



EMBASSY OF NICARAGUA
THE HAGUE

Territorial and Maritime Dispute

Nicaragua v. Colombia

Application by Costa Rica for Permission to Intervene

**NICARAGUA'S OBSERVATIONS ON COSTA RICA'S ANSWER TO JUDGE
BENNOUNA'S QUESTION**

1. At the end of the hearing held on 15 October 2010, Judge Bennouna posed to Costa Rica the following question:

“Costa Rica has indicated to the Court that it has still not ratified the maritime delimitation treaty in the Caribbean Sea, which it signed with Colombia on 17 March 1977, “in consideration of Nicaragua’s continuous requests that Costa Rica not ratify the treaty until the dispute with Colombia has been resolved [and] acting out of good neighbourliness” (CR 2010/12, para. 8 (Brenes)).

Has Costa Rica postponed ratification of the Treaty of 17 March 1977 pending the Court’s judgment on the merits, in the case before it, between Nicaragua and Colombia?

In other words, is Costa Rica waiting for the Court’s judgment on the merits for clarification of certain notions mentioned in the same verbatim record (DR 2010/12, p. 35, para. 13 (Lathrop)), on this basis of which the 1977 Treaty was supposedly negotiated and signed?”¹

2. Costa Rica’s answer to Judge Bennouna’s question makes it absolutely clear that Costa Rica has no interest of a legal nature that may be affected by the Court’s decision in *Nicaragua v. Colombia*, and thus confirms what was already evident from the written and oral pleadings on the Application for Permission to Intervene, filed on 25 February 2010.

3. Costa Rica states in paragraph 5 of its answer that: “neither the ‘certain notions’ referenced in the question posed by the Court nor the 1977 agreement itself

¹ CR 2010/17, p. 27 (Judge Bennouna).



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constitute an interest of a legal nature that may be affected by the decision in this case, *per se*.” Nicaragua agrees with Costa Rica. Costa Rica’s 1977 Treaty with Colombia does not itself constitute an interest of a legal nature sufficient to satisfy the requirements of Article 62, because, as Costa Rica says, it would not “be affected by a decision in this case, *per se*.” Costa Rica could not credibly take any other position

4. Costa Rica clarifies that the *only* interest of a legal nature “presented in its Application and throughout its oral submissions is its ‘... interest in the exercise of its sovereign rights and jurisdiction *in the maritime area in the Caribbean Sea* to which it is entitled under international law by virtue of its coast facing on that sea.’”² That being the sole interest of a legal nature asserted by Costa Rica in support of its Application for Permission to Intervene under Article 62, the Application must fail.

5. As Nicaragua showed in its Written Observations and, especially, in its oral pleadings on 13 and 15 October, Costa Rica’s “interest” in the “maritime area in the Caribbean Sea to which it is entitled” will not and cannot be affected by the decision of the Court in this case³. Costa Rica has presented two different definitions of the “maritime area in the Caribbean Sea” in which it claims to have an interest of a legal nature. The first is the maritime area defined in the 1977 Treaty. Nicaragua showed that the decision in this case, and particularly the boundary between Nicaragua and Colombia to be drawn by the Court, will not affect Costa Rica’s area of legal interest under the 1977 Treaty⁴.

² Costa Rica’s Answer to the Honourable Judge Bennouna’s Question (22 Oct. 2010), para. 5. (Emphasis added).

³ Written Observations of the Republic of Nicaragua on the Application for permission to intervene filed by the Republic of Costa Rica, 26 May 2010, paras. 6, 11-33; CR 2010/13, p. 11, para. 7 (Argüello), p. 13, paras. 13-14 (Argüello), pp. 29-30, paras. 7-8 (Reichler), pp. 32-42, paras. 14-44 (Reichler); CR 2010/16, pp. 19-24, paras. 3-21 (Reichler).

⁴ CR 2010/13, pp. 36-37, paras. 27-29 (Reichler); CR 2010/16, p. 18, para. 31 (Argüello), p. 20, paras. 7-8 (Reichler), p. 21, para. 11 (Reichler), pp. 22-24, paras. 13-21 (Reichler). It is Nicaragua’s view, as explained in its oral pleadings, that Costa Rica’s maritime areas, in which it has an interest of a legal nature, are limited to those described in the 1977 Treaty, even though the Treaty itself never entered into force and may not be binding on the parties. As Nicaragua argued, Costa Rica’s renunciation of claims to



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6. Nicaragua has also shown that, even if Costa Rica could, *quod non*, claim the larger area of legal interest that it defined in its oral pleadings on 11 and 14 October, it would still fail to meet the requirements of Article 62, because, as Nicaragua showed, even the larger area claimed by Costa Rica will not be affected by the decision in this case⁵.

7. Since the only interest of a legal nature Costa Rica has identified in its written and oral pleadings is its interest in a maritime area in the Caribbean Sea, and Nicaragua has demonstrated that that interest -- whether defined geographically by the 1977 Treaty between Costa Rica and Colombia, or by Costa Rica's oral pleadings -- will not and cannot be affected by the Court's decision in this case, the Application must be denied.

8. Insofar as Costa Rica maintains the position it advanced in the oral pleadings -- that it "has postponed ratification of the 1977 agreement because the ongoing dispute between the Parties, requires decision by this Court"⁶ -- Nicaragua observes that Costa Rica acknowledges, in the very next sentence of its answer to Judge Bennouna's question, that it was not until 24 December 1999 that it first learned of "Nicaragua's intention to bring a case before this Court against Colombia," a case which was in fact brought two years later, on 6 December 2001⁷. This answer does not explain why Costa Rica did not ratify the agreement between 17 March 1977 and 24 December 1999, a period of more than 22 years. Plainly, it was for reasons having nothing to do with any intentions of Nicaragua -- of which Costa Rica was unaware -- in regard to the bringing of this case.

areas beyond the agreed 1977 limits survives the non-ratification or even failure of the Treaty to create binding obligations, and is effective not only in regard to Colombia but, as a renunciation of territory, also *erga omnes*. CR 2010/13, pp. 15-16, para. 22 (Argitello), pp. 27-28, paras. 32-35 (Reichler).

⁵ CR 2010/13, p. 11, para. 7 (Argitello), p. 13, paras. 13-14 (Argitello), pp. 29-30, paras. 7-8 (Reichler), pp. 32-36, paras. 14-26 (Reichler); CR 2010/16, pp. 20-24, paras. 9-21 (Reichler).

⁶ Costa Rica's Answer to the Honourable Judge Bennouna's Question (22 Oct. 2010), para. 2.

⁷ *Ibid.*



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9. The reasons Costa Rica desisted from ratifying the 1977 Treaty were explained during the oral pleadings and are not related to the present case. Since this is basically a subsidiary question, it is addressed separately in the Annex to this comment.

10. Whatever Costa Rica's ultimate intentions may be, for purposes of its Application for Permission to Intervene the only relevant question is whether its interest of a legal nature -- the maritime area in the Caribbean Sea that is defined either by the 1977 Treaty or Costa Rica's oral pleadings -- may be affected by the decision in this case. As Nicaragua has shown, it cannot be so affected, whichever of the two maritime areas properly defines Costa Rica's legal interest. The Application for permission to intervene must therefore be denied.

The Hague, 29 October 2010.

Carlos J. ARGÜELLO GÓMEZ

Agent of the Republic of Nicaragua

**ANNEX TO NICARAGUA’S COMMENTS ON THE RESPONSE OF THE COSTA RICAN
GOVERNMENT TO THE QUESTION PUT BY JUDGE BENNOUNA**

Territorial and Maritime Dispute (Nicaragua v. Colombia)

Application for permission to intervene filed by the Republic of Costa Rica

[Translation by the Registry]

1. At the end of the public hearing held on Friday 15 October 2010, Judge Bennouna addressed the following question to Costa Rica:

“Costa Rica has indicated to the Court that it has still not ratified the maritime delimitation treaty in the Caribbean Sea, which it signed with Colombia on 17 March 1977, ‘in consideration of Nicaragua’s continuous requests that Costa Rica not ratify the treaty until the dispute with Colombia has been resolved . . . [and] acting out of good neighbourliness’ (CR 2010/12, p. 22, para. 8 (Brenes)).

Has Costa Rica postponed ratification of the Treaty of 17 March 1977 pending the Court’s judgment on the merits, in the case before it, between Nicaragua and Colombia?

In other words, is Costa Rica waiting for the Court’s judgment on the merits for clarification of certain notions mentioned in the same verbatim record (CR 2010/12, p. 35, para. 13 (Lathrop)), on the basis of which the 1977 Treaty was supposedly negotiated and signed?”¹

2. The Costa Rican Government’s response to the question put by Judge Bennouna² underscores the ambiguity which characterized the application for permission to intervene and Costa Rica’s oral argument during the hearings in the incidental proceedings which took place between 11 and 15 October, not least because, in answer to a single question, Costa Rica responds in the affirmative to what it considers to be the “first formulation”³ and in the negative to what it considers to be the “second”⁴.

3. With regard to the “first formulation of the question”, Costa Rica affirms that it has postponed ratification of the 1977 Treaty “because the ongoing dispute between the Parties, Nicaragua and Colombia, requires decision by this Court”, and refers to a statement by its Minister for Foreign Affairs⁵. That statement must be put in its context, something which Costa Rica is careful to avoid doing.

4. When it was made, almost 24 years had passed since the signing of the Treaty, and the successive and repeated attempts by the Costa Rican Government to obtain the necessary authorization from the Legislative Assembly for its ratification had failed. Therefore, it is unreasonable to assert that the present case (or even the prospect of it) could have been the cause of the non-ratification of the Treaty.

¹CR 2010/17, p. 27 (Bennouna).

²Costa Rica’s written response to the question put by Judge Bennouna, 22 Oct. 2010.

³*Ibid.*, para. 2.

⁴*Ibid.*, para. 5.

⁵*Ibid.*, para. 2.

5. According to Minister for Foreign Affairs Gonzalo Facio, who signed the 1977 Treaty, the latter was simply meant to serve as an *incentive* (“acicate”) to conclude another treaty concerning the maritime boundaries between the two countries in the Pacific⁶, because it was there that Costa Rica’s “vital interests” lay⁷. The aim was for its “principal neighbour” in the region, Colombia, to recognize Costa Rica’s sovereignty over the island of *El Coco* and its full effect in terms of Costa Rica’s rights over an extensive maritime area of 500,000 square kilometres. The treaty concerning the Pacific, which was expressly described at the outset as *additional* to that of 1977⁸, was signed in 1984, thereby fulfilling the aims of the Costa Rican Government. The Legislative Assembly, however, still did not authorize the ratification of the 1977 Treaty.

6. When the Government of Costa Rica submitted a new draft law to the Legislative Assembly authorizing the ratification of both treaties, taken together, it met with repeated objections, leading to an unfavourable report by the Commission on Legal Affairs⁹ and, ultimately, the permanent shelving of the draft law in February 2000¹⁰, 16 years after the parliamentary procedure had begun.

7. The “formal burial” of the draft, as it was described by one parliamentary spokesman¹¹, forced the Governments of Costa Rica and Colombia to sever the link between the treaties of 1977 and 1984¹². This enabled the 1984 Treaty to enter into force on 20 February 2001¹³. The statement by Foreign Minister Rojas referred to by Costa Rica was made the following day¹⁴.

8. The fact remains that the Legislative Assembly referred the draft law authorizing ratification of the 1977 Treaty back to the Government in September 2001; since then, the Government has made no further attempt to resubmit it to the Legislative Assembly, as stated in the response to the question put by Judge Bennouna¹⁵.

9. The Government of Costa Rica has chosen not to explain why the Costa Rican Legislative Assembly rejected the successive attempts by the Government to secure ratification.

10. In any case, that refusal had nothing to do with the resolution of the dispute between Nicaragua and Colombia. When, on 5 April 1994 (9th session), the Commission on Legal Affairs of the Costa Rican Legislative Assembly issued an unfavourable report on the ratification of the 1977 Treaty, it recommended that Costa Rica “renegotiate the treaty, so as to achieve more

⁶Legislative Assembly, Commission on Legal Affairs, 24th session (27 Aug. 1985), file No. 9927, p. 197 (Ann. 3).

⁷These were the words of Mr. Manuel Freer Jiménez, who negotiated both treaties for Costa Rica, Legislative Assembly, Commission on Legal Affairs, 18th session (23 July 1985), file No. 9927, p. 123 (Ann. 2).

⁸In the foreword to the draft law authorizing ratification of the 1977 and 1984 Treaties, it is stated that the additional treaty of 1984 “constitutes the first international recognition of the marine and submarine spaces which Costa Rica claims on the basis of the island of *El Coco*” and that “[t]he said treaty guarantees at international level the uncontested exercise of our jurisdiction in an area of the Pacific Ocean of half a million square kilometres, recognized by our principal neighbour in that maritime area, Colombia”, file No. 9927, p. 3 (Ann. 1).

⁹Legislative Assembly, Commission on Legal Affairs, 99th session (5 April 1994), file No. 9927, pp. 418-419 (Ann. 5).

¹⁰Legislative Assembly, Order of 10 February 2000, file No. 9927 (Ann. 6).

¹¹File No. 9927, 156th session (16 Mar. 1993), p. 368 (Ann. 4).

¹²Diplomatic notes of 29 May 2000 (see Colombia’s Rejoinder, Ann. 3).

¹³The instruments of ratification were exchanged on 20 February 2001.

¹⁴Costa Rica’s written response to the question put by Judge Bennouna, 22 Oct. 2010, para. 2.

¹⁵*Ibid.*, paras. 2 and 3.

favourable conditions in the Caribbean, given the force of international precedent which Colombia attributes to our recognition of its sovereignty over the island of San Andrés”¹⁶.

11. By contrast with its response to the “first formulation” of Judge Bennouna’s question, in its response to the “second formulation” of the question, Costa Rica denies that it is “waiting for the Court’s judgment on the merits for clarification of certain notions . . . on the basis of which the 1977 Treaty was supposedly negotiated and signed”¹⁷.

12. Costa Rica reiterates that these “notions”, i.e., that the 82° W meridian established the maritime boundary between Nicaragua and Colombia and that the islands of the Archipelago of San Andrés, under Colombian sovereignty, were entitled to full effect on the maritime areas, were presented merely “to demonstrate that Costa Rica believed — at the time the 1977 agreement was concluded — that Colombia was the State with which delimitation was required in this part of the Caribbean”, but do not constitute, any more than the 1977 Treaty, “an interest of a legal nature that may be affected by the decision in this case, *per se*”. The Costa Rican Government insists on the fact that its interest of a legal nature which may be affected by the Court’s decision is the “interest in the exercise of its sovereign rights and jurisdiction in the maritime area in the Caribbean Sea to which it is entitled under international law by virtue of its coast facing on that sea”¹⁸.

13. Both in its Written Observations on the application for permission to intervene filed by Costa Rica and during the hearings, Nicaragua has shown not only that the “notions” on which Costa Rica claimed to base its argument were erroneous, but also that Costa Rica was well aware of that fact¹⁹.

14. The disagreement between Nicaragua and Colombia over the interpretation of the 82° W meridian clearly pre-dates the claim that the Bárcenas-Meneses-Esguerra Treaty of 1928 was invalid, and Costa Rica knew perfectly well that Nicaragua denied that the said meridian was the boundary of its maritime areas facing Colombia, a position which this Court agreed with in its Judgment of 13 December 2007²⁰.

15. Moreover, the presumption that the San Andrés Archipelago had full effect in the delimitation of the maritime areas did not reflect any position of principle, other than the aim being pursued by Costa Rica, namely, the according of the same effect by Colombia to the uninhabited island of *El Coco*, under Costa Rican sovereignty, in the Pacific.

¹⁶Legislative Assembly, Commission on Legal Affairs, 99th session (5 Apr. 1994), file No. 9927, p. 419 (Ann. 5).

¹⁷Costa Rica’s written response to the question put by Judge Bennouna, para. 5.

¹⁸Application for permission to intervene, para. 11; Costa Rica’s written response to the question put by Judge Bennouna, para. 5.

¹⁹Written Observations of the Republic of Nicaragua on the application for permission to intervene filed by the Republic of Costa Rica, 26 May 2010, paras. 21-22; CR 2010/13, pp. 13-14, paras. 15-16 (Argüello Gómez).

²⁰*Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 867, para. 115.



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CERTIFICATION

The undersigned Agent of the Republic of Nicaragua certifies, in accordance of Article 51 of the Rules of the Court, that the documents included in the Annex to the observations of the government of the Republic of Nicaragua on the response of the government of the Republic of Costa Rica to the question put by Judge Bennouna to Costa Rica at the end of the hearing held on Friday afternoon, 15 October 2010, in the case concerning Territorial and Maritime Dispute (Nicaragua v. Colombia), are accurate translations into French of the original language of the documents that have been invoked. These documents are the following:

LIST OF ANNEXES TRANSLATED INTO FRENCH

NUMBER	DOCUMENT
ANNEX 1	Treaty on Delimitation of Marine and Submarine Areas and Maritime Cooperation Between the Republic of Colombia and the Republic of Costa Rica, Considerations, Costa Rica's Legislative Assembly.
ANNEX 2	Minutes N° 18 of 23 July 1985, Costa Rica's Legislative Assembly, Permanent Commission on Legal Affairs.
ANNEX 3	Minutes N° 24 of 27 August 1985, Costa Rica's Legislative Assembly, Permanent Commission on Legal Affairs.
ANNEX 4	Minutes of the session N° 156, 16 March 1993. Costa Rica's Legislative Assembly.
ANNEX 5	Minutes N° 99 of 5 April 1994, Costa Rica's Legislative Assembly, Permanent Commission on Legal Affairs.
ANNEX 6	Ordinance of 10 February 2000, Costa Rica's Legislative Assembly.

This certification is made on 29 October 2010.


Carlos J. ARGÜELLO GÓMEZ
Agent of the Republic of
Nicaragua

ANNEX 1

Treaty on the Delimitation of Marine and Submarine Spaces and Maritime Cooperation between the Republic of Colombia and the Republic of Costa Rica, additional to that signed at San José on 17 March 1977

Foreword, p. 3 (extract)

Considerations regarding the Treaty

The delimitation of the maritime boundaries with the Republic of Colombia obtained through the signing of this additional treaty may be considered of great legal and political significance for our country, since it constitutes the first international recognition of the marine and submarine spaces which Costa Rica claims on the basis of the island of *El Coco*. The said treaty guarantees at international level the uncontested exercise of our jurisdiction in an area of the Pacific Ocean of half a million square kilometres, recognized by our principal neighbour in that maritime area, Colombia.

ANNEX 2

**Minutes of the 18th ordinary session of the Permanent Commission
on Legal Affairs held on 23 July 1985 at 1.45 p.m.**

Present: Herrera Araya, Chairman; Guevara Barahona, Secretary; Malavassi Vargas, Menéndez Chaves, Murillo Rodriguez, Valverde Rodriguez and Villanueva Badilla.

.....

p. 123 (extract)

Mr. FREER JIMÉNEZ:

It would appear that Colombia had reservations, because — in my opinion — it had no real wish to attribute such large areas to an island as small as that of *El Coco*. That is what prompted me to advise Mr. Fernando Volio to withdraw from the Assembly a treaty with Colombia regarding the Caribbean, in order to negotiate an additional treaty which includes the Pacific, where Costa Rica's vital interests lie.

ANNEX 3

**Minutes of the 24th ordinary session of the Permanent Commission
on Legal Affairs held on 27 August 1985 at 1.45 p.m.**

Present: Herrera Araya, Chairman; Guevara Barahona, Secretary; Malavassi Vargas,
Menéndez Chaves, Murillo Rodriguez, Valverde Rodriguez and Villanueva Badilla.

.....

p. 197 (extract)

Mr. GONZALO FACIO SEGREDA:

I admit, however, that it was always my intention for that to be no more than an *incentive* to conclude the treaty in the Pacific, which was the treaty of real interest to us, because it was the way to obtain recognition, from potential opponents, of the exclusive economic zone of the island of *El Coco*, which gives us 500,000 square kilometres.

ANNEX 4

Minutes of the 156th session of the Costa Rican Legislative Assembly, 16 March 1993 at 3.59 p.m.

p. 368 (extract)

Mr. CASTRO RETANA:

I am happy for this matter to be referred back to the Commission *sine die*, because it is a way of formally burying a draft which, in one way or another, would impair the sovereignty and territorial integrity of this country. In other words, it prejudices Articles 7 and 9 of our Political Constitution. So I am pleased that the Legislative Assembly has taken this significant and historic decision today, because this treaty on the delimitation of maritime areas, which was negotiated by the Executive with the Republic of Colombia, posed a serious threat to our territorial integrity and, as representatives of the Costa Rican people, it is clear that we could not accept the weakening of the territorial integrity of our country. Having said that, I am pleased that the draft is being referred back to the Commission *sine die*. To be quite clear, what we are doing today as members of the Assembly is giving a formal burial to a draft law which, as we all know, the friends of the Republic of Colombia, and in particular its Government, were very keen to see approved.

ANNEX 5

Minutes of the 99th ordinary session of the Permanent Commission on Legal Affairs held on Tuesday 5 April 1994 at 2.30 p.m.

p. 419 (extract)

The SECRETARY, *a.i.*:

The maritime boundary established in the Caribbean Sea under the treaty signed in 1977 does not warrant the approval of this Legislative Assembly, for the following reasons, amongst others: this treaty does not recognize Costa Rica's entitlement to 200 miles in the Caribbean Sea. This may be explained by the fact that it was negotiated at a time when the Law of the Sea Convention had not yet been signed, and therefore the concepts of baselines, the continental shelf and exclusive economic zones have also not been applied. In terms of procedure, it should be noted that the Executive previously withdrew the treaty from the Assembly, filing it under No. 8141. When it was submitted, it had been signed only by the Minister for Foreign Affairs and not by the President of the Republic. It would be more appropriate for Costa Rica to renegotiate the treaty, so as to achieve more favourable conditions in the Caribbean, given the force of international precedent which Colombia attributes to our recognition of its sovereignty over the island of San Andrés.

ANNEX 6

Order of 10 February 2000 by the Costa Rican Legislative Assembly

On this date, the Archives Service shall receive from the Secretariat the draft law ratifying the Treaty on Delimitation of Marine and Sub-marine Spaces and Maritime Cooperation between the Republic of Costa Rica and the Republic of Colombia, file No. 9927, in accordance with Article 119 of the Rules of the Legislative Assembly, more than four years having elapsed since it was first discussed in the Legislative Assembly. The file consists of two volumes comprising 430 pages.
