean Sea by all legal means available, including the procedure provided for in Article 62 of the Statute.

(ii) The second is to inform the Court of the nature of its rights and interests of a legal nature that could be affected by a decision of the Court, taking into account the maritime boundaries claimed by the Parties in the main case that had been submitted to the Court.

Now these two objects relate both to Honduras's main request to intervene as a party and to its subsidiary request to intervene as a non-party. And provided that Honduras can show the requisite interest of a legal nature that may be affected by a decision in the case, both objects appear to be legitimate. The first reflects an object which a number of States have previously referred to in their intervention requests, and as to which the Court has never indicated that such a request is improper, with respect to non-party intervention. And the second has been confirmed to be a proper object of intervention by the Court on several occasions, including in the *El Salvador/Honduras* case, the *Cameroon* v. *Nigeria* case and the *Indonesia/Malaysia* case.

(iii) The third object, as articulated in Honduras's Application, is the request for Honduras to be authorized to intervene in a capacity of a party which, if accepted, would result in Honduras recognizing the binding effect of the decision that will be rendered.

Obviously, if such a request — this third object — is not accepted by the Court, Honduras repeats its subsidiary request to be permitted to intervene as a non-party.

4. In its Written Observations on the Application, filed on 2 September 2010, Colombia indicated that it has no objection to Honduras's request to intervene as a non-party. With respect to Honduras's request to intervene in the capacity of a party, Colombia's position was more nuanced.

5. This aspect of Honduras's Application raises a number of issues relating to the bilateral delimitation between Nicaragua and Honduras which was addressed in the 2007 Judgment. As Colombia's Agent has indicated, Colombia was not a party to that case, and it did not consider it appropriate to express a view on those issues. And that is why Colombia's Written Observations indicated that the request to intervene as a party fell to the Court to decide in accordance with its discretion under Article 62, paragraph 2, of the Statute: and this is a matter that will be discussed further by Professor Crawford later this morning.

6. For my part, I shall elaborate the reasons underlying Colombia's Written Observations on the non-party intervention point during the course of my presentation this morning. But, first, however, I would like to place Honduras's Application in context by reviewing the geographic

scope of that Application and its relationship to the delimitation situation that exists in the area: and following this, I shall address the question of whether Honduras has an interest of a legal nature which may be affected by a decision in the case.

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B. The scope of Honduras's Application

7. Honduras makes it clear that it is not seeking to intervene in any of the territorial matters that are at issue in the main case (Application, para. 16). Honduras has, in fact, previously recognized Colombia's sovereignty over the islands and cays comprising the San Andrés archipelago in particular, by virtue of the treaty it entered into with Colombia in 1986.

8. The Application is limited to a request for permission to intervene only in relation to a *part* of the delimitation area between Nicaragua and Colombia in the main case. To be more precise, and as now is going to be illustrated on the screen, and you saw this earlier this morning, Honduras has indicated that the maritime area within which it claims to have interests of a legal nature that may be affected by a decision in the case is situated within a rectangle which is bounded by the coordinates that have been mentioned earlier, resulting in the circumscribed figure on the screen (Application para. 17).

9. Given that the test under Article 62 of the Statute is whether the applicant State has an interest of a legal nature that may be affected by a decision in the case, two initial questions need to be addressed in order to determine whether Honduras has met the requirements of Article 62:

(i) The first is, can Honduras point to the existence of an interest of a legal nature within the relevant part of the rectangle that it has identified?

(ii) And secondly, if so, if it can point to such an interest, is the delimitation of any part of the maritime area subsumed within that rectangle in dispute between Colombia and Nicaragua such that a decision in the case may affect Honduras's legal interests?

It is only if the answer to both of those questions is positive that a third question arises, which is namely:

(iii) whether the appropriate mode for Honduras's intervention is as a non-party or a party.

10. To answer the first two questions, it is necessary to examine how the legal interests of the various States in the region have evolved through the delimitation of maritime areas in this part of the Caribbean Sea prior to the filing of Honduras's Application.

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C. The historical context

11. Since its independence, Colombia has been exercising sovereignty and sovereign rights over all of the islands comprising the San Andrés archipelago and their waters, which includes the northern islands. Colombia possesses 200-nautical-mile entitlements measured from the baselines of the islands within the archipelago, including from Serranilla and Bajo Nuevo located north of the 15th parallel, as well as from Providencia and Serrana located further south. In 1978, Colombia enacted a law promulgating a 200-nautical-mile EEZ and referring to its continental shelf rights (referred to in para. 3.33 of Nicaragua's Memorial).

12. At the end of the 1970s, Honduras claimed rights over maritime areas lying north of the 15th parallel and, for the first time ever, over Serranilla. Colombia immediately rejected any notion of Honduran rights over Serranilla: and thereafter, Colombia and Honduras engaged in a process of extensive negotiations in order to agree on their maritime boundary. During this process, Nicaragua announced no claims over Serranilla and its surrounding waters, as the distinguished Agent for Honduras confirmed on Monday [CR 2010/18, p. 15, para. 8 (López Contreras)]. And nor was Serranilla in dispute between Nicaragua and Honduras in the case that was decided in 2007.

13. The negotiations between Colombia and Honduras culminated in the signing of a maritime boundary agreement on 2 August 1986 (Counter-Memorial of Colombia, Ann. 10; judges' folder tab 9). The 1986 Treaty represented a compromise, as most delimitation agreements do — a point that was brought out by Sir Michael Wood earlier this week [CR 2010/18, pp. 33-34, para. 10]. Honduras effectively renounced its sovereignty claim over Serranilla. Colombia, in turn, agreed not to press the full extent of its maritime entitlements generated by Providencia and Serrana and, to the north-west, of Serranilla Island, although Serranilla did maintain its full rights elsewhere around the island. The maritime boundary that was agreed thus fell between the Honduran coast and Colombia's islands.

14. In the meantime, while it seems that Nicaragua and Honduras may have contemplated commencing negotiations for the delimitation of their maritime boundary in 1977, those initiatives broke down as a result of the change in government in Nicaragua that took place in July 1979. As Nicaragua's Memorial in the case with Honduras stated:

> "the revolution that toppled the Nicaraguan Government in 1979 did not leave any margin for the continuation of a negotiation that had scarcely begun with the diplomatic notes exchanged in May 1977" (Memorial of Nicaragua in the *Nicaragua* v. *Honduras* case, p. 38, para. 20).

15. Notwithstanding that negotiations between Honduras and Nicaragua had broken down, Colombia still wanted to settle its dispute with Honduras, and to continue with its practice of agreeing maritime boundaries that had started with the boundary agreements Colombia signed with Costa Rica, Panama, Haiti and the Dominican Republic in the 1970s.

16. With respect to the delimitation situation between Colombia and Honduras, both countries possessed maritime rights and entitlements north of the 15° parallel as the Honduras's Application correctly notes at paragraph 11. Those rights were generated by the San Andrés archipelago, on the one hand, and Honduras's coast on the other. These respective entitlements overlapped, a situation which gave rise to the need for delimitation.

(i) The 1986 Colombia-Honduras Agreement

17. As can be seen on the map now being projected on the screen, the Colombia-Honduras Treaty delimited the maritime boundary in the following way. Starting at the 82° meridian, the boundary runs along the 14° 59' 08" N parallel up to meridian 79° 56' 00" W. As the Honduran

Government had officially stated at the time, the point at which the land boundary between Nicaragua and Honduras reaches the sea was located at latitude 14º 59' 08" — hence the reason that latitude was chosen. The boundary then continues to the north until reaching the 12-mile territorial sea generated by Serranilla cays. It continues along the border — as you can see on the screen — of that 12-mile arc of circle — which corresponds to the western sector of the territorial sea of Serranilla cays — until it reaches the tangent parallel on the external border of the arc of circle (at lat. 16º 04' 15" N and long. 79° 50' 32"). And from that point, the agreement stipulates that the boundary continues eastwards along the same parallel "up to where the limits should be established with a third State", which was Jamaica. Serranilla was thus left with its full suite of maritime entitlements to the south, south-east and east of the boundary line.

18. There was a tendency on the part of both Honduras's distinguished Agent and Sir Michael, in their presentations on Monday, to emphasize that Honduras possesses maritime claims to the north of the 15° parallel and east of the 82° meridian under the 1986 Treaty [CR 2010/18, pp. 14-15, para. 7 (Lopez); pp. 42-43, para. 38, and pp. 43-44, paras. 42-44 (Wood)]. I would simply recall that any Honduran rights under that Treaty are also bounded in the east by the limits of the 1986 delimitation line I have discussed, which largely coincides with Honduras's rectangle.

19. The Treaty between Colombia and Honduras was a purely bilateral delimitation agreement. The agreement did not deal with any maritime claim that either party to it had with third States in the region. In fact, Article II of the Treaty provided that the agreed delimitation line would not prejudice the drawing of maritime boundaries already established or which may be established with third States in the future, provided that such boundaries did not affect the jurisdiction which either party recognized to the other under the treaty.

20. Now, unlike its practice with respect to the earlier maritime delimitation agreements signed by Colombia, Costa Rica and Panama which were discussed last week — Nicaragua promptly protested the 1986 Treaty to Honduras and Colombia one month after it was signed (Memorial of Nicaragua in the *Nicaragua* v. *Honduras* case, Ann. 70). This was, in fact, the only boundary treaty — the only boundary treaty — signed by Colombia that Nicaragua ever protested.

(ii) The Colombia-Jamaica Agreements

21. The second boundary agreement in the area is the Maritime Boundary and Joint Regime Area signed between Colombia and Jamaica on 12 November 1993. It covered areas located to the east of the Colombia-Honduras Treaty, as we will illustrate on the screen.

22. The treaty provided for a maritime boundary between the two countries starting at point 1 — which is being highlighted on the map. The boundary line, which was based on equidistance principles, then extended eastwards through a series of three other points, beyond which the boundary continued until it intercepted with a point, which was at that time unspecified, where the Colombia-Haiti delimitation line intercepted a delimitation line that still needed to be decided between Jamaica and Haiti. Now this part of the Colombia-Jamaica boundary lies beyond the area of concern set out in Honduras's Application and thus is not immediately relevant.

23. To the north-west of point 1 however, Colombia and Jamaica agreed to establish a Joint Regime Area. And this is the area that is shown by shading on the map. Within that area, it was agreed that both States, Colombia and Jamaica, were entitled to exercise sovereign rights to explore for and exploit the natural resources of the sea-bed and subsoil, and the superjacent waters, and to carry out other related activities. Third State activities in this area were not authorized, as expressly recorded in the treaty. As Sir Michael noted on Monday, the Joint Regime Area fully respected the 1986 Colombia-Honduras delimitation [CR 2010/18, p. 34, para. 13]. By the same token, Honduras has fully respected the 1993 Colombia-Jamaica Treaty. In fact the limit of the Joint Regime Area to the north of Serranilla starts at the end of the Colombia-Honduras boundary line.

24. Prior to the signing of the 1993 Treaty, Colombia and Jamaica had also concluded two fishing agreements, in 1981 and 1984, in the same general area. Nicaragua never protested the 1993 Treaty, or either of the Fishing Agreements, or the activities carried out thereunder.

(iii) The Court's 2007 Judgment

25. This brings me to the Nicaragua-Honduras delimitation which was the subject of the Court's 2007 Judgment. The location of the terminal point of that boundary is an issue that Honduras raised in its Application and again in its first round of oral argument on Monday. And, as I have said, because Colombia was not a party to that case, it will refrain from taking a position

on that issue. On the map that now appears on the screen, we have simply placed an arrow on the bisector to reflect what is said in the *dispositif* of the Court's Judgment — namely:

> "From point F, it shall continue along the line having the azimuth of 70° 14' 41.25 [seconds] until it reaches the area where the rights of third States may be affected." (*I.C.J. Reports 2007 (II)*, p. 763, para. 321 (3).)

Now that is where the Court put an arrow in its sketch-map 8 in its Judgment. It did not put any arrow at the end of the dashed line that Nicaragua showed you this morning. And I note that Nicaragua's illustrations this morning, not only has Nicaragua placed in arrow, in fact a flashing arrow at the end of the dash line, it has converted the dash line into a solid red line. But this is the only arrow that appears on the Court's sketch-map in the Judgment.

26. The Court's decision in its *dispositif* is entirely consistent with a number of other pronouncements made in its Judgment. For example, in paragraph 312 of the Judgment, the Court referred to the general principle that it "will not rule on an issue when in order to do so the rights of a third party that is not before it, have first to be determined", and the Court continued, "[a]ccordingly, it is usual in a judicial delimitation for the precise endpoint to be left undefined in order to refrain from prejudicing the rights of third States" (para. 312).

27. Elsewhere, in the Judgment, when the Court referred to the relevance of the 82nd meridian, which is at issue as part of the merits in the main case, the Court observed that it "will avoid prejudicing those proceedings by its decision here" — that was in paragraph 315. And in paragraph 318, the Court indicated that it had considered certain interests of third States resulting from bilateral treaties in the region and the Court stated that "its consideration of these interests is without prejudice to any other legitimate third party interests which may also exist in the area". It is therefore apparent from these passages that the Court accepted the fact that its delimitation in the *Nicaragua* v. *Honduras* case should not prejudice the rights of a third State such as Colombia.

28. I might also note in passing that, in paragraph 319 of its Judgment, the Court observed that:

> "[I]n no case may the line be interpreted as extending more than 200 nautical miles from the baselines from which the breadth of the territorial sea is measured; any claim of continental shelf rights beyond 200 miles must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf established thereunder."

29. I mention this point because there is a suggestion at paragraph 26 of Honduras's Application that Honduras's legislation provides for rights over the continental shelf extending beyond 200 nautical miles. In fact, from the illustration that was put on the screen this morning by Nicaragua showing an arrow at the end of the dashed line, that arrow seems to project and point to areas lying beyond 200 nautical miles of the coasts of Nicaragua and Honduras as well. Honduras's "rights" are said to be cast in terms that conform to rights that Honduras possesses under Article 76 of the 1982 Convention on the Law of the Sea. For its part, as the Court is aware, Nicaragua's main argument in the present case — at least after its Reply — depends on a purported extension of the continental shelf in areas beyond 200 nautical miles from its coast.

30. Notwithstanding what Honduras's legislation may say on the point, Colombia would recall that Honduras became a party to the 1982 Convention on 5 October 1993, as the Honduran Application points out itself at paragraph 26. Since that time, Honduras has made no outer continental shelf submission to the United Nations Commission on the Limits of the Continental Shelf, and the time-limit for the filing of any such submission has lapsed. Colombia does not believe that there are any areas of outer continental shelf in this part of the Caribbean Sea — certainly none have been submitted to and approved by the United Nations Commission — and that therefore such issues are legally irrelevant. In any event, fortunately perhaps, the issue does not appear to be pertinent for purposes of considering Honduras's Application for permission to intervene since the interests of a legal nature that Honduras has advanced in these proceedings lie within the rectangle I described earlier, all of which is situated within 200 nautical miles of Honduras's coast.

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D. Honduras's interests of a legal nature within the rectangle

31. Now that brings me back to the question whether Honduras has shown an interest of a legal nature within that rectangle that may be affected by a decision in the case. For ease of reference, the rectangle is again being superimposed on the map in order to illustrate its relationship to the previous delimitations that I have discussed.

32. The southern limit of the rectangle corresponds to the first segment of the boundary line agreed in the 1986 Colombia-Honduras Treaty. On the east, Honduras's rectangle is bounded by the 80° meridian. This limit is just to the west of the segment of the Colombia-Honduras boundary between Points 2 and 3 — you can see a small gap there — and, north of Point 3, the rectangle trespasses very slightly onto the area that was subject to the 1993 agreement between Colombia and Jamaica. That area of overlap is relatively minor, and Colombia does not interpret Honduras's rectangle as challenging the validity of either the 1986 line or the 1993 Treaty: Honduras has never had any problem with either of those instruments.

33. Maritime areas situated within the rectangle and lying north of the bisector are not at issue in the present case. As between Nicaragua and Honduras, the Court has ruled that those areas appertain to Honduras.

34. South of the bisector the situation is different. In the first place, Honduras and Nicaragua appear to have a difference regarding whether the Court fixed a terminal point on the bisector and thereby only delimited a part of their boundary in its 2007 Judgment. Without entering into that debate, Colombia nevertheless wishes to emphasize that the projection of the bisector beyond point F is not to affect third-States' rights, as the Court so clearly held in paragraph 321 of its *dispositif*. Colombia also wishes to emphasize that it considers itself to be one such third State.

35. In this respect, it is important to recall that maritime areas lying north of the 15° parallel and east of the 82° meridian are at issue in the present case because Colombia can and does claim maritime entitlements vis-à-vis Nicaragua in these areas. In fact, the same point was effectively shown by Nicaragua's figure 3.1 from its Reply that counsel for Nicaragua displayed on the screen this morning. You will remember, that is the delimitation area to be delimited between Colombia and Nicaragua in the main case, as presented by Nicaragua. That map was presented on the

screen — unless my copy is deficient, I do not believe it has been included in the judges' folders — but the Court will be able to see that there is an area within that delimitation area proposed by Nicaragua that falls north of the 15° parallel. In other words, part of the area to be delimited between Colombia and Nicaragua in the main case, according to Nicaragua's own figure, does include areas north of the 15° parallel. Colombia's equidistance-based maritime boundary claim projects into that area. Obviously, the Court had no jurisdiction in the *Nicaragua* v. *Honduras* case to rule on matters that are in dispute between Colombia and Nicaragua. A point that I shall come back to later.

36. Honduras's Application recognizes Colombia's entitlements in this area (in paragraph 11 of its Application). For his part, on Monday Sir Michael noted that in the main case, Colombia is claiming that its bilateral obligations vis-à-vis Honduras do not prevent it from claiming in the present proceedings rights and interests in the areas north of the 15th parallel and east of the 82nd meridian as against Nicaragua [CR 2010/18, pp. 44-45, para. 46].

37. Honduras's pleadings have emphasized that, as between itself and Colombia, Honduras also has rights in this area pursuant to the 1986 Treaty since the areas in question lie north of the 15th parallel and east of the 82° meridian.

38. And in the light of this situation, the position can usefully be summarized as follows:

— in its 2007 Judgment, the Court could not, and did not, decide on the legal rights of third States not party to those proceedings;

— the Court therefore did not make any ruling with respect to Colombia's rights vis-à-vis Nicaragua — and vice versa — bearing in mind that, in the pending case — this case — the delimitation dispute between Colombia and Nicaragua includes areas located to the north of the 15° parallel;

— by the same token, the Court also did not pronounce upon the legal rights of Colombia and Honduras that were the subject-matter of the 1986 Treaty — because the Treaty was not at issue at that time, in the *Nicaragua* v. *Honduras* case, and Colombia was not a party to that case — nor did the Court pronounce on the 1993 Colombia-Jamaica Treaty — because neither party to that agreement was a party to the *Nicaragua* v. *Honduras* case either;

— the same considerations are at play in the present case by virtue of the fact that both Colombia and Nicaragua claim as against each other areas which are covered by the 1986 Treaty. As a result of its interests of a legal nature reflected in the 1986 Treaty, Honduras submits that it should be permitted to intervene in these proceedings in order to inform the Court of its interests and to protect those interests.

39. And it is in the light of that situation, and to revert to the first two questions I posed earlier in my intervention, that Colombia appreciates why Honduras considers, first of all, that it has an interest of a legal nature within areas circumscribed by the rectangle under the 1986 Treaty and, secondly, why and how that interest *may* be affected by a decision in the case given that areas within the rectangle *are* in dispute between Colombia and Nicaragua in the main proceedings.

40. It is for this reason that Colombia has not objected to Honduras being permitted to present its views on these matters through the vehicle of intervention. Because as Colombia sees it, other States have been permitted to intervene as non-parties in delimitation cases where a decision in the main case may affect its legal interests.

41. Nicaragua's Written Observations adopt a different position. One of the reasons Nicaragua objects to Honduras's intervention request is because Nicaragua considers that Honduras is seeking to reopen matters between Nicaragua and Honduras that have already been decided by the Court in its Judgment of 8 October 2007. According to Nicaragua, the Court determined that the area between the 15th parallel and the bisector belonged to Nicaragua, not Honduras.

42. However, Nicaragua also maintains that Colombia, likewise, has no rights north of the 15° parallel (Written Observations of Nicaragua, para. 12). Accordingly, Nicaragua argues that there are no areas at issue in the main case which could affect any interests of a legal nature of Honduras: and it is on this point that Colombia fundamentally disagrees. It is also on this point that Nicaragua's position is fundamentally inconsistent with their figure 3.1 that was displayed on the screen earlier.

43. Now, because Nicaragua has raised this argument — the lack, or the alleged lack of Colombian rights north of the 15° parallel — because Nicaragua has raised it in connection with Honduras's Application, Colombia has no choice but to respond here in order to make its position clear. But by doing so, this in no way prejudices the fact that Colombia's and Nicaragua's claims within this area are a matter that can only be resolved at the merits stage of the case.

44. Nicaragua's Written Observations asserted that Honduras itself has argued in its Application that the rectangular area cannot be claimed by Colombia by virtue of the 1986 Treaty (Written Observations of Nicaragua, para. 22). But Colombia, however, reads Honduras's Application as actually saying exactly the opposite. Indeed, it is precisely because Honduras recognizes that Colombia *is* entitled to claim maritime areas lying north of the 15th parallel as against Nicaragua, and has done so in the main case, that Honduras considers that its interests of a legal nature may be affected by a decision in the case.

45. The point was made clear in paragraph 10 of Honduras's Application. There, Honduras pointed out that it is Nicaragua, not itself, that contends that Colombia has renounced its rights north of the 15th parallel by means of concluding the 1986 Treaty with Honduras. But Honduras goes on to note that the 1986 Treaty *in no way* permits Nicaragua to maintain that it is only Nicaragua that possesses rights north of the parallel in the pending case since, to do so, would not only make one of the Parties to this case disappear — Colombia — it would also run counter to the principle that a third State cannot seek to rely on an agreement in force between two other States in order to establish its own legal rights.

46. In Colombia's view, the matter is straightforward. In their Treaty of 1986, Colombia and Honduras agreed on the delimitation of *their* respective maritime entitlements only as between themselves. And that agreement in no way precluded Colombia — or Honduras for that matter — from advancing its own claims vis-à-vis Nicaragua. Stated another way, the fact that Colombia's maritime entitlements north of the 15th parallel were bilaterally delimited with Honduras under the 1986 Treaty based on factors that those two States — and only those two States — considered relevant does not mean that Colombia's legal entitlements somehow cease to exist vis-à-vis Nicaragua. While Colombia remains bound by the 1986 Treaty in its relations with Honduras, and vice versa, the treaty in no way binds Colombia with respect to Nicaragua: and that is why

Colombia is fully entitled to advance a claim to maritime areas situated north of the 15th parallel against Nicaragua in the pending case — all the more so in view of the fact that the areas to which Colombia claims north of the 15th parallel vis-à-vis Nicaragua lie closer to Colombian territory than they do to Nicaraguan territory. Now those are issues which obviously will need to be addressed in greater detail at the merits phase of the proceedings.

47. For present purposes, given that these matters are in issue in the pending case between Nicaragua and Colombia, and that Honduras also has legal interests situated within the same general area as reflected in the 1986 Treaty, Colombia considers that Honduras *has* satisfied the test to intervene as a non-party in the case under Article 62 of the Statute. And therefore Colombia repeats what it said in its Written Observations — that it has no objection to this aspect of the Honduras's Application.

48. Mr. President, Members of the Court, that concludes my presentation. I thank the Court for its attention, and I would be grateful, Mr. President, if you could now call on Professor Kohen to continue Colombia's presentation.

The President: I thank Mr. Rodman Bundy for his presentation. I now invite Professor Kohen to the floor.

M. KOHEN :

L'IMPACT DU TRAITÉ DE DÉLIMITATION MARITIME DE 1986 SUR LA REQUÊTE HONDURIENNE À FIN D'INTERVENTION

1. Monsieur le président, Mesdames et Messieurs les juges, c'est un grand honneur de comparaître devant votre haute juridiction au nom de la République de Colombie.

2. Il m'appartient d'examiner l'impact du traité de délimitation maritime conclu entre la Colombie et le Honduras sur la requête à fin d'intervention déposée par ce dernier dans la présente instance.

3. Vous connaissez déjà le tracé résultant de ce traité de délimitation maritime, tout comme sa position par rapport à la ligne revendiquée par la Colombie dans cette affaire et la délimitation établie par la Cour dans votre arrêt du 8 octobre 2007. Rappelons d'emblée que les trois Etats qui

comparaissent devant vous sont d'accord pour reconnaître que votre arrêt n'a pas pu affecter les droits des Etats tiers[4]. La Colombie, comme il est bien connu, n'a pas été partie à l'affaire du *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes*.

4. Dans sa requête à fin d'intervention, le Honduras indique que «l'intervention qu'il sollicite est limitée à la seule délimitation maritime dans la zone circonscrite par le traité de 1986»[5]. La requête hondurienne constate que la Colombie a fait valoir des revendications à l'égard du Nicaragua au nord du 15e parallèle[6]. Les observations écrites du Nicaragua examinent les références faites par la Cour au traité de 1986. Le Nicaragua conclut que

> «the Court has already ruled that Honduras has no rights or interests between the bisector and the 15th parallel in this area, and observed that Colombia, likewise, has no rights north of the 15th parallel. Thus, the Judgement of 8 October 2007 negates the very «rights and interests that Honduras' application to intervene seeks to protect.»[7]

5. Ce matin, Alain Pellet a donné pour acquis que la Colombie n'a pas de titre aux juridictions maritimes opposables au Nicaragua dans la zone du traité de 1986. Il a sans doute jugé que les arguments développés par le Nicaragua vendredi dernier relatifs aux effets des traités de délimitation étaient suffisants. La semaine dernière, en effet, le Nicaragua a commencé à s'intéresser aux matières relevant des audiences de cette semaine. Nous avons entendu une argumentation plus que suspecte sur les prétendus effets *erga omnes* des traités bilatéraux, sur le caractère prétendument «objectif» des traités de délimitation ou encore une défense — assez surprenante venant du Nicaragua, mais toujours la bienvenue — de l'importance du principe de stabilité des frontières[8]. Le but du Nicaragua est clair : par une pirouette juridique intelligente mais néanmoins dépourvue de tout fondement, il prétend inférer des traités de délimitation maritime que la Colombie et ses voisins ont conclus entre 1976 et 1993 des droits en sa faveur, tout en niant

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[4] CR 2007/5, p. 23, par. 69 (Pellet) ; CR 2010/16, p. 21 et 23, par. 11 et 16 (Reichler) ; CR 2010/18, p. 41, par. 35 (Wood).

[5] Requête à fin d'intervention du Honduras (RIH), par. 16. Traduction du Greffe : «the intervention for which it requests permission is confined exclusively to the maritime delimitation in the zone delineated by the 1986 Treaty».

[6] RIH, par. 18. Voir aussi CR 2010/18, p. 44, par. 46 (Wood).

[7] Observations écrites du Nicaragua (OEN), par. 12. Traduction non officielle : «La Cour a déjà statué sur le fait que le Honduras ne pouvait se prévaloir d'aucun droit ni intérêt particulier au regard de la zone comprise entre la bissectrice et le 15e parallèle dans cette région, et a noté, de la même manière, que la Colombie ne possède aucun droit au nord du 15e parallèle. Ainsi, l'arrêt du 8 octobre 2007 nie l'existence des «droits et intérêts que la requête du Honduras à fin d'intervenir vise justement à protéger».»

[8] CR 2010/16, p. 27-28, par. 32-34 (Reichler).

l'essence même de ses traités, à savoir, qu'il s'agit de traités par lesquels les Parties — je souligne, *les Parties* — se sont partagées les espaces maritimes relevant de leur juridiction dans des zones où ces espaces se chevauchaient. Dans le cas qui nous occupe, il s'agit pour le Nicaragua de prétendre se subroger au Honduras dans le traité de 1986.

6. Dans cet exposé, je vais traiter du caractère infondé de ces arguments nicaraguayens. Je me pencherai tout d'abord sur l'interprétation erronée que le Nicaragua fait des références au traité de 1986 que l'on trouve dans votre arrêt du 8 octobre 2007. J'examinerai ensuite les arguments nicaraguayens visant à déduire du traité de 1986 des droits en sa faveur, ce qu'il fait en vue d'écarter tout droit ou intérêt juridique dont les parties au traité elles-mêmes disposent dans la zone pertinente.

A. Le Nicaragua interprète de manière erronée la référence faite par la Cour au traité de 1986

7. La Colombie partage le point de vue exprimé lundi par le Honduras selon lequel votre Cour ne s'est pas prononcée sur les effets juridiques du traité de 1986 liant le Honduras et la Colombie[9]. J'ajoute que vous ne vous êtes pas non plus prononcés en 2007 sur les effets de ce traité par rapport aux Parties à la présente instance. Le Nicaragua fait pour sa part une lecture diamétralement opposée — et j'ajoute erronée — de l'arrêt du 8 octobre 2007 en ce qui concerne le traité de 1986, et les effets et la portée de la délimitation opérée par l'arrêt par rapport aux droits des Etats tiers dans la région considérée.

8. Comme je l'ai déjà mentionné, selon les observations écrites du Nicaragua, — je cite ma traduction — la Cour «a noté que la Colombie ne possède aucun droit au nord du 15e parallèle». La partie adverse «oublie» néanmoins quelques mots essentiels de l'arrêt de votre Cour. Je citerai le texte complet :

> «[La Cour] relève cependant qu'une éventuelle délimitation entre le Honduras et le Nicaragua qui se prolongerait vers l'est au-delà du 82e méridien et au nord du 15e parallèle (ce qui serait le cas de la bissectrice retenue par la Cour) ne porterait en réalité pas préjudice aux droits de la Colombie, dans la mesure où les droits de cette

[9] CR 2010/18, p. 40, par. 32 (Wood).

> dernière *en vertu de ce traité* ne s'étendent pas au nord du 15e parallèle.»[10] (*Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras), arrêt, C.I.J. Recueil 2007 (II)*, p. 759, par. 316 (les italiques sont de nous).)

9. Le Nicaragua a «oublié» les mots «en vertu de ce traité». Et cet «oubli» s'avère critique dans la mesure où il remet en question le principe fondamental selon lequel la Cour ne peut exercer sa juridiction qu'à l'égard d'un Etat qui y a consenti[11]. La Cour n'aurait jamais pu trancher sur des droits dont la Colombie dispose en vertu du droit international général, à l'égard du Nicaragua et à propos des espaces maritimes dans la région, *sans le consentement de la Colombie*. La seule explication possible de ce paragraphe de l'arrêt qui soit conforme au principe fondamental du consentement des parties est la suivante : la Cour a estimé que, *en vertu du traité de 1986*, et ce, *uniquement à l'égard du Honduras*, la Colombie ne dispose pas de droit dans la zone comprise au nord du 15e parallèle et à l'ouest de la ligne qui, partant de ce parallèle, se dirige vers le nord. Le traité ne prévoit pas autre chose. Il ne crée pas de droits en faveur du Nicaragua. Ainsi, la question relative aux droits de la Colombie au nord du 15e parallèle relève de la compétence de la Cour dans cette affaire, et non dans l'affaire *Nicaragua c. Honduras*. L'arrêt relatif à cette dernière affaire précise indubitablement que votre Cour «se gardera de préjuger [de l'affaire *Nicaragua*

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[10] Texte anglais : «The Court nevertheless observes that any delimitation between Honduras and Nicaragua extending east beyond the 82nd meridian and north of the 15th parallel (as the bisector adopted by the Court would do) would not actually prejudice Colombia's rights because Colombia's rights under this Treaty do not extend north of the 15th parallel.»

[11] *Statut de la Carélie orientale, avis consultatif du 23 juillet 1923, C.P.J.I., série B, n°5*, p. 27 ; *Droits de minorités en Haute- Silésie (écoles minoritaires), arrêt du 26 avril 1928, C.P.J.I., série A, n°15*, p. 22 ; *Détroit de Corfou (Royaume-Uni c. Albanie), exceptions préliminaires, arrêt du 25 mars 1948, C.I.J. Recueil 1948*, p. 27 ; *Réparation des dommages subis au service des Nations Unies (1948-1949), avis consultatif du 11 avril 1949, C.I.J. Recueil 1949*, p. 178 ; *Interprétation des traités de paix conclus avec la Bulgarie, la Hongrie et la Roumanie, avis consultatif du 30 mars 1950, C.I.J. Recueil 1950*, p. 71 ; *Anglo-Iranian Oil Co. (Royaume-Uni c. Iran), exception préliminaire, arrêt du 22 juillet 1952, C.I.J. Recueil 1952*, p. 103 ; *Or monétaire pris à Rome en 1943 (Italie c. France, Royaume-Uni et Etats-Unis), compétence de la Cour, arrêt du 15 juin 1954, C.I.J. Recueil 1954*, p. 32 ; *Plateau continental (Jamahiriya arabe libyenne/Malte), requête de l'Italie à fin d'intervention, arrêt du 21 mars 1984, C.I.J. Recueil 1984*, p. 22, par. 34 ; *Applicabilité de la section 22 de l'article VI de la convention sur les privilèges et immunités des Nations Unies, avis consultatif du 15 décembre 1989, C.I.J. Recueil 1989*, p. 189, par. 31 ; *Différend frontalier terrestre, insulaire et maritime (El Salvador/Honduras; Nicaragua (intervenant)), requête du Nicaragua à fin d'intervention, arrêt du 13 septembre 1990, C.I.J. Recueil 1990*, p. 133, par. 94 ; *Certaines terres à phosphates à Nauru (Nauru c. Australie), exceptions préliminaires, arrêt du 26 juin 1992, C.I.J. Recueil 1992*, p. 260, par. 53 ; *Timor oriental (Portugal c. Australie), arrêt du 30 juin 1995, C.I.J. Recueil 1995*, p. 101, par. 26 ; 12 ; *Compétence en matière de pêcheries (Espagne c. Canada), compétence de la Cour, arrêt du 4 décembre 1998, C.I.J. Recueil 1998*, p. 456, par. 55 ; *Conséquences juridiques de l'édification d'un mur dans le Territoire palestinien occupé, avis consultatif du 9 juillet 2004, C.I.J. Recueil 2004*, p. 157, par. 47 ; *Activités armées sur le territoire du Congo (nouvelle requête : 2002) (République démocratique du Congo c. Rwanda), compétence et recevabilité, arrêt, C.I.J. Recueil 2006*, p. 32, par. 64 ; *Activités armées sur le territoire du Congo (nouvelle requête : 2002) (République démocratique du Congo c. Rwanda), compétence et recevabilité, arrêt, C.I.J. Recueil 2006*, p. 32, par. 65 ; *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro), arrêt, 26 février 2007*, p. 31, par. 76 ; *Application de la convention pour la prévention et la répression du crime de génocide (Croatie c. Serbie), exceptions préliminaires, arrêt, C.I.J. Recueil 2008*, p. 423, par. 33 ; *Certaines questions concernant l'entraide judiciaire en matière pénale (Djibouti c. France), arrêt, C.I.J. Recueil 2008*, p. 203, par. 60.

c. Colombie] par sa décision en la présente espèce» (*Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras), arrêt, C.I.J. Recueil 2007 (II),* p. 758, par. 315)[12]. Ceci s'applique bien entendu aux deux Parties à la présente instance.

10. La Cour a insisté sur la portée limitée de son analyse de la manière suivante :

> «La Cour s'est ainsi penchée sur certains intérêts d'Etats tiers *tels qu'ils résultent de traités bilatéraux* conclus entre pays de la région qui pourraient être pertinents quant aux limites de la frontière maritime tracée entre le Nicaragua et le Honduras. La Cour ajoute que l'examen auquel elle a procédé de ces divers intérêts est *sans préjudice de tous autres intérêts légitimes d'Etats tiers dans la zone*.» (*Ibid.*, par. 318 (les italiques sont de nous).)[13]

11. Egalement négligé par le Nicaragua, il se trouve un autre élément dont l'examen est nécessaire pour déterminer si la requête hondurienne à fin d'intervention est ou non recevable. Il s'agit du fait que l'arrêt du 8 octobre 2007 détermine sans équivoque que la délimitation se poursuit «jusqu'à atteindre la zone dans laquelle elle risque de mettre en cause les droits d'Etats tiers» (*ibid.*, p. 763, par. 321, dispositif, 3). La Colombie est de fait un Etat tiers dont les droits risquent d'être mis en cause. C'est là que s'arrête la délimitation décidée par cet arrêt. Ce qui se passe au-delà de cette jonction est une question que la Cour n'a bien entendu pas réglée dans l'arrêt du 8 octobre 2007. Compte tenu de l'existence d'un traité comme celui de 1986, les intérêts du Honduras au nord du 15e parallèle et à l'ouest du 80e méridien pourraient indéniablement se trouver affectés par une décision de la Cour dans la présente affaire.

B. La tentative nicaraguayenne pour déduire du traité de 1986 des droits en sa faveur n'a aucun fondement juridique

12. Le Nicaragua accepte du bout des lèvres que le traité de 1986 ne lui confère effectivement pas de droits et que la règle *pacta tertiis nec nocent nec prosunt* est en l'occurrence applicable. Répétons-le en français : «les traités ne peuvent ni porter préjudice ni profiter à des

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[12] Texte anglais : «The Court will avoid prejudicing those proceedings *[Territorial and Maritime Dispute (Nicaragua v. Honduras)]* by its decision here.»

[13] Texte anglais : «The Court has thus considered certain interests of third States *which result from some bilateral treaties* between countries in the region and which may be of possible relevance to the limits to the maritime boundary drawn between Nicaragua and Honduras. The Court adds that its consideration of these interests is *without prejudice to any other legitimate third party interests* which may also exist in the area.»

sujets tiers». Le Nicaragua se refuse toutefois à accepter la deuxième partie de ce brocard bien connu.

13. Voyons donc quels sont les modes détournés que le Nicaragua utiliserait pour parvenir, croit-il, à faire la démonstration de l'existence, dérivée du traité de 1986, de droits en sa faveur : la prétendue «situation objective» créée par le traité ayant un caractère *erga omnes*, l'application du principe de stabilité des frontières et une certaine jurisprudence arbitrale qui étaierait, selon ses dires, sa position. Je passe à leur examen.

a) *Les régimes «objectifs» opposables* erga omnes

14. Intéressons-nous d'abord à la notion de «régimes objectifs» qui seraient opposables *erga omnes*. Cette notion n'a pas été incorporée à la convention de Vienne sur le droit des traités. En tout état de cause, les situations envisagées par cette notion n'ont rien à voir avec l'établissement bilatéral de délimitations territoriales ou maritimes. Dans le domaine maritime, elle vise notamment les engagements conventionnels par lesquels deux ou plusieurs Etats établissent un régime de liberté de navigation dans les détroits ou canaux.

15. Selon la Commission du droit international, les hypothèses couvertes par la notion de régimes «objectifs» créant des droits et obligations *erga omnes* tombent sous le coup soit des articles 35 et 36 de la convention de Vienne sur le droit des traités, soit de la règle énoncée à l'article 38 qui prévoit la possibilité qu'une coutume ultérieure vienne se greffer au traité, rendant ainsi le droit ou l'obligation prévue par le traité opposable aux tiers[14]. Aucune de ces dispositions, appliquées au traité de 1986, n'aboutit au résultat prétendu par le Nicaragua.

16. Lorsque la Cour s'est référée à une situation objective, elle l'a fait dans un contexte bien différent. Il s'agissait de la création des Nations Unies par cinquante Etats et le fait que l'Organisation jouissait ainsi d'une personnalité internationale objective, opposable *erga omnes*[15]. Toutes ces situations sont très éloignées de l'hypothèse avancée par le Nicaragua d'une situation «objective» créée par des traités de délimitation qui permettraient à des Etats tiers de s'en prévaloir.

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[14] *Annuaire de la Commission du droit international*, 1966, vol. II, p. 251-252.

[15] *Réparation des dommages subis au service des Nations Unies, avis consultatif, C.I.J. Recueil 1949*, p. 185.

17. Si vous le permettez Monsieur le président, faisons un instant le jeu nicaraguayen. Supposons même que, face à un traité qui détermine l'étendue des espaces maritimes de deux Etats, les autres Etats se trouvent dans une situation créée par le traité qui serait opposable — favorable, dirait le Nicaragua — *erga omnes*. Quelles en seraient les conséquences ? Simplement que les Etats tiers pourraient invoquer vis-à-vis du Honduras et de la Colombie le respect de leurs obligations internationales dans leurs zones respectives découlant du traité. Cela n'a toutefois aucune incidence sur la question de la délimitation qui demeure, quant à elle, du ressort exclusif des Parties. «It is relational», comme dirait mon ami Alain Pellet en citant mon autre ami James Crawford.

b) ***Le Nicaragua invoque à tort le principe de stabilité des frontières***

18. Venons-en maintenant au principe de stabilité des frontières. Ce principe n'implique en aucun cas qu'un Etat tiers puisse se prévaloir d'une délimitation bilatérale établie par d'autres Etats. Si ce principe a effectivement un but, c'est celui d'éviter la remise en cause par l'une ou l'autre partie d'une frontière existante, du fait de la découverte de prétendues erreurs ou pour d'autres raisons, y compris du fait de l'éventuelle extinction du traité[16].

19. Tout en étant soumis à ce principe[17], il convient de relever que les traités de délimitation maritime possèdent des caractéristiques qui leur sont propres. Ainsi, comme tout accord de délimitation maritime, le traité de 1986 exprime la conviction des parties qu'elles ont abouti à un résultat équitable, comme l'exige le droit coutumier, dont les articles 74 et 83 de la convention des Nations Unies sur le droit de la mer sont l'expression[18].

20. Les raisons pour lesquelles deux Etats aboutissent à ce résultat équitable sont variées et multiples. Le résultat équitable se mesure dans le contexte de cette relation bilatérale, qui constitue un *«unicum»*, pour emprunter la terminologie que votre Cour a utilisée dans l'arrêt du *Golfe du*

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[16] *Interprétation de l'article 3, paragraphe 2, du traité de Lausanne, avis consultatif, 1925, C.P.J.I. série B n° 12*, p. 20 ; *Temple de Préah Vihéar (Cambodge c. Thaïlande), fond, arrêt, C.I.J. Recueil 1962*, p. 34 ; *Différend territorial (Jamahiriya arabe libyenne/Tchad), arrêt, C.I.J. Recueil 1994*, p. 37, par. 72-73.

[17] *Plateau continental de la mer Egée (Grèce c. Turquie), arrêt, C.I.J. Recueil 1978*, p. 36, par. 85.

[18] *Délimitation maritime et questions territoriales entre Qatar et Bahreïn (Qatar c. Bahreïn), fond, arrêt, C.I.J. Recueil 2001*, p. 110-111, par. 226-230 ; *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras), arrêt, C.I.J. Recueil 2007*, p. 740-741, par. 265-266, par. 270.

Maine [19]. Pour vous donner un exemple, Mmes et MM. les juges : il se peut que l'Etat A soit disposé à faire davantage de concessions à l'Etat B, qui est prêt à négocier une délimitation maritime et en même temps à renoncer à des revendications territoriales dans la même zone, et pas à l'Etat C, qui, de son côté, rejette la validité même du traité bilatéral le plus important existant entre eux et souhaite ainsi chasser l'Etat A d'une région dans laquelle ce dernier a une présence bicentenaire !

21. Pour le reste, nous sommes en parfait accord avec le Nicaragua sur l'importance du principe de stabilité des frontières, qu'elles soient terrestres ou maritimes. Dans cette affaire, c'est précisément le Nicaragua qui a défié ce principe tant dans son aspect terrestre que maritime. Il l'a fait de la manière la plus grave qui soit, en rejetant l'existence même du traité de 1928/1930 par une prétendue déclaration unilatérale de nullité. Il le fait encore, selon les prétentions gourmandes et instables dont il fait montre dans cette affaire, en voulant bouleverser l'équilibre conventionnel établi par tous les autres riverains de la mer des Caraïbes sud-occidentale.

c) ***Une jurisprudence arbitrale sans pertinence***

22. J'arrive maintenant à la jurisprudence que le Nicaragua a citée à l'appui de sa thèse selon laquelle l'abandon qu'un Etat ferait de son titre sur des espaces maritimes lors de la conclusion d'un traité bilatéral le serait *erga omnes*.

23. Deux sentences arbitrales ont été citées à cet égard[20], lesquelles se réfèrent à des situations totalement différentes de celles à l'examen devant votre Cour. La première est celle relative à la *Délimitation maritime entre la Barbade et Trinité-et-Tobago*. Le paragraphe cité par le Nicaragua est le suivant :

[19] *Délimitation de la frontière maritime dans la région du golfe du Maine (Canada/Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 1984*, p. 290, par. 81.

[20] CR 2010/13, p. 37, par. 29 (Reichler), CR 2010/16, p. 28, par. 33.

> «The maritime areas which Trinidad and Tobago has, in the 1990 Trinidad Venezuela Agreement, given up in favour of Venezuela do not any longer appertain to Trinidad and Tobago and thus the Tribunal could not draw a delimitation line the effect of which is to attribute to Trinidad and Tobago areas it no longer claims.»[21]

24. Dans cette affaire, Trinité-et-Tobago ne revendiquait pas face à la Barbade les espaces maritimes cédés au Venezuela. Il s'agissait de la prétention de Trinité-et-Tobago à faire valoir les concessions qu'il avait faites au Venezuela en concluant un traité de délimitation avec ce dernier, aux fins d'obtenir une «compensation» lors de l'établissement de sa délimitation avec la Barbade. Trinité-et-Tobago prétendait que, du fait de son consentement à déplacer au nord sa ligne de délimitation avec le Venezuela — afin que ce dernier ait un accès à l'océan Atlantique —, la délimitation avec la Barbade devait en conséquence être elle-aussi déplacée vers le nord. La sentence arbitrale ne peut donc pas être lue comme signifiant l'impossibilité d'opposer à un Etat tiers un titre à des espaces maritimes, du fait de la conclusion d'un traité de délimitation avec un autre Etat.

25. La deuxième sentence arbitrale présentée par le Nicaragua ne se référait pas à un conflit maritime. Il s'agit de l'affaire *Erythrée/Yémen*, dans sa première phase, concernant la souveraineté sur certaines îles. Le conseil du Nicaragua a seulement cité cette partie de la décision :

> «Boundary and territorial treaties made between two parties are *res inter alios acta* vis-à-vis third parties. But this special category of treaties also represents a legal reality which necessarily impinges upon third states, because they have effect *erga omnes*.»[22]

26. Malheureusement, le conseil nicaraguayen a «oublié» de citer le passage qui suit et qui montre clairement ce qui était ici en jeu. Je le ferai à sa place :

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[21] *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them*, decision of 11 April 2006, *RSA*, vol. XXVII, par. 347 (CR 2010/13, p. 37, par. 29 (Reichler)). Traduction non officielle : «La zone maritime que Trinité-et-Tobago a cédée au Venezuela en vertu de l'accord trinité-vénézuélien de 1990 n'appartient plus à Trinité-et-Tobago de la sorte que le Tribunal se trouve dans l'impossibilité d'établir une ligne de délimitation ayant pour effet d'attribuer à Trinité-et-Tobago des zones sur lesquelles il ne peut plus faire valoir ses droits.»

[22] *Eritrea/Yemen, Territorial Sovereignty and Scope of the Dispute*, Award of the Arbitral Tribunal in the First Stage, 9 October 1998, par. 153 (CR 2010/16, p. 28, par. 33 (Reichler). Texte français : «Les traités frontaliers et territoriaux conclus entre deux parties sont *res inter alios acta* pour toute tierce partie. Mais cette catégorie particulière de traités représente aussi une réalité juridique qui touche nécessairement les Etats tiers parce qu'ils ont effet *erga omnes*.»

> «If State A has title to territory and passes it to State B, then it is legally without purpose for State C to invoke the principle of *res inter alios acta*, unless its title is better than that of A (rather than of B). In the absence of such better title, a claim of *res inter alios acta* is without legal import.»[23]

27. En fin de compte, cette citation tronquée du Nicaragua fait la preuve de la futilité de son argumentation. Car ce que cet exemple jurisprudentiel tend à démontrer est précisément le contraire de ce qu'allègue le demandeur. Il y a là la confirmation de deux choses : la mise en œuvre de la règle «*pacta tertiis*» et la nécessité, en dernier ressort, de l'existence d'un meilleur titre sur le territoire.

28. Mais permettez-moi, Monsieur le président, une remarque additionnelle. La première sentence arbitrale *Erithrée/Yémen* avait trait au différend territorial. Dans ce genre de différend, ce qui compte c'est d'établir qui des parties possède le titre sur le territoire en cause. Comme le soulignait Prosper Weil :

> «La délimitation maritime est d'une tout autre nature. Loin de reposer sur l'idée qu'il ne saurait y avoir sur un espace donné qu'un seul titre juridique, elle postule la concurrence, sur un même espace, de deux titres tout aussi valables l'un que l'autre… Il s'agit d'imposer à chacun des deux titres qui pèsent le même poids un sacrifice raisonnable, de manière à pouvoir réaliser une division de l'espace sur lequel ils s'entrecroisent.»[24]

C. L'attitude du Nicaragua face au traité de 1986 l'empêche d'invoquer un quelconque droit en sa faveur

29. J'en viens maintenant à un autre argument majeur pour rejeter toute velléité nicaraguayenne à se prévaloir du traité de 1986. En effet, par son comportement et ses prises de position à l'égard de la validité même du traité, le Nicaragua se trouve à présent dans l'impossibilité de faire valoir, du fait de ce même traité, quelque droit ou situation que ce soit à son avantage.

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[23] *Eritrea/Yemen, Territorial Sovereignty and Scope of the Dispute*, Award of the Arbitral Tribunal in the First Stage, 9 October 1998, par. 153. Texte français : «Si l'Etat A détient le titre sur un certain territoire et le transfère à l'Etat B, il est alors juridiquement sans objet pour l'Etat C d'invoquer le principe *res inter alios acta* sauf si le titre détenu par lui est supérieur à celui de A (et non au titre de B). En l'absence d'un titre qui soit ainsi supérieur, il n'est d'aucune utilité sur le plan juridique d'invoquer le principe *res inter alios acta*.»

[24] Prosper Weil, *Perspectives de la délimitation maritime* (Paris : Pedone, 1988), p. 99-100. Texte anglais : «Nowadays maritime delimitation is quite different. Far from assuming that there can be only one legal title to a given area, it postulates the existence of two equally valid titles in competition with one another over the same area. It is not a question of which proof is the more or less convincing, which title the weightier, but of requiring from each of the parties with these equally well-founded titles a reasonable sacrifice such as would make possible a division of the area of overlap.» Prosper Weil, *The Law of Maritime Delimitation — Reflections* (Cambridge : Grotius Publications Limited, 1989), p. 91-92.

30. Le Nicaragua s'est vigoureusement opposé à la conclusion du traité de 1986. De surcroît, il l'a considéré — une fois n'est pas coutume ! — comme étant «non valide», selon la qualification employée par le conseil du Nicaragua devant vous le 8 mars 2007 lors des audiences dans l'affaire *Nicaragua c. Honduras*[25].

31. Par ailleurs, dans sa note de protestation datée du 8 septembre 1986, le Nicaragua affirme catégoriquement : «the Republic of Nicaragua rejects the treaty subscribed between Honduras and Colombia on August 2, 1986; it manifests that it does not recognize nor admits *any effect whatsoever* of the referred instrument»[26].

32. Enfin, dans sa réplique dans l'affaire contre le Honduras, on peut lire : «Honduras fails to explain how a treaty that has been protested by a third State upon its conclusion and which State has continued to do so afterwards, *could have any legal effects for that Third State*.»[27]

33. Comment un Etat qui considère un traité invalide, et qui fait savoir aux Etats parties à ce traité qu'il ne reconnaît à celui-ci *aucun effet juridique* peut-il prétendre par la suite que le traité a pour effet la renonciation par la Colombie à des titres maritimes en sa faveur ?[28]

Conclusions

34. Monsieur le président, Mesdames et Messieurs les juges, j'arrive à ma conclusion. La voici. Le Honduras est toujours partie au traité de 1986. Celui-ci demeure toujours en vigueur. Dans la présente affaire, les interprétations que le Nicaragua fait des effets du traité de 1986 ne sont pas partagées par les parties au traité. Cette interprétation concerne des espaces qui sont en cause dans la présente affaire. En tant que partie au traité, le Honduras a certainement un intérêt qui peut être affecté par toute décision que la Cour prendra à cet égard.

35. Aux fins de cette phase de la procédure, je peux résumer la situation juridique relative au traité de 1986 de la manière suivante :

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[25] CR 2007/4, p. 52, par. 11 (Pellet).

[26] *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras)*, mémoire du Nicaragua, vol. II, annexe 70, p. 162 (les italiques sont de nous). Traduction non officielle : «la République du Nicaragua rejette le traité conclu le 2 août 1986 entre le Honduras et la Colombie ; elle manifeste qu'elle ne reconnaît ni n'admet *aucun effet de quelque sorte que ce soit* découlant de l'instrument susmentionné».

[27] *Ibid.*, réplique du Nicaragua, par. 3.34 (les italiques sont de nous). Traduction non officielle : «Le Honduras n'a pas su expliquer comment un traité peut avoir quelque effet juridique que ce soit à l'égard d'un Etat tiers qui a protesté contre celui-ci dès sa signature et n'a cessé de le faire par la suite.»

[28] Affaire du *Temple de Préah Vihéar (Cambodge c. Thaïlande), fond, arrêt, C.I.J. Recueil 1962*, p. 40.

Primo, le traité de 1986 n'a pas établi des droits ou situations en faveur des Etats tiers et certainement pas en faveur du Nicaragua.

Secundo, la notion controversée de régime «objectif» n'est pas applicable au traité de 1986, et ce dernier n'a pas établi une délimitation dont les prétendus effets *erga omnes* permettraient à des Etats tiers de s'en prévaloir.

Tertio, du fait du rejet par le Nicaragua du traité de 1986, cet Etat se voit dans l'impossibilité de l'invoquer en sa faveur de quelque manière que ce soit.

Quarto, votre arrêt du 8 octobre 2007 ne peut pas être interprété dans le sens invoqué par le Nicaragua, savoir, que votre Cour a disposé des droits de la Colombie dans une affaire à laquelle la Colombie n'était pas partie.

36. La prétention du Nicaragua d'ôter toute pertinence au traité de 1986 dans la présente procédure n'est ainsi pas fondée. Dans la mesure où les parties à ce traité sont le Honduras et la Colombie, dans la mesure où la Colombie invoque dans la présente procédure des droits vis-à-vis du Nicaragua au regard de zones qui, en vertu du traité, relèvent de la juridiction du Honduras dans la relation bilatérale qui unit la Colombie à ce dernier, et dans la mesure où le Nicaragua prétend qu'aucune des deux parties au traité n'a de droits dans la zone maritime qui fait l'objet du présent différend, il existe un intérêt juridique pour le Honduras pouvant être mis en cause dans la présente affaire.

37. Mesdames et Messieurs les juges, je vous remercie de votre attention et vous prie, Monsieur le président, de donner la parole au professeur James Crawford.

The PRESIDENT: I thank Professor Marcelo Kohen for his presentation. I now invite Professor James Crawford to the floor.

Mr. CRAWFORD:

HONDURAS' APPLICATION TO INTERVENE AS A PARTY

A. Introduction

1. Mr. President, Members of the Court, in this brief presentation, I want to reflect on Honduras's Application to intervene as a party in the present case between Nicaragua and Colombia. Mr. Bundy has already described our position as "more nuanced", and I want to explain why.

B. A brief history of party intervention before the Court

2. Before doing so, however, I should say a word about the development of the intervention of the State as a party to the main case under Article 62 of your Statute.

3. The drafters of the Permanent Court's Statute were working on a clean sheet of paper and there was no provision for discretionary intervention under what is now Article 62 in either the 1899 or the 1907 Hague Conventions. What the Advisory Committee of Jurists originally had by way of a precedent for intervention concerned the interpretation of multilateral treaties: what is now Article 63 started life as Article 56 of the 1899 Hague Convention, subsequently Article 84 of the revised 1907 Convention[29].

4. Article 62 was thus an innovation, inserted in the Statute on a British initiative. In fact the English text of Article 62 referred to intervention "as a third party": the two language texts were only reconciled, with the deletion of these words, in 1945.

5. The Report of the Advisory Committee of 1920 was clear that intervention under Article 62 was discretionary, that was limited to States having an interest of a juridical character, *un intérêt d'ordre juridique*. The Advisory Committee expressed the view that there was one case:

> "in which the Court cannot refuse a request to be allowed to intervene, that is in questions concerning the interpretation of a Convention in which States, other than the contracting parties, have taken part; . . . When collective treaties are concerned,

[29]Convention for the Pacific Settlement of International Disputes, The Hague, 18 Oct. 1907, 6 League of Nations, *Treaty Series (LNTS)* 54.

> general interpretations can thus be obtained very quickly by the mechanism of Article 63 intervention."[30]

This suggests that the Advisory Committee did not have in mind the situation of a State intervening as a party to the case by reason of its interest in that case. This would logically require that as a party it is bound by the decision to the extent of its intervention.

6. No change was made to Articles 62 and 63 as proposed by the Advisory Committee in 1920. Nor was any change made in 1945, save that the Drafting Committee deleted the words "as a third party" in the English text, saying that this was a drafting amendment which did not "change the sense"[31].

7. Turning from the drafting history to the law, Shabtai Rosenne is sweeping in his statement of the obscurities and uncertainties associated with Article 62. He says, and I quote: "There is broad agreement that both provisions are full of what Article 32 of the Vienna Convention on the Law of Treaties . . . would regard as obscurities and ambiguities." He then goes through a long list of these and concludes "an imposing array of obscurities, ambiguities and lack of concordance between the two language versions of the Statute"[32].

8. The Court may feel that with such an authority expressing such uncertainty, a rather cautious attitude is called for, and so to an extent it is. But intervention is widely practised in legal systems, and residual difficulties with the language of Article 62 can be resolved by the Court.

9. Indeed you did this in considering the Philippines's request to intervene in *Sipadan and Ligitan*, where you adopted a broad and facultative approach to the formula used in Article 62 allowing intervention in respect of reasons which constituted necessary steps to the *dispositif* (*Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Application to Intervene, I.C.J. Reports 2001*, p. 596, para. 47).

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[30]Permanent Court of International Justice, *Procès-verbaux*, 745 (1920) in S. Rosenne, *The Law and Practice of the International Court*, Vol. III — Procedure, (4th ed.), 2006, p. 1442. See, also, *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application for Permission to Intervene, Judgment, I.C.J. Reports 1981*, p. 13, para. 22.

[31]*Documents of the United Nations Conference on International Organization*, 1945, Vol. XIV, p. 676.

[32]"Report on the Draft Statute of an International Court of Justice" referred to in Chapter VII of the Dumbarton Oaks Proposal (Jules Basdevant, Rapporteur) in *Official Comments relating to the Statute of the Proposed International Court of Justice*, 14 *UNCIO* 387, p. 849; Rosenne, *op. cit*., p. 1446.

10. Indeed it is clear that there are cases where intervention as a party is not merely desirable or appropriate but actually legally necessary. Take as an example a case where some third State is a necessary party to the proceedings in the sense of the *Monetary Gold* case, and assuming that the jurisdictional conditions for party intervention are met. Where the legal interests of the third State "would not only be affected by a decision, but would form the very subject-matter of the decision" (*Monetary Gold Removed from Rome in 1943, Preliminary Question, Judgment, I.C.J. Reports 1954,* p. 32), intervention by the third State as a party resolves the difficulty. And indeed it was specifically provided for as a contingency in the *Monetary Gold* case itself, except that the intervention did not happen. I do not suggest that intervention of a party under Article 62 is limited to the *Monetary Gold* situation, but I do say it is a clear example of a case where intervention as a party would be appropriate.

11. Furthermore the treatment of intervention as a party in the Court's case law, despite the fact that intervention as a party has never yet been allowed, does enable us to say some things with a measure of assurance. I will mention five points.

12. First, unlike non-party intervention, a State which intervenes as a party must have a relevant jurisdictional link with both the original parties to the case.

13. Secondly, intervention is an incidental procedure. As the Court said in the *Haya de la Torre* case:

> "every intervention is incidental to the proceedings in a case; it follows that a declaration filed as an intervention only acquires that character, in law, if it actually relates to the subject-matter of the pending proceedings" (*Haya de la Torre, Judgment, I.C.J. Reports 1951*, p. 76).

14. Thirdly, and as a corollary, intervention may not be used to tack on a new case, distinct from the case that exists between the original parties. As this Court said in regard to Italy's requested intervention in the *Libya/Malta* case:

> "if Italy were permitted to intervene in the present proceedings in order to pursue the course it has itself indicated it wishes to pursue, the Court would be called upon, in order to give effect to the intervention, to determine a dispute, between Italy and one or both of the principal Parties" (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene, Judgment, I.C.J. Reports 1984*, p. 20, para. 31).

The Court reached a similar conclusion in the *Libya/Tunisia* case:

> "The findings at which it arrives and the reasoning by which it reaches those findings in the case between Tunisia and Libya will therefore inevitably be directed exclusively to the matters submitted to the Court in the Special Agreement concluded between those States . . . It follows that no conclusions or inferences may legitimately be drawn from those findings or that reasoning with respect to rights or claims of other States not parties to the case." (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application for Permission to Intervene, Judgment, I.C.J. Reports 1981*, p. 20, para. 35.)

15. These dicta all reflect the basic requirement stated by the Chamber in 1990 when Nicaragua sought to intervene in *El Salvador/Honduras*. The Chamber stressed that: "An incidental proceeding cannot be one which transforms that case into a different case with different parties." (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment, I.C.J. Reports 1990*, p. 134, para. 98.)

16. Fourthly, although a successful intervener becomes a party to the original case, and as such has important procedural rights — nonetheless it remains a case between the original parties, to which the intervener is joined as a party. The intervener can, within the framework of the Rules and the Court's procedural orders, express its views on the matter or matters on which it is permitted to intervene. It is bound by the decision of the Court on the substance of the case — to the extent of its intervention. That must mean that remedies granted in the original case — e.g., by way of declaration — can be made to apply to the intervener as a party, and that the intervener can be the beneficiary of remedies granted against an original party. On the other hand, if the intervener wishes to seek remedies of its own, outside the remedial framework of the main case, it should do so in separate proceedings — proceedings which it will, by definition, be able to bring[33].

17. Fifthly, it seems undisputed that — just as with non-party intervention — an intervener as a party may be authorized to intervene on certain issues only, in which case the rights to be heard, etc., associated with the intervention will be correspondingly limited. This of course is what the Chamber did in *El Salvador/Honduras*, in the context of what it held to be a non-party intervention by Nicaragua[34].

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[33]See, e.g., *Haya de la Torre, Judgment, I.C.J. Reports 1951*, p. 76. See, also, Rosenne, *op. cit.*, p. 1465.

[34]*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment,,I.C.J. Reports 1990*, pp. 135-136, paras. 102-103.

18. A point which is less clear is whether the same test of legal interest applies to requests to intervene as a party as in the case of non-party intervention. Of course Article 62 makes no such distinction — but then the underlying distinction between party and non-party intervention was not present to the minds of the drafters of Article 62; it is a creation of your case law.

19. Even if the answer to that question is yes — that there is a single test for legal interest — the point remains that the application of that test to the facts of a given case will necessarily depend on what is sought by the intervening State[35]. The consent or objection to the intervention by the original parties is relevant but not decisive: intervention is available under the Statute, and it is the Court — not the parties — which decides on the application to intervene: this is emphasized by Article 62, paragraph 2.

20. As you said in the *Libya/Malta* case:

> "while the Court attaches great importance to the element of the will of States . . . it is worth recalling that under paragraph 2 of Article 62, 'it shall be for the Court to decide' upon a request for permission to intervene, and the opposition of the parties to a case is, though very important, no more than one element to be taken into account by the Court" (*Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application to Intervene, Judgment, I.C.J. Reports 1984*, p. 28, para. 46).

21. Moreover, you have said, the Court has no general discretion to qualify or disqualify an intervener "for reasons simply of policy". If the various conditions are met, permission to intervene should normally follow (*ibid.*, p. 12, para. 17). In this sense, intervention is an important aspect of your judicial process under the Statute; it distinguishes this Court in an additional way from arbitral tribunals.

C. The positions of the Parties and of Honduras in the present case

22. Mr. President, Members of the Court, I turn to consider the position of the Parties, and of Honduras, in the present case.

23. In its Application, Honduras took the position that the Court fixed the endpoint of its boundary with Nicaragua in the 2007 Judgment and, thus, only determined a part of the maritime boundary (Application, para. 7). Sir Michael elaborated on this point by noting that, in its 2007 Judgment the Court did not indicate the precise point where the jurisdiction of a third State is

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[35] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application to Intervene, Judgment, I.C.J. Reports 1981*, p. 17, para. 29.

reached [CR 2010/18, p. 38, para. 25], or even the location of the area where the rights of third States may be affected [*ibid.*, p. 39, para. 27].

24. Honduras contended that, in the present case, Nicaragua continues to claim rights which extend beyond the terminal point fixed by the Court (Application, para. 9). So, I interpolate, does Colombia. It is in this context that Honduras refers to the "incertitude" that it says exists regarding the fixing of maritime boundaries with Nicaragua north of the 15° parallel and east of the 82nd meridian, and it adds that, if the 1986 Treaty concluded with Colombia settled definitively the question of the maritime limits of those two countries, "a difference over delimitation subsists between Honduras and Nicaragua" (Application, paras. 13 and 18).

25. It is in this context that Honduras seeks to intervene as a party. As the Honduran Application states (para. 22), it wishes to attach to the pending case the completion of the maritime frontier between Honduras and Nicaragua, on the one hand, and the tripoint between Honduras, Nicaragua and Colombia, on the other, something the Court did not decide in 2007. In his presentation on Monday, Sir Michael left the tripoint floating by simply noting that the 2007 Judgment does not establish that there cannot be a maritime boundary between Nicaragua and Honduras to the south of the bisector [CR 2010/18, p. 40, para. 31]. Honduras requests the Court to determine the segment of the maritime boundary starting from the terminal point on the bisector fixed in 2007 and running to the tripoint.

26. For its part, Nicaragua's Written Observations maintain that the 2007 Judgment settled the entire Caribbean Sea boundary between Nicaragua and Honduras (with the exception of a very small area in the territorial sea that is irrelevant for present purposes), and that the Court did not fix a terminus on the bisector line (Written Observations of Nicaragua, paras. 3, 16 and 19). Nicaragua also says that there is no tripoint between the three States (*ibid.*, para. 11). So there is considerable opposition between the positions, and the question for present purposes is whether the Court may decide in favour of one position or the other; it is not a question of the merits of the case itself.

27. In its Written Observations, Colombia has considered it appropriate to leave Honduras's request to the Court's discretion in accordance with the power granted under Article 62, paragraph 2, of the Statute. I will revert to this shortly. Meanwhile you have heard Mr. Bundy

setting out in more detail Colombia's position with respect to the area identified by Honduras as relevant and the rights claimed there. I will not repeat what he has said.

D. Honduras's claim to intervene as a party in the present case: issues for the Court under Article 62, paragraph 2

28. Mr. President, Members of the Court, against that background of the law and the positions of the Parties, I turn to consider Honduras's claim to intervene and set out certain issues which the Court will need to consider, with respect. As Sir Michael said on Monday, this is the first time that there has been an express application under Article 62 to intervene as a party[36], though in the course of the proceedings in the *El Salvador/Honduras* case Nicaragua did offer to be bound by the Chamber's decision if allowed to intervene on the delimitation[37].

29. A number of aspects of Honduras's request to intervene as a party either relate to elements that concern only the bilateral maritime boundary between Honduras and Nicaragua or the meaning, scope and *res judicata* effect of the 2007 Judgment. At this stage of the proceedings, Colombia does not consider that it is appropriate to express views on the meaning or scope of the 2007 Judgment. With respect to the Judgment's effect, the governing provision is Article 59 of the Statute, in accordance with which the Judgment has no binding effect on Colombia. That is why Colombia's Written Observations indicated that the matter of intervention in accordance with the Statute, should be left to the Court to decide. The question there is whether the object and purpose of Honduras's request in truth relates to intervention under Article 62 in the main case between Nicaragua and Colombia or whether it relates to another dispute not directly at issue in the main case, and correspondingly whether Honduras's principal request should be granted in whole or in part or refused.

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[36]CR 2010/18, p. 31, para. 2 (Wood).

[37]*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment, I.C.J. Reports 1990*, p. 131, para. 91.

30. To repeat, Colombia has considered it appropriate to leave this request to your discretion in accordance with Article 62, paragraph 2. In these circumstances, I will not attempt, at this stage, to provide a complete appraisal of Honduras's Application, still less to draw definitive conclusions. I would simply make the following points which the Court may take into account in exercising its powers.

31. First, as to jurisdiction, that problem does not arise here, since all three States are parties to the Pact of Bogotá.

32. Secondly, as to intervention as an incidental procedure, an incident to the main case, there are factors pointing both ways. Looked at globally, in the context of the dispute as a whole, Honduras's intervention is incidental. Looked at in its own terms, it might seem less clear, although Honduras's claims do seem to "relate[] to the subject-matter of the pending proceedings", in terms of the *Haya de la Torre* case (*Haya de la Torre, Judgment, I.C.J. Reports 1951*, p. 76).

33. Thirdly, Honduras's intervention may be seen to relate to the existing dispute between Colombia and Nicaragua, though the gist of its claims is against Nicaragua rather than Colombia.

34. Fourthly, the balance between the original claims of the parties *inter se* and the claims sought to be introduced by Honduras requires consideration. The question may be posed in remedial terms: Honduras seeks finality, but the question is whether the intervener wishes to seek remedies of its own, outside the remedial framework of the main case. That is a matter of appreciation for the Court.

35. Fifthly, there is the question whether Honduras may be authorized to intervene on certain issues only — that is another matter of appreciation.

36. As to the existence of an interest of a legal nature, Mr. Bundy has shown that this exists here, in a way which is surely sufficient for the purposes of Article 62, having regard to the inherent contingency in appreciating in advance of a judicial decision which interest "may" be affected by it.

37. On the other hand, there are perhaps special circumstances in this case which need to be assessed when deciding the issue under Article 62 of party intervention. One is the fact that on closely associated issues, Honduras is bound by the *res judicata* of 2007, however far it may extend, whereas Colombia, by virtue of Article 59 of the Statute, is not bound by that Judgment.

E. Conclusion

38. Mr. President, Members of the Court, at the risk of inspiring a further question from Judge Donoghue, I do not propose to go further at this stage. Colombia will listen attentively — as I am sure will the Court — to Honduras's presentation of these various factors tomorrow.

39. Nicaragua, for its part, denies outright that Honduras has any interest of a legal nature in the area the subject of the dispute between Nicaragua and Colombia — or in any part of that area. If that is right, there can be no intervention by Honduras whether as a party or otherwise. But my colleague Mr. Bundy has shown it is not right and, that as a minimum, Honduras qualifies to intervene as a non-party under Article 62. It is for the Court to go further, if it so decides.

Mr. President, Members of the Court, that concludes my presentation, and Colombia's first round oral argument.

The PRESIDENT: I thank Professor James Crawford for his presentation. That brings to an end the first round of oral argument on Honduras's Application for permission to intervene. I wish to thank Honduras and the Parties for the statements presented in the course of this first round of oral argument.

The Court will meet again tomorrow, from 3 p.m. to 4 p.m. to hear the second round of oral argument of Honduras.

Thank you. The Court is adjourned.

The Court rose at 12.45 p.m.