INTERNATIONAL COURT OF JUSTICE

ALLEGED VIOLATIONS OF SOVEREIGN RIGHTS AND MARITIME SPACES IN THE CARIBBEAN SEA

(NICARAGUA *v.* COLOMBIA)

PRELIMINARY OBJECTIONS OF THE REPUBLIC OF COLOMBIA

VOLUME I

19 DECEMBER 2014

TABLE OF CONTENTS

Chapter 1

INTRODUCTION

1.1. Colombia respectfully affirms that the International Court of Justice (the Court) cannot adjudicate on the matters brought by Nicaragua's *Application* of 26 November 2013. In accordance with Article 79 of the Rules of Court, this Pleading sets out Colombia's preliminary objections to the jurisdiction of the Court.

1.2. Nicaragua submitted its *Memorial* on 3 October 2014,[1] in accordance with the Court's Order of 3 February 2013. These preliminary objections are submitted within the time period laid down in Article 79, paragraph 1 of the Rules of Court.

1.3. The *Application* lodged by Nicaragua on 26 November 2013 concerns compliance with the Judgment of 19 November 2012 (hereinafter the "2012 Judgment"). This is clear from the submissions set forth in the *Application*,[2] which

---

[1] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)*, Memorial of Nicaragua, 3 Oct. 2014 ("Memorial of Nicaragua").

[2] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)*, Application of the Republic of Nicaragua instituting proceedings against the Republic of Colombia, 26 Nov. 2013 ("Application"), para. 22. This paragraph reads: "Nicaragua… requests the Court to adjudge and declare that Colombia is in breach of:

- its obligation not to use or threaten to use force under Article 2(4) of the UN Charter and international customary law;
- its obligation not to violate Nicaragua's maritime zones as delimited in paragraph 251 of the ICJ Judgment of 19 November 2012 as well as Nicaragua's sovereign rights and jurisdiction in these zones;

Nicaragua has sought, without success, to reformulate and distance itself from in the *Memorial*. The alternative basis for jurisdiction claimed by Nicaragua, an alleged inherent power in the Court to ensure compliance with its own judgments, confirms that Nicaragua's focus in instituting the present proceedings was on compliance with the Judgment.

1.4. In its *Memorial*, Nicaragua's submissions read:

> "1. For the reasons given in the present Memorial, the Republic of Nicaragua requests the Court to adjudge and declare that, by its conduct, the Republic of Colombia has breached:
>
> a. its obligation not to violate Nicaragua's maritime zones as delimited in paragraph 251 of the Court Judgment of 19 November 2012 as well as Nicaragua's sovereign rights and jurisdiction in these zones;
>
> b. its obligation not to use or threaten to use force under Article 2(4) of the UN Charter and international customary law;
>
> c. and that, consequently, Colombia has the obligation to wipe out the legal and material consequences of its internationally wrongful acts, and make full reparation for the harm caused by those acts.

- its obligation not to violate Nicaragua's rights under customary international law as reflected in Parts V and VI of UNCLOS;
- and that, consequently, Colombia is bound to comply with the Judgment of 19 November 2012, wipe out the legal and material consequences of its internationally wrongful acts, and make full reparation for the harm caused by those acts."

2. Nicaragua also requests the Court to adjudge and declare that Colombia must:

> a. Cease all its continuing internationally wrongful acts that affect or are likely to affect the rights of Nicaragua.
>
> b. In as much as possible, restore the situation to the *status quo ante*, in
>
> (i) revoking laws and regulations enacted by Colombia, which are incompatible with the Court's Judgment of 19 November 2012 including the provisions in the Decrees 1946 of 9 September 2013 and 1119 of 17 June 2014 to maritime areas which have been recognized as being under the jurisdiction or sovereign rights of Nicaragua;
>
> (ii) revoking permits granted to fishing vessels operating in Nicaraguan waters; and
>
> (iii) ensuring that the decision of the Constitutional Court of Colombia of 2 May 2014 or of any other National Authority will not bar compliance with the 19 November 2012 Judgment of the Court.
>
> c. Compensate for all damages caused insofar as they are not made good by restitution, including loss of profits resulting from the loss of investment caused by the threatening statements of Colombia's highest authorities, including the threat or use of force by the Colombian Navy against Nicaraguan fishing boats [or ships exploring and exploiting the soil and subsoil of Nicaragua's continental shelf] and third state fishing boats licensed by Nicaragua as well as from the exploitation of Nicaraguan waters by fishing vessels unlawfully 'authorized' by Colombia, with the

> amount of the compensation to be determined in a subsequent phase of the case.
>
> d. Give appropriate guarantees of non-repetition of its internationally wrongful acts."[3]

1.5. It will be seen that by rephrasing its submissions in the *Memorial* Nicaragua seeks, unsuccessfully, to distance the submissions from the issue of compliance. Thus, in the *Memorial*, paragraph 1 of the submissions no longer includes a *tiret* reading "its obligation not to violate Nicaragua's rights under customary international law as reflected in Parts V and VI of UNCLOS", or the words "comply with the Judgment of 19 November 2012". Paragraph 2 is entirely new. It is not appropriate, in the present pleading, to enter into the merits. It is, however, obvious that each of the obligations raised by Nicaragua in the submissions flows from the Judgment (see Chapter 6 below).

***

1.6. This is not the place to respond to the many unfounded allegations scattered throughout the *Application* and *Memorial*, as this would take us into the merits. But three allegations must be addressed at the outset. They are examined further in the following chapters.

1.7. *First*, Nicaragua's repeated assertion that Colombia has taken a decision not to comply with the Judgment is false. On

[3] Square brackets in the original.

the contrary, Colombia accepts that the Judgment is binding upon it in international law. The Colombian Constitutional Court took the same position in its decision of 2 May 2014.[4] The question that has arisen in Colombia is how to implement the 2012 Judgment domestically, having regard to the relevant constitutional provisions and the nature of Colombia's legal system with respect to boundaries.

1.8. *Second*, Nicaragua has not and could not provide the slightest evidence of any unlawful threat of force contrary to Article 2, paragraph 4 of the Charter of the United Nations. To the contrary, Colombia has given instructions to its armed forces to avoid any risk of confrontation and the situation has remained calm. Nicaragua's attempt to demonstrate otherwise, in the context of the present proceedings, stands in sharp contrast with the constructive attitude of those officials from both countries who work in the area in question, and indeed with the statements of Nicaragua's own Head of State.

1.9. *Third*, Nicaragua had not raised any complaints with Colombia, either in writing or orally, prior to filing the *Application* with the Court on 26 November 2013 concerning any of the matters now submitted to the Court: that is, the alleged violation of Nicaragua's maritime zones as delimited by the Court and sovereign rights and jurisdiction in these zones;

[4] Annex 4: Judgment C-269/14, *Actio Popularis* of Unconstitutionality against Articles II (Partially), V (Partially), XXXI and L of the Law No. 37 of 1961, Whereby the American Treaty on Pacific Settlement (Pact of Bogotá) is Approved, 2 May 2014.

the alleged threat or use of force; and, the allegation that Colombia had engaged in internationally wrongful acts and had to make full reparation for those alleged acts. Nor had any representation been made regarding Decree 1946 of 2013, including the alleged granting of fishing permits; nor had the issue of compensation for alleged damages or any corresponding request of non-repetition of acts been raised. Colombia had been given no indication, before the *Application*, that Nicaragua considered that there was a legal dispute between the Parties on these matters. Indeed, it was only some nine months *after* the *Application* had been filed that Nicaragua, for the first time, protested to Colombia about alleged prejudicial treatment directed at Nicaraguan vessels, in a Note Verbale dated 13 September 2014.[5] Coming as it did just three weeks before Nicaragua was scheduled to file its *Memorial*, the Note is a transparent effort to manufacture a case where none exists.

1.10. As Colombia pointed out in its response to the Note,[6] the vast majority (some 85%) of the so-called "incidents" to which Nicaragua refers in the Note are said to have occurred, based on Nicaragua's own account, well *after* the institution of proceedings and more than six months *before* the Note was sent. Not only do the alleged events relate to a period when Nicaragua's senior military officials were on record as saying

[5] Annex 17: Note Verbale No. MRE/VM-DGAJST/457/09/14 from the Ministry of Foreign Affairs of Nicaragua to the Ministry of Foreign Affairs of Colombia, 13 Sept. 2014.

[6] Annex 18: Note Verbale No. S-GAMA-14-071982 from the Ministry of Foreign Affairs of Colombia to the Ministry of Foreign Affairs of Nicaragua, 1 Oct. 2014.

that there were no problems with the Colombian Navy, but the lateness in reporting the events strongly suggests that none of them was understood by Nicaragua to be an "incident" at the time. To the contrary, as confirmed by officials of both Parties, the situation at sea remains calm; and good communication and cooperation between the naval forces of both Parties attest to the absence of any significant problems. Nicaragua's claims to the contrary for the purposes of the present proceedings are simply groundless.

1.11. The *Application* relies on two bases of jurisdiction: Article XXXI of the Pact of Bogotá;[7] and "the jurisdiction of the Court [lying] in its inherent power to pronounce on the actions required by its Judgments".[8]

1.12. Colombia submits that neither basis invoked by Nicaragua affords the Court jurisdiction in the present case, for the reasons given in these preliminary objections.

1.13. Chapter 2 describes, so far as is relevant for the present preliminary objections, the Judgment of 19 November 2012 in the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)* case and its aftermath.

1.14. Chapter 3 presents Colombia's first preliminary objection. It demonstrates that the Court lacks jurisdiction under the Pact of Bogotá because Colombia submitted its letter of denunciation

[7] Application, paras. 16-17.
[8] *Ibid.*, para. 18.

of the Pact of Bogotá on 27 November 2012 and, in accordance with Pact Article LVI, the denunciation had immediate effect with respect to any new application brought against Colombia. It also responds to Nicaragua's remarks on this question in its *Memorial*.

1.15. Chapter 4 presents Colombia's second and third preliminary objections. It shows that there is no dispute between Nicaragua and Colombia, and that the Court lacks jurisdiction because the precondition of Article II of the Pact of Bogotá was not met. Nicaragua has not established that on the date of the *Application* (26 November 2013) there was a dispute between the Parties. Nor has it shown that the Parties were of the opinion, on the date of the *Application*, that the alleged controversy "[could not] be settled by direct negotiations though the usual diplomatic channels…".[9]

1.16. Chapter 5 shows that there is no basis in the law and practice of the Court for Nicaragua's alternative assertion that "the jurisdiction of the Court lies in its inherent power to pronounce on the actions required by its Judgments."[10]

1.17. Chapter 6 explains that the Court lacks jurisdiction over "disputes arising from non-compliance with its Judgments." The assertion of an inherent jurisdiction to ensure and monitor compliance with the Judgment of the Court of 19 November 2012 has no basis in the law and practice of the Court.

---

[9] Pact of Bogotá, Article II.

[10] Application, para. 18.

1.18. Chapter 7 summarizes Colombia's preliminary objections, and is followed by Colombia's Submission.

Chapter 2

THE JUDGMENT OF 19 NOVEMBER 2012 AND ITS AFTERMATH

A. Introduction

2.1. In accordance with Article 79, paragraphs 4 and 7 of the Rules of Court, this Chapter sets out the factual and legal background that is relevant to the preliminary objections. While Colombia will not respond in this pleading to each allegation contained in Nicaragua's *Application* and *Memorial*, it is essential for the case to be set in its proper context. When Colombia's actions, including the conduct of its officials and the statements of its President, are taken as a whole, it is apparent that they neither constitute nor imply non-compliance with the Court's 2012 Judgment, as Nicaragua alleges. Rather, the facts demonstrate Colombia's respect for international law, coupled with its need to take into account domestic law in implementing the Judgment. It is, moreover, noteworthy that Nicaragua itself never accused Colombia of failing to comply with the Judgment prior to lodging its *Application* on 26 November 2013.

2.2. This Chapter is structured as follows. In Section B, Colombia will recall a number of findings in the Court's Judgment of 19 November 2012 that have a bearing on its jurisdictional objections. Section C then turns to the post-Judgment facts relating to (1) Colombia's denunciation of the Pact of Bogotá; (2) Nicaragua's distorted account of Colombia's position regarding the Judgment when viewed in the light of the

internal law requirements of Colombia, including a decision of its Constitutional Court, and Nicaragua's own conduct; and (3) Presidential Decree 1946 dealing with the contiguous zones generated by the Colombian islands which comprise the Archipelago of San Andrés, Providencia and Santa Catalina. As will be seen, none of Colombia's actions constitute or imply non-compliance with the Court's Judgment.

B. The Judgment of 19 November 2012

2.3. On 6 December 2001, Nicaragua instituted proceedings against Colombia in respect of a dispute relating to title to territory and maritime delimitation in the Caribbean Sea.

2.4. In its *Application*, Nicaragua requested the Court, *inter alia,*

> "to determine the course of the single maritime boundary between the areas of continental shelf and exclusive economic zone appertaining respectively to Nicaragua and Colombia, in accordance with equitable principles and relevant circumstances recognized by general international law as applicable to such a delimitation of a single maritime boundary."[11]

While Nicaragua's formal submissions changed during the course of the proceedings, throughout both the written and oral phases Nicaragua requested the Court to make a full delimitation

[11] Application, para. 8.

of all of its overlapping maritime entitlements with those of Colombia.

2.5. For its part, Colombia, at all stages of the proceedings on the merits, rejected Nicaragua's contention on what was the appropriate form of delimitation. Colombia argued that the delimitation was to be effected between Nicaragua's mainland coast and the entitlements generated by Colombia's islands in the Caribbean,[12] and requested the Court to draw a single maritime boundary delimiting the exclusive economic zone and the continental shelf between both States.[13]

2.6. Both Parties also addressed the question of sovereignty over the islands that remained in dispute following the Court's Judgment of 13 December 2007 on the preliminary objections that Colombia had raised in the case.

2.7. On 19 November 2012, the Court delivered its Judgment.

2.8. With respect to the islands, the Court noted that it is well established in international law "that islands, however small, are capable of appropriation", and that "low-tide elevations within the territorial sea may be taken into account for the purpose of

---

[12] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Counter-Memorial of Colombia (Vol. I)*, para. 8.11; *Ibid.*, *Rejoinder of Colombia (Vol. I)*, para. 5.45; *Ibid., Public Sitting 4 May 2012, CR2012/17*, p. 38, Conclusion *(5)* (Agent of Colombia).

[13] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Counter-Memorial of Colombia (Vol. I)*, p. 425, Submission *(b); Ibid.*, *Rejoinder of Colombia (Vol. I)*, p. 337, Submission *(b); Ibid., Public Sitting 4 May 2012, CR2012/17*, p. 39, Final Submission *(c)* (Agent of Colombia).

measuring the breadth of the territorial sea."[14] The Court also observed that both Parties agreed that the Alburquerque Cays, East-Southeast Cays, Roncador, Serrana, Serranilla and Bajo Nuevo were islands capable of appropriation,[15] and it found, based on the evidence, that a feature referred to as QS 32 situated on Quitasueño also qualified as an island.[16]

2.9. On the question of sovereignty, the Court held that the Republic of Colombia has sovereignty over the islands at Alburquerque, Bajo Nuevo, East-Southeast Cays, Quitasueño, Roncador, Serrana and Serranilla[17] (Colombia's sovereignty over the islands of San Andrés, Providencia and Santa Catalina having been settled by the 1928 Treaty between the Parties).[18]

2.10. With respect to the question of maritime delimitation, the Court was called upon to effect a definitive and final delimitation between the maritime entitlements of Colombia and the continental shelf and exclusive economic zone of Nicaragua.[19] This was based on the overlap between Nicaragua's entitlement to a continental shelf and exclusive economic zone from its mainland coast and adjacent islands and Colombia's

---

[14] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012,* p. 624 at p. 641, para. 26.
[15] *Ibid.,* p. 642, para. 27.
[16] *Ibid.,* p. 645, paras. 37-38.
[17] *Ibid.,* p. 718, para. 251 (1).
[18] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007,* p. 832 at p. 861, para. 88.
[19] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012,* p. 624 at p. 671, para. 136.

entitlement to a continental shelf and exclusive economic zone.[20]

2.11. In terms of the maritime entitlements of Colombia's islands, the Court rejected Nicaragua's submission that an equitable solution could be achieved by drawing a 12-nautical mile enclave around the islands of San Andrés, Providencia and Santa Catalina and a 3-nautical mile enclave around each of the other Colombian islands. With respect to San Andrés, Providencia and Santa Catalina, the Court noted that the Parties agreed that each of these islands is entitled to a territorial sea, exclusive economic zone and continental shelf.[21] It also concluded that Roncador, Serrana, the Alburquerque Cays and East-Southeast Cays, as well as the island QS 32 on Quitasueño, were each entitled to a territorial sea of 12 nautical miles.[22] The territorial sea of Serrana follows a 12-nautical mile envelope of arcs measured from Serrana Cay and the other cays in its vicinity,[23] and the territorial sea of Quitasueño is measured from QS 32 and from the low-tide elevations located within 12 nautical miles from QS 32.[24] The Court did not deem it

---

[20] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012,* p. 670, para. 132.

[21] *Ibid.,* p. 686, para. 168.

[22] *Ibid.,* p. 692, paras. 180 and 182. Article 121(3) states that "[r]ocks which cannot sustain habitation or economic life of their own shall have no exclusive economic zone or continental shelf".

[23] *Ibid.,* p. 715, para. 238.

[24] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012,* p. 624 at pp. 692-693, paras. 182-183 and p. 713, para. 238.

necessary to determine the precise status of Roncador, Serrana, the Alburquerque Cays and East-Southeast Cays.[25]

2.12. As for Serranilla and Bajo Nuevo, the Court indicated that it was not called upon to determine the scope of their maritime entitlements.

2.13. The Court also indicated that any adjustment or shifting of the provisional median line "must not have the effect of cutting off Colombia from the entitlements generated by its islands in the area to the east of those islands"[26] where those islands generate an entitlement to a continental shelf and exclusive economic zone. And it went on to observe:

> "In addition, the Nicaraguan proposal would produce a disorderly pattern of several distinct Colombian enclaves within a maritime space which otherwise pertained to Nicaragua with unfortunate consequences for the orderly management of maritime resources, policing and the public order of the oceans in general, all of which would be better served by a simpler and more coherent division of the relevant area."[27]

2.14. In paragraph (4) of the operative part of its Judgment, the Court set out the line of the single maritime boundary delimiting

---

[25] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012,,* pp. 691-692, para. 180.
[26] *Ibid.,* p. 704, para. 216.
[27] *Ibid.,* p. 708, para. 230.

the continental shelves and the exclusive economic zones of the Parties.[28]

2.15. The Court thus ruled that (i) the islands in dispute were capable of appropriation and that sovereignty over them lay with Colombia; (ii) each of the islands is entitled to a minimum of a 12-nautical mile territorial sea, and that low-tide elevations situated within 12 nautical miles of an island may be taken into account for the purpose of measuring the territorial sea; (iii) while the islands of San Andrés, Providencia and Santa Catalina generate entitlements to a 200-nautical mile exclusive economic zone and a continental shelf, it was not necessary to make a similar finding with regard to the other islands under Colombia's sovereignty in the area; and, (iv) the boundary delimited by the Court was a single maritime boundary delimiting the continental shelf and exclusive economic zones of the Parties.

2.16. While the Court recognized that Colombia's islands generate maritime entitlements under international law, it did not address the subject matter of the contiguous zone, even though both Colombia and Nicaragua had mentioned it in their pleadings.

[28] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012,* p. 624 at pp. 718-720, para. 251 (4).

C. Post-Judgment Facts Relevant to the Preliminary Objections

(1) COLOMBIA'S DENUNCIATION OF THE PACT OF BOGOTÁ

2.17. Colombia denounced the Pact of Bogotá on 27 November 2012. On that date, the Minister of Foreign Affairs of Colombia transmitted to the depositary, the General Secretariat of the Organization of American States (hereafter "OAS") a notification of denunciation pursuant to Article LVI of the Pact.[29]

2.18. Article LVI of the Pact of Bogotá, which governs withdrawal from the treaty, provides that:

> "The present Treaty shall remain in force indefinitely, but may be denounced upon one year's notice, at the end of which period it shall cease to be in force with respect to the state denouncing it, but shall continue in force for the remaining signatories. *The denunciation shall be addressed to the Pan American Union, which shall transmit it to the other Contracting Parties.*
>
> *The denunciation shall have no effect with respect to pending procedures initiated prior to the transmission of the particular notification.*"[30] (Emphasis added)

---

[29] Annex 15: Diplomatic Note GACIJ No. 79357 from the Minister of Foreign Affairs of Colombia to the Secretary-General of the Organization of American States, 27 Nov. 2012.

[30] Annex 33: Text of the Pact of Bogotá, in the Four Authentic Languages (Spanish, English, Portuguese, and French).

2.19. The full terms of the Note of 27 November 2012, wherein the Minister stated that Colombia's denunciation of the Pact took effect "as of today" (27 November 2012) with regard to the procedures that were initiated *after* its notice – in conformity with Article LVI – are as follows:

> "I have the honour to address Your Excellency, in accordance with article LVI of the American Treaty on Pacific Settlement, on the occasion of notifying the General Secretariat of the Organization of American States, as successor of the Pan American Union, that the Republic of Colombia denounces as of today from the 'American Treaty on Pacific Settlement', signed on 30 April 1948, the instrument of ratification of which was deposited by Colombia on 6 November 1968.
>
> *The denunciation from the American Treaty on Pacific Settlement is in force as of today with regard to procedures that are initiated after the present notice*, in conformity with Article LVI, second paragraph, providing that '[t]he denunciation shall have no effect with respect to pending procedures initiated prior to the transmission of the particular notification'."[31] (Emphasis added)

---

[31] Annex 15. The original text in Spanish reads as follows:

> *"Tengo el honor de dirigirme a Su Excelencia, de conformidad con el artículo LVI del Tratado Americano de Soluciones Pacíficas, con ocasión de dar aviso a la Secretaria General de la Organización de Estados Americanos, a su digno cargo, como sucesora de la Unión Panamericana, que la República de Colombia denuncia a partir de la fecha el "Tratado Americano de Soluciones Pacíficas", suscrito el 30 de abril de 1948 y cuyo instrumento de ratificación fue depositado por Colombia el 6 de noviembre de 1968.*

2.20. On 28 November 2012, the Department of International Law of the Secretariat for Legal Affairs of the OAS informed States Parties to the Pact and the Permanent Missions of the Member States that on 27 November 2012 it had received Note GACIJ No. 79357 by which the Republic of Colombia withdrew from the American Treaty on Pacific Settlement "Pact of Bogotá", signed in Bogotá, 30 April 1948. The OAS note reads as follows:

> "The Department of International Law of the Secretariat for Legal Affairs of the Organization of American States (OAS) presents its compliments to the High Contracting Parties to the American Treaty on Pacific Settlement (Pact of Bogotá) and to the other permanent missions to the OAS and has the honor to advise them that, on November 27, 2012, it received from the Republic of Colombia Note GACIJ No. 79357, attached hereto, through which it denounces said Treaty adopted on April 30, 1948 at the Ninth International Conference of American States."[32]

> La denuncia del Tratado Americano de Soluciones Pacíficas rige a partir del día de hoy respecto de los procedimientos que se inicien después del presente aviso, *de conformidad con el párrafo segundo del artículo LVI el cual señala que 'La denuncia no tendrá efecto alguno sobre los procedimientos pendientes iniciados antes de transmitido el aviso respectivo'."* (Emphasis added).

[32] Annex 16: Note No. OEA/2.2/109/12 from the Secretariat for Legal Affairs of the Department of International Law of the Organization of American States to the High Contracting Parties to the American Treaty on Pacific Settlement (Pact of Bogotá) and to the other Permanent Missions to the Organization of American States, 28 Nov. 2012. The original text in Spanish reads as follows:

> *"El Departamento de Derecho Internacional de la Secretaría de Asuntos Jurídicos de la Organización de los Estados Americanos (OEA) tiene el honor de saludar a las Altas Partes Contratantes del Tratado Americano de Soluciones Pacíficas (Pacto de Bogotá) y a*

2.21. It is noteworthy that after receipt of the relevant depositary notification issued by the OAS on 28 November 2012, and circulated among all States Parties to the Pact of Bogotá with Colombia's Note attached, no State – including Nicaragua – advanced any objection, either upon receipt of the notification or within the framework of the OAS, to the terms or mode of Colombia's withdrawal from the Pact of Bogotá.

(2) COLOMBIA'S ACTIONS NEITHER CONSTITUTE NOR IMPLY AN INTENTION NOT TO COMPLY WITH THE JUDGMENT

2.22. In its *Application* and *Memorial*, Nicaragua seeks to portray Colombia as not intending to comply with the Judgment. It does so by distorting Colombia's position concerning the Judgment.

2.23. In furtherance of this stratagem, under the heading "Decision Requested" in its *Application*, Nicaragua "requests the Court to adjudge and declare that… Colombia is bound to comply with the Judgment of 19 November 2012…".[33] And, under the heading "The Legal Ground for Nicaragua's Request", Nicaragua asserted that "[b]y itself, the decision made by Colombia not to comply with [the Judgment] is a breach of that State's obligations

---

las demás Misiones Permanentes ante la OEA con el objeto de poner en su conocimiento que con fecha 27 de noviembre de 2012 recibió por parte de la República de Colombia la Nota GACIJ No. 79357, adjunta a la presente, mediante la cual denuncia dicho Tratado adoptado el 30 de abril de 1948 durante la Novena Conferencia Internacional Americana."

[33] Application, para. 22.

under international law, which entails its responsibility."[34] While the Submissions set out in Nicaragua's *Memorial* no longer request the Court to rule that Colombia is bound to comply with the Judgment,[35] it is apparent that this is the *leitmotif* underlying Nicaragua's claims.

2.24. In fact, Colombia has never taken any decision not to comply with the Judgment despite the disappointment of certain constituencies in Colombia with parts of it. On the contrary, both its highest officials and its highest court (the Constitutional Court) have made it clear that the Judgment is binding under international law. However, in order to give effect to the Judgment in its domestic legal order (to make it "applicable"), it is necessary for Colombia to comply with the requirements of domestic law, in particular with Article 101, paragraph 2, of its Constitution. Contrary to what Nicaragua would have the Court believe, there is nothing exceptional in the distinction between the position under international law and domestic law, particularly in States following a dualist approach. Nor is it unusual that time is needed to give effect to an international obligation, whether under a treaty or a judgment.

2.25. Nicaragua quotes Colombian officials out of context and selectively to paint a misleading picture. By way of example, in paragraph 4 of its *Application* and again at paragraph 2.3 of its *Memorial*, Nicaragua quotes selectively from President Santos'

---

[34] Application, para. 19.
[35] Memorial of Nicaragua, pp. 107-108.

televised address of 19 November 2012, the day of the Court's Judgment. Nicaragua intimates that the President attacked the 2012 Judgment and even the Court itself. Nothing could be further from the truth. What Nicaragua failed to point out is that a significant portion of the President's address highlighted positive elements of the Court's decision with respect to Colombia and Colombia's respect for international law.

2.26. Nicaragua further highlights the following passage from the President's address: "Taking into account the above, Colombia – represented by its Head of State – emphatically rejects that aspect of the Judgment rendered by the Court today."[36] Significantly, Nicaragua fails to quote the following sentence of the speech which reads: "It is because of this, that *we will not discard any recourse or mechanism afforded to us by international law to defend our rights*." The President then closed his address with the following remark: "Compatriots: You can be sure that *we will act respecting the legal norms – as has been the tradition of our country* – but also defending with firmness and determination the rights of all Colombians."[37] Colombia's respect for international law is evident from those statements.

2.27. Nicaragua also attempts to cast aspersions on Colombia's conduct following the Judgment by citing excerpts from another Presidential address, dated 28 November 2012, which referred

[36] Application, para. 4 and Memorial of Nicaragua, para. 4.18.

[37] Annex 6: Declaration of the President of the Republic of Colombia, 19 Nov. 2012. (Emphasis added)

to Colombia's denunciation of the Pact of Bogotá the previous day.[38] What Nicaragua fails to acknowledge, however, is that Colombia's actions were carried out in strict conformity with the provisions of the Pact, as discussed in Section C (1) above, and with international law. Moreover, Nicaragua again fails to cite a passage from the President's address which shows Colombia's intention to act in accordance with international law. Indeed, as Colombia's President underscored with respect to the denunciation: "This denunciation... *does not prevent Colombia from* resorting *to the mechanisms and recourses available to us under international law* in order to defend our interests and protect the rights of the Colombians."[39]

2.28. Nicaragua's pleadings focus on the part of this second Presidential address where President Santos said: "Land borders and maritime boundaries between States should not be left to a Court, but rather must be fixed by States through treaties or mutual agreement."[40] Once more, Nicaragua fails to place the citation in context. President Santos was simply referring to the fact that it is common for States to delimit their boundaries by agreement and that States have often excluded the possibility for the International Court of Justice to deal with these matters – as is the case with Norway, Canada, Australia and New Zealand. In the view of the President: "These are States respectful of international law, as Colombia is and has been". As the

[38] Application, paras. 6-7 and Memorial of Nicaragua, para. 2.6.
[39] Annex 8: Declaration of the President of the Republic of Colombia, 28 Nov. 2012. (Emphasis added)
[40] Application, p. 5, para. 7 and Memorial of Nicaragua, para. 2.6.

Colombian President went on to note: "With this denunciation, Colombia *does not pretend to separate itself from the pacific settlement of disputes. To the contrary, Colombia reiterates its commitment always to resort to peaceful procedures.*"[41]

2.29. In addition, as will be seen in Chapter 4, Nicaragua never voiced any complaint that Colombia was not complying with the Judgment before it filed its *Application*. To the contrary, public statements by Nicaragua's highest military officials with respect to the maritime situation reported no problems with the Colombian Navy, and the President of Nicaragua was on record as saying that he favoured entering into an agreement with Colombia to implement the Judgment.[42]

2.30. For its part, Colombia remains committed to international law and accepts the 2012 Judgment. Colombia has internal law requirements that need to be respected in relation to the Judgment – a situation that is common in State practice.

2.31. Under international law, judgments of the Court establish rights and obligations for the parties, but it is for State parties to decide how they implement decisions of the Court at the domestic level. As Kolb observes:

> "The question of the execution of judgments within a State is governed by that State's internal organs.

---

41 Annex 8. (Emphasis added)

42 See Chapter 4, Section E below.

> Internal legal systems vary as regards the discharge of international obligations."[43]

This is the particular case of States such as Colombia, which apply in some respects a dualist system.

2.32. This principle runs like a thread through a number of judgments of the Court. For example, in *Avena and Other Mexican Nationals*, the Court acknowledged the discretion of the United States in determining how it would carry out its obligations flowing from the Judgment. In the operative part of that Judgment, the Court held that

> "the United States of America [was] to provide, *by means of its own choosing*, review and reconsideration of the convictions and sentences of the Mexican nationals...".[44] (Emphasis added)

2.33. Similarly, in *Arrest Warrant of 11 April 2000*, while the Court found that Belgium was obliged to cancel the arrest warrant, it could do so "by means of its own choosing."[45]

2.34. Many national legal systems do not accord direct domestic effect to the judgments of international courts or tribunals. Indeed, implementation of decisions of international courts, including judgments of the International Court of Justice, often depends on enacting specific legislation (including

---

[43] R. Kolb, *The International Court of Justice* (2013), pp. 838-839.

[44] *Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004,* p. 12 at p. 73, para. 153 (11).

[45] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002,* p. 3 at p. 33, para. 78 (3).

constitutional amendments and ratification of international agreements), or on the judicial application of pre-existing domestic law in conformity with the decisions of international courts.[46] Thus, in the United Kingdom, the dualist system precludes direct domestic application of decisions of international courts without a legislative or other domestic act of incorporation or transposition.[47]

2.35. In particular, the implementation of judicial decisions relating to land and maritime delimitation can raise complex issues in domestic systems given that administrative arrangements engaging and impacting diverse public interests may have to be adjusted. Boundaries may be covered by existing legislation, treaties previously concluded with third States, or international agreements that had been ratified according to internal procedures or otherwise incorporated by legislation into domestic law. Many of these matters may require time-consuming legal adjustments, all the more so in States whose legal systems are characterized by the Rule of Law.

---

[46] See, for example: C. Schulte, *Compliance with Decisions of the International Court of Justice* (2004), pp. 270-271, in connection with the *Arrest Warrant of 11 April 2000* case, and *Medellin* v. *Texas*, 552 U.S. 491 (2008) in which the United States Supreme Court held that while the ICJ's decision in *Avena and Other Mexican Nationals* created an international legal obligation on the part of the United States, it was not automatically binding domestic law.

[47] P. Sales and J. Clement, "International Law in Domestic Courts: The Developing Framework", in 2008 *Law Quarterly Review* 124, p. 402 *et seq*. And see, for United States practice, the decision of the Supreme Court in *Sanchez-Llamas*, where the court held that "nothing in the ICJ's structure or purpose suggests that its interpretations were intended to be binding on U.S. courts". *Sanchez-Llamas* v. *Oregon,* 548 U.S. at 354 (2006).

2.36. For example, after the Court rendered its Judgment in *Land and Maritime Boundary between Cameroon and Nigeria*, Nigeria emphasized the need to amend its Constitution with respect to the Bakassi Peninsula because it was comprised within the definition of Nigerian territory in that instrument. It took the parties to that case six years to arrange the transfer of the territory to Cameroon and another five years during which a transitional period applied. Significantly, at the end of the transition period, the members of the Security Council

> "praise[d] the Governments of Cameroon and Nigeria for their commitment in honouring their obligations to comply with the decisions of the International Court of Justice and for the responsible and peaceful way in which they have resolved their differences on this matter".[48]

The response of the Security Council shows the latitude that States are afforded in terms of the time needed to implement judgments that implicate sensitive constitutional and political issues.

2.37. This practice confirms the understanding that a State is not always able nor expected to give immediate effect to judgments of the Court in its domestic law; nor is it required or expected to treat them as automatically self-executing internally. Thus, the obligation to comply with a judgment may allow implementation within a reasonable period of time, taking into

[48] United Nations Security Council, Press Release SC/11094-AFR/2680, 15 Aug. 2013.

account the need to amend legislation or comport with other legal rules that are constitutionally mandated. This was recognized in the Judgment of the Permanent Court of International Justice (hereafter the "PCIJ") in *Free Zones of Upper Savoy and the District of Gex*, to which Nicaragua referred in its *Memorial*.[49] In that case, the PCIJ accepted that:

> "The organization of the customs line in rear of the political frontier is a matter which necessarily must take time."[50]

Accordingly, the PCIJ

> "consider[ed] it appropriate that a reasonable period should be accorded to the French Government in which to comply with the terms of the present judgment." [51]

2.38. With respect to Colombia, in order to understand the various statements of Colombian officials cited in Nicaragua's written pleadings, reference needs to be made to Article 101, paragraph 2, of the 1991 Political Constitution of the Republic of Colombia, which provides that:

> "The boundaries fixed in the manner set forth in this Constitution may only be modified by virtue of treaties approved by Congress, duly ratified by the President of the Republic."[52]

---

[49] Memorial of Nicaragua, para. 4.49.

[50] *Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Series A/B, No. 46*, p. 170.

[51] *Ibid.*, p. 171.

[52] Annex 1: Political Constitution of the Republic of Colombia, Article 101.

2.39. It is because of this constitutional provision that the President of Colombia, as well as the Minister of Foreign Affairs, have consistently referred to the complexities involved in the application of the Judgment given that boundaries must be the subject of treaties under Colombian law. At no time have they asserted that the Judgment is not binding under international law, or will not be complied with.[53]

2.40. Indeed, in pursuit of legal guidance, the President of Colombia referred the question of the constitutionality of Law 37 of 1961, which incorporated the Pact of Bogotá into national legislation, and whether Articles XXXI and L of the Pact of Bogotá violate Articles 3, 9 and 101 of the Constitution, to the Constitutional Court.[54]

---

[53] Annex 47: Reuters, *Colombia Court backs Santos in sea boundary dispute with Nicaragua*, 2 May 2014. As reported by Reuters, in "Colombia Court Backs Santos in Sea Boundary Dispute with Nicaragua" on 2 May 2014: "Santos... has never said that he flatly rejected the ICJ's ruling and stated in the past that Colombia would not go to war to resolve the dispute."

[54] Annex 2: *Actio Popularis* of Unconstitutionality against Articles XXXI and L of the Pact of Bogotá (Law No. 37 of 1961), Submitted by the President of the Republic of Colombia to the Constitutional Court, 12 Sept. 2013. In this regard, it may be noted that Colombia's dualist approach to these matters is reflected in the fact that, when Colombia signed the Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations, it made the following interpretative declaration:

> "With respect to article 27, paragraph 1, Colombia specifies that it accepts that a State may not invoke the provisions of its internal law as justification for its failure to perform the treaty, on the understanding that this rule does not exclude judicial control of the constitutionality of laws adopting treaties."
> See UNTS Doc. A/CONF.129/15. Available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-3&chapter=23&lang=en#EndDec (Last visited 15 Dec. 2014)

2.41. On 2 May 2014, the Constitutional Court handed down a summary of its decision in the case, reserving for subsequent publication its full ruling. The full text of the decision – which consists of 312 pages – was published on 26 November 2014. In the decision, the Constitutional Court first considered paragraphs 1 and 2 of Article 101 of the Constitution. [55]

2.42. The Constitutional Court found that the purpose of the first paragraph was to state the overall situation of the boundaries as they stood when the Constitution was approved in 1991. Any changes to the status of those boundaries, as already stated by the Constitutional Court in earlier jurisprudence, had to be made pursuant to the rule established in the second paragraph[56] – *i.e.*, on the basis of a treaty approved by Congress and ratified by the President.

2.43. Turning to the Pact of Bogotá, the Constitutional Court reaffirmed the validity of the Pact approved by Law 37 of 1961, "whose validity is unquestionable under the principle of *pacta sunt servanda* during the time that the Treaty [was in force] for Colombia."[57] The Constitutional Court then went on to state:

> "it follows that the decisions rendered by the International Court of Justice, on the basis of the jurisdiction recognized by Colombia through Article XXXI of the Pact, cannot be disregarded, in conformity with what is prescribed in Article 94 of

---

55 Annex 1.
56 Annex 4, paras. 8.5- 8.6, 9.3- 9.4, 9.9- 9.10.
57 *Ibid.*, paras. 9.10- 9.11.

> the Charter of the United Nations, that provides that each Member of the United Nations is committed to comply with the decision of the International Court of Justice in any case to which it is a party." [58]

2.44. At the same time, the Constitutional Court also ruled that decisions adopted by the ICJ in relation to boundaries are to be incorporated into the national legal system through a duly approved and ratified treaty under the terms of Article 101.[59] As the Constitutional Court noted:

> "In this sense, the authorities of Colombia have the obligation to comply with Article 101, paragraph 2, in the manner in which it has been interpreted by this Tribunal, seeking recognition of the effectiveness of the constitutional provision in a way that is consistent with the duty to comply with international obligations."[60]

2.45. In sum, the Constitutional Court ruled that Article XXXI of the Pact of Bogotá was constitutional, on the understanding that decisions of the ICJ with respect to boundaries are to be incorporated into domestic law in the manner provided for under the terms of Article 101 of the Constitution. The first operative paragraph reads as follows:

> "First: To declare Article XXXI of Law 37 of 1961 'approving the American Treaty on Pacific Settlement (Pact of Bogotá)' CONSTITUTIONAL, in the understanding that the decisions of the

---

58 Annex 4, para. 9.10.
59 *Ibid.*, paras. 9.9- 9.11.
60 *Ibid.*, para. 9.12.

> International Court of Justice adopted apropos of boundary disputes must be incorporated into domestic law by a treaty duly ratified and approved under the terms of Article 101 of the Constitution."[61]

2.46. The decision of the highest judicial organ in Colombia, entrusted with the interpretation of the Constitution, shows that Colombia is not a State whose policy is one of non-compliance with its international obligations. The requirement that an international judgment must be implemented by means of a treaty is a product of the constitutional relationship between international and national law in a dualist system. It is indicative of compliance, not non-compliance – as Nicaragua seeks to argue.

(3) THE CONTIGUOUS ZONE

2.47. The contiguous zone is one of the maritime zones to which Colombia, like all other coastal States, is entitled under international law. Because Nicaragua has referred to Colombia's contiguous zone in its *Application* and *Memorial*,[62] it is necessary to explain briefly the basis for that zone.

2.48. The contiguous zone is mentioned for the first time in Colombian domestic law in Article 101 of the Constitution of 1991, which refers to "the subsoil, the territorial sea, *the*

---

[61] Annex 4, First operative paragraph.

[62] See, for instance, Application, pp. 7-15, paras. 10-12 and Memorial of Nicaragua, paras. 2.11-2.14.

contiguous zone, the continental shelf, the exclusive economic zone" of Colombia.[63]

2.49. The baselines from which to measure Colombia's 12-mile territorial sea are established in Articles 4, 5 and 6 of Law No. 10 of 1978. These baselines also serve, according to customary international law, as the basis for measuring Colombia's contiguous zone.

2.50. While Colombia's entitlement to a contiguous zone around its islands was fully addressed by the Parties in the case concluded with the Judgment of 19 November 2012, its delimitation was not an issue addressed or decided by the Court.

2.51. In its Rejoinder, for example, Colombia explained that each of its islands in dispute in the case generated, *inter alia*, contiguous zone entitlements.[64] The fact that the contiguous zones around Colombia's islands also significantly overlapped with each other was described at paragraph 8.68 of the Rejoinder and graphically depicted on Figures R-7.1[65] and R-8.3[66] to that pleading.

2.52. As can be seen on Figure R-7.1[67] the proximity of Colombia's islands to each other is such that, moving from south

---

63 Annex 1. (Emphasis added)

64 *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Rejoinder of Colombia (Vol. I)*, para. 5.34.

65 *Ibid.*, p. 239.

66 *Ibid.*, p. 307.

67 *Ibid.*, p. 239.

to north, the contiguous zone of the Alburquerque Cays overlaps with that of the East Southeast Cays and San Andrés Island; the contiguous zones of San Andrés and Providencia overlap with the contiguous zone of Quitasueño; the contiguous zone of Quitasueño overlaps with that of Serrana; and the contiguous zone of Serrana overlaps with that of Roncador. The figure also shows that none of these contiguous zones overlap with either the territorial sea or contiguous zone of Nicaragua.

2.53. At one point in the proceedings relating to Costa Rica's request to intervene, Nicaragua contended that Colombia had never claimed a contiguous zone around its islands.[68] However, when Colombia recalled Article 101 of its Constitution, which expressly proclaimed such a zone, the allegation was not repeated.[69] Instead, both Parties referred in some detail to the contiguous zones around the islands during the hearings on the merits.[70]

2.54. The contiguous zone situated beyond Colombia's territorial sea lying off its continental coast is governed by customary international law. The regulation of Colombia's insular territories in the Western Caribbean, was complemented

---

[68] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Public Sitting 15 Oct. 2010, CR 2010/16*, p. 14, para. 20 (Agent of Nicaragua).

[69] *Ibid., Public Sitting 27 Apr. 2012, CR 2012/12*, p. 18, paras. 44-45 (Bundy).

[70] *Ibid.*, p. 15, para. 27 and pp. 18-19, paras. 42-45 (Bundy); *Ibid., Public Sitting 23 Apr. 2012, CR 2012/8*, p. 31, para. 17 (Elferink) and *Public Sitting 1 May 2012, CR 2012/14*, p. 31, para. 3 (Elferink).

by Presidential Decree No. 1946 of 9 September 2013, as amended by Presidential Decree No. 1119 of 17 June 2014.

2.55. These decrees implement Colombia's Constitution of 1991 and Law No. 10 of 1978,[71] and are based on the territorial, cultural, administrative and political unity of the Archipelago of San Andrés, Providencia and Santa Catalina established as a Department according to Article 309 of Colombia's 1991 Constitution.[72] They are also explicit in stating that their provisions have to be understood and applied in conformity with international law.[73]

2.56. As stated by President Santos on 9 September 2013, the choice made by Colombia in Presidential Decree No. 1946 of 2013 was that of proclaiming "an Integral Contiguous Zone, which joins together the contiguous zones of all our islands and keys in the Western Caribbean Sea."[74]

2.57. The shape of the unified Contiguous Zone includes the overlapping contiguous zones of the islands and cays of the

---

[71] Annex 3: Presidential Decree No. 1946 of 2013, Territorial Sea, Contiguous Zone and Continental Shelf of the Colombian Islands Territories in the Western Caribbean, 9 Sept. 2013, Considerations 7-9.

[72] *Ibid.*, Consideration 3. "Department" being equivalent to the first political division, i.e., state/province level.

[73] Annex 5: Presidential Decree No. 1119 of 2014, Amendment to the Presidential Decree No. 1946 of 2013, Territorial Sea, Contiguous Zone and Continental Shelf of the Colombian Islands Territories in the Western Caribbean, 17 June 2014, Article 3.

[74] Annex 12: Declaration of the President of the Republic of Colombia, 9 Sept. 2013. See also, Annex 9 of the Application and Annex 4 of the Memorial of Nicaragua. The Spanish original is as follows: "declaramos la existencia de una Zona Contigua Integral, a través de la cual unimos las zonas contiguas de todas nuestras islas y cayos en el mar Caribe Occidental."

archipelago and some further areas which derive from the need to ensure the "proper administration and orderly management of the entire Archipelago of San Andrés, Providencia and Santa Catalina" as well as "the need to avoid the existence of irregular figures or contours which would make practical application difficult."[75] This was done in application of a general criterion of good administration and orderly management of the seas.[76]

2.58. As regards the rights exercised in the Contiguous Zone, Decree No. 1946 includes some activities that belong to the exercise of high seas freedoms. They are referred to as concerning the "integral security of the State, including piracy and trafficking of drugs and psychotropic substances, as well as conduct contrary to the security in the sea and the national maritime interests."[77] The Decree also includes matters normally comprised in the police powers of the coastal State in its contiguous zone such as customs, fiscal, immigration and sanitary regulation. The Decree also provides that "violations against the laws and regulations related to the preservation of the environment and the cultural heritage"[78] will be prevented and controlled.

2.59. No official map of the Contiguous Zone has been published, pending the determination of the relevant points and

---

[75] Annex 3, Article 5, para. 2.

[76] See, *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012,* p. 624 at p. 708, para. 230.

[77] Annex 3, Article 5, para. 3(*a*).

[78] *Ibid.*

baselines according to Articles 3 and 6 (as modified in 2014) of the Decree.

2.60. Importantly, the Decree claims Colombia's right to sanction infringements of laws and regulations concerning the abovementioned matters, provided that such infringements are committed in its insular territories or in their territorial sea.[79] This corresponds to customary international law.

2.61. Conformity with international law is confirmed in the text of the first Decree (2013), and reiterated by the amendment to Article 1(3)[80] and the addition of a last paragraph to Article 5,[81] both made in the second Decree (2014).

2.62. Thus, Article 1(3) as amended specifies that Colombia exercises jurisdiction and sovereign rights over the maritime spaces different from the territorial sea "in the terms prescribed by international law… in what corresponds to each of them." It also specifies that: "In those spaces Colombia exercises historic rights in conformity with international law."[82] And the last paragraph added to Article 5 states that the application of the provisions on the exercise of Colombia's faculties of enforcement and control in the Integral Contiguous Zone "will be carried out in conformity with international law."[83]

---

79 Annex 3, Article 5, para. 3(*b*).
80 Annex 5, Article 1.
81 *Ibid.*, Article 3.
82 *Ibid.*, Article 1.
83 *Ibid.*, Article 3.

2.63. Colombia's Integral Contiguous Zone (i) is necessary for the orderly management, policing and maintenance of public order in the maritime spaces in the Archipelago of San Andrés, Providencia and Santa Catalina, (ii) is to be applied in conformity with international law having due regard to the rights of other States, (iii) is in conformity with customary international law, and (iv) consequently, cannot be said to be contrary to the Court's Judgment of 19 November 2012.

2.64. Having presented the general background relevant to the question of jurisdiction, the following chapters set out in full each of Colombia's Preliminary Objections.

Chapter 3

FIRST OBJECTION: THE COURT LACKS JURISDICTION UNDER THE PACT OF BOGOTÁ *RATIONE TEMPORIS*

A. Introduction

3.1. In instituting these proceedings, Nicaragua has put forward, as its principal basis of jurisdiction, Article XXXI of the Pact of Bogotá. On the face of its *Application*, several issues do not appear to be in contention: first, that Nicaragua is a party to the Pact; second, that Colombia, which had been a party to the Pact, lawfully and effectively denounced it, on 27 November 2012, in accordance with its terms; third, that Colombia's notification of denunciation stated that, in accordance with Article LVI of the Pact, "the denunciation... shall apply as of today with respect to proceedings which may be initiated subsequent to the present notice..."; and, fourth, that Nicaragua's *Application* has been lodged after the date of the transmission of the notice of denunciation. The essential point of difference is that Nicaragua avers in its *Application* that "in accordance with Article LVI of the Pact, that denunciation will take effect after one year, so that the Pact will cease to be in force for Colombia after 27 November 2013."[84] In doing so, Nicaragua errs in its interpretation of Article LVI.

3.2. The conclusion in 1948 of an American treaty on pacific

[84] Application, para. 17.

settlement, which included under certain conditions acceptance of the compulsory jurisdiction of a permanent international judicial institution, the International Court of Justice, was considered a significant step by the American States and was not undertaken lightly: the Pact contained a number of important safeguards, one of which was the right to terminate that acceptance with immediate effect.

3.3. Colombia will show that the Court is without jurisdiction under Article XXXI of the Pact of Bogotá because Colombia's notification of denunciation of the Pact was transmitted to the General Secretariat of the OAS on 27 November 2012. From the date of transmission (27 November 2012), Colombia no longer accepted the jurisdiction of the Court under Article XXXI of the Pact. As the present case was instituted by Nicaragua on 26 November 2013, long after 27 November 2012 (the date on which Colombia's consent to the jurisdiction of the Court under Article XXXI of the Pact ceased to have effect as provided in its Article LVI), the Court has no jurisdiction over this case.

3.4. After a brief introduction to the features and organization of the Pact of Bogotá (Section B (1) and the Appendix), Section B (2) *(a)* and *(b)* of the present Chapter will consider Article LVI in accordance with the general rule for the interpretation of treaties in Article 31 of the Vienna Convention on the Law of

Treaties (VCLT).[85] Section B (2) *(c)* then considers supplementary means that are reflected in Article 32 of the VCLT, for the purpose of confirming the meaning reached by application of the general rule. Section C discusses the denunciation of the Pact of Bogotá by Colombia and the practice of the Parties to the Pact as regards denunciation of the Pact under Article LVI thereof. Section D responds to the points concerning jurisdiction under Article XXXI made by Nicaragua in its *Memorial*. Section E concludes that the Court does not have jurisdiction in respect of the present proceedings, since they were instituted after the transmission of Colombia's notice of denunciation of the Pact.

B. The Pact of Bogotá Allows Parties to Withdraw from the Treaty by Unilateral Denunciation

(1) The relevant features of the Pact of Bogotá

(a) The structure of the Pact of Bogotá

3.5. The Pact of Bogotá was concluded on 30 April 1948 during the Ninth International Conference of American States (the conference at which the Charter of the OAS was also adopted).[86] There are currently 14 Parties, out of the 35

---

[85] 1155 UNTS 331.

[86] The Pact has been considered by the Court at the jurisdictional phases of earlier cases: *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 69; *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 832. The Pact was also the basis for the Court's jurisdiction in *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007*, p. 659; *Dispute Regarding*

Members of the OAS. Two States – El Salvador in 1973 and Colombia in 2012 – having denounced the Pact.

3.6. The Pact of Bogotá has eight chapters and 60 articles:

- Chapter One. General Obligations to Settle Disputes by Pacific Means.
- Chapter Two. Procedures of Good Offices and Mediation.
- Chapter Three. Procedure of Investigation and Conciliation.
- Chapter Four. Judicial Procedure
- Chapter Five. Procedure of Arbitration
- Chapter Six. Fulfilment of Decisions
- Chapter Seven. Advisory Opinions.
- Chapter Eight. Final Provisions.

3.7. As apparent in the chapter titles and as described in more detail in the Appendix to the present Chapter, the Pact of Bogotá deals with a number of distinct substantive and procedural obligations. Four of the eight chapters of the Pact – Chapters Two, Three, Four and Five – deal with specific *procedures* for dispute settlement. The remaining four Chapters deal with other undertakings and obligations of the treaty partners such as, for

---

Navigational and Related Rights (Costa Rica v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 213*; Maritime Dispute (Peru* v. *Chile), Judgment,* 27 Jan. 2014. In addition to the present proceedings, Nicaragua has invoked the Pact as a principal basis of jurisdiction in the case concerning the *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)* and in the *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua* v. *Colombia)* case. On 18 Nov 2010 it was invoked against Nicaragua by Costa Rica in the *Certain Activities carried out by Nicaragua in the Border Area* (the proceedings of which were joined with those of the *Construction of a Road in Costa Rica along the San Juan River* case on 17 Apr. 2013) and on 24 Feb 2014 in the *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean* case.

example, the non-use of force;[87] the obligation to settle international controversies by regional procedures before referring them to the Security Council;[88] the obligation not to exercise diplomatic representation with regard to matters that are within the domestic jurisdiction of a State party;[89] the exercise of the right of individual or collective self-defense, as provided for in the Charter of the United Nations;[90] ensuring the fulfilment of judgments and awards;[91] and the possibility of resorting to advisory opinions.[92] Chapter Eight contains the final provisions.

(b) The Pact's jurisdictional provision

3.8. Article XXXI of the Pact, upon which Nicaragua relies, provides:

> "In conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice, the High Contracting Parties declare that they recognize, in relation to any other American State, the jurisdiction of the Court as compulsory *ipso facto*, without the necessity of any special agreement so long as the present Treaty is in force, in all disputes of a juridical nature that arise among them concerning:
>
> a) The interpretation of a treaty;
>
> b) Any question of international law;
>
> c) The existence of any fact which, if

87 Article I.
88 Article II.
89 Article VII.
90 Article VIII.
91 Article L.
92 Article LI.

established, would constitute the breach of an international obligation;

d) The nature or extent of the reparation to be made for the breach of an international obligation."

3.9. Article XXXI refers to and adopts the language of Article 36(2) of the Statute of the International Court of Justice (the 'Optional Clause', which provides for the 'compulsory jurisdiction' of the Court through a system of interlocking declarations). Article XXXI has a similar effect, though limited to the Parties to the Pact, as would a series of interlocking Optional Clause declarations. At the same time, as the Court has said, the commitment under Article XXXI is "an autonomous commitment, independent of any other which the parties may have undertaken or may undertake by depositing with the United Nations Secretary-General a declaration of acceptance of compulsory jurisdiction under Article 36, paragraphs 2 and 4 of the Statute."[93]

3.10. As a provision of a treaty, the application of Article XXXI is subject to the conditions prescribed in other provisions of the Pact. Under the Pact, the commitment to submit to the procedures specified in the Pact applies only where "a controversy arises between two or more signatory states which, in the opinion of the parties, cannot be settled by direct

[93] *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988,* p. 69 at p. 85, para. 36.

negotiations through the usual diplomatic channels."[94] This restriction is contained in Article II. Other restrictions are contained in Article IV (other procedures initiated),[95] Article V (matters which by their nature are within domestic jurisdiction)[96] and Article VI (matters already settled between the parties, by arbitral award, by decision of an international court or governed by earlier treaties).[97] Indeed Article XXXIV specifically mentions that if the Court, for reasons stated in Articles V, VI and VII of the Pact, declares itself without jurisdiction, such controversy shall be declared ended.[98]

3.11. Yet another such restriction, central to the present case, is *ratione temporis*; it is contained in the last sentence (second paragraph) of Article LVI of the Pact (the denunciation clause).

---

[94] This restriction was discussed by the Court in *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 69 at p. 85, para. 36.

[95] Article IV reads: "Once any pacific procedure has been initiated, whether by agreement between the parties or in fulfillment of the present Treaty or a previous pact, no other procedure may be commenced until that procedure is concluded."

[96] Article V reads: "The aforesaid procedures may not be applied to matters which, by their nature, are within the domestic jurisdiction of the state. If the parties are not in agreement as to whether the controversy concerns a matter of domestic jurisdiction, this preliminary question shall be submitted to decision by the International Court of Justice, at the request of any of the parties."

[97] Article VI reads: "The aforesaid procedures, furthermore, may not be applied to matters already settled by arrangement between the parties, or by arbitral award or by decision of an international court, or which are governed by agreements or treaties in force on the date of the conclusion of the present Treaty."

[98] See *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 69 at pp. 84-85, para. 35.

(2) THE LAW AND PROCEDURE OF DENUNCIATION UNDER THE PACT OF BOGOTÁ

(a) The provision: Article LVI, first and second paragraphs

3.12. Article 54 of the VCLT provides, in relevant part, that: "The termination of a treaty or the withdrawal of a party may take place: (a) in conformity with the provisions of the treaty." As will be recalled, Article LVI of the Pact of Bogotá provides for denunciation of the Pact:

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

3.13. Article LVI of the Pact has two paragraphs. The first paragraph sets forth the right of a State Party to denounce the Pact, the modalities for exercising such a right and the effect of denunciation. The second paragraph specifically addresses the effect of notice of denunciation on the "procedures" under Chapters Two to Five of the Pact. The second paragraph of Article LVI reads:

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

The equally authentic French, Portuguese and Spanish texts are to the same effect:

> *"La dénonciation n'aura aucun effet sur les* procédures *en cours entamées avant la transmission de l'avis en question."*

> *"A denúncia não terá efeito algum sôbre os processos pendentes e iniciados antes de ser transmitido o aviso respectivo."*

> *"La denuncia no tendrá efecto alguno sobre los procedimientos pendientes iniciados antes de transmitido el aviso respectivo."*[99]

(b) The ordinary meaning of Article LVI in its context and in the light of its object and purpose: judicial procedures cannot be initiated after the transmission of the notification of denunciation

3.14. The rules of interpretation in Articles 31 to 33 of the VCLT reflect customary international law and as such are applicable to the interpretation of the Pact of Bogotá. Under Article 31(1),

> "[a] treaty shall be interpreted in good *faith* in accordance with *the* ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." (Emphasis added)

[99] Annex 33.

3.15. Article LVI of the Pact is to be interpreted in accordance with the rules set forth in Articles 31 to 33 of the VCLT. Article LVI, and in particular its second paragraph, need to be interpreted in accordance with their ordinary meaning, to secure for the provision an *effet utile*, and to avoid a result which is "manifestly absurd or unreasonable," as explained in more detail in section D below.

3.16. It is clear from the text of the second paragraph of Article LVI that, during the year following transmission of the notification of the denunciation, *no new procedures*, including judicial ones, may be initiated. Any other interpretation that might allow procedures to be initiated *after* the transmission of the notification would deprive the second paragraph of *effet utile*. If the intention was to allow the initiation of new procedures, it would have been sufficient simply to refer to pending procedures and it would have been unnecessary to *limit* the pending procedures to those that were "*initiated prior"* to the "*transmission*" of the denunciation notification. Thus, the effect of giving notice of denunciation is that, while the Pact itself only ceases to be in force for the denouncing State one year later *no new* procedures (including proceedings before the International Court of Justice) may be instituted against the denouncing State after the date of the transmission of the notification of denunciation to the Secretary-General of the OAS.

3.17. As will be shown below, this results from a good faith

interpretation of the terms of the Pact in their context and in the light of the Pact's object and purpose. The meaning is also confirmed by the *travaux préparatoires* which will be addressed in subsection *(c)* below.

3.18. As noted above, the Pact has eight chapters. The reference to pending "*procedures"* in the second paragraph of Article LVI refers to four of them: Chapter Two (Procedures of Good Offices and Mediation), Chapter Three (Procedure of Investigation and Conciliation), Chapter Four (Judicial Procedure) and Chapter Five (Procedure of Arbitration). All of these Chapters deal with specific procedures that may be initiated against a State Party during the pendency of its consent to such initiation.

3.19. The effect of denunciation under Article LVI must be understood taking account of both of its paragraphs, each addressing specific issues affected by denunciation.[100] The first paragraph provides that denunciation takes effect with one year's notice as regards the Pact as a whole, which – as has been seen above[101] – includes important rights and obligations unconnected to any specific procedure that may be initiated under the Pact. The second paragraph of Article LVI, as explained above, deals specifically with *procedures* that can be initiated under the Pact. Chapters Two, Three, Four and Five deal with these procedures. The second paragraph protects

[100] VCLT, Article 31(1).
[101] See para. 3.7 above.

procedures that were initiated before the transmission of notification of denunciation and hence are pending at that moment. Efforts to initiate any of the *procedures* in Chapters Two, Three, Four and Five *after* the date of notification fall outside the protective mantle of the second paragraph of Article LVI and are devoid of legal effect.

3.20. The second paragraph of Article LVI makes a distinction between pending procedures initiated before the transmission of the notification of denunciation and procedures initiated after the transmission. The second paragraph is clear that denunciation has no effect with respect to procedures that are pending at the time of transmission of the notification of denunciation, having been initiated prior to the transmission of the notification of denunciation. *A contrario*, denunciation *does* have effect as regards any other procedures *not pending* at the time of transmission of the notification because they purported to be initiated *after* the transmission of the notification.

3.21. Hence the second paragraph of Article LVI includes provisions with regard to specific *procedures* under the Pact:

- As regards those already pending at the time of transmission of the notification of denunciation, the denunciation has no effect. This conforms to the normal position with regard to international litigation. Jurisdiction is to be determined at the moment of the institution of the proceedings and is not affected by the

subsequent withdrawal of consent to jurisdiction, whether given in the compromissory clause of a treaty or by declaration under Article 36(2) of the Statute.[102]

- Any proceedings which a party to the Pact (whether the denouncing State or any other party) may try to commence after transmission of the notification of denunciation fall outside the denouncing State's consent to jurisdiction, which terminates with immediate effect upon transmission of the notification.

3.22. Thus, Article LVI provides two different *dates* for the effect of denunciation. The effect for the *procedures* under Chapters Two, Three, Four and Five is immediate, while the effect for the other undertakings and obligations of the Pact occurs only one year after the date of denunciation.

3.23. This interpretation results clearly from the application of the general rule on the interpretation of treaties of Article 31 of

---

[102] As Rosenne says, "once a State has given its consent to the referral of a dispute to the Court, it may not withdraw that consent during the pendency of the proceedings for which it was given if another State has acted on the basis of that consent and has instituted proceedings before the Court." In: S. Rosenne, *The Law and Practice of the International Court*, *1920-2005*, (2006), Vol. II, p. 569; see also pp. 785-789, 939-945. The case-law includes *Nottebohm, Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 111 at p. 123; *Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports I957*, p. 125 at p. 142; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984,* p. 392 at p. 416, para. 54; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14 at p. 28, para. 36; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 412 at p. 438, para. 80.

the VCLT. There is therefore no necessity for recourse to the *travaux préparatoires*. Nor should this interpretation of the second paragraph of Article LVI occasion any surprise. States frequently take care to ensure that their consent to the jurisdiction of an international court or tribunal may be terminated with immediate effect. This is, for example, expressly the case with a number of declarations of acceptance of the Court's jurisdiction under the Optional Clause, in which States reserve the right to terminate their acceptance of the Court's jurisdiction with immediate effect.[103] For example, the United Kingdom's declaration of 5 July 2004 includes the following:

> "1. The Government of the United Kingdom of Great Britain and Northern Ireland accept as compulsory ipso facto and without special convention, on condition of reciprocity, the jurisdiction of the International Court of Justice, in conformity with paragraph 2 of Article 36 of the Statute of the Court, until such time as notice may be given to terminate the acceptance…
>
> 2. The Government of the United Kingdom also reserve the right at any time, by means of a

[103] States reserving the right to terminate their optional clause declarations with immediate effect include Botswana (1970), Canada (1994), Cyprus (1988), Germany (2008), Kenya (1965), Madagascar (1992), Malawi (1966), Malta (1966, 1983), Mauritius (1968), Nigeria (1998), Peru (2003), *Portugal* (2005), Senegal (1985), Slovakia (2004), Somalia (1963), Swaziland (1969), Togo (1979) and the United Kingdom (2005). See: C. Tomuschat, "Article 36", in: A . Zimmermann *et al* (eds.), *The Statute of the International Court of Justice: A Commentary* (2012), pp. 678-680. Tomuschat refers to denunciation with immediate effect as "the price to be paid for adherence by States to the optional clause. And it corresponds to the logic of a jurisdictional system which is still largely based on unfettered sovereignty." p. 678.

> notification addressed to the Secretary-General of the United Nations, and with effect as from the moment of such notification, either to add to, amend or withdraw any of the foregoing reservations, or any that may hereafter be added."

3.24. A comparison between the language of the second paragraph of Article LVI and denunciation provisions in some other multilateral treaties involving dispute settlement procedures also reveals that it is not unusual for treaties to separate the effect of denunciation in general from the effect on procedures available under the treaty. Thus, the way in which the Parties to the Pact drafted the second paragraph of Article LVI, in order to clearly distinguish between pending procedures that had been initiated *prior* to the denunciation and those initiated *after* the denunciation is, in no sense, unusual.

3.25. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958[104] (the "New York Convention") deals with the effect of denunciation in Article XIII, consisting of three paragraphs. Paragraph (1) deals with the effect of denunciation on the New York Convention. Paragraph (3) deals specifically with pending proceedings, indicating precisely the date of the institution of such proceedings:

> "1. ... Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.
>
> (...)

[104] 330 UNTS 38.

> 3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement *proceedings have been instituted before the denunciation takes effect*." (Emphasis added)

For the New York Convention, the relevant date is the *date on which* the *denunciation takes effect*. Note how precisely the New York Convention specifies that date in Article XIII(1).

3.26. Similarly, the Additional Protocol to the European Convention on State Immunity of 16 May 1972[105] provides in Article 13(2) that:

> "Such denunciation shall take effect six months after the date of receipt by the Secretary-General of such notification. The Protocol shall, however, continue to apply to *proceedings introduced* in conformity with the provisions of the Protocol *before the date on which such denunciation takes effect.*" (Emphasis added)

3.27. Article 31(2) of the United Nations Convention on Jurisdictional Immunities of States and Their Property of 2 December 2004[106] addresses the effect of denunciation on the Convention itself and then deals with its effect on pending proceedings. Here again, the Convention specifies clearly the relevant date of the institution of a proceeding not affected by denunciation:

---

[105] Additional Protocol to the European Convention on State Immunity (Basel, 16 May 1972), Council of Europe, 1495 UNTS 182.

[106] UN Doc. A/RES/59/38.

> "Denunciation shall take effect one year following the date on which notification is received by the Secretary-General of the United Nations. The present Convention shall, however, continue to apply to any question of jurisdictional immunities of States and their property arising in *a proceeding instituted* against a State before a court of another State prior to the *date on which the denunciation takes effect* for any of the States concerned." (Emphasis added)

3.28. In the same vein, the European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 8 November 1990[107] and the Optional Protocol to the International Covenant on Civil and Political Rights of 16 December 1966[108] provide for the general effect of

---

[107] European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Strasbourg, 8 November 1990), Council of Europe, ETS No. 141, Article 43 – Denunciation:

> "1. Any Party may, at any time, denounce this Convention by means of a notification addressed to the Secretary General of the Council of Europe.
>
> 2. Such denunciation shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of the notification by the Secretary General.
>
> 3. The present Convention shall, however, continue to apply to the enforcement under Article 14 of confiscation for which a *request has been made* in conformity with the provisions of this Convention *before the date on which such a denunciation takes effect*. (Emphasis added)

[108] 999 UNTS 171. Article 12 provides:

> "1. Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-*General* of the United Nations. Denunciation shall take effect three months after the date of receipt of the notification by the Secretary-General.
>
> 2. Denunciation shall be without prejudice to the continued *application* of the provisions of the present Protocol to *any communication submitted* under article 2 *before the effective date of denunciation.*" (Emphasis added)

denunciation on the two treaties and then for the specific effect on the pending proceedings, indicating the precise relevant dates.

3.29. As in the treaties covered above, the Pact of Bogotá in Article LVI addressed the general effect of denunciation and the effect on the pending procedures separately in its first and second paragraphs. Again, as in the treaties referenced above, Article LVI of the Pact dealing with denunciation is very specific about the relevant date of the initiation of the pending procedures. Under the Pact, only those proceedings initiated *prior to the transmission of the notification of denunciation* are unaffected by denunciation.

3.30. In 1948, the American States, for whom consent to the compulsory jurisdiction of the International Court of Justice was a new and major departure, decided to reserve their freedom to withdraw such consent with immediate effect should circumstances so require, but to do so without effect on pending proceedings. That is precisely what was achieved by the second sentence of Article LVI.

3.31. This is also consistent with the State practice of the parties to the Pact. Of the sixteen States that ratified or acceded to the Pact,[109] two have denounced it, namely El Salvador

---

[109] Bolivia, Brazil, Chile, Colombia (denounced 2012), Costa Rica, Dominican Republic, Ecuador, El Salvador (denounced 1973), Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay.

in 1973, and Colombia in 2012. Colombia's denunciation essentially matches that of El Salvador so far as concerns judicial procedures instituted subsequent to the transmission of the denunciation. The final paragraph of El Salvador's notice of denunciation, which is dated 24 November 1973, 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*, it reaffirms at the same time its firm resolve to continue participating in the collective efforts currently under way to restructure some aspects of the system in order to accommodate it to the fundamental changes that have occurred in relations among the states of the Americas."[110] (Emphasis added)

3.32. As in the case of Colombia's notification of denunciation, no other State Party to the Pact – Nicaragua included – lodged any objection with the OAS or, in fact, expressed any reaction whatsoever within the OAS to the terms or mode of El Salvador's withdrawal from the Pact of Bogotá.

---

[110] Annex 14: Diplomatic Note from the Minister of Foreign Affairs of El Salvador to the Secretary-General of the Organization of American States, 24 Nov. 1973. In the original, in Spanish, the paragraph reads:

> *"Finalmente, mi Gobierno deja constancia de que, si El Salvador, por las razones expuestas,* denuncia *ahora el Pacto de Bogotá,* denuncia que ha de principiar a surtir efectos a partir del día de hoy, *reitera al mismo tiempo su firme propósito de continuar participando en los esfuerzos colectivos que actualmente se realizan para reestructurar algunos aspectos del sistema, a fin de acomodarlo a los cambios fundamentales que han ocurrido en las relaciones entre los Estados americanos."* (Emphasis added)

(c) The ordinary meaning is confirmed by the travaux préparatoires

3.33. The interpretation above results clearly from the application of the general rule on the interpretation of treaties of VCLT Article 31. There is therefore no necessity for recourse to the *travaux préparatoires*. Nevertheless, such recourse is permitted under Article 32 of the VCLT in order to confirm the ordinary meaning resulting from the application of the general rule. The *travaux* confirm the ordinary meaning.

3.34. The extended exercise that began at Montevideo in 1933 and culminated in the adoption of the Pact of Bogotá in 1948 was intended to update the various instruments for peaceful settlement in the Americas[111] by systematizing in a single instrument the different mechanisms for pacific dispute settlement in the existing treaties.

3.35. The pre-1936 treaties referring to conflict resolution and their procedures were unsystematic in a number of ways. One, of 1902, concerning compulsory arbitration, had only six ratifications. The other, of 1929, also dealing with arbitration, had more ratifications, but they were accompanied by reservations with respect to the scope of the arbitration clause. With the exception of the Treaty of Compulsory Arbitration (1902)[112] and the General Treaty of Inter-American Arbitration

---

111 Pact of Bogotá, Arts. LVIII and LVIX.

112 Treaty on Compulsory Arbitration, (Mexico, 29 Jan. 1902). See Annex19: Inter-American Treaties from 1902 to 1936, Clauses of Denunciation.

(1929),[113] the other pre-1936 regional treaties did not have rigorous and comprehensive compulsory dispute settlement provisions, such as that found in the Pact of Bogotá.

3.36. With respect to termination, Article 22 of the Treaty on Compulsory Arbitration signed on 29 January 1902 provided in relevant part 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."[114]

This provision clearly prescribed that the termination of the treaty obligations, including arbitration procedures already initiated, were to take effect after a year. On the other hand,

---

[113] General Treaty of Inter-American Arbitration, (Washington, 5 Jan. 1929), in Annex 19.

[114] General Treaty of Inter-American Arbitration, (Washington, 5 Jan. 1929), in Annex 19. 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."*

The 1902 treaty was not included among the agreements that the Juridical Committee should take into account for the construction of the draft treaty for the coordination of the Inter-American peace agreements to be submitted to the Seventh International American Conference through Resolution XV, approved on 21 December 1938. In Annex 28, *Text of Document C: Report to Accompany the Draft Treaty for the Coordination of Inter-American Peace Agreements and Draft of an Alternative Treaty*, at pp. 81-83.

Article 9 of the General Treaty of Inter-American Arbitration signed at Washington on 5 January 1929 provided in the relevant part that

> "[t]his treaty shall remain in force indefinitely, but it may be denounced by means of one year's previous notice at the expiration of which it shall cease to be in force as regards the Party denouncing the same, but shall remain in force as regards the other signatories."[115]

This provision, which does not deal with the pending procedures, is similar to the remaining treaties up to 1936.[116]

3.37. In the context of a regional law-making effort to secure region-wide subscription to a comprehensive dispute resolution mechanism, the challenge for the conveners of the conference begun at Montevideo was to secure a draft which would attract

---

115 In Spanish:

"Este tratado regirá indefinidamente, pero podrá ser denunciado mediante aviso anticipado de un año, transcurrido el cual cesará en sus efectos para el denunciante, quedando subsistente para los demás signatarios.".

116 See in Annex 19, excerpts of the following on denunciation: Treaty of Compulsory Arbitration, 29 Jan. 1902, Article 22; Treaty to Avoid or Prevent Conflicts Between the American States (The Gondra Treaty), 3 May 1923, Article IX; General Convention of Inter-American Conciliation, 5 Jan. 1929, Article 16; General Treaty of Inter-American Arbitration, 5 Jan. 1929, Article 9; Protocol of Progressive Arbitration, 5 Jan. 1929; Anti-War Treaty of Non-Aggression and Conciliation (The Saavedra-Lamas Pact), 10 Oct. 1933, Article 17; Additional Protocol to the General Convention on Inter-American Conciliation, 26 Dec. 1933; Convention on Maintenance, Preservation and Reestablishment of Peace, 23 Dec. 1936, Article 5; Additional Protocol Relative to Non-Intervention, 23 Dec. 1936, Article 4; Treaty on the Prevention of Controversies, 23 Dec. 1936, Article 7; Inter-American Treaty on Good Offices and Mediation, 23 Dec. 1936, Article 9; Convention to Coordinate, Extend and Assure the Fulfillment of the Existing Treaties Between the American States, 23 Dec. 1936, Article 8.

wide subscription, and, at the same time, assuage the various concerns of the States in the region.

3.38. On 27 December 1937, the Director General of the Pan-American Union sent a communication to the U.S. Under-Secretary of State, describing the main failures of the Treaty to Avoid or Prevent Conflicts between the American States of 1923 (Gondra Treaty) and suggesting that the U.S. Government "consider the possibility of taking the initiative at the forthcoming Conference at Lima in *recommending additions to the existing treaties of peace* with the view of increasing their usefulness."[117]

3.39. On 15 November 1938, the United States submitted to the American States a draft 'Project for the Integration of American Peace Instruments',[118] for discussion during the Eighth American International Conference which was to be held in Lima from 9 to 27 December 1938. This U.S. Project did not include any language approximating what would eventually become the second paragraph of Article LVI of the Pact of Bogotá.

3.40. One month later, however, on 16 December 1938, during

---

[117] Annex 22: Memorandum from the General Director of the Pan-American Union to the United States Under Secretary of State, 28 Dec. 1937, at p. 6. (Emphasis added)

[118] Annex 23: Delegation of the United States of America, *Topic 1: Perfecting and Coordination of Inter-American Peace Instruments, Draft on Consolidation of American Peace Agreements submitted to the First Commission*, Eighth International Conference of American States, Lima, Peru, 15 Nov. 1938, at p. 1.

the Lima Conference, the United States submitted an amended second draft of its Project.[119] This new draft contained the language that would eventually become the second paragraph of Article LVI of the Pact of Bogotá (hereafter the "U.S. Proposal"). This language was highlighted in the original text in order to indicate that it represented a new provision by comparison with the earlier texts.[120] Article XXII of the U.S. Proposal read:

> "ARTICLE XXII: The present treaty shall remain in effect indefinitely, but may be denounced by means of one year's notice given to the Pan American Union, which shall transmit it to the other signatory governments. After the expiration of this period the treaty shall cease in its effects as regards the party which denounce it, but shall remain in effect for the remaining high contracting parties. *Denunciation shall not affect any pending proceedings instituted before notice of denunciation is given.*"[121] (Italics in original)

3.41. Thus, what became the second paragraph of Article LVI of the Pact of Bogotá had its origin in the proposal by the United States of 16 December 1938, a proposal made with the evident intention of ensuring that a State that was party to the Pact could withdraw its consent to be bound by any of the procedures – whichever they might be – as of the date of notification,

---

[119] Annex 24: Delegation of the United States of America, *Topic 1: Perfecting and Coordination of Inter-American Peace Instruments, Final Draft on Consolidation of American Peace Agreements submitted to the First Commission*, Eighth International Conference of American States, Lima, Peru, 16 Dec. 1938, pp. 193-194.

[120] In the English version of the U.S. Proposal, all new matters were in italics while in the Spanish version the new text appears in bold.

[121] Annex 24, p. 203.

even though the effects of denunciation on the general substantive obligations of the Pact itself would take effect after one year.

3.42. This formulation was not found in the treaties on pacific settlement of disputes concluded prior to 1936. The drafting of this proposal was clear and deliberate and was manifestly intended to ensure the right to cease to be bound by compulsory procedures with immediate effect.[122]

3.43. On 19 December 1938, Green H. Hackworth, then Legal Adviser to the U.S. Department of State and a member of the U.S. delegation, and later a Judge and President of the Court, explained at the meeting of Sub-Committee 1 of Committee I of the Lima Conference that "all new matter had been

---

[122] The idea to consolidate existing American treaties on the peaceful settlement of disputes was prominent at the Montevideo Conference of 1933. In particular, Resolution XXXV of 23 Dec. 1933 noted "the advantages that the compilation and articulation into a single instrument would offer, for all provisions which are scattered in different treaties and other relevant principles for the prevention and pacific settlement of international conflicts", and resolved that a Mexican draft "Code of Peace" would be put to the consideration of member States through the Pan-American Union. This draft, which was the first proposal for the coordination of Inter-American peace treaties, did not contain any provisions relating to termination, denunciation, or withdrawal. See Annex 20: Seventh International Conference of American States, Montevideo, Uruguay, *Code of Peace, Resolution XXXV*, Approved 23 Dec. 1933, at p. 51.

The draft "Code of Peace" was submitted to the States at the Inter-American Conference for the Consolidation of Peace, held in Buenos Aires in 1936, but no significant progress was made on that occasion. See Annex 21: Inter-American Conference for the Maintenance of Peace, Buenos Aires, Argentina, *Code of Peace, Resolution XXVIII*, Approved 21 Dec. 1936.

underlined."[123]

3.44. The U.S. delegation thus deliberately drew attention to the new language which was not part of the previous Inter-American instruments. All the negotiating States were, accordingly, made aware of the change which was being introduced and which modified the effect of denunciation in contrast to what it had been in the earlier multilateral instruments.

3.45. Of the various drafts related to the coordination and consolidation of American peace agreements presented to the Lima Conference, only that presented by the United States addressed the matter of denunciation.[124]

3.46. On 21 December 1938, the Lima Conference adopted Resolution XV, which made particular mention in its preamble of the draft "on the Consolidation of American Peace Agreements", submitted by the United States, because it structured the "process of pacific solution of differences between American States through the consolidation, in a single instrument, of the regulations contained in the eight treaties now

---

[123] Annex 25: Delegation of the United States of America, *Report of the Meetings of Sub-Committee 1 of Committee I, Consolidation of American Peace Instruments and Agreements*, Eighth International Conference of American States, 19 Dec. 1938, at p. 5. It is to be noted that the U.S. delegation highlighted in italics the additions, which include the second paragraph of what became Art. LVI (see Annex 24, Art. XXII at p. 203).

[124] Annex 26: Comparative Chart of Drafts Presented by American States to the First Commission at the Eighth International Conference of American States, Lima, Peru, Dec. 1938.

in force."[125] By Resolution XV the Lima Conference submitted various projects on inter-American dispute settlement procedures to the International Conference of American Jurists for it to integrate them into a single instrument.[126]

3.47. In March 1944, the Inter-American Juridical Committee published two drafts for distribution to American States for their consideration; both drafts contained the U.S. Proposal.[127]

---

[125] Annex 27: Eighth International Conference of American States, *Perfection and Coordination of Inter-American Peace Instruments, Resolution XV*, Approved 21 Dec. 1938, p.1, Consideration 4.

[126] Annex 27, p. 2, para. 2.

[127] The two drafts contained in Annex 28 are: Inter-American Juridical Committee, *Text of Document A: Draft Treaty for the Coordination of Inter-American Peace Agreements*, Minutes of the Inter-American Juridical Committee, 1944, pp. 53-68 (integrating existing Inter-American agreements on pacific dispute settlement, but made no changes to their texts); and *Text of Document B: Draft of an Alternative Treaty Relating to Peaceful Procedures*, at pp. 69-79 (proposed new material based upon the various drafts submitted in Lima in 1938). The U.S. proposal was contained in Article XXXII of the *Draft Treaty for the Coordination of Inter-American Peace Agreements* (Document A) which read:

> "The present treaty shall remain in effect indefinitely, but it may be denounced by means of notice given to the Pan American Union one year in advance, at the expiration of which it shall cease to be in force as regards the Party denouncing the same, but shall remain in force as regards the other signatories. Notice of denunciation shall be transmitted by the Pan American Union to the other signatory governments. Denunciation shall not affect any pending proceedings instituted before notice of denunciation is given."

The U.S. proposal was contained in Article XXVIII of the *Draft of an Alternative Treaty Relating to Peaceful Procedures* (Document B) which read:

> "This treaty will be valid indefinitely, but maybe denounced through notice of one year in advance to the Pan-American Union, [and] the other signatory Governments. The denunciation will not have any effect on procedures pending and initiated prior to the transmission of that notice."

3.48. In September 1945, the Inter-American Juridical Committee submitted its "Preliminary draft for the Inter-American System of Peace". The report attached to it states that "Part VII of the Preliminary Draft of the Juridical Committee, entitled 'Final Provisions' follows the general lines already approved by the American States."[128] In Part VII, Final Provisions, Article XXIX includes the U.S. Proposal in a formula similar to that contained in the final version of the Pact of Bogotá. It reads:

> "Article XXIX.
>
> (…)
>
> [Paragraph 3] The present treaty shall remain in effect indefinitely, but it may be denounced by means of notice given to the Pan American Union one year in advance, at the expiration of which it will cease to be in force as regards the party denouncing the same, but shall remain in force as regards the other signatories. Notice of the denunciation shall be transmitted by the Pan American Union to the other signatory governments. Denunciation shall not affect any pending proceedings instituted before notice of denunciation is given."[129]

3.49. On 18 November 1947, a fourth (and final) draft project on the integration of Inter-American peace instruments was published by the Inter-American Juridical Committee and distributed to the American States for their consideration.

---

[128] Annex 29: Inter-American Juridical Committee, *Draft of an Inter-American Peace System and an Accompanying Report, Article XXIX*, 4 Sept. 1945, Article XXIX, at p. 22.

[129] *Ibid.*, at pp. 11-12.

Article XXVI of the fourth draft retained the U.S. Proposal:

> "Article XXVI...
>
> (...)
>
> [Paragraph 3] The present treaty shall remain in effect indefinitely, but it may be denounced by means of notice given to the Pan American Union one year in advance, at the expiration of which it shall cease to be in force as regards the Party denouncing the same, but shall remain in force as regards the other signatories. Notice of denunciation shall be transmitted by the Pan American Union to the other signatory governments. Denunciation shall not affect any pending proceedings instituted before notice of denunciation is given."[130]

3.50. The Ninth International Conference of American States took place in Bogotá, Colombia, from 30 March to 2 May 1948. The Conference approved the first part of Article XXVI (Paragraph 3) referring to denunciation. The second part of Article XXVI (Paragraph 3) was sent to the Drafting Committee. On 29 April, at the last session of the Third Commission's Drafting Committee,[131] the then Article LV (now Article LVI) was divided into two paragraphs:

> "This treaty will be in force indefinitely, but it may be denounced through advance notice of one year, and will cease to have effect for the party making the denunciation, and remains in force for

[130] Annex 30: Inter-American Juridical Committee, *Inter-American Peace System: Definitive Project Submitted to the Consideration of the Ninth International Conference of American States in Bogotá, Article XXVI*, 18 Nov. 1947, Article XXVI, p. 9.

[131] Annex 31: Ninth International Conference of American States, *Minutes of the Second Part of the Fourth Session of the Coordination Commission*, 29 Apr. 1948, p. 537.

> the other signatories. The denunciation will be made to the Pan-American Union, which will transmit it to the other contracting parties.
>
> The denunciation will not have any effect on proceedings pending and initiated prior to the transmission of the respective notice."[132]

3.51. As can be seen, the U.S. Proposal of 1938 on the matter of denunciation was almost identical to the final text adopted in the Pact of Bogotá. But it had an important structural modification: the separation of the single paragraph in the original into two paragraphs to better reflect the different subject matters of each paragraph. The second paragraph makes abundantly clear that only those pending proceedings that were initiated prior to the transmission of the denunciation notice remain unaffected. Of the other drafting changes introduced by the Drafting Committee in 1948, the principal change was the replacement of the expression "before notice of denunciation is given" by the expression "prior to the transmission of the particular notification". That was a change which served to emphasize that the critical date was that of transmission. Both the reference of the second paragraph to the Drafting Committee and the change made by that Committee confirm that specific attention was paid to the second paragraph and its drafting.

3.52. The chart below shows the modifications undergone by the paragraph in question in the inter-American treaty context.

---

[132] Annex 31, p. 541.

The development of the second paragraph of Article LVI of the Pact of Bogotá

U.S. PROPOSAL FOR THE TREATY ON THE CONSOLIDATION OF AMERICAN PEACE CONVENTIONS, 1938	PACT OF BOGOTÁ,1948
"ARTICLE XXII: The present treaty shall remain in effect indefinitely, but may denounced by means of one year's notice given to the Pan American Union, which shall transmit it to the other signatory government. After the expiration of this period the treaty shall cease in its effects as regards the party which denounce it, but shall remain in effect for the remaining high contracting parties. *Denunciation shall not affect any pending proceedings instituted before notice of denunciation is given*." (Emphasis added in the original).	"ARTICLE LVI: The present Treaty shall remain in force indefinitely, but may be denounced upon one year's notice, at the end of which period it shall cease to be in force with respect to the state denouncing it, but shall continue in force for the remaining signatories. The denunciation shall be addressed to the Pan American Union, which shall transmit it to the other Contracting Parties. *The denunciation shall have no effect with respect to pending procedures initiated prior to the transmission of the particular notification*." (Emphasis added).

3.53. Thus, the *travaux préparatoires* of the Pact of Bogotá confirm the ordinary meaning of Article LVI: Article LVI is

structured in two paragraphs separating the deferred general effect of denunciation on the Pact's other obligations, from the immediate effect on procedures initiated after denunciation.

C. Colombia's Denunciation of the Pact of Bogotá was in Accordance with the Requirements of the Pact of Bogotá

3.54. Colombia denounced the Pact, with immediate effect, on 27 November 2012. On that date, the Minister of Foreign Affairs of Colombia transmitted to the depositary, the General Secretariat of the OAS, a notification of denunciation pursuant to Article LVI of the Pact. It will be convenient to set it out again:

> "I have the honour to address Your Excellency, in accordance with article LVI of the American Treaty on Pacific Settlement, on the occasion of notifying the General Secretariat of the Organization of American States, as successor of the Pan American Union, that the Republic of Colombia denounces as of today from the 'American Treaty on Pacific Settlement', signed on 30 April 1948, the instrument of ratification of which was deposited by Colombia on 6 November 1968.
>
> The denunciation from the American Treaty on Pacific Settlement is in force as of today with regard to procedures that are initiated after the present notice, in conformity with Article LVI, second paragraph..."[133]

---

[133] Annex 15. The original text in Spanish says:

"Tengo el honor de dirigirme a Su Excelencia, de conformidad con el artículo LVI del Tratado Americano de Soluciones Pacíficas, con ocasión de dar aviso a la Secretaria *General de la Organización de Estados*

3.55. In her Note, the Minister of Foreign Affairs stated unequivocally that Colombia's denunciation of the Pact took effect "as of today", that is, 27 November 2012,

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

3.56. According to the Note and in accordance with the second paragraph of Article LVI of the Pact, while the withdrawal could not have had any effect with respect to pending *procedures* initiated prior to the transmission of the notification, the withdrawal had immediate effect with regard to any *procedures* initiated subsequent to the transmission of the notification on 27 November 2012.

3.57. On 28 November 2012, the Department of International Law of the Secretariat for Legal Affairs of the OAS informed

---

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

the States Parties to the Pact and the Permanent Missions of the other Member States of the OAS that on 27 November 2012 it had received Note GACIJ No. 79357 by which the Republic of Colombia "denounced" the American Treaty on Pacific Settlement "Pact of Bogotá", signed in Bogotá, 30 April 1948.[134] No State Party to the Pact reacted to that Note.

D. Response to points made in the *Memorial*

3.58. In its *Memorial*, Nicaragua deals only summarily with the jurisdiction of the Court under Article XXXI of the Pact of Bogotá.[135] The present section responds point-by-point to what little Nicaragua says, though most of the issues have already been addressed in greater length in the preceding sections of the present Chapter.

3.59. As a preliminary point, it should be noted that Nicaragua refers to the effect of Article XXXI as two 'matching declarations',[136] as though they were declarations under the Optional Clause (Article 36, paragraph 2 of the ICJ Statute). Indeed, it later refers to "Colombia's declaration in conformity with Article 36, paragraph 2 of the Court's Statute"[137] and "Colombia's declaration accepting the Court's compulsory

134 Annex 16.
135 Memorial of Nicaragua, paras. 1.12-1.23.
136 *Ibid.*, para. 1.14.
137 *Ibid.*, para. 1.16.

jurisdiction".[138] That is similar to an argument made by Honduras in the *Border and Transborder Armed Actions (Nicaragua* v. *Honduras)* case, which was rejected by the Court.[139] Jurisdiction under Article XXXI is treaty-based, falling under Article 36, paragraph 1 of the Court's Statute. It does not depend upon the making of 'matching declarations' under Article 36, paragraph 2.[140] While it has similar effect, as the Court has made clear the commitment under Article XXXI is "an autonomous commitment."[141]

3.60. In arguing that the Court has jurisdiction under the Pact, Nicaragua relies almost exclusively on the words "so long as the present Treaty is in force", which appear in Article XXXI. By then referring only to paragraph 1 of Article LVI, and ignoring its second paragraph, Nicaragua concludes that jurisdiction covers applications made after the transmission of the notification of denunciation.[142] In doing so, Nicaragua ignores the fact that these words are part of the longer expression, "without the necessity of any special agreement so long as the present Treaty is in force". That expression is included in

---

138 Memorial of Nicaragua, paras. 1.18-1.19.

139 *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 69. at pp. 82-88, paras. 28-41. At paragraph 33, the Court recalled that Nicaragua had advanced the same argument as Honduras in 1984 in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America).*

140 This point is made clearly in the extract from the article by Jiménez de Aréchaga cited at Memorial of Nicaragua, para. 1.22.

141 *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 69 at p. 85, para. 36.

142 Memorial of Nicaragua, para. 1.16.

Article XXXI to indicate that the jurisdiction established under Article XXXI does not require a special agreement (*compromis*). The inclusion of these words within Article XXXI does not and cannot override the express terms of Article LVI, second paragraph. To interpret them as having this effect would render the terms of Article LVI, second paragraph without effect contrary to the interpretive principle of *effet utile*.[143]

3.61. The "*effet utile*" principle is one of the keystones of treaty interpretation. As the Court and the PCIJ have stated on numerous occasions:

> "in case of doubt the clauses of a special agreement by which a dispute is referred to the Court, must, if it does not involve doing violence to their terms, be construed in a manner enabling the clauses themselves to have appropriate effects (*Free Zones of Upper Savoy and the District of Gex, Order of 19 August 1929, P.C.I.J., Series A, No. 22*, p. 13)."[144]

3.62. Nicaragua seeks to suggest that if Colombia's interpretation were to be accepted, the first paragraph of Article LVI would be devoid of effect. That is simply not the

---

[143] See paras. 3.15-3.16 above.

[144] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70 at p. 125, para. 133; *Corfu Channel case, Judgment of April 9th 1949: I.C.J. Reports 1949*, p. 4 at p. 24: "It would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement should be devoid of purport or effect."; *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 6 at p. 25, para. 51: "Any other construction would be contrary to one of the fundamental principles of interpretation of treaties, consistently upheld by international jurisprudence, namely that of effectiveness".

case. As explained above, there is a clear distinction between the first and second paragraphs of Article LVI. The first paragraph provides that denunciation takes effect with one year's notice as regards the Pact as a whole, which includes important rights and obligations unconnected to any specific procedure that may be initiated under the Pact. By contrast, the second paragraph of Article LVI deals exclusively with procedures under the specific provisions of Chapters Two, Three, Four and Five that were initiated before the transmission of notification of denunciation and hence were pending at that moment.

3.63. The rights and obligations of the Parties to the Pact that are preserved by the first paragraph of Article LVI during the one year period of denunciation include the 'general obligation to settle disputes by peaceful means' set forth in Chapter One of the Pact, and the following:

- The solemn reaffirmation under Article I of commitments made in earlier international conventions and declarations, as well as in the Charter of the United Nations: (i) to refrain from the threat or the use of force, (ii) or from any other means of coercion for the settlement of their controversies, and (iii) to have recourse at all times to pacific procedures.
- The obligation under Article II "to settle international controversies by regional procedures before referring them to the Security Council" as well as affording the Parties the possibility of having recourse to "such special

procedures as, in their opinion, will permit them to arrive to a solution", therefore providing them with an alternative to the procedures established in the Pact.

- The obligation under Article VII restricts "not to make diplomatic representations in order to protect their nationals, or to refer a controversy to a court of international jurisdiction for that purpose, when the said nationals have had available the means to place their case before competent domestic courts of the respective state".
- The provision contained in Article VIII concerning the right of individual and collective self-defence.

3.64. Nicaragua's attempt, in the *Memorial*, to side-step the plain words of Article LVI is unconvincing. It would have been easy enough for the negotiators of the Pact to draft a provision under which denunciation had no effect on any procedures instituted during the period of notice provided for in the first paragraph of Article LVI, as was done in several examples of treaties mentioned above. They did not do so. Moreover, as shown above, the negotiating history of Article LVI confirms that States deliberately chose to accept the U.S. Proposal and draft the second paragraph so that it had the effect of allowing a party to withdraw from the compulsory procedures under the Pact with immediate effect.

3.65. Nicaragua proceeds to make five points[145] in an effort to

[145] Memorial of Nicaragua, paras. 1.18-1.23.

demonstrate that the second paragraph of Article LVI does not mean what its plain words say. This attempt to establish that "Colombia's denunciation of the Pact… has no bearing on the Court's jurisdiction"[146] fails.

3.66. *First*, Nicaragua asserts that "there is nothing in this sentence [the second paragraph of Article LVI] that negates the effectiveness of Colombia's declaration". And it goes on to say that "[n]or is there anything in the sentence that negates" the first paragraph of Article LVI.[147] Nicaragua makes these bald assertions without reference to the actual terms of the second paragraph, which qualify the effect of denunciation under the first paragraph, by making it clear that denunciation does not affect pending proceedings, that is proceedings instituted before transmission of the notice of denunciation. Nicaragua merely states that

> "To read the language otherwise, as Colombia apparently does, would not only be illogical, and out of keeping with the plain text, but would also be in direct contradiction of the other Treaty provisions quoted above, to wit, Article XXXI and LVI, first paragraph; and this would be inconsistent with the rules of treaty interpretation set forth in Articles 31 to 33 of the Vienna Convention on the Law of Treaties."[148]

3.67. On the contrary, it is Nicaragua that puts forward arguments that are inconsistent with the Vienna rules. Nicaragua

---

146 Memorial of Nicaragua, para. 1.18.
147 *Ibid.*
148 *Ibid.*

ignores the "ordinary meaning to be given to the terms of the treaty". Indeed, it does not even seek to address the terms of the second paragraph of Article LVI, which are the relevant terms in the present context ("pending procedures initiated prior to the transmission of the particular notification"), and it ignores the *travaux préparatoires*.

3.68. *Second*, Nicaragua argues that "the second sentence of Article LVI cannot apply to declarations under Article XXXI because those declarations are not 'pending procedures'."[149] This argument is specious. It has already been pointed out that Article XXXI does not involve 'matching declarations' as asserted by Nicaragua.[150] The reference in the second sentence to 'pending procedures' is not a reference to any declaration accepting the Court's jurisdiction, but to a 'procedure initiated' under the Pact, that is to say, a procedure of good offices or mediation;[151] a procedure of inquiry or conciliation;[152] a judicial procedure;[153] or a procedure of arbitration.[154] In the present case, the procedure in question is the judicial procedure instituted by unilateral application on 26 November 2013, that is, just one day short of 12 months after the transmission of the notification of denunciation on 27 November 2012.

3.69. *Third* (presumably in the alternative), Nicaragua refers to

149 Memorial of Nicaragua, para. 1.19.
150 See para. 3.59 above.
151 Pact of Bogotá, Chapter Two.
152 *Ibid.*, Chapter Three.
153 *Ibid.*, Chapter Four.
154 *Ibid.*, Chapter Five.

"Colombia's apparent *a contrario* argument".[155] And it argues that "the [second] sentence does not address 'pending procedures' initiated after a notice of denunciation has been circulated", but "merely states that some procedures, i.e., those initiated *prior* to the notice, would *not* be affected."[156] Even accepting that the second sentence mentions expressly only proceedings instituted before the notice was transmitted, the *a contrario* argument is a powerful one, having regard to the terms of the second paragraph.[157] It was clearly intended that no new procedures could be instituted after transmission of the notice of denunciation. It will further be recalled that the *travaux* show that the negotiating States took a conscious decision to exclude procedures that were commenced after transmission of the notice of denunciation.[158] It is no argument simply to assert, as Nicaragua does, that "the *a contrario* reading of the sentence cannot stand against the express language of Articles XXXI and LVI, first paragraph."[159] As explained above, the terms of these provisions do not contradict the interpretation of the second paragraph set out in the present Chapter.

3.70. *Fourth*, Nicaragua relies upon the Court's case-law to the effect that its jurisdiction is not affected by the expiry of an Optional Clause declaration.[160] This is uncontested, but says nothing about whether jurisdiction is established in the first

---

155 Memorial of Nicaragua, para. 1.20.
156 *Ibid.*, para. 1.20.
157 See paras. 3.20-3.32 above.
158 See paras. 3.33-3.54 above.
159 Memorial of Nicaragua, para. 1.20.
160 *Ibid.*, para. 1.21.

place. The present case is clearly different, since it involves the interpretation of a jurisdictional provision in a treaty, in accordance with its own terms, not the effect of the termination of an Optional Clause declaration.

3.71. *Fifth*, Nicaragua relies upon a 1989 article by Jiménez de Aréchaga,[161] which it reads as indicating that, in the view of that distinguished author, jurisdiction persists in respect of procedures commenced during the one-year notice period. The author does not say that. He states, without reference to Article LVI, that "the withdrawal of the acceptance of compulsory jurisdiction as soon as the possibility of a hostile application looms on the horizon has been severely restricted." It is indeed 'severely restricted' – but not wholly excluded – since to avoid a looming application it is not sufficient to withdraw a declaration – as may be the case under the Optional Clause, for example in the case of the United Kingdom – but the State has to go as far as to denounce the Pact of Bogotá, which is politically a much more significant act.

3.72. *Finally*, Nicaragua refers to a phrase from the Court's judgment in the *Border and Transborder Armed Actions* case[162] in which it said that "the commitment in Article XXXI… remains valid *ratione temporis* for as long as that instrument itself remains in force between those States."[163] What Nicaragua

---

161 Memorial of Nicaragua, para. 1.22.

162 *Ibid.*, para. 1.23.

163 *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 69 at p. 84, para. 34 *in fine*.

neglects to point out is that this was one of a series of points made by the Court in response to Honduras' attempt to import the conditions, including the temporal conditions, of its Optional Clause declaration into Article XXXI of the Pact of Bogotá. When the relevant passage[164] is read as a whole it is clear that the Court was not addressing the effect of Article LVI, but only addressed Article XXXI.

E. Conclusion

3.73. For the reasons set out in the present Chapter, and in accordance with the terms of the first and second paragraphs of Article LVI of the Pact of Bogotá, the International Court of Justice does not have jurisdiction in respect of the proceedings commenced by Nicaragua against Colombia on 26 November 2013, since the proceedings were instituted after the transmission of Colombia's notice of denunciation of the Pact.

[164] *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 69 at p. 84, paras. 33-34.

APPENDIX TO CHAPTER 3
THE PACT OF BOGOTÁ

3A.1. Chapter One is entitled "General obligation to settle disputes by peaceful means", and contains a number of undertakings of a general nature. In Article I, the Parties,

> "solemnly reaffirming their commitments made in earlier international conventions and declarations, as well as in the Charter of the United Nations, agree to refrain from the threat or the use of force, or from any other means of coercion for the settlement of their controversies, and to have recourse at all times to pacific procedures."

3A.2. Under Article II, the Parties "recognize the obligation to settle international controversies by regional procedures before referring them to the Security Council", and

> "Consequently, in the event that a controversy arises between two or more signatory states which, in the opinion of the parties, cannot be settled by direct negotiations through the usual diplomatic channels, the parties bind themselves to use the procedures established in the present Treaty, in the manner and under the conditions provided for in the following articles, or, alternatively, such special procedures as, in their opinion, will permit them to arrive at a solution."

3A.3. The commitment to submit to the procedures under the Pact applies only where a controversy arises between two or more signatory states which, in the opinion of the parties, cannot

be settled by direct negotiations through the usual diplomatic channels.[165]

3A.4. Articles III and IV states the Parties' freedom to choose the procedure that they consider most appropriate, although no new procedure may be commenced until the initiated one is concluded. Article V excludes the application of the Pact's procedures to matters within domestic jurisdiction.

3A.5. According to Article VI:

> "The aforesaid procedures … may not be applied to matters already settled by arrangement between the parties, or by arbitral award or by decision of an international court, or which are governed by agreements or treaties in force on the date of the conclusion of the present Treaty."

3A.6. Article VII restricts recourse to diplomatic protection, providing as follows:

> "The High Contracting Parties bind themselves not to make diplomatic representations in order to protect their nationals, or to refer a controversy to a court of international jurisdiction for that purpose, when the said nationals have had available the means to place their case before competent domestic courts of the respective state."

3A.7. The last provision in Chapter One concerns the right of individual and collective self-defense, and reads:

---

[165] This restriction in Article II was discussed by the Court in *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 69.

> "Neither recourse to pacific means for the solution of controversies, nor the recommendation of their use, shall, in the case of an armed attack, be ground for delaying the exercise of the right of individual or collective self-defense, as provided for in the Charter of the United Nations."

3A.8. Chapters Two and Three cover "Procedures of Good Offices and Mediation", and "Procedure of Investigation and Conciliation" respectively, while Chapter Five deals with "Procedure of Arbitration".

3A.9. Chapter Four, entitled "Judicial Procedure", consists of seven articles, the first of which, Article XXXI, is the provision relied upon by Nicaragua as the basis for the jurisdiction of the Court in the present proceedings. It is set out and discussed in these pleadings' Chapter 3 supra.[166]

3A.10. Chapter Six of the Pact, consisting of a single article (Article L), makes special provision for ensuring the fulfillment of judgments and awards. It reads:

> "If one of the High Contracting Parties should fail to carry out the obligations imposed upon it by a decision of the International Court of Justice or by an arbitral award, the other party or parties concerned shall, before resorting to the Security Council of the United Nations, propose a Meeting of Consultation of Ministers of Foreign Affairs to agree upon appropriate measures to ensure the fulfillment of the judicial decision or arbitral award."

---

[166] Chapter 3, at paras. 3.8-3.10.

3A.11. Chapter Seven, also a single article, makes special provision for seeking advisory opinions from the Court:

> "The parties concerned in the solution of a controversy may, by agreement, petition the General Assembly or the Security Council of the United Nations to request an advisory opinion of the International Court of Justice on any juridical question.
>
> The petition shall be made through the Council of the Organization of American States."

3A.12. Chapter Eight (Final Provisions) has the following articles:

- Art. LII ratification
- Art. LIII coming into effect
- Art. LIV adherence; withdrawal of reservations
- Art. LV reservations
- Art. LVI denunciation
- Art. LVII registration
- Art. LVIII treaties that cease to be in force as between the parties[167]
- Art. LVIX excludes application of the foregoing article to procedures already initiated or agreed upon on the basis of such treaties

[167] Treaty to Avoid or Prevent Conflicts between the American States, of 3 May 1923; General Convention of Inter-American Conciliation, of 5 Jan. 1929; General Treaty of Inter-American Arbitration and Additional Protocol of Progressive Arbitration, of 5 Jan. 1929; Additional Protocol to the General Convention of Inter-American Conciliation, of 26 Dec. 1933; Anti-War Treaty of Non-Aggression and Conciliation, of 10 Oct. 1933; Convention to Coordinate, Extend and Assure the Fulfilment of the Existing Treaties between the American States, of 23 Dec. 1936; Inter-American Treaty on Good Offices and Mediation, of 23 Dec. 1936; Treaty on the Prevention of Controversies, of 23 Dec. 1936.

3A.13. Finally, Article LX provides that the Treaty shall be called the "Pact of Bogotá."

Chapter 4

SECOND AND THIRD OBJECTIONS: THE COURT LACKS JURISDICTION BECAUSE THERE WAS NO DISPUTE WITH RESPECT TO NICARAGUA'S CLAIMS; AND BECAUSE THE PRECONDITION IN ARTICLE II OF THE PACT OF BOGOTÁ HAD NOT BEEN FULFILLED

A. Introduction

4.1. Even if the Court does not uphold Colombia's *ratione temporis* objection to jurisdiction addressed in Chapter 3, the Court still has no jurisdiction under the Pact for the following two reasons:

- *First*, there was no dispute between the two Parties since, prior to filing its *Application*, Nicaragua failed to make any claims relating to the violation of its "sovereign rights and maritime zones" or to "the use of or threat to use force" by Colombia, or to Colombia's Decree 1946 of 2013 that could give rise to a dispute, or any objection to Colombia's conduct relating to the relevant maritime areas.
- *Second*, notwithstanding the above, at the time of the filing of the *Application*, the Parties were not of the opinion that the purported controversy "[could not] be settled by direct negotiations through the usual diplomatic channels", as is required by Article II before resorting to the dispute resolution procedures in the Pact.

These objections are legally distinct, but they are presented together in this Chapter because they arise out of the same factual matrix.

4.2. Article II of the Pact provides as follows:

> "The High Contracting Parties recognize the obligation to settle international controversies by regional procedures before referring them to the Security Council of the United Nations.
>
> Consequently, in the event that a controversy arises between two or more signatory states which, in the opinion of the parties, cannot be settled by direct negotiations through the usual diplomatic channels, the parties bind themselves to use the procedures established in the present Treaty, in the manner and under the conditions provided for in the following articles, or, alternatively, such special procedures as, in their opinion, will permit them to arrive at a solution."

4.3. Colombia will first address the relevant temporal scope for assessing the existence of a dispute and the fulfilment of the condition precedent under Article II of the Pact (Section B).

4.4. Following this, Colombia will set out its second preliminary objection: namely, the lack of jurisdiction due to the absence of a dispute between the two States with regard to the claims referred to in Nicaragua's *Application* (Section C). In this connection, it is particularly noteworthy that Nicaragua's only diplomatic Note in which it complained of Colombia's conduct

was sent to Colombia on 13 September 2014, well after the *Application* was filed.

4.5. In Section D, Colombia will turn to its third objection, and will address the meaning and scope of Article II of the Pact. Neither Nicaragua's *Application* nor its *Memorial* even mentions the precondition set out in Article II for the submission of a controversy to the dispute resolution procedures contained in the Pact, let alone shows that it has been satisfied in this case.

4.6. Section E then addresses the conduct of the Parties. As will be seen, their behaviour following the Court's Judgment of 19 November 2012 attests to the absence of a dispute as well as the non-fulfilment of the precondition under Article II of the Pact that the Parties were of the opinion that the alleged dispute "cannot be settled by direct negotiations through the usual diplomatic channels". To the contrary, the highest officials of both Parties have repeatedly stressed the need to enter into discussions with a view to concluding an agreement relating to the Judgment.

B. The Relevant Time Frame

4.7. The Court has emphasized on numerous occasions, most recently in its 2012 Judgment in the *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)* case, that what matters is that "on the date when the *Application* [is] filed, a dispute exist[s]".[168] In relation to the prerequisite under Article II of the Pact, the Court has also indicated that:

> "The critical date for determining the admissibility of an application is the date on which it is filed (cf. *South West Africa, Preliminary Objections, I.C.J. Reports 1962*, p. 344). It may however be necessary, in order to determine with certainty what the situation was at the date of filing of the Application, to examine the events, and in particular the relations between the parties, over a period prior to that date, and indeed during the subsequent period."[169]

Moreover, in the 2011 Judgment in the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* case, the Court reaffirmed, in relation to a provision analogous to Article II of the Pact, that the prerequisite must "be fulfilled before the seisin".[170]

---

[168] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012*, p. 422 at p. 445, para. 54.

[169] *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 69 at 95, para. 66.

[170] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011,* p. 70 at p.128, para. 141.

4.8. Consistent with these precedents, the critical date in the present case is the date of the filing of Nicaragua's *Application*: 26 November 2013. Thus, Nicaragua must demonstrate that (i) a controversy on the subject-matter of its claims had crystallized by the time it filed its *Application*, and (ii) that the condition precedent in Article II of the Pact was fulfilled on 26 November 2013.

4.9. Moreover, even if the Parties' conduct after 26 November 2013 were relevant, that conduct, discussed in Section E, confirms that no dispute on the subject-matter of Nicaragua's *Application* has crystallized, and that negotiations have not been exhausted.

C. The Second Objection: The Claims Referred to in Nicaragua's *Application* Were Not the Subject-Matter of a Dispute

4.10. As the Court stated in the 1974 judgments in the *Nuclear Tests (Australia* v. *France) (New Zealand* v. *France)* cases:

> "the existence of a dispute is the primary condition for the Court to exercise its judicial function; it is not sufficient for one party to assert there is a dispute, since 'whether there exists an international dispute is a matter for objective determination' by the Court (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase), Advisory Opinion, I.C.J. Reports 1950,* p. 74)."[171]

[171] *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 253 at pp. 270-271, para. 55 and *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 457 at p. 476, para. 58.

To which the Court then added:

> "not only Article 38 itself but other provisions of the Statute and Rules also make it clear that the Court can exercise its jurisdiction in contentious proceedings only when a dispute genuinely exists between the parties."[172]

4.11. In order to reach an objective determination as to the existence of a genuine dispute between two States, the Court has stressed that "[i]t must be shown that the claim of one party is positively opposed by the other".[173] In other words, as explained by a former Vice-President of the Court: "[t]he test of whether there exists a dispute is thus one of opposability and not of unfettered freedom for the Court."[174]

4.12. This is the situation under the Court's Statute, but it is also the situation under the Pact of Bogotá, which refers twice to the need for a dispute to exist in order that judicial proceedings can be activated by one party against the other. First, Article II provides that the parties to the Pact bind themselves to use the

---

[172] *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 253 at p. 271, para. 57 and *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 457 at p. 477, para. 60.

[173] *South West Africa Cases (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment of 21 December 1962: I.C.J. Reports 1962*, p. 319 at p. 328; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction of the Court and Admissibility of the Application, Judgment, I.C.J. Reports 2006*, p. 6 at p. 40, para. 90; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70 at p. 84, para. 30.

[174] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 832. Dissenting opinion of Vice-President Al-Khasawneh, p. 885, para. 19.

procedures established in it (including the judicial procedures) "in the event that a controversy arises between two or more signatory states." Second, in Article XXXI the parties to the Pact declare that they recognize the jurisdiction of the Court "in all disputes of a juridical nature that arise among them" concerning the well-known categories of matters listed thereon. Therefore, it is clear that under the system for the peaceful settlement of disputes established in the Pact of Bogotá, the Court can only exercise its jurisdiction in contentious proceedings when a genuine controversy or dispute of a juridical nature has arisen between States that are parties to the treaty.

4.13. According to Nicaragua's *Application*, the subject-matter of the controversy relates to Colombia's purported violations of "Nicaragua's sovereign rights and maritime zones" (as determined by the 2012 Judgment) as well as "the threat of the use of force… in order to implement these violations". However, there was no dispute at the date on which the *Application* was lodged concerning the claims referred to by Nicaragua in its pleadings.

4.14. Following the 2012 Judgment, declarations have been consistently made by both States' highest representatives concerning the necessity to implement the Judgment through the adoption of a treaty dealing with, *inter alia*, (i) the protection of the historic fishing rights of the population of the Archipelago of San Andrés, Providencia and Santa Catalina; (ii) the protection of the Seaflower Biosphere Reserve; and (iii) developing

measures for ensuring security in the relevant waters, in particular in relation to the fight against organized crime and drug-trafficking. In contrast, before filing its *Application*, Nicaragua never complained to Colombia that its conduct violated Nicaragua's sovereign rights and maritime zones, let alone that it was in breach of Article 2, paragraph 4, of the UN Charter. Given Nicaragua's failure to specify the subject-matter of its allegations prior to the submission of its *Application*, or to raise a complaint, no objective dispute existed between the Parties.

4.15. If anything, the opposite was the case. For, not only had Nicaragua never referred to any such violations on the part of Colombia prior to filing its *Application*, but, on the contrary, members of Nicaragua's Executive and Military were on record as having stated that communications with the Colombian Navy were good, the situation in the south-western Caribbean was calm, and that no problems existed.[175]

4.16. It was only on 13 September 2014, almost ten months after the *Application* was filed and just three weeks before Nicaragua filed its *Memorial*, that Nicaragua sent a diplomatic Note to Colombia which, for the first time, made reference to the "infringe[ment] upon the sovereign rights of Nicaragua" and "the continuous threat to use force" by Colombia. In support of

[175] See Section E below.

its contention, Nicaragua attached to its Note, also for the first time, a list of alleged "incidents".[176]

4.17. In its reply dated 1 October 2014, Colombia expressed surprise at Nicaragua's list of "incidents". As Colombia pointed out:

> "(…) This is the first note from Nicaragua voicing itself on that regard, even though more than 85 per cent of the incidents supposedly occurred more than six months ago. Without prejudice to the position of Colombia in relation to the actual occurrence of said alleged events, Nicaragua's lateness in reporting them demonstrates that none was seen or understood by Nicaragua or Colombia as an incident."[177]

4.18. Nicaragua's belated protest cannot change the fact that, prior to the filing of the *Application*, a dispute had never arisen let alone crystallized. Nicaragua attempts to justify its tardiness by stating that it wanted to "avoid favouring the political manipulation of this sensitive topic in the face of the recent Colombian national elections".[178] But this excuse rings hollow, and can in no way create a dispute where none existed at the relevant time.

---

[176] Annex 17.

[177] Annex 18. In this context, also of interest is the fact that more than 70% of the "incidents" adduced in Nicaragua's Note purportedly took place after the filing of the *Application*. In other words, even accepting that such events occurred *quod non*, they do not prove the existence of a dispute prior to the critical date.

[178] Annex 17.

4.19. Further confirmation of this state of affairs can be drawn from Nicaragua's own *Memorial*. On 13 August 2014, that is to say, eight months *after* the filing of the *Application* and just a month and a half prior to the filing of its *Memorial*, the Ministry of Foreign Affairs of Nicaragua had to "request" the Nicaraguan Army headquarters and General Staff - Navy to provide information

> "of any incident that *may* have taken place between the Colombian Navy and Nicaraguan Navy, as well as with the Nicaraguan fishermen in the zone that was returned by the International Court of Justice."[179] (Emphasis added)

4.20. The fact that Nicaragua's Foreign Ministry was unaware of any problems as late as August 2014 demonstrates that: (i) Nicaragua's Armed Forces had not deemed it worthy to notify Nicaragua's civilian authorities responsible for foreign relations of the incidents that Nicaragua now says occurred prior to – and even after – the filing of the *Application*; (ii) before the filing of the *Application*, no competent Nicaraguan authority had thus been informed of any alleged incidents, much less registered a complaint about them; and, (iii) the attempt made by Nicaragua to justify its failure to protest by invoking its desire not to favour the political manipulation of the Colombian national elections is unpersuasive to say the least.

[179] Memorial of Nicaragua, Annex 23-A, p. 281.

D. The Third Objection: The Precondition of Article II of the Pact of Bogotá was not met. The Meaning of Article II of the Pact of Bogotá

4.21. The text of Article II of the Pact of Bogotá has been set out in paragraph 4.2 above. The Court has already had the opportunity, in its 1988 Judgment in the *Border and Transborder Armed Actions (Nicaragua* v. *Honduras)* case, to elucidate various points concerning the interpretation of that Article.[180] The same provision is at the heart of the present preliminary objection. As will be seen:

- Article II imposes a condition precedent to invoking the "procedures" established by the Pact, including resort to judicial means of settlement;
- the prerequisite is one pertaining to the Parties' good faith opinion; and,
- the prerequisite presupposes that Parties involved in a controversy and not only one of them must be of the opinion that it "cannot be settled by direct negotiations through the usual diplomatic channels" before judicial proceedings can be brought.

(1) ARTICLE II OF THE PACT OF BOGOTÁ IMPOSES A CONDITION PRECEDENT TO THE PROCEDURES ESTABLISHED BY THE PACT

4.22. As the Court stated in its 1988 Judgment, Article II of the Pact "constitutes… a *condition precedent to recourse to the*

[180] *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 69 at pp. 92-99, paras. 58-76.

pacific procedures of the Pact in all cases" (emphasis added).[181] The Court therefore rejected Nicaragua's attempts in the above-mentioned case to deprive Article II of any *effet utile* by arguing that Article II was irrelevant given the compromissory clause contained in Article XXXI of the Pact.[182]

4.23. Article II refers to a controversy which, in the opinion of the Parties, "cannot be settled" by direct negotiations rather than one which "is not settled".

4.24. With respect to the latter category of clauses, the Court noted that Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) – which requires that the dispute "is not settled by negotiations" – must not be interpreted in the sense "that all that is needed is that, as a matter of fact, the dispute ha[s] not been resolved".[183]

---

[181] *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 69 at p. 94, para. 62.

[182] Nicaragua had tried to read Article XXXI of the Pact in isolation. In other words, it separated Article II of the Pact from the compromissory clause by stating that the former only sets forth "one circumstance" and "not the exclusive one - in which the parties bind themselves to use the procedures set forth in the Pact" (*Border and Transborder Armed Actions (Nicaragua* v. *Honduras),* Counter-Memorial of Nicaragua (Jurisdiction and Admissibility), para. 193). This led Nicaragua to conclude that "[b]ecause Article XXXI is unconditional, it applie[d] regardless of the opinion of the parties as to whether the dispute [could] be settled by negotiations." (*Ibid.*). This was clearly an incomplete analysis of the context. Alternatively, Nicaragua argued that, "[t]he true construction" of this provision is that "the parties to a dispute are bound to use the procedures in the Pact whenever one of them believes that it cannot be settled by diplomacy." (*Ibid.*, para. 194). This argument ran counter to the plain language of Article II, which refers to "the opinion of the parties" not just one of them, and was equally unavailing.

[183] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation),*

Indeed, the Court also emphasized that negotiations are still a precondition to seisin.[184] As the Court observed – by referring to the *Armed Activities on the Territory of Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda)* case – a clause referring to a dispute *which is not settled* "requires also that any such dispute be subject of negotiations" prior to the filing of an application.[185]

4.25. The same reasoning applies with greater force when the clause in question refers to a dispute (or controversy) which "cannot be settled by direct negotiations through the usual diplomatic channels". As the joint dissenters in the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* case observed:

> "28. It is true that the Court has *consistently* interpreted compromissory clauses providing for the submission to the Court of disputes which 'cannot *be* settled' (in French: 'qui ne peuvent pas être réglés' or 'qui ne sont pas susceptibles d'être réglés') by negotiation as meaning that the Court

---

Preliminary Objections, Judgment, I.C.J. Reports 2011, p. 70 at p. 126, para. 133.

[184] *Ibid.,* p. 128, para. 140.

[185] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70 at p. 127, para. 137. In the 2006 Judgment in the *Armed Activities on the Territory of Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda)* case, the Court arrived at the same conclusion with regard to two provisions that adopt the same wording of Article 22 of the CERD: Article 29, paragraph 1, of the Convention on the Elimination of all Forms of Discrimination against Women and Article 75 of the World Health Organization Constitution: *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006,* p.6 at pp. 35-41, paras. 80-93, and pp. 41-43 at paras. 94-101.

> *cannot exercise jurisdiction unless an attempt at negotiation has been made and has led to deadlock*, that is to say that there is *no reasonable hope* – or no longer any – *for a settlement of the dispute by diplomatic means*. This line of case law dates back to the Judgment in the *Mavrommatis Palestine Concessions* case…".[186] (Emphasis added)

4.26. In other words, provisions of the category requiring that the dispute "cannot be settled" – into which Article II of the Pact falls – clearly establish that the condition is only met if an attempt at negotiating has been made in good faith, and it is clear, after reasonable efforts, that a deadlock has been reached and that there is no likelihood of resolving the dispute by such means.[187]

---

[186] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011,* at p. 6. Joint dissenting opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge *ad hoc* Gaja, p. 150, para. 28.

[187] The above conclusion is confirmed by the consistent case law of the two Courts. In the 1924 Judgment in the *Mavrommatis Palestine Concessions* case, the PCIJ stated that "discussion[s] should have been commenced" and a "dead lock... reached" for the prerequisite to be met. (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p.13.). In the 1962 Judgment in the *South West Africa* cases, the Court stressed, "that an impasse was reached" and that the "continuance of this deadlock, compels a conclusion that no reasonable probability exists that further negotiations would lead to a settlement." (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports*, 1962, p. 319 at p. 345). More recently, in the 2012 Judgment in the *Questions relating to the Obligation to Prosecute or Extradite* case, the Court has taken the same position. (*Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012*, p. 422 at pp. 445-446, para. 57).

(2) THE CONDITION PRECEDENT CONCERNS THE PARTIES' OPINION

4.27. Article II of the Pact refers to a controversy which, "in the opinion of the parties", cannot be settled. This language points to the importance of the Parties' opinion as to whether the controversy can or cannot be settled by direct negotiations, rather than applying an objective evaluation whether the controversy is capable of being settled.

4.28. In the 1988 Judgment in the *Border and Transborder Armed Actions* case, the Court came to the conclusion that it "d[id] not have to make an objective assessment" of the possibility of the dispute being settled by direct negotiations, "but to consider what is the opinion of the Parties thereon."[188] At the same time, the Court also stated that "the holding of opinions can be subject to demonstration, and… the Court may expect 'the Parties [to provide] substantive evidence that they consider in good faith' a certain possibility of negotiation to exist or not to exist."[189] Thus, the Court indicated that, in order to ascertain the opinion of the Parties, it "is bound to analyse the sequence of events in their diplomatic relations."[190]

4.29. As Colombia will show in Section E below, both Parties were of the view that matters arising out of the Court's 2012

---

[188] *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 69 at p. 94, para. 63.

[189] *Ibid.*, p. 95, para. 65.

[190] *Ibid.*, p. 95, para. 67.

Judgment could and should be dealt with by a negotiated agreement. Even though they had not commenced direct negotiations to this end through the usual diplomatic channels by the time Nicaragua filed its *Application*, neither Party was of the opinion that the dispute, to the extent one may have existed, could not be settled by direct negotiations. The sequence of events shows that Colombia always kept the door open for a negotiation with Nicaragua.

(3) THE CONDITION PRESUPPOSES THAT THE PARTIES MUST BE OF THE OPINION THAT THE CONTROVERSY "CANNOT BE SETTLED BY DIRECT NEGOTIATIONS THROUGH THE USUAL DIPLOMATIC CHANNELS"

(a) The textual interpretation: the ordinary meaning of the terms "in the opinion of the parties"

4.30. Under Article 31, paragraph 1, of the Vienna Convention on the Law of Treaties, the words "in the opinion of the parties" fall to be interpreted in good faith in accordance with the ordinary meaning to be given to their terms in their context and in the light of the Pact of Bogotá's object and purpose. What is clear is that Article II refers to the opinion *of the parties*, not just of one of them. Hence, both parties must be of the opinion that a controversy cannot be settled by direct negotiations through the usual diplomatic channels before resort can be made to the dispute resolution procedures in the Pact.

4.31. In the *Border and Transborder Armed Actions* case, Nicaragua unsuccessfully argued that "in the opinion of the

parties" meant in the opinion of the State seising the Court.[191] However, this interpretation did violence to the ordinary meaning of the terms appearing in Article II, which use the plural and not the singular form of the term "parties", and it failed to give the term "parties" an *effet utile*.[192] The correct reading is confirmed by the last words of Article II, which allows the Parties to choose "such special procedures as, *in their opinion*, will permit them to arrive at a solution". (Emphasis added)

4.32. To read Article II of the Pact as meaning that only the opinion of the Party that wishes to seize the Court of the controversy matters would not only go against the plain meaning of the words, but also lead to a manifestly absurd result. For what purpose would be served by this prerequisite if its fulfilment were to depend entirely on the opinion manifested by the Applicant?

4.33. It is only when the "opinion of the parties" is to the effect that the dispute "cannot be settled" that the procedures envisaged in the Pact can be initiated. Consequently, if one, let alone both, of the States' *bona fide* opinion is that the dispute can be settled by "direct negotiations through the usual diplomatic channels", then the prerequisite is not met and the Court has no jurisdiction to hear the case.

---

[191] *Border and Transborder Armed Actions (Nicaragua* v. *Honduras),* Counter-Memorial of Nicaragua (Jurisdiction and Admissibility), para. 193.

[192] See para. 3.61 above.

(b) The textual interpretation: the context and the object and purpose of the Pact in light of the Charter of the Organization of American States

4.34. Article 3 (i) of Chapter II of the OAS Charter enunciates the principle that "[c]ontroversies of an international character arising between two or more American States shall be settled by peaceful procedures". Consistent with this provision, Article 26 in Chapter V[193] (Pacific settlement of disputes) of the OAS Charter provides as follows:

> "In the event that a dispute arises between two or more American States which, in the opinion of one of them, cannot be settled through the usual diplomatic channels, the parties shall agree on some other peaceful procedure that will enable them to reach a solution."

4.35. While Article 26 of the OAS Charter uses the term "in the opinion of one of them", it was drafted just before Article II of the Pact during the Ninth International Conference of American States held in Bogotá. To be more precise, Article II of the Pact was in fact written in the immediate aftermath of Article 26 of the OAS Charter. Thus, the changing of terminology from "in the opinion of one of them" in the Charter to "in the opinion of the Parties" in the Pact cannot be perceived as anything but a deliberate choice, which must be given proper effect.

[193] Originally adopted at the Ninth International Conference of American States as Article 22 of Chapter IV.

(c) The interpretation does not lead to the manifestly absurd result that one Party retains an arbitrary right to veto the opening of the Pact of Bogotá's procedures

4.36. In the *Border and Transborder Armed Actions* case, Nicaragua's main argument against the reading of Article II of the Pact requiring both Parties to be of the opinion that the dispute cannot be settled by negotiations was that "a party could veto resort to these modes of settlement simply by saying that in its opinion the dispute can be settled by direct negotiation between the Parties."[194] However, the Court noted that it "does not consider that it is bound by the mere assertion of the one Party or the other that its opinion is to a particular effect"[195]. As the Court explained, "it must, in the exercise of its judicial function, be free to make its own determination of that question on the basis of such evidence as is available to it."[196] It was in this context that the Court then added that it may expect "'the Parties [to provide] substantive evidence that they consider in good faith' a certain possibility of negotiation to exist or not to exist."[197]

4.37. As will be demonstrated below, the evidence in this case shows that neither Party considered that the dispute could not be settled by negotiations when Nicaragua filed its *Application*. Indeed, both of them were in favour of negotiating an agreement

---

194 *Border and Transborder Armed Actions (Nicaragua* v. *Honduras),* Counter-Memorial of Nicaragua (Jurisdiction and Admissibility), para. 189.

195 *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 69 at p. 95, para. 65.

196 *Ibid.*

197 *Ibid.*

regulating matters between them arising as a result of the 2012 Judgment. It is Nicaragua that is trying to sidestep Article II of the Pact by initiating a procedure when in reality it has consistently taken the position that the alleged controversy can be settled by "direct negotiations".

(d) The supplementary means of interpretation: the travaux préparatoires confirm the textual interpretation

4.38. Colombia does not consider that recourse to the *travaux préparatoires* of the Pact under Article 32 of the Vienna Convention is necessary since the interpretation according to the general rule enshrined in Article 31 does not leave the meaning "ambiguous or obscure", and does not lead to a result which is "manifestly absurd or unreasonable". Nonetheless, it is worth noting that the *travaux préparatoires* confirm that the drafters of the Pact made a conscious decision to use the language "in the opinion of the parties" instead of referring to the opinion of just one of them.

4.39. At the Ninth International Conference of American States in Bogotá, it was in its Third Committee that the future Article II of the Pact was initially drafted so as to provide that what mattered was only the opinion of one of the Parties. The information found in the records of the Conference on this point is rather scarce. But what is decisive is that the Committee for Coordination of the Conference subsequently adopted the terminology "*en opinión de las partes*" in the text of the final

draft article. As indicated in an explanatory note of the Style Commission of the Conference, the Pact was signed at the closure of the Conference in Spanish and it was later translated into the other three languages.[198]

(e) The 1985 attempt by the Inter-American Juridical Committee to modify Article II of the Pact of Bogotá

4.40. In 1985, the Permanent Council of the OAS requested the Inter-American Juridical Committee to determine whether amendments to the Pact needed to be made. Though the Rapporteur of the Committee had suggested modifying Article II of the Pact by amending the phrase "in the opinion of the parties" to "in the opinion of one of the parties", the Committee rejected such proposal.[199] This confirms the conclusion that Article II was drafted specifically with the intention of referring to the opinion of both parties to a dispute, not just one of them.

(4) THE NATURE AND EXTENT OF THE CONDITION REQUIRING THAT THE DISPUTE "CANNOT BE SETTLED" BY NEGOTIATIONS

(a) There must be evidence of a genuine attempt to negotiate in relation to the subject-matter of the dispute brought before the Court

4.41. In the 2011 Judgment in the *Application of the International Convention on the Elimination of All Forms of*

---

[198] Annex 32: Ninth International Conference of American States, *Style Commission*, 29 Apr. 1948, p. 591.

[199] Opinion of the Inter-American Juridical Committee on the American Treaty on Pacific Settlement (Pact of Bogotá), Organization of American States, Doc. OEA /Ser.G., CP/Doc. 1603/85, 3 Sept. 1985.

Racial Discrimination case, the Court stated that "[m]anifestly, in the absence of evidence of a genuine attempt to negotiate, the precondition of negotiation is not met."[200] In addition, it is not enough that negotiations have merely been sought. Rather, the applicant must have "made an offer – a serious offer – to negotiate with the respondent" in relation to "the subject-matter of the dispute brought before the Court".[201]

4.42. The Court based itself on similar reasoning in the 2006 Judgment in the *Armed Activities on the Territory of Congo* case, when it underlined that "[t]he evidence has not satisfied the Court that the DRC in fact sought to commence negotiations in respect of the interpretation or application of the Convention."[202]

4.43. In his separate opinion in the 1963 judgment in the *Case concerning the Northern Cameroons (Cameroon* v. *United Kingdom)*, Judge Sir Gerald Fitzmaurice remarked that:

> "it would still not be right to hold that a dispute 'cannot' be settled by negotiation, when the most obvious means of attempting to do this, namely by

---

[200] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70 at p. 133, para. 159.

[201] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70 at p. 133, para. 159, Joint dissenting opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge *ad hoc* Gaja, p. 158, paras. 51-53.

[202] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 6 at pp. 40-41, para. 91.

> direct discussions between the parties, had not been tried - since it could not be assumed that these would necessarily fail because there had been no success in what was an entirely different, and certainly not more propitious, milieu."[203]

Moreover, as the Court has recently stated[204], mere protests or disputations are not equivalent to negotiations:

> "In determining what constitutes negotiations, the Court observes that negotiations are distinct from mere protests or disputations. Negotiations entail more than the plain opposition of legal views or interests between two parties, or the existence of a series of accusations and rebuttals, or even the exchange of claims and directly opposed counter-claims. As such, the concept of 'negotiations' differs from the concept of 'dispute', and requires – at the very least – a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute."[205]

---

[203] *Northern Cameroons, Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 123. Separate opinion of Judge Sir Gerald Fitzmaurice, p. 97.

[204] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70 at p. 132, para. 157; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 6 at pp. 40-41, para. 91.

[205] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70 at p. 132, para. 157.

4.44. Based on the foregoing, a State cannot argue that it believes that a controversy "cannot be settled" unless that State has at least made a genuine attempt to negotiate.[206]

(b) The negotiations must have been exhausted

4.45. The Court's case law concerning provisions requiring that the dispute "cannot be settled" establishes that it is not sufficient merely to attempt negotiations; rather, such means must be resorted to until they have met with "failure" or "have become futile or deadlocked".[207] In this sense, the PCIJ stated:

> "Negotiations do not of necessity always presuppose a more or less lengthy series of notes and despatches; it may suffice that a discussion should have been commenced, and this discussion may have been very short; this will be the case if a deadlock is reached, or if finally a point is reached at which one of the Parties definitely declares himself unable, or refuses, to give way and there can be therefore no doubt that *the dispute cannot be settled by diplomatic negotiation*."[208] (Italics in the original)

---

[206] This was also Nicaragua's opinion in the *Border and Transborder Armed Actions* case. See, *I.C.J. Pleadings*, *Border and Transborder Armed Actions (Nicaragua* v. *Honduras)*, Vol. II, p. 98 (Pellet):

> "*La seule question qui se pose à ce stade est donc la suivante: la condition – la condition unique – mise par l'article II à la saisine de la Court est-elle remplie? En d'autres termes des 'négociations diplomatiques ordinaires' ont-elles eu lieu et peut-on déduire de celles-ci que le différend ne peut pas être résolu par ce biais?*"

[207] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70 at p. 133, para. 159.

[208] *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 13.

4.46. Nonetheless, the duration of the negotiations may be of evidentiary value. In any event, it cannot be shown that such peaceful means of settlement have failed or reached a deadlock if discussions have not, or have barely, started.[209]

4.47. As the following section will show, apart from the fact that no "dispute" existed between Nicaragua and Colombia at the time Nicaragua filed its *Application*, negotiations between the Parties had not been exhausted. Indeed, they had not even begun because Nicaragua had made no complaint that Colombia was not complying with the Judgment. Given that Article II of the Pact of Bogotá sets a condition that must be met before initiating any procedure under the Pact, which requires that the Parties be of the opinion that the dispute cannot be settled by direct negotiations, the condition to seisin had not been satisfied on 26 November 2013. Consequently, the Court lacks jurisdiction.

E. The Parties' *Bona Fide* Conduct Attests to the Fact that, in their Opinion, their Maritime Differences can be Settled by "Direct Negotiations through the Usual Diplomatic Channels"

4.48. In this section, Colombia will show that, based on the

[209] In this respect, the Court's conclusion in the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* case – that the prerequisite had not been fulfilled – was largely the consequence of the short period of time – merely three days – that had passed between the materialization of the dispute on the relevant subject-matter and the filing of the Application. *I.C.J. Reports 2011*, p. 70 at p. 135, para. 168.

conduct of both Nicaragua and Colombia, it cannot be concluded that the alleged controversy with Nicaragua is one that, "in the opinion of the Parties, cannot be settled by direct negotiations through the usual diplomatic channels". In fact, the opposite is the case. As of the date Nicaragua commenced these proceedings, the highest officials of both countries were on record as stating that they wished to undertake the negotiation of a treaty in the light of what the Court decided in the 2012 Judgment.

(1) THE CONDUCT OF NICARAGUA

4.49. The timing of Nicaragua's *Application* was evidently determined solely by the date of termination, in its view, of the basis of jurisdiction under Article XXXI of the Pact of Bogotá. It was not determined by any opinion that negotiations to resolve an alleged dispute or disputes had failed or were futile. Nicaragua filed its *Application* on 26 November 2013, one day before the date on which, in its opinion, the basis of jurisdiction under the Pact of Bogotá expired. The timing of that filing was based on the fact that, regardless of the chances of success of negotiations, Nicaragua considered that it had to seise the Court prior to the expiry of the only basis of jurisdiction available to it. The fact that Nicaragua felt that it had to institute proceedings at the latest on that day cannot in any way affect the assessment of the jurisdictional pre-condition set out in Article II of the Pact, which Nicaragua had not satisfied.

4.50. Nicaragua's pleadings refer to a meeting that took place in Mexico City between the Presidents of both countries at the beginning of December 2012, shortly after the Judgment was rendered.[210] What Nicaragua fails to point out is that, at that meeting, President Ortega "reiterated Nicaragua's willingness to discuss issues relating to the implementation of the Court's judgment and its determination to manage the situation peacefully".[211] This was followed by a further declaration of President Ortega on 22 February 2013, in which he stated:

> "I [President Ortega] am certain that President Santos and the People of Colombia know that the solution to the ruling by the International Court of Justice is […] to follow the path to organize the ruling the of the Court [sic], organize it in terms of its implementation, how to organize it, how to apply it".[212]

According to the account provided in Nicaragua's *Memorial*:

> "Ortega said that both in Mexico, during the takeover by President Enrique Peña Nieto, and in the recent Summit of Latin American States in Chile, he had the opportunity to discuss the issue with the Colombian President and that they have always spoken of taking joint measures."[213]

4.51. Two-and-a-half months before the filing of the *Application* (on 10 September 2013), President Ortega repeated the point "that you can open a dialogue between the

---

210 Application, pp. 5-6, para. 8; Memorial of Nicaragua, para. 2.7.

211 Application, pp. 5-6, para. 8; See also Memorial of Nicaragua, para. 2.55.

212 Memorial of Nicaragua, Annex 35.

213 *Ibid.*

Government of Nicaragua and the Government of Colombia, and that these negotiations may produce an agreement that allows us to make the transition in an orderly manner…"[214]. He added that the treaty should include agreements for fishing, the environment, and the fight against drug trafficking[215]. According to Nicaragua's *Memorial*, the very next day the National Assembly of Nicaragua declared "its full endorsement of the position of the Government of Nicaragua for a peaceful solution through a treaty implementing the judgment".[216] Two days later, President Ortega added that Nicaragua was willing to create a national commission that would meet with a commission from Colombia on the issue of implementation of the 2012 Judgment.[217]

4.52. President Ortega was also on record as stating, at the 33rd anniversary of Nicaragua's naval forces held on 14 August 2013:

> "We need to fight against drug trafficking and organized crime, because that is the main threat to the security of our countries; that is the biggest threat. And there is the conviction that we need to

---

214 Annex 40: Semana, *Ortega calls for respect to the Judgment of the Court of The Hague*, 10 Sept. 2013. It is important to stress, as acknowledged in Nicaragua's *Memorial*, that President Ortega had already recognized on 26 November 2012 the right of "the people of Colombia and the Raizal brethren" to perform their historic fishing activities in Nicaraguan waters. Memorial of Nicaragua, para. 2.54 and Annex 27. Additionally, Nicaragua's *Memorial* indicates that on 5 December 2012 President Ortega "promised that Nicaragua would protect the areas of the original Seaflower Reserve, now located in Nicaragua's exclusive economic zone, as it would the rest of the areas that are now recognized as being part of the Nicaraguan maritime areas." Memorial of Nicaragua, para. 2.57.

215 *Ibid*.

216 Memorial of Nicaragua, para. 2.59 and Annex 40 thereto.

217 Annex 41: La Jornada, *Ortega says that Nicaragua is ready to create a Commission to ratify the Judgment of the ICJ*, 13 Sept. 2013

> join our efforts, what we have been doing first here in our Central American sub-region, in the Caribbean and also *coordinating activities with our sister Republic of Colombia.*
>
> (...)
>
> *Nicaragua respects and is ready to work together with Colombia in protecting the [*Seaflower*] Reserve zone. We are ready to develop the dialogue, the negotiations between Colombia and Nicaragua* that will finally enable us to overcome that situation so that we, Colombians and Nicaraguans, may work further for peace, for stability.
>
> As I said, we must recognize that in the middle of all this media turbulence, the Naval Force of Colombia, which is very powerful, that certainly has a very large military power, *has been careful, has been respectful and there has not been any kind of confrontation between the Colombian and Nicaraguan Navy*, thank God, and God help us to continue working that way.
>
> (…) I am convinced, we hope that this will continue in the same manner *until we can reach the dialogue, reach the negotiations so as to conclude the definitive agreements to apply the judgment rendered by the Court in the month of November of last year*. We are totally so disposed."[218] (Emphasis added)

4.53. The fact that there was no issue with Colombia at the time Nicaragua filed its *Application* was confirmed by Admiral Corrales Rodriguez, Chief of the Nicaraguan Naval Force, who stressed on 18 November 2013, just before the *Application* was filed, that "in [the] one year of being there we have not had any

[218] Annex 11: Declaration of the President of the Republic of Nicaragua, 14 Aug. 2013.

problems with the Colombian Naval Forces", that the naval forces of the respective countries "maintain[ed] a continuous communication" and that "we have not had any conflicts in those waters."[219]

4.54. This was entirely consistent with what the Chief of Nicaragua's Army, General Aviles, had stated on 5 December 2012: that "communication with the Colombian authorities" is ongoing and that the Naval Forces of Colombia had not approached Nicaraguan fishing boats.[220]

4.55. These statements demonstrate that, up to the filing of the *Application*, Nicaragua was of the opinion that the two neighbours maintained good relations, there had been no naval "incidents", and they could resolve their alleged controversy by way of negotiations. In these circumstances, the filing by Nicaragua of an application directed against Colombia on 26 November 2013 was completely at odds with reality.

4.56. Even after Nicaragua filed its *Application* – in other words, after the critical date for assessing whether the prerequisite under Article II of the Pact was met – President Ortega stated on 29 January 2014 that, "We concluded that there will be a moment in which we will sign agreements between Colombia and Nicaragua… Afterwards, we will have to wait

[219] Annex 43: El Nuevo Diario, *Patrolling the recovered sea*, 18 Nov. 2013.
[220] Annex 36: El Nuevo Diario, *The Navies are communicating*, 5 Dec. 2012.

until Colombia and Nicaragua discuss to reach an agreement that allows us to establish a way, especially and so I said to President Santos, to guarantee all the rights of the native population."[221] In addition, as recently as 9 May 2014, a dispatch referred to in Nicaragua's *Memorial* reported that:

> "Nicaragua proposed to Colombia to create a bi-national commission to coordinate the fishing operations, antidrug patrolling and the conjunct administration for the reserve of the Seaflower biosphere in the Caribbean Sea, with the base of the delimitations established by the International Court of Justice (ICJ)."[222]

That same dispatch quoted President Ortega as saying that:

> "We propose to the government of Colombia, to President Juan Manuel Santos, to work for a Colombian-Nicaraguan commission so a treaty can come out of it that will allow us to respect, and put in practice the judgment by the ICJ."[223]

4.57. Moreover, on 18 March 2014, some four months after Nicaragua submitted its *Application*, General Aviles reiterated that there "are no incidents" and that the two States' navies were

---

[221] Annex 45: El Colombiano, *Colombia and Nicaragua will conclude agreements on the Judgment of The Hague: Ortega*, 29 Jan. 2014.

[222] Memorial of Nicaragua, Annex 46. According to the same dispatch, "Ortega said that the bilateral dialogue is important to establish through a treaty 'how the reserve (Seaflower) will be handled, how the area will be patrolled and the subject of fisheries'". For President Ortega "[w]e have to reach an agreement with our Colombian brothers (...) to establish already a conjunct administration" of the reserve 'with the companionship of the UN'". He concluded by stating that, "in spite of the fact that Colombia has not acknowledged the judgment of the ICJ, the same has been applied in fact, little by little, and without confrontations."

[223] *Ibid*.

navigating in their respective waters and maintaining "permanent communication".[224]

4.58. It is clear, therefore, that the President of Nicaragua has explicitly stated on numerous occasions, both before and after the *Application* was filed, that Nicaragua's opinion was always that "direct negotiations" should be undertaken with Colombia. And the Nicaraguan military has likewise confirmed that the position in the sea is calm.

(2) THE CONDUCT OF COLOMBIA

4.59. The record shows that Colombia also considered that any maritime issues between the two Parties arising as a result of the Court's Judgment should be dealt with by means of negotiations in order to conclude a treaty. In addition, on multiple occasions the President of Colombia stressed the importance of respecting the rule of law – both international and domestic – as well as the need for the two Parties to cooperate in order to find practical ways to implement the 2012 Judgment. In other words, Colombia's conduct confirms that its highest authorities were of the opinion that any controversy could be settled by way of "direct negotiations".

4.60. In its *Application*, Nicaragua sought to infer from the declaration of President Santos of 19 November 2012 that

[224] Annex 46: El Economista, *Nicaragua denies intimidation of Colombia in San Andrés*, 18 Mar. 2014.

Colombia had rejected the Court's 2012 Judgment. This is incorrect. President Santos' declaration underlined that Colombia "shall act with respect for the law", and that it was looking for "recourse or mechanism[s] available… in international law, to defend [her] rights". The President's declaration in the immediate aftermath of the decision only served to demonstrate Colombia's good faith. As President Santos emphasized:

> "Today, I wish to tell the people of San Andrés that we are *committed to find mechanisms and specific strategies*, and to produce results – *including the* negotiation *of treaties* as may be necessary – so that their rights may at no time be disregarded." [225] (Emphasis added)

It should be recalled as well that President Ortega also stressed the need to guarantee the rights of the people of San Andrés.

4.61. Colombia's view could not have been clearer. Colombia was, and continues to be, looking for the resolution of any controversy that might stem from the Court's 2012 Judgment within the framework of "direct negotiations". This message was echoed shortly afterward on 24 November 2012, when President Santos stated that, "We would ask the Minister of Foreign Affairs to enter into direct contact with the Government of Nicaragua to handle this dilemma with prudence and respect". [226]

---

[225] Annex 6.

[226] Annex 34: 90 Minutos, *Colombia seeks contact with Nicaragua after Judgment of The Hague*, 24 Nov. 2012.

4.62. For her part, Colombia's Foreign Minister Holguín favoured the establishment of permanent contacts between the Commanders of the respective navies to avoid any confrontation. On 5 December 2012, following comments made by a Nicaraguan journal concerning alleged harassment of Nicaraguan fishing boats by the Colombian Naval Forces, she contacted Colombia's Navy Commander, Admiral García, who stated that he had not received any reports on the matter. She also reiterated her impression, shared by Nicaragua, that the relations between the two States were good and that the meeting in Mexico between the two Presidents had been positive.[227]

4.63. In fact, the Minister of Foreign Affairs had already commenced discussions with her Nicaraguan counterpart on 20 November 2012.[228] During that conversation, the Minister emphasized that the issue was one of concluding treaties so that the people of the Archipelago of San Andrés, Providencia and Santa Catalina could continue to fish where they had always done so. As she confirmed:

> "I had a conversation with the Minister of Foreign Affairs of Nicaragua, we will look at fisheries agreements. We need to agree on some fisheries agreements so the islanders can continue fishing in places where they have done so, especially artisanal fishing."[229]

---

[227] Annex 36.

[228] Annex 7: Press Conference of the Minister of Foreign Affairs of Colombia, 20 Nov. 2012.

[229] *Ibid*.

4.64. The protection of the historic fishing rights of the people of the Archipelago of San Andrés, Providencia and Santa Catalina is of paramount importance for Colombia. It is an inherent part of the culture of the Archipelago. It is in this sense that the declarations made by Colombia's highest authorities[230] must be understood, contrary to the way Nicaragua seeks to portray them in its *Application* and *Memorial*.[231] Those declarations in no way imply any disregard for the Judgment of the Court.

4.65. Again, in his declaration of 28 November 2012, the President of Colombia stated that, despite the denunciation of the Pact of Bogotá, "Colombia does not pretend to separate itself from the peaceful solution of disputes", but rather it "reiterates its commitment always to resort to peaceful procedures".[232] The same speech emphasised on the importance of respecting international law.

4.66. Following the two Presidents' meeting in Mexico City on 1 December 2012, President Santos stated that the way forward was through "reasonable dialogue" and "international diplomacy".[233] Far from rejecting the 2012 Judgment, as

---

[230] Annex 10: Declaration of the President of the Republic of Colombia, 18 Feb. 2013; Annex 38: Blu Radio, *Waters of San Andrés, main challenge of new Commander of the Navy*, 13 Aug. 2013.

[231] Memorial of Nicaragua, paras. 4.34-4.37 and Annexes 3 and 41 thereto.

[232] Annex 8.

[233] Annex 35: Tele Sur, *Ortega and Santos talk in Mexico about dispute*, 1 Dec. 2012.

Nicaragua asserts in its *Application* and *Memorial*,[234] President Santos stressed that:

> "[Today] [w]e – the Minister of Foreign Affairs and I – gathered with President Ortega. We explained in the clearest way our position: we want the Colombian rights, those of the raizales, not only with respect to the rights of the artisanal fishermen but other rights, to be re-established and guaranteed. He understood.
>
> We expressed that we should handle this situation with cold head, in an amicable and diplomatic fashion, as this type of matters must be dealt with to avoid incidents. He also understood.
>
> We agreed to establish channels of communication to address all these points. I believe this is the most important. I believe that meeting was positive."[235]

4.67. Colombia's Foreign Minister echoed the same theme. On 13 January 2013, the Minister was explicit in underlining that "we have a fluent communication" and that all "communication channels are open".[236]

4.68. The consistency of Colombia's position was further confirmed on 9 September 2013 when, in a speech, President Santos[237] stressed a number of points. These included the need to conclude a treaty in connection with the implementation of the Judgment, the importance of the Archipelago of San Andrés,

---

234 Application, para. 8; Memorial of Nicaragua, para. 2.7.

235 Annex 9: Declaration of the President of the Republic of Colombia, 1 Dec. 2012.

236 Annex 37: El Tiempo, Press Interview to the Minister of Foreign Affairs of Colombia, 13 Jan. 2013.

237 Annex 12.

Providencia and Santa Catalina as a whole, and the priority that needed to be given to protecting the environmental and social elements of the Seaflower Reserve.[238]

4.69. Along the same lines, on 10 September 2013, Foreign Minister Holguín reiterated her conviction that Colombia "will reach an agreement with Nicaragua"[239] – a position that she repeated four days later when she declared that, "Colombia is open to dialogue with Nicaragua to sign a treaty that establishes the boundaries and a legal regime that contributes to the security and stability in the region".[240]

4.70. All of these statements show very clearly that, far from declaring that it would not comply with the Judgment, Colombia has always been open to negotiations with Nicaragua with respect to the 2012 Judgment. Both President Santos and Foreign Minister Holguín are on record as stating that the negotiation and conclusion of a treaty with Nicaragua is necessary. Nicaragua's President had taken the same view. At the same time, Colombia's President was conscious of the need to respect Colombian domestic law in connection with issues

---

[238] *Ibid*. To quote the President: "A THIRD DECISION is to resort to all legal and diplomatic means to reassert the protection of the Seaflower Reserve, where our fishermen have been at work for hundreds of years". As he emphasized, it is an area of "great ecological value… to the Archipelago and to the world, which UNESCO has declared a World Biosphere Reserve." His declaration serves to illustrate that, once again, all the prerequisites for the opening of "direct negotiations" are present according to Colombia's opinion.

[239] Annex 39: W Radio, Radio Interview to the Minister of Foreign Affairs of Colombia, 10 Sept. 2013.

[240] Annex 42: El Tiempo, *The Minister of Foreign Affairs explains in detail the strategy* vis-a-vis *Nicaragua*, 15 Sept. 2013.

relating to its boundaries. As discussed in Chapter 2, that was why an application was made to the Colombian Constitutional Court on 12 September 2013 to rule on the matter.[241]

4.71. That is the context within which the declarations of President Santos[242] and Vice-President Garzón,[243] invoked in Nicaragua's *Memorial*, must be understood. The question of the applicability of the 2012 Judgment in Colombian law is entirely distinct from compliance with the Judgment under international law. As to the latter, Colombia's President repeatedly affirmed that Colombia respects international law, and that Colombia was prepared to negotiate a treaty with Nicaragua regarding the implementation of the Judgment.

4.72. On 27 November 2013, the day after the filing of the *Application*, Colombia recalled its Ambassador to Nicaragua for consultations. This was an understandable reaction to Nicaragua's surprise filing of the *Application*. As the Minister of Foreign Affairs stated:

> "It is not a big problem. The relations with Nicaragua will not be broken … We have

---

[241] The Colombian Minister of Foreign Affairs also remarked that, "the Government has said that it awaits the decision of the Constitutional Court before initiating any action". (Annex 42). This statement, however, in no way attests to the impossibility to solve the alleged controversy by having recourse to "direct negotiations". Quite to the contrary, it emphasized the need to negotiate since the sentence delivered by the Constitutional Court on 2 May 2014 confirmed the opinion that the Judgment of 2012 should be incorporated into domestic law through the conclusion and ratification of a treaty between the two States.

[242] Annex 13: Declaration of the President of the Republic of Colombia, 18 Sept. 2013; Memorial of Nicaragua, Annex 5.

[243] Memorial of Nicaragua, Annex 38.

> [re]called our Ambassador for consultations because sometimes you do not understand how they come to a decision as the last application which that country has submitted in The Hague. I say this, because you go to the Court when all the instances to solve a problem are exhausted …".[244]

4.73. The Minister's reaction underlines the fact that Colombia – which obviously still believed that "direct negotiations" were appropriate – was genuinely taken unaware by Nicaragua's action. While Nicaragua's highest authorities had explicitly manifested their readiness to resort to negotiations, they nonetheless proceeded to seise the Court without giving negotiations a chance and without there being any dispute between the Parties at that time.

F. Conclusion

4.74. For the reasons set out above, the Court does not have jurisdiction in respect of the proceedings commenced by Nicaragua against Colombia on 26 November 2013. In particular:

(1) There was no dispute between the two Parties when Nicaragua filed its *Application*; and,

(2) in any event, the condition precedent under Article II of the Pact of Bogotá has not been fulfilled because, in the opinion of the Parties, to the extent there was any dispute, it was not one that could not be settled by direct negotiations through the usual diplomatic channels.

---

[244] Annex 44: El Universal, *In Colombia a rupture of diplomatic relations with Nicaragua is excluded*, 24 Dec. 2013.

Chapter 5

FOURTH OBJECTION: THE COURT HAS NO "INHERENT JURISDICTION" UPON WHICH NICARAGUA CAN RELY IN THE FACE OF THE LAPSE OF JURISDICTION UNDER THE PACT OF BOGOTÁ

A. Introduction

5.1. Since Nicaragua is well aware that the Court does not have jurisdiction under the Pact of Bogotá, as was demonstrated in Chapters 3 and 4, Nicaragua's *Application* invokes a second basis of the Court's jurisdiction, which purportedly "lies in its inherent power to pronounce on the actions required by its Judgments."[245] According to Nicaragua, this inherent power of the Court is "a complement to Article XXXI to the Pact of Bogotá"[246] which can serve as "an alternative basis for its jurisdiction in the present case".[247] In its *Memorial*, Nicaragua expands this so-called "inherent jurisdiction" to "disputes arising from non-compliance with its *Judgments*,"[248] an aspect of the Court's so-called "inherent" jurisdiction which is examined in the following Chapter. The magical property of Nicaragua's concept of "inherent jurisdiction" conjures the Court's jurisdiction for issues for which the Court otherwise would not have jurisdiction under its Statute.

---

245 Application, para. 18.
246 Memorial of Nicaragua, para. 1.24.
247 *Ibid.,* para. 1.32.
248 *Ibid.*, para. 1.26; see also subtitle C.2. before para. 1.24. at p. 12.

5.2. To sustain its theory of "inherent jurisdiction", Nicaragua is compelled to dismiss the clear purport of the Statute and the Rules of Court and to misrepresent decisions of the PCIJ and the International Court of Justice. Instead of this Court's law and practice, Nicaragua tries to enlist the law and practice of the European Court of Human Rights (ECHR) and the Inter-American Court of Human Rights (IACHR); even then, it ignores the explicit statutory authority afforded to those other Courts for monitoring the implementation of their decisions.

5.3. If Nicaragua's broad theory of inherent jurisdiction were to be taken seriously, it would cause mischievous results. It would strike at the foundation of consensual jurisdiction under Article 36, paragraphs 2 and 3, of the Statute for Nicaragua's theory of "inherent jurisdiction" ignores any conditions which States may have attached to their consent to jurisdiction. Once a State accepted the Court's jurisdiction in a particular dispute, it would remain permanently subject to the Court's jurisdiction with regard to that dispute after the Court's final judgment, or to any other matter or fact subsequent to the judgment but related to what had already been settled. Since, according to Nicaragua, the legal basis of this "inherent jurisdiction" is independent of the Statute and the Rules of the Court, it would not be subject to temporal limitations. Rather, it would enable the Court to resume exercise of jurisdiction with respect to a final judgment years after the judgment and with regard to any other dispute which might arise between the parties in connection with the implementation of the judgment.

5.4. Nicaragua's conception of an inherent jurisdiction enabling the Court to pronounce itself on alleged non-compliance with a previous judgment, independently from its Statute, Rules, or the consent of the parties to the exercise of such a jurisdiction, is devoid of merit, as Colombia will demonstrate below.

B. The Statute of the Court Does Not Support an Inherent Jurisdiction

5.5. In support of its theory of the Court's inherent jurisdiction, Nicaragua relies on the Court "[b]eing a court of justice",[249] as if there is a Platonic court with unlimited power not found in the Statute or Rules of the Court which can be selectively used to supplement the Statute and Rules. Thus, Nicaragua states:

> "Being a court of justice, the International Court of Justice has an inherent jurisdiction to pronounce itself on cases of non-compliance with a previous Judgment. *And of course, it is immaterial that no provision in the Rules or the Statute of the Court confirms such inherent jurisdiction*: *as a matter of definition 'inherent jurisdiction' need not be expressed but stems from the very nature of the International Court of Justice as a court of law and is implied in the texts determining the jurisdiction of the Court*."[250] (Emphasis added)

5.6. Not only is Nicaragua's contention factitious, but also contradictory. By dismissing the relevance of the fact that there is nothing in the Statute or the Rules of the Court to authorize "inherent" jurisdiction, the Court is presented as an institution,

---

249 Memorial of Nicaragua, para. 1.26.

250 *Ibid.*, para. 1.26.

under Nicaragua's theory, which somehow exists and operates independently from its Statute. Nicaragua's theory is also contradictory. Having dismissed the relevance of any contrary provision in the Statute or the Rules of the Court in order to support its contention, Nicaragua, nevertheless, reverts to the instruments determining the Court's jurisdiction to argue that such inherent jurisdiction is "implied" in those texts. Nicaragua, however, fails to point to any "texts determining the jurisdiction of the Court" that even remotely imply such an "inherent" power.

5.7. To state the obvious, the Court has been created by the Statute and only has those powers which that instrument confers on it. Article 1 of the Statute expressly states that the Court shall function in accordance with its Statute:

> "The International Court of Justice established by the Charter of the United Nations as the principal judicial organ of the United Nations shall be constituted and shall function in accordance with the provisions of the present Statute."

5.8. Article 1 of the Statute could not be clearer. The basis of the Court's jurisdiction is set out in Article 36. Nicaragua's theory of inherent jurisdiction does not fall within any of the bases of jurisdiction provided for therein (special agreement, treaty, convention, optional clause declaration or even *forum prorogatum*).

5.9. The Statute provides for only two procedures by which the Court can exercise a continuing jurisdiction in a case without the need for an independent basis of jurisdiction. The first procedure is for requests for the interpretation of a judgment under Article 60;[251] the second is for applications for revision under Article 61.[252]

5.10. In its *Memorial*, Nicaragua is at pains to make clear that it is not asking for interpretation or revision of the Judgment of 19 November 2012. It admits that the Judgment did not provide for a subsequent phase of the proceedings and that that Judgment has the status of *res judicata:*

> "1.28 Leaving aside interpretation and revision, or the case when a judgment expressly provides for a subsequent phase of the proceedings – neither of those situations being relevant in the present case –...
>
> (…)
>
> 1.31 Indeed, in the present case, the Court had not expressly envisaged 'an examination of the situation' in its *Judgment*. …
>
> (…)
>
> 1.34 Nor does Nicaragua ask the Court to reaffirm what it has already decided in its *Judgment*: this is *res judicata*…

---

[251] *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear* (Cambodia *v.* Thailand) *(Cambodia* v. *Thailand)*, *Judgment, I.C.J. Reports 2013*, p. 281 at p. 295, para. 32.

[252] *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. 392 at p. 398, para. 18.

(…)

3.6 The judgment of 19 November 2012 established the boundary between the continental shelf and exclusive economic zone of the Republic of Nicaragua and the Republic of Colombia in the area that is the subject of the present case. The judgment has the status of *res judicata*."[253]

5.11. The *Memorial* also makes clear that Nicaragua is asking for the Court "to decide *new* legal questions and to examine 'facts other than those which it has considered in the judgment [of 19 November 2012], and consequently all facts subsequent to that judgment', something 'the Court, when giving an interpretation, refrains from [doing]'."[254] Hence, in the absence of jurisdiction under the Pact of Bogotá, Nicaragua is perforce postulating an "inherent jurisdiction" of the Court to consider "*facts other than those*" which it had already considered in its Judgment of 19 November 2012 and "*facts subsequent to that judgment*". The Statute provides no such jurisdiction, for it would subvert the foundational principle of the consent of the parties.

[253] Memorial of Nicaragua, paras. 1.28, 1.31, 1.34 and 3.6.
[254] *Ibid.*, para 1.33.

C. The Court's Case Law does not Support Nicaragua's Theory of the Court's Inherent Jurisdiction

5.12. Nicaragua's theory of an "inherent" supervisory and monitoring power of the Court would perpetuate the Court's jurisdiction *ad infinitum*, regardless of any withdrawal of the other Party from submission to the jurisdiction of the Court. Because this would violate the consensual basis of jurisdiction, the PCIJ and the International Court of Justice have never claimed an "inherent jurisdiction" to decide "*new* legal questions and to examine facts other than those which it has considered in… [a] judgment… and consequently all facts subsequent to that judgment."[255]

5.13. Nonetheless, Nicaragua tries to rely, in particular, on three cases decided by the PCIJ and the International Court of Justice: *The Electricity Company of Sofia,* the *Nuclear Tests* cases*,* and *Military and Paramilitary Activities in and against Nicaragua*. In none of these decisions, however, did the Court purport to exercise an "inherent jurisdiction".

(1) THE ELECTRICITY COMPANY OF SOFIA

5.14. In the 1939 Judgment in *The Electricity Company of Sofia*,[256] both of the disputing Parties, Belgium and Bulgaria had accepted the PCIJ's jurisdiction through the Optional Clause. They had also concluded the Treaty of conciliation, arbitration and judicial settlement of 23 June 1931, but in the latter

---

[255] Memorial of Nicaragua, para. 1.33.

[256] *Ibid*., para. 1.24, and footnote 15, citing the PCIJ Judgment in the case concerning *The Electricity Company of Sofia*.

instrument, the PCIJ's jurisdiction was only accepted if the parties had not agreed to arbitration. Hence, the PCIJ had two treaty-grounded bases of jurisdiction before it. The PCIJ observed:

> In its [the Court's] opinion, the multiplicity of agreements concluded accepting the compulsory jurisdiction is evidence that the contracting Parties intended to open up new ways of access to the Court rather than to close old ways or to allow them to cancel each other out with the ultimate result that no jurisdiction would remain.
>
> (…)
>
> It follows that if, in a particular case, a dispute could not be referred to the Court under the Treaty, whereas it might be submitted to it under the declarations of Belgium and Bulgaria accepting as compulsory the jurisdiction of the Court, in accordance with Article 36 of the Statute, the Treaty cannot be adduced to prevent those declarations from exercising their effects and disputes from being thus submitted to the Court."[257]

After rejecting jurisdiction on the basis of the 1931 Treaty, the PCIJ proceeded to examine the question of its jurisdiction on the alternate basis of the Optional Clause:

> "The negative result arrived at by the examination of the first source of jurisdiction does not however dispense the Court from the duty of considering the other source of jurisdiction invoked separately and independently from the first.
>
> The Court will now proceed to consider the

[257] *The Electricity Company of Sofia, Series A/B, No. 77, Judgment of 4 April 1939*, p. 76.

> Bulgarian Government's argument relating to the declarations of adherence to the Optional Clause of the Court's Statute."[258]

As can be seen, *The Electricity Company of Sofia* did not raise, even by implication, the issue of "inherent jurisdiction".

(2) NUCLEAR TESTS

5.15. In an effort to support its theory of "inherent jurisdiction", Nicaragua quotes, out of context, a passage from the Court's Judgment in the *Nuclear Tests*. Nicaragua's partial quotation from the latter part of paragraph 23 of the Court's Judgment reads:

> "Such inherent jurisdiction […] derives from the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded."[259]

Nicaragua fails to mention that the words "[*s*]*uch* inherent jurisdiction" in the above quotation refer back to the earlier part of that paragraph and the paragraph before it. There the Court, discussing the classification of matters as jurisdiction or admissibility, said:

> "In this connection, it should be emphasized that the Court possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand to ensure that the exercise of its jurisdiction over the merits, *if and when*

---

[258] *The Electricity Company of Sofia, Series A/B, No. 77, Judgment of 4 April 1939*, p. 80.

[259] Quoted in Memorial of Nicaragua, para. 1.25.

> *established*, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute, *to ensure the observance of the 'inherent limitations on the exercise of the judicial function' of the Court, and to 'maintain its judicial character'* (*Northern Cameroons, Judgment, I.C.J. Reports 1963***,** at p. 29). Such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purposes just indicated, derives from the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded".[260] (Emphasis added)

Indeed, the Court by citing its decision in *Northern Cameroons* was emphasizing the "inherent limitations" on the exercise of the judicial function of the Court so as to maintain its judicial character.

5.16. In addition to quoting out of context, Nicaragua mistakenly asserts that the "situation in the present case is legally similar to that presented by *Nuclear Tests* cases."[261] Nicaragua purports to find that similarity in that, first, "the Court found that, in view of the assurances given by France, the dispute had disappeared."[262] And, *second*, the Court stated that "[o]nce the Court has found that a State has entered into a commitment concerning its future conduct it is not the Court's

---

[260] *Nuclear Tests (Australia* v. *France)*, *Judgment*, *I.C.J. Reports 1974*, p. 253 at p. 259-260, para. 23.

[261] Memorial of Nicaragua, para. 1.29.

[262] *Ibid*.

function to contemplate that it will not comply with it."[263] From this, Nicaragua infers that when the Court rendered its Judgment of November 2012, it was with the understanding that its judgment will be complied with.[264]

5.17. But simply reading all of the *Nuclear Tests* judgments shows that they actually disprove Nicaragua's theory of "inherent jurisdiction". Indeed, the *Nuclear Test* cases confirm the well-established principle that the Court does not retain jurisdiction after a judgment on the subject-matter of the dispute *unless* the Court has expressly reserved jurisdiction over the case. Furthermore, the judgments confirm that the Court will make such a reservation only in a rare situation, such as was presented in *Nuclear Tests* where the defection of a party from its unilateral commitment would have undercut the premise on which its judgments were based. Read in their entirety, the judgments show that unless the Court expressly reserves its jurisdiction over a case, once it delivers its final judgment, the judgment is *res judicata;* there is no "inherent jurisdiction" over that judgment in anticipation of what might subsequently occur.

5.18. Contrary to Nicaragua's assertion, the present case bears no similarity to *Nuclear Tests*. The decision rendered by the Court in its Judgment of 19 November 2012 was not based on any commitment that a party to the proceedings had made that caused the object of the original dispute to disappear. Nor did

---

[263] *Nuclear Tests (New Zealand* v. *France), Judgment*, *I.C.J. Reports 1974*, p. 457 at p. 477, para. 58 quoted in Memorial of Nicaragua, para. 1.29.

[264] Memorial of Nicaragua, para. 1.29.

the Court make any express reservation with respect to the claims that were raised in that case. Nothing in the 2012 Judgment even hints at the Court's intention to retain or reserve a continuing or "inherent power" to pronounce on the actions required by its Judgment.

(3) MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA

5.19. Nor is there anything in the 1984 *Judgment* in the *Military and Paramilitary Activities in and against Nicaragua* that could even suggest that the Court upheld "inherent jurisdiction". Indeed, the Court there quoted from *Factory at Chorzow* that it is not for the Court to contemplate various scenarios of whether or to what extent parties would comply with its judgments:

> "It should be observed however that the Court '*neither can nor should* contemplate the contingency of the judgment not being complied with' *(Factory at Chorzow, P. C. I. J., Series A, No. 17,* p. 63)."[265] (Emphasis added)

5.20. It has been pointed out that inherent judicial powers are always implied powers and are confined to what is necessary to carry out the functions that have been expressly conferred.[266] But an inherent jurisdiction cannot expand the Court's jurisdiction, independently, from what is expressly conferred upon it in its Statute.

---

[265] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment*, *I.C.J. Reports 1984*, p. 392 at p. 437 para. 101.

[266] C. Brown, *A Common Law of Adjudication* (2007), pp. 69 and 71.

D. The Practice of the European Court of Human Rights and of the Inter-American Court of Human Rights does not Support Nicaragua's Theory of Inherent Jurisdiction for the International Court of Justice

5.21. Nicaragua invokes the practice of the European Court of Human Rights and of the Inter-American Court of Human Rights[267] as support for its theory of "inherent jurisdiction" existing independently from the statute or other constituent instruments of these institutions or from the consent of the parties before them. Nicaragua's presentation of these institutions is incorrect; the practice of these human rights courts actually contradicts Nicaragua's theory.

(1) THE EUROPEAN COURT OF HUMAN RIGHTS

5.22. Nicaragua tries to prove the implied supervisory powers of the European Court of Human Rights[268] by means of the concurring opinion of Judge Pinto de Albuquerque in *Fabris* v. *France.*[269] Nicaragua does not mention that Article 46 of the European Convention on Human Rights provides a specific procedure under which the Committee of Ministers may refer to the Court the question of non-compliance of a State Party with the judgment:

---

267 Memorial of Nicaragua, para. 1.27.

268 *Ibid*., para. 1.27 at footnote 18.

269 European Court of Human Rights (Grand Chamber), *Fabris* v. *France*, Application No. 16574/08 (7 February 2013). Concurring opinion of Judge Pinto de Albuquerque, p. 31.

> "Binding force and execution of judgments
>
> 1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.
>
> 3. If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two thirds of the representatives entitled to sit on the committee.
>
> 4. If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two thirds of the representatives entitled to sit on the committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1.
>
> 5. If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of paragraph 1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case."

As is apparent, none of the powers of the ECHR with respect to the Council of Ministers' supervision of compliance (Article 46 (3) and (4) of the European Convention of Human Rights)[270] is in any way "implied" or "inherent". To the contrary: all the

[270] See Chapter 6, Section B. (3) below.

powers of the European Court of Human Rights flow from express stipulations in the Convention. The European Court of Human Rights has not claimed "implied powers" or an "inherent jurisdiction" in order to monitor compliance in terms of Nicaragua's contention.[271]

(2) THE INTER-AMERICAN COURT OF HUMAN RIGHTS

5.23. Nicaragua also tries to rely on the Inter-American system of human rights protection.[272] But the competence of the Inter-American Court of Human Rights to monitor compliance with its decisions, far from being "inherent" or "implied", is a result of a task assigned to the Court in Article 65 of the American Convention on Human Rights which provides:

> "To each regular session of the General Assembly of the Organization of American States the Court shall submit, for the Assembly's consideration, a report on its work during the previous year. It shall specify, in particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations."[273]

In order for the Court to report to the Assembly, in its annual report, whether a State has not complied with its decision, the Court has to monitor compliance with its decision. In *Baena Ricardo* et al. v. *Panama*, the Inter-American Court stated:

---

[271] European Court of Human Rights, *Wasserman* v. *Russia (No. 2)*, Application No. 21071/05 (10 April 2008), para. 36: "The Court acknowledges that it has no jurisdiction to review the measures adopted in the domestic law legal order to put an end to the violations found in its judgment in the first case brought by the applicant."

[272] Memorial of Nicaragua, para. 1.27 in footnote 22.

[273] 1144 UNTS 123.

> "The Court considers that, when adopting the provisions of Article 65 of the Convention, the intention of the States was to grant the Court the authority to monitor compliance with its decisions, and that the Court should be responsible for informing the OAS General Assembly, through its annual report, of the cases in which the decisions of the Court had not been complied with, because it is not possible to apply Article 65 of the Convention unless the Court monitors compliance with its decisions."[274]

5.24. Thus, far from being an inherent power, the competence to "monitor compliance" is derived from the Convention. The Inter-American Court of Human Rights uses the expression 'inherent' to mean consequentially linked to the express duty of reporting, and not to mean an additional basis of jurisdiction without express grounds on the Convention, as Nicaragua argues. Accordingly, Article 69 of the Rules of Procedure of the Inter-American Court of Human Rights expressly regulates the procedure for monitoring compliance.[275]

E. Conclusion

5.25. There is no foundation for Nicaragua's theory of an "inherent" or supervisory jurisdiction of the International Court

---

[274] I/A Court H.R., Case of Baena Ricardo et al. Competence. Judgment of 28 Nov. 2003. Series C No. 104, paras. 74-76.

[275] Rules of Procedure of the I/A Court H.R. (approved during its LXXXV Regular Period of Sessions, held from November 16 to 28, 2009), Article 69 which is entitled "Procedure for Monitoring Compliance with Judgments and Other Decisions of the Court". The I/A Court H.R., also invokes as "grounds for the competence" for monitoring compliance, *inter alia*, Articles 33, 62 (1) (3) of the American Convention.

of Justice independent of the Statute or the Rules of the Court and absent consent of the parties. The Statute of the International Court of Justice provides no support for an "inherent" jurisdiction over a case that has already been decided in a final and binding judgment. The "inherent" jurisdiction for which Nicaragua contends violates the fundamental principle of consent which governs all forms of judicial settlement of international disputes. Accordingly, this alternate basis for Nicaragua's *Application* is groundless.

Chapter 6

FIFTH OBJECTION: THE COURT HAS NO POST-ADJUCATIVE ENFORCEMENT JURISDICTION

A. Introduction

6.1. Confronted with the jurisdictional consequence of Colombia's denunciation of the Pact of Bogotá, Nicaragua seeks to invent other bases of jurisdiction on which to rest its claims. One of them is the novel theory of "inherent jurisdiction" which was considered in the previous objection.[276] Another, which is as radical, is that the Court has a specific jurisdiction to monitor and supervise compliance with its judgments. Colombia submits that even if the Court were to find that it had an "inherent jurisdiction", such "inherent jurisdiction" does not extend to a post-adjudicative enforcement jurisdiction.

6.2. In the references to this head of the Court's jurisdiction in its *Application* and especially in its *Memorial*, Nicaragua carefully avoids the term "enforcement", dancing around it with expressions such as "supervision of compliance" or the Court's "supervisory" or "monitoring" powers, even entirely repackaging its claim to enforcement as a claim of State responsibility. In *Nuclear Tests*, the Court held:

> "In the circumstances of the present case, although the Applicant has in its Application used the traditional formula of asking the Court "to adjudge

[276] See Chapter 5 above.

> and declare" (a formula similar to those used in the cases quoted in the previous paragraph), the Court must ascertain the true object and purpose of the claim and in doing so it cannot confine itself to the ordinary meaning of the words used."[277]

In the instant case, the Court will have no difficulty in ascertaining the true object and purpose of Nicaragua's claim: that, after the Court has rendered a final judgment, it retains an extra-Statutory inchoate jurisdiction over the implementation of its judgment.

6.3. This is one more effort at inventing a type of perpetual jurisdiction and, like Nicaragua's more general theory of inherent jurisdiction, it lacks any basis in the Statute of the Court, in the Pact of Bogotá or in the Court's jurisprudence. Nor is this a lacuna: enforcement is expressly assigned to other institutions. Both the UN Charter and the Pact of Bogotá assign the subject matter of Nicaragua's claim to the Security Council. Moreover, under Article L of the Pact of Bogotá, the State Party claiming non-compliance "shall, before resorting to the Security Council of the United Nations, propose a Meeting of Consultation of Ministers of Foreign Affairs to agree upon appropriate measures to ensure the fulfilment of the judicial decision."[278]

---

[277] *Nuclear Tests (Australia* v. *France)*, *Judgment*, *I.C.J. Reports 1974*, p. 253 at p. 263, para. 30.

[278] Nor, indeed, is there anything to enforce in the instant case. The 2012 Judgment is declaratory. In the words of the Permanent Court of International Justice, it

> "is in the nature of a declaratory judgment, the intention of which is to ensure recognition of a situation at law, once and for all and with binding force as between the Parties…"

6.4. While Colombia objects to jurisdiction on this count, it wishes to confirm, lest there be any doubt, that it has always considered itself bound by the 2012 Judgment of the Court and that all of Nicaragua's allegations of non-compliance lack any basis in fact and in law.

B. Nicaragua's Claim Seeks to Have the Court Undertake a Post-Adjudicative Enforcement or "Compliance Monitoring" Role over its Judgments

6.5. The gravamen of Nicaragua's case is the allegation that Colombia has not complied with the Judgment of November 2012. Nicaragua's *Application* concludes its first request with the claim that:

> "*consequently*, Colombia is bound to comply with the Judgment of 19 November 2012, wipe out the legal and material consequences of its internationally wrongful acts and make full reparation for the harm caused by those acts." (Emphasis added).

This reduces all of the first request to non-compliance and to a demand for judicial enforcement. The *Memorial*, while seeking

---

Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), *Judgment No. 11, 1927, P.C.I.J. Series A, No. 13*, p. 20.

As a matter of substantive law, the 2012 Judgment delimiting the maritime boundaries between the Parties does not require any further judicial implementation by the Court. Any pronouncement of the Court on the "actions required by its Judgment", to quote from Nicaragua's Application, cannot substantively add to the pronouncement of a "situation at law" already decided by the Court, and would entail the usurpation of enforcement powers.

to recast Nicaragua's claims as reparation, inescapably reverts to non-compliance and enforcement.[279] Thus, the *Memorial* demands that

> "Colombia must, from the time that the judgment is issued, act in accordance with the terms of the judgment."

and that

> "[i]n the present case, Colombia must treat the waters determined by the Court to appertain to Nicaragua as Nicaraguan waters (territorial sea or exclusive economic zone and continental shelf, as appropriate), and refrain from treating them as subject to Colombian jurisdiction."[280]

6.6. The formulation of Nicaragua's requests corroborates the finding that Nicaragua seeks to ensure and enforce compliance with the Judgment of 19 November 2012 on a jurisdictional basis which has not been conferred on the Court by the Parties under the Pact of Bogotá.

6.7. In the *Application*, Nicaragua relies on what it styles a broad jurisdiction of the Court "to pronounce on the actions required by its Judgments."[281] In this vein, the *Memorial* invokes the jurisdiction of the Court "to pronounce itself on cases of non-compliance with a previous Judgment."[282]

---

279 Memorial of Nicaragua, para. 1.35.
280 *Ibid.*, para. 3.9.
281 Application, para. 18.
282 Memorial of Nicaragua, para. 1.26; see also subtitle C.2. before para. 1.24.

6.8. Nicaragua's alternative jurisdictional base to this claim, thus, rests on the premise that the Court has an inherent enforcement jurisdiction, encompassing the power to supervise and ensure compliance with its judgments. As a matter of law, the Court has no such jurisdiction.

C. Neither the ICJ Statute nor the Pact of Bogotá Grants the Court a Post-Adjudicative Enforcement or "Compliance Monitoring" Role Over Its Judgments

(1) The Statute of the ICJ does not grant the Court an enforcement competence

6.9. Even assuming, *quod non,* that the Court still has jurisdiction in the instant case under Article XXXI of the Pact of Bogotá, such jurisdiction would be confined to adjudication. At the same time, it would not extend to Nicaragua's claims for enforcement by the Court premised on Colombia's alleged non-compliance with the Judgment of 2012. Neither the UN Charter nor the Pact of Bogotá assigns enforcement, including supervision and monitoring of compliance, to the International Court of Justice.

6.10. Under the Charter and Statute, adjudication is assigned to the Court; enforcement, encompassing the subsequent supervision of compliance with a judgment of the Court, is not. As Rosenne observes:

> "In international law this separation of the adjudication from the post-adjudication phase is fundamental, operative both in the sphere of arbitration and in that of judicial settlement. This is

> reflected in the distinction between the binding force and the enforceability of the judgment or award."[283]

This foundational distinction is universally acknowledged. As noted in a leading commentary of the Statute:

> "The execution of decisions is not a matter for the ICJ, but for the parties to the dispute which, according to Art. 94, para. 1 UN Charter, have to comply with the Court's decisions."[284]

6.11. Cot and Pellet's authoritative study of the Charter is in accord:

> "S'agissant des prononcés judiciaires de cette Cour, la distinction est maintenue entre leur force de chose jugée, dont le Statut traite en termes inchangés (Articles 59-61), et leur force exécutoire, qui relève de la Charte. Cela signifie que la Cour est concernée par le caractère obligatoire et définitif de ses prononcés et doit connaître elle-même des demandes en interprétation ou en révision, tandis qu'un conflit sur l'inexécution est considéré comme distinct du litige soumis à la Cour et doit être réglé par des voies politiques et non plus judiciaires...".[285]

---

[283] S. Rosenne, *The Law and Practice of the International Court*, *1920-2005*, (2006), Vol. I, p. 199.

[284] K. Oellers-Frahm, "Article 94", in: A. Zimmermann *et al* (eds.), *The Statute of the International Court of Justice: A Commentary* (2012), p. 191.

[285] A. Pillepich, "Article 94", in: J.P. Cot and A. Pellet (eds.), *La Charte des Nations Unies*, *Commentaire article par article* (2005), Vol. II, para. 13. As noted by the author:

> "With respect to the judicial pronouncements of this Court, the distinction is maintained between their force as *res judicata,* which the Statute [of the International Court of Justice] treats in unchanged terms (Articles 59-61) and their executory effect, which is governed by the Charter. This means that the Court deals with the binding and final nature of its pronouncements and must rule itself on requests for interpretation and revision, whilst a conflict over non-execution

6.12. The Court's Statute provides for neither judicial enforcement of judgments nor any judicial supervisory powers over implementation of its judgments. Instead, the UN Charter vests in the Security Council the power to take steps to ensure compliance (Article 94 (2)). Indeed, the Washington Committee of Jurists stated in 1945 that: "It was not the business of the Court to ensure the execution of its decisions."[286] As Judge Weeramantry put it, "The *raison d'être* of the Court's jurisdiction is adjudication and clarification of the law, not enforcement and implementation."[287]

6.13. To similar effect, Judge Guillaume, noting the statutorily limited role of the Court in the enforcement of its judgments, only in the context of Statute Article 60,[288] has stated that "any dispute relating to compliance is regarded as separate from the dispute resolved by the decision and cannot therefore be brought before the Court without a further agreement between the parties concerned."[289]

6.14. The Statute of the Court provides for only one situation in which the Court is empowered to require compliance as a

---

is considered as distinct from the controversy submitted to the Court and must be solved though channels which are political and no longer judicial...".

[286] 14 UNCIO 833.

[287] *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 90 at p. 219. Dissenting opinion of Judge Weeramantry, p. 190.

[288] G. Guillaume, "Enforcement of Decisions of the International Court of Justice", in: N. Jasentuliyana (ed.), *Perspectives in International Law* (1995), p. 280.

[289] *Ibid*., p. 281.

condition to exercise jurisdiction. Article 61(3), dealing with an application for revision, provides:

> "The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision."

Plainly, Nicaragua's *Application* does not seek a revision of the Judgment of 19 November 2012. But the Statute provides no basis for Nicaragua's claim that the Court possesses an "inherent power to pronounce on the actions required by its Judgments"; nor has the Court ever assumed such a power in the absence of the express consent of the parties. As Judge Guillaume stated:

> "On several occasions, therefore, the Court has ruled that it cannot and should not consider the possibility of non-compliance with its judgments, and it has made pronouncements concerning compliance only in those cases where the parties have specifically empowered it to do so. For example, in the dispute between Burkina Faso and Mali concerning the determination of their land boundary, both parties had requested the Chamber of the Court to which the case had been referred to appoint three experts to assist them in the demarcation of the frontier in accordance with the Court's Judgment. The Chamber ruled that 'nothing in the Statute of the Court nor in the settled jurisprudence' prevented it from 'exercising this power', and it accordingly appointed the experts.
> This example is worth noting, and one can imagine other cases where the States that are parties to a dispute might, by way of a special agreement, confer certain powers upon the Court regarding the implementation of the resulting judgments…".[290]

[290] G. Guillaume, *op. cit.*, p. 281. In supporting this view, Judge Guillaume relies on a number of decisions of the PCIJ and ICJ in footnote 22 of his text.

6.15. Nicaragua itself recognizes that there is no mechanism for the execution of judgments of the International Court of Justice, apart from what it characterizes as "the very hypothetical use of Article 94, paragraph 2, of the Charter."[291] Yet its submissions try to mobilize the Court for enforcement and execution purposes. Nicaragua's overall objective is to induce the Court to expand its jurisdiction in an unprecedented way and in clear contradiction with its Statute and the Charter of the United Nations.

(2) CONSENT TO JURISDICTION UNDER THE PACT OF BOGOTÁ DOES NOT INCLUDE AN ASSIGNMENT OF AN ENFORCEMENT ROLE TO THE COURT

6.16. The Pact of Bogotá contains the same distinction between adjudication and "measures to ensure the fulfillment of the judicial decision", including in the case of non-compliance with a decision of the International Court of Justice:

> "Article L. If one of the High Contracting Parties should fail to carry out the obligations imposed upon it by a decision of the International Court of Justice or by an arbitral award, the other party or parties shall, before resorting to the Security Council of the United Nations, propose a meeting of Consultation of Ministers of Foreign Affairs to agree upon appropriate measures to ensure the fulfillment of the judicial decision or award."

6.17. In Chapter Six of the Pact, under the title "Fulfillment of Decisions", Article L mandates ("shall") a specific, non-judicial

---

[291] Memorial of Nicaragua, para. 1.27 at footnote 18.

mechanism in the case of a complaint alleging "fail[ure] to carry out the obligations imposed upon it by a decision of the International Court of Justice…". The premise of the provision is that this is a matter assigned to the Security Council. Before that, the party seeking fulfillment "shall… propose a meeting of Consultation of Ministers of Foreign Affairs… to agree upon appropriate measures to ensure the fulfillment of the judicial decision…". Article L contemplates no recourse to the International Court of Justice for the contingencies which it addresses.

6.18. Thus, Article XXXI, in the light of Article L, cannot be read to confer any jurisdiction of the Court to decide on measures for alleged failure to carry out an obligation imposed by the Court.

(3) NEITHER THE COURT NOR ITS PREDECESSOR HAVE EVER ASSUMED POWERS, TO SUPERVISE OR TO ENFORCE COMPLIANCE WITH THEIR JUDGMENTS

6.19. Nicaragua's attempt to find support in the jurisprudence of the International Court of Justice and its predecessor for an inherent jurisdiction to supervise compliance fails.[292]

6.20. In the *Factory at Chorzów* case, the PCIJ refused "to contemplate the contingency of a judgment not to be complied

[292] Memorial of Nicaragua, para. 1.27 at footnote 20 and para 1.29.

with."[293] This dictum, rather than suggesting an implied power of supervising compliance in subsequent proceedings, is opposed to it.

6.21. The same is true for the reference to the dictum of the PCIJ in the *Factory at Chorzów* case in *Military and Paramilitary Activities in and against Nicaragua.*[294]

6.22. In *LaGrand*, the Court did not assume jurisdiction in a dispute over violation of a previous judgment, but in a dispute over the consequences, in criminal proceedings, of a violation of the right to consular assistance under the Vienna Convention on Consular Relations.[295] This decision, therefore, bears no relation to any monitoring powers as claimed in Nicaragua's *Application* and *Memorial*.

(4) NICARAGUA'S RELIANCE ON OTHER INTERNATIONAL REGIMES IS INAPPOSITE

6.23. Faced with a dearth of authority with respect to the International Court of Justice's powers as to supervising compliance and enforcement,[296] Nicaragua tries to base itself on the purported powers of some regional international courts,

---

[293] *Factory at Chorzów*, *Merits*, *Judgment No. 13, 1928, P.I.C.J., Series A, No. 17*, p. 63.

[294] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment*, *I.C.J. Reports 1984*, p. 392 at p. 437, para. 101.

[295] *LaGrand (Germany* v. *United States of America)*, *Judgment*, *I.C.J. Reports 2001*, p. 406 at p. 485, para. 48.

[296] Memorial of Nicaragua, para. 1.27 at footnote 18.

which operate under entirely different treaty systems: the European Court of Human Rights (ECHR) and the Inter-American Court of Human Rights. But, as explained in the previous Chapter, Nicaragua ignores the fact that the competence of these two courts of human rights with regard to monitoring and compliance with their judgments are explicitly provided for in their constituent instruments, together with the conditions under which they may exercise such a competence.

6.24. In particular, Nicaragua[297] seeks support in a concurring opinion in a case before the European Court of Human Rights. Judge Pinto de Albuquerque's concurring opinion in *Fabris* v. *France*[298] proposed that the ECHR has "power *to supervise the execution of their judgments* when this is necessary for the discharge of their functions."[299] (Emphasis added)

6.25. But Judge Pinto de Albuquerque's concurring opinion is not representative of that Court's jurisprudence and, moreover, is far from supporting an "inherent jurisdiction" to monitor compliance regardless of the specific treaty provisions governing judicial functions. The European Court of Human Rights has no power to monitor compliance with its judgments and to review measures of implementation of a previous

---

297 Memorial of Nicaragua, para. 1.27 at footnote 18.

298 European Court of Human Rights (Grand Chamber), *Fabris* v. *France*, Application No. 16574/08, Judgment (7 February 2013). Concurring opinion of Judge Pinto de Albuquerque, p. 31.

299 European Court of Human Rights (Grand Chamber), *Fabris* v. *France*, Application No. 16574/08, Judgment (7 February 2013). Concurring opinion of Judge Pinto de Albuquerque, p. 31.

judgment on the basis of a new complaint by the applicant. According to Article 35(2)(b) of the European Convention on Human Rights[300] and the case law of the European Court of Human Rights, an application is inadmissible when a prior application which was already adjudicated and a new application "relate essentially to the same person, the same facts and the same complaints".[301] Under Article 46(2) of the European Convention on Human Rights, supervision of judgments lies with the Committee of Ministers of the Council of Ministers.[302] After the amendment of Article 46 by Protocol No. 14 (in force since 2010), the Committee of Ministers may refer to the ECHR aspects of *interpretation* relevant in the context of its own supervision[303] and bring the question whether

---

[300] Article 35(2)(b) of the European Convention on Human Rights reads:

> "The Court shall not deal with any application submitted under Article 34 that… (b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information."

[301] European Court of Human Rights, *Folgero and Others* v. *Norway (No. 2)*, Application No. 15472/02, Final Decision on Admissibility (14 Februaray 2006), para. 11; European Court of Human Rights (Grand Chamber), *Verein gegen Tierfabriken Schweiz* v. *Switzerland (No. 2)*, Application No. 32772/02, Judgment (10 April 2008), para. 63.

[302] Article 46(2) of the European Convention on Human Rights reads: "The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution." See: R.C. White and C. Ovey, *The European Convention on Human Rights* (2010), pp. 53 *et seq*.; E. Lambert Abdelgawad, "The Execution of the Judgments of the European Court of Human Rights: Towards a Non-coercive and Participatory Model of Accountability", *ZaöRV/Heidelberg Journal of International Law* 69(3), 2009, p. 471.

[303] Article 46(3) of the European Convention on Human Rights reads:

> "If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to

a Party has failed its obligation of compliance before the Court.[304] These express provisions of the European Convention on Human Rights do not allow the applicant to request supervision of compliance by the ECHR.[305]

6.26. Nicaragua's reference to the Inter-American system of human rights protection[306] also ignores the fact that the competence of the Inter-American Court of Human Rights is based on the American Convention on Human Rights. Furthermore, the Inter-American Court relies on the consent of the OAS General Assembly – which has monitoring powers under Article 65 of the American Convention of Human Rights – to the Court's exercise of supervisory jurisdiction.[307]

6.27. In addition, the practice of the Inter-American Court of Human Rights since 2002 to monitor compliance with its judgments[308] is inextricably linked to the system of human

---

the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two thirds of the representatives entitled to sit on the Committee."

304 Article 46(4) of the European Convention on Human Rights reads:

"If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two thirds of the representatives entitled to sit on the committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1."

305 E. Lambert Abdelgawad, *op. cit.*, p. 473.

306 Memorial of Nicaragua, para. 1.27 in footnote 20.

307 I/A Court H.R., Case of Baena Ricardo et al. Competence. Judgment of November 28, 2003. Series C No. 104, paras. 74-76.

308 D.C. Baluarte, "Strategizing for Compliance: The Evolution of a Compliance Phase of Inter-American Court Litigation and the Strategic

rights protection under the American Convention on Human Rights[309] and to the individual right to access to justice (Article 8 and 25 of the American Convention on Human Rights).[310] Such an objective regime bears no resemblance to the function and powers of the International Court of Justice and to the regime of enforcing compliance under the United Nations Charter.[311]

D. Conclusion

6.28. Nicaragua's contention that the Court has a jurisdiction to ensure and monitor compliance with its judgments has no basis in law. It stands in contradiction to the Statute of the Court and the UN Charter. Neither the Pact of Bogotá nor any "inherent jurisdiction" support supervisory powers of the Court over compliance as advanced by Nicaragua. Nicaragua's submissions fail to take into account the fundamental distinction between the adjudication and post-adjudication phases of a dispute; the Court has no role in the latter. Moreover, to accept Nicaragua's contention would do violence to the consensual basis of the Court's jurisdiction.

Imperative for Victims' Representatives", *American University International Law Review* 27, 2012, p. 263; C.M. Ayala Corao, "La ejecución de sentencias de la Corte Interamericana de Derechos Humanos", *Revista de Estudios Constitucionales* 5, 2007, p. 143 *et seq*.

309 A.A. Cançado Trindade, *Access of Individuals to International Justice* (2011), pp. 122-123.

310 I/A Court H.R., Case of Baena Ricardo et al. Competence. Judgment of November 28, 2003. Series C No. 104, paras. 110-114.

311 UN Charter, Article 94 (2).

6.29. For these reasons, the Court should reject Nicaragua's claims purporting to base themselves on this jurisdictional invention.

Chapter 7

SUMMARY OF PRELIMINARY OBJECTIONS

7.1. To conclude, the Court is without jurisdiction over Nicaragua's *Application* of 26 November 2013 for the following reasons.

7.2. *First*, the Court lacks jurisdiction under the Pact of Bogotá – the principal basis on which Nicaragua purports to found jurisdiction – because Colombia submitted its notice of denunciation of the Pact of Bogotá on 27 November 2012 and, in accordance with Article LVI of the Pact, the denunciation had immediate effect with respect to any application brought against it after 27 November 2012.

7.3. *Second*, the Court is without jurisdiction because there was no dispute between the Parties on 26 November 2013, the date of the filing of Nicaragua's *Application*.

7.4. *Third*, the Court lacks jurisdiction because the precondition in Article II of the Pact of Bogotá has not been met. In particular, Nicaragua has not established that, on the date of the *Application*, the Parties were of the opinion that the alleged controversy "[could not] be settled by direct negotiations though the usual diplomatic channels".

7.5. *Fourth*, the Court has no "inherent jurisdiction" upon which Nicaragua can rely in the face of the lapse of jurisdiction

under the Pact of Bogotá. There is no basis in the law and practice of the Court for Nicaragua's assertion that "the jurisdiction of the Court lies in its inherent power to pronounce on the actions required by its Judgments."

7.6. *Fifth*, the assertion of an inherent jurisdiction to ensure and monitor compliance with the Judgment of the Court of 19 November 2012 likewise has no basis in the law and practice of the Court. The Court lacks jurisdiction over "disputes arising from non-compliance with its Judgments".

SUBMISSION

For the reasons set forth in this Pleading, the Republic of Colombia requests the Court to adjudge and declare, that it lacks jurisdiction over the proceedings brought by Nicaragua in its Application of 26 November 2013.

Colombia reserves the right to supplement or amend the present submission.

CARLOS GUSTAVO ARRIETA PADILLA
Agent of Colombia

The Hague, 19 December 2014

TABLE OF CONTENTS

VOLUME II: LIST OF ANNEXES

COLOMBIAN OFFICIAL DOCUMENTS

DECLARATIONS

DIPLOMATIC DOCUMENTS AND CORRESPONDENCE

INTER-AMERICAN TREATIES AND RELATED DOCUMENTS

OTHER DOCUMENTS