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CR 2015/22

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2015

Public sitting

held on Monday 28 September 2015, at 10 a.m., at the Peace Palace,

President Abraham presiding,

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

Preliminary Objections

VERBATIM RECORD

ANNÉE 2015

Audience publique

tenue le lundi 28 septembre 2015, à 10 heures, au Palais de la Paix,

sous la présidence de M. Abraham, président,

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

Exceptions préliminaires

COMPTE RENDU

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

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

M. Couvreur, greffier

The Government of Nicaragua is represented by:

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

as Agent and Counsel;

Mr. Vaughan Lowe, Q.C., member of the English Bar, Emeritus Professor of International Law, Oxford University, member of the Institut de droit international,

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

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

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

as Counsel and Advocates;

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

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

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

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

Ms Claudia Loza Obregon, First Secretary, Embassy of Nicaragua in the Kingdom of the Netherlands,

Mr. Benjamin Samson, Ph.D. Candidate, Centre de droit international de Nanterre (CEDIN), University Paris Ouest, Nanterre-La Defense,

Ms Gimena González,

as Assistant Counsel;

Ms Sherly Noguera de Argüello, Consul General of the Republic of Nicaragua,

as Administrator.

Le Gouvernement du Nicaragua est représenté par :

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

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M. César Vega Masís, vice-ministre des affaires étrangères, directeur des affaires juridiques, de la souveraineté et du territoire au ministère des affaires étrangères,

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

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comme conseils adjoints ;

Mme Sherly Noguera de Argüello, consul général de la République du Nicaragua,

comme administrateur.

The Government of Colombia is represented by:

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H.E. Mr. Francisco Echeverri Lara, Vice Minister of Multilateral Affairs, Ministry of Foreign Affairs,

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as Agent;

H.E. Mr. Manuel José Cepeda Espinosa, former President of the Constitutional Court of Colombia, former Permanent Delegate of Colombia to UNESCO and former Ambassador of Colombia to the Helvetic Confederation,

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

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

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H.E. Mr. Andelfo García González, Ambassador of the Republic of Colombia to the Kingdom of Thailand, Professor of International Law, former Deputy Minister for Foreign Affairs,

Ms Andrea Jiménez Herrera, Counsellor, Embassy of the Republic of Colombia in the Kingdom of the Netherlands,

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S. Exc. M. Francisco Echeverri Lara, vice-ministre des affaires multilatérales, ministère des affaires étrangères,

comme autorités nationales ;

S. Exc. M. Carlos Gustavo Arrieta Padilla, ancien juge au Conseil d'Etat de la Colombie, ancien *Attorney General* de la Colombie et ancien ambassadeur de la Colombie auprès du Royaume des Pays-Bas,

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Mme Andrea Jiménez Herrera, conseiller, ambassade de la République de Colombie au Royaume des Pays-Bas,

Ms Lucía Solano Ramírez, Second Secretary, Embassy of the Republic of Colombia in the Kingdom of the Netherlands,

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Mr. Giovanny Andrés Vega Barbosa, Group of Affairs before the ICJ, Ministry of Foreign Affairs,

Ms Ana María Durán López, Group of Affairs before the ICJ, Ministry of Foreign Affairs,

Mr. Camilo Alberto Gómez Niño, Group of Affairs before the ICJ, Ministry of Foreign Affairs,

Mr. Juan David Veloza Chará, Third Secretary, Group of Affairs before the ICJ, Ministry of Foreign Affairs,

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Mr. Rear Admiral Luís Hernán Espejo, National Navy of Colombia,

CN William Pedroza, International Affairs Bureau, National Navy of Colombia,

CF Hermann León, National Maritime Authority (DIMAR), National Navy of Colombia,

Mr. Scott Edmonds, Cartographer, International Mapping,

Mr. Thomas Frogh, Cartographer, International Mapping,

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Mr. Eran Sthoeger, LL.M., New York University School of Law,

Mr. Renato Raymundo Treves, LL.M., Associate, Curtis, Mallet-Prevost, Colt & Mosle LLP Milan,

Mr. Lorenzo Palestini, Ph.D Candidate, Graduate Institute of International and Development Studies, Geneva,

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M. Giovanny Andrés Vega Barbosa, division des affaires portées devant la CIJ, ministère des affaires étrangères,

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comme conseillers juridiques ;

le contre-amiral Luis Hernán Espejo, marine nationale de Colombie,

le capitaine ***de vaisseau*** William Pedroza, bureau des affaires internationales, marine nationale de Colombie,

le capitaine de frégate Hermann León, autorité maritime nationale (DIMAR), marine nationale de Colombie,

M. Scott Edmonds, cartographe, International Mapping,

M. Thomas Frogh, cartographe, International Mapping,

comme conseillers techniques ;

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M. Lorenzo Palestini, doctorant, Institut de hautes études internationales et du développement, Genève,

comme assistants juridiques.

Le PRESIDENT : Veuillez vous asseoir. L'audience est ouverte.

La Cour se réunit aujourd'hui pour entendre les Parties en leurs plaidoiries sur les exceptions préliminaires soulevées par la Colombie en l'affaire relative à des *Violations de droits souverains et d'espaces maritimes dans la mer des Caraïbes (Nicaragua c. Colombie)*. Le juge Crawford s'est récusé de l'affaire, conformément au paragraphe 2 de l'article 17 du Statut de la Cour.

J'indique par ailleurs que, pour des raisons dont il m'a dûment fait part, le juge Tomka n'est pas en mesure de siéger aujourd'hui.

Je relève que la Cour ne comptant sur son siège aucun juge de la nationalité des Parties, chacune d'elles s'est prévalue de la faculté que lui confère le paragraphe 2 de l'article 31 du Statut de désigner un juge *ad hoc*. Le Nicaragua avait initialement désigné M. Gilbert Guillaume ; celui-ci ayant démissionné de ses fonctions le 8 septembre 2015, le Nicaragua a désigné M. Yves Daudet. La Colombie a quant à elle désigné M. David Caron.

L'article 20 du Statut dispose que «[t]out membre de la Cour doit, avant d'entrer en fonction, prendre l'engagement solennel d'exercer ses attributions en pleine impartialité et en toute conscience». Et en vertu du paragraphe 6 de l'article 31 du Statut, cette disposition s'applique également aux juges *ad hoc*.

Bien que M. Daudet ait été désigné juge *ad hoc* en d'autres affaires dans lesquelles il a fait des déclarations solennelles, il lui faut, conformément au paragraphe 3 de l'article 8 du Règlement de la Cour, en faire une nouvelle en la présente affaire.

Avant de les inviter à faire leur déclaration solennelle, je dirai quelques mots de la carrière et des qualifications de M. Daudet et de M. Caron.

De nationalité française, M. Daudet est docteur en droit et agrégé de droit public et de science politique. Il a occupé divers postes d'enseignement et de recherche en France métropolitaine, en Martinique, à l'île Maurice, au Maroc et en Côte d'Ivoire. Il a été membre de la délégation française au groupe d'experts, puis à la Conférence des Nations Unies sur le transfert international de technologie. M. Daudet est secrétaire général de l'Académie de droit international de La Haye et professeur émérite de l'Université Paris I (Panthéon-Sorbonne), dont il a été premier vice-président. Il a été désigné pour siéger en qualité de juge *ad hoc* dans l'affaire du *Différend*

frontalier (Burkina Faso/Niger) et dans l'affaire relative à l'*Obligation de négocier un accès à l'océan Pacifique (Bolivie c. Chili).* M. Daudet est par ailleurs membre du comité de rédaction de l'*Annuaire français de droit international*, et membre de la Société française pour le droit international et de la branche française de l'Association de droit international/International Law Association. Il a publié de nombreux ouvrages et articles dans différents domaines du droit international.

De nationalité américaine, M. Caron est titulaire d'un doctorat en droit international de l'Université de Leyde et diplômé de l'Académie de droit international de La Haye. M. Caron est doyen et professeur de la *Dickson Poon School of Law du Kings's College London* depuis 2013. Il a également été conférencier, directeur de recherche et directeur d'études auprès de l'Académie de droit international de La Haye. M. Caron, qui a été président de l'*American Society of International Law* de 2010 à 2012, est membre de l'Institut de droit international et, depuis 1991 (avec une interruption de trois années entre 2005 et 2008), membre du comité de rédaction de l'*American Journal of International Law*. Il a également été président de l'Institute for Transnational Arbitration et de la section de droit international de l'*American Association of Law Schools*, membre du conseil exécutif de l'*American Bar Association*, section de droit international, membre élu de l'*American Law Institute*, codirecteur de l'Institut du droit de la mer, et membre de divers comités et groupes d'études de l'*International Law Association*. M. Caron exerce par ailleurs les fonctions d'arbitre, de conseil principal et d'expert dans des arbitrages internationaux. Il est spécialisé dans les questions maritimes et environnementales.

J'invite maintenant MM. Daudet et Caron à prendre l'engagement solennel prescrit par l'article 20 du Statut et je demande à toutes les personnes présentes à l'audience de bien vouloir se lever. Monsieur Daudet.

M. DAUDET :

«Je déclare solennellement que je remplirai mes devoirs et exercerai mes attributions de juge en tout honneur et dévouement, en pleine et parfaite impartialité et en toute conscience.»

Le PRESIDENT : Je vous remercie, Monsieur Daudet. Monsieur Caron.

M. CARON :

"I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously."

Le PRESIDENT : Je vous remercie, Monsieur Caron. Veuillez vous asseoir. La Cour prend acte des déclarations solennelles faites par MM. Daudet et Caron.

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Je rappellerai à présent les principales étapes de la procédure en l'espèce.

Le 26 novembre 2013, le Nicaragua a introduit une instance contre la Colombie au sujet d'un différend relatif «aux violations des droits souverains et des espaces maritimes du Nicaragua qui lui ont été reconnus par la Cour dans son arrêt du 19 novembre 2012 en l'affaire du *Différend territorial et maritime (Nicaragua c. Colombie)*, ainsi qu'à la menace de la Colombie de recourir à la force pour commettre ces violations».

Pour fonder la compétence de la Cour, le Nicaragua invoque l'article XXXI du traité américain de règlement pacifique signé le 30 avril 1948, dénommé officiellement «pacte de Bogotá». Il souligne que le 27 novembre 2012, la Colombie a procédé à la dénonciation du pacte, dénonciation qui, en application de l'article LVI de celui-ci, ne devait prendre effet, selon le Nicaragua, qu'au terme d'un an, le pacte cessant ainsi de produire ses effets à l'égard de la Colombie après le 27 novembre 2013. Le Nicaragua soutient que «[d]e surcroît et à titre subsidiaire, la compétence de la Cour réside dans le pouvoir qui est le sien de se prononcer sur les mesures requises par ses arrêts».

Par ordonnance du 3 février 2014, la Cour a fixé au 3 octobre 2014 la date d'expiration du délai pour le dépôt du mémoire du Nicaragua et au 3 juin 2015 la date d'expiration du délai pour le dépôt du contre-mémoire de la Colombie. Le Nicaragua a déposé son mémoire dans le délai prescrit.

Le 19 décembre 2014, la Colombie, se référant à l'article 79 du Règlement, a soulevé certaines exceptions préliminaires d'incompétence de la Cour. En conséquence, par ordonnance du

19 décembre 2014, le président, considérant qu'en vertu des dispositions du paragraphe 5 de l'article 79 du Règlement la procédure sur le fond était suspendue, et tenant dûment compte de l'instruction de procédure V, a fixé au 20 avril 2015 la date d'expiration du délai dans lequel le Nicaragua pourrait présenter un exposé écrit contenant ses observations et conclusions sur les exceptions préliminaires soulevées par la Colombie. Le Nicaragua a déposé un tel exposé dans le délai ainsi fixé, et l'affaire s'est ainsi trouvée en état pour ce qui est des exceptions préliminaires.

*

Conformément au paragraphe 2 de l'article 53 de son Règlement, la Cour, après s'être renseignée auprès des Parties, a décidé de rendre accessibles au public, à l'ouverture de la procédure orale, des exemplaires des exceptions préliminaires et de l'exposé écrit sur ces exceptions. En outre, conformément à la pratique de la Cour, l'ensemble de ces documents sera placé dès aujourd'hui sur le site Internet de la Cour.

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Je constate la présence à l'audience des agents, conseils et avocats des deux Parties. Conformément aux dispositions relatives à l'organisation de la procédure arrêtées par la Cour, les audiences comprendront un premier et un second tours de plaidoiries. Le premier tour de plaidoiries débute aujourd'hui et se terminera le mardi 29 septembre. Chaque Partie disposera d'une séance de trois heures. Le second tour de plaidoiries s'ouvrira le mercredi 30 septembre et s'achèvera le vendredi 2 octobre. Chaque Partie disposera d'une séance de deux heures.

*

La Colombie, qui sera entendue en premier, pourra aujourd'hui, si besoin, déborder un peu au-delà de 13 heures, compte tenu du temps consacré à ma déclaration liminaire et aux déclarations

solennelles des juges *ad hoc*. Je donne à présent la parole à S. Exc. M. Arrieta Padilla, agent de la Colombie. Monsieur l'agent, vous avez la parole.

Mr. ARRIETA:

1. Mr. President, distinguished Members of the Court, it is a great honour for me to address the principal judicial organ of the United Nations, as Agent of the Republic of Colombia. My delegation's task is to demonstrate that there is no jurisdiction in this case. Colombia does this with the utmost respect, convinced that the Court will appreciate that a well-founded objection to jurisdiction is an affirmation of confidence in the Court and in international law; but also convinced that an invocation of the Court in circumstances in which there is manifestly no basis for jurisdiction and no consent to jurisdiction is an abuse of international law and an abuse of the Court itself.

2. I shall not comment on Nicaragua's propensity to resort to the Court, or about its apparent policy to use it as a first instance to solve matters with most of its neighbours that could have been resolved by means of negotiation; but I would like simply to note that, on this particular occasion, it has done so without any valid basis for jurisdiction whatsoever.

3. We agree with the proposition that "[r]ecourse to judicial settlement of legal disputes, particularly referral to the International Court of Justice, should not be considered an unfriendly act between States"[1], but we believe that the law-abiding status of a State is not measured in terms of how many times it goes to court, but in terms of its good neighbourliness and its compliance with international law. Colombia's view, like that of the region, is that, as a matter of principle, judicial settlement should only be resorted to when attempts at negotiation and other forms of direct dialogue have been exhausted. Unfortunately, that has not occurred in this case.

4. Mr. President, I will not conceal my Government's and my countrymen's disappointment with the maritime delimitation effected in the 2012 Judgment. It was, and continues to be, a source of consternation, not only politically, but most painfully, from a human and social perspective. This is particularly so for the inhabitants of the archipelago and especially for the Colombian

[1]Manila Declaration on the Peaceful Settlement of International Disputes. Approved by the United Nations General Assembly. Resolution No. 37/10 of 15 November 1982.

Raizal people, whose symbiotic relationship with the sea, in which Nicaragua never had the slightest presence, dates back centuries and who have always seen those areas as their ancestral legacy and their birthright. The sketch-map included in the Court's Judgment depicting the maritime delimitation gave rise to serious concerns that the San Andrés Archipelago, which had always been viewed as a national unit, had somehow been split apart, and that the local inhabitants, who depend on the linkages between their islands for their living, had been deprived of access to their traditional fishing grounds and, so, to a fundamental part of their cultural heritage. In particular, the image of certain of Colombia's islands as enclaves had a powerful psychological effect and was resented by all Colombians.

5. But, notwithstanding, Colombia is absolutely committed to the rule of law, both internally and externally. This is evidenced by our presence here today, to argue these preliminary objections.

6. Mr. President, Members of the Court, the Government of Colombia does not take lightly Nicaragua's grave accusations that our country has threatened to use force, or that Colombia has failed to comply with your 2012 decision. We reject those accusations and, at the same time, we are convinced that the Court lacks jurisdiction to entertain them, for the reasons which will be set out in our preliminary objections, which will be further developed in these hearings. Yet, because once preliminary objections have been raised the only depiction of events before the Court is that presented by the Applicant, a few brief remarks correcting Nicaragua's most serious misrepresentations may be in order.

7. The Court will be relieved to know that the reality in the area could not differ more starkly from Nicaragua's account in its Application and Memorial. To date, there has not been one single episode that could even come close to being construed as a breach of Colombia's international obligations, or as a threat or use of force in contravention of the United Nations Charter. It is striking, really, to see how Nicaragua tries to portray itself as a victim.

8. Mr. President, Nicaragua's Application came as a complete surprise and, quite frankly, was very frustrating for Colombia, given the peaceful situation at sea and the Parties' repeated statements that they were intent on negotiating a treaty to implement the Judgment. Colombia is

convinced that there was not and is not a dispute between the Parties, much***, much*** less one that could possibly form the basis of a case before this honourable institution.

9. Since November 2012, Colombia has been urging the negotiation and conclusion of a treaty with Nicaragua, and has done everything necessary to incorporate the Court's decision into its legal system. In the same spirit, the Government filed a constitutional petition that ended with a decision by our Constitutional Court, in which it ruled unambiguously that, pursuant to Article 94 of the Charter of the United Nations, judgments rendered by this International Court of Justice are binding and cannot be disregarded[2].

10. Colombia's actions in the archipelago since November 2012 have had the purpose of fulfilling its obligations in the area, protecting its archipelago and its people according to international law. Not so Nicaragua. During the past ***two*** and a half years it has been unable to control transnational crime in the area, it has failed to provide aid to local and international navigation in the immediate vicinity of the archipelago, and it has tolerated some people's fishing practices, which have been undertaken using inhumane conditions and predatory methods which threaten to break the delicate environmental balance of the San Andrés Archipelago.

11. Colombia has always believed that the post-judgment adjudication situation can be addressed through good faith negotiations between the parties involved. It also believes that those negotiations can lead to a treaty that implements the 2012 Judgment. As will be shown in these proceedings, after the initial shock of the 2012 decision, all the actions of the Colombian authorities have always been oriented toward the application of the decision and we have tried to address those matters in a friendly and constructive manner.

12. Mr. President, as explained, Colombia's denunciation of the Pact of Bogotá on 27 November had immediate effect with respect to the initiation of new procedures against Colombia. Notwithstanding, Nicaragua filed its Application one year later, on 26 November 2013. The timing of its Application was artificial and cynical. Not only was there no dispute at all at that time, but Nicaragua had not even hinted to Colombia that they believed we were violating their maritime spaces or threatening them with the use of force. Rather, Nicaragua files its Application

[2]Preliminary Objections of Colombia (POC), Vol. II, Ann. 4, para. 9.10.

on what it thought was the very last day, and, therefore, manufactured a dispute where none really existed.

13. As noted by Colombia in its preliminary objections, Nicaragua's case essentially concerns Colombia's compliance with the Judgment of 19 November 2012. This is clear from the submissions set forth in the Application. Nevertheless, in line with its habit of evading the consequences of weak arguments by changing its submissions throughout the proceedings, Nicaragua has sought in its Memorial to distance itself from its initial formulation. But Nicaragua has failed to change the true nature of the case. Indeed, the substance of its action is belied by two fundamental facts: first, Colombia's recognition that the Judgment is binding, as confirmed by our Constitutional Court; and, second, Colombia's continued availability and openness to dialogue has been constant.

14. Now, Mr. President, distinguished Members of the Court: it is important to explain what was the actual situation as of the date of Nicaragua's Application?

— First, there were no complaints at all, of any kind from Nicaragua regarding Colombia's conduct prior to the lodging of its Application;

— second, President Ortega himself had confirmed as much, and had even credited Colombia's President with the fact that the situation between the two countries at sea was calm and peaceful;

— third, Nicaragua's senior military leaders has said that there had been no incidents at all at sea; on the contrary, they repeatedly insisted that what was happening was a permanent collaboration between the navies; and

— fourth, the Heads of State of both countries were on record as repeatedly saying that the way to deal with the maritime situation in the light of the Court's 2012 ***decision*** was by means of bilateral negotiations in order to conclude a treaty on a number of important matters. Those include, among others, the protection of the historical fishing rights of the population, environmental concerns including the all-important Seaflower Reserve, and the fight against transnational crime, boundaries and other matters.

15. Now Mr. President, Members of the Court, pursuant to Article 79, paragraph 7, of the Rules of Court, and Practice Direction VI, the statements and evidence that we will be presenting at

these hearings will be confined to those matters that are relevant to the preliminary objections raised by Colombia. We will not be entering into questions pertaining to the merits of the case and hope that everyone will follow that rule.

16. Mr. President, Members of the Court, allow me now to outline the sequence of Colombia's first round of presentations. You can also find the order of these presentations under tab 1 of the judges' folders.

— To begin with, Sir Michael Wood will explain why the Court lacks jurisdiction under the Pact of Bogotá *ratione temporis*, which is Colombia's first preliminary objection;

— next, Mr. Rodman Bundy will present the facts which Colombia considers relevant for the understanding of my country's second and third preliminary objections;

— following Mr. Bundy, Professor Michael Reisman will elaborate on Colombia's second objection: namely, that on the date of the filing of the Application, there was no dispute between Nicaragua and Colombia with respect to the claims contained in the Application;

— Mr. Eduardo Valencia-Ospina will then explain why, even if Article 31 of the Pact of Bogotá was deemed to constitute a valid basis of jurisdiction, the precondition in its Article II had not been fulfilled on the date of the filing of the Application, which is our third preliminary objection;

— and finally, Professor Tullio Treves will develop Colombia's fourth and fifth preliminary objections, according to which the Court has no inherent power or post-adjudicative jurisdiction upon which Nicaragua can rely.

17. Mr. President, Members of the Court, I thank you for your attention and I would be grateful if you would be so kind as to give the floor to Sir Michael Wood.

Le PRESIDENT: Je vous remercie, Monsieur l'Agent. Je donne maintenant la parole à Sir Michael Wood.

Sir Michael WOOD:

FIRST PRELIMINARY OBJECTION: ARTICLE LVI OF THE PACT OF BOGOTÁ

1. Mr. President, Members of the Court, it is an honour to appear before you, and it is a special honour to do so on behalf of the Republic of Colombia.

2. As the Agent has just explained, I shall deal with Colombia's first preliminary objection: that the Court has no jurisdiction under the Pact of Bogotá because Nicaragua's Application was lodged after the transmission of Colombia's notification of denunciation. This, we say, follows clearly from the second paragraph of Article LVI of the Pact, a provision which Nicaragua largely ignores.

3. Mr. President, Members of the Court, for convenience, the full text of the Pact of Bogotá, in the four authentic languages (English, French, Portuguese and Spanish) is at the back of your folders, at tabs 34 to 37. And Article LVI is also at tab 2, and is now, I hope, appearing on the screen.

4. Article LVI reads:

> "The present Treaty shall remain in force indefinitely, but may be denounced upon one year's notice, at the end of which period it shall cease to be in force with respect to the state denouncing it, but shall continue in force for the remaining signatories. The denunciation shall be addressed to the Pan American Union, which shall transmit it to the other Contracting Parties.
>
> *The denunciation shall have no effect with respect to pending procedures initiated prior to the transmission of the particular notification.*"

5. Mr. President, it is, of course, for the Court to determine whether it has jurisdiction, as is clear from Article XXXIII of the Pact of Bogotá and was highlighted in your recent Judgment in *Bolivia* v. *Chile*[3]. The difference between the Parties turns on the interpretation of Article LVI, and in particular on the interpretation of its second paragraph: "The denunciation shall have no effect with respect to pending procedures initiated *prior to the transmission* of the particular notification."

6. That language could not be clearer — and it is clear in all four authentic languages: "procedures initiated prior to the transmission of the . . . notification", *not* "procedures initiated

[3] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection*, Judgment of 24 September 2015, para. 38.

prior to the date when the Treaty ceased to be in force for the denouncing State". The application of the general rule of treaty interpretation reflected in Article 31 of the Vienna Convention on the Law of Treaties to Article LVI, taken as a whole**,** leads to only one conclusion***:*** procedures that a State may seek to initiate after the transmission of the notification are affected by the denunciation.

7. And this result is by no means unusual or surprising. When negotiating States intend that jurisdiction remain for proceedings initiated between notice and the effective date, treaty practice refers to the later date for jurisdictional purposes in clear and unambiguous terms. For example, Article 40 (2) of the European Convention on State Immunity[4] and Article 58 (2) of the European Convention on Human Rights[5] make express reference to the date on which denunciation takes effect.

8. Nicaragua says that it "will demonstrate that Colombia's strained reading of Article LVI of the Pact of Bogotá militates against the object and purpose of the Pact (the settlement of disputes efficiently and definitively), the principle of good faith and does not conform to the rules of treaty interpretation". It is striking, Mr. President, that the rules of treaty interpretation take third place in Nicaragua's thinking; the absence of any consideration of the "ordinary meaning to be given to the terms of the treaty" is remarkable. The rules of treaty interpretation are almost an afterthought, and this is confirmed when one reads Chapter 2 of Nicaragua's Written Statement. The conclusion urged upon you by Nicaragua results from a misapplication of the accepted rules of treaty interpretation. It ignores the actual wording of the second paragraph of Article LVI; it is

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[4]European Convention on State Immunity, Art. 40:

"(1) Any Contracting State may, in so far as it is concerned, denounce this Convention by means of notification addressed to the Secretary General of the Council of Europe. (2) Such denunciation shall take effect six months after the date of receipt by the Secretary General of such notification. This Convention shall, however, continue to apply to proceedings introduced before the date on which the denunciation takes effect, and to judgments given in such proceedings."

[5]European Convention on Human Right, Art. 58 (1) and (2):

"1. A High Contracting Party may denounce the present Convention only after the expiry of five years from the date on which it became a party to it and after six months' notice contained in a notification addressed to the Secretary General of the Council of Europe, who shall inform the other High Contracting Parties.

2. Such a denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective."

dismissive of the *a contrario* argument put forward by Colombia; and it deprives the second paragraph of any *effet utile.*

9. Mr. President, to set the scene, I shall first say a few words about the Pact of Bogotá in general, as well as about the practice of the parties to the Pact in the matter of denunciation. I shall then address the central issue before you, the interpretation of Article LVI of the Pact in accordance with the general rule of interpretation set forth in Article 31 of the Vienna Convention. And finally I shall touch briefly on the *travaux préparatoires* of Article LVI.

The Pact of Bogotá: General

10. Mr. President, first a few words about the Pact of Bogotá. I am, of course, aware that Members of the Court are very familiar with this instrument. I have noted, for example, Judge Cançado Trindade's account of the Pact in his separate opinion last week[6].

11. The Pact was concluded at Bogotá in 1948, during the Ninth International Conference of the American States. It was undoubtedly a pioneering text. It was the culmination of a series of agreements among the countries of the Americas, and the first to be open potentially to all of them. The unique character of the Pact was plain to the negotiators in 1948. So far as concerns dispute settlement, it went much further than the Charter of the Organization of American States (OAS), which itself only contained very general provisions.

12. The Pact contained far-reaching provisions whereby the parties consent to compulsory dispute settlement. At the same time, however, the American States included important limitations on those provisions, including the right to denounce the Pact with immediate effect upon consent to jurisdiction.

13. We described the Pact of Bogotá in our written pleadings[7] and today I shall only refer to some salient features which need to be borne in mind when interpreting Article LVI.

14. The Pact has 60 articles divided into eight chapters. Chapters II through V deal with the specific procedures of dispute settlement, including adjudication before this Court. The remaining chapters contain important substantive obligations and undertakings.

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[6] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection,* Judgment of 24 September 2015; separate opinion of Judge Cançado Trindade, paras. 54-58.

[7] POC, Vol. I, Chap. 3 and App. to Chap. 3 (Pact of Bogotá), paras. 3.5-3.7.

15. For example, Article I contains a general yet central undertaking by the parties. It is now on the screen. ~~***[The Pact itself is at tab 3.]***~~ As you will see, in this Article the parties reaffirm their commitments in the United Nations Charter, and "agree to refrain from the threat or the use of force, or from any other means of coercion for the settlement of their controversies, and to have recourse at all times to pacific procedures.

16. Under Article II of the Pact, the parties are obligated to settle their international disputes by regional procedures before referring them to the United Nations Security Council. Giving priority to regional procedures was a matter of great importance to the American States, which of course is reflected in Chapter VIII of the United Nations Charter.

17. In addition, Article II limits the parties' consent to jurisdiction to disputes that could "not be settled by direct negotiations through the usual diplomatic channels". My colleague, Mr. Valencia-Ospina, will address this point shortly.

18. Article VIII, also in Chapter I, protects the right of individual or collective self-defence in the event of an armed attack as provided for in the Charter of the United Nations.

19. The commitment of American States to the newly formed United Nations, in 1948, to the non-use of force, to the right of self-defence under the Charter, and their commitment to regional settlement before going to the Security Council, are hardly secondary matters under the Pact, particularly when viewed in their historical context in 1948.

20. Article VII contains an important undertaking of the parties to limit their use of the right of diplomatic protection vis-à-vis each other.

21. Article L shows that where it is alleged that a party to the Pact has failed to comply with an ICJ judgment or arbitral award, it is not the role of the Court to monitor compliance, a matter that Professor Treves will deal with later this morning. Rather, the article provides that consultations between the relevant OAS foreign ministers are to be convened before resorting to an outside mechanism, such as the United Nations Security Council.

22. Article LI states that the parties may agree to petition the United Nations General Assembly or the Security Council to request an advisory opinion by this Court on a legal issue, a request they shall submit through the OAS Council.

23. Mr. President, I hope it is clear, from what I have said, that, in addition to the specific procedures for the peaceful settlement of disputes, the Pact also contains substantive rights and obligations of the utmost importance in inter-State relations. While the dispute settlement procedures are important, so too are the substantive rights and obligations set forth in the Pact.

Denunciation practice under the Pact

24. I now turn to the denunciation practice under the Pact of Bogotá. The Pact currently has 14 Contracting Parties, out of the 35 members of the OAS. Two States — El Salvador in 1973 and Colombia in 2012 — have denounced the Pact. You will find the original Spanish text of El Salvador's denunciation, with translations, at tab 4 in the folders. It is similar to Colombia's denunciation, in stating that the denunciation "will begin to take effect as of today"; "*prend effet à compter de ce jour*". No party to the Pact lodged any objection with the OAS to the terms of El Salvador's denunciation, or, indeed, reacted in any way within the OAS or elsewhere. Nor did the OAS Secretariat express any reservations over the terms of the denunciation[8].

25. I now turn to Colombia's denunciation of the Pact. You will find this at tab 5**,** and it is coming up on the screen. On 27 November 2012, the Minister for Foreign Affairs of Colombia transmitted to the depositary, the General Secretariat of the OAS, a notification of denunciation pursuant to Article LVI of the Pact. The notification stated, and here I quote:

> "that the Republic of Colombia denounces as of today the 'American Treaty on Pacific Settlement'"[9].

The Minister for Foreign Affairs added unequivocally, citing the second paragraph of Article LVI, that Colombia's denunciation of the Pact took effect, and I quote:

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[8]See also POC, paras. 3.31-3.32.

[9]POC, Vol. II, Ann. 15. The original text in Spanish reads:

> *"Tengo el honor de dirigirme a Su Excelencia, de conformidad con el artículo LVI del Tratado Americano de Soluciones Pacíficas, con ocasión de dar aviso a la Secretaria General de la Organización de Estados Americanos, a su digno cargo, como sucesora de la Unión Panamericana, que la República de Colombia denuncia a partir de la fecha el 'Tratado Americano de Soluciones Pacíficas', suscrito el 30 de abril de 1948 y cuyo instrumento de ratificación fue depositado por Colombia el 6 de noviembre de 1968.*
>
> *La denuncia del Tratado Americano de Soluciones Pacíficas rige a partir del día de hoy respecto de los procedimientos que se inicien después del presente aviso, de conformidad con el párrafo segundo del* artículo *LVI el cual señala que 'La denuncia no tendrá efecto alguno sobre los procedimientos pendientes iniciados antes de transmitido el aviso respectivo'."*

> "as of today with regard to the procedures that are initiated after the present notice, in conformity with Article LVI, second paragraph, providing that '[t]he denunciation shall have no effect with respect to pending procedures initiated prior to the transmission of the particular notification'".

26. The following day, the Secretariat for Legal Affairs of the OAS informed the Contracting Parties to the Pact and the Permanent Missions of the other Member States of the OAS that on 27 November 2012 it had received the Colombian Note by which Colombia "denounced" the Pact of Bogotá[10]. No State party to the Pact — including Nicaragua — reacted in any way.

27. And yet it was one year later, on 26 November 2013, that Nicaragua filed its Application in the current case, seeking to base the Court's jurisdiction on the Pact of Bogotá.

Interpretation of Article LVI: General Rule of Interpretation (Art. 31 VCLT)

28. Mr. President, Members of the Court, these facts are not disputed. What divides the Parties is the legal effect of the transmission of Colombia's notification. I now turn to the text of the Pact, and in particular to Article LVI, second paragraph, to show that the transmission of Colombia's notification of denunciation terminated its consent to the jurisdiction of the Court with immediate effect.

29. I must first recall the precise terms of Article LVI. As I have said, it is at tab 2, and it is on the screen, and I would recall in particular the second paragraph:

> "The denunciation shall have no effect with respect to pending procedures initiated prior to the transmission of the particular notification."

The key words are "transmission" and "notification". The paragraph specifies the date of transmission of the notification as the key date. It distinguishes between procedures initiated before the date of transmission and those that might be sought to be initiated after that date.

30. I think that there is agreement that the applicable rules of interpretation are the customary rules set forth in the Vienna Convention[11].

31. And I need not recall the terms of Article 31 of the Vienna Convention, though our friends opposite seem largely to ignore it. Nicaragua indeed invites you to overlook the ordinary meaning to be given to the actual terms of Article LVI, and instead have regard to its own

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[10]POC, Vol. II, Ann. 16.

[11]Written Statement of Nicaragua (WSN), para. 2.6.

subjective view of the object and purpose of the Pact and to its own peculiar notion of the application in this case of the principle of good faith.

32. In its Written Statement and in its Memorial[12], Nicaragua claims to apply the rules of treaty interpretation, but in fact, it disregards the ordinary meaning of the words actually used in the second paragraph of Article LVI. Instead, it starts by addressing what it terms "the relationship between Article XXXI and Article LVI"[13] and then it addresses Article LVI, but only its first paragraph[14]. Nicaragua then moves swiftly on to apply its distorted version of the law to the facts, followed by a short discussion of the object and purpose of the Pact to bolster its argument[15].

33. It is only later, when attempting to show the validity of its interpretation of Article LVI, paragraph 1, that Nicaragua sees it fit to mention that Article LVI comprises two paragraphs. In this way, it attempts to make the case that the second paragraph does not sit well with its own interpretation of the first paragraph, which interpretation at this point is treated by Nicaragua as set in stone.

34. But that is not how treaty interpretation works. You cannot interpret a treaty by first discarding one paragraph that you do not like and then feign surprise when that paragraph does not fit your subjective and partial views, views based on ignoring half of the relevant provision. That is the fundamental flaw in Nicaragua's position.

35. Colombia, on the contrary, has provided the Court with a proper interpretation of the Pact, giving due effect to all of its relevant terms, interpreted in good faith and in the light of its object and purpose[16].

36. Mr. President, Members of the Court, I shall now apply the general rule of treaty interpretation to Article LVI[17], but at the same time address Nicaragua's arguments[18]. Let us therefore start with the ordinary meaning to be given to the terms of Article LVI.

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[12]Memorial of Nicaragua (MN), para. 1.18; WSN, para. 2.6.

[13]WSN, paras. 2.7-2.8.

[14]WSN, paras. 2.9-2.10.

[15]WSN, para. 2.11.

[16]POC, paras. 3.14-3.57.

[17]POC, paras. 3.14-3.32.

[18]WSN, paras. 2.6-2.40.

37. The first paragraph sets out the right of a State party to denounce the Pact, and the steps it must take to exercise that right. A notification of denunciation is to be addressed to the Secretary-General of the OAS (originally the Pan American Union), who then transmits the notification to the other parties to the Pact. That is what happened in the present case, on 27 and 28 November 2012 respectively. Thereafter, the substantive obligations under the Pact continue until the expiry of one year.

38. Then comes the second paragraph of the article. I will not read it again.

39. Mr. President, Nicaragua does everything it can to avoid dealing with the actual text of the second paragraph. But the ordinary meaning of the text leaves no room for doubt. It is clear from the text that procedures initiated after the transmission of the notification are not protected from the effect of denunciation. The drafters, conscious of the need to protect procedures already instituted before the transmission of the notification, stated that such procedures were not affected.

40. The two paragraphs of Article LVI have to be read together. The first paragraph provides that denunciation as regards to the Pact's substantive obligations — such as those that I referred to regarding non-use of force, the obligation to settle disputes peacefully, the obligation to have recourse to the Meeting of Consultation — takes effect after the expiry of the one year's notice. The second paragraph concerns the parts of the Pact dealing with specific procedures for the peaceful settlement of disputes, namely Chapters II to V. It distinguishes between procedures initiated prior to transmission of the notification of denunciation and those that might be initiated after transmission of the notification. By virtue of the second paragraph, denunciation has no effect on the former. But procedures that were not initiated prior to the transmission are not saved by the second paragraph.

41. This interpretation, based upon the ordinary meaning to be given to the terms actually used, allows the whole article, not just part of it, to have an *effet utile*, which is a fundamental principle of treaty interpretation. Nicaragua is simply wrong when it asserts that Colombia's interpretation deprives the first paragraph of any meaning. It is Nicaragua's interpretation that deprives the second paragraph of any or all *effet utile*.

42. Mr. President, I now turn to two arguments made by Nicaragua. First, and I confess I have not fully grasped this argument, Nicaragua makes the bold assertion that what it dismissively

terms "the one-sentence second paragraph of Article LVI" "cannot defeat the Court's jurisdiction under Article XXXI and the first paragraph of Article LVI"; (those were its words). Article XXXI is at tab 8 in the folders, and is now on the screen. Article XXXI — as Members of the Court are well aware — is a treaty provision whereby the parties to the Pact accept the jurisdiction of the Court in terms similar to the optional clause of the Court's Statute.

43. Contrary to Nicaragua's theory, the first paragraph of Article LVI says nothing about consent to jurisdiction. It simply concerns the modalities of denunciation: how, addressed to whom, when.

44. Nicaragua asserts that the second paragraph of Article LVI, and I quote, "does not address 'pending procedures' initiated after a notice of denunciation has been circulated" and that "Colombia's *a contrario* reading of the paragraph . . . cannot stand against the express language of Articles XXXI and LVI, first paragraph, which ensure the effectiveness of Colombia's acceptance of the Court's compulsory jurisdiction for twelve months after notification has been given." That is the end of the quote from Nicaragua.

45. This argument that the general provisions of Articles XXXI and LVI, first paragraph, somehow trump the specific intent of the second paragraph of Article LVI would deprive the second paragraph of its intended purpose and of all *effet utile*. It would lead to the remarkable position that the Parties considered it necessary to state expressly that procedures initiated before transmission of the notification would continue, but remained silent about procedures initiated after transmission of the notification yet somehow intended that they too would continue. How could the drafters have considered it necessary to make express provision in the first case, when one might indeed have expected the procedures to continue, but then remained silent in the second case, when the position would have been much less clear?

46. Nicaragua relies on the words "so as long as the present Treaty is in force" in Article XXXI of the Pact. While ignoring the second paragraph of Article LVI, Nicaragua invokes this short phrase in Article XXXI to bolster its claim that consent to jurisdiction subsists for applications made during the one-year period following the transmission of the notification[19].

[19]WSN, paras. 2.16-2.18.

47. Mr. President, the general terms of the treaty-based consent to jurisdiction under Article XXXI cannot override the express terms of Article LVI, which specifically addresses the effect of transmitting the notification of denunciation, and its second paragraph in particular, which specifically deals with the question of procedures for the peaceful settlement of disputes following such transmission. Article LVI is the governing provision, not Article XXXI.

48. In order to make its argument based on Article XXXI sound more plausible, Nicaragua, characteristically perhaps, avoids citing the relevant sentence in full. The sentence in question states that the jurisdiction exists "without the necessity of any special agreement so long as the present Treaty is in force". The purpose of this clause is to emphasize that consent to the jurisdiction of the International Court of Justice under the Pact does not require a special agreement, a *compromis*. Its purpose is not to address the extent of the consent *ratione temporis*. Its purpose is not to qualify or override the ordinary meaning of Article LVI, second paragraph. If one reads the two provisions together, it is clear that the words "so long as the present treaty is in force" mean, and can only mean, for so long as the relevant provisions of the Pact are in force in accordance with their terms. Read thus, there is no inconsistency between Article XXXI and Article LVI.

49. Nicaragua makes another argument based on its subjective view of the object and purpose. Dispute settlement by the Court remains subject to the consent of States. However, as Colombia explained in Chapter 3 of its Preliminary Objections[20], the object and purpose of Article LVI is to set out the modalities and effects of denunciation. When progress is made in terms of consent to adjudication in international law, States often insist on safeguards. Article LVI of the Pact of Bogotá is just such a safeguard, and is fundamental to the structure and acceptability of the Pact. Without an effective denunciation clause, the far-reaching provisions on peaceful settlement of disputes, whether through this Court or otherwise, would not have been acceptable to States.

50. There is nothing unusual about the fact that States are willing to consent to the jurisdiction of the Court, but reserve their right to terminate such consent with immediate effect.

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[20]POC, paras. 3.23-3.32.

We see this with the optional clause and as one author has explained, this is "the price to be paid for adherence by States to the optional clause. And it corresponds to the logic of a jurisdictional system which is still largely based on unfettered sovereignty."[21] ~~*[Available only in English.]*~~

Interpretation of Article LVI: Supplementary Means of Interpretation (Art. 32 VCLT)

51. Mr. President, Members of the Court, I will now turn very briefly to the *travaux préparatoires* of Article LVI of the Pact. Nicaragua in its wisdom has chosen to dismiss summarily our account of the *travaux préparatoires*. At paragraphs 3.33 to 3.52 of our written Preliminary Objections, we set out fully the relevant *travaux préparatoires*. These confirm that the drafters of the Pact consciously chose to word Article LVI so as to limit with immediate effect the initiation of new procedures against the denouncing States, including recourse to this Court, upon the transmission of the notification of denunciation.

52. Nicaragua, in its Written Statement, argues that the meaning of Article LVI is identical to that of Article 9 of the General Treaty of Inter-American Arbitration of 1929[22]. Mr. President, Members of the Court, that is simply not the case. The language, of what later became, almost word for word, the second paragraph of Article LVI, was added to the negotiating text, as we explained in the written Preliminary Objections, in 1938 upon a proposal by the United States of America[23]. It did not exist in the 1929 Treaty. That this was a new issue was highlighted in the text circulated, and was explained orally by Legal Adviser to the United States State Department, Mr. Hackworth[24].

53. Despite this, Nicaragua asserts that the meaning of the text remained identical over the 20 years between 1929 and 1948. Had the text not been changed, Nicaragua would be right! But the text *was* changed, attention was drawn to the change and the meaning of the draft Article was altered accordingly.

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[21]C. Tomuschat, "Article 36", in A. Zimmermann et al., *The Statute of the International Court of Justice. A Commentary*, 2nd ed., 2012, p. 678; MN 74.

[22]WSN, para. 2.37.

[23]POC, Ann. 25 at p. 5.

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

Conclusion

54. Mr. President, Members of the Court, in short, it is Colombia's submission that, in accordance with the terms of Article LVI of the Pact of Bogotá, properly interpreted, the Court does not have jurisdiction in respect of the proceedings commenced by Nicaragua on 26 November 2013. This is because the Application was lodged after the transmission of Colombia's notification of denunciation, which had immediate effect as regards new applications.

55. Mr. President, Members of the Court, that concludes what I have to say and I thank you for your attention. I request that you invite Mr. Rodman Bundy to the podium, to continue our pleadings. Thank you.

Le PRESIDENT : Merci. Je donne maintenant la parole à M. Rodman Bundy.

Mr. BUNDY: Thank you Mr. President, Members of the Court, it is, as always, a great honour to appear before you today and again on behalf of the Republic of Colombia.

THE FACTS RELEVANT TO COLOMBIA'S PRELIMINARY OBJECTIONS

Introduction

1. Now the Court will recall that Colombia's second preliminary objection is that, prior to the filing of Nicaragua's Application on 26 November 2013, there was no dispute between the Parties with respect to the claims advanced in the Application that could trigger the dispute resolution provisions of the Pact, including the Court's jurisdiction[25]. Colombia's third objection is that, even if a dispute could be said to exist, *quod non*, the Parties were not of the opinion that it could not be settled by direct negotiations through the usual diplomatic channels. That is another precondition contained in Article II of the Pact that must be satisfied before the dispute resolution provisions can be resorted to[26].

2. My task this morning is to address the facts that are relevant to these two objections. Professor Reisman and Mr. Valencia-Ospina will come back later to discuss the legal consequences of the facts for jurisdictional purposes.

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[25]POC, paras. 4.10-4.20.

[26]POC, paras. 4.21-4.73.

3. Both Parties agree that the critical date for assessing whether a dispute existed and, if so, whether the precondition of Article II of the Pact had also been fulfilled, is 26 November 2013, the date of the filing of the Application[27]. And as I will show, prior to that date there was not a whisper of complaint from Nicaragua about Colombia's conduct. In fact, Nicaragua's highest military officials had said precisely the opposite — that there were no incidents or problems. Moreover, senior political leaders on both sides, including the Heads of State of Nicaragua and Colombia, were on record as saying that the implementation of the 2012 Judgment, and any related issues, could be achieved through discussions with a view to reaching a treaty. That scarcely suggests that, when Nicaragua abruptly filed its Application in November 2013, a dispute had arisen, let alone one that could not be settled by direct negotiations through the usual diplomatic channels. In fact, it was not until 13 September 2014 — that is almost ten months *after* the Application was filed — that Nicaragua, for the first time, made any complaint to Colombia about alleged violations of its maritime spaces or threats of the use of force.

The facts placed in their proper perspective

Prior to the Application, there was no dispute and, in any event, the Parties were open to negotiations

4. The Judgment in the *Territorial and Maritime Dispute* case was rendered on 19 November 2012. And Nicaragua refers to the fact that, on that day, Colombia's President Juan Manuel Santos declared that the Judgment was "not applicable"[28] and that, with respect to the enclaving of two of Colombia's islands, Colombia "rejects *this aspect* of the decision issued today" (emphasis added)[29]. Apparently, Nicaragua considers that these words somehow evidence the existence not only of a dispute between the Parties, but one that could not be settled by negotiations.

5. Regrettably, Nicaragua only filed a truncated English translation of the statement made by President Santos, which gives a very misleading picture of what he actually said. I would

[27]POC, paras. 4.7-4.8; WSN, para. 4.31.

[28]WSN, paras. 3.6-3.7.

[29]*Ibid.*, paras. 4.34 and 4.35.

respectfully invite the Court to read the complete version that was filed as Annex 6 to Colombia's preliminary objections, which places the President's remarks in their proper context.

6. What actually happened is that, on 19 November 2012, President Santos discussed the Judgment fully and frankly. It is true that the enclaving of Colombia's islands was met with disappointment in Colombia, especially given the historical unity of the San Andrés Archipelago and Colombia's presence in that area. But despite this, President Santos went on to emphasize not once, but *three times*, that Colombia "respects the law", that Colombia "will not discard any recourse or mechanism available to us in international law, to defend our rights", and that "[y]ou may be sure that we shall act with respect for the law — as has been our tradition . . .". The President also drew attention to a point mentioned by Colombia's Agent earlier this morning: namely, that he, as President, had a duty to respect Colombia's Constitution, Article 101 of which provides that boundaries must be established or modified by means of a treaty — a process that necessarily entails the need for negotiations.

7. Those statements of President Santos cannot possibly be read as closing the door to negotiations with Nicaragua, and equally importantly Nicaragua did not view them as such. To the contrary, in the months that followed, the political leaders of both States made it clear that the best manner to deal with the situation arising out of the Judgment was via bilateral negotiations and the conclusion of a treaty.

8. At the beginning of December 2012, Presidents Santos and Ortega met in Mexico City. Two days earlier, Nicaragua's President had declared that: "I want to shake hands with President Santos and say that I and the people of Nicaragua [want] to fix this situation as fraternally as brothers . . ."[30]. For his part, President Santos immediately went on record after the Mexico City meeting as follows:

> "We expressed that we should handle this situation with cold head[s], in an amicable and diplomatic fashion, as this type of matters must be dealt with to avoid incidents. He [President Ortega] also understood."[31]

[30] MN, Ann. 31.

[31] POC, Ann. 9.

President Santos then added: "The way to settle this type of situations is through dialogue"[32], and "[i]f there is a problem, we will call each other"[33].

9. The Parties' mutual intention to resolve matters relating to the Judgment bilaterally was confirmed shortly afterwards. On 13 January 2013, Colombia's Foreign Minister, María Ángela Holguín, referred to the fact that a meeting had been held with President Ortega in order "to open a dialogue and a door to avoid any confrontation and to establish a communication channel"[34]. One month later, President Ortega indicated that he would invite Colombia to establish joint commissions to deal with the implementation of the Judgment. President Ortega also confirmed that, in his discussions with President Santos in Mexico and during the Summit of Latin American States in Chile, the two leaders, and I quote for President Ortega "had always spoken of taking joint measures"[35].

10. In the meantime, the situation at sea was calm. For example, on 5 December 2012, the Chief of Nicaragua's Army, General Avilés, confirmed that Nicaragua was in communication with the Colombian authorities, and that "there has been no boarding to fishing vessels"[36]. In short, there were no complaints emanating from Nicaragua in connection with the events at sea, and channels of communication had been established at both the political and military levels.

11. That situation persisted throughout 2013. On 14 August 2013, President Ortega gave a speech on the occasion of the 33rd Anniversary of Nicaragua's naval forces[37]. Not only did he repeat that Nicaragua sought a dialogue with Colombia, he also stated that, despite what he called the "media turbulence" — and I think we have all seen media turbulence:

> "[W]e must recognize that . . . the Naval Force of Colombia, which is very powerful, that certainly has a very large military power, has been careful, has been respectful and there has not been any kind of confrontation between the Colombian and Nicaraguan Navy".

President Ortega then continued:

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[32]POC, Ann. 35.

[33]WSN, Ann. 5.

[34]POC, Ann. 37.

[35]MN, Ann. 35 [available only in English]; see also POC, para. 4.50.

[36]POC, Ann. 36, and see also Ann. 37.

[37]POC, para. 4.52.

> "And I [that is, President Ortega] am convinced that, the one who . . . has determined that pacific activity is President Juan Manuel Santos. I am convinced, we hope that this will continue in the same manner until we can reach the dialogue, reach the negotiations so as to conclude the definitive agreements to apply the judgment rendered by the Court in the month of November of last year. We are totally so disposed."[38]

12. On the Colombian side, Foreign Minister Holguín responded positively to President Ortega's proposal for dialogue. On 10 September 2013, she stated that: "We would like to speak with Nicaragua on a path toward a treaty", and that, "[o]ur doors are undoubtedly open"[39]. Two days later, Nicaragua's National Assembly endorsed President Ortega's intention to engage in a dialogue with Colombia to find mechanisms to the conclusion of a treaty with respect to the Judgment[40].

13. Mr. President, Members of the Court, far from evidencing the existence of a dispute, let alone one that could not be resolved by negotiations as Nicaragua alleges, those statements showed a common desire by both Parties, just a few weeks before Nicaragua lodged its Application, to resolve any matters relating to the Judgment by the negotiation of an appropriate treaty.

14. In its Written Statement, Nicaragua acknowledges that the Parties were open to negotiations. However, it tries to explain away the relevance of this by contending that this expressed openness did not concern the subject-matter of this dispute, which Nicaragua says is one involving alleged violations of its maritime rights and the threat of the use of force[41].

15. That is an exercise in semantics that gains no traction. Prior to the deposit of Nicaragua's Application — and even for a significant period afterwards — there was no dispute over any alleged violations of Nicaragua's maritime spaces, or concerning a threat of the use of force, that could have formed the basis of negotiations. That is because there were no claims from Nicaragua at all; only statements from its political and military leaders that the situation was calm, respectful and without incident. So, by the same token, there was no response by Colombia that could have given rise to the level of a dispute.

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[38]POC, Ann. 11.

[39]WSN, Ann. 8.

[40]MN, Ann. 40.

[41]WSN, para. 4.60.

16. And indeed, even after Colombia proclaimed an Integral Contiguous Zone by Presidential Decree No. 1946 on 9 September 2013 — a decree that Nicaragua harps on in its written pleadings — Nicaragua did not raise any objections. The first time Nicaragua ever referred to this zone was when it filed its Application in the case[42].

17. Nicaragua also claims that the public statements that were made by various officials about matters that could form the basis of a treaty were unrelated to Nicaragua's rights as determined by the Court in its 2012 Judgment[43]. But this too is incorrect. On 10 September 2013, President Ortega himself expressed a willingness to reach a treaty with Colombia. As a published report of President Ortega's remarks indicated and noted at the time: "The 'treaty' proposed by the Nicaraguan president to Colombia must include agreements for fishing, the environment, the fight against drug trafficking 'and all that applies in this area, which has already been decided by the Court,' . . ."[44]. The reference to "all that applies in this area", which has already been decided by the Court, would obviously have included any Nicaraguan concerns it might have had relating to the implementation of the Judgment, to the extent such concerns actually existed.

18. On 12 September 2013, Colombia's President filed an application with the Colombian Constitutional Court requesting the Court — the Constitutional Court — to rule on the constitutionality of the dispute resolution provisions of the Pact of Bogotá in so far as the determination of Colombia's boundaries was concerned[45]. That application focused on whether a treaty was required in order to modify or establish a maritime boundary under Article 101 of Colombia's Constitution[46] — that is, as a matter of internal law.

19. Nicaragua argues that this step indicated that Colombia was of the opinion that no negotiation was possible because Colombia wanted to await the Constitutional Court's decision before taking any further action[47]. That contention is groundless. Not only did the step taken by President Juan Manuel Santos provide a sound constitutional basis for continuing with diplomatic

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[42]Application, paras. 10 *et seq.*

[43]WSN, para. 4.61.

[44]POC, Ann. 40.

[45]POC, Ann. 2.

[46]POC, paras. 2.40-2.46, and see Anns. 2 and 4 thereto.

[47]WSN, paras. 4.44-4.45.

negotiations, Nicaragua itself, in its written statement, filed a press report referring to the fact that President Santos said, "in the meantime the government [Colombian Government] will try to secure a new treaty with Nicaragua that satisfies both countries"[48]**.** ***I***n the meantime. Indeed, the day after the application to Colombia's Constitutional Court was filed, Nicaragua's President restated his willingness to create a bilateral commission through which the Parties could work together to conclude a treaty on the implementation of the Judgment[49]. Nicaragua clearly had no issue with the Constitutional Court proceedings in Colombia.

20. On 18 November 2013, that is just eight days before Nicaragua filed its Application — eight days — the Chief of Nicaragua's naval forces, Admiral Corrales Rodriguez, in response to a question whether there had been any incidents, any conflicts with Colombia at sea, said the following, and I quote — just eight days before the Application: "There have not been any conflicts and that is why I want to highlight that in one year of being there we have not had any problems with the Colombian Navy."[50]

21. Mr. President, Members of the Court. That was the situation that existed when Nicaragua filed its Application on 26 November ***2013***. There was no claim by Nicaragua that could have been "positively opposed"[51] by Colombia. And there was no dispute between the Parties regarding either Colombia's compliance with the Judgment or any of the events that Nicaragua now complains of. To the contrary, the Parties had made it crystal clear that they were in favour of negotiating a treaty to deal with the post-Judgment situation.

After the Application, both Governments still did not consider that there was a dispute and, in any event, the Parties were open to negotiations

22. Even after Nicaragua filed its Application, its political leaders continued to declare that negotiation of a treaty with Colombia was a Nicaraguan priority. On 29 January 2014, for

[48]WSN, Ann. 7.

[49]POC, Ann. 41.

[50]POC, para. 4.53; Vol. II, Ann. 43 thereto, p. 355.

[51]*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328.

example, President Ortega stated that, together with President Santos, they had concluded that the two States would sign agreements with respect to boundaries[52].

23. And, as I have said, for its part, Colombia required the conclusion of such a treaty as a matter of domestic law and that was confirmed by the Constitutional Court's ruling handed down in May 2014, in which the Colombian Constitutional Court stated:

> "[T]he decisions rendered by the International Court of Justice, on the basis of the jurisdiction recognized by Colombia through Article XXXI of the Pact, cannot be disregarded, in conformity with what is prescribed in Article 94 of the Charter of the United Nations."[53]

Colombia's Agent mentioned this earlier. The Constitutional Court also held that decisions of the International Court of Justice with respect to boundaries had to be incorporated into domestic law in the manner provided for by Article 101 of the Constitution: that is, by means of treaties.

24. One week later, Nicaragua's President reiterated the need to establish a bilateral commission "so [that] a treaty can come out of it that will allow us to respect, and put in practice the judgment by the ICJ"[54]. Thus, far from indicating that the Parties somehow stood on the brink of a dispute, the record shows both before the filing of the Application and afterwards, that they continued to be ready and willing to negotiate a treaty.

25. In the meantime, Nicaragua's General Avilés, whom I referred to a minute ago, had again confirmed that, according to the permanent communications that had been put in place between the two countries' navies — and I quote from Nicaragua's General — "the area remains without incidents"[55]. This statement, which was made in March 2014, repeated what Nicaragua's military commanders had said before. It underscores the artificiality of the Application that Nicaragua filed in November 2013, alleging that a dispute existed over violations of Nicaragua's maritime spaces and the threat of the use of force. ***That is c***ompletely contradicted by Nicaragua's own senior most military commanders.

26. Mr. President, it was only on 13 September 2014 — that was almost ten months *after* the Application was deposited and on Nicaragua's interpretation of the Pact of Bogatá, ten months

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[52]POC, Ann. 45.

[53]POC, Ann. 4, para. 9.10.

[54]MN, Ann. 46. [Only available in English]

[55]POC, Ann. 46.

after Colombia's denunciation of the Pact took effect — that Nicaragua sent a Note Verbale to Colombia which, for the first time, referred to any alleged infringements of Nicaragua's sovereign rights[56]. That Note attached a list of so-called "incidents", *none of which* had ever been referred to before, and all of which were directly contradicted by the repeated assurances of the chiefs of Nicaragua's armed forces that there had not been a single incident at sea between the date of the Court's Judgment and the filing of the Application in November 2013 and, indeed, up until at least March 2014, four months after the Application.

27. In these circumstances, Mr. President, distinguished Members, it cannot credibly be said as a matter of fact that, as of 26 November 2013, there was a dispute between the Parties over the events now complained of by Nicaragua. Nor does the record show that the Parties were of the opinion that, to the extent a dispute somehow existed, it could not be settled by direct negotiations through the usual diplomatic channels. Senior leaders of both countries had repeatedly emphasized the desire to negotiate a treaty or treaties relating to the post-Judgment situation.

28. Mr. President, that concludes my presentation. I thank the Court for its courtesy and attention, and I would ask whether, I am not sure after the coffee break or now, the floor could next be given to Professor Reisman. Thank you very much,

Le PRESIDENT : Merci, Monsieur Bundy. La Cour va maintenant marquer une pause de 15 minutes. L'audience est suspendue.

L'audience est suspendue de 11 h 25 à 11 h 40

Le PRESIDENT : Veuillez vous asseoir. L'audience reprend et je donne maintenant la parole au professeur Michael Reisman. Monsieur le professeur.

Mr. REISMAN:

SECOND PRELIMINARY OBJECTION: ABSENCE OF A DISPUTE

1. Thank you Mr. President. Mr. President, Members of the Court, it is an honour to appear before you on behalf of the Republic of Colombia. My assignment is to explain why — even if the

[56]POC, Ann. 17.

Court were to find jurisdiction *ratione temporis*, whether under the Pact of Bogotá or under Nicaragua's second basis of jurisdiction — Nicaragua's claims would still fail your jurisdictional requirements because they were not the subject-matter of a dispute at the time of application.

2. The law on this matter may be briefly summarized:

— *first*, even if a putative respondent State is deemed to have consented to jurisdiction, that jurisdiction is effective for a specific case only if there is a dispute;

— *second*, the existence of a dispute is not determined by the subjective assumption of the Applicant but is a matter for "objective determination" by the Court;

— *third*, an objective determination of a dispute requires that the Applicant have indicated to the Respondent, by some modality, the content of its claim, whether legal or factual, and, reciprocally, that the Respondent have indicated, by some modality, its rejection of the claim; ***and***

— *fourth*, the critical date for determining the objective existence of the dispute is that of the filing of the Application.

3. It is hardly necessary to multiply authorities for the law here. From *Peace Treaties* on, the Court has repeatedly confirmed that ~~***that***~~ there must be a dispute and that it is the Court which makes the "objective determination"[57]. As for the critical date for determining the objective existence of a dispute as a condition for jurisdiction — the Court held in *Arrest Warrant*: "The Court recalls that, according to its settled jurisprudence, its jurisdiction must be determined at the time that the act instituting proceedings was filed."[58]

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[57] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion: I.C.J. Reports 1950*, p. 74; *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, pp. 270-271, para. 55; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 476, para. 58; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 84, para 30.

[58] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, pp. 12-13, para. 26. The Court has emphasized that even for admissibility, the critical date is the date of filing. Thus, the Court held in its 1988 Judgment on *Border and Transborder Armed Actions*: "The critical date for determining the admissibility of an application is the date on which it is filed." *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, I.C.J. Reports, 1988*, p. 95, para. 66. The Court maintained this view in the subsequent cases of *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I. C.J., Reports 1998* pp. 25-26, paras. 42-44*; Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, pp. 84-85, para. 30; and *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J., Reports 2012*, pp. 442 and 444-445, paras 46 and 54.

4. Now, making an objective determination is challenging in the contemporary arena, when many States are democratic and have rich communications ecologies. Then their robust internal politics may produce a discordant chorus of many voices from different branches — executive, legislative and judicial — from different departments and from different political factions. Some of the voices may be speaking to domestic audiences while others are vying *to shape* a national political policy rather than authoritatively addressing an external audience, as French authorities did in *Nuclear Tests*[59]. Equally relevant is the moment in time when the voices make themselves heard: some of those voices may reflect initial disappointment with a judgment, to be succeeded by acceptance of it.

5. When there is a chorus of domestic voices, an objective determination naturally looks, in particular, to those of the respective chief executives, as you held in *Georgia* v. *Russia*[60]. Common views of the executives of both States on policy matters are particularly probative. Statements made by military officials as to facts in their domain of expertise are probative as facts, as the Court held in *Congo* v. *Uganda*[61].

6. Mr. President, Nicaragua's Application fails all of these requirements. As I will explain in a moment, the record, when fairly and "objectively" read, shows confirmation of such shared views by the Presidents of Colombia and Nicaragua, a fact which belies the assertion that there was an objective dispute. But first, permit me to correct Nicaragua's misstatement of Colombia's argument as to the modalities of communicating for purposes of objectively establishing that there is a dispute.

7. Colombia's submission was that to fulfil the "objective" requirement, the counter-party has to be informed of the other party's grievance and claim. At several points in its Written

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[59]*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 16, para. 34; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 16, para. 35.

[60]*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 87, para. 37.

[61]As you held in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*:

> "The Court will treat with caution evidentiary materials specially prepared for this case and also materials emanating from a single source. It will prefer contemporaneous evidence from persons with direct knowledge. It will give particular attention to reliable evidence acknowledging facts or conduct unfavourable to the State represented by the person making them (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 41, para. 64). The Court will also give weight to evidence that has not, even before this litigation, been challenged by impartial persons for the correctness of what it contains." (*Judgment, I.C.J. Reports 2005*, p. 201, para. 61.)

Statement, Nicaragua attributes to Colombia the straw-man argument that ***I'm quoting Nicaragua,*** "as a matter of international law no 'dispute' can exist until it has been in some way 'constituted' by the sending of a formal diplomatic Note"[62].

8. Mr. President, what Colombia *actually* argued — and argues — is that while international law does not require a specific modality, "[g]iven Nicaragua's failure to specify the subject-matter of its allegations prior to the submission of its Application, or to raise a complaint, no objective dispute existed between the Parties"[63]. Now, a diplomatic Note can certainly accomplish this, but it is only one of many possible modalities. What counts is that the counter-party be informed *before* the critical date. If an application sufficed *per se* to constitute the objective existence of the dispute, your jurisprudence on this matter would be pointless.

9. Indeed, the Court's constant jurisprudence *(jurisprudence constant**e**)* is particularly clear on the need to demonstrate that the State against whom a complaint is made has had the opportunity to react in some manner so that a "positive opposition of the claim of one party by the other"[64] actually materializes[65]. To paraphrase what the Court held in *Georgia* v. *Russia*, but substituting the names of the Parties in the instant case, what the Court needs to establish in order to determine the existence of a dispute is "whether [Nicaragua] made such a claim [revealing a disagreement on a point of law or fact between the two States] and whether [Colombia] positively opposed it with the result that there is a dispute between them . . ."[66].

10. Mr. President, I turn to Nicaragua's statement of the dispute. In its 2013 Application, Nicaragua defined the "Subject of the dispute" in these words: "The dispute concerns the

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[62]WSN para. 3.9; see also paras. 3.16-3.20.

[63]POC, para. 4.14.

[64]*Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 315, para. 89.

[65]See *South West Africa Cases (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment of 21 December 1962: I.C.J. Reports 1962*, p. 328; *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, pp. 99-100, para. 22; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J., Reports 1998*, p. 17, paras. 21-22; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 13, para. 27; *Certain Property (Liechtenstein* v. *Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 18, para. 24; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 40, para. 90.

[66]*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 85, para. 31.

violations of Nicaragua's sovereign rights and maritime zones declared by the Court's Judgment of 19 November 2012 and the threat of the use of force by Colombia in order to implement these violations."[67] Mr. President, Nicaragua never raised any of these claims with nor otherwise manifested them to Colombia prior to the submission of its Application. And it has submitted no evidence to the contrary. Thus Nicaragua fails to show a key element of the requirement as to the objective existence of the dispute.

11. Failing to adduce any evidence that it had raised its claims with Colombia before the date of submission of the Application, Nicaragua cherry-picks statements made by Colombian officials in an effort to show that Colombia was aware of or somehow intuited Nicaragua's "phantom" claims, rejected them, and hence there was a dispute. Nicaragua does this not only by selective quotation, but also by putting a "spin" on the statements, taking them out of context and distorting their meaning. But, logically, if Nicaragua failed to raise its claims against Colombia prior to the submission of its Application, Colombia's communications and statements could not have addressed, let alone opposed non-existent claims. But that impossibility aside, the Colombian statements which Nicaragua selects fail to support its assertion.

12. First, Colombia never stated, in terms that meet the *Peace Treaties* requirement, that "the two sides hold clearly opposite views concerning the question of the performance or non-performance"[68] of the Judgment. Nicaragua — as Mr. Bundy pointed out — reproduces a sentence in which President Santos says that Colombia "emphatically rejects that aspect of the judgment . . ."[69]. I would respectfully invite the Court to review the entire text of President Santos's statement of 19 November 2012, which is in your folders. Mr. President, that the President of Colombia disagreed with and was critical of parts of the Judgment — as was the Foreign Minister — is no cause for surprise, neither are such statements internationally illegal acts, nor do such public expressions of disappointment constitute a declaration of non-compliance with the Judgment. No rule of international law requires a State to rejoice in an adverse judgment. Nicaragua's snippet of the President's speech neglects to cite the President's real message that

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[67]Application, para. 2.

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

[69]WSN, para. 4.35

"Article 101 of our Constitution says that 'the boundaries fixed in the manner set forth in this Constitution may only be modified by virtue of treaties approved by Congress, and duly ratified by the President'."[70] Nor did Nicaragua quote the President's statement in the speech that "we are committed to find mechanisms and specific strategies, and to produce results — including the negotiation of treaties as may be necessary — so that [the archipelago's inhabitants] rights may at no time be disregarded"[71]. Mr. President, President Santos's entire speech makes clear that, far from a pronouncement of non-compliance with the Judgment, his message specified the modality for implementation of the Judgment, which was to be by treaty, as required by Colombian constitutional law.

13. Nicaragua similarly misrepresents Colombian statements which are alleged to be threats to the use of force. When the Court reads them in full, it will see that they are no more than political affirmations of the commitment to protect Colombian rights in Colombian areas. If such routine political statements are henceforth to be taken as violations of the United Nations Charter, the Security Council's agenda and the Court's docket will quickly become bloated with trivialities.

14. In any event, Mr. President, these are merits questions which the Court need not and should not touch. The decisive point is that at no time up to the critical date of 26 November 2013 did Nicaragua once indicate to Colombia, by *any* modality, that Colombia was violating Nicaraguan sovereign rights and maritime zones declared by the 2012 Judgment or that it was threatening to use force. Not once. It was only almost 10 months *after* filing its Application that Nicaragua, by Note Verbale, accused Colombia of these issues.

15. Nicaragua's contention, Mr. President, that it had refrained from mentioning the alleged threats because it did not want to interfere in Colombia's election process[72] is not worthy of comment. I suggest that the real reason for Nicaragua's failure to raise the issue is that there was none! The Nicaraguan Navy had not reported any incidents and just before Nicaragua filed its Application on 18 November 2013, Nicaraguan Admiral Corrales Rodriguez, eight days before the

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

[71]*Ibid*., p. 90.

[72]POC, Vol. II, Ann. 17, p. 151.

Application, reported that there have not been any conflicts[73]. I will not repeat the quotation that had been read by my colleague Mr. Bundy, but he said that there "have not been any conflicts" and that "we have not had any problems with the Colombian Navy".

16. On 14 August 2013, President Ortega announced — this is worth, I think, reviewing:

> "we must recognize that in the middle of all this media turbulence, the Naval Force of Colombia, which is very powerful, that certainly has a very large military power, has been careful, has been respectful and there has not been any kind of confrontation between the Colombian and Nicaraguan Navy, thank God"[74].

17. It was many months *after* the Application that Nicaragua's Ministry of Foreign Affairs requested its own navy to report any alleged incidents that may have taken place. Why and why then? I suggest, Mr. President, in order to fabricate the impression that there was a dispute at the time of its Application.

18. *Peace Treaties* teaches that a dispute exists objectively in "a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations"[75]. Nothing in the record shows those required "clearly opposite views" of the subject-matter of the Application at the time of Nicaragua's filing.

19. Mr. Bundy has already referred to President Santos's statement. Comparable views were expressed by Nicaraguan President Ortega. In his speech on 14 August 2013, after referring to drug trafficking, organized crime and the Seaflower Reserve, President Ortega announced:

> "I am convinced, we hope that this will continue in the same manner until we can reach the dialogue, reach the negotiations so as to conclude the definitive agreements to apply the judgment rendered by the Court in the month of November of last year. We are totally so disposed."[76]

Nicaragua's Memorial quotes President Ortega on 9 May 2014 as follows:

> "We propose to the government of Colombia, to President Juan Manuel Santos, to work for a Colombian-Nicaraguan commission so a treaty can come out of it that will allow us to respect and put in practice the judgment by the ICJ."[77]

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

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

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

[76]POC, Vol. II, Ann. 11, p. 119.

[77]MN, p. 54 and Ann. 46, p. 441.

Given the common view of the need for a treaty to implement the Judgment, one can appreciate, all the more, Colombia's surprise at Nicaragua's Application on 26 November 2013[78].

20. Mr. President, Members of the Court, the western Caribbean is a complex arena in which Colombia, for decades, has performed critical international legal roles, including naval interdiction of human trafficking and narco-trafficking, fishing conservation and environmental protection, in addition to discharging its own sovereign responsibility to provide protection for the territory and inhabitants of the Colombian archipelago. Unlike the removal of a border checkpoint in an uninhabited desert, which may be quickly struck, dismantled and hauled away, the delimitation decreed by the Court in 2012 was in a much more complex normative environment, one which requires preparation and adjustments. Both Parties understood ~~***that***~~ this was to be accomplished by treaty. The communications between the two governments and, in Colombia's case, also within it, confirm that the Parties recognize this fact.

21. The Colombian regulations with respect to the contiguous zone must be appreciated in these terms. Up to the time of its Application, the most authoritative statements by high Nicaraguan officials indicated a common view that the implementation of the 2012 Judgment was in the process of being addressed by the counter-party and, thus, was *not* in dispute. President Ortega's statements show that he accepted that the implementation of the Judgment would be by treaty and statements by the Nicaraguan military expressed satisfaction with the comportment of the Colombian ***N***avy. In parallel fashion, none of the statements by Colombian officials, read in their entirety, said more than that the internal procedures necessary for implementing the Judgment in an orderly fashion were in process, pending the completion of which Colombian law would perforce continue to apply. But, Mr. President, for jurisdictional purposes, the two critical points are that, as of the filing of its Application, Nicaragua had not voiced any complaint whatsoever to Colombia with respect to these regulations; and that Colombia only learned about Nicaragua's views on their lawfulness — or lack of it — when it received the Application.

[78]See, also, in this regard, the statement of the Foreign Minister: POC, Vol. II, Ann. 44 at p. 359.

22. So for all of these reasons, Colombia respectfully submits that the Court lacks jurisdiction over Nicaragua's Application of 26 November 2013 for, on that date, there was no dispute over the matters raised in ***the*** Application.

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

The PRESIDENT: Je donne la parole à M. Valencia-Ospina.

Mr. VALENCIA-OSPINA:

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

1. Mr. President, Members of the Court, the Government of my country, Colombia, has done me an honour with a deep personal significance by appointing me to plead on its behalf before the highest judicial organ of the United Nations.

2. I have been assigned to address the question of the non-fulfilment of the precondition imposed by Article II of the Pact of Bogotá. I will demonstrate that, at the time Nicaragua filed its Application, the Parties were not of the opinion that the alleged controversy "[could] not be settled by direct negotiations through the usual diplomatic channels", as Article II requires.

3. This third objection is raised as an alternative ground to the two already pleaded. It is nevertheless closely linked to the second objection concerning the absence of a dispute. For while it is true that these grounds are legally distinct, it is equally true that the Court has often relied upon discussions and diplomatic exchanges — such as those that take place during negotiations — in order to disclose the existence of a dispute at the critical date[79].

4. It is in fact undisputed that, prior to the belated Nicaraguan diplomatic Note of 13 September 2014, there were no exchanges between the Parties that addressed the alleged violations of Nicaragua's maritime zones, and much less on the purported threat of or use of force by Colombia. But the Parties have been exchanging views all along on four important

[79] *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 15; *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, pp. 10-12; *Right of Passage over Indian Territory (Portugal* v. *India), Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 149.

subject-matters that relate to: *(a)* the implementation of the 2012 Judgment; *(b)* the protection of the historical fishing rights of the population of the archipelago of San Andrés; *(c)* the conservation of the Seaflower Biosphere Reserve; and *(d)* the fight against drug trafficking in the Caribbean Sea.

5. Nicaragua has asserted that the "subject-matters on which the parties kept the door open to eventual negotiations are different from the subject-matter" of its claims[80]. But Nicaragua cannot have it both ways. It cannot, on the one hand, argue that there is an objective dispute by selectively quoting the statements made by the Parties and, on the other hand, put this very same conduct aside because it attests to the fact that negotiations are possible. Nicaragua's move in favour of jurisdiction must fail on either one of those two grounds. Either the conduct discloses the absence of a dispute regarding the claims referred to in the Application, or it reveals that the precondition of Article II of the Pact had not been fulfilled. Should the Court reject the second objection concerning the absence of a dispute, it should still find that the statements made by the highest representatives of both States and the meetings held between them in Mexico and Chile clearly demonstrate that, at the time of the filing of the Application, the Parties did not think that direct negotiations were not the way to proceed.

6. Before going further into the matters in contention, I wish to stress two important points over which the Parties are in agreement:

— first, as already affirmed by the Court in its 1988 Judgment in the *Border and Transborder Armed Actions* case between Nicaragua and Honduras, Article II of the Pact constitutes a precondition to all the procedures of the treaty[81];

— second, the critical date for assessing whether this precondition has been fulfilled is the date of the filing of the Application[82]. The Parties' agreement on this second point can come as no surprise to the Court in view of its conclusions in the 2011 Judgment in the *Georgia* v. *Russian*

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[80]WSN, paras 4.53-4.65.

[81]*Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 69, at p. 94, para. 62; POC, paras. 4.22-4.26; WSN, para. 4.9.

[82]POC, paras. 4.7-4.9; WSN, para. 4.31.

Federation case and the 2012 Judgment in the *Belgium* v. *Senegal* case[83]. However, in view of the opinions held on this issue, I wish to stress that, in the instant case, there is an additional fundamental reason for admitting that the critical date can correspond only to the date of the filing of the Application. The seisin of the Court having occurred at the very last moment before the termination for Colombia of the Pact of Bogotá, the basis of jurisdiction under this instrument has at the very least expired since then. Thus, it would be impossible for Nicaragua to bring fresh proceedings after 26 November 2013. In other words, the situation is markedly different from the one that the Court was confronted with in its 2008 Judgment in the *Croatia* v. *Serbia* case, where it found that all the preconditions to jurisdiction were concurrently fulfilled at a given moment in time after the filing of the Application[84]. This being said, the Parties also agree with the Court's 1988 finding that, "[i]t may however be necessary, in order to determine with certainty what the situation was at the date of filing of the Application, to examine the events, and in particular the relations between the Parties, over a period prior to that date, and indeed during the subsequent period"[85].

7. It is at this stage where agreement ends and disagreement starts. Nicaragua has indeed contested both the meaning of Article II of the Pact and the characterization of the opinion of the Parties put forward by Colombia in its preliminary objections. For Nicaragua, in the opinion of the Parties must be interpreted as signifying in the opinion of one of them — the Applicant — that is to say in Nicaragua's own opinion.

8. In addition, Nicaragua has advanced what it claims to be an "objective" assessment about the opinion of the Parties in order to conclude that both of them were of the good faith belief that the alleged controversy could not be settled by way of direct negotiations. But Nicaragua's own assessment is located at the polar opposite of objectivity. Indeed, I will show that Nicaragua is not only selectively quoting and misconstruing the declarations of Colombia's highest representatives,

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[83] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 70, at p. 124, para. 130; *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 444, para. 54 and pp. 445-446, paras. 57-59.

[84] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J Reports 2008*, pp. 445-446, para. 96.

[85] *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 95, para. 66.

but also deliberately ignoring the statements made by its own President and military and disregarding the steps taken by the two Presidents. Such omissions speak for themselves. For to quote accurately its President would mean for Nicaragua to explicitly contradict itself, since he has made it abundantly clear that negotiations were possible and indeed the way to proceed.

9. No prospective applicant which is required to fulfil the precondition of Article II of the Pact would publicly declare, only two months prior to the seisin of the Court and the termination for Colombia of the Pact, that diplomatic means are the way to proceed, if it genuinely thought otherwise[86]. Likewise, a State that has recently become an applicant would not publicly assert less than two months after having filed its application that negotiations are still possible, if it thought that that was in fact untrue[87]. While the case law of the Court shows that "negotiations and recourse to judicial settlement have been pursued *pari passu*"[88] and, therefore, that the two means are not mutually exclusive, the situation is of course different when a provision such as Article II of the Pact is applicable. In situations such as the current one, the very fact that Nicaragua has confirmed that negotiations were possible immediately before and after the filing of its Application, demonstrates that the precondition had not been fulfilled at the critical date.

10. I will now proceed to address the meaning of Article II of the Pact before objectively assessing the opinion of the Parties. In so doing, I shall rebut the arguments made by the Applicant in its Written Statement.

The Meaning of Article II of the Pact of Bogotá

The condition presupposes that the Parties must be of the opinion that the controversy "cannot be settled by direct negotiations through the usual diplomatic channels"

11. Article II of the Pact, which now appears on the screen, in its relevant part reads as follows: "in the event that a controversy arises between two or more signatory states which, *in the opinion of the parties*, cannot be settled by direct negotiations through the usual diplomatic channels, the parties bind themselves to use the procedures established in the present Treaty".

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[86]POC, paras. 4.51-4.52 and Vol. II, Anns. 11, 40 and 41.

[87]*Ibid.*, para. 4.56 and Ann. 45.

[88]*Aegean Sea Continental Shelf (Greece* v. *Turkey), Judgment, I.C.J. Reports 1978*, p. 12, para. 29.

12. Nicaragua has alleged that "Colombia conveniently overlooks" the authentic French text of the same article which refers to "de l'avis de l'une des parties"[89]. But, apart from the English, what about the texts, also appearing on the screen, in Spanish — "en opinión de las Partes" — and Portuguese — "na opinião das Partes" — which clearly refer to the opinion of the Parties? It is rather Nicaragua that is the party that conveniently overlooks these three equally authentic texts, which include Spanish, Nicaragua's and Colombia's own official language, in which the Nicaraguan Senate and Executive incorporated the Pact into its domestic legislation[90]. The Applicant asserts that the phrase "in the opinion of the parties is, on its face, ambiguous", and is "susceptible to either of the interpretations advanced by Colombia and Nicaragua"[91]. On the contrary, what is definitely unambiguous is the fact that the three authentic texts drafted in the Spanish, Portuguese and English languages use the plural "parties" and not the singular form of the term.

13. To buttress its theory that the opinion of only one of the parties is all that is required, Nicaragua resorts to the 1985 Opinion of the Inter-American Juridical Committee on the American Treaty on Pacific Settlement[92]. The Applicant goes even further and dares to criticize Colombia for not having appended that Opinion to its preliminary objections[93]. As a matter of fact Colombia, at paragraph 4.40 of its preliminary objections, did refer to the 1985 Opinion, a document which being in the public domain was identified by its documentary source at footnote 199 of the same pleadings. But let our attention not be distracted by Nicaragua's unfounded criticism, and let us instead look more closely at what Nicaragua does in order to blatantly alter the conclusions of this 1985 Committee's Opinion. Nicaragua contents itself with quoting in its Written Statement and annexing thereto merely two paragraphs of the Opinion[94]. However, such excerpts are simply

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[89]WSN, para. 4.4.

[90]*La Gaceta*, Diario Oficial, Año LIV, Managua, D.N., Nos. 100, 18 May 1950, p. 966; 118, 9 June 1950, pp. 1138-1139; 121, 18 June 1950, p. 1162; 159, 2 August 1950, pp. 1514-1518; 160, 3 August 1950, pp. 1529-1533.

[91]WSN, para. 4.19.

[92]Opinion of the Inter-American Juridical Committee on the American Treaty on Pacific Settlement (Pact of Bogotá), Organization of the American States Doc. OEA/Ser.G, CP/Doc. 1603/85, 3 Sep. 1985, reproduced in Ann. 23 of Nicaragua's Counter-Memorial in the *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 423.

[93]WSN, paras. 4.24-4.27.

[94]*Ibid.*, para. 4.25 and Ann. 2.

descriptive of the personal views expressed by the Committee's Rapporteur already in his report dated 19 August 1985, and not a reflection of the Committee's conclusions in the Opinion it formally adopted ten days later, on 29 August 1985, which Opinion annexed the Rapporteur's report[95]. Nicaragua does not quote, and does not include in its annexes, the Opinion's clear acknowledgment that the 11-member Committee as a whole rejected the amendment proposed by the Rapporteur. As stated in the paragraph of the Opinion immediately following those quoted by Nicaragua, which now appears on the screen:

> "Although there was a motion by the Rapporteur that an adjustment in the text be recommended to make it consistent with the French version . . ., the amendment voted on for that particular phrase of the second paragraph of Article II was that it [should] read 'in the opinion of one of the parties'. That amendment carried the votes of Drs. Leoro [Rapporteur], Vieira, Callejas-Bonilla, Rabasa and Waaldijk."[96]

In other words, the amendment was supported only by a minority of the full membership of the Committee and, hence, it was rejected. Moreover, the phrase "in the opinion of the parties" in the plural was kept in Article II of the complete text of the Pact adopted by the Committee and reproduced as the concluding part of its Opinion[97]. And yet, Nicaragua unashamedly feels free to assert that "[i]t is thus clear that the conclusion reached by the Juridical Committee is that Article II refers to the opinion of one of the parties to a dispute, not both of them — exactly the opposite of the proposition for which Colombia cites the 1985 Juridical Committee report"[98].

14. However, this is simply not so. What is crystal clear is precisely the contrary. Nicaragua has grossly distorted the Opinion by advancing, as if it were the Committee's interpretation, a reading proposed by the Rapporteur which is precisely the one rejected by the Committee.

15. Moreover, to read Article II of the Pact as meaning that only the opinion of the Applicant matters, as Nicaragua asserts, would lead to a manifestly absurd result. For what purpose would be served by this prerequisite if its fulfilment were to depend solely on the opinion of the party that

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[95]Opinion of the Inter-American Juridical Committee on the American Treaty on Pacific Settlement (Pact of Bogotá), Organization of the American States Doc. OEA/Ser.G, CP/Doc. 1603/85, 3 Sep. 1985, reproduced in Ann. 23 of Nicaragua's Counter-Memorial in the *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 423.

[96]Opinion of the Inter-American Juridical Committee on the American Treaty on Pacific Settlement (Pact of Bogotá), Organization of the American States Doc. OEA/Ser.G, CP/Doc. 1603/85, 3 Sep. 1985, reproduced in Ann. 23 of Nicaragua's Counter-Memorial in the *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, pp. 431-432.

[97]*Ibid.*, p. 442.

[98]WSN, para. 4.27.

seises the Court? Evidently Nicaragua feels compelled to insist on such reading because it is fully conscious that in the opinion of Colombia direct negotiations were possible.

The condition presupposes an objective assessment of the opinion of the parties

16. The precondition established in Article II of the Pact presupposes an objective assessment of the opinion of the parties. As this Court stated in 1988, "the holding of opinions can be subject to demonstration, and . . . the Court may expect 'the Parties [to provide] substantive evidence that they consider in good faith' a certain possibility of negotiation to exist or not to exist"[99]. The Parties agree with this statement of principle. In practice, however, Nicaragua seeks to demonstrate its bona fide opinion by relying solely on the fact that it is the State that has filed the Application. In the Applicant's own words: "Nicaragua was justified in forming the same view, as the filing of the Application attests."[100]

17. According to the Applicant, Nicaragua had made in the 1988 *Border and Transborder Armed Actions* case "an argument very much like the one Colombia now puts forward"[101]. But what Nicaragua had argued in that case was that the issue "is not whether one of the parties or both of them must think that the dispute cannot be settled by diplomatic means but whether the dispute can in fact be settled by such means"[102]. Nicaragua's contention constitutes yet another deliberate misinterpretation of Colombia's arguments. Colombia has clearly stated in its preliminary objections that the language of Article II of the Pact of Bogotá "points to the importance of the Parties' opinion as to whether the controversy can or cannot be settled by direct negotiations"[103].

18. Moreover, Nicaragua has advanced the untenable proposition that Colombia's analysis of the Court's jurisprudence relating to compromissory clauses, in treaties that provide for recourse to the Court only in the case of a dispute that "is not" or "cannot be" settled by negotiations, is "inapposite"[104]. In its view, the subjective element embodied in Article II implies that it "cannot be

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

[100] WSN, para. 4.50.

[101] *Ibid.*, para. 4.12.

[102] *Ibid.*

[103] POC, para. 4.27.

[104] WSN, para. 4.3.

analogized to those other compromissory clauses"[105]. By characterizing Article II of the Pact as "unique", Nicaragua deludes itself by thinking that it can arrive at the conclusion that Colombia simply cannot rely on any such jurisprudential precedent to interpret this provision[106].

19. In this respect, it suffices to emphasize that not even Nicaragua believes what it says. In effect, Nicaragua finds it quite appropriate for itself to refer to the Court's jurisprudence in order to draw purported parallels between the current situation and both the 1988 Advisory Opinion concerning the *UN Headquarters Agreement* and the 1980 Judgment in the *Tehran Hostages* case[107]. It is implausible to attempt such a comparison. In so far as the Advisory Opinion is concerned, there had been extensive negotiations and consultations prior to the filing of the corresponding request. Besides, for the United States its own Anti-Terrorism Act "ha[d] superseded the requirements of the UN Headquarters Agreement to the extent that those requirements [were] inconsistent with th[at] Statute"[108]. Thus, the issue was not one of non-applicability but clearly one of non-compliance with an international obligation. Moreover, in that case the Court was confronted with a provision setting a lower threshold for previous negotiations since the requirement was that the dispute "is not settled" rather than that it "cannot be settled". In relation to the *Tehran Hostages* case, suffice it to recall that, following United States offers to negotiate, the Ayatollah Khomeini "solemnly forb[ade] members of the Revolutionary Council . . . to meet the United States representatives"[109]. Obviously, the very holding of hostages in a diplomatic mission significantly impairs the prospect for further discussions since negotiations with the receiving State are one of the mission's key functions[110].

20. In reasoning on the basis of the jurisprudential distinction between provisions requiring that the dispute "is not settled" and provisions requiring that it "cannot be settled", what Colombia has sought is to describe the appropriate standard against which the opinion of the Parties must be

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[105] *Ibid.*, para. 4.11 and paras 4.9-4.13.

[106] *Ibid.*, para. 4.3.

[107] WSN, paras 4.47-4.52.

[108] *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988*, p. 23, para. 26.

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

[110] Art. 3, para. 1 (c) of the Vienna Convention on Diplomatic Relations of 18 April 1961.

measured. Article II of the Pact falls squarely in the category of the "cannot be settled" dispute provisions. Hence, the Parties must be of the good faith opinion that negotiations might not just be impractical, but that they would be futile. In any event, even under the Applicant's premise according to which actual negotiations are not necessary to fulfil the precondition of Article II of the Pact, the indisputable fact remains that the statements of the highest representatives of both States and the steps that they have taken attest to their will to settle any alleged controversy by way of negotiations.

The Parties were of the good faith opinion that the alleged controversy could be settled by way of direct negotiations

21. I will now deal with the opinion of the Parties as expressed by their highest representatives and military officials. The evidence, which was also discussed by Mr. Bundy, shows that both Parties were of the opinion that negotiations were possible and indeed the way to proceed. It is abundantly clear from the many declarations made by the President of Nicaragua that the Applicant was never of the opinion that the controversy could not be settled by way of negotiations.

22. The Applicant discusses the conduct of Nicaragua in a single paragraph — 4.37 — of its Written Statement. Out of the numerous declarations made by its President, Nicaragua has chosen to refer to only two: those made on 28 November 2012 and 10 September 2013. But neither of those two declarations attest to the futility of negotiations. In fact, Colombia fails to understand the reason why the November pronouncement by the President of Nicaragua that, "Colombia will recognize the ruling of the International Court of Justice, because there is no other way forward" implies that negotiations are useless[111]. Such characterization of the real meaning of the Presidential statement is obviously in contradiction with the conduct of the Parties at that time, as demonstrated by the constructive meetings between the Presidents of the two countries held soon after in Mexico, in December 2012, and in Chile, in February 2013[112]. In fact, the Applicant has itself admitted that "both Parties had made public statements keeping the door open to eventual

[111]WSN, para. 4.37.

[112]POC, para. 4.50.

negotiations"[113]. According to Nicaragua, it is only at a later time that Colombia shut the door to negotiations[114]. Therefore, the November statement by the Nicaraguan President cannot be read as signifying that in the opinion of the Applicant negotiations were futile.

23. In relation to the declaration of 10 September 2013, Nicaragua does quote its President, but once again it does so selectively[115]. While the President of Nicaragua indeed remarked that there is no question, as Colombia has repeatedly acknowledged, that "[t]he Court decisions are obligatory", the Applicant fails to mention that its President also stated, as shown on the screen, that: "We agree that you can open a dialogue between the Government of Nicaragua and the Government of Colombia, and that these negotiations may produce an agreement that allows us to make the transition in an orderly manner"[116].

24. In an effort to demonstrate that Colombia "ha[d] shut the door to any negotiations", Nicaragua refers to events that occurred in the "two and a half months leading up to the Application"[117]. According to the Applicant, "pending the decision of the Constitutional Court, Colombia was of the opinion that no negotiation was even possible"[118]. However, the statements made by the Colombian President and Minister for Foreign Affairs respectively on 15 and 18 September 2013 indicate that Colombia emphasized the need to conduct negotiations in order to conclude a treaty that would implement the 2012 Judgment. The fact that the adoption of an implementing treaty was one of the key points of Colombia's position is also attested to by the President's speech of 9 September 2013 and the Foreign Minister's declaration of the next day[119]. The need to wait for the ruling of the Constitutional Court cannot therefore be understood as having rendered negotiations futile. In fact, it constituted an important step at the domestic level to give a solid ground to the negotiations on the implementation of the 2012 Judgment.

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[113]WSN, para. 4.5.

[114]*Ibid.*, para. 4.5.

[115]WSN, para. 4.37.

[116]POC, para. 4.51 and Vol. II, Ann. 40.

[117]WSN, paras 4.38-4.52, Anns. 12 and 39.

[118]*Ibid.*, para. 4.46.

[119]POC, paras 4.68-4.69.

25. To measure the validity of the Applicant's assumption that the complaint to the Constitutional Court made negotiations useless, it suffices to check the declarations made by Nicaragua's Executive and Military before and after the Colombian statements of 15 and 18 September 2013. These declarations, which Nicaragua purposely ignored in its Written Statement, provide concrete evidence of the bona fide opinion of the Applicant's authorities up until the filing of the Application, at the very least.

26. In this respect the official address made by the President of Nicaragua on 14 August 2013 is most enlightening. It shows not only that the relations between the two Parties were good and that the Colombian navy was acting professionally, but also that negotiations concerning the implementation of the 2012 Judgment and related issues were, in the opinion of the Parties, possible[120]. Let us look at the relevant parts of this declaration, now on the screen.

> "Nicaragua respects and is ready to work together with Colombia in protecting the [Seaflower] Reserve zone. We are ready to develop the dialogue, the negotiations between Colombia and Nicaragua that will finally enable us to overcome that situation so that we, Colombians and Nicaraguans, may work further for peace, for stability.
>
> I ***[President Ortega] am convinced***, we hope that this will continue in the same manner until we can reach the dialogue, reach the negotiations so as to conclude the definitive agreements to apply the judgment rendered by the Court in the month of November of last year. We are totally so disposed."

27. Likewise on 13 September 2013 — that is to say after the filing of the complaint before the Constitutional Court that allegedly had rendered negotiations useless — the President of Nicaragua affirmed that he was willing to create a national commission that would meet with a commission from Colombia on the issue of implementation of the 2012 Judgment[121]. In other words, prior to the Colombian statements of 15 and 18 September 2013, Nicaragua was certainly of the bona fide opinion that negotiations were possible.

28. These Colombian statements did not lead Nicaragua to change its opinion. Indeed, on 18 November 2013, the chief of the Nicaraguan navy made a statement concerning the absence of any conflict with the Colombian naval forces stressing that the naval forces of the respective countries maintained continuous communication[122]. The Chief of the Nicaraguan army made a

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[120]POC, para. 4.52, Ann. 11.

[121]*Ibid.*, para. 4.51, Ann. 41.

[122]*Ibid.*, para. 4.53, Ann. 43.

similar statement on 18 March 2014, that is to say close to four months after the critical date[123]. Even more significantly, as the screen shows, the President of Nicaragua stated on 29 January 2014, in the immediate aftermath of the filing of the Application, that:

> "I had the opportunity to discuss the issue with President Santos in Mexico when Enrique Peña Nieto took office. We concluded that there will be a moment in which we will sign agreements between Colombia and Nicaragua in order to establish, properly, agreements to be ratified by the respective parliaments, these will refer to the boundaries established by the Court . . . Afterwards, we will have to wait until Colombia and Nicaragua discuss to reach an agreement that allows us to establish a way, especially and I so said to President Santos, to guarantee all the rights of the native population."[124]

If this was Nicaragua's opinion merely two months after the filing of the Application, it is evident that that must have been the Applicant's opinion at the critical date. Moreover, on 9 May 2014, the President of Nicaragua reiterated his proposal to create "a Colombian-Nicaraguan commission so [that] a treaty can come out of it that will allow us to respect, and put in practice the judgment by the ICJ"[125].

29. Declarations such as those just mentioned demonstrate that Nicaragua did not interpret the Colombian statements of 15 and 18 September 2013 as having rendered negotiations futile. In other words, Nicaragua's conduct directly contradicts the characterization of the Colombian statements made by the Applicant.

30. Notwithstanding Nicaragua's insistence to the contrary, it is a fact that Colombia has not "repudiated" the 2012 Judgment. The President and the Foreign Minister of Colombia have emphasized that the problem is one of 'applicability' under domestic law and not one of "compliance"[126]. Nicaragua itself has included in its annexes statements of the Executive of Colombia that confirm this distinction[127]. The Executive of Nicaragua was conscious that Colombia was facing "a legal impairment in the application of the ruling" under its domestic system[128]. The issue of incorporation was not unknown to Nicaragua before the filing of the

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[123] *Ibid.*, para. 4.57, Ann. 46.

[124] POC, para. 4.56, Ann. 45.

[125] MN, para. 2.60, Ann. 46.

[126] POC, Vol. II, Anns. 12, 13, 39 and 42.

[127] WSN, Anns. 4, 6, 7, 8 and 9.

[128] POC, Vol. II, Anns. 41 and 45; WSN, Anns. 4, 6, 7, 8 and 9.

complaint before the Constitutional Court and cannot therefore have led to a change of opinion in its Executive[129].

31. In this context, it is easy to understand the declaration made by the Colombian Foreign Minister — who honours us today with her presence here — as a reaction to the filing of the Application by Nicaragua. As the Minister stated:

> "It is not a big problem. The relations with Nicaragua will not be broken […] We have [re]called our Ambassador for consultations because sometimes you do not understand how they come to a decision as the last application which that country has submitted in The Hague. I say this, because you go to the Court when all the instances to solve a problem are exhausted."[130]

The Minister's reaction underlines the fact that Colombia was completely taken by surprise by the new additional case brought before the Court. While Nicaragua's and Colombia's highest representatives had made it clear that negotiations were the way to proceed, the Applicant unilaterally seised the Court on the very last moment before the termination of the Pact of Bogotá for the Respondent. In this manner, Nicaragua wished at all costs to preserve the jurisdictional avenue that it hoped was still available to it vis-à-vis Colombia, but in so doing, it failed to fulfil the precondition of Article II of the Pact.

Conclusion

32. Mr. President, Members of the Court, I will now sum up Colombia's third preliminary objection.

33. Nicaragua would have you believe that on the question of whether direct negotiations were possible, the only opinion that matters is its own. To support this self-serving reading of Article II of the Pact, Nicaragua has blatantly altered the content of the 1985 Inter-American Juridical Committee's Opinion. For, in spite of its assertion to the contrary, it is Nicaragua, not Colombia, which has provided a reading of the provision that corresponds exactly to the one rejected by the Juridical Committee.

34. Having supposedly deprived Colombia's conduct of any legal value, Nicaragua would also have you believe that, in its own bona fide opinion, negotiations were useless at the time of the

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[129]POC, Vol. II, Ann. 12; NWS, Anns. 6 and 7.

[130]POC, paras 4.72-4.73 and Vol. II, Ann. 44.

seisin of the Court. In fact, the Applicant infers such opinion from the very filing of the Application. But what about the numerous statements made by its President that expressly addressed the issue of the implementation of the 2012 Judgment and the viability of direct negotiations through the usual diplomatic channels? Nicaragua either ignores them or selectively cites them. Yet, the President of Nicaragua's statements made on 14 August, 10 and 13 September 2013 and 29 January and 9 May 2014, conclusively demonstrate that the Applicant was of the opinion that direct negotiations were possible before and after and, henceforth, at the critical date[131].

35. Nicaragua has sought to deprive Article II of the Pact of any useful purpose. For if the Applicant's opinion was the only one that mattered, and the filing of an application could alone be sufficient to substantiate such opinion, what would be left of this provision? What would be left of the Court's pronouncement in the 1988 Judgment that it "may expect 'the Parties [to provide] substantive evidence that they consider in good faith' a certain possibility of negotiation to exist or not to exist"[132]?

36. Nicaragua's reading of Article II of the Pact conferring pre-eminence to the French text over the three other authentic texts, coupled with its far from objective assessment of its own opinion, certainly leads to a manifestly absurd result. There is simply nothing left of Article II of the Pact and certainly not a meaningful precondition to be fulfilled prior to the initiation of the Pact's procedures.

37. In conclusion, for the reasons I have explained, the Court lacks jurisdiction over Nicaragua's Application because the precondition imposed by Article II of the Pact has not been fulfilled.

38. Mr. President, Members of the Court, this concludes my presentation. I respectfully ask that you call on my colleague, Mr. Treves.

Le PRESIDENT : Merci, Monsieur Valencia-Ospina. Je donne maintenant la parole au professeur Tullio Treves.

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[131]POC, Vol. II, Anns. 11, 40, 41 and 45; MN, para. 2.60, Ann. 46.

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

M. TREVES : Merci, Monsieur le président. Monsieur le président, Mesdames et Messieurs les juges, c'est un grand honneur pour moi de plaider devant vous et je suis reconnaissant au Gouvernement de la République de Colombie de m'en avoir donné l'occasion.

QUATRIÈME ET CINQUIÈME EXCEPTIONS PRÉLIMINAIRES : LA COUR N'A PAS UN POUVOIR INHÉRENT POUR JUGER DES DEMANDES DU NICARAGUA

1. La présente plaidoirie porte sur les quatrième et cinquième exceptions préliminaires soulevées par la Colombie. Ces deux exceptions sont distinctes car elles portent respectivement sur l'inexistence d'un pouvoir inhérent de la Cour de juger sur une prétendue inexécution de l'arrêt de 2012 et sur l'inexistence d'un pouvoir inhérent de surveillance sur l'exécution des arrêts. Nous allons néanmoins traiter ces exceptions dans la même plaidoirie puisqu'elles soulèvent, dans la plupart des cas, les mêmes questions. Ces questions ont trait à la base alternative de compétence soulevée par le Nicaragua. Ainsi, elles n'ont pas de lien direct avec les trois premières exceptions qui viennent d'être entendues par la Cour. Ni l'une ni l'autre n'est défensible car elles ne fournissent pas une base de compétence à la Cour.

2. Ma tâche est de démontrer que, contrairement à ce que soutient le Nicaragua, dans la présente affaire la Cour n'est pas compétente au titre d'un «pouvoir inhérent». Cette expression est utilisée, dans les textes en français des arrêts de la Cour, plus fréquemment que «compétence inhérente», terme plus similaire à l'expression «inherent jurisdiction» que l'on trouve dans les textes anglais. Tant il en est ainsi que, dans la présente affaire, les services de la Cour traduisent en français l'expression «inherent jurisdiction» utilisée dans les plaidoiries écrites par «pouvoir inhérent».

3. Cette divergence linguistique couvre une différence de fond, subtile mais importante, ayant trait à la question de savoir à quoi se réfère le terme «inhérent». L'expression «pouvoir inhérent» implique que, au cas où il existe une compétence bien établie basée sur le consentement des parties, celle-ci comprend certains pouvoirs nécessaires à son exercice. L'expression anglaise semblerait, par contre, encourager la mauvaise interprétation que, même en l'absence d'une compétence bien établie basée sur le consentement des parties, la Cour aurait une compétence lui permettant d'agir à l'égard de parties dont le consentement manque. La version française est

cohérente avec le Statut et le principe de la compétence consensuelle. Si on la lit comme le fait le Nicaragua, ce n'est pas le cas de la version anglaise.

4. Le Nicaragua soutient que la compétence de la Cour à juger d'une alléguée violation de l'arrêt du 19 novembre 2012 ou d'une violation des obligations dérivant de l'arrêt découlerait d'un «pouvoir inhérent» *(inherent jurisdiction)* qu'aurait la Cour[133]. Le Nicaragua invite la Cour à exercer ce pouvoir inhérent pour examiner la situation créée par l'allégué comportement de la Colombie qui, à son avis, «remet en cause le fond même» de l'arrêt de 2012. Ce pouvoir inhérent constituerait une «base de compétence à titre subsidiaire en la présente affaire»[134].

5. La Colombie rejette l'allégation du Nicaragua et soutient que la Cour n'a aucun pouvoir inhérent lui permettant de juger d'une affaire distincte, introduite après la conclusion d'une autre affaire entre les mêmes parties et qui a fait l'objet d'un arrêt de la Cour.

6. La compétence à juger sur le fond d'un différend ne s'établit que sur la base des titres de compétence prévus par le Statut. Cela vaut, notamment, pour les différends portant sur l'inexécution d'un autre jugement. C'est ce qu'affirme notamment une étude doctrinale très autorisée

> «tout différend relatif à cette exécution doit être regardé comme un différend distinct de celui réglé par le jugement. La Cour ne saurait dès lors s'en saisir sans un nouvel accord des parties. ***Aussi*** a-t-elle jugé à plusieurs reprises qu'elle ne pouvait, ni ne devait envisager l'inexécution de ses arrêts et ne s'est-elle prononcée sur cette exécution que dans les cas où les parties lui avaient donné spécifiquement compétence à cet effet.»[135]

7. L'affaire qui nous occupe correspond exactement à celles envisagées par l'étude que l'on vient de citer : il s'agit d'une affaire portant sur un prétendu nouveau différend, qui requiert un nouveau procès soumis aux règles ordinaires du contentieux, y compris les règles portant sur la compétence. Je dis bien, prétendu nouveau différend puisque, comme l'a souligné mon collègue Michael Reisman, il n'y a pas de différend d'ordre juridique dans cette affaire du fait que le Nicaragua n'a pas rempli les conditions nécessaires à l'existence d'un différend à la date critique.

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[133] EEN, par. 5.9.

[134] MN, par. 1.32.

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

8. Dans la présente affaire il n'existe pas un accord des parties conférant à la Cour la compétence pour s'occuper de l'exécution de l'arrêt de 2012 ou d'aspects de celle-ci. Il n'existe pas non plus une disposition de cet arrêt prévoyant la division du procès en plusieurs phases.

9. En outre, l'on ne trouve dans le jugement de 2012 aucune trace d'une réservation de compétence pouvant permettre de ressusciter la compétence de la Cour au cas où certaines conditions devaient se vérifier à l'avenir, comme dans les affaires des *Essais nucléaires*[136]. L'obligation de se conformer aux arrêts de la Cour, consacrée à l'article 94, paragraphe 1, de la Charte des Nations Unies et à l'article 59 du Statut de la Cour, ne saurait se substituer à une clause permettant expressément de «réexaminer la situation» telle qu'on la trouve dans les deux arrêts de 1974 sur les *Essais nucléaires*, respectivement aux paragraphes 60 et 63. Ces clauses des arrêts de 1974 ont un caractère tout à fait exceptionnel, tandis que l'obligation de se conformer aux décisions de la Cour est l'effet normal de tout arrêt de celle-ci. Faire de cette dernière obligation, comme le voudrait le Nicaragua, une base de compétence serait tout à fait erroné car cela permettrait de rouvrir toute affaire où une partie allègue que l'autre ne se conforme pas au jugement qui l'a tranchée.

10. Les arrêts de la Cour que le Nicaragua invoque au soutien de sa position sur l'existence d'un pouvoir inhérent *(inherent jurisdiction)* ne fournissent aucun appui à celle-ci. Ce n'est certainement pas le cas de l'arrêt dans l'affaire de la *Compagnie d'électricité de Sophia*, que le Nicaragua invoque dans son mémoire comme faisant autorité sur l'existence d'un tel pouvoir inhérent[137]. En effet, en acceptant les arguments présentés par la Colombie[138] — le même Nicaragua reconnaît que dans cet arrêt «la question du «pouvoir inhérent» ne s'est pas posée, fût-ce implicitement»[139].

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[136] *Essais nucléaires (Australie c. France), arrêt, C.I.J. Recueil 1974*, p. 272, par. 60 ; *Essais nucléaires (Nouvelle-Zélande c. France), arrêt, C.I.J. Recueil 1974*, p. 477, par. 63, ainsi que *Demande d'examen de la situation au titre du paragraphe 63 de l'arrêt rendu par la Cour le 20 décembre 1974 dans l'affaire des* Essais nucléaires (Nouvelle-Zélande c. France) *(Nouvelle-Zélande c. France), ordonnance du 22 septembre 1995, C.I.J. Recueil 1995*, p. 297, par. 32.

[137] MN, par. 1.24, note 15.

[138] EPC, par. 5.14.

[139] EEN, par. 5.3.

11. Il ne s'agit non plus des arrêts sur les *Essais nucléaires* de 1974, ni de l'arrêt *LaGrand*[140] de 2001. Ces arrêts, tout en mentionnant des pouvoirs inhérents de la Cour, n'y trouvent pas une base de compétence pour juger d'un différend donné.

12. En effet, dans les arrêts sur les *Essais nucléaires*, la Cour affirme que le «pouvoir inhérent» qu'elle possède «l'autorise à prendre toute mesure voulue … pour faire en sorte que, *si sa compétence au fond est établie*, l'exercice de cette compétence ne se révèle pas vain»[141]. Ainsi, le «pouvoir inhérent» ne peut s'exercer que dans le cadre d'une affaire à l'égard de laquelle la compétence au fond «est établie» et non vice versa. Ce pouvoir ne saurait pour autant fournir la base de cette compétence.

13. Dans l'affaire *LaGrand*, l'Allemagne soutenait que la Cour avait compétence pour juger de l'inobservance de l'ordonnance du 3 mars 1999 portant mesures conservatoires. Elle faisait valoir comme argument «accessoire et subsidiaire» que cette compétence relevait du pouvoir inhérent de la Cour[142].

14. La Cour ne considéra pas nécessaire d'examiner l'argument accessoire et subsidiaire de l'Allemagne. Elle accepta son argument principal[143], mais elle affirma néanmoins :

> «*Lorsque la Cour a compétence pour trancher un différend*, elle a également compétence pour se prononcer sur des conclusions la priant de constater qu'une ordonnance en indication de mesures rendue aux fins de préserver les droits des Parties à ce différend n'a pas été exécutée.»[144]

15. Ce dernier passage de l'arrêt *LaGrand*, lu hors contexte, donne l'occasion au Nicaragua de faire l'affirmation suivante :

> «Il n'y a aucune raison de ne pas transposer *mutatis mutandis* la position de la Cour concernant son pouvoir inhérent de se prononcer sur le non-respect d'ordonnances en indication de mesures conservatoires aux différends découlant d'un défaut d'exécution de ses arrêts.»[145]

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[140] *LaGrand (Allemagne c. Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 2001*, p. 466.

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

[142] *LaGrand (Allemagne* c. *Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 2001*, p. 483, par. 44, où le texte français exceptionnellement utilise «compétence inhérente» comme équivalent de «inherent jurisdiction»), et mémoire de la République fédérale d'Allemagne, par. 3.02.

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

[144] *LaGrand (Allemagne* c. *Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 2001*, p. 484, par. 45 (les italiques sont de nous).

[145] EE, par. 5.16.

16. Cette affirmation manque de fondement. Elle ne tient aucunement compte de la différence entre la détermination, dans un jugement sur le fond, adopté dans le cadre d'un différend sur lequel la compétence est établie, du non-respect d'une ordonnance portant mesures conservatoires et un différend ayant pour objet l'allégué non-respect d'un arrêt portant sur une affaire déjà conclue et ayant la force de la chose jugée.

17. Aucun raisonnement par analogie n'est possible. La condition dont la Cour souligne la nécessité en mentionnant ses pouvoirs inhérents dans les affaires des *Essais nucléaires*, à savoir que sa compétence au fond doit être établie[146], n'est pas remplie. Le Nicaragua voudrait faire de cette précondition à leur exercice, la conséquence des pouvoirs inhérents de la Cour. Ce serait mettre la charrue avant les bœufs ! Il s'agit d'une véritable *petitio principii*.

18. Contrairement à ce que dit le Nicaragua, il existe ainsi une raison, une bonne raison en effet, pour ne pas transposer à des différends portant sur le non-respect des jugements l'affirmation de la Cour concernant la compétence en matière d'inexécution d'une ordonnance en indication de mesures provisoires.

19. Les pouvoirs inhérents de la Cour fonctionnent dans le cadre de différends à l'égard desquels sa compétence est établie sur la base d'un titre préexistant. L'on ne saurait les invoquer pour établir une compétence autrement inexistante.

20. Le Nicaragua n'a pas voulu préciser si les pouvoirs inhérents qui, selon lui fondent la compétence de la Cour, concernent un différend portant sur l'exécution de l'arrêt de 2012 ou sur l'inobservance des droits dérivant de celui-ci, en soutenant qu'il s'agirait d'un «intéressant débat juridique» qui appartiendrait au fond et serait sans importance pour ce qui est de la compétence de la Cour[147]. Il n'est pas nécessaire d'entrer ici dans cette discussion. Il n'en reste pas moins que la prétention du Nicaragua de fonder la compétence de la Cour sur un «pouvoir inhérent» de celle-ci est inextricablement liée à l'existence d'une connexion entre l'affaire conclue et la nouvelle affaire. Il s'agit néanmoins de différends distincts pour chacun desquels l'existence d'un titre de compétence est nécessaire.

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

[147] EEN, par. 5.9.

21. Monsieur le président, Mesdames et Messieurs les juges, je voudrais maintenant partager avec la Cour des réflexions qui renforcent l'argument que, dans la présente affaire en tout cas, la Cour n'a pas un pouvoir inhérent de surveillance sur l'exécution de ses jugements.

22. Il faut remarquer tout d'abord qu'un tel pouvoir n'est pas prévu par le Statut. D'après ce dernier, les seuls cas de compétence de la Cour concernant des arrêts ayant l'effet de la chose jugée ont trait à l'interprétation et à la revision de ces arrêts (art. 60 et 61) et la seule mention dans le Statut de l'exécution d'un arrêt se trouve à l'article 61, paragraphe 3, d'après lequel «la Cour peut subordonner l'ouverture de la procédure en revision à l'exécution préalable de l'arrêt». Nous ne nous trouvons dans aucune des situations envisagées par ces dispositions du Statut.

23. Qui plus est, l'article 94, paragraphe 2, de la Charte des Nations Unies, qui est dans vos dossiers et devrait apparaître sur l'écran, prévoit une procédure à laquelle peut recourir la partie à un litige qui considère que l'autre partie ne satisfait pas aux obligations qui lui incombent en vertu d'un arrêt rendu par la Cour. Cette procédure consiste en un recours au Conseil de sécurité qui, «s'il le juge nécessaire, peut faire des recommandations ou décider des mesures à prendre pour faire exécuter l'arrêt».

24. Compte tenu de cette disposition de la Charte, les Etats américains, afin d'éviter toute divergence entre eux concernant les suites d'un arrêt de la Cour et pouvant impliquer des risques de conflit, adoptèrent une *lex specialis* régionale pour ces divergences. Leur propos était de régler celles-ci «au sein de la famille» sans recourir, si possible, au Conseil de sécurité. Cela s'explique si l'on considère que, au lendemain de la seconde guerre mondiale, les arrangements régionaux se présentaient aux Etats des Amériques comme une protection supplémentaire à celle de la Charte des Nations Unies.

25. La *lex specialis* régionale mentionnée est la procédure prévue à l'article L du pacte de Bogotá. Cet article impose l'obligation de s'adresser à la réunion de consultation des ministres des relations extérieures des Etats parties au pacte à tout Etat partie qui entend recourir au Conseil de sécurité aux fins de l'article 94, paragraphe 2, de la Charte. La réunion des ministres des relations extérieures du pacte de Bogotá est convoquée «afin que celle-ci convienne des mesures à prendre

en vue d'assurer l'exécution de la décision judiciaire[148] ou arbitrale». Le caractère obligatoire de la procédure de l'article L comporte que, pour les Etats liés au pacte, le pouvoir de surveillance sur les suites des arrêts de la Cour appartient au Conseil de sécurité et au conseil des ministres des relations extérieures des Etats parties au pacte, et, partant, non à la Cour internationale de Justice.

26. Il me paraît important de souligner que — quel que soit le point de vue que l'on adopte quant au moment où la dénonciation du pacte par la Colombie déploie ses effets — l'article L et le manque de compétence de la Cour en matière de surveillance sur les suites de ses arrêts qui en découle étaient en vigueur et, partant, obligatoires pour les Parties à la présente affaire au moment de la demande du Nicaragua.

27. Monsieur le président, Mesdames et Messieurs les juges, je ne saurais conclure cette plaidoirie sans souligner que suivre le Nicaragua dans sa revendication d'un pouvoir inhérent pouvant fonder la compétence de la Cour dans la présente affaire serait un précédent dangereux. Le principe selon lequel le consentement des parties est une précondition nécessaire pour établir la compétence de la Cour en serait bouleversé. Et il serait présomptueux de ma part d'insister, devant vous, sur l'importance dirais-je primordiale, dans le cadre d'ensemble du droit international, du principe du consentement tel qu'incorporé dans le Statut de la Cour et d'autres instances juridictionnelles, en tant que base de la compétence des cours et tribunaux internationaux.

28. Au vu de ce qui précède, la Colombie maintient ses quatrième et cinquième exceptions préliminaires.

29. Cette phase des plaidoiries de la Colombie dans la présente affaire est ainsi terminée.

30. Je vous remercie, Monsieur le président, Mesdames et Messieurs les juges, pour votre patience et votre attention.

Le PRESIDENT : Merci, Monsieur le professeur. Voilà qui met un terme au premier tour de plaidoiries de la Colombie. La Cour se réunira de nouveau demain mardi 29 septembre, à 10 heures, pour entendre le Nicaragua en son premier tour de plaidoiries. L'audience est levée.

L'audience est levée à 13 heures.

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[148] ***L'article L dit «juridique». Il s'agit d'une faute évidente comme il résulte des*** autres versions linguistiques : anglais : «judicial» ; espagnol : «judicial» ; portugais: «judicial».