Corrigé
Corrected

CR 2015/26

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2015

Public sitting

held on Monday 5 October 2015, at 10 a.m., at the Peace Palace,

President Abraham presiding,

***in the case concerning* Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua *v.* Colombia)**

Preliminary Objections

VERBATIM RECORD

ANNÉE 2015

Audience publique

tenue le lundi 5 octobre 2015, à 10 heures, au Palais de la Paix,

sous la présidence de M. Abraham, président,

***en l'affaire relative à la* Question de la délimitation du plateau continental entre le Nicaragua et la Colombie au-delà de 200 milles marins de la côte nicaraguayenne (Nicaragua c. Colombie)**

Exceptions préliminaires

COMPTE RENDU

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

Présents : M. Abraham, président
M. Yusuf, vice-président
MM. Owada
Tomka
Bennouna
Cançado Trindade
Greenwood
Mmes Xue
Donoghue
M. Gaja
Mme Sebutinde
MM. Bhandari
Robinson
Gevorgian, juges
MM. Brower
Skotnikov, 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,

as Counsel;

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 :

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

comme agent et conseil ;

M. Vaughan Lowe, Q.C., membre du barreau d'Angleterre, professeur émérite de droit international, Oxford University, membre de l'Institut de droit international,

M. Alex Oude Elferink, directeur de l'Institut néerlandais du droit de la mer et professeur de droit international maritime, Université d'Utrecht,

M. Alain Pellet, professeur émérite de 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,

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

comme conseils et avocats ;

M. César Vega Masís, ministre adjoint des affaires étrangères et 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,

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

comme conseils ;

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

Mme Claudia Loza Obregon, premier secrétaire à l'ambassade du Nicaragua au Royaume des Pays-Bas,

M. Benjamin Samson, doctorant au Centre de droit international de Nanterre (CEDIN), Université Paris Ouest, Nanterre-La Défense,

Mme Gimena González,

comme conseils adjoints ;

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

comme administrateur.

The Government of Colombia is represented by:

H.E. Ms María Ángela Holguín Cuéllar, Minister for Foreign Affairs,

Hon. Ms Aury Guerrero Bowie, Governor of the Archipelago of San Andrés, Providencia and Santa Catalina,

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

as National Authorities;

H.E. Mr. Carlos Gustavo Arrieta Padilla, former Judge of the Council of State of Colombia, former Attorney General of Colombia and former Ambassador of Colombia to the Kingdom of the Netherlands,

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,

as Co-Agent;

Mr. W. Michael Reisman, McDougal Professor of International Law at Yale University, member of the Institut de droit international,

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,

Mr. Tullio Treves, member of the Institut de droit international, Senior Public International Law Consultant, Curtis, Mallet-Prevost, Colt & Mosle LLP, Milan, Professor, University of Milan,

Mr. Eduardo Valencia-Ospina, member and Special Rapporteur of the International Law Commission, President of the Latin American Society of International Law,

Mr. Matthias Herdegen, Dr. h.c., Professor of International Law, Director of the Institute of International Law at the University of Bonn,

as Counsel and Advocates;

H.E. Mr. Juan José Quintana Aranguren, Ambassador of the Republic of Colombia to the Kingdom of the Netherlands, Permanent Representative of Colombia to the OPCW, former Permanent Representative of Colombia to the United Nations in Geneva,

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,

Le Gouvernement de la Colombie est représenté par :

S. Exc. Mme María Ángela Holguín Cuéllar, ministre des affaires étrangères,

Mme Aury Guerrero Bowie, gouverneur de l'archipel de San Andrés, Providencia et Santa Catalina,

S. Exc. M. Francisco Echeverri Lara, ministre adjoint chargé des affaires multilatérales, ministère des affaires étrangères,

comme représentants de l'Etat ;

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

comme agent ;

S. Exc. M. Manuel José Cepeda Espinosa, ancien président de la Cour constitutionnelle de Colombie, ancien délégué permanent de la Colombie auprès de l'UNESCO et ancien ambassadeur de la Colombie auprès de la Confédération helvétique,

comme coagent ;

M. W. Michael Reisman, professeur de droit international à l'Université de Yale, titulaire de la chaire McDougal, membre de l'Institut de droit international,

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

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

M. Tullio Treves, membre de l'Institut de droit international, conseiller principal en droit international public, cabinet Curtis, Mallet-Prevost, Colt & Mosle LLP, Milan, professeur à l'Université de Milan,

M. Eduardo Valencia-Ospina, membre et rapporteur spécial de la Commission du droit international, président de l'association latino-américaine de droit international,

M. Matthias Herdegen, docteur *honoris causa*, professeur de droit international, directeur de l'Institut de droit international de l'Université de Bonn,

comme conseils et avocats ;

S. Exc. M. Juan José Quintana Aranguren, ambassadeur de la République de Colombie auprès du Royaume des Pays-Bas, représentant permanent de la Colombie auprès de l'OIAC, ancien représentant permanent de la Colombie auprès de l'Office des Nations Unies à Genève,

S. Exc. M. Andelfo García González, ambassadeur de la République de Colombie auprès du Royaume de Thaïlande, professeur de droit international, ancien ministre adjoint des affaires étrangères,

Mme Andrea Jiménez Herrera, conseiller à l'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,

Mr. Andrés Villegas Jaramillo, Co-ordinator, Group of Affairs before the ICJ, Ministry of Foreign Affairs,

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,

as Legal Advisers;

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,

as Technical Advisers;

Ms Charis Tan, Advocate and Solicitor, Singapore, member of the New York Bar, Solicitor, England and Wales, Eversheds LLP, Singapore,

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,

as Legal Assistants.

Mme Lucía Solano Ramírez, deuxième secrétaire de l'ambassade de la République de Colombie au Royaume des Pays-Bas,

M. Andrés Villegas Jaramillo, coordonnateur du groupe chargé des affaires portées devant la CIJ au sein du ministère des affaires étrangères,

M. Giovanny Andrés Vega Barbosa, groupe chargé des affaires portées devant la CIJ au sein du ministère des affaires étrangères,

Mme Ana María Durán López, groupe chargé des affaires portées devant la CIJ au sein du ministère des affaires étrangères,

M. Camilo Alberto Gómez Niño, groupe chargé des affaires portées devant la CIJ au sein du ministère des affaires étrangères,

M. Juan David Veloza Chará, troisième secrétaire, groupe chargé des affaires portées devant la CIJ au sein du ministère des affaires étrangères,

comme conseillers juridiques ;

le contre-amiral Luis Hernán Espejo, marine colombienne,

le capitaine de vaisseau William Pedroza, bureau des affaires internationales, marine colombienne,

le capitaine de frégate Hermann León, direction générale des affaires maritimes et portuaires, marine colombienne,

M. Scott Edmonds, cartographe, International Mapping,

M. Thomas Frogh, cartographe, International Mapping,

comme conseillers techniques ;

Mme Charis Tan, avocat et *solicitor* (Singapour), membre du barreau de New York, *solicitor* (Angleterre et pays de Galles), cabinet Eversheds LLP, Singapour,

M. Eran Sthoeger, LL.M., faculté de droit de l'Université de New York,

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

M. Lorenzo Palestini, doctorant à l'Institut de hautes études internationales et du développement de 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 la *Question de la délimitation du plateau continental entre le Nicaragua et la Colombie au-delà de 200 milles marins de la côte nicaraguayenne (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.

Je relève par ailleurs 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 a désigné M. Leonid Skotnikov, et la Colombie, M. Charles Brower.

L'article 20 du Statut dispose que «[t]out membre de la Cour doit, avant d'entrer en fonctions, prendre l'engagement solennel d'exercer ses attributions en pleine impartialité et en toute conscience». En vertu du paragraphe 6 de l'article 31 du Statut, cette disposition s'applique également aux juges *ad hoc*. Avant de les inviter à faire leur déclaration solennelle, je dirai quelques mots de la carrière et des qualifications de M. Brower et de M. Skotnikov.

De nationalité américaine, M. Brower est titulaire d'une licence de l'Université de Harvard. Il a, au cours de sa carrière, allié une longue pratique d'avocat à de hautes fonctions publiques, tant au niveau national qu'international. En tant que conseil et arbitre, il a traité des affaires notamment devant la Commission des Nations Unies pour le droit commercial international, la Commission d'indemnisation des Nations Unies et le Centre international pour le règlement des différends relatifs aux investissements. M. Brower a également représenté plusieurs Etats dans des procédures devant la Cour internationale de Justice, et il est membre des panels de plusieurs instances arbitrales internationales. Il a aussi exercé les fonctions de juge *ad hoc* à la Cour interaméricaine des droits de l'homme et d'expert à la Commission d'indemnisation des Nations Unies à Genève. M. Brower a par ailleurs servi au département d'Etat des Etats-Unis à Washington où, en tant que conseiller juridique par intérim, il était juriste principal du département et juriste international principal du Gouvernement des Etats-Unis. Il a également été conseiller spécial adjoint du président des Etats-Unis. M. Brower a occupé les fonctions de président de

l'American Society of International Law. Depuis 1983, il exerce les fonctions de juge au Tribunal des réclamations Etats-Unis/Iran à La Haye. Il a publié divers ouvrages sur le droit international et le règlement des différends internationaux.

De nationalité russe, M. Skotnikov est diplômé en droit international de l'Institut des relations internationales de Moscou. Il est bien connu de la Cour puisqu'il en a été membre pendant neuf ans, entre février 2006 et février de cette année. Avant d'entrer en fonctions à la Cour, il a été fonctionnaire au département consulaire du ministère des affaires étrangères de l'URSS, à la mission permanente de l'URSS auprès de l'Organisation des Nations Unies et au département juridique du ministère des affaires étrangères de l'URSS. M. Skotnikov est ensuite devenu directeur du département juridique du ministère des affaires étrangères de la Fédération de Russie. Il a également été ambassadeur extraordinaire et plénipotentiaire de la Fédération de Russie auprès du Royaume des Pays-Bas puis ambassadeur et représentant permanent de la Fédération de Russie auprès de l'Office des Nations Unies et des autres organisations internationales ayant leur siège à Genève, et de la conférence du désarmement. M. Skotnikov a participé à de nombreuses rencontres et négociations internationales en tant que membre de la délégation soviétique, représentant de l'URSS, et membre puis chef de la délégation de Russie. Il a aussi été membre du curatorium de l'Académie de droit international. M. Skotnikov a par ailleurs mené des activités doctrinales, de recherche et de conseil. Il est actuellement membre du groupe d'experts chargé de réaliser une évaluation indépendante intermédiaire du système d'administration de la justice à l'Organisation des Nations Unies, fonctions qui lui ont été confiées par le Secrétaire général.

J'invite maintenant MM. Brower et Skotnikov 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 Brower.

Mr. BROWER:

> "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 Brower. Monsieur Skotnikov.

Mr. SKOTNIKOV:

"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 Skotnikov. Veuillez vous asseoir. La Cour prend acte des déclarations solennelles faites par MM. Brower et Skotnikov.

*

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

Le 16 septembre 2013, le Nicaragua a introduit une instance contre la Colombie au sujet d'un différend relatif à «la délimitation entre, d'une part, le plateau continental du Nicaragua s'étendant au-delà de 200 milles marins des lignes de base à partir desquelles est mesurée la largeur de la mer territoriale du Nicaragua et, d'autre part, le plateau continental de la Colombie».

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 prenait effet, selon le Nicaragua, qu'au terme d'un an, le pacte de Bogotá cessant ainsi de produire ses effets à l'égard de la Colombie après le 27 novembre 2013.

Le Nicaragua soutient en outre que l'objet de sa requête demeure dans le champ de compétence de la Cour telle que celle-ci l'a établie dans l'affaire du *Différend territorial et maritime (Nicaragua c. Colombie)*. Il fait notamment valoir que la Cour n'a pas, dans son arrêt du 19 novembre 2012, tranché de manière définitive la question — dont elle était saisie — de la délimitation du plateau continental entre lui-même et la Colombie dans la zone située à plus de 200 milles marins de la côte nicaraguayenne.

Par ordonnance du 9 décembre 2013, la Cour a fixé au 9 décembre 2014 la date d'expiration du délai pour le dépôt du mémoire du Nicaragua et au 9 décembre 2015 la date d'expiration du délai pour le dépôt du contre-mémoire de la Colombie.

Le 14 août 2014, avant l'expiration du délai prescrit pour le dépôt du mémoire du Nicaragua, la Colombie, se référant à l'article 79 du Règlement, a soulevé certaines exceptions préliminaires à la compétence de la Cour et à la recevabilité de la requête. Pour sa part, le Nicaragua a prié la Cour, dans le cas où la procédure sur le fond serait suspendue, de lui accorder un délai suffisant pour la préparation de l'exposé écrit contenant ses observations et conclusions sur ces exceptions. Par ordonnance du 19 septembre 2014, la Cour, constatant qu'en vertu des dispositions du paragraphe 5 de l'article 79 du Règlement la procédure sur le fond était suspendue, a fixé au 19 janvier 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 avoir consulté les 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.

*

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 demain le mardi 6. Chaque Partie disposera d'une séance de trois heures. Le second tour de plaidoiries s'ouvrira le mercredi 7 octobre et s'achèvera le vendredi 9. Chaque Partie disposera d'une séance de deux heures.

*

La Colombie sera entendue en premier. C'est le coagent de la Colombie qui va prendre la parole ce matin, S. Exc. M. José Cepeda Espinosa. Je vous donne la parole.

M. CEPEDA ESPINOSA :

1. Monsieur le président, Mesdames et Messieurs les juges, c'est un grand honneur pour moi, en tant que coagent de la République de Colombie, de m'adresser la Cour en ces audiences provoquées par une requête du Nicaragua. C'est la troisième fois que le Nicaragua nous amène à comparaître devant vous. Notre présence est un témoignage de la tradition colombienne centenaire de respect pour le droit international.

2. La semaine dernière, le Nicaragua s'est exprimé avec le but évident d'attiser des sentiments envers la Colombie. Par considération pour la Cour, nous n'entrerons pas dans ce jeu-là. Nous croyons dans le rôle pacifiant de la raison en espérant qu'elle l'emportera sur la pugnacité des passions. Bien évidemment, nous présenterons nos arguments avec fermeté, la même fermeté de nos convictions.

3. Monsieur le président, une fois de plus le Nicaragua demande la délimitation du plateau continental au-delà de 200 milles marins de ses côtes. Une fois encore, il demande une délimitation à l'intérieur de la zone économique exclusive de la Colombie. Il s'agit en fait de la même prétention que le Nicaragua a portée devant vous en 2001, qu'il a poursuivie pendant 11 ans et vis-à-vis de laquelle vous avez tranché que le Nicaragua ne s'était pas acquitté du fardeau de la preuve dans l'arrêt définitif de 2012.

4. Je ne vais pas dissimuler la douleur que certains aspects de votre décision ont causé au peuple colombien et, en particulier, aux membres de la communauté raizale qui habitent l'archipel de San Andrés et Providencia. Leurs vies ont été profondément perturbées. C'est naturel qu'un débat franc et ouvert continue jusqu'à présent, étant donné que la Colombie est la plus ancienne démocratie constitutionnelle de toute l'Amérique latine.

5. Néanmoins, la Colombie, dans le respect du droit international et conformément à la décision de sa Cour constitutionnelle, est bien préparée à conclure un traité avec le Nicaragua afin d'appliquer le jugement de 2012. C'est grâce au fait qu'elle a été saisie par le président Juan Manuel Santos que la Cour constitutionnelle a pu clarifier que le jugement de 2012 devait être

incorporé par la voie d'un traité approuvé par une loi et non pas par une réforme constitutionnelle, comme l'a fait le Nicaragua. Monsieur le président, c'est avec ce même respect pour le droit, pour tout le droit, que nous comparaissons devant vous aujourd'hui.

6. Dans l'affaire entendue la semaine dernière, le Nicaragua a cherché de dépeindre la Colombie comme refusant de se conformer au jugement de 2012. La Colombie a démontré que ces allégations étaient sans fondement. Cette semaine, la requête du Nicaragua expose à merveille les contradictions du demandeur, puisqu'elle dévoile le fait que c'est le Nicaragua qui refuse d'accepter le caractère définitif du jugement de 2012. La Colombie s'oppose à cette nouvelle démarche abusive du Nicaragua et a donc soulevé des exceptions préliminaires. Afin de les mettre en perspective, permettez-moi de rappeler quelques faits essentiels.

7. Les demandes du Nicaragua à l'encontre de la Colombie ont déjà été présentées à propos de la requête du 6 décembre 2001. Dans la requête de 2001, le Nicaragua avait soumis un différend portant sur la souveraineté territoriale, ainsi que sur la délimitation maritime. Le Nicaragua avait en effet demandé un tracé complet de la délimitation maritime entre les deux Parties. Sa prétention originelle concernant une frontière maritime unique, telle que décrite et illustrée dans son mémoire, était située bien au-delà de 200 milles marins de ses côtes. Tel était également le cas de ses conclusions finales en ce qui concerne, cette fois, sa demande relative à un plateau continental étendu.

8. Il est donc évident que, il y a environ 14 ans, le Nicaragua a demandé une délimitation des mêmes espaces maritimes qui font aujourd'hui l'objet de sa nouvelle requête. Ce fait, à lui seul, ébranle la légitimité de la demande réitérée du Nicaragua.

9. Monsieur le président, Il faut rappeler que dans la procédure introduite en 2001, le Nicaragua a changé ses prétentions de manière continue. Ainsi, le Nicaragua est passé d'une demande visant à obtenir le tracé d'une frontière maritime unique entre les côtes continentales des deux Etats (prétention par ailleurs totalement absurde compte tenu de la distance entre les côtes continentales pertinentes) à une demande, soulevée dans ***la*** réplique de 2010, de délimitation des espaces du prétendu plateau continental situé *au-delà* de 200 milles marins de ses lignes de base. De plus, durant les audiences, la prétention du Nicaragua relative à un plateau continental étendu a subi plusieurs mutations avant de devenir, dans les conclusions finales, la demande I 3). Après ce

changement, le Nicaragua a demandé à la Cour de procéder «à une division par parts égales de la zone du plateau continental où les droits des deux Parties sur celui-ci se chevauchent»[1]. En dépit du caractère variable des demandes formulées par le Nicaragua, deux éléments sont demeurés constants. Premièrement, le Nicaragua a toujours demandé une délimitation complète et définitive de tous les espaces maritimes entre les deux Parties. Deuxièmement, ces espaces maritimes étaient situés dans les mêmes espaces vis-à-vis desquels le Nicaragua cherche de nouveau à obtenir une délimitation dans cette affaire.

10. Dans son jugement de 2012, la Cour internationale de Justice n'a pas accueilli l'exception d'irrecevabilité soulevée par la Colombie à l'encontre de la demande formulée par le Nicaragua concernant le plateau continental étendu. Ainsi, la Cour a exercé l'intégralité de sa compétence en tranchant toutes les demandes soumises par le Nicaragua sur le fond, y compris la demande relative à l'existence d'un titre sur le plateau continental au-delà de 200 milles marins et sa délimitation. Cette demande n'a pas été accueillie par la Cour. Partant, la Cour a tracé la délimitation maritime unique de la zone économique exclusive et du plateau continental entre les deux Etats. Il s'agit d'une délimitation complète qui constitue une décision définitive. La Cour n'a laissé aucune question de délimitation maritime entre la Colombie et le Nicaragua irrésolue ou en attente. Ce fut la fin de l'affaire. Comme l'agent du Nicaragua l'a lui-même souligné durant les audiences — dans un passage repris dans le jugement de 2012 :

> «[s]ur le fond, ce que le Nicaragua demandait initialement à la Cour, et qu'il lui demande toujours, c'est que *l'ensemble des zones maritimes* du Nicaragua et de la Colombie soient délimitées conformément au droit international»[2].

Et l'agent a ajouté:

> «Mais quelle que soit la méthode ou la procédure que suivra la Cour pour effectuer la délimitation, le Nicaragua souhaite *qu'aucune zone maritime ne reste à délimiter* entre lui-même et la Colombie. C'est là le principal objectif du Nicaragua depuis qu'il a introduit sa requête en l'espèce.»[3]

---

[1] *Différend territorial et maritime (Nicaragua c. Colombie)*, CR 2012/15 Corr. (agent du Nicaragua), p. 39.

[2] *Différend territorial et maritime (Nicaragua c. Colombie)*, CR 2012/8, p. 24-25, par. 43 (agent du Nicaragua) ; *Différend territorial et maritime (Nicaragua c. Colombie), arrêt, C.I.J. Recueil 2012 (II)*, p. 671, par. 134. (Les italiques sont de nous.)

[3] *Différend territorial et maritime (Nicaragua c. Colombie)*, CR 2012/8, p. 25, par. 44 (agent du Nicaragua) ; *Différend territorial et maritime (Nicaragua c. Colombie), arrêt, C.I.J. Recueil 2012 (II)*, p. 671, par. 134. (Les italiques sont de nous.)

11. Monsieur le président, Mesdames et Messieurs les juges, c'est précisément ce que la Cour a effectué. Elle a exercé pleinement toute l'étendue de sa compétence en procédant au tracé d'une délimitation complète de tous les espaces maritimes entre le Nicaragua et la Colombie. Rien n'est resté pendant.

12. L'agent du Nicaragua a confirmé ce point dans sa plaidoirie de mardi dernier. Il a affirmé que le Nicaragua avait espéré que «that judgment had brought to *an end* an ancestral dispute»[4]. Après il a souligné que le jugement de 2012 «should have put *an end* to Nicaragua's long wait»[5].

13. Et oui, Monsieur le président, la Cour a mis fin à tout différend relatif à la délimitation maritime entre le Nicaragua et la Colombie.

14. Par respect du droit international, le Nicaragua aurait dû au moins s'abstenir de demander à la Cour ce que la Cour lui avait déjà refusé. Mais le Nicaragua croit que la Cour lui a accordé une licence spéciale pour poursuivre encore une fois la même prétention devant elle. Nous ne pensons pas que la Cour ait octroyé au Nicaragua, ni eût l'intention de lui octroyer une telle exception — ou bien une invitation si on veut employer la terminologie utilisée par celui-ci dans son mémoire[6].

15. Pour quelle raison le Nicaragua estime-t-il que la Cour lui a étendu une invitation comportant un tel privilège ? Peu importe. Ce qui importe vraiment est de savoir si la Cour va permettre au Nicaragua de passer outre son jugement de 2012, et ainsi parvenir à satisfaire l'appétit qui semble être insatiable du Nicaragua.

16. Monsieur le président, Mesdames et Messieurs les juges, il vient un temps où la bonne administration de la justice exige que le contentieux arrive à sa fin. On a dépassé ce moment.

17. La République de Colombie a choisi de confirmer son respect pour le droit et pour la Cour, en comparaissant devant vous pour présenter ses arguments concernant l'incompétence de la Cour et l'irrecevabilité de la requête. Mais nous faisons cela avec la conviction que le Nicaragua a déjà eu son mot à dire devant votre Cour pour ce qui est de l'objet de sa nouvelle requête et qu'il

---

[4] CR 2015/23, p. 10-11, par. 5 (agent du Nicaragua) ; les italiques sont de nous.

[5] CR 2015/23, p. 10-11, par. 5 (agent du Nicaragua) ; les italiques sont de nous.

[6] Exposé écrit du Nicaragua (EEN), par. 3.19.

s'agit d'un abus de procédure que d'essayer de poursuivre à nouveau les mêmes prétentions maritimes.

18. Monsieur le président, Mesdames et Messieurs les juges, la République de Colombie comparaît devant cette haute instance en ayant confiance dans les principes cardinaux du droit international pertinent : le principe du consentement, le principe de la stabilité du droit et le principe de la bonne foi.

19. Premièrement, la Colombie adhère fermement au principe selon lequel la compétence de la Cour dépend du consentement des Etats souverains. La Colombie n'a pas donné son consentement à la compétence de la Cour dans cette affaire. Le 27 novembre 2012, la Colombie a exercé son droit souverain de dénoncer le pacte de Bogotá avec effet immédiat. Conformément au pacte, aucune nouvelle procédure ne pouvait être initiée après la transmission de l'avis.

20. Deuxièmement, la Colombie compte sur le fait que le principe de la stabilité et de la certitude du droit, duquel découle le caractère définitif des jugements, soit respecté. Les jugements de la Cour internationale de Justice sont définitifs, obligatoires et sans recours. Ils ont l'autorité de *res judicata*. Le Nicaragua avait déjà demandé une délimitation du plateau continental *au-delà* de 200 milles marins et la Cour n'a pas accueilli cette demande. La chose est donc jugée pour les Parties et la Cour. Elle ne doit pas, elle ne peut pas, être rouverte. Ce chapitre des relations entre les deux Parties, ainsi que le rôle de la Cour sur le fond, est clos. En fait, la requête du Nicaragua équivaut à une tentative d'appel ou de revision du jugement de 2012 en contravention avec les dispositions du Statut. Inconscient de ses contradictions, le Nicaragua invoque, d'une part, les effets de la chose jugée dans l'affaire discutée la semaine dernière[7] et méconnaît d'autre part, l'autorité de la *res judicata* dans l'affaire qui nous occupe actuellement.

21. Troisièmement, la Colombie compte sur le respect des procédures et obligations par voie de traité, lesquelles doivent être exécutées de bonne foi par les Etats parties. La convention des Nations Unies sur le droit de la mer, un traité auquel le Nicaragua est partie, exige des Etats qui l'ont ratifiée l'obtention d'une recommandation de la Commission des limites du plateau continental. Même si la Colombie n'est pas partie à cette convention, la Cour a souligné, dans le

[7] CR 2015/23, p. 44, par. 1 ; p. 47, par. 8 ; p. 53, par. 21 (Pellet).

paragraphe 126 du jugement de 2012, que «le fait que la Colombie n'y soit pas partie n'exonère pas le Nicaragua des obligations qu'il tient de l'article 76 de cet instrument»[8]. En l'espèce, la Commission n'a pas formulé de recommandation relative aux limites de la marge continentale demandées par le Nicaragua. Néanmoins, le Nicaragua demande à la Cour d'ignorer ses propres omissions.

22. Monsieur le président, permettez-moi enfin de répondre à une allégation particulièrement bizarre faite par le Nicaragua dans ses observations écrites à l'encontre des exceptions préliminaires de la Colombie. Au paragraphe 3.24 de celles-ci, le Nicaragua soutient que la Colombie aurait refusé d'engager une discussion portant sur la question, toujours en attente selon le Nicaragua, de la délimitation au-delà de 200 milles marins de la côte du Nicaragua. Elle va même jusqu'à accuser la Colombie de violer l'obligation impérieuse de régler ses différends internationaux par des moyens pacifiques.

23. Ces accusations, Monsieur le président, sont totalement infondées. Le fait est que la prétention portée par le Nicaragua devant la Cour a déjà été réglée par des moyens pacifiques. En l'espèce, elle a été réglée par votre jugement de 2012. Il n'y a tout simplement aucune question pendante ou «en attente». La délimitation a été complètement et définitivement décidée. Ainsi, la Colombie est loin d'avoir violé l'obligation de régler les différends par voie pacifique. C'est plutôt le Nicaragua qui, en introduisant cette procédure, vise à étendre la compétence de la Cour au-delà de son point de rupture tout en ignorant le caractère définitif des jugements de la Cour.

24. Le Nicaragua sait au fond de son cœur que la Cour est incompétente pour délimiter. C'est pourquoi il a soumis une seconde demande qui ferait partie du même différend. Sans rougir, le Nicaragua demande à la Cour d'adopter un régime juridique provisoire général applicable aux Caraïbes «dans l'attente de la délimitation»[9], en ignorant que la délimitation a déjà été effectuée. Si la Cour venait à examiner la seconde demande, elle devrait abandonner sa fonction judiciaire et s'aventurer dans le rôle de législateur de la mer des Caraïbes. La demande du Nicaragua est tout à fait en dehors des fonctions de la Cour. De toute manière, la Cour a déjà affirmé expressément

---

[8] *Différend territorial et maritime (Nicaragua c. Colombie), arrêt, C.I.J. Recueil 2012 (II),* p. 668-669, par. 126.

[9] *Question de la délimitation du plateau continental entre le Nicaragua et la Colombie au-delà de 200 milles marins de la côte nicaraguayenne (Nicaragua c. Colombie)*, requête du 16 septembre 2013, p. 8, par. 12 (deuxième demande).

dans son jugement de 2012 qu'elle ne pouvait pas accueillir la demande du Nicaragua, y compris en sa formulation générale.

25. Monsieur le président, les exceptions préliminaires de la Colombie relatives à l'incompétence de la Cour et à l'irrecevabilité de la requête seront développées en détail par les conseils dans l'ordre qui suit :

— Pour commencer, sir Michael Wood va démontrer que la dénonciation du pacte de Bogotá par la Colombie a eu un effet immédiat en ce qui concerne les procédures entamées après la transmission de l'avis de dénonciation.

— Après lui, le professeur Matthias Herdegen démontrera que l'idée selon laquelle la Cour disposerait d'une compétence dérivant du jugement de 2012 n'a aucun fondement.

— M. Rodman Bundy va, quant à lui, mettre en exergue le fait que les prétentions soulevées par le Nicaragua ont été pleinement plaidées et décidées dans l'affaire terminée par l'arrêt de 2012.

— Il sera suivi par le professeur Michael Reisman qui va exposer l'exception préliminaire de la Colombie fondée sur le principe de *res judicata*.

— Par la suite, M. Bundy fera un bref retour afin d'expliquer pourquoi les prétentions du Nicaragua constituent une tentative dissimulée d'appel ou de revision du jugement de 2012, en violation des dispositions du Statut et du Règlement de la Cour.

— Enfin, le professeur Tullio Treves présentera, d'une part, l'exception relative à l'irrecevabilité de la requête et, d'autre part, l'exception à la compétence de la Cour pour ce qui est de la seconde demande.

26. En vertu des dispositions du paragraphe 7 de l'article 79 du Règlement et de l'Instruction de procédure VI, nos plaidoiries et éléments de preuve seront limités aux matières qui sont pertinentes pour l'examen des exceptions préliminaires. Nous n'empiéterons pas sur les questions qui relèvent du fond de l'affaire.

27. Monsieur le président, je remercie la Cour de sa courtoisie et vous serais reconnaissant si vous pouviez avoir la gentillesse de donner la parole à sir Michael Wood. Merci beaucoup.

Le PRESIDENT : je vous remercie, Excellence. Je donne à présent 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 on behalf of the Republic of Colombia.

2. As the Co-Agent has just said, my task today is to explain Colombia's first preliminary objection: that the Court does not have jurisdiction in this case, because the Application was introduced on 16 September 2013, almost ten months after the transmission of Colombia's notification of denunciation of the Pact of Bogotá. As I shall show, this conclusion follows from the terms of Article LVI, the denunciation clause.

3. As Members of the Court will be aware, this preliminary objection is identical to our first preliminary objection in the case heard last week[10]. The pleadings in that case are available to the Members of the Court[11]. I do not think it would be appropriate for me simply to repeat what ***we*** said last week[12]. I would particularly like to ask the indulgence of Judges Skotnikov and Brower, who did not sit on the Bench last week. What I propose to do this morning is just to summarize Colombia's arguments, while taking account of what we learnt, last week, of Nicaragua's position on this preliminary objection.

4. I should also mention that the relevant chapters in Colombia's written preliminary objections in the two cases are identical, except for the inclusion in the chapter in the *Alleged Violations* case of a few additional paragraphs responding to points made by Nicaragua in its Memorial[13].

5. Mr. President, Members of the Court, the full text of the Pact of Bogotá in the four authentic languages, English, French, Portuguese and Spanish, is in your folders at tabs 32 to 36. For convenience, Article LVI is also at tab 5.

---

[10] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia).*

[11] *Ibid.*, CR 2015/22, CR 2015/25.

[12] *Ibid*., CR 2015/22, pp. 19-30 (Wood); CR 2015/24, pp. 10-18 (Wood); *ibid.*, pp. 40-41, paras. 11-13 (Bundy).

[13] *Ibid.*; Preliminary Objections of Colombia (POC), Vol. I, paras. 3.58-3.72.

6. Mr. President, the issue dividing the Parties concerns the effect of Article LVI of the Pact, and in particular its second paragraph, which reads: "The denunciation shall have no effect with respect to pending procedures initiated *prior to the transmission of the particular notification*."

7. Nicaragua would have you read this paragraph as if it said something like: "The denunciation shall have no effect with respect to pending procedures initiated *prior to the date when the Pact ceases to be in force with respect to the State denouncing it*."

8. That would have been easy enough to draft. But, unfortunately for Nicaragua, that is not what the negotiating States agreed. That is not what the parties to the Pact consented to.

9. Mr. President, Members of the Court, I shall first address briefly the practice of the parties in the matter of denunciation. I shall then turn to the central issue before you, the interpretation of Article LVI of the Pact in accordance with the general rule of interpretation in Article 31 of the Vienna Convention. Finally, I shall refer briefly to the *travaux préparatoires*.

Denunciation practice under the Pact

10. The Pact currently has 14 parties, 14 out of the 35 members of the Organization of American States (OAS). Two States — El Salvador in 1973, and Colombia in 2012 — have denounced it.

11. On 27 November 2012, the Minister for Foreign Affairs of Colombia transmitted to the depositary a notification of denunciation pursuant to Article LVI. The notification is at tab 4, and is now appearing on the screen.

12. The Minister for Foreign Affairs made it clear, citing the second paragraph of Article LVI, that Colombia's denunciation of the Pact took effect, and I quote: "as of today with regard to the procedures that are initiated after the present notice, in conformity with Article LVI, second paragraph . . .".

13. No State party to the Pact — not even Nicaragua — reacted to that Note when notified by the OAS the following day. Of course, Nicaragua — some ten months later — initiated the present proceedings, but that makes it all the more remarkable that they let Colombia's notification pass in silence.

14. There was likewise no objection, by any State, to El Salvador's notification of denunciation in 1973, which was in terms similar to that of Colombia [14].

Interpretation of Article LVI: general rule of interpretation (Art. 31 VCLT)

15. Mr. President, Members of the Court, I now turn to the interpretation of Article LVI, applying the general rule set forth in Article 31 of the Vienna Convention.

16. Nicaragua's approach to treaty interpretation has been interesting, to say the least. In its written pleadings, it set out the ordinary meaning of the first paragraph, and only the first paragraph, of Article LVI, read together with Article XXXI[15]. It then proceeded to analyse the object and purpose of the Pact[16]. It was only when attempting to show the validity of its interpretation of Article LVI, first paragraph, that Nicaragua even acknowledged that it had a second paragraph. Nicaragua, while explaining what it thought Article LVI did not say, avoided providing any positive interpretation of what it does say.

17. On Friday of last week, at the end of the second round of the oral proceedings in the other case, Nicaragua finally provided both the Court, and Colombia, with an interpretation of Article LVI as a whole. According to Professor Pellet, the first paragraph is "*clair et net et il n'y a pas là matière à interprétation*". The second paragraph, again according to Professor Pellet, draws the consequence of the "principle" in the first paragraph as regards "procedures initiated [as he says] prior to denunciation". He then "concedes" that, in his words, "the formula is ambiguous" because it refers to "pending procedures initiated prior to the transmission of the particular notification". But**,** Mr. President, these words are not at all ambiguous; they are, to coin a phrase, "*clair et net et il n'y a pas là matière à interprétation*". Professor Pellet then asserts that the supposed ambiguity "is easy to resolve in the light of the context . . ., in the light also of the *travaux préparatoires* and the object and purpose of the Pact of Bogotá". And that is the end of his argument[17].

---

[14]POC, Vol. II, Ann. 3. The final paragraph of El Salvador's notification reads: "Lastly, my government wishes to place on record that if El Salvador is now denouncing the Pact of Bogotá for the reasons expressed — a denunciation that will begin to take effect as of today."

[15]Written Statement of Nicaragua (WSN), paras. 2.6-2.12.

[16]WSN, paras. 2.12-2.15.

[17]*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)*, CR 2015/25, p. 45, para. 29 (Pellet)***.; CR 2015/25, pp. 19, 24-25, paras. 6, 23 (Remiro Brotóns).***

18. Professor Remiro Brotóns, for his part, came up with some remarkable propositions to explain the meaning and purpose of the second paragraph. He said that "one must not confound what is not necessary with what is useless"[18]. He conceded that, on his reading, the drafters could have omitted the second paragraph, but went on to say that "to be *superfluous* does not signify to be without *effet utile*"[19]. Mr. President, I must confess there are times when Cartesian logic, if that is what it is, escapes me.

19. Mr. President, for Nicaragua's interpretation to be valid and give the whole text *effet utile*, its language would have had to have been drafted differently, as is now shown on your screen. At the top, you have the second paragraph of Article LVI. Below, you have a text that would correspond to Nicaragua's interpretation, but that is not the text we find in the Pact.

20. In fact, Mr. President, the American States were perfectly aware how to draft such a provision. They had done so in the past. Article 22 of the 1902 Treaty of Compulsory Arbitration, which is on the screen and at tab 7, provided that

> "[i]f any of the signatories wishes to regain its liberty, it shall denounce the Treaty, but the denunciation will have effect solely for the Power making it, and then only after the expiration of one year from the formulation of the denunciation. When the denouncing Power has any question of arbitration *pending at the expiration of the year, the denunciation shall not take effect in regard to the case still to be decided*."[20]

21. Of course the Court must interpret Article LVI of the Pact as it stands. And as it stands it expressly preserves pending procedures, and not those initiated after the transmission of the notification of denunciation.

22. Nicaragua argues that Colombia's interpretation of Article LVI deprives the first paragraph of any meaning. That is not the case. To support its position, Nicaragua argues that the provisions of the Pact of Bogotá are inseparable and that, without jurisdiction over procedures initiated after the notification ~~***of denunciation***~~, the Pact would be an empty shell during the

---

[18]CR 2015/25, p. 19, para. 5 (Remiro Brotóns).

[19]*Ibid.*, para. 6 (Remiro Brotóns).

[20]POC, para. 3.36; emphasis added. In Spanish:

> "*Si alguna de las signatarias quisiere recobrar su libertad, denunciará el Tratado; más la denuncia no producirá efecto sino únicamente respecto de la Nación que la efectuare, y sólo después de un año de formalizada la denuncia. Cuando la Nación denunciante tuviere pendientes algunas negociaciones de arbitraje a la expiración del año, la denuncia no surtirá sus efectos con relación al caso aun no resuelto.*"

one-year period of notice. Nicaragua selectively canvasses the articles of the Pact in an effort to show that on Colombia's approach the Pact would be devoid of meaning[21].

23. Mr. President, in its written pleadings and last week Colombia has demonstrated that a significant number of substantive obligations continue to apply to the denouncing State during the one-year period, even if new procedures cannot be initiated against it[22]. Furthermore, other important provisions of the Pact will still be in effect after the transmission of the notification of denunciation: they continue to govern any procedures initiated before the transmission and their content and applicability are independent of the ability to initiate new procedures during the one-year period.

24. Colombia has provided the Court with an interpretation that gives effect to all the relevant provisions of the Pact, interpreted in good faith and in the light of its object and purpose. We dealt with this fully in writing[23] and in oral argument last week[24]. Nicaragua, for its part, has made no effort to address the actual text of Article LVI.

25. I shall now do so, briefly. It is at tab 6, and on the screen. The second paragraph, as you know by now, reads:

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

26. 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 initiated after that date.

27. The first paragraph sets out the right of a party to denounce the Pact, and the steps it must take to exercise that right. Once the Pact is denounced, many obligations, such as those regarding non-use of force, the obligation to settle disputes peacefully, resort to regional political mechanisms prior to the United Nations Security Council and others, continue to apply until the expiry of the one year's notice. These are fundamental obligations under the Pact which, it will be

---

[21]CR 2015/23, p. 25-27, paras. 16-26 (Remiro Brotóns).

[22]POC, Vol. I, paras. 3.5-3.7; see also Appendix to Chapter. 3 (Pact of Bogotá); CR 2015/22, pp. 21-23, paras. 10-23 (Wood).

[23]POC, paras. 3.12-3.32.

[24]*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)*, CR 2015/22, pp. 26-53, paras. 37-56 (Wood); CR 2015/24, pp. 10-18 (Wood).

recalled, was adopted in 1948, just three years after the United Nations Charter. Moreover, Article I of the Pact contains an obligation to refrain from "other means of coercion", an obligation which is not found, in terms at least, in the United Nations Charter.

28. The drafters of the Pact were evidently conscious of the need to protect procedures already initiated at the moment of the transmission of the notification of denunciation. They therefore provided in the second paragraph that pending procedures initiated prior to the transmission were not to be affected by the denunciation. The second paragraph, as I said, clearly distinguishes between procedures initiated prior to the transmission, and those initiated afterwards. The transmission has no effect on the former. But procedures that may be initiated after the transmission are not saved.

29. This interpretation, based on the ordinary meaning to be given to the terms actually used, allows the whole article, and not just half of it, to have an *effet utile*.

30. Nicaragua argues that Colombia's reading of the paragraph, and I quote, "cannot stand against the express language of Articles XXXI and LVI, first paragraph"[25] or be used to read into Article LVI what it does not say[26]. Mr. President, that is mere assertion. While conceding that an *a contrario* argument is a permissible method of interpretation — it could hardly do otherwise — Nicaragua claims that it does not have a role to play in the interpretation of Article LVI[27].

31. To that I will make two short observations. First, *a contrario* arguments have been accepted and applied as an important interpretative tool by this Court, most recently in *Burkina Faso/Niger*[28]. Second, it is not Colombia but Nicaragua that is reading into the text what is not there. The text protects procedures on the date of transmission of the notification, and only those procedures. Nicaragua somehow deduces from the text that procedures initiated after the notification of denunciation survive as well.

32. Mr. President, Nicaragua seeks to bolster its interpretation by referring to the object and purpose of the Pact. As the Court said in its 1988 Judgment in ~~*the*~~ *Nicaragua* v. *Honduras* ~~*case*~~,

---

[25]WSN, para. 2.19.

[26]*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)*, CR 2015/25, p. 18, para. 4 (Remiro Brotóns).

[27]*Ibid*., CR 2015/25, p. 20, para. 11 (Remiro Brotóns).

[28]*Frontier Dispute (Burkina Faso/Niger), Judgment, I.C.J. Reports 2013*, pp. 81-82, paras. 87-88; and separate opinion of Judge *ad hoc* Daudet, pp. 156-157.

"the purpose of the American States in drafting [the Pact] was to reinforce their mutual commitments with regard to judicial settlement"[29]. But the Pact advanced that cause within the limits of the consent of the Parties given in the Pact, neither more nor less. You cannot use the object and purpose of a treaty to ignore its specific provisions. You cannot use what you claim to be the object and purpose of a treaty on pacific settlement to interpret away unambiguous conditions and safeguards contained in the treaty. Treaties conferring jurisdiction are neither to be interpreted restrictively nor broadly. They are to be interpreted in accordance with the Vienna rules. And it does not further the cause of judicial settlement to ignore the limits that States place on their consent.

Interpretation of Article LVI: *Travaux Préparatoires* (Art. 32 VCLT)

33. Mr. President, finally I need to add a word about the *travaux préparatoires.* They confirm Colombia's interpretation of the text and show that the drafters of the Pact consciously chose to word Article LVI so as to preclude the initiation of new procedures against the denouncing State, with immediate effect upon the transmission of the notification of denunciation. I shall not repeat ***the*** description of the *travaux* at paragraphs 3.33 to 3.5***3*** of our preliminary objections[30]. It has not been challenged by Nicaragua.

34. Nicaragua argues that the deliberate addition to the negotiating text of the second paragraph of Article LVI, on the proposal of the United States, the State Department Legal Adviser, Green Hackworth, during the Lima Conference of December 1938, made no difference to the meaning of the provision that was taken from the 1929 Arbitration Treaty, which was the basis of the text. You have on the screen the text of Article 9 of the 1929 Treaty and Article LVI of the Pact. To support their remarkable claim, all that Nicaragua's lawyers can say is that in 1948 there was no debate in the relevant commission, no explanations, etc.[31]. The records of 1948 may be limited. That is by no means unusual for conferences of that date, or even now, and it certainly is not unusual in relation to the final clauses of a treaty, or to matters discussed in a drafting

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

[30]POC, paras. 3.33-3.53.

[31]*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia),* CR 2015/23, p. 29, para. 31 (Remiro Brotóns).

committee. But in fact, as we have shown in detail in our written pleadings, the *travaux* do confirm that the drafters of the Pact consciously chose to word Article LVI as they did.

35. As I have said, Nicaragua accepts that the original draft of Article LVI was based on Article 9 of the General Treaty of Inter-American Arbitration of 1929. Yet despite the change, despite the additional sentence, introduced in 1938 to the text of what eventually became Article LVI, and maintained in all subsequent drafts — drafts of 1944, 1945, 1947 and then, in 1948 it became a separate paragraph — despite all this, Nicaragua continues to contend that the new paragraph was, in their word "superfluous" and that the meaning of the Article remained the same[32]. Mr. President, Members of the Court, we would say that the change is obvious. Nicaragua's position is untenable.

Conclusion

36. Mr. President, Members of the Court, the object and purpose of Article LVI — and of the Pact more generally — support the same conclusion as the ordinary meaning, good faith and context.

37. As Colombia explained in Chapter 3 of its Preliminary Objections[33], the object and purpose of Article LVI is to set out the modalities and effects of denunciation. There is nothing unusual about the fact that States willing to consent to the jurisdiction of the Court reserve their right to terminate such consent with immediate effect.

38. In our written preliminary objections, we referred to the ample practice under the Optional ***Clause***[34]. This practice demonstrates that it not uncommon for States to set conditions on their consent to jurisdiction**,** including the ability to terminate consent with immediate effect. Nicaragua acknowledged last week that the two bases of jurisdiction, the Pact and the Optional

---

[32]WSN, para. 2.39.

[33]POC, paras. 3.23-3.32.

[34]POC, para. 3.23. States reserving the right to terminate their optional clause declarations with immediate effect include Botswana (1970), Canada (1994), Cyprus (1988), Germany (2008), Ireland (2011), Italy (2014), Kenya (1965), Lithuania (2012), Madagascar (1992), Malawi (1966), Malta (1966, 1983), Mauritius (1968), Nigeria (1998), Peru (2003), Portugal (2005), Romania (2015), Senegal (1985), Slovakia (2004), Somalia (1963), Swaziland (1969), Togo (1979) and the United Kingdom (2014). See also: Chr. 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; declaration recognizing as compulsory the jurisdiction of the Court by Greece, http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=1&code=GR (last visited: 2 October 2015).

Clause, strongly resemble each other. Article XXXI, they said, was a kind of "collective optional declaration"[35].

39. To conclude, Mr. President, Nicaragua's approach to treaty interpretation is imaginative, original — and wholly unconvincing. It has nothing to do with the rules set forth in the Vienna Convention. Nicaragua may not like the words it finds in the second paragraph of Article LVI. The meaning to be given to the terms of Article LVI ***may*** not suit its case. But the terms of the provision are as they are. And no amount of imaginative argumentation by Nicaragua's lawyers will make them mean something they do not mean.

40. Mr. President, Members of the Court, that concludes what I have to say. I thank you for your attention, and I would ask that you invite Professor Herdegen to the podium. Thank you.

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

Mr. HERDEGEN:

SECOND PRELIMINARY OBJECTION: THE JUDGMENT OF 19 NOVEMBER 2012 DID NOT RESERVE TO THE COURT A "CONTINUING JURISDICTION"

1. Je vous remercie, Monsieur le président. Mr. President, Members of the Court, I appreciate the honour of addressing the Court today and the privilege to do so on behalf of the Republic of Colombia. My assignment is to show that there is no "continuing jurisdiction" of the Court which survives the Judgment of 19 November 2012.

2. In an attempt to overcome the lapse of jurisdiction under the Pact of Bogotá, Nicaragua argues that it can present its original claim for delimitation of the outer continental shelf in new proceedings under the old title of jurisdiction[36]. It suggests that the initial Application from 2001 remains pending before the Court and is now simply continued[37]. In the creative vein it already displayed in last week's hearings, Nicaragua parades a flamboyant fountain of novel titles to jurisdiction flowing from what it considers the nature of judicial functions. This time it is

---

[35] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia*), CR 2015/25, p. 45, para. 28 (Pellet).

[36] Application, para. 10.

[37] *Ibid*. See also WSN, paras. 3.1-3.29.

"continuing jurisdiction" which is to remedy Nicaragua's failure to present the necessary evidence for its old claim to a continental shelf beyond 200 nautical miles.

3. Although the 2012 Judgment concluded that Nicaragua's claim to an extended continental shelf in its final version was admissible[38], Nicaragua asserts that the Court acted inconsistently and declined to exercise jurisdiction on the delimitation of the extended shelf[39].

4. Nicaragua has enriched its reliance on "continuing jurisdiction" by a rather peculiar new argument. Its Written Statement contends that the Judgment of 2012 refrained from exhausting jurisdiction in order to allow Nicaragua to complete the deficient evidence and to submit the necessary information to the Commission on the Limits of the Continental Shelf (CLCS)[40]. In Nicaragua's idiosyncratic reading, such judgment even "invited" Nicaragua to amend its submissions in new proceedings[41].

The Court fully exercised jurisdiction over the Nicaraguan claim to a continental shelf extending beyond 200nm in *Territorial and Maritime Dispute*

5. In order to establish some kind of "continuing jurisdiction", Nicaragua insists that the Court refrained from fully exercising jurisdiction over the Nicaraguan claim to an extended continental shelf in *Territorial and Maritime Dispute*[42]. This is a clear misconstruction of the Court's Judgment. In 2012 the Court recalled its duty to exhaust its jurisdiction, and I quote from paragraph 136, now on screen: "[t]he Court must not exceed the jurisdiction conferred upon it by the Parties, but it must also exercise that jurisdiction to its full extent"[43]. The Court acted in conformity with this duty when it fully delimitated the maritime boundary between the two States on the basis that Nicaragua had failed to establish its claim to an extended continental shelf[44].

---

[38]*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Merits, Judgment, I.C.J Reports 2012 (II)*, p. 665, paras. 111-112.

[39]WSN, para. 3.2.

[40]WSN, para. 3.19.

[41]WSN, para. 3.19.

[42]WSN, paras. 3.2., 3.8.

[43]*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 671 para. 136.

[44]*Ibid.*, p. 670 para. 131; p. 719 para. 251 (3).

6. The 2012 Judgment found that Nicaragua presented insufficient evidence as to the existence of an extended shelf[45]. Therefore the Judgment, in paragraph 129, concludes that Nicaragua had not established its claim before the Court[46]. This allows for only one conclusion: the Court dismissed the claim to an extended continental shelf because Nicaragua had not met its burden of proof, as my colleagues Mr. Bundy and Professor Reisman will show. This understanding of the Judgment as resting on grounds of evidence seems to be shared in the writings[47].

7. In its 2012 Judgment, the Court fully adjudicated upon the entire dispute and decided all pending issues. There is nothing, nothing at all in the Court's Judgment to suggest that the prior application remains pending in respect of the claim to a continental shelf beyond 200 nautical miles, and that Nicaragua may reintroduce it at any time of its choosing. *Territorial and Maritime Dispute* was removed from the list of pending cases on the Court's website upon delivery of the 2012 Judgment. Of course, if Nicaragua's argument were right, this should not have happened.

There is only one situation in which a State may rely on continuing jurisdiction in fresh proceedings without the other party's explicit consent

8. Mr. President, I shall now address the notion of "continuing jurisdiction", which Nicaragua tries to conjure out of thin air and to turn into an instrument for vexatious litigation. Apart from interpretation and revision under the Statute, the fundamental principles of consent and legal stability only admit strictly limited cases where the Court retains jurisdiction, following a judgment on the merits: first, by agreement between the parties; second, *proprio motu*, in order to reserve an issue for a subsequent stage of the same proceedings; and third, by an express judicial reservation contingent on the basis of the judgment being affected.

9. For an example, an instance of the first case — that is agreement of the parties —, one need look no further than the Court's list of pending cases. In *Gabčíkovo-Nagymaros*, the Court's

---

[45]*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012*, p. 668-669 paras. 125-129.

[46]*Ibid.*, p. 669 para. 129.

[47]N. Burke, "Nicaragua v. Colombia at the ICJ: Better the Devil You Don't?" in *Cambridge Journal of International and Comparative Law*, Vol. 2, 2013, pp. 314 and ff.; N. Grossman, "Territorial and Maritime Dispute (Nicaragua v. Colombia), International Court of Justice judgment on disputed islands and maritime boundaries", in *American Journal of International Law*, No. 107, 2013, pp. 396 and ff. (see pp. 402-403).

jurisdiction was reserved in accordance with an express provision in the Special Agreement[48]. By contrast, in *Territorial and Maritime Dispute* the parties never agreed to reserve the jurisdiction of the Court for an additional judgment.

10. Apart from agreement between the parties, the Court itself may expressly reserve jurisdiction on particular aspects of the dispute within the same proceedings and choose to adjudicate different issues in consecutive stages[49].

11. Nicaragua confounds "continuing jurisdiction" to deal with a new application, on the one hand, with subsequent stages of adjudication within the same proceedings, on the other. Therefore, Nicaragua's strong reliance on the *Corfu Channel* case[50] is quite misplaced. In *Corfu Channel*, the Judgment found that the Court had jurisdiction to assess the amount of compensation and that "further proceedings on this subject are necessary"[51]. The Court simply reserved adjudication of damages to a later phase of the same proceedings[52], as it did in several other cases[53]. And quite recently, in *Armed Activities on the Territory of the Congo*, the Court decided to resume the proceedings with regard to reparation on the basis of an express reservation[54]. No even remotely comparable language is to be found in the Judgment in *Territorial and Maritime Dispute*.

12. Mr. President, Members of the Court, in addition to these cases there is one — and only one — exceptional case in which the Court has ever assumed jurisdiction which can be activated by a new application on the same subject-matter. In *Nuclear Tests*, the Court found that the claim of the applicants no longer had any object and that the Court was therefore not called upon to give a decision thereon. It based the termination ~~***of the cases***~~ on a unilateral and express commitment of

---

[48]*Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 83, para. 155 (2). See also Special Agreement, Art. 5.3.

[49]*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 242, para. 184 and p. 149, para. 292 (15); *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 279, para. 344 and p. 281, para. 345 (14).

[50]WSN, paras. 3.11.

[51]*Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 26.

[52]*Ibid.*, p. 36.

[53]See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America). Merits, Judgment, I.C.J. Reports 1986*, p. 242, para. 184 and p. 149, para. 292 (15); *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 279, para 344 and p. 281, para. 345 (14).

[54]*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, Order of 1 July 2015, para. 8.

the respondent State, which had made the dispute disappear. The Court expressly envisaged an "eventual examination of the situation", if the basis of its judgment were to be affected; that is, if the respondent failed to comply with its commitment[55].

13. In sum, jurisdiction survives a final judgment only when the parties consent to it or when the Court explicitly reserves it, as it did in the quite exceptional circumstances of *Nuclear Tests* or for the purpose of adjudication in consecutive stages of the same proceedings. This express reservation links the Court's powers with the two overarching principles which govern the Court's jurisdiction: consent and legal stability. The reservation of jurisdiction by the Court is always anchored in the established consent of the parties as the basis of jurisdiction, as the Court emphasized in the *Nuclear Tests* cases[56]. At the same time, the express character of the reservation serves the interest of legal certainty and legal stability. There is, consequently, no such thing as an implicit jurisdiction over new proceedings, as ***it*** is urged upon you by Nicaragua.

The present application bears no similarity with the *Nuclear Tests* cases

14. The *Territorial and Maritime Dispute* ~~***case***~~ bears no similarity with the *Nuclear Tests* cases. The Court did not expressly envisage the possibility of "an examination of the situation". Colombia did not assume any unilateral commitment, which deprived Nicaragua's claim of any object.

15. In the absence of an explicit reservation, there can be no doubt that the 2012 Judgment finally adjudicated on the Nicaraguan claim in its entirety.

16. Still, Nicaragua now tries to depict Colombia's legitimate and well-founded challenge to any "continuing jurisdiction" as a kind of defiance to judicial dispute settlement which triggers this very sort of jurisdiction despite lapse of consent[57]. This is a creative, sweeping, and circular doctrine. And it is only the respect for my distinguished colleagues from the other side that prevents me from calling this conceptual approach an absurdity.

---

[55] *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 272, para. 60; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 477, para. 63.

[56] *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 259, para. 23; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 463, para. 23.

[57] WSN, paras. 3.15, 3.23-325.

The 2012 Judgment neither could nor did extend an invitation to Nicaragua to present a new application with amended evidence

17. As a last resort, Nicaragua seeks to construe a kind of implied reservation of jurisdiction in order to make up for the lack of an express reservation. It suggests that the Court "invited" Nicaragua to complete its submissions to the CLCS and then return to the Court to present its newly substantiated claim[58]. When the Court held that Nicaragua, as party to UNCLOS, was not relieved from its obligations under Article 76 of the Convention[59], it certainly did not "invite" Nicaragua to complete its submissions to the CLCS and then file a fresh application against Colombia. Nicaragua had had ample time, in fact, more than a decade, to supply the Court with information and substantiate its claim to an extended shelf. The Judgment nowhere indicates that Nicaragua would be allowed to remedy its case in new proceedings. If the applicant fails to meet its burden of proof, all that a court of law can and should do is to reject the claim. And that is exactly what the Court did in *Territorial and Maritime Dispute*.

Nicaragua tries to create a new type of "continuing jurisdiction", which would allow a State to indefinitely harass the respondent State with new applications

18. Mr. President, Members of the Court, Nicaragua tries to create a new type of "continuing jurisdiction", based neither on an agreement of the parties nor on an express reservation in a judgment. Nicaragua's addition would consist of a unilateral reservation of jurisdiction, effected by the stratagem of presenting incomplete evidence — and then using that very insufficiency to trump the judgment which had quite properly rejected the claim for the failure to meet the burden of proof. There is no legal basis for such a novel doctrine and, were it accepted, it would generate endless litigation.

19. Thus, in the case of an insufficiently substantiated claim, Nicaragua argues for a judicial posture of allowing the applicant to present a new application. Such a judicial invitation, as construed by Nicaragua, would grossly violate the Court's own concept of exhausting its jurisdiction. It would also undermine the principle of good administration of justice.

---

[58]WSN, para. 3.19.

[59]*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Merits, Judgment, I.C.J. Reports 2012 (II)*, pp. 668-669, para. 126.

20. As the 2007 Judgment in the Bosnian *Genocide* case underlines, the stability of legal relations and the interest in a final settlement of the dispute are key factors guiding the exercise of jurisdiction[60]. These principles of adjudication leave no room for protracting a final determination of a dispute until the applicant finally chooses to present its case with amended evidence.

21. Nicaragua's approach turns the narrow concept of expressly retained jurisdiction, which the Court has confined to very exceptional circumstances, into a kind of perpetual jurisdiction which would allow a State to harass another State — and the Court — with repetitive claims masked within varying submissions. It is against this kind of vexatious litigation that Article VI of the Pact of Bogotá — which is now on screen — seeks to protect the respondent State: it precludes a State from recycling matters already settled by the decision of an international court with a fresh application.

Conclusion

22. Mr. President, Members of the Court, Nicaragua's creative jurisdictional construct rests on perpetual powers of adjudication which it miraculously conjures by submitting to the Court old evidence in the new format of final submissions to the Commission on the Limits of the Continental Shelf.

23. After the Judgment of November 2012, there remains nothing more to decide. Accordingly, there is no jurisdictional "leftover" on which Nicaragua could rest its Application.

24. Much as a *perpetuum mobile*, a perpetual motion machine violates the laws of physics, Nicaragua's theories of implicit perpetual jurisdiction violate the laws of jurisdiction. They expose the Court and respondents to the permanent threat of reviving old claims in defiance of the principle of finality of judgments. Distorting and deluding the Court's case law, Nicaragua construes a general vision of judicial powers which would support an asymmetric administration of justice and allow a party to remedy an already closed case even after lapse of consent. This would be the very end of legal stability which the Court's Statute and the Court's case law seek to ensure.

25. Mr. President, I thank the Members of the Court for their courteous attention and request you to invite Mr. Bundy to continue Colombia's pleadings.

---

[60] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 90, para. 115.

Le PRESIDENT : Je donne maintenant la parole à Monsieur Bundy.

Mr. BUNDY:

THE PROCEEDINGS IN THE *TERRITORIAL AND MARITIME DISPUTE* CASE

Introduction

1. Thank you very much, Mr. President, Members of the Court. It is, as always, an honour to appear before this Court and also a privilege for me to represent the Government of Colombia once again.

2. I have to say, however, that I do so with a distinct sense of *déjà vu*. Nicaragua introduced the *Territorial and Maritime Dispute* case in 2001. For 11 years, thereafter, Nicaragua argued for a maritime boundary with Colombia that lay beyond 200 nautical miles from Nicaragua's coast. Many in this room participated in those proceedings. While Nicaragua's claims went through different incarnations, they were all consistent in requesting the Court to delimit a maritime boundary, including a continental shelf boundary, in precisely the same area that Nicaragua's Application in this case asks the Court to delimit.

3. In short, the Parties extensively argued the case that Nicaragua now seeks to resubmit to your jurisdiction, and the Court fully and finally decided the case in its 2012 Judgment. ***And t***here, the Court did not uphold Nicaragua's submission I (3), which was a submission for "a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties"[61]; in effect, a continental shelf boundary situated more than 200 miles from Nicaragua's coast. Having failed in the prior case to persuade the Court to uphold its submission I (3), Nicaragua now wants a second chance — another bite at the apple. As we have shown, there is no jurisdictional basis for such a request.

4. In this presentation, I shall recall briefly the key elements of the proceedings in the *Territorial and Maritime Dispute* case which reveal how Nicaragua is now trying to litigate a case

[61] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II),* p. 664, para. 106.

that has already been argued and decided. Following my presentation, Professor Reisman will ***then*** show that the Court's Judgment in this respect is *res judicata*.

The treatment of the issues in the original case

5. In the prior case, Nicaragua's Application and Memorial requested the Court to decide a single maritime boundary delimiting the exclusive economic zones and ~~***the***~~ continental shelves of the two Parties. ***Now t***he fact that Nicaragua was seeking a boundary, including a continental shelf boundary, that lay more than 200 nautical miles from its coast can be seen from the map that now appears on the screen — which is also at tab 11 of your folders. This map shows two things. First, Nicaragua claimed that the relevant area extended right up to Colombia's mainland coast — that is the area that is shaded on the map. It is evident that that area comprises the same area that Nicaragua now asks the Court to delimit in the present case. ***And secondly***, Nicaragua's claim clearly fell beyond its 200-mile limit — you can see that from the red line on the map; more than 200 miles from Nicaragua's coast — and again in the same area that it now seeks the delimitation of in the present proceedings.

6. Colombia took issue with this claim in its Counter-Memorial, pointing out that Nicaragua could obviously have no EEZ entitlement that was situated more than 200 nautical miles from its baselines, and that Nicaragua had not even begun to establish a continental shelf entitlement beyond 200 miles.

7. Nicaragua therefore changed its claim in its Reply. In its Reply it stated that, after undertaking a more detailed analysis of the question of delimitation — which is really quite an admission in the middle of a case that Nicaragua had commenced eight years earlier —, but after undertaking a more detailed analysis including additional geological and hydrographical studies of the area, it, Nicaragua, had decided to request the delimitation of the continental shelf, which Nicaragua maintained extended well over 200 nautical miles from its coast[62].

8. Nicaragua's Reply contained a section entitled "The Continental Shelf in the Western Caribbean: The Geological and Geomorphological Evidence", and another section entitled "The

[62] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia),* Nicaragua's Reply, p. 12, paras. 25-26.

Geological Evidence of the Outer Limit of Continental Shelf Areas Attributable to Nicaragua"[63]. In those sections, Nicaragua advanced arguments on what it contended were the characteristics of the sea-bed and subsoil beyond 200 miles from its coast. Nicaragua also attached to its pleadings three technical annexes (Anns. 16-18) that it had filed as preliminary information with the CLCS, arguing that these supported its claim to a continental shelf entitlement extending over 200 nautical miles from its baselines.

9. Mr. President, permit me to display on the screen some, just some, of Nicaragua's materials accompanying Chapter III of its Reply in the prior case that were presented to evidence its claim. The first, which is also at tab 12 of your folders, is a depiction of what Nicaragua considered was the geomorphology of the area. Nicaragua largely pinned its alleged entitlement to an extended continental shelf on a feature called the Nicaraguan Rise, which you see on the figure. I will come back to the Nicaraguan Rise in a few moments.

10. The next slide on the screen, which is tab 13, was used by Nicaragua to illustrate what it claimed was the relevance of geology and plate tectonics in the area. And Nicaragua used this depiction to argue that the Caribbean Plate extended for a long distance off the coast of Nicaragua, and formed a geological dividing line between Colombia's natural prolongation, which Nicaragua maintained was limited to a narrow strip off the Colombian mainland coast, and the natural prolongation of Nicaragua.

11. The following illustration, which is tab 14, shows one, there are a number of these, but one of the bathymetric profiles which Nicaragua also relied on to prove its extended continental shelf entitlement. And the last illustration I shall inflict on you — there were many others filed both in Nicaragua's Reply, and during the oral proceedings — this last illustration shows Nicaragua's continental shelf claim as it was set out in the Reply, this is tab 15. And you will see that that claim, and the area of alleged "overlapping margins" posited by Nicaragua, falls in precisely the area that Nicaragua now asks you to delimit in the present case.

12. Nicaragua considered that it had established its entitlement to a continental shelf based on the technical materials it included in Chapter III of its Reply. As Nicaragua asserted at the time:

---

[63] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia),* Nicaragua's Reply, pp. 81 and 89.

"Chapter III above leaves no doubt that physically and legally the continental shelves of Nicaragua and Colombia meet and overlap in an area roughly 300 nautical miles from the Nicaraguan mainland coast and 100 nautical miles from the Colombian mainland coast"[64]. And Nicaragua then asked for a continental shelf delimitation in this area in its submissions.

13. During the oral hearings, Nicaragua's technical adviser, Dr. Cleverly, took the floor in both rounds — and I use his words ***and I quote from Dr. Cleverly*** — "to describe in more detail the geological and geomorphological aspects, particularly of the continental shelf"[65]. Now his presentation included a discussion of plate tectonics, geomorphology, bathymetry, data, and metadata. And he even presented a fly-through video at the hearings, which was said to portray the geology and geomorphology of the area beyond 200 miles from Nicaragua's baselines that Nicaragua was requesting the Court to delimit. Based on these materials, Dr. Cleverly's conclusion was that: "Nicaragua's continental margin and natural prolongation extend well past 200 miles to a distance of about 500 miles"[66]. And for his part, my good friend Mr. Lowe confidently stated during the oral proceedings that, "the existence of the continental shelf is essentially a question of *fact*"[67]; and that, in the case at hand, "[t]he geology speaks for itself; and Dr. Cleverly has explained it to you"[68].

14. Quite clearly, the Court did not agree. In its Judgment, the Court stated that Nicaragua "has not established that it has a continental margin that extends far enough to overlap with Colombia's 200-nautical-mile entitlement to the continental shelf, measured from Colombia's mainland coast . . ."[69]. Given that a delimitation can only take place where there are overlapping entitlements to maritime areas, the fact that Nicaragua failed to prove its case on entitlement led the Court to conclude, both in its reasoning (para. 131), and unanimously in its *dispositif* (para. 251 (3)), that it could not uphold Nicaragua's claim contained in its submission I (3).

---

[64] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, Nicaragua's Reply, para. 5.27.

[65] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, Verbatim Record, CR 2012/9, p. 10, para. 2 (Cleverly).

[66] *Ibid.*, para. 37 (Cleverly).

[67] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, Verbatim Record, CR 2012/9, p. 26, para. 25 (Lowe); emphasis added.

[68] *Ibid.*, para. 28 (Lowe).

[69] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), I.C.J. Reports 2012* , p. 669, para. 129.

15. In its Written Statement in this case, Nicaragua advances the astonishing assertion that Colombia "has not at any stage challenged the factual and geomorphological evidence of the continuity of the seabed as the natural prolongation of Nicaragua's territory"[70]. ***That is from Nicaragua's Written Statement in this case***. Now that is plainly wrong, as a review of the written and oral proceedings in the prior case shows. At every stage of the case, Colombia challenged the factual evidence adduced by Nicaragua to substantiate its claim to an extended continental shelf entitlement and a delimitation of that shelf with Colombia.

16. For example in its Rejoinder, Colombia demonstrated that Nicaragua had not even come close to proving its case. Nicaragua had in part relied on what it said were publicly available sources for its case on geology and geomorphology. Yet, as Colombia pointed out, none of that material was annexed to the Nicaraguan Reply and it was not publically available[71]. Colombia then took issue with all three of the technical annexes that Nicaragua had supplied, those were Annexes 16, 17 and 18, and showed why each one of them was deficient[72]. Indeed, Colombia noted that Nicaragua itself had admitted, and I am now quoting Nicaragua's own words, that "some of the data and the profiles described below do not satisfy the exacting standards required by the CLCS for a full submission, as detailed in the Commission's Guidelines"[73].

17. During the oral proceedings, Colombia also responded to the technical materials Nicaragua submitted, and to the arguments of Dr. Cleverly and Mr. Lowe.

18. For example, Colombia took issue with Nicaragua's description of the Nicaraguan Rise. And as counsel for Colombia explained, in its case against Honduras, in Nicaragua's case against Honduras decided by the Court in 2007, Nicaragua had identified the Nicaraguan Rise as a feature that extends from the continental landmass triangle formed at the boundary of Honduras and Nicaragua and the Rise extends in a north-easterly direction, that is towards Jamaica, Haiti[74]. In the south, that is towards Colombia, Nicaragua conceded that the continental shelf was "not so

---

[70]WSN, para. 5.22.

[71]*Territorial and Maritime Dispute (Nicaragua* v. *Colombia),* Colombia's Rejoinder, para. 4.49.

[72]*Ibid.,* paras. 4.50-4.56.

[73]*Ibid.,* para. 4.53, citing Preliminary Information of Nicaragua to the CLCS, para. 21.

[74]Nicaragua's Memorial in the *Honduras* case, p. 6, para. 5; p. 9, para. 13.

generous"[75]. But when it came to its case against Colombia, in the *Territorial and Maritime Dispute* case, Nicaragua took a fundamentally inconsistent position as to the location and extension of the Nicaraguan Rise[76] and Colombia pointed this out in the prior case.

19. And counsel for Colombia also explained why the technical annexes filed by Nicaragua were wholly insufficient to establish an extended continental shelf entitlement. This included an explanation of why the foot of slope points that Nicaragua posited beyond 200 miles from its coast were technically deficient, why the data and so-called metadata for Nicaragua's bathymetric profiles were incomplete, why the sediment thickness calculations advanced by Nicaragua were unreliable, and why the data, as a whole, was unsubstantiated and of sub-standard quality[77]. And as counsel for Colombia emphasized at the end of the first round presentation in the prior case: "Colombia challenges *everything* about Nicaragua's new continental shelf claim"[78]. And as recalled during the second round of oral argument by Colombia ***and I quote again***: "You either have the required data or you do not, and Nicaragua does not"[79]. So how Nicaragua in these proceedings can assert that Colombia had not in the earlier case at any stage challenged the factual and geomorphological evidence of Nicaragua's so-called extended continental shelf claim is unfathomable.

Conclusion

20. In the proceedings that ended with the Court's 2012 Judgment, Nicaragua had the burden of proof to establish its entitlement, its claims for a continental shelf entitlement beyond 200 miles and for the delimitation of that shelf with Colombia. As the Court stated in its Judgment in the *Pedra Branca/Pulau Batu Puteh* case — and it's a principle that the Court has often repeated: "It

[75] *Ibid.*, p. 9, para. 12.

[76] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, Verbatim Record, CR 2012/16, pp. 45-46, paras. 53-57 (Bundy).

[77] *Ibid.*, pp. 56-58, paras. 58-66, and p. 61, para. 79 (Bundy).

[78] *Ibid.*, p. 62, para. 84.

[79] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, CR 2012/16, p. 47, para. 61 (Bundy).

is a general principle of law, confirmed by the jurisprudence of this Court, that a party which advances a point of fact in support of its claim must establish that fact"[80].

21. And on the basis of the record in the *Territorial and Maritime Dispute* case, it is clear that Nicaragua's claim to a continental shelf entitlement beyond 200 miles, and its request for the Court to delimit the shelf in that area, were declared ~~***to be***~~ admissible by the Court, were fully argued by the Parties, considered on their merits by the Court and definitively decided in the 2012 Judgment. Quite simply, Nicaragua did not submit sufficient proof of relevant facts to establish its entitlement to a continental shelf beyond 200 miles or a delimitation with Colombia and the Court therefore did not uphold Nicaragua's Submission I (3). As Professor Reisman will explain shortly, the matter is *res judicata*, and Nicaragua should not be afforded a second chance to litigate its claim.

22. Mr. President, Members of the Court, that concludes my presentation. I am grateful as always for the Court's attention, and I would ask — perhaps after the break, Mr. President — if the floor could be given to Professor Reisman. Thank you very much.

Le PRESIDENT : Merci, la Cour va à présent marquer une pause de 15 minutes. L'audience est suspendue.

L'audience est suspendue de 11 h 30 à 11 h 50.

Le PRESIDENT : Veuillez vous asseoir. L'audience reprend. Je donne à présent la parole au professeur Michael Reisman pour la poursuite des plaidoiries de la Colombie. Monsieur le professeur, vous avez la parole.

Mr. REISMAN: Merci, Monsieur le président.

---

[80] *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008*, p. 31, para. 45; see also *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 86, para. 68; *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia* v. *Greece), Judgment, I.C.J. Reports 2011 (II)*, p. 668, para. 72; *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 71, para. 162.

THIRD PRELIMINARY OBJECTION: THE COURT LACKS JURISDICTION IN THIS CASE BECAUSE NICARAGUA'S CLAIMS ARE BARRED BY *RES JUDICATA*

1. 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 jurisdiction under Nicaragua's proposed bases of jurisdiction were found to obtain in this case, Nicaragua's claim would be barred by *res judicata*. It is manifest on the face of the record, which Mr. Bundy has just reviewed, that Nicaragua's claim in its 2013 Application had already been briefed, vigorously argued and decided in your 2012 Judgment. It may not be raised again.

The Controlling Legal Principle

2. The controlling legal principle here is *res judicata:* it bars reopening a judgment when there is an identity between what Judge Anzilotti described as "the three traditional elements . . . *persona, petitum, causa petendi*"[81]. Judge Jessup, in *South West Africa Second Phase*, observed that "the essentials for the application of the *res judicata* principle, [are] identity of parties, identity of cause and identity of object in the subsequent proceedings"[82].

3. There are, Mr. President, affirmative and defensive consequences to a *res judicata*. The affirmative consequence makes the substance of the holding definitive and binding. The defensive consequence shields a respondent from being harassed again and again by an applicant, who had its "day in court" — in this case, *eleven years* in court — but failed to vindicate its claim. As you said in the 2007 Judgment in *Genocide*, "[d]epriving a litigant of the benefit of a judgment it has already obtained must in general be seen as a breach of the principles governing the legal settlement of disputes"[83].

4. Paragraph 115 of the *Genocide Case* is displayed on the screen and is in your folders.

5. There you derive "the fundamental character" of the principle of *res judicata* from the very source of your competence and authority, the Statute and the United Nations Charter. As for the content of the principle, may I recall your precise words: "That principle signifies that *the*

---

[81] *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13;* dissenting opinion of M. Anzilotti, p. 23.

[82] *South West Africa (Ethiopia v. South Africa), Second Phase, Judgment, I.C.J. Reports 1966, p.* 333. ***Dissending Opinion Jessup.***

[83] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I),* p. 91, para. 116.

decisions of the Court are not only binding on the parties, but are final, in the sense that *they cannot be reopened by the parties as regards the issues that have been determined . . .*"[84]

6. In the same judgment, you stated

> "[O]nce the Court has made a determination, whether on a matter of the merits of a dispute brought before it, or on a question of its own jurisdiction, that determination is definitive both for the parties to the case, in respect of the case (Article 59 of the Statute), and for the Court itself in the context of that case."[85]

As Nicaragua purports to bring the present case on the basis of the Pact, it is pertinent to recall your jurisdictional holding in 2007:

> "[A]ccording to Article XXXIV of the Pact — you wrote — controversies over matters which are *governed* by agreements or treaties shall be declared "ended" in the same way as controversies over matters *settled* by arrangement between the Parties, arbitral award or decision of an international court." [86]

Mr. President, in the prior case, Nicaragua's I (3) claim asked the Court to adjudge and declare that

> "The appropriate form of delimitation, within the geographical and legal framework constituted by the mainland coasts of Nicaragua and Colombia, is a continental shelf boundary dividing by equal parts the overlapping entitlements to a continental shelf of both Parties."[87]

In your 2012 Judgment, the Court found I (3) admissible and then unanimously found "that it cannot uphold the Republic of Nicaragua's claim contained in its final submission I (3)"[88].

7. ***Mr. President, i***n line with the principle of *res judicata*, that should have been the end of the issue raised in Nicaragua's I (3) submission. But in its 2013 Application, Nicaragua once more requests the Court to adjudge and declare:

> "*First*: The precise course of the maritime boundary between Nicaragua and Colombia in the areas of the continental shelf which appertain to each of them beyond the boundaries determined by the Court in its Judgment of 19 November 2012."[89]

8. Mr. President, Members of the Court, the wording may vary but, as the juxtaposition on the screen shows, semantics cannot obscure that Nicaragua's new Application is the same as its

---

[84] *Ibid.*, p. 90, para. 115; emphasis added.

[85] *Ibid.*, p. 101, para. 138.

[86] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 848, para. 39.

[87] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia),* Verbatim Record, CR 2012/15, p. 50 (Argüello).

[88] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II),* p. 719, para. 251.

[89] Application, p. 8, para. 12

submission in the prior case, which the Court held admissible and then decided that Nicaragua had failed to establish.

The Written and Oral Submissions

9. Mr. President, throughout the proceedings in *Territorial and Maritime Dispute*, two themes recurred in Nicaragua's pleadings: first, as Mr. Bundy explained, Nicaragua maintained that the relevant area within which the delimitation should be effected included the maritime area beyond 200 [nautical] miles of the Parties' mainland coasts. This is the same area in which Nicaragua now asks the Court to make a mainland-to-mainland delimitation.

10. Second, Nicaragua — in its Memorial[90] and in its Reply[91] of 2009 — claimed a continental shelf boundary that lay *beyond* 200 nautical miles from its baselines; Mr. Bundy has recalled to you the extensive argument on this point in the hearing. At the end of the hearing, Nicaragua's I (3) submission requested a continental shelf boundary dividing by equal parts overlapping entitlements to a continental shelf of both Parties[92]. The remedy sought in its 2013 Application is identical in all these respects to those in the I (3) claim in *Territorial and Maritime Dispute*.

The Judgment

11. In your 2012 Judgment, you rejected Colombia's admissibility objection and decided that Nicaragua's claim in final submission I (3) was admissible[93]. Nicaragua makes the quite remarkable assertion that when you said that the admissibility determination did "not address . . . the issue of the validity of the legal grounds on which it is based"[94], you were preserving the merits of that claim for later proceedings. But, Mr. President, a decision on admissibility is just that; it does not address the merits. If the Court finds a claim inadmissible, it does not proceed to the

[90] "[T]he appropriate form of delimitation, within the geographical and legal framework constituted by the mainland coasts of Nicaragua and Colombia, is a single maritime boundary in the form of a median line between these mainland coasts." *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 634, para. 16. See also, *Territorial and Maritime Dispute (Nicaragua* v. *Colombia*), Memorial of Nicaragua (I), 28 April 2003, p. 215-216, para. 3.58.

[91] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, Reply of Nicaragua, 18 Sep. 2009, Chap. III, p. 90, para. 3.38.

[92] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 636, para. 17.

[93] *Ibid.*, p. 665, para. 112.

[94] *Ibid.*, p. 665, para. 112.

merits. If it finds the claim admissible, it turns to the merits, as it, in fact, did in Part IV of its 2012 Judgment, which was entitled "Consideration of Nicaragua's Claim for Delimitation of a Continental Shelf Extending Beyond 200 Nautical Miles"[95]. In that Part, the Court referred to the "relevant maritime area" and "recal[led]" that "the relevant area cannot extend beyond the area in which the entitlements of both Parties overlap"[96]. This confirms that the Court's determination that Nicaragua's claim "cannot be upheld"[97] was both expressly and by necessary implication a final adjudication on Nicaragua's claim that Nicaragua and Colombia had overlapping entitlements to the continental shelf beyond 200 [nautical] miles from Nicaragua's baselines. By then deciding, in Part III of the 2012 Judgment, that the I (3) claim was admissible and, in Part IV, not upholding it on the merits but then, in its *dispositif*, deciding that "the single maritime boundary delimiting the continental shelf and the exclusive economic zones of the Republic of Nicaragua and the Republic of Colombia"[98], the Judgment produced a *res judicata*. It was a full and final delimitation of a *single* maritime boundary between the Parties.

12. Mr. President, notwithstanding this merits determination, Nicaragua contends that the inquiry the Court set for itself in the 2012 Judgment was "circumscribed"; was limited only to those "proceedings" and that you "refused to decide" the question it now seeks to raise again[99]. On this imaginative reading, Mr. President, Members of the Court, the questions answered in your 2012 Judgment were not those that Nicaragua posed in its Application, not those that the Court found admissible, not those that the Court ultimately decided but, instead, according to Nicaragua, the questions posed in Nicaragua's final submissions in the prior proceedings remain to this day in a state of suspended animation — judged "admissible" yet somehow "undecided" by the unanimous finding in the final Judgment's operative clause.

13. That this was not what the Court did may be seen by comparing the 2012 Judgment with the operative clause in the 1986 *Nicaragua* v. *United States of America* Judgment. The

---

[95] *Ibid.*, p. 665.

[96] *Ibid.*, p. 685, para. 163.

[97] *Ibid.*, p. 669-670, paras. 128-131.

[98] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 719, para. 251 (4).

[99] WSN, p. 35, para. 4.3, p. 43, para 4.23.

1986 Judgment was express in "reserving" the question of reparations for "subsequent" proceedings in the case[100]. Nicaragua now contends that the "situation presented here is analogous" to the 1986 Judgment[101], but it glides quickly past the absence, in the 2012 Judgment, of the analogous and necessary language "reserving" the issue for future proceedings. Relatedly, Nicaragua elides the fact that the Court's reservation of the issue of reparations in the 1986 Judgment contemplated a "subsequent procedure in the case", not a separate and new case that awkwardly blends an Article 61 request for revision with a *de novo* second bite at the merits of the 2001 request for delimitation. By contrast, the 2012 Judgment not only contains no reservation, but it repeatedly marks Nicaragua's failure to prove the necessary predicate of overlapping continental shelves beyond 200 miles from its baselines.

14. Having tried and failed to meet its burden in the last proceedings — or, more precisely, having succeeded as to admissibility but failed as to merits — Nicaragua asks for another chance. Yet, as you explained in the *Genocide* case, "[t]he operative part of a judgment of the Court possesses the force of *res judicata*"[102] and it would involve a fair measure of schizophrenia to have one operative part of a judgment determine that the Court "cannot uphold"[103] a claim and another judgment finding the same claim can be upheld.

Nicaragua's "Grounds"

15. By now, many Members of the Court must feel as if they have been dragged through a Proustian recall of a case the Court was entitled to assume was behind it. I apologize but I must take you to what Nicaragua's 2013 Application describes as the "main grounds on which Nicaragua's claim is based"[104], an examination that will, inevitably, recall 2012. You will see, Mr. President, that each of Nicaragua's grounds was raised by it in *Territorial and Maritime Dispute*, and recounted and disposed of in your 2012 Judgment.

---

[100] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 149, para. 292 (15).

[101] WSN, p. 46, para. 4.31.

[102] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 94, para. 123.

[103] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 719, para. 251.

[104] Application, pp. 6-7, para. 11.

16. Nicaragua's first "ground" is that "Nicaragua is entitled under UNCLOS and under customary international law to a continental shelf extending throughout its continental margin"[105]. This ground will be familiar to you because Nicaragua argued the same point in the prior case. For example, in its Reply in 2009, Nicaragua contended that: "In accordance with the provisions of Article 76 of the 1982 Law of the Sea Convention, Nicaragua has an entitlement extending to the outer limits of the continental margin."[106] At paragraph 105 of your Judgment in 2012, you explicitly took account of Nicaragua's argument, and you said "Nicaragua contended that, under the provisions of Article 76 of the United Nations Convention on the Law of the Sea (UNCLOS), it has an entitlement extending to the outer edge of the continental margin"[107].

17. Thus Nicaragua's first "ground" was considered and decided in paragraphs 105 and 129 of the 2012 Judgment. ***And b***ecause of the identity of *persona*, *petitum* and *causa petendi*, it is barred by *res judicata*.

18. The second "ground" in Nicaragua's Application reads: "That [Nicaragua's] entitlement to a continental shelf extending throughout its continental margin exists *ipso facto* and *ab initio*."[108] This argument, too, will be familiar to you, as it, too, was raised by Nicaragua and considered by the Court. In oral argument, counsel for Nicaragua maintained on several occasions that Nicaragua's continental shelf entitlement extending to the outer limit of its margin exists *ipso facto* and *ab initio*[109]. The Judgment referred to the fact that both Parties "agree that coastal States have *ipso facto* and *ab initio* rights to the continental shelf"[110]. But the Judgment went on to state that the Parties "disagree about the nature and content of the rules governing the entitlements . . . to a shelf beyond 200 nautical miles"[111]. Nicaragua's second "ground" was thus considered and then

---

[105] *Ibid.*, p. 6, para. 11 *(a)*.

[106] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, Reply of Nicaragua, 18 Sep. 2009, p. 88, para. 3.34.

[107] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 662, para. 105.

[108] Application, p. 6, para. 11 *(b)*.

[109] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, Verbatim Record, CR 2012/9, p. 22, para. 4; p. 24, para. 18; p. 26, paras. 26-27; and p. 32, para. 59 (Lowe).

[110] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 666, para. 115.

[111] *Ibid.*, p. 666, para. 115.

decided by paragraphs 115 and 129 of the Judgment. ***And b***ecause of the identity of *persona*, *petitum* and *causa petendi*, it is barred by *res judicata*.

19. Nicaragua's third "ground", which appeared in paragraph 11 *(c)* of its Application, reads: "That continental margin includes an area beyond Nicaragua's 200-nautical-mile maritime zone and in part overlaps with the area that lies within 200 nautical miles of Colombia's coast."[112]

20. This, too, will be familiar to the Court. Nicaragua's Reply in 2009 devoted two full sections to what it called "Overlapping Continental Margins" and the relation of Nicaragua's claim to the areas of Colombia's continental shelf and exclusive economic zone[113]. Figures 3.10 and 3.11 in that Reply, which are now on the screen and in your folders, depicted what, in Nicaragua's view, was the "Area of overlapping continental margins". Please note, Mr. President, Members of the Court: these are Nicaragua's maps from the previous case. As they show, Nicaragua maintained that its continental margin extended beyond 200 nautical miles from its baselines and overlapped with the continental shelf that lies *within* 200 nautical miles of Colombia's coast. In oral argument, counsel for Nicaragua contended that Nicaragua's continental shelf extended for almost 500 miles, overlapping with Colombia's 200-nautical-mile entitlement, giving rise, Nicaragua insisted, to the need for delimitation[114].

21. Nicaragua also asserted in its 2009 Reply that "[t]he extent of the natural prolongation of the Nicaraguan continental shelf in the area of delimitation is a physical fact that can be verified scientifically with data that are in the public domain"[115]. Mr. Bundy explained earlier that Nicaragua, in its 2009 Reply, appended and discussed the evidence which, it insisted, established its continental margin beyond 200 nautical miles. It then reviewed it extensively in its oral argument[116].

---

[112]Application, p. 6, para. 11 *(c)*.

[113]*Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, Reply of Nicaragua, 18 Sep. 2009, Chap. III (Sec. VI D), pp. 92-93, paras. 3.45-3.46 and Sec. VII, pp. 93-96, paras. 3.47-3.56.

[114]*Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, Verbatim Record, CR 2012/9, p. 26, para. 28 (Lowe).

[115]*Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, Reply of Nicaragua, 18 Sep. 2009, p. 12, para. 27.

[116]*Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, Reply of Nicaragua, 18 Sep. 2009, pp. 89-90, paras. 3.37-3.40 and Anns. 16-18 to the Reply; also see *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, Verbatim Record, CR 2012/9, pp. 10-21, paras. 1-38 (Cleverly).

22. ***And a***s Nicaragua itself acknowledges in its Application, the Court did not accept that it had established that Nicaragua "has a continental margin that extends beyond 200 nautical miles from the baselines from which its territorial sea is measured"[117]. That is a quote from the Application of Nicaragua.

23. Thus, Nicaragua's third "ground" in the present case was considered and decided by the 2012 Judgment and, because of the identity of *persona*, *petitum* and *causa petendi*, is barred by *res judicata*.

24. Nicaragua's fourth "ground" reads: "The area of overlap must be delimited so as to achieve an equitable result, using a method that will preserve the rights of third States."[118] Aside from the fact that this presupposes that there is an area of overlap of continental shelf beyond 200 miles from its baselines, a proposition that Nicaragua failed to establish in the prior case, its fourth ground is a repetition of an argument which it unsuccessfully pressed in the previous case. Because, again, of the familiar identity of *persona*, *petitum* and *causa petendi*, the question of delimitation beyond 200 nautical miles is *res judicata*.

25. In its 2009 Reply, Nicaragua stated that the delimitation it was requesting in areas situated beyond 200 nautical miles was "a line dividing the areas where the coastal projections of Nicaragua and Colombia converge and overlap in order to achieve an equitable result"[119]. Nicaragua advanced the same contention in oral argument in the prior case[120]. Once again, Nicaragua's Application does no more than repeat grounds that were fully rehearsed, addressed and decided in the prior case.

26. But, Nicaragua argues that *Haya de la Torre* and *Asylum* stand for the proposition that, as Nicaragua puts it, "even closely related issues *not* actually determined in one case remain amenable to adjudication in another"[121]. Aside from the fact that the issue raised in Nicaragua's new application *was actually* decided, Nicaragua misconstrues *Haya de la Torre*. In that case,

---

[117]Application, p. 2, para. 4.

[118]*Ibid.*, p. 6, para. 11 *(d)*.

[119]*Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, Reply of Nicaragua, 18 Sep. 2009, p. 78, para. 3.11, p. 88, para. 3.35. See also p. 100, para. 3.66 of the Reply where Nicaragua repeated the same point.

[120]See Professor Lowe's statement at *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, Verbatim Record, CR 2012/9, p. 22, para.4.

[121]WSN, p. 39, para. 4.13; emphasis in original.

Colombia had requested the Court to find that it was not bound, in the execution of the Court's earlier *Asylum* Judgment, to deliver Mr. Haya de la Torre to the Peruvian authorities. The Court, however, noted that in the *Asylum* case, Peru had not demanded his surrender. Accordingly, the Court stated: "[t]his question was not submitted to the Court and consequently was not decided by it"[122]. There was, the Court concluded, "no *res judicata* upon the question of surrender".

27. Now, by contrast to *Asylum*, the question of the delimitation of the continental shelf beyond 200 miles from Nicaragua's baselines set forth in Nicaragua's 2013 Application *was* raised and *was* decided by the Court in its 2012 Judgment.

28. The fifth "legal ground" in Nicaragua's Application concerns Nicaragua's conception of Colombia's duties pending the drawing of a boundary. It is in your folders at tab 26. This ground is supposed to provide a legal basis for Nicaragua's second request which asks the Court to adjudge and declare:

> "*The principles and rules of international law that determine the rights and duties of the two States in relation to the area of overlapping continental shelf* claims and the use of its resources, *pending the delimitation of the maritime boundary* between them beyond 200 nautical miles from Nicaragua's coast."[123]

29. This "ground" will be treated by Professor Treves and I will simply note that both the "ground" and the second request assume that the first request is not *res judicata*. Inasmuch as the first request is, as I have shown, barred by *res judicata*, the second request has no base on which to rest. But even on its own terms, the second request was already pressed by Nicaragua in the prior case and it materially reproduces and relies on the same arguments as did Nicaragua's final submission I (3) in *Territorial and Maritime Dispute*. There, Nicaragua's ostensible rationale was to allow the Parties, to quote counsel, to "get on with the management and exploitation of marine resources and the implementation of their rights and duties in their respective areas"[124]. In the current Application, Nicaragua's ostensible rationale is that each Party "conduct itself in relation to the area of overlapping continental shelf claims and the use of its resources in such a manner as to

---

[122] *Haya de la Torre Case, (Colombia* v. *Peru), Judgment, I.C.J. Reports 1951*, p. 79.

[123] Application, p. 8, para. 12; emphasis added.

[124] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia),* Verbatim Record, CR 2012/15, p. 26, para. 53 (Lowe).

avoid causing harm to the interests of the other"[125]. Here again, Mr. President, we find the now familiar identity of all the elements, with the result that the second request is *res judicata*.

30. Nicaragua cannot evade the consequences of *res judicata* of the second request by juggling a few words. Nor can the juggling obscure the fact that the essential syllogism here has a missing premise. Nicaragua, having already failed to prove its extended shelf claim in the prior case, now returns to the Court and asks it to accept, on faith, Nicaragua's assurance that it is entitled to the shelf, which it was unable to prove in the prior case, and, on the basis of that unproved assurance, to order Colombia to act as if the shelf belongs to Nicaragua and to enact a code to enable Nicaragua to conduct itself as if it were entitled to the shelf, which it was unable to establish in the previous case. Having failed to secure a favourable judgment on this point in 2012, reshuffling the words cannot make its claim "new" today and evade the bar of *res judicata*.

31. In sum, Mr. President, the record I have reviewed shows that the question of the delimitation of the continental shelf beyond 200 miles from Nicaragua's baselines, set forth in Nicaragua's current Application, as well as its second request, which assumes the first as its necessary predicate, were raised in the prior case and decided by the Court in its 2012 Judgment. They are *res judicata.*

Nicaragua's defence

32. Mr. President, I now turn to Nicaragua's attempts to circumvent the *res judicata* of the 2012 Judgment. Nicaragua claims, *inter alia*, that the Court was not in a position to delimit the extended continental shelf in the earlier Judgment because Nicaragua had not at the time established an entitlement to such an extended continental shelf. If the Court was, indeed, not in a position to delimit Nicaragua's entitlement to the extended continental shelf it was claiming, it was because Nicaragua failed to prove its case. Nicaragua's written submissions and oral arguments in the prior proceedings clearly show that Nicaragua was granted full opportunity by the Court, and had tried and then believed that it had established its entitlement, both on legal grounds and by submission of data. When the Court explained that Nicaragua's mere "preliminary information" did not discharge its burden of proving an entitlement either before the CLCS or the Court, the

[125]Application, pp. 6–7, para. 11 *(e)*.

Court did not reserve its final judgment on Claim I (3) for another day — perhaps, for example, by suspending the case for a fixed time period while Nicaragua perfected its submission to the CLCS. Instead, the Court fully and finally judged that Nicaragua had failed to establish its claim.

33. In its new Application, Nicaragua claims that it has established such an entitlement. This time it purports to be based on a final submission to the CLCS in June 2013. Nicaragua asserts that the Court should now be in a position to do what it could not do in the earlier decision, thanks to geological and geomorphological facts, which it had not produced in the prior proceedings. This, in spite of the fact that the Court has already issued a judgment finding that Nicaragua had not established its claim!

34. Mr. President, an effort such as this, designed to circumvent the doctrine of *res judicata* by the production of additional facts will not succeed. In the *Genocide* case, you analysed the rigorous procedure under Article 61 of the Statute, especially with regard to new facts in the context of its relationship with *res judicata*:

> "This [the principle of *res judicata*] does not however mean that, should a party to a case believe that elements have come to light subsequent to the decision of the Court which tend to show that the Court's conclusions may have been based on incorrect or insufficient facts, the decision must remain final, even if it is in apparent contradiction to reality. The Statute provides for only one procedure in such an event: the procedure under Article 61, which offers the possibility for the revision of judgments, subject to the restrictions stated in that Article. In the interests of the stability of legal relations, *those restrictions must be rigorously applied*."[126] (Emphasis added.)

35. The predicament which those rigorously applied restrictions create for Nicaragua have led it to some jurisdictional acrobatics. It has instituted new proceedings before the Court, purportedly based on Article XXXI of the Pact of Bogotá, but has also submitted that "the subject-matter of the present Application remains within the jurisdiction established in the case concerning the *Territorial and Maritime Dispute* . . . of which the Court was seised by [Nicaragua's 2001] Application"[127]. Nicaragua does not explain how the Court's jurisdiction in the earlier case remains established and continues as valid for the new Application[128], if it is not asking

---

[126] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 92, para. 120.

[127] Application, p. 6, para. 10.

[128] *Ibid.*, Chap. IV.

for an interpretation, under Article 60 or a revision, under Article 61, points on which Mr. Bundy will address you. To extricate itself from its jurisdictional muddle, Nicaragua even suggests that its Application is not based on new evidence "as such"[129]. That equivocation is, in itself, an acknowledgment of Nicaragua's profound jurisdictional problems.

36. Mr. President, Members of the Court, for all of these reasons, Colombia submits that the requests contained in Nicaragua's Application are barred by *res judicata* and respectfully asks the Court to dismiss the Application for want of jurisdiction.

37. Mr. President, Members of the Court, thank you for your attention and Mr. President may I ask you to call upon my colleague Mr. Bundy.

Le PRESIDENT : Merci, Monsieur le professeur. La parole est à Mr. Bundy.

Mr. BUNDY:

FOURTH PRELIMINARY OBJECTION: NICARAGUA'S REQUEST IS AN ATTEMPT TO APPEAL OR REVISE THE 2012 JUDGMENT OVER WHICH THE COURT HAS NO JURISDICTION

1. Merci, Monsieur le président, Members of the Court, in this brief intervention, I shall address Colombia's fourth preliminary objection: that the Court lacks jurisdiction over Nicaragua's request to delimit the shelf lying beyond 200 nautical miles from its baseline because that request represents either an appeal of the 2012 Judgment, or an attempt to revise that Judgment without complying with the conditions for the admissibility of a request for revision.

2. In the *Territorial and Maritime Dispute* case, Nicaragua argued that it had an entitlement to a continental shelf extending more than 200 miles from its coast. It therefore asked in its submission I (3) for a delimitation of that entitlement with Colombia. And as I explained earlier this morning, Colombia contested Nicaragua's claim. And the Court concluded that the claim contained in submission I (3) cannot be upheld.

3. On 24 June 2013, that is seven months after the Judgment was delivered, Nicaragua filed a full submission with the CLCS (it had previously filed preliminary information in 2010, which it had relied on in the prior case). In its Application, Nicaragua asserts that this submission of June 2013 demonstrates that Nicaragua's continental margin extends more than 200 nautical miles

[129]WSN, p. 47, para. 4.33.

from its baselines and overlaps with Colombia's entitlement[130]. Now the implication of that contention is that, while Nicaragua failed to satisfy its burden of proof that it had a continental shelf entitlement that extends for more than 200 miles in the prior case, it now considers that it can establish such an entitlement based on the new submission it made to the CLCS. It therefore asks for the same kind of delimitation in these proceedings that it unsuccessfully requested in the earlier case. In other words, Nicaragua wants another chance to litigate its claim based this time on its new CLCS submission rather than on its 2010 preliminary information.

4. And that, as Professor Reisman suggested a moment ago, is where Nicaragua runs into a fundamental problem. Either it wants to reargue facts that were fully canvassed in the case that was decided in 2012, where its submission was not upheld; or it wants to introduce new facts in the form of its CLCS submission in order to prove what it was unable to prove earlier. But in either case, Nicaragua is stuck on the horns of a jurisdictional dilemma which is fatal to its case.

5. If Nicaragua wants to reargue its case on the basis of "old facts", that is tantamount to an appeal of the 2012 Judgment that runs counter to Article 60 of the Statute: "The Judgment is final and without appeal". If, on the other hand, Nicaragua wants to introduce "new facts" to support its claim, then that would constitute an attempt to revise the Judgment without complying with the conditions laid out in Article 61 of the Statute for the admissibility of such a request.

6. Now Nicaragua's pleadings are ambiguous on this point. In its Written Statement in this case, Nicaragua says that it "is not seeking to rely on new geological and geomorphological facts as such"[131]. It is far from clear what the words "as such" mean, or whether Nicaragua is simply relying on the fact that it made a submission to the CLCS, not on the "facts" contained in that submission. But be that as it may, either Nicaragua is seeking to rely on new facts that were not introduced in the prior case to support its extended continental shelf claim or it is not. You cannot have it both ways.

7. If we take Nicaragua at face value — that it is not relying on any new geological or geomorphological facts — then it is obvious that Nicaragua wants to reargue factual points that were already considered in the prior case. And indeed, the figure on the screen, which is also in

---

[130] Application of Nicaragua, para. 5.

[131] WSN, para. 4.33.

tab 29 of your folders, shows that there is not much difference between the limits of Nicaragua's purported extended continental shelf claim submitted in the prior case based on its preliminary information — that is the red line — and the limits of its new claim as set out in the Executive Summary of Nicaragua's 2013 submission to the CLCS — which is the green line — although the green line does extend well into areas also claimed by third States in the north and south. Under Article 60 of the Statute there is no jurisdictional basis for relitigating points that have already been argued and decided with binding force in a previous judgment.

8. Now the only answer that Nicaragua has in response is that these issues were not decided by the 2012 Judgment[132], but as shown this morning ***by*** my earlier presentation, and a few moments ago by Professor Reisman, that is simply not correct. Nicaragua argued that it had an extended continental shelf entitlement in the prior case; it asked the Court for a delimitation of that shelf with Colombia in the same area it now requests the Court to delimit; and the Court unanimously ruled that Nicaragua's submission could not be upheld. The matter was decided.

9. In contrast, if Nicaragua is seeking to rely on new facts as a result of its 2013 submission, then this would be an attempt to revise the 2012 Judgment under the cloak of fresh proceedings.

10. As Professor Reisman pointed out, the Statute provides for only two ways to revisit a previous decision of the Court: interpretation under the second sentence of Article 60, and revision under Article 61. Nicaragua asserts that it is not seeking interpretation[133]. With respect to revision, however, Nicaragua knows full well that it could never fulfil the conditions set out in Article 61, which the Court has indicated must be rigorously applied, and satisfied in their totality, for a revision request to be admissible[134].

11. Let me recall that Nicaragua became a party to UNCLOS in 2000. It introduced the *Territorial and Maritime Dispute* case in 2001. At that time, Nicaragua was well aware that, if it wished to establish the outer limits of its continental shelf beyond 200 miles, it would have to

---

[132]*Ibid.*, para. 4.38.

[133]WSN, para. 3.27.

[134]*Application for Revision of the Judgment of 11 September 1992 in the Case concerning the* Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) *(El Salvador* v. *Honduras, Judgment, I.C.J. Reports 2003*, p. 399, para. 20; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 92, para. 120. And see, *Application for Revision of the Judgment of 11 July 1996 in the Case concerning* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Yugoslavia), Preliminary Objections *(Yugoslavia* v. *Bosnia and Herzegovina), Judgment, I.C.J. Reports 2003*, pp. 11-12, para. 16.

comply with the requirements of Article 76 of the Convention and prove its case to the satisfaction of the CLCS. Nicaragua had over ten years to marshal the evidence necessary to make a submission to the CLCS and it also had over ten years before this Court to prove its case, and it failed to do either. Instead, it waited until seven months after the Judgment to make a submission to the CLCS.

12. In the light of those circumstances, it is evident that Nicaragua never would have been able to satisfy the conditions for the admissibility of a request for revision of the 2012 Judgment, either because there were no new facts of a decisive nature or, if there were, because of Nicaragua's negligence in not introducing them earlier.

13. In an effort to overcome this hurdle, Nicaragua again resorts to its mantra that there is no relevant decision the revision of which Nicaragua could need to seek[135]. But we have already shown that that argument is without merit. There was such a decision, as is clear from the reasoning and the operative part of the 2012 Judgment.

14. What is also striking about the Executive Summary to the submission that Nicaragua made to the Commission in June 2013 — that was just three months before it filed its Application in this case — what is striking about that Executive Summary is that it states "there are no unresolved land or maritime disputes related to this submission"[136]. Let me repeat that, Mr. President, "no unresolved land or maritime disputes related to this submission"! That is what Nicaragua was telling the Commission. That statement is fundamentally inconsistent with the claim that Nicaragua has introduced in this case. Proclaiming seven months after the 2012 Judgment was rendered that there are no unresolved maritime disputes in the area covered by Nicaragua's submission can only mean that Nicaragua considered that the Court had fully and finally delimited the maritime boundary between Colombia and Nicaragua in its 2012 Judgment.

15. In short, there is no jurisdictional basis under the Statute for Nicaragua to relitigate its case here, either on the basis of old facts that have already been argued and decided, or on the basis of new facts allegedly discovered after the Judgment was rendered.

---

[135]WSN, para. 4.45.

[136]Executive Summary of Nicaragua's CLCS Submission, p. 2, para. 8. Available at: http://www.un.org/Depts/los/clcs_new/submissions_files/nic66_13/Executive%20Summary.pdf (last visited: 4 Oct. 2015).

16. Mr. President, that concludes my brief remarks. I thank you for your courtesy, and I would ask that the floor now be given to Professor Treves. Thank you very much.

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

Mr. TREVES: Thank you, Mr. President. Mr. President, Members of the Court, it is a great honour for me to plead before you and to do so on behalf of the Republic of Colombia.

FIFTH PRELIMINARY OBJECTION: OBJECTION TO ADMISSIBILITY OF NICARAGUA'S FIRST REQUEST AND TO NICARAGUA'S SECOND REQUEST

I have today two tasks: to confirm Colombia's preliminary objection to admissibility of Nicaragua's first request — which is subsidiary to the other preliminary objections submitted by it — and to confirm Colombia's preliminary objection to Nicaragua's second request.

Colombia's preliminary objection to admissibility of Nicaragua's first request

1. Colombia's preliminary objection to admissibility of Nicaragua's first request is as follows:

> "The Court cannot consider the Application by Nicaragua because the CLCS has not ascertained that the conditions for determining the extension of the outer edge of Nicaragua's continental shelf beyond the 200-nautical mile line are satisfied and, consequently, has not made a recommendation."[137]

2. Nicaragua contends that this is a *non sequitur*[138]. To the contrary, it is the logical consequence of the UNCLOS process for establishing the outer limits of the continental shelf. Far from being "an attempt to inflate the role of the CLCS beyond its expert technical function"[139] as Nicaragua asserts, it is a recognition of this role and of its importance in the process set out in Article 76 of UNCLOS.

3. The importance of the role of the CLCS emerges in the Court's 2007 Judgment, *Nicaragua* v. *Honduras*, which was confirmed in the 2012 Judgment, *Nicaragua* v. *Colombia*[140].

---

[137] POC, Vol. I, para. 7.15.

[138] WSN, para. 5.8.

[139] *Ibid.*, para. 5.43.

[140] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 759, para. 319; *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C:J. Reports 2012 II)*, pp. 668-669, para. 126.

In 2012 the Court stated: "'any claim of continental shelf rights beyond 200 miles [by a State party to UNCLOS] must be in accordance with Article 76 of UNCLOS *and reviewed by the Commission on the Limits of the Continental Shelf* established thereunder . . .'"[141]

4. Moreover, the present case, which concerns a question of delimitation, presupposes the overlap of entitlements. As it will be shown, the role of the CLCS concerns also the entitlement of the coastal State to the continental shelf beyond 200 nautical miles and is not limited to delineating its outer limit.

5. Nicaragua concedes — albeit after showing considerable hesitation[142] — that "the CLCS recommendations . . . have [a] prescriptive character . . ."[143].

6. That statement is correct, as far as it goes. But Nicaragua errs when it continues, stating that: "There is no indication that they [the CLCS recommendations] have that [prescriptive] character in relation to basic continental shelf entitlements."[144]

7. To the contrary, the prescriptive effect of the CLCS recommendations is not confined to delineation for two basic reasons.

8. First, according to UNCLOS Annex II, Article 4, the coastal State must submit to the CLCS particulars of the outer limits "along with supporting scientific and technical data". These data, as required by Article 76 ***paragraph*** 4, concern, in particular, the position of the foot of the slope and the thickness of sedimentary rocks, namely, the very elements that the Commission must examine as evidence of the existence of entitlement in order to make its recommendations.

9. Second, the "Test of Appurtenance" included in the CLCS *Scientific and Technical Guidelines*"[145] — which appears on the screen and is also in your folders — makes clear that the Commission's task is: (A) to "*determine the legal entitlement* of a coastal State to delineate the outer limits of the continental shelf"[146]; and, (B) to delineate such outer limit[147]. This second task

---

[141]*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C:J. Reports 2012* , pp. 668-669, para. 126; emphasis added.

[142]WSN, para. 5.15.

[143]*Ibid.*, para. 5.28.

[144]*Ibid.*, para. 5.28.

[145]CLCS/11, 13 May 1999, para. 2.2, which is divided in nine subparagraphs; judges' folders, tab 30.

[146]*Ibid.*, para. 2.2.2; emphasis added.

[147]*Ibid.*, para. 2.2.3.

is only performed if the coastal State has been "able to demonstrate to the Commission that the natural prolongation of its submerged land territory to the outer edge of its continental margin extends beyond the 200-nautical-mile distance criterion"[148]. Thus, the CLCS recommendations address not only the outer limit line but also the entitlement claimed by the coastal State.

10. The recommendations of the CLCS are a step in a process that starts with a claim set out in a submission to the CLCS, continues with the examination of the submission and the recommendations by the Commission, and concludes with the establishment by the coastal State of the outer limit of its continental shelf "on the basis" of the CLCS recommendations. Without the recommendation of the CLCS, the coastal States parties to UNCLOS cannot establish the outer limit of their continental shelf.

11. Nicaragua contends that it "has now submitted all of the necessary information to the CLCS" and that, thus, it "has taken all possible steps to remove the obstacles that the Court [in its 2012 Judgment] considered to stand in the way of it reaching a decision on delimitation"[149]. This is a double misrepresentation. It misrepresents what Nicaragua has done and misrepresents what the Court stated in the paragraph of the 2012 Judgment to which Nicaragua refers.

12. First misrepresentation: Nicaragua has not submitted the information necessary to remedy the insufficiency of the evidence submitted in the case concluded in 2012. All it has done is to make a submission to the CLCS in 2013, with which, it admits, it is "not seeking to rely on new geological and geomorphological facts as such"[150]. Following this admission, Nicaragua, incredibly, states that its submission to the CLCS "*indisputably* satisfies the Commission's informational requirements as contained in its Scientific and Technical Guidelines, and *shows definitively* that Nicaragua has a continental margin that overlaps with Colombia's 200-nautical-mile entitlement to the continental shelf"[151]. This statement, far from being indisputable, is wrong. The geological and geomorphological facts and the materials purporting to furnish evidence thereof are those already known to the Court.

---

[148] *Ibid.*, para. 2.2.3.

[149] WSN, para. 5.21.

[150] *Ibid.*, para. 4.33.

[151] *Ibid.*, para. 4.33; emphasis added.

13. Furthermore, Nicaragua states that Colombia "has not at any stage challenged the factual and geomorphological evidence of the continuity of the seabed as the natural prolongation of Nicaragua's territory"[152]. To put it bluntly, this is not true. Suffice it to recall the points made a few minutes ago by my colleague Mr. Bundy and the unequivocal language he used in his pleading in the case concluded in 2012[153].

14. I come now to the second misrepresentation. Far from referring to a submission by Nicaragua to the CLCS, the Court stated that: "Nicaragua, in the present proceedings, ***has not established that it has*** a *continental margin that extends far enough to overlap with Colombia's 200-nautical-mile entitlement to the continental shelf . . .*"[154]

15. Thus, what counts for the Court is the extension of the continental margin, and that such extension be *"established"*. The submission of "the necessary information to the CLCS"[155] (assuming *quod non* that Nicaragua submitted the "necessary" information) does not, of itself, do that. It is but a step in the process parties to UNCLOS have to follow — an intermediate step. The establishment of the extension of the continental margin is the necessary prerequisite for the determination of the limits of the continental shelf beyond 200 nautical miles by the coastal State on the basis of the CLCS recommendations. Nicaragua has not complied with this prerequisite. The Court has confirmed that such establishment had not been accomplished in 2012. Neither has it been accomplished now.

16. In sum, Nicaragua has not established its entitlement to the continental shelf beyond 200 ~~***nautical***~~ miles because Nicaragua has not established its limits according to the procedure of Article 76 which is compulsory for it, as stated by the Court in 2007 in *Nicaragua* v. *Honduras*[156] and in 2012 in *Nicaragua* v. *Colombia*[157]. These statements appear on the screen.

---

[152] *Ibid.*, para. 5.22.

[153] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, Verbatim Record, CR 2012/16, paras. 52-53 and 57.

[154] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II),* p. 669, para. 129; emphasis added.

[155] WSN, para. 5.21.

[156] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II),* p. 759, para. 319.

[157] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II),* pp. 668-669, para. 126.

17. Colombia takes note of these statements of the Court in its Judgments of 2007 and 2012 and relies on them. They clarify that the fact that Colombia is not a party to UNCLOS does not relieve Nicaragua of its obligations under UNCLOS Article 76. Consequently, even if the Court were to find that it has jurisdiction to entertain Nicaragua's first request, this request would, in any event, be inadmissible.

18. Nicaragua argues that inadmissibility would lead to an "impasse": the CLCS would not be able to examine the submission of Nicaragua, because, according to its rules, it cannot do so in the presence of objections by Colombia[158], Costa Rica[159], Panama[160] and Jamaica[161], and the Court would not be able to proceed to delimitation because of the lack of the CLCS recommendation[162]. Nicaragua calls this "impasse" an "absurdity". It is not. The term "impasse", with its pejorative undertone, is a misnomer. In fact, it is the intended result of a legal régime based on an important international legal principle, namely, that the coastal State's right to determine the external limit of its continental shelf cannot be exercised if it impinges upon the claims of another State.

19. Nor can Colombia be blamed for the impasse. Nicaragua's inability to have the CLCS consider its submission is due not only to Colombia's objection. Other Caribbean States such as Costa Rica, Panama and Jamaica have also objected. This shows that the submission of Nicaragua, as well as its request in the present case, raises concerns of an entire region[163], not only of Colombia.

20. Two tribunals mandated to delimit parts of the Bay of Bengal, namely the International Tribunal for the Law of the Sea in *Bangladesh* v. *Myanmar* and the Annex VII Arbitration Tribunal in *Bangladesh* v. *India*, were only able to proceed without the requisite determination by the CLCS because of the special character of the Bay's continental margin. That character was already recognized in 1982 in Annex II of the Final Act of the Third United Nations Conference for the

---

[158]POC, Vol. II, Ann. 22.

[159]*Ibid.*, Ann. 19 and Ann. 24.

[160]*Ibid.*, Ann. 23 and Ann. 25.

[161]*Ibid.*, Ann. 20.

[162]WSN, paras. 5.29-5.31.

[163]POC, Vol. II, Ann. 21and Ann. 26.

Law of the Sea. This special character explains why the present case must be distinguished from the *Bay of Bengal* cases.

21. In the *Bay of Bengal* cases it was possible to decide on delimitation of the continental shelf beyond 200 nautical miles notwithstanding the impossibility of delineating the external limit of the continental shelf of one of the parties because the delimitation sought was a *lateral* delimitation, a delimitation between States with *adjacent coasts*[164]. The *Bangladesh* v. *India* award draws attention to this aspect, specifying that the Tribunal saw "no grounds why it should refrain from exercising its jurisdiction to decide on the *lateral* delimitation of the continental shelf beyond 200 nm before its outer limits have been established"[165]. (English only) In a lateral delimitation it is possible to adopt a line continuing indefinitely, along the same bearing, the delimitation line decided for an area within the 200-nautical-mile limit, without determining the endpoint of that line and thus trespassing on the Commission's role. Judge Donoghue alludes to this technique in her separate opinion annexed to the 2012 Judgment[166].

22. It must be noted that in *Nicaragua* v. *Honduras*, a case between States with adjacent coasts, the Court stated that a delimitation line drawn with this technique may not

> "be interpreted as extending more than 200 nautical miles from the baselines from which the breadth of the territorial sea is measured; any claim of continental shelf rights beyond 200 miles must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf"[167].

23. Be it as it may, the present case concerns a delimitation between States with opposite coasts. Delimitation in such case cannot be done without first identifying the extent of each State's shelf entitlement. The circumstance that the delimitation considered be a lateral one, that permitted ITLOS and the Annex VII Arbitral Tribunal to overcome the "impasse" argument, does not occur in the present case. In a situation in which opposite coasts are more than 400 nautical miles apart, the Court cannot determine the existence or extent of the areas of the alleged overlapping entitlements to be delimited without knowing the outer limit of Nicaragua's entitlement. But this

---

[164]POC, para. 7.16.

[165]*Award in the Matter of the Bay of Bengal Maritime Boundary between the People's Republic of Bangladesh and the Republic of India, 7 July 2014*, para. 76; emphasis added.

[166]*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*; separate opinion of Judge Donoghue, p. 757, para. 22.

[167]*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 759, para. 319.

depends on Nicaragua having established those outer limits on the basis of the recommendations of the CLCS. This Nicaragua has not done as it has not completed the procedure which — according to the Court's Judgments of 2007 and 2012 — it must follow as a party to UNCLOS.

24. In sum, in the present case there is no possibility of delimiting the continental shelf beyond 200 nautical miles in the absence of the CLCS recommendations.

25. Mr. President, Members of the Court, the final argument of Nicaragua against Colombia's objection to admissibility of its first request is that this objection is not of an "exclusively preliminary character", and that, consequently, if not rejected outright, it "should be joined to the merits" under Article 79 ***paragraph*** 9 of the Rules of the Court[168].

26. Article 79 ***paragraph*** 9 of the Rules is the result of an amendment introduced in 1972. This amendment eliminates the explicit reference, present in the previous version of the Article[169], to the joinder of the preliminary objection to the merits. This was not a merely cosmetic amendment. As it has been recently observed: "under the present Rules objections should be decided at the preliminary stage wherever reasonably possible"[170].

27. This is reflected in the Court's Judgment of 13 December 2007. Your Court stated:

> "In principle, a party raising preliminary objections is entitled to have these objections answered at the preliminary stage of the proceedings unless the Court does not have before it all facts necessary to decide the question raised or if answering the preliminary objection would determine the dispute, or some elements thereof, on the merits."[171]

28. The circumstances of the present case correspond to the situation described by the Court as warranting a decision on the objection before examining the merits.

29. The "merits" of the Nicaraguan claim concern the delimitation of the continental shelf beyond 200 nautical miles from the baselines of Nicaragua. As in all delimitation cases, the issues to be decided concern facts and legal principles applicable, according to the relevant jurisprudence of your Court, to the drawing of a maritime boundary.

---

[168]WSN, paras. 5.32-5.36.

[169]Article 68 of the Rules of the Court as adopted in 1946.

[170]S. Talmon, "Article 43", in A. Zimmermann, K. Oellers-Frahm, C. Tomuschat, C. J. Tams, *The Statute of the International Court of Justice: A Commentary*, 2nd ed., Oxford, 2012, p. 1168.

[171]*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 852, para. 51.

30. None of these issues requires to be examined in order to decide the preliminary objection submitted by Colombia.

31. This is the archetypical question that *can* be decided before any proceedings on the merits. It is also a question that *should* be decided before any proceedings on the merits.

32. Nothing in Colombia's objection to admissibility of Nicaragua's first request requires that it be examined with the merits. All the elements the Court needs in order to decide on the objection are before it. To defer its consideration is not only unnecessary. It is incompatible with procedural economy and the good administration of justice[172].

33. Mr. President, Members of the Court, this concludes my pleading in support of Colombia's preliminary objection to admissibility of Nicaragua's first request. I will now turn to Colombia's preliminary objection to Nicaragua's second request. A request, which, it may be said at the outset, seems to be viewed by Nicaragua as a lifeboat in case the first request sinks.

Colombia's preliminary objection to Nicaragua's second request

34. Nicaragua's second request is that the Court

> "adjudge and declare . . . the principles and rules of international law that determine the rights and duties of the two States in relation to the area of overlapping continental shelf claims and the use of its resources, pending the delimitation of the maritime boundary between them beyond 200 nautical miles from Nicaragua's coast"[173].

35. This second request comes after the first, which requests the Court to delimit the continental shelf areas of the two Parties beyond 200 nautical miles from the Nicaraguan coast. Reading it in context, it is easy to see that the expression "pending the delimitation" refers to the delimitation to be effected by the Court according to Nicaragua's first request. The second request has to be considered in light of the decision the Court may take on the first. But, whatever this decision may be, the second request would be inadmissible.

36. If the Court were to decide (contrary to Colombia's contentions) that it has jurisdiction to entertain Nicaragua's first request and that this request is admissible, the Court would adopt a judgment determining the maritime boundary. Once this is done, there would be no time frame

---

[172] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*; declaration of Judge Tomka, p. 899, para. 8; declaration of Judge Keith, p. 921, para. 1.

[173] Application, para. 12.

during which the rights and obligations of the Parties "pending the delimitation" would apply. The second request would be, consequently, without object and inadmissible.

37. If, consistently with Colombia's contentions, the Court decides that it has no jurisdiction over the first request or that such request is inadmissible, no delimitation issue will be pending before the Court and the second request will be all the more inadmissible.

38. Mr. President, Members of the Court, the points just made would be sufficient to dispose of Nicaragua's second request. I cannot, however, leave unanswered certain points made by Nicaragua in its Written Statement. Nicaragua holds that its second request is not devoid of object because "there will be a period pending the establishment of definitive outer limits for the continental shelf"[174].

39. In Nicaragua's view, were the Court to find that it has jurisdiction to effect the requested delimitation or that this request is admissible, a situation in which its second request would apply would materialize because "the exact geographical coordinates of a specific part of the boundary might be affected by a subsequent recommendation of the CLCS or by action in response to such a recommendation"[175]. This is a fictional eventuality. The Court is not requested by Nicaragua to determine a provisional, perhaps incomplete, delimitation. It is requested to draw — and I quote from the Application — the "precise course"[176] of the boundary — a definitive delimitation which, as it concerns States with opposite coasts, will also determine the outer limit of the Parties' continental shelves. In the presence of such outer limit, the CLCS would have no role to play. Furthermore, there is no indication that the objections to the CLCS action would be dropped.

40. If the Court were to find that it has no jurisdiction on Nicaragua's first request (or that the request is inadmissible) Nicaragua holds that there would be a lack of delimitation to which its second request would apply. The fact that the second request would apply only in this case, reveals the true nature of such request. It is a subordinate which can be resorted to only if the first request

[174]WSN, para. 5.38.

[175]*Ibid.*, para. 5.38.

[176]Application, p. 8, para. 12.

fails. It concerns a separate independent claim. Consequently, it is absurd to follow Nicaragua in considering the second request as "subsumed" [177] in the first.

41. If the second request is considered a claim different and separate from the one on delimitation, it becomes necessary to determine whether the Court has jurisdiction.

42. The question must be answered in the negative because most of the jurisdictional objections made by Colombia as regards the first request equally apply to the second request when considered as concerning an independent claim. This is obviously the case of the all-encompassing jurisdictional objection based on the effects of Colombia's denunciation of the Pact of Bogotá (first preliminary objection); as well as of the objection based on the lack of existence in international law of a "continuing jurisdiction" (second preliminary objection). It is also, relatedly and more importantly, the case of the third preliminary objection based on *res judicata*. As it has been shown eloquently by Professor Reisman, *res judicata* under the 2012 Judgment covers the lack of entitlement of Nicaragua to areas beyond 200 nautical miles from its coasts and the consequent absence of overlapping claims in that area. Nicaragua's request for the establishment of a legal régime to govern that area should therefore be dismissed *in limine litis*.

43. The second request would, furthermore, entail that the Court determine the rules applicable to an interim régime for an area of the sea-bed over which Nicaragua's entitlement has not been established. The claim would moreover require the Court to adopt a judgment which, unavoidably, would be provisional and impossible to reconcile with the principle of stability and finality of boundaries. It may be wondered whether this corresponds to the judicial function of the Court.

Conclusion

44. As the arguments raised against them are, for the reasons presented, unfounded, the preliminary objections raised by Colombia to the admissibility of Nicaragua's first and to Nicaragua's second request are maintained.

45. This concludes the present phase of Colombia's pleadings.

---

[177] WSN, para. 5.42.

46. I wish to thank you, Mr. President and Members of the Court, for your kind attention and patience.

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

L'audience est levée à 13 h 5.

_____