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INTERNATIONAL COURT OF JUSTICE

TERRITORIAL AND MARITIME DISPUTE
(NICARAGUA *v.* COLOMBIA)

PRELIMINARY OBJECTIONS OF THE GOVERNMENT OF COLOMBIA

VOLUME I

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PRELIMINARY OBJECTIONS OF THE GOVERNMENT OF COLOMBIA

INTRODUCTION

I. Procedural History

1. On 6 December 2001 the Republic of Nicaragua lodged with the Registry of the International Court of Justice an Application by which it instituted proceedings before the Court against the Republic of Colombia regarding a "dispute [that] consists of a group of related legal issues subsisting between the Republic of Nicaragua and the Republic of Colombia concerning title to territory and maritime delimitation"[1].

2. In particular Nicaragua asked the Court to adjudge and declare:

> "First, that the Republic of Nicaragua has sovereignty over the islands of Providencia, San Andrés and Santa Catalina and all the appurtenant islands and cays, and also over the Roncador, Serrana, Serranilla and Quitasueño cays (insofar as they are capable of appropriation);
>
> Second, in the light of the determinations concerning title requested above, the Court is asked further 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."

[1] *Application of Nicaragua*, para. 1.

3. In its Order of 26 February 2002 the Court fixed 28 April 2003 as the time limit for the filing of Nicaragua's Memorial. Nicaragua duly filed its Memorial on that date. In its Memorial Nicaragua substantially reaffirmed its original request to the Court, although adding certain refinements. The case presented by Nicaragua remains, however, essentially one which concerns sovereignty over the islands, cays and islets of the Archipelago of San Andrés and Providencia ("the Archipelago of San Andrés"), and the maritime boundary running between those territories and Nicaragua's mainland and insular features in the western part of the Caribbean Sea.

4. As to jurisdiction, in its Application Nicaragua asserts that, "in accordance with the provisions of Article 36, paragraph 1, of the Statute, jurisdiction exists by virtue of Article XXXI of the Pact of Bogotá"[2] and that "in accordance with the provisions of Article 36, paragraph 2, of the Statute, jurisdiction also exists by virtue of the operation of the Declaration of the Applicant State dated 24 September 1929 and the Declaration of Colombia dated 30 October 1937"[2]. In its Memorial Nicaragua in effect simply repeats this assertion, without further elaboration[3].

5. Not a single word is said by Nicaragua in its Memorial on the relationship between these two alleged titles of jurisdiction –even though– as will be shown in Chapter III below, the Court has dealt at length with this issue in the *Armed Actions* case[4]. Nor does Nicaragua's Memorial refer to the fact that Colombia had withdrawn its Declaration prior to the filing of Nicaragua's Application.

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[2] *Application of Nicaragua,* para. 1.
[3] *Memorial of Nicaragua,* para. 3, pp. 1-2.
[4] *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988.*

II. Colombia's Preliminary Objections

6. In accordance with the provisions of Article 79, paragraph 1, of the Rules of Court, as amended with effect from 1 February 2001, Colombia has the honour to submit the present Preliminary Objections. Colombia's Preliminary Objections relate to the jurisdiction of the Court and to other matters a decision on which is sought before any further proceedings on the merits. Those Preliminary Objections address the two titles of jurisdiction invoked by Nicaragua. Those Preliminary Objections will be set out in full in Chapters II and III of this Pleading.

III. Colombia's Position: An Overview

7. In its Application, Nicaragua states that the case it seeks to bring before the Court concerns *(a)* the issue of sovereignty over certain islands and cays forming the Archipelago of San Andrés in the Caribbean Sea, and *(b)*, in the light of the Court's determination of that issue, the course of the maritime boundary between the areas of continental shelf and exclusive economic zone appertaining respectively to Nicaragua and Colombia**.**

8. Both those matters were definitively settled by a treaty concluded between Colombia and Nicaragua more than 70 years ago following a dispute between the two States which had arisen with regard to the Mosquito Coast and the Archipelago of San Andrés, including the Islas Mangles (Corn Islands). Thus, by instituting these proceedings Nicaragua is seeking to reopen a matter which has long since been settled.

A. THE HISTORICAL BACKGROUND IN OUTLINE

9. Colombia and Nicaragua became independent States following the break up of the Spanish colonial Empire in the Americas in the early years of the nineteenth century. At that time the Archipelago of San Andrés -which then included the Islas Mangles (Corn Islands)- and part of the Mosquito Coast were part of the Spanish Viceroyalty of Santa Fe (or Viceroyalty of Nueva Granada), the forerunner of present-day Colombia. From the time that Colombia became an independent nation and right up to the present time, the islands and cays of the Archipelago of San Andrés –as it is known today[5]– have always been fully and exclusively administered by Colombia and have been under Colombian sovereignty, subject only to a transient dispute between Colombia and the United States of America –but not involving Nicaragua– regarding sovereignty over three of the Archipelago's cays (Roncador, Quitasueño and Serrana) which was resolved by agreement between Colombia and the United States, with the latter's renouncing all claims to sovereignty over them. Colombia has exercised its sovereignty and carried out countless acts of governmental authority and administration in those islands and cays of the Archipelago of San Andrés for nearly two centuries. Colombia has throughout done so publicly, peacefully, uninterruptedly and *à titre de souverain*. In short, ever since the break up of the Spanish Empire, sovereignty over the Archipelago of San Andrés has been vested in and exercised by Colombia, and Colombia alone.

10. In marked contrast, throughout the period since Nicaragua's own independence in 1821 and up to the present time, none of the islands, cays or islets of the Archipelago of San Andrés has ever been under Nicaraguan sovereignty or, much less, administered by Nicaragua in any particular or degree. Nicaragua's claim that the islands and cays of the

[5] Unless otherwise specified, all references to the Archipelago of San Andrés are to be understood as meaning the Archipelago as it is known today. See Chapter I, para. 1.8.

Archipelago appertained to Nicaragua in 1821, 1823, 1838, or at any other time, is simply preposterous.

11. As regards the Mosquito Coast, in the 19th century it was under direct control of Great Britain and their Miskito protégés. Since the very emergence of Colombia as an independent State, Colombia, on the basis of the titles derived from the Spanish Crown, asserted its rights of sovereignty and jurisdiction over that coast first against the British Government, and from the mid-19th century, against Nicaragua as well. Despite the fact that Nicaragua in 1860 signed the Treaty of Managua (Wyke-Zeledón) with Great Britain, the Miskitos –under British protection– continued to hold the effective control over the coast that officially came to be known as "Reserva Mosquitia" (Mosquito Reservation). This situation prevailed until 1894 when Nicaragua, with the support of the United States, began to exercise some presence on the aforementioned coast. Colombia, for its part, continued to assert its rights over the Mosquito Coast against Nicaragua, but without being able to resolve the matter between the two countries.

12. The differences between both States were compounded by the fact that, in 1890, Nicaragua occupied the Islas Mangles (Corn Islands) by force in an act that was duly protested by Colombia. This occupation only affected the Islas Mangles (Corn Islands) while the other islands, islets and cays of the Archipelago of San Andrés continued to be under full Colombian sovereignty and jurisdiction.

13. In 1913 Nicaragua for the first time advanced claims to certain islands of the Archipelago of San Andrés. Thus, the subject matter of the controversy between the two countries comprised the Mosquito Coast and the Archipelago of San Andrés of which the Islas Mangles (Corn Islands) were part. After protracted negotiations between the two States, the matter was definitively settled by the Treaty Concerning Territorial Questions at Issue between Colombia and Nicaragua concluded in 1928 and its Protocol of Exchange of

Ratifications of 1930. This instrument, also known as the Esguerra-Bárcenas Treaty, was discussed and approved by the Congresses of both States. The 1928 Treaty and its Protocol of Exchange of Ratifications of 1930 was registered with the League of Nations by Colombia on 16 August 1930, and by Nicaragua on 25 May 1932.

14. In that Treaty and its Protocol of Exchange of Ratifications, the Parties stated that they were "… desirous of putting an end to the territorial dispute pending between them…"[6] (as the Treaty's preamble recites). By Article I Nicaragua expressly recognized Colombian sovereignty over the Archipelago of San Andrés. Nicaragua also agreed in that Treaty that in respect of three of the Archipelago's cays –Roncador, Quitasueño and Serrana– "sovereignty… [was] in dispute between Colombia and the United States": Nicaragua thus acknowledged that it had no claims to them. For its part, Colombia recognized Nicaragua's sovereignty over the Mosquito Coast and over the Islas Mangles (Corn Islands), two islands which were also part of the Archipelago of San Andrés. Moreover, the parties also agreed upon the 82°W Meridian as the maritime limit between Colombia and Nicaragua.

15. Thereafter, both States conducted themselves consistently with the provisions upon which they had agreed in that Treaty of 1928 and its Protocol of Exchange of Ratifications of 1930. In accordance with its terms Colombia continued to exercise its uninterrupted sovereignty and administration of the Archipelago of San Andrés, and exercised authority and jurisdiction over the maritime areas to the east of Meridian 82°W. Nicaragua never exercised any such sovereignty, administration, authority and jurisdiction over Colombia's Archipelago and maritime areas to the east of the meridian.

[6] Unless an official source for a translation is identified, translations have been prepared for the purposes of this Pleading.

B. NICARAGUA'S ATTEMPTS TO REOPEN THE QUESTIONS SETTLED BY THE 1928 TREATY AND ITS PROTOCOL OF EXCHANGE OF RATIFICATIONS OF 1930

16. Four decades after the entry into force of the 1928 Treaty and its Protocol of 1930, in 1969 Nicaragua, for the first time ever, purported –without questioning the validity or effectiveness of the 1928 Treaty as a whole– to carry out activities in areas to the east of the agreed boundary along the 82º W Meridian, by granting survey permits and oil concessions in those areas. Colombia protested to the Nicaraguan Government.

17. A decade later, in 1980, by which time the Treaty had been in force for 50 years, Nicaragua unilaterally purported to disclaim the 1928 Treaty, by declaring it null and void. Just as Colombia had rejected Nicaragua's earlier attempt to carry out activities in areas to the east of the agreed boundary along the 82º W Meridian, Colombia again rejected this further attempt to vitiate a boundary and territorial treaty which it continued to apply without interruption. Naturally, Colombia continued to exercise its sovereignty and jurisdiction over the Archipelago of San Andrés and its appurtenant maritime areas, as it had been doing for almost two centuries.

18. By instituting these present proceedings, Nicaragua is continuing to pursue its attempt to disclaim a treaty settlement which was arrived at after painstaking negotiations, and which has now endured for just over 70 years.

C. COLOMBIA'S PRELIMINARY OBJECTIONS

19. Colombia submits two Preliminary Objections, relating to the jurisdiction of the Court and to other matters a decision

on which is sought before any further proceedings on the merits.

20. As noted above (paragraph 4), in its Application (and substantially repeated in its Memorial) Nicaragua refers to two titles of jurisdiction.

21. First, Nicaragua contends in its Application that "[i]n accordance with the provisions of Article 36, paragraph 1, of the Statute, jurisdiction exists by virtue of Article XXXI of the Pact of Bogotá", a treaty to which both Nicaragua and Colombia are parties. Nicaragua makes no mention of any other relevant provision of the Pact.

22. Second, Nicaragua contends that "in accordance with the provisions of Article 36, paragraph 2, of the Statute, jurisdiction… exists by virtue of the operation of Declaration of the Applicant State dated 24 September 1929 and the Declaration of Colombia dated 30 October 1937".

23. Nicaragua accordingly rests its Application in the instant proceedings on the same two titles of jurisdiction as those on which it relied in its Application against Honduras in the *Armed Actions* case, where the Court summarized them as follows:

> "[Nicaragua] asserts that the Court could entertain the case both on the basis of Article XXXI of the Pact of Bogotá and on the basis of the declarations of acceptance of compulsory jurisdiction made by Nicaragua and Honduras under Article 36 of the Statute."[7]

[7] *Border and Transborder Armed Actions [Nicaragua* v. *Honduras], Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 82, para. 26.

However, the Court specified that

> "Since, in relations between the States parties to the Pact of Bogotá, that Pact is *governing*, the Court will first examine the question whether it has jurisdiction under Article XXXI of the Pact."[8]

24. According to Article 79, paragraph 1, of the Rules of Court (as amended on 5 December 2000),

> "Any objection by the respondent to the jurisdiction of the Court or to the admissibility of the application, or other objection the decision upon which is requested before any further proceedings on the merits, shall be made in writing as soon as possible, and not later than three months after the delivery of the Memorial."

25. Three categories of objections are provided for in this Rule, two of them specific, and the third of a general nature:

(a) objections to the jurisdiction of the Court;
(b) objections to the admissibility of the Application; and
(c) other objections the decision upon which is requested before any further proceedings on the merits – in the French version of the Rules: *"toute autre exception sur laquelle le défendeur demande une décision avant que la procédure sur le fond se poursuive…"*.

26. As the Court has noted in the *Lockerbie* case, the "field of application *ratione materiae*" of Article 79 of the Rules "is

[8] *Border and Transborder Armed Actions (Nicaragua v. Honduras), Judgement, ICJ Reports 1988*, p. 82, para. 27. Emphasis added.

thus not limited solely to objections regarding jurisdiction and admissibility", but extends to any "other objection" which possesses a 'preliminary character' insofar as its purpose and effect, as ascertained by the Court, are "to prevent, *in limine*, any consideration of the case on the merits."[9]

1. In respect of the Pact of Bogotá

27. In respect of Nicaragua's claim to base the jurisdiction of the Court on Article XXXI of the Pact of Bogotá, Colombia, on the basis of Article 79 of the Rules, submits a preliminary objection on which it respectfully requests the Court to rule *in limine litis*, in accordance with the procedure set out in that same article.

28. The American Treaty on Pacific Settlement, officially known as the "Pact of Bogotá", was adopted in line with Article 26 of the Charter of the Organization of American States. It is an important element in the Inter-American system for the pacific settlement of disputes. Article XXXI of the Pact of Bogotá reads as follows:

> "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:

[9] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie [Libyan Arab Jamahiriya* v. *United Kingdom], Preliminary Objections, Judgment, I.C.J. Reports 1998,* p. 26, para. 47. The Court used the same language in its Judgment of the same date in the parallel case brought against the United States (*Ibid.*, at pp. 131-2, para. 46).

(a) The interpretation of a treaty;
(b) Any question of international law;
(c) The existence of any fact which, if established, would constitute the breach of an international obligation; or
(d) The nature or extent of the reparation to be made for the breach of an international obligation."

29. Article XXXI, however, does not of itself dispose of the matter which Nicaragua now seeks to put before the Court – namely sovereignty over the Archipelago of San Andrés and the maritime boundary between Colombia and Nicaragua. As will be shown later on[10], it is essential to read the Pact of Bogotá as a whole, and not selectively as Nicaragua does. Article II of the Pact provides that the parties bind themselves to use the procedures established therein (good offices, mediation, investigation, conciliation, judicial procedure and arbitration), in the manner and under the conditions provided for in the Pact itself.

30. In this context, full account must therefore also be taken of Article VI of the Pact. That Article reads:

> "The aforesaid procedures [which include those of Chapter IV relating to Judicial Procedure, in which Article XXXI appears], 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 [i.e. 30 April 1948, when the Pact was signed]."
>
> *"Tampoco podrán aplicarse dichos*

[10] See paras. 2.5 and ff.

> *procedimientos a los asuntos ya resueltos por arreglo de las partes, o por laudo arbitral, o por sentencia de un tribunal internacional, o que se hallen regidos por acuerdos o tratados en vigencia en la fecha de la celebración del presente Pacto."*

31. Article VI thus requires that Article XXXI "not be applied" to the matters referred to, namely (a) the matters already settled by the arrangement embodied in the 1928 Treaty and its Protocol of Exchange of Ratifications of 1930, and (b) matters governed by a treaty in force on 30 April 1948, as uncontestably and incontestably the 1928 Treaty and its 1930 Protocol was. By virtue of Article VI, therefore, Article XXXI relied on by Nicaragua to found the jurisdiction of the Court is inapplicable on both grounds, and the Court cannot have jurisdiction under that inapplicable Article XXXI as such.

32. Article VI of the Pact of Bogotá is not, however, the only other relevant provision which must be taken into account. Article XXXIII provides (in accordance with normal practice) that if there is any dispute over the Court's jurisdiction, then the Court must decide that issue. And if the Court reaches the conclusion that on the basis of Article VI it is without jurisdiction to hear the dispute submitted to it, then under Article XXXIV the controversy "shall" be declared "ended" (*terminée*, *terminada*). The Pact of Bogotá expressly gives the Court jurisdiction to make this declaration. What the Court is without jurisdiction to do is to hear the controversy anew, as if it were not already settled by an arrangement between the Parties or governed by a treaty in force on 30 April 1948.

33. In short, the very Pact of Bogotá invoked (selectively) by Nicaragua requires instead (when read in full) that the Court must declare that the controversy is ended.

34. The exception contained in Article VI of the Pact of Bogotá ensures that the matters referred to cannot be reopened. As will be shown in Chapter II, the *travaux préparatoires* at the IX International Conference of American States, in relation to Article VI, confirm the intention of the States Party not to apply the procedures set forth in the Pact to matters which have already been settled by arrangement between the parties, as well as those governed by agreements or treaties in force on the date on which the Pact was signed.

35. The meaning and effect of Articles VI and XXXIV of the Pact are thus clear. In the present proceedings, the dispute having been settled by the 1928 Treaty and its Protocol of Exchange of Ratifications of 1930, a declaration by the Court that the matter is "ended" (*terminée, terminada*) is what the Pact requires. If Nicaragua's Application were allowed to proceed, the dispute with regard to the Archipelago of San Andrés which had arisen in 1913 between the two countries and which they settled in 1928 after protracted negotiations, would thus revive more than seventy years later, and the whole issue, including Colombia's rights over the Mosquito Coast and the Islas Mangles (Corn Islands), would now be brought back to square one.

36. The scope of the 1928 Treaty and its 1930 Protocol of Exchange of Ratifications is clear.

37. First, as regards territorial possessions, it establishes that Nicaragua recognizes Colombia's sovereignty over "the islands of San Andrés, Providencia, Santa Catalina and all the other islands, islets and cays that form part of the said Archipelago of San Andrés", and that Colombia recognizes Nicaragua's sovereignty over the Mosquito Coast and the Islas Mangles (Corn Islands). Second, the Treaty provides that the cays of Roncador, Quitasueño and Serrana, are not considered to be included in it, on the ground that sovereignty over them "is in dispute between Colombia and

the United States": since the Treaty could only have applied to those cays on the basis that they were part of the Archipelago, it follows that Nicaragua has recognized that they are part of the Archipelago, and since further the dispute over sovereignty over them was said to be a matter between only Colombia and the United States, it follows that Nicaragua also agreed that it had no claim to sovereignty over them.

38. As regards the maritime area, on Nicaragua's initiative the line of the Meridian 82°W was agreed between both countries and a provision was included to that effect in the Protocol of Exchange of Ratifications of 1930. It provided that "the Archipelago of San Andrés and Providencia, which is mentioned in the first clause of the referred to Treaty, does not extend west of the 82 Greenwich meridian". In so stipulating, the parties agreed that Colombia's rights extended to the east of that meridian and therefore, that the rights of Nicaragua extended to the west of Meridian 82° W – in other words that this meridian would be the boundary between both countries.

39. Nicaragua argues that the provision in the Protocol of Exchange of Ratifications regarding Meridian 82° W is a western boundary for Colombia vis-à-vis Nicaragua but not an eastern boundary for Nicaragua vis-à-vis Colombia: this is incoherent. It is inconceivable that a boundary that divides the areas of jurisdiction appertaining to two bordering States, negotiated and established by agreement between the parties, can be considered as a boundary for only one of them and not for the other. It is evident that the jurisdiction of one State ends where that of the other begins.

40. The debate in the Nicaraguan Congress confirms the meaning of the incorporation in the Protocol of Exchange of Ratifications of the provision regarding the 82º W Meridian: the terms used included a *"border",* a *"dividing line of the waters in dispute",* a *"delimitation",* a *"demarcation of the*

dividing line"[11] – in other words: a boundary between the two countries. Further confirmation of the character of the 82º W Meridian as a boundary between both States lies in the fact that, for a very long period, both countries conducted themselves as regards the boundary in accordance with the agreement included in that provision.

41. It is thus clear that the 1928 Treaty and its 1930 Protocol of Exchange of Ratifications cover precisely the issues which Nicaragua is seeking by its Application to reopen.

42. Nicaragua adds, however, an argument that seeks to deny present legal force to the 1928 Treaty and its 1930 Protocol of Exchange of Ratifications. The Treaty is, argues Nicaragua, null and void; moreover, so Nicaragua argues, Colombia has itself acted in breach of it, and thus the Treaty has been terminated by that breach. Neither of these arguments withstands scrutiny.

43. Nicaragua argues first that the Treaty was concluded in breach of the provisions of the Constitution of Nicaragua at the time, and second, that in concluding the Treaty Nicaragua was subject to coercion by the United States. Both arguments are on their merits (or lack of them) wholly unconvincing (as will be demonstrated in paras.1.99-1.111below).

44. Nicaragua knows this. Nicaragua allowed fifty years to elapse without voicing any challenge to the validity of the 1928 Treaty and its Protocol of Exchange of Ratifications of 1930. In its judgment of 1960 in the case concerning the *Arbitral Award made by the King of Spain on 23 December 1906*, the Court found that "Nicaragua's failure to raise any question with regard to the validity of the Award for several years… debars it from relying subsequently on complaints of nullity"[12]. Nicaragua's *six* year delay in that case may be compared with *half-century* delay before

[11] See Chapter I, paras.1.59, 1.61-1.63.
[12] *I.C.J. Reports 1960*, pp. 213-214.

challenging the validity of the 1928 Treaty – a treaty which also has a territorial character.

45. In addition to those two arguments, Nicaragua has advanced a further argument, to the effect that Colombia's "interpretation" of the 82°W Meridian as a boundary amounted to a breach of the Treaty and has thus led to the Treaty being unilaterally terminated. To assert that the adoption of an argument as to the correct interpretation of a treaty amounts to a violation of the Treaty is fanciful; it is particularly so when that argument is based on the very terms used by Nicaragua's own representatives in the Congressional debates in which the Treaty was approved. Moreover, Nicaragua bases its argument on the (incorrect) view that Colombia only adopted that "interpretation" in 1969, when in fact Colombia did no more than assert the agreement as it was conceived by Nicaragua in 1930 and agreed by both parties at that time. In any event, even on Nicaragua's incorrect version of events Nicaragua waited 34 years before advancing this argument -of the Treaty's termination due to its alleged breach by Colombia- for the first time in its Memorial of 2003.

46. As explained more fully below (see para.1.115), as early as 1931 –a year after the Treaty's entry into force– the 82° W Meridian was included as the boundary between Colombia and Nicaragua in the Official Map of the Republic of Colombia. Nicaragua made no protest. Colombia subsequently published several similar official maps that were not protested by Nicaragua either. Colombia has consistently continued to exercise its sovereignty and jurisdiction over the maritime areas pertaining to the Archipelago of San Andrés up to the aforementioned meridian.

47. As noted above, Nicaragua's allegation that Colombia is in breach of the 1928 Treaty and its Protocol of Exchange of Ratifications of 1930 was advanced for the first time in Nicaragua's Memorial of 28 April 2003. At no time before,

even when Nicaragua in 1969 purported to carry out activities to the east of the maritime boundary agreed along the 82° W Meridian, or in 1980 when it purported to declare the 1928 Treaty as a nullity, did Nicaragua put forward an argument of this nature.

48. Nicaragua cannot now be heard to argue that Colombia, by implementing the 82°W Meridian as a maritime boundary - as agreed in 1930 and complied with from then on- is in breach of the 1928 Treaty with the result that that Treaty has been terminated or is subject to termination. A purpose of so extraordinary a claim is to vitiate Colombia's valid objections to jurisdiction. Were the Court to sustain such an argument, it would permit a State to evade limitations on the jurisdiction of the Court by means of a spurious claim. The presentation of alleged violations before the Court would then of itself suffice to render those reservations –which are an expression of the will of States– ineffectual.

49. In short, the 1928 Treaty with its 1930 Protocol of Exchange of Ratifications is valid, and is in force.

2. In respect of Article 36, paragraph 2, of the Statute: the Optional Clause Declarations

50. As noted earlier (para. 23), the Court has held that where a State relies both on Declarations under the Optional Clause and on provisions of the Pact of Bogotá, it is the latter which "is governing"[13], so much so that, when the Court has jurisdiction under the Pact of Bogotá, it has no need to consider whether it has jurisdiction also by virtue of the Parties' Optional Clause Declarations. Since in the present proceedings the Court has jurisdiction –and indeed has the duty– under Article XXXIV (in accordance with Article VI) to declare "the controversy ended", there is no need, and

[13] *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, ICJ Reports 1988*, p. 82, para. 27.

indeed no room, for the Court to consider whether it might have jurisdiction under the Optional Clause.

51. In any event, as decided by the Court in the *Armed Actions* case[14], jurisdiction under the Pact is governing and hence exclusive. So, whether there existed or not on the day of the Application a jurisdictional title based on the Optional Clause system does not affect the Court's jurisdiction under the Pact of Bogotá. Therefore, whether Colombia's Declaration was still valid or not on the day of the Application is immaterial.

52. Nevertheless, since Nicaragua asserts that "jurisdiction also exists" in accordance with the provisions of Article 36, paragraph 2, of the Statute, Colombia will show that the Court's jurisdiction in these proceedings can in no way be based on the Parties' Declarations under the Optional Clause system. There are two reasons for this.

53. First, Nicaragua fails to note in its Memorial that Colombia's Optional Clause Declaration of 30 October 1937 was terminated by Colombia with immediate effect on 5 December 2001 that is, *before* the filing of Nicaragua's Application on 6 December 2001.

54. Consequently, at the time when Nicaragua's Application was submitted to the Court there was no mutuality of acceptance of the Optional Clause by the Applicant and Respondent States, as is required by Article 36, paragraph 2, of the Statute of the Court. The Court does not have jurisdiction by virtue of Nicaragua's Declaration alone. The practice of both Colombia (in 1937 and 2001) and Nicaragua (in 2001) has been to interpret their respective Declarations as subject to withdrawal or amendment with immediate effect.

55. Second, even taking Colombia's terminated Declaration as if it had been in force at the time of the submission of the

[14] *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgement, ICJ Reports 1988*, p. 82, para 27.

Application (which it was not), any resulting jurisdiction of the Court would be limited by the terms of that Declaration. Colombia's Declaration of 30 October 1937 contained the reservation that "[t]he present declaration applies only to disputes arising out of facts subsequent to 6 January 1932". It is significant that this reservation relates to the date of facts out of which a dispute arose.

56. It is evident from the outline of the circumstances leading to the present proceedings that Nicaragua's complaint involves in substance an attempt to reopen a dispute already settled in the 1928 Treaty and its Protocol of Exchange of Ratifications of 1930. Nicaragua's challenge is to the meaning, and indeed to the very existence in law, of that Treaty and Protocol. Moreover, the facts at the heart of the present proceedings advanced or alleged by Nicaragua in its Application and Memorial relate to matters occurring as long ago as the early years of the twentieth century, and even earlier.

57. It follows that it is a dispute which "arose out of" facts (in particular, the 1928 Treaty and its 1930 Protocol) which pre-date 6 January 1932; it is thus not a dispute within the only category of disputes which were within the scope of Colombia's 1937 Declaration, namely "disputes arising out of facts subsequent to 6 January 1932".

58. It follows further that it is not a dispute over which the Court could have jurisdiction by virtue of Colombia's 1937 Declaration even if (which is not the case) that Declaration had still been extant at the time when Nicaragua submitted its Application.

59. Therefore, for both these reasons –the absence of a Colombian Declaration at the time when Nicaragua's Application was submitted, and the terms of the terminated 1937 Declaration had it still been in force– the Court does not have jurisdiction under Article 36, paragraph 2, of the Statute, as relied on by Nicaragua.

IV. Contents of the Present Pleading

60. On the basis of Article 79 of the Rules of Court, Colombia accordingly raises two preliminary objections to the effect that, first, in accordance with Articles VI and XXXIV of the Pact of Bogotá the Court is "without jurisdiction to hear the controversy" and therefore the Court shall declare the "controversy … ended", and second, that the Court has no jurisdiction under Article 36, paragraph 2, of its Statute.

61. The present pleading, in addition to this Introduction, consists of five Chapters dealing with the following matters:

Chapter I	Background of the case
Chapter II	In accordance with Articles VI and XXXIV of the Pact of Bogotá, the Court is "without jurisdiction to hear the controversy" and therefore shall declare the "controversy … ended"
Chapter III	The Declarations of Colombia and Nicaragua under the Optional Clause do not afford the Court jurisdiction
Chapter IV	Short summary of Colombia's reasoning in these Preliminary Objections, and
Chapter V	Colombia's Submissions.

62. The Preliminary Objections also include two additional volumes. Volume II comprises documentary annexes and Volume III contains a set of maps.

CHAPTER I

BACKGROUND OF THE CASE

I. The Parties before the Court

1.1 The Parties before the Court are States which both have coasts on the Caribbean Sea. Colombia is divided into 32 "Departamentos" (provinces), one of them being according to Articles 101 and 309 of the National Constitution, the "Departamento Archipiélago de San Andrés, Providencia y Santa Catalina". This province comprises all the islands, islets and cays in the Archipelago of San Andrés.

1.2 Nicaragua is divided into 15 provinces and 2 autonomous regions. These regions are the North Atlantic and South Atlantic, whose territories are part of what was formerly known as the Mosquito Coast. This coastal zone is geographically and socially different from the rest of the country.

1.3 Since the beginning of Colombia's independent life, the Archipelago of San Andrés has been an integral part of its territory and, as such, has always been expressly included in its domestic law. In contrast, Nicaragua has never in its domestic law specified that the Archipelago of San Andrés is part of its territory.

II. The Geographical Area

1.4 The Archipelago of San Andrés is located at the south-west end of the Caribbean Sea, in the general area comprised between latitudes 16° 30' N and 11° 00' N and longitudes

82° 00' W and 78° 00' W, to the east of Honduras, the south-west of Jamaica, the east of Nicaragua, the north-east of Costa Rica and the north of Panama. Map No. 1 illustrates this geographical area.

1.5 Colombia has fixed its maritime boundaries in the Caribbean through a series of treaties with its neighbours in the area[15] (See Map No 2), beginning with the 1928 Treaty and its Protocol of Exchange of Ratifications of 1930, concluded with Nicaragua. Thereafter, maritime boundary treaties have been concluded with Panama, in 1976; with Costa Rica, in 1977; with the Dominican Republic, in 1978; with Haiti, in 1978; with Honduras, in 1986; and with Jamaica, in 1993[16].

1.6 Subsequent to the 1928 Treaty and its 1930 Protocol with Nicaragua, the maritime delimitation lines established in the treaties signed by Colombia with Panama, Costa Rica, Honduras and Jamaica, were drawn between the Archipelago of San Andrés and the main coasts of those States. The treaty with Jamaica not only establishes a maritime boundary, but also a joint regime area between the two countries for purposes of control, exploration and exploitation of the living and non-living resources. The limits of that joint regime area were likewise built by drawing lines between the Archipelago of San Andrés and the Jamaican coast. Even though the treaty with Costa Rica has not been ratified, it has been applied *bona fides* by the Parties since the very moment of its signature. That treaty, signed by the Colombian Ambassador in Costa Rica and the Foreign Affairs Minister of that country, Gonzalo J. Faccio, establishes a delimitation line between the Costa Rican coast and the islands and cays of the Archipelago of San Andrés. Moreover, Colombia has concluded several treaties that take into account its aforementioned boundaries in the Caribbean Sea on matters such as drug interdiction.

[15] It is noteworthy that Colombia has concluded maritime delimitation treaties in the Pacific Ocean as well, with Costa Rica, Panama and Ecuador.
[16] Annex 1, a-g: Colombia's Maritime Delimitation Treaties in the Caribbean.

A. THE ARCHIPELAGO OF SAN ANDRÉS

1.7 Historically, the Archipelago of San Andrés was formed by the Archipelago of San Andrés as it belongs to Colombia today and the Islas Mangles (Corn Islands) whose occupation and lease by Nicaragua had given rise to Colombia's protests in 1890 and 1913 respectively.

1.8 The Archipelago of San Andrés today is formed by the islands of San Andrés (including Johnny Cay, Hayne's Cay, Rose Cay, Cotton Cay and Rocky Cay) Providencia (including Low Cay, Basalt Cay, Palm Cay, Cangrejo Cay, Hermanos Cay and Casa Baja Cay) and Santa Catalina; the Cays of Roncador (including Dry Rocks), Quitasueño, Serrana (including North Cay, Little Cay, Narrow Cay, South Cay, East Cay and Southwest Cay), Serranilla (including Beacon Cay, East Cay, Middle Cay, West Breaker and Northeast Breaker), Bajo Nuevo (including Bajo Nuevo Cay, East Reef and West Reef), Albuquerque (including North Cay, South Cay and Dry Rock), and the group of Cays of the East-Southeast -"Cayos del Este-Sudeste"- (including Bolivar Cay or Middle Cay, West Cay, Sand Cay and East Cay), as well as by other adjacent islets, cays, banks and atolls (Map No. 3, Chart COL 004, depicts the Archipelago).

1.9 The Cays of Albuquerque, the westernmost feature of the Archipelago, are located 10 nautical miles to the east of the 82º W Meridian and some 100 nautical miles off Nicaragua's mainland coast**.** Bajo Nuevo –the easternmost cay– is located 70 nautical miles east of Serranilla Cay, 122 nautical miles off Jamaica's coast, and 269 nautical miles off Nicaragua's mainland coast. The Archipelago has a maximum elevation above sea level of 350 metres (approximately 1150 feet).

1.10 San Andrés, Providencia and Santa Catalina have several urban centres throughout the islands. The population of the Archipelago in 2003 is close to 80,000 inhabitants[17]. The capital of the Archipelago Department is the city of San Andrés on the island of San Andrés. It is a city endowed with a broad and modern infrastructure, including Government facilities and public utilities; it has excellent hotels and other facilities for tourism, shops and department stores, and branches of most of the financial institutions operating in the country. It has a road network with paved ways, and there are centres for elementary, higher and college education, public and private hospitals and health centres, and places of worship of different denominations. There are radio stations and four transmission stations (one on San Andrés Island and three on Providencia Island, two of which also cover Santa Catalina Island) for the television channels of the rest of Colombia. San Andrés as well as Providencia have excellent airports that allow for the many flights –day and night, in the case of San Andrés– proceeding to and from the rest of Colombia and Central and North American countries.

1.11 The Archipelago is an important centre of commerce and tourism, its most dynamic economic activities. The tourist flow comes mainly from the rest of the Colombian territory, as well as from Central American and Caribbean countries. In fact, thousands of tourists from countries like Costa Rica, Panama, Honduras, the United States, Canada, and Nicaragua visit the Archipelago every year.

1.12 Colombia has, for nearly two centuries, without any interruption, always regulated all aspects of the economic, social, administrative and judicial life of the Archipelago with *animus domini*. The Governors of the Department of San Andrés as well as the Mayors of the two existing

[17] National Statistics Department of Colombia *(Departamento Nacional de Estadística de Colombia)*, Estimated Population Projections, Census Studies, 1997.

municipalities –San Andrés (on the island of San Andrés) and Providencia (comprising the island of Providencia and Santa Catalina) – are, as in every other Department in the country, elected by popular vote according to the Colombian Constitution and law. The Archipelago Department elects two Representatives to the House of Representatives of the National Congress and its inhabitants participate in countrywide elections (Presidential, Senate, and others).

1.13 In San Andrés and in Providencia, the Judicial Branch operates in full. There is also a Customs District, part of the National Tax and Customs Direction. Likewise, the Archipelago has always had the presence of the authorities and agents of the National Police.

1.14 On the islands and cays of the Archipelago, there are Colombian Navy detachments responsible for the operation and maintenance of the lighthouses and navigational aids, control of fishing, and the interdiction of shipments of illicit narcotics.

1.15 As regards the cays, traditionally and historically they have always been the fishing grounds for the people of the Archipelago of San Andrés who carry out their activities on the basis of Colombian governmental regulations.

1.16 Colombia's uninterrupted sovereignty over the Archipelago of San Andrés has been duly recognized by the international community in general and Nicaragua in particular. Thus, for instance, in the mid 20th century, Nicaragua appointed consuls in San Andrés and on several occasions has requested the Colombian authorities flight and fishing permits, and its nationals have traditionally requested Colombia to grant visas and tourism cards to visit the Archipelago.

1.17 Some 32 nautical miles off the coast of Nicaragua and 69 nautical miles off the Cays of Albuquerque –which are closest to them– lies a group of two islands known as the Corn Islands, or Islas Mangles or Islas del Maiz, that have belonged to Nicaragua since the 1928 Treaty. The largest island (Great Corn Island) has an approximate area of 10 square kilometres, whereas the smallest (Little Corn Island) has an approximate area of 2.9 square kilometres.

1.18 To the southeast of the terminus of the land border between Nicaragua and Honduras near Cape Gracias a Dios, there are certain Nicaraguan cays and reefs called "Miskito Cays", located approximately 30 nautical miles off the Nicaraguan coast. They are uninhabited and are only used as temporary shelter by fishermen.

B. THE MARITIME AREA

1.19 The Archipelago of San Andrés and the Islas Mangles (Corn Islands) are located within a maritime area of irregular depths, from some hundreds of fathoms deep abruptly descending in places to depths close to 3,000 metres.

1.20 Due to the special features of the Caribbean coast of Nicaragua (the "Mosquito Coast") and of the Islas Mangles (Corn Islands) and the Miskito Cays, the fishery potential lies off those coasts, where the largest fishing capacity of the entire area is found. In contrast, the areas east of the 82º W Meridian have, in general terms, limited fishing potential for lobster fishing and snailfish collection in the maritime areas adjacent to the cays of Roncador, Quitasueño, Serrana, Serranilla and Bajo Nuevo.

1.21 Within the framework of international agreements or under the express authorisation of the Colombian Government, nationals of other countries may carry out fishing activities in the maritime areas of the Archipelago. All fishing activities performed in the area are subject to strict conservation measures established by the Colombian Government.

III. The Colonial and Early Post-Colonial Era

1.22 The parts of the Spanish Empire in the Americas relevant for the present proceedings were the Viceroyalty of Santa Fe[18] (comprising mostly the present-day Republic of Colombia) and the Captaincy General of Guatemala (which included part of what is now mainland Nicaragua).

1.23 The Mosquito Coast as well as the Archipelago of San Andrés –which included the Islas Mangles (Corn Islands)– formed part of the Viceroyalty of Santa Fe when it was definitively established in 1739[19]. For a short period (1792-1803) Spain authorised the Captain General of Guatemala to appoint a Governor for the Archipelago. However, in December 1802, the Governor of the Archipelago as well as the islanders wrote to the King, requesting that the Archipelago be placed again under the jurisdiction of the Viceroyalty of Santa Fe.

1.24 The King of Spain then provided, by a Royal Order of 20 November 1803[20], that the Archipelago of San Andrés,

[18] The Spanish documents of the time interchangeably referred to said Viceroyalty as *Virreinato de la Nueva Granada (Viceroyalty of Nueva Granada)* or *Virreinato de Santa Fe (Viceroyalty of Santa Fe)*, due to the fact that Santa Fe was the capital of the Viceroyalty and the seat of the viceroys.

[19] *Cédula Real (Royal Letters Patent)* of 1739, establishing the Viceroyalty of Santa Fe, in Borda, F. de P.: Límites de Colombia con Costa Rica, Memoria redactada de orden del Gobierno de Colombia, Imprenta de La Luz, Bogotá, 1896, pp. 310-313.

[20] Annex 2: Royal Order of 20 November 1803.

including the Islas Mangles (Corn Islands), as well as the part of the Mosquito Coast from Cape Gracias a Dios southward, be segregated from the Captaincy General of Guatemala and become dependent upon the Viceroyalty of Santa Fe, to which these territories belonged for the remainder of the Colonial era.

1.25 However, regarding the Mosquito Coast, since the mid-17th century, British subjects, with the aid of the Governor of Jamaica, began to occupy and colonize the coast which is today Nicaragua's eastern coast between Cape Gracias a Dios and the San Juan River. Upon the dissolution of the Spanish Empire, that portion of the Coast which had been assigned to Colombia by the Spanish Sovereign in 1803 (as explained in the preceding paragraph) was under British possession.

1.26 When Spain's American Empire broke up, Colombia emerged as an independent State in 1810. Colombia became known as "Great Colombia" in 1819 and its Constitution was adopted in 1821. The Archipelago of San Andrés –including the Islas Mangles (Corn Islands)– adhered to that Constitution by means of public proclamations by the inhabitants of the islands[21] in 1822 and, in that same year, was incorporated as the Sixth Canton of the Province of Cartagena.

1.27 As regards Nicaragua's independence, although the provinces that were part of the Captaincy General of Guatemala proclaimed their independence from the Spanish Crown on 15 September 1821, a few months later they were absorbed by the Mexican Empire to which they belonged until 1823. In that year, the "Repúblicas Unidas de Centroamérica" (Central American Federation) were formed

[21] Letter addressed by Col. Perú de Lacroix, Colonel of the Republican Armies *(interim Commander, during Oct. 1822, of the 6th Canton of the Province of Cartagena –mainly comprised by San Andrés, Old Providence and Corn Islands-, Department of Magdalena)* to General Francisco de Paula Santander, Vice President of the Republic of Colombia, on 11 Nov. 1822.

as a single State that was to last until 1838 when Nicaragua separated from the Federation and declared its "sovereignty and independence"[22].

1.28 In the 19th century the Mosquito Coast was under direct control of Great Britain and their Miskito protégés. Since the very emergence of Colombia as an independent State, Colombia, on the basis of the titles derived from the Spanish Crown, began to assert its rights of sovereignty and jurisdiction over that coast against the British Government. Since the mid-19th century, Colombia had asserted its rights over the Mosquito Coast against Nicaragua as well. Despite the fact that Nicaragua in 1860 signed the Treaty of Managua (Wyke-Zeledón) with Great Britain, the Miskitos –under British protection– continued to hold the effective control over the coast that officially came to be known as "Reserva Mosquitia" (Mosquito Reservation). This situation prevailed until 1894 when Nicaragua, with the support the United States, began to exercise some presence on that coast. During that entire period, Colombia continued to assert its rights over the Mosquito Coast against Nicaragua.

1.29 The differences between both States were compounded by the fact that in 1890, when there was still a British presence in the Mosquitian Reservation, the representative or "commissary", designated by the Nicaraguan Government for the Mosquito Coast, occupied the Islas Mangles (Corn Islands) by force. The Colombian Minister of Foreign Affairs, in an official Note of 5 November 1890, protested to Nicaragua against its occupation of those islands "over which the Republic [of Colombia] holds indisputable titles of dominion and ownership".[23] This unlawful occupation only affected the Islas Mangles (Corn Islands), while the other islands and cays of the Archipelago of San Andrés continued to be under full Colombian sovereignty and jurisdiction, in

[22] *Memorial of Nicaragua*, p. 61, para. 2.5.
[23] Annex 3: Diplomatic Note of 5 Nov. 1890 addressed to Nicaragua's Foreign Affairs Minister by Colombia's Foreign Affairs Minister.

the same manner as every other portion of the country's territory.

1.30 Ever since the consolidation of its independence from the Spanish Crown and the foundation of the Republic, Colombia *à titre de souverain* has for almost two centuries exercised publicly, peacefully and uninterruptedly its sovereignty over the Archipelago of San Andrés, including all the islands, islets and cays[24] that are part of it.

1.31 In striking contrast, Nicaragua exercised no sovereignty at all over the Archipelago of San Andrés. Nicaragua is unable to show the exercise of any element of administration in either the 19th or 20th centuries.

1.32 Moreover, as will be hereinafter explained, it was only when Colombia definitively renounced all its rights over the Mosquito Coast and the Islas Mangles (Corn Islands) in the 1928 Treaty that Nicaragua became the lawful sovereign over those territories.

IV. The Emergence of a Dispute in 1913, upon Nicaragua's Claim to the Archipelago of San Andrés

A. EMERGENCE OF THE DISPUTE OVER THE ARCHIPELAGO OF SAN ANDRÉS IN 1913

1.33 On 8 February 1913, Nicaragua signed a treaty with the United States (known as the Chamorro – Weítzel Treaty) under which it purported to grant the United States the right to build an inter-oceanic canal through Nicaraguan territory. In the same treaty, Nicaragua purported to grant to the United

[24] Between 1928 and 1972, the cays of Roncador, Quitasueño and Serrana were subjected to a special "status quo" regime between Colombia and the United States.

States a 99 year lease of the Islas Mangles (Corn Islands) which belonged to Colombia. The treaty was not approved by the United States' Senate. In the following year, the two countries signed a new instrument, the Chamorro-Bryan Treaty that in general contained the same terms as the former treaty. Colombia protested to Nicaragua in a Note dated 9 August 1913[25] and to the United States on 6 February 1916 when the Senate's Foreign Relations Committee had recommended the approval of that Treaty[26].

1.34 Despite the fact that a difference between the two countries had arisen during the mid-19th century regarding sovereignty over the Mosquito Coast and, later on, on the occasion of Nicaragua's taking of the Islas Mangles (Corn Islands) (as mentioned in para. 1.29 above), it was only on 24 December 1913 that Nicaragua, for the first time, in a Note responding to Colombia's aforementioned Note of 9 August 1913, asserted claims over certain islands of the Archipelago of San Andrés. As regards the Islas Mangles (Corn Islands) and the Mosquito Coast, Nicaragua's reply reiterated its claims over them.

B. NEGOTIATIONS BETWEEN THE PARTIES

1.35 Since the dispute over the Archipelago of San Andrés arose in 1913, an extended exchange of diplomatic Notes took place between the two countries, with regard to the Mosquito Coast, the Islas Mangles (Corn Islands) and other islands belonging to the Archipelago of San Andrés. During the course of that exchange, each of the parties extensively put

[25] Annex 4: Diplomatic Note of 9 Aug. 1913, addressed to Nicaragua's Foreign Affairs Minister by Colombia's Foreign Affairs Minister.

[26] El Salvador and Costa Rica also protested against this Treaty whereby Nicaragua granted to the United States, for a period of 99 years, the right to establish, exploit and maintain a naval base on a part of its territory on the Gulf of Fonseca, located on the Pacific Ocean. Separate cases were brought by those States against Nicaragua before the Central American Court of Justice that issued its judgments in 1916 and 1917. However, Nicaragua's refusal to comply with the decisions precipitated the collapse of the Central American Court of Justice.

forth its respective positions and views with regard to the rights over those territories.

1.36 In early 1919, Mr. Manuel Esguerra –who had been appointed as the Colombian Ambassador to the Central American States[27] since 1915– arrived at Managua, with the purpose of carrying out negotiations with the Government of Nicaragua in order to settle the differences subsisting between the parties.

1.37 On 27 March 1922, the Nicaraguan Government announced its decision to establish a Legation in Bogotá, headed by Mr. José M. Pasos Arana. Nicaragua's Government expressed its confidence that the designation of Mr. Pasos would contribute to the direct settlement of the territorial questions between Nicaragua and Colombia that both governments had been dealing with.

1.38 In April 1922, the Nicaraguan Government expressed to Esguerra its willingness to settle the dispute by direct negotiations between the parties. Taking account of Nicaragua's disposition, the Government of Colombia, through Esguerra, proposed a possible formula to that effect to the Government of Nicaragua. By that formula, Colombia would renounce its rights over the Mosquito Coast and the Islas Mangles (Corn Islands) in exchange for Nicaragua's renouncing to any claim whatsoever over the Archipelago of San Andrés including all of its islands, islets and cays. The Colombian Government consulted the Foreign Affairs Advisory Commission[28] and requested its recommendation in this regard.

[27] The Colombian Ambassador (Minister Plenipotentiary) to Nicaragua was likewise accredited in all the other Central American countries.

[28] The Foreign Affairs Advisory Commission was a consultative organ of the government, formed by the most illustrious experts on international relations at the time.

1.39 The Commission's recommendation concurred with the aforementioned formula and thus, was adopted by the Colombian Government. Consequently, Esguerra and the Foreign Affairs Minister of Nicaragua, under the Nicaraguan President's authorization, continued to hold negotiations on the matter, as a result of which Esguerra presented a draft treaty[29] in March 1925 to Nicaragua's Minister, thus formalizing the proposal submitted by Esguerra that had been discussed since 1922.

1.40 According to the draft treaty that aimed to address the issues that divided the parties, Nicaragua would renounce "in a definitive and absolute manner" the sovereignty rights it believed itself to hold over "the islands of San Andrés, Providencia, Santa Catalina and all the other islands, islets and cays of the Archipelago of San Andrés and Providencia". In turn, Colombia would do the same with regard to its rights over the Mosquito Coast, lying between the Cape Gracias a Dios and the San Juan River, as well as to "the islands called Great Corn Island and Little Corn Island, or Mangle Islands"[30]. As will be shown in paragraph 1.45 below, the terms of this proposal are substantially the same as those which were to be incorporated into the 1928 Treaty signed between the parties.

1.41 The Nicaraguan Minister replied to Esguerra's Note[31], pointing out that "under instructions from the President, [he] had been discussing those issues with [Esguerra, the Colombian Ambassador] until culminating in the draft that you propose for my Government's consideration", and that "… had the political events which have precipitated within these last few days allowed it, it is very likely that this

[29] Annex 5: Diplomatic Note No. 232 of 18 Mar. 1925 and accompanying draft of Treaty presented to Nicaragua's Foreign Affairs Minister by Colombia's Ambassador in Managua.
[30] See Annex 5, draft treaty.
[31] Annex 6: Diplomatic Note No. 157 of 28 Mar. 1925, addressed to the Ambassador of Colombia in Managua by Nicaragua's Foreign Affairs Minister.

important matter would have been solved under equitable and cordial terms".

1.42 In effect, the general civil war that broke out in Nicaragua at the time led to a suspension of negotiations during the rest of 1925 and 1926, and also to Esguerra's departure from that country.

1.43 In mid-1927 the Nicaraguan Government conveyed to Colombia its willingness to resume the negotiations in order to settle the controversy.

V. The Settlement of the Dispute by the Esguerra-Bárcenas Treaty of 1928 and its Protocol of Exchange of Ratifications of 1930

A. CONCLUSION OF THE TREATY

1.44 The dispute was finally settled by the Esguerra – Bárcenas Treaty signed between Colombia and Nicaragua in Managua on 24 March 1928[32] and its Protocol of Exchange of Ratifications of 5 May 1930. The Treaty settled the controversy by each party recognizing the other's sovereignty over the respective disputed territories (thereby renouncing its claims), and by establishing the 82º W Meridian as the boundary between the two countries. That is precisely the dispute that Nicaragua now seeks to reopen before this Court.

[32] Annex 1 a: Treaty Concerning Territorial Questions at Issue between Colombian and Nicaragua, 24 March 1928 and its Protocol of Exchange of Ratifications of 5 May 1930. Original in Spanish and English translation. See footnote 6.

1.45 This Treaty has since governed the matter. Its substantive provisions are, in the original authentic Spanish text, as follows:

> *"Artículo I*
>
> *La República de Colombia reconoce la soberanía y pleno dominio de la República de Nicaragua sobre la Costa de Mosquitos comprendida entre el cabo de Gracias a Dios y el río San Juan, y sobre las islas Mangle Grande y Mangle Chico en el Océano Atlántico (Great Corn Island y Little Corn Island); y la República de Nicaragua reconoce la soberanía y pleno dominio de la República de Colombia sobre las Islas de San Andrés, Providencia, Santa Catalina y todas las demás islas, islotes y cayos que hacen parte de dicho archipiélago de San Andrés.*
>
> *No se consideran incluidos en este Tratado los cayos Roncador, Quitasueño y Serrana, el dominio de los cuales está en litigio entre Colombia y los Estados Unidos de América.*
>
> *Artículo II*
>
> *El presente Tratado será sometido para su validez a los Congresos de ambos Estados, y una vez aprobado por estos, el canje de las ratificaciones se verificará en Managua o Bogotá, dentro del menor término posible."*

The English text is as follows:

> Article I
>
> The Republic of Colombia recognizes the full and entire sovereignty of the Republic of Nicaragua over the Mosquito Coast between

> the Cape Gracias a Dios and the San Juan River, and over the Mangle Grande and Mangle Chico islands, in the Atlantic Ocean (Great Corn Island and Little Corn Island); and the Republic of Nicaragua recognizes the full and entire sovereignty of the Republic of Colombia over the islands of San Andrés, Providencia, Santa Catalina and all the other islands, islets and cays that form part of the said Archipelago of San Andrés.
>
> The Roncador, Quitasueño and Serrana cays are not considered to be included in this Treaty, sovereignty over which is in dispute between Colombia and the United States of America.
>
> Article II
>
> The present Treaty, in order to be valid, shall be submitted to the Congresses of both States, and once approved by them, the exchange of ratifications shall take place at Managua or Bogotá, in the shortest possible term.

1.46 In Nicaragua, the President approved the Treaty by Resolution of 27 March 1928[33] and ordered it to be submitted to Congress for consideration.

1.47 In Colombia, in accordance with the Constitution, the President ordered the Treaty to be submitted to Congress for its approval. It was accordingly presented by the Minister of Foreign Affairs on 18 September 1928. In its transmittal to Congress, the Government noted that

[33] See Annex 10, at p. 1145, and Annex 7, at p. 746.

> "*… the settlement in question comes to dispel any motive of divergence between the two countries…*"[34]

The Minister of Foreign Relations pointed out that the Treaty confirmed Colombia's sovereignty over the Archipelago and thus prevented any future claim by Nicaragua and any future controversy:

> "*This arrangement forever consolidates the Republic's situation in the Archipelago of San Andrés and Providencia*, erasing any pretension to the contrary, and perpetually recognizing the sovereignty and right of full domain for our country over that important section of the Republic."[35]

B. APPROVAL AND RATIFICATION OF THE TREATY

1.48 The Colombian Senate, after the three mandatory debates, gave its approval on 28 October 1928.

1.49 The Treaty was then submitted to the Colombian House of Representatives for consideration, where it was also subjected to the mandatory debates and was approved by that House on 14 November 1928.

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[34] *"… el arreglo en cuestión viene a alejar todo motivo de divergencia entre los dos países…". Anales del Senado, Sesiones Ordinarias de 1928* [Annals of the Senate, Ordinary Sessions of 1928], No. 114, 20 Sept. 1928, p. 713. Emphasis added.

[35] *"Este arreglo viene a consolidar definitivamente la situación de la República en el Archipiélago de San Andrés y Providencia, borrando toda pretensión contraria y reconociendo a perpetuidad para nuestro país la soberanía y el derecho de pleno dominio de aquella importante sección de la República". Anales del Senado, Sesiones Ordinarias de 1928* [Annals of the Senate, Ordinary Sessions of 1928], No. 114, 20 Set. 1928, p 713. Emphasis added.

1.50 Subsequently, the Treaty was finally approved in Colombia, by Law 93 of 17 November 1928[36], about nine months after its signature.

1.51 In the Nicaraguan Congress, a Study Commission ("Comisión Dictaminadora"), composed of the same Senators who were members of the Senate's Foreign Affairs Commission, was created to study the Treaty and recommend a decision in that regard**.**

1.52 The Nicaraguan Senatorial Study Commission agreed with the Nicaraguan Minister of Foreign Affairs and his advisors to propose the 82°W Meridian "as the limit in the dispute with Colombia" and proceeded to discuss the matter with the Colombian Ambassador in Managua[37].

1.53 Thus, bearing in mind that the Colombian Congress had already approved the Treaty, a process of negotiation between the two countries was initiated with a view to settling the issue. These negotiations and consultations took place between the Nicaraguan Foreign Minister, his advisors and the members of the Foreign Affairs Commission of the Nicaraguan Senate on the one hand, and the Colombian Government through its Ambassador in Managua on the other.

1.54 The Colombian Ambassador in Managua transmitted Nicaragua's proposal to his Government[38]. After a careful study by the Colombian Government, it was considered that the provision concerning the 82° W Meridian as the

[36] *Anales de la Cámara de Representantes* [Annals of the Chamber of Representatives], 30 Nov. 1928, Diario Oficial, Bogotá, No. 20952 of 23 Nov. 1928, p. 547.
[37] Annex 8: Record of session XLIX of the Chamber of the Senate of the Nicaraguan Congress, 5 Mar. 1930. *La Gaceta*, Diario Oficial, Año XXXIV, Managua, D.N., No. 98, 7 May 1930, p. 778.
[38] Cablegram of 8 Feb. 1930, addressed to the Ministry of Foreign Affairs of Colombia by the Colombian Ambassador in Managua, Manuel Esguerra.

boundary between the two States could be included in the Protocol of Exchange of Ratifications.

1.55 The Colombian Ministry of Foreign Affairs further instructed its representative in Managua to propose that a specific map be expressly referred to in the provision as the basis for identifying the agreed boundary along the Meridian 82º W[39].

1.56 In this regard, the parties finally agreed to use for the aforementioned purpose the chart published in 1885 by the Hydrographic Office in Washington under the authority of the Secretary of the Navy of the United States. That map, widely known in both countries, clearly permits the identification of the 82º W Meridian -established as the maritime boundary between Colombia and Nicaragua.

1.57 Both the inclusion of the provision in the Protocol of Exchange of Ratifications as well as the reference to the 1885 chart were accepted by the Government of Nicaragua and by the Senatorial Study Commission, prior to the debate in the Nicaraguan Senate. The reference to the 1885 United States chart was included in the ratification instruments of both Nicaragua and Colombia[40].

1.58 The entire negotiation process between both countries concerning the inclusion of the provision regarding the dividing line of the waters in dispute began at the end of January 1930 and lasted until the Nicaraguan Senate's approval of the Treaty on 6 March 1930.

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[39] Memorandum of 11 Feb. 1930, to the Colombian Ambassador in Managua, Manuel Esguerra, from the Colombian Ministry of Foreign Affairs.

[40] Although the reference to the 1885 chart was included in the ratification instruments of both Nicaragua and Colombia, the two governments later decided nonetheless to omit express reference to this chart in the Protocol of Exchange of Ratifications.

1.59 In the record of the Nicaraguan Senate plenary session of 4 March 1930, regarding the Treaty's approval, it is stated:

> "7. The report of the Commission, signed by Senators Paniagua Prado, Pérez and Amador, that had studied the initiative of the Executive branch, submitting *the border treaty between Nicaragua and Colombia* [*'el tratado de límites entre Nicaragua y Colombia'*] for the consideration of this High Body was read."[41]

The Nicaraguan congressional Study Commission recommended in its report that the Treaty be ratified with the provision agreed with the Government of Colombia, in the following terms:

> "…understanding that the Archipelago of San Andrés mentioned in the first clause of the Treaty does not extend west of Greenwich meridian 82 of the chart published in October 1885 by the Hydrographic Office of Washington under the authority of the Secretary of the Navy of the United States of North America."[41]

> *("... en la inteligencia de que el Archipiélago de San Andrés que se menciona en la cláusula primera del Tratado no se extiende al Occidente del meridiano 82 de Greenwich de la carta publicada en octubre de 1.885 por la Oficina Hidrográfica de Washington bajo la autoridad del Secretario de la Marina de los Estados Unidos de América.")*

[41] Annex 7: Record of session XLVIII of the Chamber of the Senate of the Nicaraguan Congress, 4 Mar. 1930. *La Gaceta*, Diario Oficial, Año XXXIV, Managua, D.N., No. 94, 1 May 1930, pp. 746-747. Emphasis added.

For his part, Senator Paniagua Prado, member of Study Commission created to analyse the Treaty, took the floor to explain

> "… that there *being no ground whatsoever for the pretensions* [of Nicaragua] *over the disputed territories,* the best solution that can be given to this dispute from a patriotic standpoint, is to approve the Treaty under discussion…"[42]

Later on, he again took the floor

> "... to reinforce his arguments and he tried to show the advisability and need to approve the Treaty which is being dealt with." [43]

1.60 The debate in the Nicaraguan Senate plenary session of 4 March 1930 was postponed to the following day in order to hear the Foreign Affairs Minister's view on the inclusion of the agreed provision regarding the 82° W Meridian.

1.61 During the Nicaraguan Senate plenary session of 5 March 1930, Senator Paniagua Prado, member of the Study Commission, and who proposed summoning the Foreign Affairs Minister to appear in that session, said:

> "…That since the Honourable Senator Don Demetrio Cuadra had stated during yesterday's session his fears that the Colombian

[42] Annex 7: Record of session XLVIII of the Chamber of the Senate of the Nicaraguan Congress, 4 Mar. 1930. *La Gaceta*, Diario Oficial, Año XXXIV, Managua, D.N., No. 94, 1 May 1930, pp. 746-747. Emphasis added.

[43] Annex 8: Record of session XLIX of the Chamber of the Senate of the Nicaraguan Congress, 5 Mar. 1930. *La Gaceta*, Diario Oficial, Año XXXIV, Managua, D.N., No. 98, 7 May 1930, pp. 777-779. Emphasis added.

Government would not accept the amendment to the Treaty with Nicaragua … that the Study Commission proposed. Since he therefore considered that addition or amendment of the Treaty not to be convenient, and His Excellency the Minister of Colombia [in Managua], Mr. Esguerra having declared to me in my capacity as Senator of the Republic, *that his Government was willing to accept the agreed delimitation*, he had asked for the Minister of [Foreign] Affairs to be called in order to learn whether our Ministry of Foreign Affairs is officially aware of that decision of the Colombian Government *regarding the clarification or demarcation of the dividing line of the waters in dispute*; as he understands *that such demarcation is indispensable for the question to be at once terminated forever.*"[44]

("Que con motivo de haber manifestado en la sesión de ayer el Honorable Senador don Demetrio Cuadra sus temores de que el Gobierno Colombiano no acepte la reforma al Tratado con Nicaragua… que propone la Comisión Dictaminadora. Pareciéndole por lo mismo no conveniente esa adición o reforma al tratado y habiéndome manifestado el Excelentísimo Señor Ministro de Colombia, señor Esguerra, en mi carácter de senador de la República, que su gobierno estaba dispuesto a aceptar la delimitación acordada, había pedido se llamara al señor Ministro de Relaciones, para conferenciar con él a fin de saber si nuestra Cancillería tiene conocimiento oficial de esa resolución del Gobierno

[44] Annex 8: Record of session XLIX of the Chamber of the Senate of the Nicaraguan Congress, 5 Mar. 1930. *La Gaceta*, Diario Oficial, Año XXXIV, Managua, D.N., No. 98, 7 May 1930, pp. 777-779. Emphasis added.

> *Colombiano en relación con la aclaración o demarcación de la línea divisoria de aguas en disputa; pues él tiene entendido que esa demarcación es indispensable para que la cuestión quede de una vez terminada para siempre.")*

1.62 The Nicaraguan Foreign Affairs Minister began by explaining the way in which the Government of Nicaragua had agreed on the decision regarding the addition of the 82º W Meridian as the boundary in the dispute with Colombia:

> "…that during an interview at the Ministry of Foreign Affairs with the Honourable Senate Commission on Foreign Affairs, *it was agreed between the Commission and the advisors of the Government to accept the 82° west Greenwich meridian* and of the Hydrographic Commission of the Ministry of the Navy of the United States of 1885, *as the boundary in this dispute with Colombia…*"[45]

> *("…que en una entrevista en el Ministerio de Relaciones con la Honorable Comisión de Relaciones del Senado, se convino entre la Comisión y los Consejeros del Gobierno en aceptar como límite en esta disputa con Colombia el 82º Oeste del meridiano de Greenwich y de la Comisión Hidrográfica del Ministerio de la Marina de los Estados Unidos de 1885…")*

1.63 The Nicaraguan Foreign Affairs Minister went on to explain that, since certain concerns had arisen due to the possibility

[45] Annex 8: Record of session XLIX of the Chamber of the Senate of the Nicaraguan Congress, 5 Mar. 1930. *La Gaceta*, Diario Oficial, Año XXXIV, Managua, D.N., No. 98, 7 May 1930, pp. 777-779. Emphasis added.

that the inclusion of the boundary proposed by the Government of Nicaragua could imply the need for a new consideration of the Treaty by the Colombian Congress, he had discussed the issue with the representative of Colombia and the latter, in turn, had consulted with his Government:

> "… that having dealt with the Honourable Minister of Colombia [in Managua], and he in turn with his Government, who manifested that he begged not to alter the Treaty because it would have to be submitted again to the Congress' consideration; having insinuated to H.E. Minister Esguerra to discuss this issue again with his Government, and after obtaining a reply, he had manifested to him that his Government had authorized him to declare that such Treaty would not be submitted for the approval of the Colombian Congress *by reason of the… dividing line ['con motivo de la… línea divisoria]*, that he could therefore… assure the Honourable Chamber… that the Treaty would be approved without the need for it to be submitted again for the approval of the [Colombian] Congress." [46]

The Nicaraguan Foreign Affairs Minister also explained that the inclusion of the 82º W Meridian's

> "only *purpose was to establish a boundary between the archipelagos* which had been the reason for the dispute" *("sólo tenía por objeto señalar un límite entre los archipiélagos que habían sido motivo de la disputa")*; "the Colombian Government had already accepted that clarification according to what was

[46] Annex 8: Record of session XLIX of the Chamber of the Senate of the Nicaraguan Congress, 5 Mar. 1930. *La Gaceta*, Diario Oficial, Año XXXIV, Managua, D.N., No. 98, 7 May 1930, pp. 777-779. Emphasis added.

> expressed by their Minister Plenipotentiary, [who had] solely manifested that this clarification [should] be made in the protocol of *[sic]* ratification of the Treaty; that this clarification was a need for the future of both nations, as *it came to establish the geographical boundary between the archipelagos in dispute*, without which the question would not be completely defined *['...pues venía a señalar el límite geográfico entre los archipiélagos en disputa sin lo cual no quedaría completamente definida la cuestión']*."[47]

1.64 Yet another reiteration of the Nicaraguan Congress' understanding of the implications of the aforementioned provision as an agreed boundary was given by Senator Demetrio Cuadra when he then took the floor and stated:

> "I consider it to be a complete amendment of the Treaty and therefore should be returned for the consideration of the Colombian Congress where everything is done with legal formality. It is urgent for us to clarify our rights over the Mosquito territory and over the islands granted by the Bryan-Chamorro Treaty as belonging to Nicaragua for the construction of the Canal."[48]

1.65 The Treaty was unanimously approved in the Nicaraguan Senate on 6 March 1930.

1.66 In the Nicaraguan Chamber of Deputies, the Treaty was reviewed by the Foreign Affairs Commission formed by the following Deputies: Argüello, Irías, García and Borgen. When unanimity was not achieved for the approval of the

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[47] Annex 8: Record of session XLIX of the Chamber of the Senate of the Nicaraguan Congress, 5 Mar. 1930. *La Gaceta*, Diario Oficial, Año XXXIV, Managua, D.N., No. 98, 7 May 1930, pp. 777-779. Emphasis added.

[48] Annex 9: Record of session LVIII of the Chamber of Deputies of the Nicaraguan Congress, 1 Apr. 1930. *La Gaceta*, Diario Oficial, Año XXXIV, Managua, D.N., No. 182, 20 Aug. 1930, p. 1460 ff.

instrument, Deputy Borgen drafted a minority report recommending that the Treaty not be approved. For their part, Deputies Argüello, Irías and García drafted a majority report that concluded as follows:

> "…recommending to ye, the approval of the aforementioned Treaty concluded between Nicaragua and Colombia, with the addition proposed in the Senate Chamber".[49]

After a lengthy debate, the majority report recommending the Treaty's approval was adopted by 25 votes to 13, thereby resulting in the Treaty's adoption in the Chamber of Deputies on 3 April 1930.

1.67 The single article covering the Nicaraguan Congressional approval decree reads as follows:

> "The Treaty concluded between Nicaragua and the Republic of Colombia on 24 March 1928, that was approved by the Executive Branch on the 27th of the same month and year, is hereby ratified; *the Treaty puts an end to the question pending between both Republics regarding the Archipelago of San Andrés and the Nicaraguan Mosquitia*[50]; understanding that the Archipelago of San Andrés mentioned in the first clause of the Treaty, does not extend to the west of Greenwich Meridian 82, of the map published in October 1885 by the Hydrographic Office of Washington under the authority of the Secretary of the Navy of the United States.

[49] Annex 9: Record of session LVIII of the Chamber of Deputies of the Nicaraguan Congress, 1 Apr. 1930. *La Gaceta*, Diario Oficial, Año XXXIV, Managua, D.N., No. 182, 20 Aug. 1930, p. 1460 ff.

[50] *"Tratado que pone término a la cuestión pendiente entre ambas Repúblicas sobre el Archipiélago de San Andrés y Providencia y la Mosquitia nicaragüense."*

> This decree shall be included in the Instrument of Ratification…"[51]

1.68 The President of Nicaragua signed into law the Congressional approval decree by Presidential Resolution of 5 April 1930[51]. The Congressional and Executive instruments of approval were published in the official journal of the Republic of Nicaragua on 2 July 1930.

1.69 In the Protocol of Exchange of Ratifications signed in Managua on 5 May 1930, the mutually agreed provision regarding the 82º W Meridian referred to above was included as follows:

> "His Excellency Dr. Don Manuel Esguerra, Envoy Extraordinary and Minister Plenipotentiary of Colombia to Nicaragua, and His Excellency Dr. Don Julian Irias, Minister for Foreign Affairs, having met in the offices of the Ministry of Foreign Affairs of the Government of Nicaragua, for the purpose of proceeding to exchange the ratifications of their respective governments, regarding the Treaty concluded between Colombia and Nicaragua, on March twenty-fourth, one thousand nine hundred and twenty-eight, *to put an end to the question pending between both Republics, concerning the San Andrés and Providencia Archipelago and the Nicaraguan Mosquitia*[52]; having communicated their full powers found in good and due form, and having noted that the said ratifications were identical, proceeded to exchange the same.

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[51] Annex 10: Official Publication in Nicaragua of the 1928 Treaty Concerning Territorial Questions at Issue between Colombian and Nicaragua, and its Protocol of Exchange of Ratifications of 1930, *La Gaceta*, Diario Oficial, Año XXXIV, Managua, D.N., No. 144, 2 July 1930, pp. 1145-1146. Emphasis added.

[52] *"…para poner término a la cuestión pendiente entre ambas Repúblicas, sobre el Archipiéo de San Andrés y Providencia y la Mosquitia nicaragüense."* Emphasis added.

> The undersigned, in virtue of the full powers which have been granted to them and on the instructions of their respective governments, hereby declare: that the Archipelago of San Andrés and Providencia, which is mentioned in the first clause of the referred to Treaty does not extend west of the 82 Greenwich meridian."

1.70 The Protocol of Exchange of Ratifications was also officially published by Nicaragua, along with the Treaty's text and the required approval decrees (Presidential and Congressional).

1.71 The Treaty of 1928 and its Protocol of Exchange of Ratifications of 1930 settled the dispute between Colombia and Nicaragua on the following basis:

(a) Nicaragua recognized Colombia's sovereignty over the islands of San Andrés, Providencia and Santa Catalina, and over the other islands, islets and cays forming part of the San Andrés Archipelago;

(b) Colombia recognized Nicaragua's sovereignty over the Mosquito Coast and over the Islas Mangles (Corn Islands), two islands which were also part of the Archipelago;

(c) Nicaragua recognized and agreed that sovereignty over the cays of Roncador, Quitasueño and Serrana, constituting part of the Archipelago, was a matter solely between Colombia and the United States, to the exclusion of Nicaragua[53]; and

[53] See paras. 1.82-1.83, *infra.*

(d) The two States agreed that the boundary between them followed the Meridian 82° W, thus eliminating any matter that could be the object of a dispute between the two nations.

1.72 Colombia continued to exercise, as it had been doing, its sovereignty and jurisdiction over each and every one of the features of the Archipelago, namely, the islands of San Andrés, Providencia and Santa Catalina, the cays of Roncador, Quitasueño y Serrana, the cays of Serranilla, Bajo Nuevo, Albuquerque, and the group of Cays of the East-Southeast or Courtown Cays ("Cayos del Este-Sudeste") as well as over the other adjacent islets, cays and banks (see para. 1.8, above). As regards the cays of Roncador, Quitasueño and Serrana, they continued to be under the status quo agreed between Colombia and the United States in 1928 (see paras. 1.82-1.83, below). There was never any exercise of sovereignty, dominion or jurisdiction over any of them on Nicaragua's part.

1.73 The Treaty was promulgated in Colombia by decree No. 993 of 23 June 1930, published in the *Diario Oficial*, the Official Journal No. 21426 of 30 June 1930, pp. 705-706. That decree entirely transcribed both the instrument of ratification of the Treaty signed by President José María Moncada of Nicaragua on 30 April 1930, and the Protocol of Exchange of Ratifications of 5 May 1930. The aforementioned Nicaraguan instrument of ratification, in turn, included the entire text of the Treaty, the decree of the Congress of Nicaragua, the presidential approval of that decree of 5 April, and the Protocol of Exchange of Ratifications. In Nicaragua, as mentioned earlier, the ratification instrument including all these documents was published in "La Gaceta", the Official Journal, No. 144, 2 July 1930, p. 1145-1146. These texts are also transcribed in the Colombian decree referred to above.

C. REGISTRATION OF THE 1928 TREATY AND ITS PROTOCOL OF EXCHANGE OF RATIFICATIONS OF 1930

1.74 The Treaty and its Protocol of Exchange of Ratifications were registered with the Secretary-General of the League of Nations on 16 August 1930, under No. 2426. Registration was initially made at the request of the Colombian Ambassador in Bern, Francisco José Urrutia[54]. In the Index of Vol. CV of the *Recueil*, when referring to the registration requested by Colombia, it is indicated, *"Treaty concerning territorial questions at issue between the two States, signed at Managua, March 24, 1928, and Protocol of Exchange of Ratifications signed at Managua, May 5, 1930"*. On page 338, where the text of the Treaty and Protocol appear, a footnote is included stating that *"The exchange of ratifications took place at Managua, May 5, 1930. The treaty came into force on that date"*[55].

1.75 Subsequently, on 25 May 1932, the Nicaraguan Foreign Affairs Minister likewise requested the Treaty's registration[56]. Since the Treaty had already been registered at the request of Colombia, the reference to the Nicaraguan communication carries the same number 2426 that had been assigned in 1930. In the alphabetical index of the 1933 volume of the League of Nations Treaty Series, there appears: *"Treaty and Protocol of Exchange of Ratifications. Territorial Questions. Communicated by Nicaragua"*[57].

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[54] Annex 11: Index of the 1930 Treaty Series of the League of Nations, League of Nations, *Treaty Series,* 1930, vol. CV, p. 7.
[55] League of Nations, *Treaty Series,* 1930, vol. CV, p.338.
[56] Annex 12: Index of the 1931-1932 Treaty Series of the League of Nations, League of Nations, *Treaty Series,* 1931-32, vol. CXXII, p. 362.
[57] Annex 13: Alphabetical Index of the 1930-1933 General Index of the Treaty Series of the League of Nations, League of Nations, *Treaty Series,* 1933, pp. 348, 422.

VI. The 1928-1972 Agreements between Colombia and the United States about the Cays of Roncador, Quitasueño and Serrana

1.76 During the 19th century, the United States Government was facing serious difficulties with its farmers because of a shortage in the provision of fertilisers. *Guano*[58], which exists on several oceanic islands and cays, especially those located in the Caribbean Sea, was the ideal solution. In order to satisfy the aforementioned needs, the 34th American Congress issued the so-called "*Guano* Law" on 18 August 1856. This stated that, when any citizen of the United States discovered and took possession of a deposit of guano on any island, rock or cay, which was not under the legal jurisdiction of any other government, it was considered to belong to the United States.

1.77 In 1890 Colombia learned that the United States Government, acting pursuant to that domestic provision, had granted authorization to one of its nationals for the extraction of *guano* on the Cays of Roncador, Quitasueño and Serrana, that are part of the Archipelago of San Andrés. The Colombian Government protested to the United States, asserting its sovereignty over those cays. A dispute thus arose between the two States which led to official exchanges between them. That controversy would resurface in 1919, when the Governor of San Andrés and Providencia informed the central Government of Bogotá about the erection of lighthouses by the United States on the cays in question.

1.78 The Colombian Minister of Foreign Affairs immediately summoned the United States Ambassador in Bogotá, to advise him of the effect that such an action would have on

[58] *Guano* is formed by excrement of marine birds, and is usually found on rocky coasts or on islets and cays scattered in the sea, especially those located in the Caribbean Sea. It is especially rich in phosphates and has been used for a long time as a top quality, low priced fertiliser.

the relations between the two countries and to deliver a Note of protest[59] addressed to the Secretary of State. The American Ambassador stated that there must have been a misunderstanding as to the ownership of the cays in question and later expressed his displeasure and concern to the State Department regarding this fact.

1.79 The American Ambassador's concern proved accurate, as strong popular protests arose almost immediately in Colombia[60]. The State Department then requested its Ambassador in Bogotá to inform the Colombian Government that the United States were willing to consider Colombia's position on the matter.

1.80 At no time between 1890 and 1928 did the Government of Nicaragua state any specific reservations or claims whatsoever to Colombia or to the United States with regard to any of the aforementioned cays.

1.81 On the contrary, in concluding the Esguerra-Bárcenas Treaty Nicaragua expressly recognized that it lacked any rights over them. For Nicaragua agreed that the question of sovereignty over them was an issue solely between Colombia and the United States to the exclusion of Nicaragua, by virtue of the provision included therein stipulating that "the Roncador, Quitasueño and Serrana cays are not considered to be included in this Treaty, sovereignty over which is in dispute between Colombia and the United States of America". No specific reference to any of those cays was ever made during the Congressional debates of the Treaty in Nicaragua. In contrast, during the approval debates of the Treaty in the Colombian Chamber of Representatives, the aforementioned

[59] Annex 14: Diplomatic Note of 13 Sept. 1919, addressed to the American Minister in Bogotá by Colombia's Foreign Affairs Minister.

[60] Annex 15: Telegram of 4 Oct. 1919, addressed to the Secretary of State of the United States by the American Minister in Bogotá, *Papers Relating to the Foreign Relations of the United States, 1919,* Vol. 1, Government Printing Office, Washington, 1934, pp. 800-801.

clause was criticized since Colombia's rights over the cays were unquestionable[61].

1.82 After the Esguerra-Bárcenas Treaty was signed on 24 March 1928, Colombia and the United States entered into an Agreement regarding the aforementioned cays on 10 April 1928[62]. The Parties agreed to maintain the existing situation in the cays, by which Colombian nationals would continue to fish –uninterruptedly– in the waters of the cays without any objection from the United States while, for its part, the United States would continue to be in charge of the maintenance of navigation aids then or afterwards established by them on the cays in question, without any objection from Colombia.

1.83 The foregoing state of affairs continued without change until the 1928 Agreement was replaced by the "Treaty concerning the status of Quita Sueno[63], Roncador and Serrana", known as the Vázquez – Saccio Treaty signed between Colombia and the United States on 8 September 1972[64]. Nicaragua never expressed any claim to Colombia regarding sovereignty over the cays, either before or after 1928, until 1971 when the negotiations between Colombia and the United States began.

1.84 The Treaty of 8 September 1972 consists of nine articles, the first of which provides that "the Government of the United

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[61] *Anales de la Cámara de Representantes, Sesiones Extraordinarias de 1928* [Annals of the Chamber of Representatives, Extraordinary Sessions of 1928], Bogotá, Wednesday, 14 Nov. 1928, number 158, page 1,131.

[62] Annex 16: Agreement between Colombia and the United States, concerning the status of Quitasueño, Roncador and Serrana, of 10 April 1928.

[63] In the official English version of the Treaty the name of the Quitasueño cay is spelled as "Quita Sueno". However, the most common denomination and the one used officially by the Government of the Republic of Colombia is "Quitasueño".

[64] Annex 17: Treaty between the Government of the Republic of Colombia and the Government of the United States of America concerning the status of Quita Sueno, Roncador and Serrana, signed on 8 September 1972.

States hereby renounces any and all claims to sovereignty over Quita Sueno, Roncador and Serrana".

1.85 In the Treaty, the Government of Colombia guaranteed, under certain conditions, the development of fishing activities by ships and nationals of the United States in the waters adjacent to the Cays; the United States transferred the existing navigation aids on the Cays to Colombia, and Colombia was to be in charge of their maintenance and operation[65]. The regime established in the Agreement of 1928 was brought to an end.

1.86 After the respective approval procedures in the Congress of each of the two States, the exchange of the ratification instruments took place in Bogotá on 17 September 1981.

1.87 The Treaty was registered with the Secretary-General of the United Nations on 31 March 1983, at the request of the United States, under number 21801.

1.88 In this way, the dispute between the United States and Colombia regarding sovereignty over the Cays of Roncador, Quitasueño and Serrana –that had begun at the end of the 19th century– was brought to an end by the 1972 Treaty.

[65] Due to the fact that the US authorities of the Panama Canal ceased the operation and maintenance of the lighthouses, the Quitasueño lighthouse (of crucial importance in an area that is especially dangerous for navigation) stopped working by the end of the 1960s, and had been replaced since 1971 by the Colombian Navy by a more modern lighthouse with different characteristics to those of the one that had been operated by the United States. The same occurred with the lighthouses in Serrana and Roncador, which were replaced with more modern and functional lighthouses by the Colombian Government.

VII. Nicaragua Purports to Carry Out Activities in Areas to the East of the Agreed Maritime Boundary between the two Countries along the 82° W Meridian

1.89 After the conclusion of the 1928 Treaty and its Protocol of Exchange of Ratifications of 1930 that settled the dispute between Colombia and Nicaragua, Colombia continued exercising its sovereignty and administration over the Archipelago and its appurtenant maritime areas in the same uninterrupted manner as it had done so for nearly two centuries.

1.90 In 1969 Nicaragua, for the very first time –and without questioning the validity or effectiveness of the 1928 Treaty as a whole– purported to carry out activities in areas to the east of the agreed maritime boundary along the 82º W Meridian by granting survey permits and oil concessions in those areas. Colombia protested to the Nicaraguan Government by Note of 4 June 1969[66].

1.91 In its Memorial[67], Nicaragua wrongly asserts that Colombia for the first time claimed the 82º W Meridian as a maritime boundary in that diplomatic Note to Nicaragua of 4 June 1969. That is not true. Colombia's 1969 protest was occasioned by Nicaragua's activities to the east of that meridian. But ever since the conclusion of the agreement reached by the 1928 Treaty and its Protocol of Exchange of Ratifications of 1930, Colombia has always conducted itself as regards the boundary on the basis of what was then agreed.

1.92 As early as 1931 –only a year after the Treaty's entry into force– the 82° W Meridian was included as the boundary between Colombia and Nicaragua in the Official Map of the

[66] Annex 18: Diplomatic Note of 4 June 1969, addressed to Nicaragua's Foreign Affairs Minister by Colombia's Ambassador in Managua.
[67] *Memorial of Nicaragua*, *inter alia*, p. 178, para. 2.255.

Republic of Colombia, without there being any protest from Nicaragua (See Maps No. 4 and 4 *bis*). Colombia subsequently published several similar official maps that were not protested by Nicaragua either (See e.g., Maps Nos. 5 - 11). In the official publications of Colombia entitled, "Limits of the Republic of Colombia" (*Límites de la República de Colombia*), published in 1934 and 1944[68], the 82° W Meridian was likewise incorporated as the border between Colombia and Nicaragua. Those publications were not the subject of protests on the part of Nicaragua. Colombia has consistently continued to exercise its sovereignty and jurisdiction over the maritime areas corresponding to the Archipelago up to the aforementioned meridian.

VIII. Nicaragua's Unilateral Challenge to the Validity of the 1928 Treaty

A. NICARAGUA'S UNILATERAL PURPORTED DECLARATION OF NULLITY

1.93 On 19 July 1979, the Sandinista Movement came to power in Nicaragua. Thereafter, a process to increase Nicaragua's military power and armaments –unprecedented in Central American history– began and, at the same time, numerous military and civilian advisers came to Nicaragua, thus generating a delicate situation in the region. Some seven months later, Nicaragua purported to question the territorial and maritime settlement reached half a century earlier with the Esguerra-Bárcenas Treaty of 1928 and its Protocol of Exchange of Ratifications of 1930.

[68] *Límites de la República de Colombia*, Republic of Colombia, Ministry of Foreign Affairs, Office of Longitudes and Borders, Editorial Centro, Bogotá, 1934 p. 46. And, *Límites de la República de Colombia,* Second edition, Republic of Colombia, Ministry of Foreign Affairs, Office of Longitudes and Borders, Colombia Lithography, Bogotá, 1944, p. 101.

1.94 On 4 February 1980, Nicaragua's Minister of Foreign Affairs, Miguel D'Escoto, unexpectedly called in the diplomatic corps accredited in that country to a meeting at the Ministry. During the meeting the Minister distributed an official declaration and a "Libro Blanco" (White Paper)[69], by which Nicaragua attempted to declare null and void the Treaty signed with Colombia in 1928. In those documents, a series of arguments were advanced to support that attempt, among them the following:

> "The historical circumstances undergone by our people since 1909 impeded the real defence of our Continental Shelf, jurisdictional waters and insular territories emerging from this Continental Shelf.
>
> [.....]
>
> A great deal of time has passed since the Bárcenas Meneses-Esguerra Treaty, but the fact is that, it was only on 19 July 1979 that Nicaragua recovered its national sovereignty; before the victory achieved by our people, it had been impossible to proceed to defend the insular, marine and submarine territory of Nicaragua.
>
> [.....]
>
> These circumstances impose the patriotic and revolutionary obligation upon us, to declare the nullity and lack of validity of the Bárcenas Meneses-Esguerra Treaty… in a historical context which incapacitated as rulers, the presidents imposed by the American forces of intervention in Nicaragua and which infringed,

[69] Nicaragua's White Paper on the case. *Libro Blanco sobre el caso de San Andrés y Providencia*, Ministerio de Relaciones Exteriores de la República de Nicaragua, Managua, 4 Feb. 1980.

> as stated, the principles of the National Constitution in force…"[70]

Nicaragua's position was in clear violation of the norms and principles of international law, in particular of the principle of *pacta sunt servanda*. It must also be noted that, at the time, the Republic of Nicaragua never stated, in relation to its purported unilateral declaration of nullity, the alleged breach by Colombia of the 1928 Treaty. In fact, the argument of alleged breach of treaty by Colombia was only advanced by Nicaragua, for the very first time, in its Memorial of 28 April 2003.

1.95 Nicaragua's extravagant claim was immediately rejected by the Government of Colombia in a Note of 5 February 1980[71]. Among other arguments, Colombia stated that,

> "The Nicaraguan attitude, of invoking the nullity or invalidity of the Esguerra – Bárcenas Treaty fifty years after having entered into force, is an unfounded claim that counters historical reality and breaches the most elementary principles of international public law. Even more so, given that an ample parliamentary debate in both countries preceded the ratification of the Treaty, that it was not approved suddenly, but that after being signed by the Plenipotentiaries of the High Parties, was discussed in two legislative periods in Nicaragua, prior to the definitive approval.

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[70] Nicaragua's White Paper on the case. *Libro Blanco sobre el caso de San Andrés y Providencia*, Ministerio de Relaciones Exteriores de la República de Nicaragua, Managua, 4 Feb. 1980. pp. 3-4. See footnote 6.

[71] Annex 19: Diplomatic Note of 5 Feb. 1980, addressed to Nicaragua's Foreign Affairs Minister by Colombia's Foreign Affairs Minister.

> No less surprising is the fact that the Nicaraguan Declaration suggests that there was a lack of sovereignty between 1909 and 1979, because if that situation had occurred, we would find ourselves facing the disregard for all the commitments contracted by Nicaragua in the seven preceding decades."

1.96 The Colombian Government produced a document of its own –the "Libro Blanco de Colombia" *(White Book of Colombia)*[72]– demonstrating the unlawfulness of the Nicaraguan position. Naturally, after this purported unilateral declaration of nullity by Nicaragua, the 1928 Treaty and its 1930 Protocol continued to be fully implemented by the Republic of Colombia.

1.97 This was not the first time the Nicaraguan Government attempted to disavow a treaty, a decision of an international court or an arbitral award. It has been a repeated practice of Nicaragua, which has in fact assumed an identical posture towards its other neighbours. In 1871 Nicaragua unilaterally declared that it considered the Cañas – Jerez Treaty of 1858, which had established its land border with Costa Rica, to be null and void. As regards to Honduras, Nicaragua also unilaterally declared as null and void, several years after it was issued, the arbitral award rendered by His Majesty the King of Spain, in 1906, defining the land border between the two countries. Likewise, Nicaragua refused to comply with the judgments of the Central American Court of Justice of 1916 and 1917.

1.98 Nicaragua has in its Memorial repeated its contention that the Esguerra-Bárcenas Treaty of 1928 is null and void. Colombia categorically rejects those contentions as wholly without foundation in international law.

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[72] *Libro Blanco de la República de Colombia 1980*, Ministerio de Relaciones Exteriores de Colombia, Bogotá, 1980.

B. THE QUESTION OF THE VALIDITY OF THE 1928 TREATY

1.99 In its Memorial, Nicaragua adopts and expands upon the "patriotic and revolutionary" analysis in its "White Paper" of 1980.

1.100 Nicaragua endeavors to show that Colombia, "well aware" that Nicaragua's title to the San Andrés Archipelago was "firmly established in accordance with the *uti possidetis iuris* principle… took advantage of the U.S. occupation of Nicaragua to extort from her the conclusion of the 1928 Treaty"[73]. It claims that "the real negotiators of the Treaty were Colombia and the United States, and that Nicaragua was merely an onlooker awaiting instructions"[74]. It maintains that the United States declined to extend its good offices in favor of a Nicaraguan proposal for arbitration with Colombia over sovereignty over the San Andrés Archipelago and rather endorsed Colombia's proposal for what came to be the substance of the 1928 Treaty as "an equitable solution"[75], to the "great disappointment"[76] of the Nicaraguan Minister. It argues that, when the United States Legation at Managua was "authorized to exert its good offices in the premises", the "premises" referred to the quarters of the Nicaragua Congress[77].

1.101 A reading of the diplomatic dispatches on which Nicaragua relies in support of these and like assertions demonstrates the liberties taken by the Nicaraguan Memorial with the diplomatic record. Nothing in these dispatches indicates or implies that Colombia "extorted" anything, or that the real negotiators of the 1928 Treaty were the United States and Colombia. On the contrary, they show that it was Colombia and Colombia alone that took the initiative in

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[73] *Memorial of Nicaragua,* p. 98, para. 2.82.
[74] *Ibid.,* p. 99, para. 2.84.
[75] *Ibid.,* p. 100, para. 2.85.
[76] *Ibid.,* p. 100, para. 2.86.
[77] *Ibid.,* p. 106, para. 2.99.

proposing the terms of a settlement of a dispute that originated with Nicaragua alone[78].

1.102 The diplomatic dispatches show that negotiations between Colombia and Nicaragua were extended over a period of years, and that, while Nicaragua sought the advice of the United States, and tried to enlist the influence of the United States in favor of its position, the United States imposed no settlement[78]. The United States did see merit in a settlement which "would make permanent a situation which ha[d] existed in fact"[78], namely, that Nicaragua administered the Mosquito Coast and the Corn Islands and that Colombia administered the San Andrés Archipelago, a perfectly plausible position on its face, and one that would "clear up" any question as to the right of Nicaragua in 1914 to lease Great and Little Corn Islands to the United States[79] for purposes guaranteeing the security of the prospective inter-oceanic way across Nicaraguan territory. Indeed, it was Nicaragua's foremost interest that an inter-oceanic way be built in its territory. It accordingly held various negotiations on the matter with the United States. The Nicaraguan Congressional records of the approval process of the 1928 Treaty clearly show that Nicaragua assigned the greatest importance to facilitating the conditions for that project.

1.103 The United States informed both Parties that, if they mutually so requested, it was prepared to mediate their dispute, on the understanding that, if ultimately it went to arbitration, the Parties bound themselves to comply with any award[80]. The United States Minister called on the President of Nicaragua at the request of, and with, the Colombian Minister in Managua to repeat what he had "already told the President about the Department's viewing

[78]See in particular, Note of 21 Mar. 1925, addressed to Nicaragua's Foreign Affairs Minister by the Secretary of State, *Papers Relating to the Foreign Relations of the United States, 1925,* Vol. I, Government Printing Office, Washington, 1940, p. 432.
[79]*Ibid.* See also, Memorandum by the Assistant Secretary of State, 2 Aug. 1927, *Papers Relating to the Foreign Relations of the United States, 1927,* Vol. I, Government Printing Office, Washington, 1942, pp. 325-327.
[80]The Secretary of State to the Minister in Colombia, 25 Sept. 1925, *loc. cit.,* pp. 434, 435.

with favor a settlement along the lines which Colombia had proposed" but his so doing was not sinister in a circumstance in which the United States had been asked by Nicaragua to assist in resolving the dispute through the extension of its good offices[81].

1.104 To claim that an authorization to the U.S. Legation in Managua to exert "its good offices in the premises" refers to the physical premises of the Nicaraguan Congress rather than to what has been previously stated is a fatuous misconstruction of the English language[82]. To maintain that Nicaragua ratified the 1928 Treaty because of "the exertions" of the United States Legation "in the premises" is not borne out by the diplomatic record cited by Nicaragua[83]. The 1928 Treaty was widely discussed in Nicaragua. The United States made clear to Nicaraguan authorities, including the new President Moncada, that it found the Treaty to be equitable and that it thought it unlikely that Nicaragua could achieve better terms; but that is not the same as saying that the United States imposed the Treaty on Nicaragua.

1.105 The alleged nullity of the 1928 Treaty was discovered by the revolutionary Junta in 1980 – more than fifty years after its negotiation. How can it be that a Treaty lengthily and duly negotiated, and lengthily approved and duly ratified, and thereafter implemented by the Parties for some five decades, can be found in 1980 to be a nullity? How can it be that a Treaty, registered separately by Colombia and by Nicaragua with the League of Nations Secretariat pursuant to Article 18

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[81]The Minister in Nicaragua (Eberhardt) to the Secretary of State, 4 Feb. 1928, *Papers Relating to the Foreign Relations of the United States, 1928,* Vol. I, Government Printing Office, Washington, 1943, p. 701.

[82]The Minister in Colombia (Caffery) to the Secretary of State, 10 Sept. 1929, *Papers Relating to the Foreign Relations of the United States 1929,* Vol. I, Government Printing Office, Washington, 1943, p. 935. Perusal of this dispatch clearly shows that the common term "premises" is therein used to refer to the matters mentioned in the previous paragraph of the letter. See also, Walker, David M., *The Oxford Companion to Law*, Clarendon Press – Oxford, 1980, p. 982, where the term "Premises" is defined as: "Things set out before, and consequently, in deeds, things previously mentioned. In conveyances, the word frequently refers back to subjects fully described earlier in the deed…"

[83]*Papers Relating to the Foreign Relations of the United States, 1929,* Vol. I, Government Printing Office, Washington, 1943, pp. 934-938.

of the Covenant of the League as a "binding" international agreement, is found some fifty years later by Nicaragua to be a nullity? How is it that, in 1969, when Colombia protested against Nicaragua's activities carried out to the east of the agreed maritime boundary with Colombia along the 82º W Meridian, Nicaragua did not notice that the Treaty instrument so providing, ratified a treaty that was purportedly null and void?

1.106 The position now embraced by the Government of Nicaragua, and illustrated by the quotations found above in paragraph 1.94, imports that, until the Sandinista Junta assumption of power, no Government of Nicaragua from 1909 to 1979 could bind Nicaragua internationally because of what it terms, "[t]his absence of sovereignty…"[84]. That absence of sovereignty, the White Paper maintains, began with United States intervention in 1909 and lasted "seventy years, until the Sandinista popular insurrection's victory on July 19, 1979"[85]. It claims that the 1928 Treaty was imposed upon Nicaragua "under the total military and political occupation by the United States"[86] and that, moreover, it infringed the National Constitution then in force, "which prohibited in absolute terms the execution of Treaties implying prejudice to the national sovereignty or division of the native soil"[86]. It acknowledges that, "[a] long time has elapsed since the Bárcenas Meneses-Esguerra Treaty, but the fact is that it was not until July 19, 1979 that Nicaragua recovered its National Sovereignty…"[87].

1.107 If however Nicaragua because of its subjection to United States influence between 1909 and 1979 lacked the capacity to conclude treaties, most notably the 1928 Treaty, it could not have become a founding Member and signatory to the Charter of the United Nations nor could it have, for

[84] Nicaragua's White Paper on the case. *Libro Blanco sobre el caso de San Andrés y Providencia*, Ministerio de Relaciones Exteriores de la República de Nicaragua, Managua, 4 Feb. 1980, p. 2.
[85] *Ibid.*, p. 11.
[86] *Ibid.*, p. 2.
[87] *Ibid.*, p. 3.

that matter, become Party to the Pact of Bogotá, the very instrument on which Nicaragua founds the jurisdiction of the Court in the present proceedings. Indeed, as Nicaragua is a party to the Statute of the International Court of Justice as a Member of the United Nations, if it lacked the capacity to sign the Charter, it lacks standing in this Court. Furthermore, Nicaragua's Declaration under the Optional Clause, which this State is also invoking before the Court in the present proceedings, was made in 1929, that is, a year after the signature of the Treaty with Colombia and just a year before its ratification.

C. ALLEGED UNCONSTITUTIONALITY

1.108 Nicaragua argues that the 1928 Treaty was in violation of the then Constitution of Nicaragua (1911), adopted under the alleged intervention of the United States, as per the dates cited in Nicaragua's own Memorial. The alleged violated rule of its domestic law provides that "…treaties may not be reached that oppose the independence and integrity of the nation or that in some way affect her sovereignty…"

It is clear that the 1928 Treaty, far from affecting the integrity or sovereignty of Nicaragua, notably favored both since by that treaty, Colombia renounced its rights over the Mosquito Coast and the Islas Mangles (Corn Islands) in favor of Nicaragua. Furthermore, since the Constitution that Nicaragua now argues was violated did not even include the Archipelago of San Andrés as part of its territory, as acknowledged by Nicaragua in its Memorial[88], it cannot be maintained that a treaty one of whose main objects was precisely that Archipelago was in violation of that Constitution. Even more so, since Nicaragua had never exercised any type of sovereignty over that Archipelago throughout its entire history.

[88] *Memorial of Nicaragua*, p. 109, para. 2.105.

1.109 In addition, it suffices to recall the governing provision of the Vienna Convention on the Law of Treaties (on which Convention Nicaragua relies in its Memorial, notwithstanding the fact that it is not a Party). Article 27 provides:

> "*Internal law and observance of treaties*
>
> A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46."

The exception provided in Article 46 is as follows:

> "*Provisions of internal law regarding competence to conclude treaties*
>
> 1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
>
> 2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and good faith."

1.110 In this case, the alleged violation of the Nicaraguan Constitution was not only not manifest to Colombia or any third State. It was not manifest to Nicaragua itself, which for fifty years treated the 1928 Treaty as Constitutional and in force. It is significant that, in the careful process of ratification of the 1928 Treaty by the Nicaraguan Congress, these Constitutional issues were not even mentioned. Nor, as noted, did the Constitution then in force specify that the San Andrés Archipelago was part of the territory of

Nicaragua; in point of fact, no Constitution of Nicaragua ever has so provided.

1.111 In the face of all of this, for the Government of Nicaragua to argue that a treaty such as the 1928 Treaty and its Protocol of Exchange of Ratifications of 1930 is void is an outrage. It constitutes a complete disregard of the most fundamental norm of international law, that is, *pacta sunt servanda*, the cornerstone of international peace and security. Nicaragua's conduct is also contrary to the principle of the respect for the obligations arising from treaties and other sources of international law, enshrined in the Charters of the United Nations and the Organization of American States[89].

D. THE 1928 TREATY HAS NOT BEEN TERMINATED BECAUSE OF "BREACH"

1.112 In Section IV of its Memorial Nicaragua maintains for the very first time that, even if the 1928 Treaty "ever entered into force, it has been terminated as a consequence of its breach by Colombia"[90]. It characterizes the 1930 Protocol of Exchange of Ratification as "an authentic interpretation of the Treaty, on which both Parties agreed and which was a condition for the ratification by the Nicaraguan Congress"[91]. But Nicaragua's Memorial goes on to allege that this common understanding of the meaning of the Treaty "was not challenged by Colombia until 1969 when, for the first time, she contended that the 82º meridian… constituted the maritime border between herself and Nicaragua…"[92]. Nicaragua contends that, "This radical shift in the common interpretation of the Treaty clearly constituted a material breach of this instrument"[93]. It

[89] Official text as published by the General Secretariat of the Organization of American States, Washington, D.C., 1997.
[90] *Memorial of Nicaragua,* p. 178.
[91] *Ibid.,* p. 178, para. 2.254.
[92] *Ibid.,* p. 178, para. 2.255.
[93] *Ibid.,* p. 178, para. 2.256.

proceeds to characterize this "whimsical and self-serving interpretation of a fundamental clause, which radically changes the intention of the contracting parties"[94] as a "material breach" which accords Nicaragua the right to terminate the Treaty in pursuance of Article 60 of the Vienna Convention on the Law of Treaties[95].

1.113 These extraordinary assertions on the part of Nicaragua –advanced by Nicaragua for the first time only in its Memorial– are patently implausible. They are groundless, as a matter of fact and a matter of law.

1.114 As a matter of fact, it is not true that in 1969 Colombia for the first time advanced the position that the 82º W Meridian constitutes a maritime dividing line between the jurisdictions of Colombia and Nicaragua. That position was the true shared position of both Parties when the 1930 Protocol was concluded. It was Nicaragua itself, in its Congressional debates, that took the lead in making clear that its proposal to include the 82º W Meridian proviso into the 1928 Treaty was precisely designed to establish such a dividing line in the waters between Colombia and Nicaragua[96]. Colombia agreed to Nicaragua's proposal as already shown.

1.115 Also as already shown, it was as early as 1931, one year after the exchange of ratifications, that the 82º W Meridian was depicted as a boundary in the Official Map of the Republic of Colombia (see maps Nos. 4 and 4*bis*), without receiving any protest from Nicaragua. Colombia subsequently published several similar official maps (see e.g., Maps Nos. 5 - 11) that were not protested by Nicaragua either. Furthermore, in the official publications of Colombia entitled, "Limits of the Republic of Colombia" (*Límites de la República de Colombia*),

[94] *Memorial of Nicaragua,* p. 179, para. 2.258.
[95] *Ibid.,* p. 180, para. 2.261.
[96] See the quotations from the Congressional consideration of the question set out in this Chapter, paras 1.59-1.63, and in Chapter II, paras. 2.41 and ff.

published in 1934 and 1944[97], the 82° W Meridian was likewise incorporated as the border between Colombia and Nicaragua. Those publications were not the subject of protests on the part of Nicaragua.

1.116 As a matter of law, even if it were true –as it is not– that in 1969 Colombia "unilaterally converted" the 82º W Meridian into a maritime boundary, a party's advancing an argument concerning the construction of a treaty cannot constitute of itself a "material breach" of it. The passage from Lord McNair's work on which Nicaragua relies[98] concerns an argument advanced in bad faith. Colombia's actions in 1969 cannot be characterized in that way. Colombia, acting in response to Nicaragua's attempt to carry out activities in areas to the east of the agreed boundary, did no more than assert the agreement as it was conceived by Nicaragua in 1930 and agreed by both Parties at that time.

1.117 Further, as a matter of law, even if an argument advanced by a party could by itself constitute a breach of treaty, that of itself could not bring the treaty to an end. Under Article 60 of the Vienna Convention on the Law of Treaties, a material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty. Nicaragua has done nothing purporting to exercise this entitlement, presumably because it knows that it has no basis for so doing. Article 45 of the Vienna Convention is instructive in this regard, for it provides as follows:

> "*Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty*

[97] *Límites de la República de Colombia*, Republic of Colombia, Ministry of Foreign Affairs, Office of Longitudes and Borders, Editorial Centro, Bogotá, 1934 p. 46. And, *Límites de la República de Colombia*, Second edition, Republic of Colombia, Ministry of Foreign Affairs, Office of Longitudes and Borders, Colombia Lithography, Bogotá, 1944, p. 101.
[98] *Memorial of Nicaragua*, p. 178, para. 2.257.

> A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under Article[s]… 60… if, after becoming aware of the facts:
>
> (a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or
>
> (b) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be."

1.118 On the facts of this matter, it is plain that, in ratifying the 1928 Treaty and in registering it with the League of Nations as binding, Nicaragua treated the 1928 Treaty as valid and in force, and that, by reason of having implemented the Treaty for decades, it more than acquiesced in its validity and maintenance in force and operation. Nicaragua's argument that the 1928 Treaty and its 1930 Protocol have terminated is wholly without merit.

1.119 Furthermore, it is evident that Nicaragua cannot now be heard to argue that Colombia, by implementing the 82°W Meridian as a maritime boundary –as agreed in 1930 and complied with from then on– is in breach of the 1928 Treaty with the result that that Treaty has been terminated or is subject to termination. A purpose of so extraordinary a claim is to vitiate Colombia's valid objections to jurisdiction: to undermine its position that, under the Pact of Bogotá, the dispute is one settled by arrangement between the parties and governed by a treaty that was in force on the date of the conclusion of the Pact, and is still in force; and to undermine its position that the dispute arises out of facts antecedent to 1932. If the Court were to sustain such

an argument, it would permit a State to evade limitations on the jurisdiction of the Court by means of a spurious claim, because the presentation of alleged violations before the Court would then of itself suffice to render those reservations –which are an expression of the will of States– ineffectual. Colombia is confident that the Court will treat Nicaragua's adventurous argument with the reserve that it merits.

1.120 Having presented the general background of the case, according to Article 79 of the Rules of Court, Colombia's Preliminary Objections are hereinafter set out in full.

CHAPTER II

IN ACCORDANCE WITH ARTICLES VI AND XXXIV OF THE PACT OF BOGOTÁ THE COURT IS "WITHOUT JURISDICTION TO HEAR THE CONTROVERSY" AND THEREFORE SHALL DECLARE THE "CONTROVERSY… ENDED"

I. The Pact of Bogotá

2.1 The "American Treaty on Pacific Settlement", known as "Pact of Bogotá" ("the Pact"), was concluded on 30 April 1948[99], during the IX International Conference of American States. It was based on a draft prepared by the Inter-American Juridical Committee that included amendments suggested by Brazil, Mexico and Peru.

2.2 The Pact of Bogotá is a principal element in the Inter-American system for the pacific settlement of disputes, and has a special place in the Charter of the Organization of American States. The Pact establishes a system for the settlement of disputes in which the Parties undertake to use the agreed procedures, *in the manner and under the conditions provided for in the Pact* (Article II of the Pact of Bogotá). The procedures established in the Pact are:

- Good offices and mediation (Chapter Two),
- Investigation and conciliation (Chapter Three),
- Judicial procedure (Chapter Four), and
- Arbitration (Chapter Five).

[99] Annex 20: American Treaty on Pacific Settlement, "Pact of Bogotá", 30 April 1948. Official text in the English and Spanish languages.

2.3 However, the Pact, in its Article VI, excludes from the application of *all* of the aforementioned procedures matters already settled by arrangements between the Parties or governed by treaties in force on the date of the Pact's conclusion.

2.4 When the Pact of Bogotá was concluded in 1948, there was a considerable number of outstanding disputes between various American States but none whatsoever between Nicaragua and Colombia.

II. The Relevant Provisions of the Pact of Bogotá

2.5 The Parties are in agreement that the Pact of Bogotá –a treaty in force between them– is governing. In both its Application and its Memorial, however, Nicaragua relies only on one provision of the Pact, namely Article XXXI, without giving effect, or even referring, to other provisions of the Pact which, in the Court's own words, "restrict the scope of the Parties' commitment"[100] under Article XXXI, namely, Articles VI and XXXIV. It is not Article XXXI, read in isolation from the other relevant provisions, which confers jurisdiction upon the Court, but the whole of Chapter Four ("Judicial Procedure") read in conjunction with the general provisions in Chapter One ("General Obligation to Settle Disputes by Pacific Means"), and in particular with Article VI, to which reference is explicitly made by the terms of Article XXXIV. Article XXXI does not stand alone, but must be read together with other relevant provisions of the Pact – to which Nicaragua makes no reference.

[100] *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, I.C.J. Reports 1988*, p. 84, para. 35.

2.6 Contrary to Nicaragua's assertion, therefore, it is not Article XXXI of the Pact read in isolation which provides a basis for the Court's jurisdiction; it is the Pact of Bogotá as a whole which provides such a basis, and it is only to the extent and within the limits defined by the Pact that the jurisdiction of the Court is determined. This is clearly borne out by Article II of the Pact, according to which

> "… In the event that a controversy arises between two or more signatory States… 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…*"[101]

2.7 According to Article VI of the Pact, the procedures under the Pact –including the judicial procedure of Chapter Four–

> "…may not be applied to matters already settled by arrangements between the Parties… or which are governed by agreements or treaties in force on the date of the conclusion of the present Treaty."

2.8 Article XXXIII provides that

> "If the Parties fail to agree as to whether the Court has jurisdiction over the controversy, the Court itself shall first decide that question."

This is precisely what the Court is respectfully requested to decide upon "before any further proceedings on the merits", as provided for in Article 79 of its Rules.

[101] Emphasis added.

2.9 According to Article XXXIV of the Pact

> "If the Court, for the reasons set forth in Article… VI… of this Treaty, declares itself without jurisdiction to hear the controversy, such controversy shall be declared ended."

The matters brought before the Court by Nicaragua's Application –the sovereignty over the Archipelago of San Andrés and the maritime boundary between Colombia and Nicaragua– are matters which –along with the matter of sovereignty over the Mosquito Coast and the Islas Mangles (Corn Islands)– were settled and governed by the Esguerra-Bárcenas Treaty of 1928 and its Protocol of Exchange of Ratifications of 1930 and which constitute both an "arrangement" and an "agreement or treat[y]" of the kind referred to in Article VI of the Pact of Bogotá. It therefore falls within the jurisdiction of the Court, and, pursuant to Articles VI and XXXIV of the Pact, the Court is bound to debar any reopening of these matters. It is bound to declare the controversy "ended", *terminée, terminada*.

III. The Object and Purpose of Articles VI and XXXIV

2.10 That the object and purpose of Articles VI and XXXIV of the Pact of Bogotá is to ensure that the procedures provided for in the Pact be used only to settle still unsettled disputes but not to reopen previously settled ones appears not only from their very wording, but also from the *travaux préparatoires*[102].

[102] See the verbatim record:
On Article VI, Annex 21: IX International Conference of American States, *Acts and Documents, Acts of the Sessions of Committee III, Third Session,* 27 Apr. 1948, Ministry of Foreign Affairs of Colombia, Bogotá, 1953, Vol. IV, pp. 134-136.
On Article XXXIV, Annex 22: IX International Conference of American States, *Acts and Documents, Acts of the Sessions of Committee III, Fourth Session,* 28 Apr. 1948, Ministry of Foreign Affairs of Colombia, Bogotá, 1953, Vol. IV, p. 172.

2.11 Article VI corresponds to one of the three articles Peru had proposed to be incorporated into the draft prepared by the Inter-American Juridical Committee to be discussed at the IX International Conference of American States. The text of the Peruvian proposal on what was later to be Article VI of the Pact, was as follows:

> "Article ... These procedures may not be applied either to matters already settled by arrangement between the parties or by arbitral or judicial decisions, or which are governed by international agreements in force on the date of the conclusion of the present Treaty."[103]

The discussions on the draft Article were held in the First Working Group set up by Committee III at the Conference. It was submitted by the Chairman for debate during the third session of Committee III on 27 April 1948, with a minor drafting change, namely, the deletion of the term "international" before "agreements". At the session, Peru and Nicaragua were represented by the renowned lawyers and diplomats, Victor Andrés Belaúnde and Guillermo Sevilla Sacasa, respectively.

2.12 The representative of Ecuador found Peru's proposal "peremptory" as well as too absolute and general, and suggested its rephrasing. Belaúnde opposed this suggestion because, in his words,

> "… it would be very dangerous to attenuate the formula, [because]… it would open the door to provoke a dispute, which is exactly what we want to avoid. I believe that an American peace system should not only resolve disputes, but also prevent them, because the provocation of

[103] IX International Conference of American States. Documents of Committee III. Pages 69-70. See Annex 21 for the full text of this part of the debates.

> disputes is precisely one of the ways of attempting against peace."[104]

The Delegate of Chile took the floor to support the Peruvian delegate:

> "My country's delegation amply supports the words of the Delegate of Peru, and is willing to vote the article in the way he has proposed it."[105]

The representative of Cuba, having expressed doubts about the usefulness of such a provision –if the difficulties are settled, so he said, what is the problem?– Belaúnde went so far as to speak of *res judicata*:

> "The danger lies in its being reopened, in wanting to reopen them. It is the exception of *res judicata.*"[106]

2.13 In the light of these explanations, the Peruvian proposal was approved, unanimously. It is now Article VI of the Pact, which, as the *travaux préparatoires* clearly show, is meant as a shield against any possible use of the procedures provided for by the Pact in order to reopen previously settled disputes.

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[104] *"… sería muy peligroso atenuar la fórmula…* [porque] *sería abrir la puerta a provocar un litigio, que es precisamente lo que queremos evitar. Creo que un sistema americano de paz debe no sólo resolver los litigios, sino también impedir que se provoquen, porque el provocar litigios es precisamente una de las formas de atentar contra la paz."* See Annex 21, p 135

[105] *"La Delegación de mi país apoya ampliamente las palabras del señor delegado del Perú, y está dispuesta a votar el articulo en la forma como él lo ha propuesto".* See Annex 21, p. 136.

[106] "*El peligro está en que se reabra, en que se quiera reabrir. Es la excepción de cosa juzgada."* See Annex 21, p. 136.

2.14 The approval debates in the adoption of the Pact in the Congresses of several signatory States further confirm the common interpretation of the intent, purpose, scope and meaning of Article VI of the Pact of Bogotá.

2.15 It is worth recalling that express reservations to Article VI were made by Bolivia[107] and Ecuador[108] when signing the Pact of Bogotá, aiming to protect the possibility that their existing territorial treaties with Chile and Peru –respectively– might be opened to review[109]. In line with their own positions regarding those treaties, they sought to leave the door open for territorial matters already settled by international treaty, to be submitted at some future date to the procedures of the Pact. Nevertheless, neither Ecuador[110] nor Bolivia ever ratified the Pact. A study carried out by the General Secretariat of the OAS in 1985[111] further confirms the purpose of the reservations entered by Bolivia

[107] Bolivia's reservation was as follows: "The Delegation of Bolivia makes a reservation with regard to Article VI, inasmuch as it considers that pacific procedures may also be applied to controversies arising from matters settled by arrangement between the parties, when the said arrangement affects the vital interests of a [S]tate."

[108] Ecuador's reservation was as follows: "The Delegation of Ecuador, upon signing this Pact, makes an express reservation with regard to Article VI and also every provision that contradicts or is not in harmony with the principles proclaimed by or the stipulations contained in the Charter of the United Nations, the Charter of the Organization of American States, or the Constitution of the Republic of Ecuador."

[109] Bolivia had repeatedly proclaimed the nullity of the treaty signed with Chile on 20 Oct. 1903. On its part, Ecuador considered that the so-called "Protocolo de Rio de Janeiro" *(Rio de Janeiro Protocol)* signed with Peru on 29 Jan. 1942, was impracticable and afterwards proclaimed its nullity. Both Chile and Peru peremptorily rejected said claims and refused to reopen matters already settled by their respective treaties in force.

[110] The Pact of Bogotá was initially submitted to the Ecuadorian Senate. In the plenary session in which the issue was considered, the report of the Foreign Affairs Commission was read. In it, it was stated that: "This Pact was signed in Bogotá by the representatives of Ecuador, with the following reservation… [See footnote 104, *supra*]… [the] aforementioned reservation leaves the possibility of the revision of Treaties open…" However, the Pact was not ratified by the Ecuadorian Government, given that it was considered that, even with the reservation formulated by Ecuador to Article VI, the revision of the Protocol of Rio de Janeiro that it had signed with Peru in 1942 was not facilitated.
(Senate debate: *Acta de la Sesión Vespertina de la Honorable Cámara del Senado* [Record of the Vespertine Session of the Honourable Chamber of the Senate of the Ecuadorian Congress], held on 31 Oct. 1949, Item XXV: First discussion of Bill number 157, Pact of Bogotá, pp. 1923 ff.)

[111] Organization of American States, Permanent Council, OEA/Ser.G CP/doc.1560/85 (Parte II), 9 Apr. 1985. Original: Spanish, pp. 17-18.

and Ecuador. After transcribing these reservations, the study states:

> "Given that Article VI of the Pact considers the arrangements, treaties, awards or decisions prior to its conclusion as definitive, and therefore excludes the matters that have been the object of any of them from its application, the reservation is essentially equal to depriving such acts from their legal effectiveness if faced with the possibility that already settled disputes might be reopened."

2.16 For their part, both Chile and Peru in respect of which Bolivia and Ecuador, respectively, then upheld the possibility of revising treaties, ratified the Pact. The procedures for the approval of the Pact in the Congresses of Chile[112] and Peru are a further indication of the interpretation that their Governments and Congresses gave to Article VI.

2.17 During the Congressional debates in Chile concerning the approval of the Pact of Bogotá, the definitive character of Article VI as a guarantor of international treaties was recognized. The relevant part of the text of Chile's reservation to Article LV of the Pact, designed to challenge and neutralize Bolivia's objection to Article VI, was originally drafted to reject any reservation that might

[112]In his transmittal to Congress the President of Chile mentioned the importance of Article VI in the face of the Bolivian reservation: "…On the other hand, it is also urgent to adopt this measure *[ratification]* since the next Inter-American Conference in Rio de Janeiro will be appraised of two proposals to replace the Pact of Bogotá, none of which includes, as does Art. VI of the Pact, any provision to prevent the review of treaties in force… for greater protection of the national interest, the Government has considered the formulation of a reservation at the time of ratification…[that] would anticipate our rejection of any reservation which attempted to alter the scope of Article VI." Message addressed by the President of the Republic of Chile to the National Congress, requesting the approval of the Pact of Bogotá in order to proceed to its ratification with a reservation, Chamber of Deputies of Chile, Session 42 of 12 May 1965, pp. 3266-3267.

change the scope of Article VI[113]. After some discussion, it was nonetheless decided to adopt a different text for the reservation, with an identical result.

2.18 Peru entered a reservation to Article XXXIII and "the pertinent part of Article XXXIV", designed to ensure that the Court would not even be able to pronounce itself on its own jurisdiction –under Article XXXIII– regarding the exceptions contemplated in Article VI, and therefore to declare controversies to be ended under Article XXXIV[114].

2.19 Nicaragua made only one reservation regarding "arbitral awards the validity of which it has impugned" – a reference to the award given by the King of Spain of 1906 in its dispute it had held with Honduras. Quite obviously, it did not envisage when it ratified the Pact that its dispute with Colombia might not have been settled and might, therefore, not fall under Article VI. Nor did it question the fact that the 1928 Treaty was in force on the date of the conclusion of the Pact of Bogotá. This was wholly understandable because Nicaragua had itself requested the registration of the 1928 Treaty and its Protocol of Exchange of Ratifications of 1930 with the League of Nations and, in 1948, had implemented the Treaty and its Protocol for almost twenty years.

2.20 The thrust of the Pact is thus crystal clear: when the Court reaches the conclusion –under Article VI– that the matter has been previously settled by an arrangement or a treaty

[113]Regarding the text of his country's reservation, the President of Chile thus stated that it should be peremptory in "…declaring, of course, that it does not and will not accept any reservation which attempts to change the literal scope of Article VI in any way". *Ibid*

[114]The Peruvian reservation reads as follows: "2. Reservation with regard to Article XXXIII and the pertinent part of the Article XXXIV, inasmuch as it considers that the exceptions of res judicata, resolved by settlement between the parties or governed by agreements or treaties in force, determine, in virtue of their objective and peremptory nature, the exclusion of these cases from the application of every procedure."

between the Parties, or that the matter is governed by a treaty in force on the date of the conclusion of the Pact, the duty of the Court –under Article XXXIV– is to declare the dispute "ended". This is exactly what the Pact of Bogotá is about: providing mechanisms of settlement for unsettled disputes, on the one hand; affirming previous settlements and opposing any attempt at their reopening, on the other hand. In the present proceedings, to declare the dispute settled by the 1928 Treaty and its Protocol of 1930 and the matter "ended", *terminée*, *terminada,* is what the Pact requires; and this lies within the Court's jurisdiction. What, in the words of Article XXXIV of the Pact, the Court is "without jurisdiction" to do is to "hear the controversy" anew, as if it were not already settled by a treaty in force.

2.21 That this is the meaning of Articles VI and XXXIV of the Pact of Bogotá is borne out by the official contemporaneous commentary on the Pact published by the Secretary-General of the Organization of American States:

> "It could occur that one of the States party in a dispute claimed that the case was not susceptible of a judicial settlement, due to its being precisely within one of the exceptions provided in the [Pact] itself, that is, because it referred to [matters]… already settled by an arrangement between the parties, or by arbitral award, or by a decision of an international court; or because it is governed by agreements or treaties in force on the date of the conclusion of the American Treaty on Pacific Settlement. In such a case the preliminary question shall be submitted to the Court whenever one of the parties claims an exception. *If the Court, in the case of judicial procedure, should declare itself without jurisdiction for the*

reasons set forth above, the controversy is declared ended…"[115]

2.22 The Pact of Bogotá must be read as a whole. Nicaragua cannot solely rely on Article XXXI of the Pact of Bogotá. By virtue of the 1928 Treaty and its Protocol of Exchange of Ratifications of 1930, which is valid and in force, the matters which Nicaragua seeks to place before the Court *(a)* have already been settled and are governed by that Treaty and its Protocol, which *(b)* was uncontestably and incontestably in force in 1948 on the date of the conclusion of the Pact. Article VI of the Pact stipulates that, consequently, on each of these grounds, Article XXXI "may not be applied".

2.23 Moreover, by virtue of Articles VI and XXXIV of the Pact of Bogotá, the Court's jurisdiction is limited to declaring the controversy ended.

IV. Definitive Settlement of the Dispute Concerning the Archipelago of San Andrés, the Mosquito Coast and the Islas Mangles (Corn Islands)

2.24 That the dispute maintained between Nicaragua and Colombia comprising the Mosquito Coast and the Islas Mangles (Corn Islands) and, since 1913 the Archipelago of San Andrés as well, was settled –after lengthy negotiations– by the Esguerra-Bárcenas Treaty of 1928 has been shown

[115] A. Lleras, "Informe sobre la Novena Conferencia Internacional de Estados Americanos", in *Anales de la Organización de Estados Americanos,* Vol. I, No. 1, Departamento de Información Pública, Unión Panamericana,Washington, D.C., 1949 pp. 49-50 (Emphasis added). See also, García-Amador, F.V. (annotated comp.): "Arreglo Pacífico de Controversias, Tratado Americano de Soluciones Pacíficas, Pacto de Bogotá", in *Sistema Interamericano a través de tratados, convenciones y otros documentos*, Subsecretaría de Asuntos Jurídico-Polìticos, Secretaría General de la Organización de Estados Americanos, Vol. I: Asuntos Jurídicos – Políticos, Washington, D.C., 1981, p. 747.

in detail in Chapter I above. As has been shown, the Treaty incorporated a formula proposed six years earlier by the Colombian representative, Manuel Esguerra, by which Colombia recognized the sovereignty of Nicaragua over the Mosquito Coast and over the Islas Mangles (Corn Islands), while Nicaragua recognized the sovereignty of Colombia over the islands of San Andrés, Providencia and Santa Catalina and over "all of the other islands, islets and cays that form part of the said Archipelago of San Andrés." The Treaty in effect consolidated the *de facto* situation which prevailed at the time – and which is today the same as that prevailing when the Treaty was negotiated, signed and ratified: the Mosquito Coast and the Islas Mangles (Corn Islands) as Nicaraguan, and the Archipelago of San Andrés including all its "islands, islets and cays" as Colombian.

2.25 Nicaragua seeks to diminish the extent of the Archipelago of San Andrés, and to exclude from it the northern cays of Roncador, Quitasueño and Serrana, and also the cays of Serranilla and Bajo Nuevo. In this way Nicaragua seeks to deny Colombia's title to those cays as agreed in the 1928 Treaty to be part of the Archipelago, and to lay claim itself to title to them. Geographically, historically and legally Nicaragua's position cannot be sustained.

2.26 Geographically and historically the Archipelago of San Andrés was understood as comprising the string of islands, cays, islets and banks stretching from Albuquerque in the south to Serranilla and Bajo Nuevo in the north –including the Islas Mangles (Corn Islands)– and the appurtenant maritime areas. It is apparent from a glance at Map No. 3 that those features constitute a single island chain which forms the Archipelago.

2.27 Moreover, published maps show that the islands comprising the present Colombian Archipelago of San Andrés[116] extend from Albuquerque Cays in the South to

[116] See para. 1.8, *supra*

Serranilla and Bajo Nuevo in the North. Thus Map No. 4, published in the year following the entry into force of the 1928 Treaty and its 1930 Protocol, and not protested by Nicaragua, contains in the top right hand corner an insert showing the Archipelago (reproduced as Map *4bis*): It is inscribed "Cartela of the Archipelago of San Andrés and Providencia pertaining to the Republic of Colombia"[117]. It shows the islands, cays and other maritime features comprising the Archipelago and extending from north to south in the area just described. Other maps are to the same effect: See e.g., Maps Nos. 5 – 11.

2.28 Legally, Nicaragua has already acknowledged in the 1928 Treaty that Roncador, Quitasueño and Serrana are part of the Archipelago. Article I of that Treaty stipulated *inter alia* that Colombia recognized Nicaragua's sovereignty over the Islas Mangles (Corn Islands), thereby taking them out of the scope of the subsequent reference to the Archipelago of San Andrés as belonging to Colombia. What the Treaty said in that latter respect was that Nicaragua recognized "the full and entire sovereignty of the Republic of Colombia over the islands of San Andrés, Providencia, Santa Catalina *and all the other islands, islets and cays that form part of the said Archipelago of San Andrés*". This stipulation was followed by the statement that "[t]he Roncador, Quitasueño and Serrana cays are not considered to be included in this Treaty, sovereignty over which is in dispute between Colombia and the United States of America". The basis on which the Treaty applied to those three cays was that they formed part of the Archipelago: this statement is inexplicable on any other basis. It follows that in accepting the 1928 Treaty containing that statement, Nicaragua acknowledged that the three cays formed part of the Archipelago and would, but for that statement, have been dealt with in accordance with the main stipulation of Article I about Colombian sovereignty over the Archipelago.

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[117] *"Cartela del Archipiélago de San Andrés y Providencia perteneciente a la República de Colombia"*.

2.29 That statement in the Treaty that the cays of Roncador, Quitasueño and Serrana were not considered to be included in it had a further important consequence. The Parties agreed to that proviso because "sovereignty over [them] is in dispute between Colombia and the United States". The question was thus left open whether these cays would in the end belong to Colombia or to the United States. But as between Colombia and Nicaragua it was established that the cays did not belong to Nicaragua. Nicaragua accepted that the only claimants to sovereignty were Colombia and the United States; it was not envisaged that they could belong to Nicaragua, and Nicaragua did not formulate any claim to that effect. Since in 1972 the United States renounced its claims to these three cays, there is –as established by Colombia and Nicaragua in 1928– no other possessor of sovereignty over them than Colombia. They thus, in full accord with the 1928 Treaty, belong to Colombia, and there is no basis whatsoever for any Nicaraguan claim to sovereignty over any of the three cays.

2.30 From the foregoing it is apparent that, once the dispute between Colombia and the United States over the three cays has been resolved, the whole Archipelago of San Andrés (other than the Islas Mangles (Corn Islands) which Colombia accepted in the 1928 Treaty as belonging to Nicaragua), from Albuquerque Cay in the south to Serranilla and Bajo Nuevo Cays in the north and including all its islands, islets and cays, has been accepted by Nicaragua in the 1928 Treaty as being under Colombia's "full and entire sovereignty". That was the essence of the settlement enshrined in the 1928 Treaty: the Islas Mangles (Corn Islands) and the Mosquito Coast recognized as Nicaraguan, and the Archipelago recognized as Colombian. The dispute would not have been settled –in the words of the preamble, the Parties would not have succeeded in "putting an end to the territorial dispute pending between them"– on any other basis; certainly not on the basis that sovereignty over some parts of the Archipelago should still remain uncertain as between Colombia and Nicaragua.

2.31 It is thus clear that the final and complete settlement of the dispute was the object and purpose of the Esguerra-Bárcenas Treaty and its 1930 Protocol. This follows not only from the history and the very text of the Treaty and its Protocol and but also from the approval debates in the Congress of both countries.

2.32 As shown in Chapter I, in both countries the ratification of the 1928 Treaty followed a debate in the national Congresses, both in the Senate and in the Chamber of Deputies. The liveliness of these debates, particularly in the Nicaraguan Congress, belies the argument raised by Nicaragua when purporting to unilaterally declare the Treaty null and void in 1980 on the ground that the Esguerra-Bárcenas Treaty had been concluded under the pressure of the United States and was not freely entered into by Nicaragua. These debates do not leave the slightest doubt as to the intention of both Parties, and particularly of Nicaragua, to regard the Treaty as a final and complete settlement of all territorial disputes between them. This is borne out by the Treaty itself, which in its Preamble states that the Parties were "desirous of putting an end to the territorial dispute pending between them"[118] – a statement repeated in the 1930 Protocol of Exchange of Ratifications, which specifies that the Treaty was concluded "to put an end to the question pending between both Republics concerning the San Andrés and Providencia Archipelago and the Nicaraguan Mosquitia."[119]

2.33 The 1928 Treaty and its Protocol of Exchange of Ratifications, in force since 5 May 1930, was registered with the League of Nations by both Nicaragua and Colombia. After the Treaty's entry into force, on multiple

[118] "*... deseosas de poner término al litigio territorial entre ellas pendiente.*"
[119] "*… para poner término a la cuestión pendiente entre ambas Repúblicas, sobre el Archipiélago de San Andrés y Providencia y la Mosquitia nicaragüense.*"

occasions –in official statements and communications– Nicaragua recognized the effectiveness of the 1928 Treaty and its Protocol of 1930. Thus, it clearly understood it to be in force on 30 April 1948, when the Pact of Bogotá was concluded.

2.34 On the date of the Pact's conclusion, Nicaragua made no reservation with regard to the 1928 Treaty which had then been in force for eighteen years. The only reservation it entered referred to arbitral awards, since Nicaragua questioned the validity of the award rendered by the King of Spain in 1906. Furthermore, it would be incomprehensible for Nicaragua to purport to unilaterally declare the nullity of the 1928 Treaty, as it did in 1980, had it not considered it to be in force.

2.35 In light of the above, it is evident that the intention of the parties was to put an end to the dispute between them and that that dispute was definitively settled by the 1928 Treaty and its Protocol of Exchange of Ratifications of 1930 which was in force on 30 April 1948, the date of the conclusion of the Pact of Bogotá. This means that the matter falls under the exceptions established in Article VI of the Pact: *(a)* the matter was settled by arrangement between the Parties and governed by a treaty, and *(b)* that treaty was in force on the date of the Pact's conclusion.

V. Establishment of the Maritime Limit along the 82º W Meridian

2.36 On 19 December 1928, the Treaty was presented to the Congress of Nicaragua. As stated in Chapter I, the Nicaraguan Senatorial Study Commission agreed with the Nicaraguan Foreign Minister, and his advisors, to propose the 82° W Meridian "as the limit in the dispute with

Colombia", and proceeded to discuss the matter with the Colombian Government, through its Ambassador in Managua. Thus, bearing in mind that the Colombian Congress had already approved the Treaty, a process of negotiation between the two countries was initiated with a view to settling the issue. These negotiations and consultations took place between the Nicaraguan Foreign Minister, his advisors and the members of the Foreign Affairs Commission of the Nicaraguan Senate on the one hand, and the Colombian Government through its Ambassador in Managua on the other. Colombia carefully studied the matter and, after the aforementioned negotiations as described in detail in Chapter I above, agreed to the inclusion of a provision establishing the 82º W Meridian as the boundary between the two countries.

2.37 As shown earlier[120], during the Senatorial debates in Nicaragua, one of the members of the Nicaraguan Senatorial Study Commission –and who therefore had been involved in the negotiations with Colombia– explained that in order to prevent any future disagreement between Nicaragua and Colombia it should be added that Meridian 82º W was to constitute the "dividing line of the waters" (*la línea divisoria de las aguas*). This demarcation, the Senator stated, was necessary to put an end forever to the issue (*esa demarcación es indispensable para que la cuestión quede de una vez, terminada para siempre*). The Minister of Foreign Relations of Nicaragua explained that it was necessary to introduce into the Protocol of Exchange of Ratifications "the clarification which marked the dividing line" (*la aclaración que demarcaba la línea divisoria*), because it "was a need for the future of both nations, as it came to establish the geographical boundary between the archipelagoes in dispute, without which the question would not be completely defined" (*era una necesidad para el futuro de ambas naciones pues venía a señalar el límite geográfico entre los archipiélagos en*

[120] See paras. 1.61 and ff.

disputa sin lo cual no quedaría completamente definida la cuestión). The Nicaraguan Minister further assured the Chamber on behalf of his Government, that the provision concerning the "*dividing line"* did not require the treaty to be submitted again to the Colombian Congress, the Colombian Ambassador having indicated to him that he had been authorized by the Colombian Government to so state (… *su Gobierno lo había autorizado para manifestar que no sería sometido a la aprobación del Congreso Colombiano ese Tratado, con motivo de la aclaración que demarcaba la línea divisoria, que por lo tanto, y aunque no existía nada escrito, podía asegurar a la Honorable Cámara, en nombre del Gobierno, que sería aprobado el Tratado sin necesidad de someterlo nuevamente a la aprobación del Congreso*). He requested, therefore, that the Senate approve the Treaty with the proposed provision[121]. This was done, as recalled earlier, by a unanimous vote on 6 March 1930.

2.38 After having been approved by the Nicaraguan Senate, the Treaty was submitted to the Nicaraguan Chamber of Deputies. The Commission of Foreign Relations proposed that the Chamber approve the Treaty, as the Senate had already done, because of the "necessity to put an end to the dispute in the form specified in the Treaty" (*la necesidad de poner fin a la disputa en la forma que el Tratado especifica*), that is to say, "with the addition proposed in the Senate" (*con la adición propuesta en la Cámara del Senado*)[122]. The Treaty and the agreed provision between Colombia and Nicaragua regarding the 82º W Meridian were approved on 3 April 1930. The provision was included in the 1930 Protocol of Exchange of Ratifications

[121] Annex 8: Record of session XLIX of the Chamber of the Senate of the Nicaraguan Congress, 5 Mar. 1930. *La Gaceta*, Diario Oficial, Año XXXIV, Managua, D.N., No. 98, 7 May 1930, pp. 777-779.

[122] Annex 9: Record of session LVIII of the Chamber of Deputies of the Nicaraguan Congress, 1 Apr. 1930. *La Gaceta*, Diario Oficial, Año XXXIV, Managua, D.N., No. 182, 20 August 1930, p. 1460 ff.

of the Treaty. The Treaty and its Protocol was published in the Official Journal of Nicaragua on 2 July l930.

2.39 It is noteworthy that the terms of the Treaty had been agreed upon under a Conservative Government in Nicaragua, with the participation of Carlos Cuadra Pasos, then Minister of Foreign Affairs, whilst the ratification and exchange of ratification instruments were both carried out by Julián Irías, Minister of Foreign Affairs of the new Liberal Government, the Liberal Party being an entrenched opponent and rival of the Conservative Party under whose leadership the treaty was negotiated.

2.40 At no time between the signature of the Esguerra-Bárcenas Treaty in 1928 and the exchange of its ratification instruments in 1930; nor between 1930 and 1948, when the Pact of Bogotá was signed; nor between 1948 and 1950 when Nicaragua deposited its instrument of ratification of the Pact of Bogotá, did Nicaragua ever state that the matter of the sovereignty over the Archipelago of San Andrés was outstanding, or that there was a question about the validity of the 1928 Treaty and its Protocol of Exchange of Ratifications of 1930, or that there existed any difference between Nicaragua and Colombia over this question. At that time, Nicaragua had never attempted to raise doubts regarding either Colombia's sovereignty over the Archipelago or the 82° W Meridian as the dividing line of the waters, the *línea divisoria de las aguas*. When the Pact of Bogotá was signed on 30 April 1948, the Esguerra-Bárcenas Treaty of 1928 and its Protocol of Exchange of Ratifications of 1930 had been in force for almost twenty years – and at no time during all these years had Nicaragua even suggested that the dispute between the two countries had not been settled by a valid treaty, in force since 1930.

VI. The Character of the 82º W Meridian

2.41 The debate in the Nicaraguan Congress leaves no doubt as to the meaning of the 82º W Meridian within the 1930 Protocol of Exchange of Ratifications: a border, a dividing line of the waters in dispute, a delimitation, a demarcation of the dividing line *(límite, línea divisoria de las aguas en disputa, delimitación, demarcación de la linea divisoria*) - in other words: a maritime boundary. It is true that the 1928-1930 settlement related in the first place to sovereignty over land –the Mosquito coast and the Islas Mangles (Corn Islands) on the one hand, the Archipelago of San Andrés on the other– because these were the issues which had divided the two countries for so many years. However, if this settlement had been restricted to territorial sovereignty and had left open the issue of the maritime division, it would not have achieved the purpose of the negotiation, which was, as was repeatedly recalled in the Nicaraguan Congress, the final and complete settlement of the dispute between the two countries. In establishing the 82° W Meridian as the boundary between Colombia and Nicaragua, the Parties wanted to put an end to the whole dispute: Nicaragua proposed, and Colombia agreed, to establish a boundary along the 82° W Meridian and not any other line.

2.42 To argue, as Nicaragua repeatedly does in its Memorial[123], that the reference in the Protocol of Exchange of Ratifications to the 82º W Meridian limits Colombia westwards vis-à-vis Nicaragua but does not limit Nicaragua eastwards vis-à-vis Colombia is preposterous. It is inconceivable that Colombia would have accepted the Treaty had Nicaragua proposed in 1930 that the 82º W Meridian constituted a westward limit for Colombia but not an eastward limit for Nicaragua. It was both appropriate and sufficient to define the western limit of Colombia,

[123] *Memorial of Nicaragua*, p. 158, para. 2.213; p. 176, para. 2.252; p. 178, para. 2.255.

without it being necessary to describe this line as being also the eastern limit of Nicaragua.

2.43 The Nicaraguan Memorial goes to great lengths in its attempt to limit the 1928-1930 settlement to its territorial component and to disregard its maritime aspect[124]. It accuses Colombia of having "self-servingly converted…, forty years after its conclusion", the territorial settlement of the Esguerra-Bárcenas Treaty into a treaty of maritime delimitation[125] the purport of which would have been, so Nicaragua argues, to delimit maritime areas that were unknown to, and unrecognized by, international law at that time. An "eccentric interpretation", so Nicaragua writes, of a treaty whose scope was "clearly limited to defining the extreme extension to the West of the archipelago, without any intention of delimiting the respective maritime areas on which the Parties may claim jurisdiction"[126].

2.44 To set the record straight, one need only refer once again to the debates in the Nicaraguan Congress, recounted above, which show the genesis and purport of the provision regarding the 82° W Meridian in the Protocol of Exchange of Ratifications of 1930. It is in the Nicaraguan Senatorial Study Commission that the idea had surfaced that, in order to put an end once and for all to the dispute between both countries, it was necessary to define the limit –on the sea as well as on land– between the two countries.

2.45 The fundamental importance of the 82° W Meridian and the boundary nature that Nicaragua attributed to it are borne out from the very negotiation regarding the inclusion of the Meridian. The proposal of the Nicaraguan Senatorial Study Commission was widely debated between its members, the Minister of Foreign Affairs and his advisors,

[124] *Memorial of Nicaragua*, pp. 146-177, paras. 2.189-2.253.
[125] *Ibid.*, p. 146, para. 2.189; p. 153, para. 2.203.
[126] *Ibid.*, p. 181, para. 2.263.

and the Ambassador of Colombia. The Colombian Government, after a careful analysis, decided to accept it and proposed that it be incorporated in the Protocol of Exchange of Ratifications.

2.46 From the debates in the Nicaraguan Congress the overriding importance which the Government of Nicaragua attached to the matter is evident, to the extent that those debates were suspended in order to learn the views of the Foreign Affairs Minister. Despite the explanations given by the Minister and one of the Senators who was part of the Study Commission, some Senators considered that the inclusion of the Meridian was, because of its boundary nature, so fundamental that it implied a full amendment of the Treaty which would then have to be considered anew by the Colombian Congress. However, that was not the path chosen by the Colombian Government which considered that, for purposes of its internationally legally binding character, it was feasible for the provision to be included in the Protocol of Exchange of Ratifications. In fact, Colombia has, as have other States, followed that type of practice on several occasions.

2.47 From the foregoing, it follows that the determination of the 82° W Meridian as a maritime limit was a fundamental element of the agreement between both countries and can in no way be considered as a mere incidental reference without any substantive significance for the agreement. This is evidenced by the fact that, in the year following the exchange of ratification instruments of the Treaty, the Meridian had already been incorporated in Colombia's official cartography –as it has continued to be on several occasions– (see Maps Nos. 4-11) as the boundary between both countries without there being any protest from Nicaragua.

2.48 There can be no doubt as to the meaning and scope of this provision since, during the congressional debates, one of the members of the Nicaraguan Senatorial Study Commission –and who therefore had been involved in the referred to negotiations with Colombia– explained that "the clarification or demarcation of the dividing line of the waters in dispute… [was] indispensable for the question to be at once terminated for ever" (*la aclaración o demarcación de la línea divisoria de las aguas en disputa… indispensable para que la cuestión quede de una vez, terminada para siempre*)[127]. As recalled above, the Nicaraguan Minister of Foreign Relations observed that without the inclusion of the provision regarding the 82° W Meridian "the question would not be completely defined" (*no quedaría completamente definida la cuestión*). If the Treaty had to be understood, as Nicaragua maintains, as having no other effect than that of defining sovereignty over the land, it would not have been described by the Nicaraguan Minister and by the Nicaraguan Congress as a "border treaty", a *tratado de límites.*

2.49 Nicaragua asserts that "treaties allocating territories or islands would usually not delimit the respective maritime jurisdiction of the Parties – except, of course, if otherwise expressly provided"[128]. But it follows from the *travaux préparatoires* that it was Nicaragua's intention, when it proposed the provision regarding the 82º W Meridian, to define a limit in the seas between the jurisdictions of both countries. Moreover, the Protocol embodies an express prescription to this effect. Contrary, therefore, to Nicaragua's assertion in its Memorial, the 1928 Treaty, by the inclusion of this provision in the Protocol of Exchange of Ratifications, *does* define a maritime limit between the Parties.

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[127] See Annex 8: Record of session XLIX of the Chamber of the Senate of the Nicaraguan Congress, 5 Mar. 1930. *La Gaceta*, Diario Oficial, Año XXXIV, Managua, D.N., No. 98, 7 May 1930, p. p. 778.

[128] *Memorial of Nicaragua*, p. 166, para. 2.232.

2.50 From the foregoing, it is demonstrated that the 1928-1930 settlement put a final end to the dispute between Colombia and Nicaragua on sea as well as on land. The determination of the limit in the sea was conceived of in both capitals, and particularly so in Managua, as complementary to the recognition of territorial sovereignties. The definitive and final maritime solution agreed upon was part and parcel of the global settlement reached in 1928-1930, on the same footing as the definitive and final recognition of the Archipelago as Colombian, and the Mosquito Coast and the Islas Mangles (Corn Islands) as Nicaraguan. To separate the maritime part of the 1928-1930 settlement from its territorial part would run counter to the intention of the Parties, the *travaux préparatoires* and the very text of the Protocol of Exchange of Ratifications, which is an integral part of the Treaty.

2.51 Confronted with this compelling evidence, Nicaragua takes a contradictory stance. On the one hand, it expressly accepts the fundamental importance of the 82° W Meridian when it maintains, in its Memorial, that the "mutual understanding on the part of both Nicaragua and Colombia of the intent and meaning of the declaration that was added by the Nicaraguan Congress to the 1928 Treaty" and included in the Protocol of Exchange of Ratifications of 1930 is to be regarded as what it calls a "conditional interpretative declaration", which "constitutes an 'authentic interpretation' of the Treaty" and "has become an integral part of the Treaty and binds both Parties"[129]. On the other hand, however, Nicaragua makes every effort to have the Court disregard this "authentic interpretation" of the Treaty because, so it says, "the only object of the Treaty was to determine sovereignty over the territories" and there did not exist "any intention of delimiting the respective

[129] *Memorial of Nicaragua*, pp. 151-153, paras. 2.197-2.202, in particular p.152, para. 2.199, and p. 153, para. 2.201; p. 178, para. 2.254.

maritime areas on which the Parties may claim jurisdiction"[130].

2.52 In yet another approach Nicaragua argues that the Esguerra-Bárcenas Treaty of 1928 "must be interpreted in light of the law prevailing at the time of its conclusion" and that to interpret the Treaty otherwise, so the Nicaraguan argument runs, would imply "that in 1930 Nicaragua and Colombia were claiming maritime areas unauthorized and even unknown in international law"[131]. The Parties cannot be supposed, so Nicaragua insists, to have delimited in 1928-1930 maritime areas which were to be authorized only fifty years later, thus "anticipating by half a century the United Nations Convention on the Law of the Sea of 1982"[132].

2.53 No doubt, in 1930 Meridian 82º W could not be understood as a maritime boundary in the modern sense of the word. However, the *travaux préparatoires* of the Protocol of Exchange of Ratifications recounted above demonstrate that the 82° W Meridian was regarded by the Parties in accordance with the law in force at the time –as required by the award in *Guinea-Bissau – Senegal* case[133]– as a limit, as a dividing line, as a line separating whatever Colombian or Nicaraguan jurisdictions or claims there then existed or might exist in the future. Nicaragua wanted to be assured that there would never more be any Colombian claim to the west of the Meridian, and by the same token Colombia was satisfied that Nicaragua would no longer claim any right to the east of the Meridian.

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[130] *Memorial of Nicaragua*, p. 175, para. 2.249, and p. 181, para. 2.263.
[131] *Ibid.*, p. 170, para. 2.241.
[132] *Ibid.*, p. 179, para. 2.258.
[133] "The Tribunal considers that the 1960 Agreement must be interpreted in the light of the law in force on the date of its conclusion…" Arbitration Tribunal for the Determination of the Maritime Boundary Guinea-Bissau – Senegal. Award of 31 July 1989, Geneva, 1989 p. 67, para. 85. The text of this Award, with its translation to the English language, was submitted as an annex to the application instituting proceedings of the Government of Guinea-Bissau in the case concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau – Senegal), The Hague, 23 Aug. 1989.

2.54 Since the 82° W Meridian was conceived as a boundary, it partakes of the finality and stability of all boundaries, whether on land or on sea. In the *Temple of Preah Vihear* case the Court laid down the basic principle that

> "… when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality… [T]his is impossible if the line so established can, at any moment, and on the basis of a continuously available process, be called in question…"[134]

The Court therefore decided that the requirements of stability and finality are to prevail even over inaccuracies in the treaty. All the more are these requirements to prevail where no inaccuracy is even alleged. In a well-known and far-reaching *dictum* in the *Aegean Continental Shelf* case the Court regarded the requirements of stability and finality as a general principle governing both sea and land boundaries:

> "Whether it is a land frontier or a boundary line in the continental shelf that is in question, the process is essentially the same, and inevitably involves the same element of stability and permanence, and is subject to the rule excluding boundary agreements from fundamental change of circumstances."[135]

2.55 It may, moreover, be recalled that the basic and most fundamental principle of the law of maritime delimitation is that the delimitation is to be effected by agreement between the Parties –as Colombia and Nicaragua did in establishing the maritime boundary between them along the 82º W Meridian– and that it is only in the absence of such an agreement that the customary rules of international law,

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[134] *I.C.J. Reports 1962*, p. 34.
[135] *I.C.J. Reports 1978*, p. 35-36, para. 85.

developed by the jurisprudence of the International Court of Justice and other international tribunals, come into play. The evolution of these rules –as a result, in particular, of the evolution of the jurisprudence– does not affect the validity of the agreements previously entered into. If the numerous delimitation agreements entered into during the last fifty years were to be regarded as invalid because the law of the sea has evolved on so many points, the fabric of international relations would be endangered. Would it be conceivable that the agreements predating the 1982 Convention of the Law of the Sea, or even the 1958 Geneva Conventions should be declared null and void, or at least inapplicable and calling for revision, because they have been concluded at a time when the concept of the continental shelf was far from what it is today and the institution of the exclusive economic zone did not even exist? The maritime limit agreed upon by Colombia and Nicaragua in 1930 is, therefore, governing, whatever changes there might have been since then in the law of the sea.

2.56 In another attempt to belittle the Esguerra-Bárcenas Treaty as having defined between Colombia and Nicaragua a limit in the seas along the 82° W Meridian, Nicaragua cites some arbitral awards which either are devoid of value as precedents or even run counter to the Nicaraguan position. The *Guinea/Guinea-Bissau* award of 1985, cited by the Nicaraguan Memorial[136], for example, states that

> *"... l'absence totale des mots eaux, mer, maritime ou mer territoriale constitue un indice sérieux de ce qu'il était essentiellement question de possessions terrestres."*[137]

[136] *Memorial of Nicaragua*, pp. 170-171, paras. 2.242-243.

[137] "The complete absence of the words waters, sea, maritime or territorial sea is a clear sign that essentially land possessions were involved there". U.N.R.I.A.A., Vol. XXIX, p. 172, para. 56. This award was rendered in the French and Portuguese languages. The passage quoted was taken from the English version that was published in *International Legal Materials*, Vol. 25, 1986, p. 279.

The same award, so Nicaragua stresses, decides that

> *"A la connaissance du Tribunal, il n'a jamais été considéré à l'époque qu'aucun de ces instruments ait alors attribué à l'un de signataires une souveraineté en mer sur autre chose que les eaux territoriales communément admises… [T]out indique que ces deux Etats [la France et le Portugal] n'ont pas entendu établir une frontière maritime générale entre leurs possessions… Elles ont seulement indiqué… quelles îles appartiendraient au Portugal…"*[138]

In our case, however, everything *does* indicate that the Parties *did* have the intention to establish a maritime division between their territories. The *travaux préparatoires do* refer to the dividing line of the waters (*línea divisoria de las aguas*) and to the demarcation of the dividing line (*demarcación de la línea divisoria*). Far from supporting Nicaragua's view, this precedent supports the character of the 82º W Meridian as a maritime boundary. Furthermore, as shown, the subsequent practice of the Parties so confirms: Colombia continued to exercise its sovereignty and jurisdiction to the east of the 82° W Meridian, included it as the boundary between both countries in its official maps (See e.g., Maps Nos. 4 - 11) since the year immediately following the exchange of ratification instruments of the 1928 Treaty, and continued to do so in several subsequent official publications (i.e. 1934 and 1944 editions of "Limits of the Republic of Colombia") without objections from Nicaragua.

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[138] "To the knowledge of the Tribunal, it was never considered at the time that any of these treaties granted maritime sovereignty to any of the signatories over anything except the commonly recognized territorial waters… [E]verything indicates that these two States [France and Portugal] had no intention of establishing a general maritime boundary between their possessions… [T]hey simply indicated which islands would belong to Portugal…" U.N.R.I.A.A., Vol. XXIX, p. 180, paras. 81-82. For the English version, see *International Legal Materials*, Vol. 25, 1986, pp. 287-288.

2.57 It has to be noted that if neither the Colombian sovereignty over the Archipelago of San Andrés nor the Meridian 82º W limit were valid because the Esguerra-Bárcenas Treaty of 1928 were to be regarded as null and void, it would then inexorably follow that no more valid would be the provision of the same Treaty recognizing the Nicaraguan sovereignty over the Mosquito Coast and the two Islas Mangles (Corn Islands). The dispute between the two countries and which they intended to settle, and indeed settled in 1928-1930 after protracted negotiations, would thus revive more than seventy years later, and the whole issue would now be brought back to square one.

2.58 The legal tactics of Nicaragua appear to be those of a stage-by-stage retreat: the Esguerra-Bárcenas Treaty is not valid, so Nicaragua argues; if it is valid, its breach by Colombia entitled Nicaragua to unilaterally declare its termination, so Nicaragua continues; and if it is still in force, it does not delimit the maritime areas along the 82° W Meridian, so Nicaragua goes on.

2.59 This retreat, however, does not stop here: there is a last leg to it – an extraordinary one, at that: if the limit on the sea is regarded by the Court as running along the 82° W Meridian, so the Nicaraguan Memorial asserts,

> "... this definition only bears upon the Archipelago itself and has no bearing whatsoever to the North or South of the San Andrés and Providencia Archipelago which at most lies between parallels 12°10' and 13°25'; that is the stretch between the Albuquerque Cays and the Island of Santa Catalina. South and north of these limits, the 1928 Treaty as interpreted by the 1930 Protocol of Exchange of Ratifications is silent

> and can be of no use to delimiting the respective maritime jurisdictions of the Parties. Therefore, even if the Treaty were found to be valid and were found to have established a maritime boundary, which Nicaragua does not accept, the limits to the south of the parallel of 12°10' N and to the north of the parallel of 13°25' N must in any case be decided by the Court in accordance with general rules of the law of the sea."[139]

In other words, if the Court were to accept the 82° W Meridian as the limit in the seas determined by the Parties in 1928-1930, then it should at least –so Nicaragua argues– restrict the extent of this agreed boundary to a short stretch – approximately 75 miles (140 kilometers). Beyond this short stretch, so Nicaragua maintains, to the north as well as to the south, there would not be any contractually defined limit in the seas, and the "general rules of the law of the sea" would be governing.

2.60 This argument is difficult to understand, and even more to accept. Nicaragua's attempt to limit the geographical extent of the Archipelago of San Andrés to the central section of that Archipelago and to purport to restrict the extent of agreed maritime boundary along the 82° W Meridian to that same section, is geographically, historically and legally incorrect (see paras. 2.25-2.28, above). Moreover, while it is true that the provision regarding the 82° W Meridian in the Protocol of Exchange of Ratifications does not assign any northern or southern limit to the effect of the Meridian as a maritime boundary, it is obvious, however, that the maritime boundary constituted by the Meridian, while it certainly cannot play a role as a limit in the seas between Colombia and Nicaragua up to the North Pole and down to the South Pole, plays this role from the tri-point in the

[139] *Memorial of Nicaragua*, pp. 176-177, para. 2.253.

North where it intersects with the maritime boundary between Nicaragua and a third State (Honduras) to the tri-point in the South where it intersects with the maritime boundary between Nicaragua and another third State (Costa-Rica). Thus, the whole of the maritime boundary agreed upon by Colombia and Nicaragua runs along the 82° W Meridian between definite points to the North and to the South.

2.61 More importantly, the Nicaraguan theory is belied by other delimitation agreements in the region. The 1986 Treaty between Colombia and Honduras, which is in force, refers to the 82° W Meridian far to the north of 13°25' (see para. 2.59, *supra*). In fact, point 1 of the maritime boundary it determines between Colombia and Honduras is defined as lying on this Meridian at the latitude of 14° 59' 08" N -a latitude clearly to the north of what Nicaragua argues is the northernmost limit of the 82° W boundary. The line M-L of the 1976 Treaty between Colombia and Panama, which is also in force, determines the maritime boundary between both countries as running along the parallel of 11° N. There exists, therefore, a pattern of delimitation agreements in the region which rests on the assumption of the validity and effectiveness of the 82° W Meridian limit between Colombia and Nicaragua as established by the 1928 Esguerra-Bárcenas Treaty and its 1930 Protocol of Exchange of Ratifications. What Nicaragua requests the Court to do is to unsettle this whole pattern of agreements and maritime delimitations.

2.62 In light of the above, it appears that the maritime limit between both countries was defined by agreement between the parties in the 1928 Treaty and its Protocol of Exchange of Ratifications of 1930. The 1928 Treaty and its 1930 Protocol were in force on 30 April 1948, the date of the conclusion of the Pact of Bogotá. This means that the matter of the maritime delimitation also falls under the

provisions of Article VI of the Pact, that is to say: *(a)* the matter was settled by arrangement between the Parties and governed by a treaty, and *(b)* that treaty was in force on the date of the Pact's conclusion.

VII. Basis of the 1928 – 1930 Settlement

2.63 The above account establishes that:

(a) The settlement reached in 1928 followed the balanced proposal made six years earlier, and formalized in March 1925, by Colombia, that is to say, the acknowledgement by each Party of the sovereignty of the other over the territories which the latter effectively occupied –the Mosquito Coast and the Islas Mangles (Corn Islands) as Nicaraguan, the Archipelago of San Andrés as Colombian.

(b) Nicaragua recognized and agreed that sovereignty over the cays of Roncador, Quitasueño and Serrana, constituting part of the Archipelago, was a matter solely between Colombia and the United States, to the exclusion of Nicaragua.

(c) On Nicaragua's initiative and proposal the provision regarding Meridian 82º W, which was agreed upon after negotiations between the parties with a view to establishing the boundary between the two countries and putting an end to the controversy "forever", *para siempre,* was included in the Treaty.

(d) In both capitals the Treaty's ratification followed a careful and thorough debate in the national Congresses.

(e) These debates do not leave the slightest doubt as to the intention of both Parties to regard the Treaty as a final and complete settlement of all territorial disputes between them. In both countries the Treaty was intended to, and understood as, putting an end once and for all to the dispute which had arisen fifteen years earlier (*para que la cuestión quede de una vez, terminada para siempre*[140]).

(f) This was so on sea as well as on land, as is evidenced by the reference, in the parliamentary debate in Nicaragua, to a *línea divisoria de las aguas*. To assert, as Nicaragua does in its Memorial, that "it was not the purpose of either the Treaty or of the Protocol of Exchange of Ratifications to delimit the respective maritime areas belonging to the Parties"[141]; that "neither the Treaty of 1928, nor the Protocol of Exchange of Ratifications of 1930 include the word 'limit', or 'boundary', or 'border'"[142]; that, consequently, "by no means do either of these instruments define a boundary between the Parties"[143]; or to purport to restrict the extent of agreed maritime boundary along the 82° W Meridian to a segment defined by the central section of the Archipelago[144], runs counter to the explicit explanations given by the Nicaraguan Government and accepted by Congress during the debate prior to ratification in Managua.

(g) By agreeing to include, in the 1930 Protocol of Exchange of Ratifications, the provision -afterwards reproduced by each party in its domestic

[140] Annex 8: Record of session XLIX of the Chamber of the Senate of the Nicaraguan Congress, 5 Mar. 1930. *La Gaceta*, Diario Oficial, Año XXXIV, Managua, D.N., No. 98, 7 May 1930, pp. 777-779.
[141] *Memorial of Nicaragua,* p. 175, para. 2.249.
[142] *Ibid.,* p. 171, para. 2.244.
[143] *Ibid.,* p.169, para. 2.237.
[144] *Ibid.*, pp. 176-7, para. 2.253.

promulgation- that "the Archipelago of San Andrés and Providencia, which is mentioned in the first clause of the referred to Treaty, does not extend west of the 82 Greenwich meridian." ["*el Archipiélago de San Andrés y Providencia que se menciona en la cláusula primera del Tratado referido no se extiende al occidente del meridiano 82 de Greenwich."*], the Parties by the same token decided, necessarily, that the rights of Nicaragua did extend up to Meridian 82º W – in other words, that this Meridian would be the boundary between both countries.

(h) Fifty years elapsed without any challenge by Nicaragua to the validity of the Esguerra-Bárcenas Treaty. In its judgment of 1960 in the case concerning the *Arbitral award made by the King of Spain on 23 December 1906* the Court found that "Nicaragua's failure to raise any question with regard to the validity of the Award for several years… debars it from relying subsequently on complaints of nullity"[145]. In that case Nicaragua had waited six years before raising the question of the validity of the award; here, Nicaragua has purported to challenge the validity of the 1928 Treaty half a century later."

VIII. Conclusion

2.64 In view of the considerations set out in this Chapter, and bearing in mind in particular

(a) that the Court has already held that, when an Applicant invokes both the Pact of Bogotá and Optional Clause Declarations, it is the Pact of Bogotá which governs;

[145] *I.C.J. Reports 1960*, pp. 213-214.

(b) that the Pact of Bogotá must be read as a whole and not selectively as Nicaragua does;

(c) that the sovereignty over the Archipelago of San Andrés and the course of the boundary between Colombia and Nicaragua are matters settled by the Esguerra-Bárcenas Treaty of 1928 and its Protocol of Exchange of Ratifications of 1930, and thus are matters settled and governed by an arrangement between the parties and a treaty in force on the date of the conclusion of the Pact of Bogotá; and

(d) that Article VI of the Pact stipulates that, consequently, on each of these grounds, Article XXXI "may not be applied",

the Court is, by virtue of Articles VI and XXXIV of that Pact, "without jurisdiction to hear the controversy" raised by Nicaragua and has to declare the controversy "ended".

CHAPTER III

THE DECLARATIONS OF COLOMBIA AND NICARAGUA UNDER THE OPTIONAL CLAUSE DO NOT AFFORD THE COURT JURISDICTION

3.1 The Application of the Republic of Nicaragua against the Republic of Colombia filed on 6 December 2001 maintains, as an alternative title of jurisdiction, that:

> "In accordance with the provisions of Articles [*sic*] 36, paragraph 2, of the Statute jurisdiction also exists by virtue of the operation of [the] Declaration of the Applicant State dated 24 September 1929 and the Declaration of Colombia dated 30 October 1937."[146]

The merits of that contention will now be addressed.

I. Jurisdiction under the Pact of Bogotá is Governing and Hence Exclusive

3.2 As stated earlier (Introduction, paragraph 4), Nicaragua bases its Application not only on Article 36, paragraph 1, of the Statute and Article XXXI of the Pact of Bogotá, but also on Article 36, paragraph 2, that is to say, on the operation of Nicaragua's Declaration of 1929 and Colombia's Declaration of 1937[147]. Nicaragua, however, is silent about the withdrawal by Colombia of its Declaration prior to the filing of Nicaragua's Application. Nor does Nicaragua deal with the relationship between these two alleged titles of jurisdiction on which the Court itself has

[146] *Application of Nicaragua*, para. 1.
[147] *Ibid.*, para. 1; *Memorial of Nicaragua,* pp. 1-2, para. 3.

specifically ruled in the case of the *Border and Transborder Armed Actions, Jurisdiction and Admissibility*, between Nicaragua and Honduras[148].

3.3 In that case, Nicaragua relied on exactly the same two titles of jurisdiction as it does in the present proceedings. In the Court's own words in that case,

> "It is, in short, claimed by Nicaragua that there exist two distinct titles of jurisdiction. It asserts that the Court could entertain the case both on the basis of Article XXXI of the Pact of Bogotá and on the basis of the declarations of acceptance of compulsory jurisdiction made by Nicaragua and Honduras under Article 36 of the Statute."[149]

Faced with these Nicaraguan claims, the Court stated that

> "Since, in relations between the States parties to the Pact of Bogotá, that Pact is governing, the Court will first examine the question whether it has jurisdiction under Article XXXI of the Pact."[150]

3.4 "[T]he commitment in Article XXXI [of the Pact of Bogotá]…, [so the Court ruled] 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"[151]. It is, so it decided, "independent of such declarations of acceptance of

[148] *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, I.C.J. Reports 1988*.
[149] *Ibid,* p. 82, para. 26.
[150] *Ibid.* p. 82, para. 27.
[151] *Ibid.* p. 85, para. 36.

compulsory jurisdiction as may have been made under Article 36, paragraph 2, of the Statute"[152]. Consequently, whether the parties in a case before the Court have, or have not, deposited such declarations, if they are parties to the Pact of Bogotá, it is the Pact of Bogotá which is commanding:

> "The commitment in Article XXXI applies *ratione materiae* to the disputes enumerated in that text; it relates *ratione personae* to the American States parties to the Pact; it remains valid *ratione temporis* for as long as that instrument itself remains in force between those States."[153]

3.5 This is so regarding both the provisions in the Pact conferring jurisdiction upon the Court and the provisions limiting and circumscribing this jurisdiction. This is why the Court, immediately after having laid down the principle of the autonomous and self-contained character of the jurisdictional provisions of the Pact of Bogotá, added that "some provisions of the Treaty restrict the scope of the parties' commitment" and referred, in particular, to the provision in Article VI concerning "matters already settled by arrangement between the Parties… or which are governed by agreements or treaties in force on the date of the conclusion of the present Treaty"[154].

3.6 Therefore, even if Colombia had still been bound by its Declaration of 30 October 1937 when Nicaragua filed its Application –*quod non*- the Pact of Bogotá –the *lex specialis*– would still be governing; the Court would still have to "declare itself to be without jurisdiction"; and the controversy would still have to be "declared ended".

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[152] *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, I.C.J. Reports 1988*. p. 88, para. 41.
[153] *Ibid.* p. 84, para. 34.
[154] *Ibid.* p. 84-85, para. 35.

3.7 The Court held that, as between the Pact and the Optional Clause, jurisdiction under the Pact is "governing", that is to say, is commanding, determinative and conclusive. It follows that consideration in these proceedings of whether there is a distinct and alternative basis of jurisdiction under the Optional Clause is inconsonant with the governing effect of the Pact of Bogotá. It cannot be concluded that the pertinent provisions of the Pact of Bogotá are "governing" while also concluding that jurisdiction shall be determined in a particular case not by those governing provisions but by the distinctive terms of declarations which might be in force under the Optional Clause.

3.8 Thus, whether the Court regards Colombia's withdrawal of its acceptance of the Optional Clause as valid and effective or not, the result is the same: the Pact of Bogotá is governing, and under the Pact the Court has only the jurisdiction defined by the limits of Articles VI and XXXIV.

3.9 Colombia could, therefore, limit its discussion of the jurisdictional issues to the objection based on Articles VI and XXXIV of the Pact of Bogotá. But since Nicaragua maintains a title of jurisdiction based on the Parties' Declarations under the Optional Clause, Colombia will nevertheless show that the Court's jurisdiction in these proceedings cannot be based on the Parties' Declarations under Article 36 of the Statute.

II. By Reason of the Dispute between Nicaragua and Colombia having been Settled and Ended, there is no Dispute before the Court to which Jurisdiction under the Optional Clause Declarations could Attach

3.10 It has been shown that by virtue of the provisions contained in Articles VI and XXXIV of the Pact of Bogotá, if the Court declares itself to be without jurisdiction to hear the controversy, "such controversy shall be declared ended". In the submission of Colombia, the Court is bound to so declare pursuant to the analysis of the previous Chapter of these Preliminary Objections. The result is that there is no controversy before the Court to which the Optional Clause can be held to apply.

3.11 A dispute which incontestably was "already settled by arrangement between the parties", a matter which incontestably was "governed" by a treaty in force on the date of the conclusion of the Pact of Bogotá cannot, by the very terms of the Pact of Bogotá which Nicaragua invokes as a title of jurisdiction, remain a dispute within the meaning of Article 36, of paragraph 2, of the Statute. A dispute cannot be settled and ended and yet at the same time be a dispute capable of adjudication by the Court pursuant to jurisdiction accorded under the Optional Clause.

III. In any Event, there is no Jurisdiction under the Optional Clause because Colombia's Declaration Was not in Force on the Day of the filing of Nicaragua's Application

3.12 In any event, jurisdiction of the Court pursuant to Article 36, paragraph 2 of the Statute and the cited Declarations of Nicaragua and Colombia thereunder does not exist, given

that the Declaration of Colombia of 30 October 1937 was terminated by Colombia before the filing by Nicaragua of its Application.

3.13 On the date of the filing of Nicaragua's Application, Colombia's Declaration under the Optional Clause had to have been in force for jurisdiction of the Court to attach. On 5 December 2001, Colombia notified the Secretary General of the United Nations the termination of its Declaration of 30 October 1937, "with effect from the date of this notification", that is with immediate effect. Colombia's termination of its Declaration was informed to all the member States of the United Nations on the following day, as it appeared published in the "Journal of the United Nations" No. 2001/237 of 6 December 2001. Not a single State has opposed Colombia's termination with immediate effect. The Application of Nicaragua was submitted to the Court on 6 December 2001.

A. TERMINATION OF AN OPTIONAL CLAUSE DECLARATION MAY BE EFFECTIVE ON NOTICE

3.14 The question may be asked whether the termination of Colombia's Declaration under the Optional Clause was effective in respect of Nicaragua's Application. Colombia, as any other State that has entered a unilateral Declaration with no temporal limits, had the right to withdraw it at any time as it did on 5 December 2001. This holds true with regard to every State Party to the Statute of the Court, including Nicaragua.

3.15 In respect of Declarations made under the Statute of the Permanent Court of International Justice, and maintained in force for the International Court of Justice by virtue of the terms of Article 36, paragraph 5 of its Statute, of which Colombia's 1937 Declaration was one and Nicaragua's of 1929 is another, Shabtai Rosenne in his treatise observes that:

> "…it would be singularly unreal to apply to them an inflexible rule said to derive from the general law of treaties and disallowing the right of unilateral denunciation. The dissolution of the League of Nations and the Permanent Court, the establishment of the United Nations, and the far-reaching changes in the international community and its organization which have followed are sufficient to allow those States to withdraw a declaration made in those far-off days when the compulsory jurisdiction was in its infancy, and which is today applicable only by virtue of Article 36, paragraph 5, of the Statute"[155].

Rosenne concludes that: "A title of jurisdiction which has terminated before the proceedings are instituted is no longer in force, and reliance cannot be placed upon it"[156].

3.16 In its Judgment in *Military and Paramilitary Activities in and against Nicaragua*[157], the Court rejected the United States argument that, because Nicaragua's declaration under the Optional Clause of the Statute of the Permanent Court of International Justice was of indefinite duration, it could be terminated by Nicaragua at any time with immediate effect and that, reciprocally, the United States could terminate its declaration at any time with immediate effect. The Court held that:

> "But the right of immediate termination of declarations with indefinite duration is far from established. It appears from the requirements of good faith that they should be treated, by analogy, according to the law of treaties, which requires a reasonable time for

[155] S. Rosenne, The Law and Practice of the International Court, 1920-1996, Vol. II, Jurisdiction, at p. 820.
[156] *Ibid*, p. 975.
[157] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States), Jurisdiction and Admissibility, I.C.J. Reports 1984,* pp. 392, 420-421.

withdrawal from or termination of treaties that contain no provision regarding the duration of their validity."[158]

3.17 This holding of the Court, as indeed its holding that it had jurisdiction to entertain the Application filed by Nicaragua on the basis of Articles 36, paragraphs 2 and 5, of the Statute of the Court, was not unanimous. Judge Oda[159], Judge Jennings[160], and Judge Schwebel [161] differed from the Court's holding that a "reasonable time" is required for withdrawal from or termination of a declaration under the Optional Clause, and maintained that neither the practice of States under the Optional Clause nor consideration of allied questions in the International Law Commission's consideration of the law of treaties sustained the Court's position. The Special Rapporteur of the International Law Commission on the Law of Treaties, and later Judge and President of the Court, Sir Humphrey Waldock, concluded that State practice under the Optional Clause as well as under treaties of arbitration, conciliation and judicial settlement, supports termination on notice[162]. Students of the Court's procedures and jurisprudence have questioned the Court's contrary indication[163].

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[158] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States), Jurisdiction and Admissibility, I.C.J. Reports 1984.* p. 420, para. 63.
[159] *Ibid.* at pp. 510, 511.
[160] *Ibid.* pp. 546, 547-553.
[161] *Ibid.* pp. 620-628.
[162] *Yearbook of the International Law Commission*, 1963, Vol. II, p. 68.
[163] See S. Rosenne, The Law and Practice of the International Court, 1920-1996, Vol. II, Jurisdiction, at p. 819, as well as Oda, S.: "Reservation in the Declarations of Acceptance of the Optional Clause and the Period of Validity of Those Declarations: The Effect of the Shultz Letter" *British Year Book of International Law,* Vol. 59 (1988), pp. 1, 18; L. Gross, "Compulsory Jurisdiction under the Optional Clause: History and Practice", in L.F. Damrosch, *The International Court of Justice at a Crossroads,* 1987, pp. 19 ff., 30; P. H. Kooijmans (writing before his election to the Court), "Who Tolled the Death-Bell for Compulsory Jurisdiction? Some Comments on the Judgment of the International Court of Justice in the Case concerning Military and Paramilitary Activities in and against Nicaragua (Jurisdiction of the Court and Admissibility of the Application)", in *Realism in Law-Making, Essays on international law in Honour of Willem Riphagen,* 1986, pp. 71 ff. and 77; D. Greig, "Nicaragua and the United States: Confrontation over the Jurisdiction of the International Court", *British Year Book of International Law,* Vol. 62, 1991; and F. Orrego Vicuña, "The Legal Nature of the Optional Clause and the Right of a State to Withdraw a Declaration Accepting the Compulsory Jurisdiction of the International Court of Justice", in *Liber Amicorum Judge Shigeru Oda*, Vol. 1, 2002, pp. 463, 467-478.

B. THE COURT'S REFERENCES TO A "REASONABLE TIME" WERE *OBITER DICTA*

3.18 The passage of the Court's Judgment requiring a "reasonable time" for withdrawal from or termination of an Optional Clause Declaration of indefinite duration was cast in hypothetical and tentative terms, suggestive of *obiter dictum.*

3.19 In any event, in *Military and Paramilitary Activities in and against Nicaragua*, that observation was not a necessary basis for the Court's decision on the point. The Court rather attached decisive weight to what it characterized as the "most important question", whether the United States was free to disregard the clause providing for six months notice which it had appended to its Declaration[164]. It also held that the reciprocity invoked by the United States concerned the scope and substance of the Declaration's commitments and not the formal conditions of their creation, duration or extinction. Similarly, when the Court in its later Judgment in the case of *Land and Maritime Boundary between Cameroon and Nigeria*[165], quoted the "reasonable time" passage from *Military and Paramilitary Activities in and against Nicaragua*, the Court was not considering that question but rather the distinct issue of whether such a temporal consideration governs the taking effect of the deposit of a declaration[166]; thus again the reference was *obiter dictum*[167] and, as such, is without precedential effect.

3.20 It is important to recall that Colombia is not in the position in which the United States was in 1984 or in which Nigeria

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[164] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States), Jurisdiction and Admissibility, I.C.J. Reports 1984,* p. 419, para. 61.
[165] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria), Preliminary Objections, I.C.J. Reports 1998*, p. 295, para. 33.
[166] *Ibid.*, paras. 34 ff.
[167] See, e.g., Orrego Vicuña, *loc., cit.,* p. 475, and J. G. Merrills, "The Optional Clause Revisited" in *British Year Book of International Law,* Vol. 64, 1993, pp. 197, 208.

was in 1998. Colombia's Declaration had no six months notice proviso, nor does Colombia seek to invoke a temporal reciprocity against Nicaragua. In the instant proceedings, there is no question about the temporal conditions of the deposit of a Declaration under the Optional Clause that were invoked by Nigeria.

3.21 States that do adhere to the Optional Clause of the Statute generally attach multiple and significant reservations, including the facility of termination or variation on notice. As it is, the dictum advanced by the Court would only apply to the singular situation of a half dozen States that made Declarations of indefinite duration under the Statute of the Permanent Court during the inter-war years, when there were high hopes for the gradual institution through the Optional Clause of a universal system of compulsory jurisdiction. The Court's dictum places those few States at a significant disadvantage vis-à-vis other States that have either not adhered to the Optional Clause at all or that have adhered with Declarations that are terminable or variable on notice.

C. NICARAGUA AND COLOMBIA IN PRACTICE HAVE TREATED THEIR DECLARATIONS AS TERMINABLE ON NOTICE

3.22 Practice shows that both Colombia and Nicaragua have interpreted their respective Declarations under the Optional Clause as permitting their withdrawal or amendment at any time with immediate effect.

3.23 Colombia initially accepted the compulsory jurisdiction of the Permanent Court of International Justice by a Declaration of 6 January 1932. Although that Declaration was of indefinite duration, on 30 October 1937 Colombia replaced it with a new one –with immediate effect– that

included a reservation applying it only to disputes arising out of facts subsequent to 6 January 1932.

3.24 The terms of the new Declaration filed by Colombia on 30 October 1937 thus provide that, "[t]he present Declaration applies only to disputes arising out of facts subsequent to 6 January 1932". Termination of the 1932 Declaration took immediate effect; no question of the elapse of a "reasonable time" before it took effect with its replacement by the Declaration of 1937 arose. No State, including Nicaragua, protested or reserved its position in respect to Colombia's termination of its 1932 Declaration with immediate effect and its replacement by the Declaration of 30 October 1937. No State, including Nicaragua, has protested or reserved its position in respect to Colombia's termination of its 1937 Declaration with immediate effect on 5 December 2001.

3.25 The practice of amending Declarations entered under the Optional Clause of the Statute of the Court with immediate effect was recently followed by Nicaragua on October 2001. In fact, on 24 October 2001, Nicaragua amended with immediate effect the Declaration under the Optional Clause that it had entered in 1929. This amendment is tantamount to termination according to the Court's view in *Military and Paramilitary Activities in and against Nicaragua*[168].

3.26 The Nicaraguan Government notified the Secretary-General of the United Nations and through him, the States parties to the Statute of the International Court of Justice, of the inclusion of a "reservation made to Nicaragua's voluntary acceptance of the jurisdiction of the International Court of Justice" providing: "Nicaragua will not accept the

[168] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States), Jurisdiction and Admissibility, I.C.J. Reports 1984,* pp. 419-421, para. 65.

jurisdiction or competence of the International Court of Justice in relation to any matter or claim based on interpretations of treaties or arbitral awards that were signed and ratified or made, respectively, prior to 31 December 1991" [169].

3.27 Thus, Nicaragua excluded –with immediate effect- from the Court's jurisdiction, the matters or claims based on interpretations of treaties or arbitral awards that were signed and ratified or made, respectively, prior to 31 December 1991.

3.28 Later, the United Nations Secretary-General circulated a Depository notification dated 5 December 2001, indicating that Nicaragua's reservation referred to matters or claims based on interpretations of treaties or arbitral awards that were signed and ratified or made, respectively, prior to 31 December *1901*. It is understood that this correction also had immediate effect.[170]

3.29 As noted above, Colombia has similarly construed its legal position in respect of its 1937 Declaration under the Optional Clause, having terminated it with immediate effect on 5 December 2001. In the submission of Colombia, this concordant "subsequent practice" of Colombia and Nicaragua constitutes, between them, a coinciding conduct regarding the interpretation of their obligations under the Optional Clause, coinciding conduct whose legal effect the Court is bound to take into account.

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[169] See Annex 23: United Nations Depository Notification of Nicaragua's reservation to its Declaration of acceptance of the compulsory jurisdiction of the International Court of Justice, dated 7 Nov. 2001.

[170] See Annex 24: United Nations Depository Notification of Nicaragua's reservation to its Declaration of acceptance of the compulsory jurisdiction of the International Court of Justice, dated 5 Dec. 2001 (Reissued).

IV. In any Event, if Found to Be in Force, the Terms of Colombia's 1937 Declaration Exclude Nicaragua's Claims, because the alleged Dispute arises out of Facts prior to 6 January 1932

3.30 If, contrary to the position of Colombia, the Court were to find that both the Declarations of Colombia and of Nicaragua were in force on the date of the filing of Nicaragua's Application, that Application would nevertheless fall outside the scope of Colombia's Declaration[171] and the Court would lack jurisdiction to pass upon the merits of the case, due to the effect of the reservation which excludes disputes arising out of facts prior to 6 January 1932. The 1937 Colombian Declaration was filed for the sole purpose of embodying that reservation, and it is for the Court to give effect to it.

3.31 The facts out of which the alleged dispute brought by Nicaragua against Colombia arises are facts that came into existence prior to 6 January 1932. Nicaragua's Application of 6 December 2001 maintains that, in 1821, the date of its independence from Spain, the groups of islands and cays forming the Archipelago of San Andrés appertained to the newly formed Federation of Central American States and that, after the dissolution of the Federation in 1838, these islands and cays came to be part of the sovereign territory of Nicaragua[172]. Nicaragua contends that the 1928 Treaty lacked legal validity and consequently cannot provide a basis of Colombian title over the Archipelago of San Andrés[172]. Nicaragua further maintains that the problem of title over the islands and cays forming the Archipelago has been compounded by what it depicts as Colombia's construction of the 1928 Treaty so that "the title it claims

[171] The text of Colombia's 1937 Declaration reads as follows: "The Republic of Colombia recognizes as compulsory *ipso facto* and without special agreement, on condition of reciprocity, in relation to any other State accepting the same obligation, the jurisdiction of the Permanent Court of International Justice, in accordance with Article 36 of the Statute.
The present Declaration applies only to disputes arising out of facts subsequent to 6 January 1932."

[172] *Application of Nicaragua,* para. 2.

gives it sovereignty over an immense part of the Caribbean Sea appertaining to Nicaragua"[173].

3.32 Colombia contests the claim of Nicaragua that the Archipelago of San Andrés appertained to Nicaragua in 1821, 1823, 1838 or at any other time. In fact, the Archipelago has been under full and exclusive sovereignty and administration by Colombia since independence from Spain. Colombia has exercised its sovereignty and carried out its governmental authority and administration in the Archipelago for almost two centuries and in that long period Nicaragua has exercised neither. Claims of Nicaragua to sovereignty over the Archipelago between 1913 and 1928 were rejected by Colombia, and were disposed of –definitively– by the Treaty Concerning Territorial Questions At Issue Between Colombia and Nicaragua signed at Managua, 24 March 1928. "…*[D]*esirous of putting an end to the territorial dispute pending between them,…" (as the Treaty's Preamble recites), by the terms of Article I of the Treaty, Nicaragua recognized "the full and entire sovereignty of the Republic of Colombia over the islands of San Andrés, Providencia, Santa Catalina and all the other islands, islets and cays that form part of the said Archipelago of San Andrés", and Colombia made a similar recognition with regard to the Mosquito Coast and the Islas Mangles (Corn Islands), which were parts of the controversy as well. The Protocol of Exchange of Ratifications of the Treaty was signed on 5 May 1930, establishing the 82° W Meridian as the boundary between Colombia and Nicaragua and bringing the 1928 Treaty into force.

3.33 These are the essential facts out of which the alleged dispute brought before the Court by Nicaragua arose and none of them is subsequent to 6 January 1932. On the contrary, they are all facts antecedent to that date. By the terms of its Memorial, Nicaragua asserts the existence of a

[173] *Application of Nicaragua*, para. 4.

dispute arising out of those facts, for it contests the history of Colombia's sovereignty over the entire Archipelago of San Andrés, maintains that the Treaty signed in 1928 "lacked" legal validity and challenges the effect of the 82° W Meridian agreed upon in the 1930 Protocol of Exchange of Ratifications. As a result of its express reservation, Colombia's Declaration of 30 October 1937 "applies only to disputes arising out of facts subsequent to 6 January 1932"; it follows that that Declaration cannot furnish a title of jurisdiction enabling the Court to entertain the claims advanced by Nicaragua. It is incontestable that the facts that constitute the heart, indeed the whole body, of Nicaragua's claims pre-date 1932.

3.34 Colombia's position is sustained by the Court's jurisprudence. The precedent directly in point is the 1938 judgment on preliminary objections of the Permanent Court of International Justice in the case of *Phosphates in Morocco*[174]. Italy brought proceedings against France in reliance on the Declarations of both States under the Optional Clause. The French Declaration of 1931 accepted the jurisdiction of the Court in relation to other States accepting the same obligation "in any disputes which may arise after the ratification of the present declaration with regard to situations or facts subsequent to this ratification…"[175]. France maintained that the dispute which Italy had submitted to the Court arose with regard to situations and facts which are not covered by these terms. The Court held:

> "The terms of the French declaration limit the scope of France's acceptance of the Court's compulsory jurisdiction *ratione temporis*. This limitation is twofold. It relates in the first place to the date on which the actual dispute arose. That point is not, however, the

[174] *Phosphates in Morocco (Italy v. France), Preliminary Objections, Judgment, 1938, P.C.I.J., Series A/B, No. 74.*
[175] *Ibid.,* at p. 22.

> subject of the objection raised by the French Government; the latter does not, indeed, deny that the dispute arose after ratification of the declaration…
>
> The second limitation in the declaration relates to the date of the situations or facts with regard to which the dispute arises. It is on this limitation that the French Government relies when it contends that the situations and facts giving rise to the present dispute were prior to the date of its acceptance of the compulsory jurisdiction –the date hereafter referred to as the 'crucial date'– and that, in consequence, the Application of the Italian Government cannot be entertained."[176]

3.35 Italy opposed this view and offered an alternative reading of the reservation:

> "This view is contested by the Italian Government, which maintains that the dispute arises from factors subsequent to France's acceptance of compulsory jurisdiction, first because certain acts… were actually accomplished after the crucial date; secondly, because these acts, taken in conjunction with earlier acts to which they are closely linked, constitute as a whole a single, continuing and progressive illegal act which was not fully accomplished until after the crucial date; and lastly, because certain acts which were carried out prior to the crucial date, nevertheless gave rise to a permanent situation inconsistent with

[176] *Phosphates in Morocco (Italy v. France), Preliminary Objections, Judgment, 1938, P.C.I.J., Series A/B, No. 74,* at pp. 22-23.

> international law which has continued to exist after the said date…"[177]

3.36 The Court construed the terms of the French declaration in the following manner:

> "The declaration… by the French Government… is a unilateral act by which that Government accepted the Court's compulsory jurisdiction. This jurisdiction only exists within the limits within which it has been accepted. In this case, the terms on which the objection *ratione temporis* submitted by the French Government is founded, are perfectly clear: the only situations or facts falling under the compulsory jurisdiction are those which are subsequent to the ratification and with regard to which the dispute arose, that is to say, those which must be considered as being the source of the dispute. In these circumstances, there is no occasion to resort to a restrictive interpretation that, in case of doubt, might be advisable in regard to a clause which must on no account be interpreted in such a way as to exceed the intention of the States that subscribed to it.
>
> Not only are the terms expressing the limitation *ratione temporis* clear, but the intention which inspired it seems equally clear: it was inserted with the object of depriving the acceptance of compulsory jurisdiction of any retroactive effects, in order both to avoid, in general, the revival of old

[177] *Ibid.,* at p. 23.

> disputes, and to preclude the possibility of the submission to the Court by means of an application of situations or facts dating from a period when the State whose action was impugned was not in a position to foresee the legal proceedings to which these facts and situations might give rise."[178]

3.37 As to the facts, the Court held:

> "… The situations and the facts which form the subject of the limitation *ratione temporis* have to be considered from the point of view both of their date in relation to the date of ratification and of their connection with the birth of the dispute. Situations or facts subsequent to the ratification could serve to found the Court's compulsory jurisdiction only if it was with regard to them that the dispute arose.
>
> … The question whether a given situation or fact is prior or subsequent to a particular date is one to be decided in regard to each specific case… However, in answering… it is necessary always to bear in mind the will of the State which only accepted compulsory jurisdiction within specified limits, and consequently only intended to submit to that jurisdiction disputes having actually arisen from situations or facts subsequent to its acceptance. But it would be impossible to admit the existence of such a relationship between a dispute and subsequent factors which either presume the existence or are merely the confirmation or development of

[178] *Phosphates in Morocco (Italy v. France), Preliminary Objections, Judgment, 1938, P.C.I.J., Series A/B, No. 74,* at pp. 23-24.

> earlier situations or facts constituting the real causes of the dispute.
>
> [.....]
>
> … What the Italian Government refers to as 'monopolization of the Moroccan phosphates' has been consistently presented by that Government as a régime instituted by the dahirs of 1920, which… have established a monopoly… It contends that this régime, being still in operation, constitutes a situation subsequent to the crucial date, and that this situation therefore falls within the Court's compulsory jurisdiction.
>
> The Court cannot accept this view. The situation which the Italian Government denounces as unlawful is a legal position resulting from the legislation of 1920; … In those dahirs are to be sought the essential facts constituting the alleged monopolization and, consequently, the facts which really gave rise to the dispute regarding this monopolization. But these dahirs are 'facts' which, by reason of their date, fall outside the Court's jurisdiction."[179]

3.38 The pertinence of these seminal holdings of the Court to the current proceedings is compelling. The facts essentially at issue were, in *Phosphates in Morocco*, the dahirs of 1920; the facts essentially at issue are, in the current proceedings, the 1928 Treaty and its 1930 Protocol of Exchange of Ratifications. Just as it availed Italy nothing to allege that, because the facts at issue had continuing effects,

[179] *Phosphates in Morocco (Italy v. France), Preliminary Objections, Judgment, 1938, P.C.I.J., Series A/B, No. 74,* pp. 24-26.

compulsory jurisdiction obtained, so in these proceedings it can avail Nicaragua nothing to allege that, because the 1928 Treaty and its 1930 Protocol of Exchange of Ratifications have continuing effects, jurisdiction obtains. There would be no room for any eventual Nicaraguan argument that the Court has jurisdiction because "there is a continuing and progressive illegal act" that was not fully accomplished before 1932; the Court rejected precisely that argument as Italy made it.

3.39 Nor is there room for any Nicaraguan argument that certain more recent developments make the dispute it alleges subject to the jurisdiction of the Court, because such developments arise out of facts prior to 6 January 1932, i.e., the conclusion of the 1928 Treaty and its 1930 Protocol of Exchange Ratifications that settled the dispute regarding sovereignty over certain territories and established the maritime boundary between the two countries. Just as the French reservation was "perfectly clear", so is that of Colombia; and just as the French limitation of the Court's jurisdiction had to be given effect, so must that of Colombia. In both cases, the limitation of the Court's jurisdiction was introduced in order to prevent the revival of old disputes (an objective that parallels the objective of Article VI of the Pact of Bogotá). Just as the will of France in accepting compulsory jurisdiction had to be respected by the Court, so must the will of Colombia in accepting compulsory jurisdiction be respected by the Court. Confirmation, after the crucial date, of facts anterior to the Declarations does not suffice to give the Court jurisdiction over disputes arising out of facts anterior to those Declarations.

3.40 Other cases of the Court and its predecessor have dealt with the issue of the effect of the exclusion from the Court's jurisdiction of disputes arising out of facts antecedent to a specified date. In its judgment on preliminary objections of

4 April 1939 in *Electricity Company of Sofia and Bulgaria*[180], the Court addressed a Belgian declaration of 10 March 1926 that afforded the Court jurisdiction over disputes "arising after the ratification of the present declaration with regard to situations or facts subsequent to this ratification…"[181]. The Bulgarian Government reciprocally invoked this limitation *ratione temporis* to challenge jurisdiction. The Parties agreed that the dispute arose in 1937. But Bulgaria contended that, while the facts complained of by Belgium all dated from a period subsequent to 10 March 1926, the situation with regard to which the dispute arose dated back to a period before that date, when awards of the Belgian-Bulgarian Mixed Arbitral Tribunal and the formula that they established for calculation of electricity prices were rendered. The Court did not accept Bulgaria's view. It held that, "the dispute between the Belgian Government and the Bulgarian Government did not arise with regard to this situation or to the awards which established it". In the case of the *Electricity Company of Sofia and Bulgaria*, the Court would also recall what it said in the Judgment of 14 June 1938 (*Phosphates in Morocco*)

> "… [t]he only situations or facts which must be taken into account from the standpoint of the compulsory jurisdiction… are those which must be considered as being the source of the dispute. No such relation exists between the present dispute and the awards of the Mixed Arbitral Tribunal. The latter constitute the source of the rights claimed by the Belgian Company, but they did not give rise to the dispute, since the Parties agree as to their binding character and that their application gave rise to no difficulty until the acts

[180] *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria), Judgment, Preliminary Objections, Series A/B, No. 77*, pp. 64-85.
[181] *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria), Judgment, Preliminary Objections, Series A/B, No. 77*, p. 81.

> complained of… A situation or fact in regard to which a dispute is said to have arisen must be the real cause of the dispute. In the present case it is the subsequent acts with which the Belgian Government reproaches the Bulgarian authorities… These are facts subsequent to the material date. Accordingly, the Court considers that the argument based on the limitation *ratione temporis* in the Belgian declaration is not well-founded"[182].

3.41 It is clear that this judgment is wholly compatible with that of the Court in *Phosphates in Morocco*, on which the Court relied; the facts, but not the law, varied. In reaffirming the rationale of *Phosphates in Morocco*, the Court held that, on the facts, the *Electricity Company* case was to be distinguished, because the real cause of the dispute, the source of the dispute and the centre point of the argument, post-dated rather than pre-dated the declaration at issue. But in the instant proceedings between Nicaragua and Colombia, the real cause of the alleged dispute, the source of the alleged dispute and the centre point of the argument are the same facts that were the object of the dispute definitively settled by the 1928 Treaty and its 1930 Protocol of Exchange of Ratifications, i.e., they pre-dated 6 January 1932, the date to which the reservation in the Colombian Declaration at issue refers. It was with the conclusion of that Treaty and its ratification that the matters at issue –then and today– between the Parties were settled. By contrast, as observed by the Court, neither of the parties in *Electricity Company* ever impugned the awards of the Mixed Arbitral Tribunal, with the consequence that the real cause and source of the dispute then was not the awards' very existence or their legal value. In the instant proceedings, Nicaragua does purport to impugn the 1928 Treaty and its 1930 Protocol.

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[182] *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria), Judgment, Preliminary Objections, Series A/B, No. 77*, p. 82.

3.42 In the case concerning *Rights of Passage over Indian Territory*[183], the International Court of Justice passed upon a preliminary objection raised by India, in respect of a reservation *ratione temporis* to India's Declaration of 28 February 1940 by which it accepted jurisdiction "over all disputes arising after February 5th, 1930, with regard to situations or facts subsequent to the same date"[184]. Portugal maintained that the dispute arose in 1954, and that the situations or facts "are really nothing but those giving rise to the dispute" which also dated from 1954[185]. India maintained that the claims relating to passage were raised by Portugal before 5 February 1930. As to whether the dispute concerned facts or situations prior to the date present in India's Declaration, the Court observed that the facts or situations to which regard must be had are only those which must be considered "as being the source of the dispute", those which are its "real cause"[186]. The Court had not been asked for any finding whatsoever with regard to the past prior to that date (5 February 1930) and, consequently, the Indian objection was rejected.

3.43 It is clear that the judgment in the *Rights of Passage* case is consistent with the law as set out in *Phosphates in Morocco*. Again, the law is constant, it is the facts that varied. In *Rights of Passage*, regardless of the date on which the dispute actually arose, the facts giving rise to it took place after the date mentioned in the reservation present in India's Declaration. But in the case brought before the Court by Nicaragua, the facts that gave rise to the dispute over sovereignty over the Archipelago of San Andrés and related questions took place before 6 January 1932, the date mentioned in the reservation present in Colombia's

[183] *Rights of Passage over Indian Territory (Portugal v. India), Merits, I.C.J. Reports 1960*, at pp. 33-35.
[184] *Ibid.*, p. 34.
[185] *Ibid.*, p. 21.
[186] *Ibid.,* p. 35.

Declaration. Here, the existing differences between the Parties were resolved by the 1928 Treaty and its 1930 Protocol. Moreover, what Nicaragua requests from the Court is precisely a finding that the 1928 Treaty and its 1930 Protocol is invalid and null, essentially on the ground of the pressure alleged to have been exerted by the United States upon the Government of Nicaragua in the years 1927-1930, i.e., facts predating the aforementioned date. Such finding is clearly beyond the jurisdiction of the Court.

3.44 According to the Court's conclusions in *Rights of Passage*, the critical facts are only those that relate to the source of the dispute, to its "real cause". In the instant proceedings, the source of the alleged dispute, its real cause, is constituted by the differences between the two countries regarding sovereignty over the Mosquito Coast, the Islas Mangles (Corn Islands), and the 1913 claim of Nicaragua to the Archipelago of San Andrés, all of which were disposed of in 1928, and the existence of a treaty in force ratified in 1930 that definitively settled the dispute, resolving the question of sovereignty over the Mosquito Coast, the Islas Mangles (Corn Islands) and the Archipelago of San Andrés, and establishing a maritime boundary between Colombia and Nicaragua. Clearly, they are facts predating 6 January 1932.

3.45 A fourth and most recent case of relevance is the *Case concerning the Legality of the Use of Force (Yugoslavia* v. *Belgium)*[187]. In Yugoslavia's submission jurisdiction was based on declarations filed under the Optional Clause. Yugoslavia's Declaration had been deposited on 26 April 1999, accepting the Court's jurisdiction "in all disputes arising or which may arise after the signature of the present Declaration, with regard to the situations or facts

[187] *Case concerning the Legality of the Use of Force (Yugoslavia* v. *Belgium), Request for Indication of Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, Vol I, pp.124-141.

subsequent to this signature..."[188]. The 1958 Declaration of Belgium accepted jurisdiction "in legal disputes arising after 13 July 1948 concerning situations or facts subsequent to that date".[188] The Court noted that, while Belgium based no argument on the limit *ratione temporis* in the Yugoslav Declaration, the Court must nonetheless consider what effects it might have prima facie on its jurisdiction in the case[189]. Thus, in order to assess whether the Court had jurisdiction, it was sufficient to determine whether the dispute brought before the Court arose before or after 25 April 1999.

3.46 The Court observed that Yugoslavia's Application was directed, in essence, against the bombing of its territory, to which the Court was asked to put an end. The Court found that it was an established fact that the bombings in question began on 24 March 1999 and had been conducted continuously since, and that a legal dispute between Yugoslavia and Belgium (and other NATO Members) over the legality of the bombings arose well before 25 April 1999. The fact that the bombings continued thereafter and that the dispute concerning them persisted did not alter the date on which the dispute arose. The Court then recalled that it is for each State, in formulating its declaration, to decide upon the limits it places upon its acceptance of the jurisdiction of the Court: "[t]his jurisdiction only exists within the limits within which it has been accepted" (citing *Phosphates in Morocco*)[190]. The Court went on to recall that the Permanent Court in *Phosphates in Morocco* held that, as a result of the condition of reciprocity stipulated by Article 36, paragraph 2 of the Statute of the Court, any limitation *ratione temporis* attached by one of the Parties to its declaration holds good as between the Parties[190].

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[188] *Case concerning the Legality of the Use of Force (Yugoslavia* v. *Belgium), Request for Indication of Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, Vol I, p. 133, para. 23.
[189] *Ibid.* p. 133, para. 24.
[190] *Ibid.* p. 135, para. 30.

Professor James Crawford[191] observes that the International Court of Justice thus referred to the judgment in *Phosphates in Morocco* "with apparent approval".

3.47 Likewise, in four other cases concerning *The Legality of the Use of Force (Yugoslavia v. Spain, v. the United Kingdom, v. Canada,* and *v. The Netherlands)* the Court, in the Orders of 2 June 1999 that resolved the request for provisional measures invoked by Yugoslavia, confirmed the continuing force of the legal rationale established in the judgment in the case of *Phosphates in Morocco* as follows:

> "… [T]he Court recalled in its Judgment of 4 December 1998 in the case concerning *Fisheries Jurisdiction (Spain* v. *Canada)*, 'It is for each State, in formulating its declaration, to decide upon the limits it places upon its acceptance of the jurisdiction of the Court: '[t]his jurisdiction only exists within the limits within which it has been accepted' (*Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74, p. 23)' (I.C.J. Reports 1998, p. 453, para. 44);*
>
> … as the Permanent Court held in its Judgment of 14 June 1938 in the *Phosphates in Morocco* case (Preliminary Objections), 'it is recognized that, as a consequence of the condition of reciprocity stipulated in paragraph 2 of Article 36 of the Statute of the Court', any limitation *ratione temporis* attached by one of the parties to its declaration of acceptance of the Court's jurisdiction 'holds good as between the

[191] J. Crawford, The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries, Cambridge University Press, 2002, p. 23.

> parties' (*Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74, p. 10);*
>
> … moreover, as the present Court noted in its Judgment of 11 June 1988 in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria)*, '[a]s early as 1952, it held in the case concerning *Anglo-Iranian Oil Co.* that, when declarations are made on condition of reciprocity jurisdiction is conferred on the Court only to the extent to which the two declarations coincide in conferring it' (*I.C.J. Reports 1952, p. 103*) (*I.C.J. Reports 1998, p. 298, para. 43*)".[192]

3.48 The question at issue in the cases concerning *The Legality of the Use of Force* was whether the dispute arose after the date of the Declaration rather than –as between Nicaragua and Colombia– whether the facts out of which the alleged dispute arose antedate or post-date the date contained in the Declaration. But what is important for present purposes is that the Court found recent reason to sustain, "with apparent approval", the rationale and continued vitality of the cardinal case of *Phosphates in Morocco*.

3.49 As clear as the Court's jurisprudence is in this case, the terms of Colombia's Declaration, were it held to be in force on the date of Nicaragua's Application, and its limitation

[192] The quoted passages can be found at: *Legality of Use of Force (Yugoslavia* v. *Spain), Request for Indication of Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999,* Vol. I., pp. 770-771, para. 25; *Legality of Use of Force (Yugoslavia* v. *United Kingdom), Request for Indication of Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999,* Vol. I, pp. 835-836, para. 25; *Legality of Use of Force (Yugoslavia* v. *Canada), Request for Indication of Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999,* Vol. II, pp. 269-270, para. 29; *Legality of Use of Force (Yugoslavia* v. *The Netherlands), Request for Indication of Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999,* Vol. II, pp. 552-553, para. 30.

ratione temporis, are also clear, as well as the intention that inspired it. The Colombian Declaration only accepted the Court's jurisdiction over disputes arising out of facts subsequent to 6 January 1932. That was Colombia's will, it was the limit of its consent to the Court's jurisdiction. Colombia's intention in including the reservation was precisely to avoid the revival of already settled disputes, such as the one that had been settled with Nicaragua by the 1928 Treaty and its Protocol of Exchange of Ratifications of 1930 and that Nicaragua now purports to reopen.

V. Conclusion

3.50 From the foregoing it is evident that:

(a) In the case of States Parties to the Pact of Bogotá that have also entered Declarations of acceptance of the Court's jurisdiction under the Optional Clause, the Pact is governing.

(b) As has been shown above (Chapter II), by virtue of Articles VI and XXXIV of the Pact of Bogotá, the Court is without jurisdiction to hear the alleged dispute brought before it by Nicaragua and therefore the controversy must be declared ended.

(c) Thus, there is no dispute left before the Court to which jurisdiction under any Optional Clause Declarations of the Parties could attach.

(d) In any case, since Nicaragua argues that a title of jurisdiction exists by virtue of the operation of the Declarations of both States under the Optional Clause, Colombia has addressed this contention and shown that

the Court's jurisdiction in these proceedings cannot be based on Article 36, paragraph 2, of the Statute.

(e) First, Colombia's Declaration of 1937 was not in force on the date of Nicaragua's Application because it had been terminated prior to that date with immediate effect. Consequently the requirement that for the Court to have jurisdiction both States must accept the Court's jurisdiction under Article 36, paragraph 2, is not satisfied.

(f) Second, even if Colombia's 1937 Declaration were held to be in force on the date of Nicaragua's Application – *quod non*–, as shown, the explicit terms of the reservation contained therein exclude from the Court's jurisdiction all the matters brought before the Court by Nicaragua. On any objective view, the alleged dispute raised by Nicaragua is one "arising out of facts" antecedent to 6 January 1932.

(g) In fact, Nicaragua's Application involves in substance an attempt to reopen a dispute already settled in the 1928 Treaty and its Protocol of Exchange of Ratifications of 1930.

3.51 The preceding considerations set out in this Chapter demonstrate that the Court is without jurisdiction to entertain Nicaragua's Application under Article 36, paragraph 2, of the Statute.

CHAPTER IV

SHORT SUMMARY OF COLOMBIA'S REASONING IN THESE PRELIMINARY OBJECTIONS

4.1 Consistently with the Court's Practice Direction II Colombia sets out below a short summary of its reasoning in these Preliminary Objections.

I. General

4.2 Derived from titles of the Spanish Empire, Colombia had rights over the Mosquito Coast comprised between the Cape Gracias a Dios and the San Juan River and over the Archipelago of San Andrés of which the Islas Mangles (Corn Islans) were part.

4.3 Ever since the break up of the Spanish Empire in the early years of the nineteenth century sovereignty over the Archipelago of San Andrés has been vested in and exercised by Colombia, and Colombia alone, in a public, peaceful and uninterrupted manner. The sole exception was a temporary *modus vivendi* enshrined in the 1928 Agreement between Colombia and the United States at a time when those two States had a difference about sovereignty over three of the cays forming part of the Archipelago (which difference was resolved by the United States renouncing all claims to the cays by treaty in 1972).

4.4 Throughout the period since Nicaragua's own independence in 1821 and continuing up to the present time, none of the islands, islets or cays of the Archipelago

of San Andrés[193] has been under Nicaraguan sovereignty or, much less, administered by Nicaragua.

4.5 Although this history demonstrates Colombia's title to the Archipelago, the presentation of the antecedents to the matters –now purported to be reopened before the Court– by Nicaragua is tendentious, unconvincing and essentially irrelevant.

4.6 This is because, when in 1913 –in addition to the differences between the two States concerning sovereignty over the Mosquito Coast and the Islas Mangles (Corn Islands)– Nicaragua for the first time advanced claims to certain islands of the Archipelago of San Andrés, the two States, after 15 years of negotiations, settled all the aforementioned matters by concluding the 1928 Treaty Concerning Territorial Questions at Issue between Colombia and Nicaragua and its Protocol of Exchange of Ratifications of 1930. The 1928 Treaty and its 1930 Protocol was registered with the League of Nations by Colombia on 16 August 1930 and by Nicaragua on 25 May 1932.

By that Treaty and its Protocol of Exchange of Ratifications of 1930

(a) Nicaragua recognized Colombia's sovereignty over the islands of San Andrés, Providencia and Santa Catalina, and over all the other islands, islets and cays forming part of the said Archipelago of San Andrés;

(b) Colombia recognized Nicaragua's sovereignty over the Mosquito Coast and the Islas Mangles (Corn Islands);

(c) Nicaragua recognized and agreed that sovereignty over the cays of Roncador, Quitasueño and Serrana, constituting part of the Archipelago, was a matter

[193] See footnote No. 5.

solely between Colombia and the United States, to the exclusion of Nicaragua; and

(d) the two States agreed upon the 82°W Meridian as the boundary between Colombia and Nicaragua.

4.7 Both States conducted themselves consistently with the Treaty of 1928 and its Protocol of 1930. Nevertheless Nicaragua in 1969 –without questioning the validity or effectiveness of the 1928 Treaty– purported to carry out activities in areas to the east of the agreed maritime boundary along the 82°W Meridian. A decade later, in 1980, after the Treaty had been in force for 50 years, Nicaragua unilaterally purported to disclaim it by declaring it null and void. Colombia rejected these attempts and continued to apply the 1928 Treaty and its 1930 Protocol uninterruptedly. Naturally, Colombia continued to exercise its sovereignty and jurisdiction over the Archipelago of San Andrés and its appurtenant maritime areas, as it had been doing for almost two centuries.

4.8 Two decades later, in its Memorial of 2003, Nicaragua for the first time purports to allege that "Colombia's interpretation of the 82°W Meridian as a maritime boundary" in 1969, amounted to a breach of the 1928 Treaty and has thus entitled Nicaragua to unilaterally terminate it. However, what happened in that year was, as mentioned in the preceding paragraph, that Nicaragua for the first time carried out activities to the east of the maritime boundary agreed along the 82° W Meridian, thus generating a protest by Colombia in which it did no more than assert the agreement as it was conceived by Nicaragua in 1930 and agreed by both parties at that time, and as reflected in official maps published by Colombia from 1931 onwards which occasioned no protest from Nicaragua. Colombia has consistently continued to exercise its sovereignty and jurisdiction over the maritime areas pertaining to the Archipelago up to the aforementioned meridian.

4.9 At no time previously, did Nicaragua put forward an argument of this nature. Nicaragua waited 34 years before advancing this fanciful argument of the Treaty's unilateral termination by its alleged breach by Colombia. The purpose of so extraordinary claim by Nicaragua is to vitiate Colombia's valid objections to jurisdiction. Were the Court to sustain such an argument, it would permit a State to evade limitations on the jurisdiction of the Court by means of a spurious claim.

4.10 Nicaragua now seeks to reopen matters that were already settled by arrangement between Colombia and Nicaragua and which are governed by the 1928 Treaty and its Protocol of Exchange of Ratifications of 1930, namely sovereignty over the Archipelago and the maritime boundary between Colombia and Nicaragua.

4.11 Nicaragua seeks to found the jurisdiction of the Court for this purpose upon Article XXXI of the Pact of Bogotá "in accordance with the provisions of Article 36, paragraph 1, of the Statute", and upon Article 36, paragraph 2, of the Statute of the Court (the Optional Clause).

II. Colombia's First Preliminary Objection

4.12 Within the framework of Article 79, paragraph 1, of the Rules of Court, this is an "objection the decision upon which is requested before any further proceedings on the merits."

4.13 Nicaragua cannot solely rely on Article XXXI of the Pact of Bogotá. By virtue of the 1928 Treaty and the Protocol of Exchange of Ratifications of 1930, which is valid and in force, the matters which Nicaragua seeks to place before the Court (a) have already been settled and are governed by that Treaty and its Protocol, which (b) was uncontestably and incontestably in force in 1948 on the date of the

conclusion of the Pact. Article VI of the Pact stipulates that, consequently, on each of these grounds, Article XXXI "may not be applied".

4.14 Moreover, by virtue of Articles VI and XXXIV of the Pact of Bogotá, the Court has to declare the controversy "ended".

III. Colombia's Second Preliminary Objection

4.15 The Court has already held that when an Applicant invokes both the Pact of Bogotá and Optional Clause Declarations it is the Pact of Bogotá which governs. Moreover, by virtue of Articles VI and XXXIV of the Pact, the Court is required to declare the controversy "ended". Therefore, by reason of the dispute between Nicaragua and Colombia having been settled and ended, there is no dispute left before the Court to which jurisdiction under the Optional Clause Declarations could attach.

4.16 In any event, the Court has no jurisdiction under Article 36, paragraph 2, of the Statute of the Court (the 'Optional Clause'). This is for two reasons.

4.17 First, when Nicaragua submitted its Application there was no Colombian Declaration under the Optional Clause: Colombia's Declaration of 1937 had already been withdrawn with immediate effect.

4.18 Consequently, the requirement that for the Court to have jurisdiction both States must accept the Court's jurisdiction under Article 36, paragraph 2, is not satisfied.

4.19 Second, even if Colombia's 1937 Declaration were in force (which Colombia denies) the Court's jurisdiction would in any event be limited by its terms.

4.20 Those terms include a reservation limiting the application of the Declaration to "disputes arising out of facts subsequent to 6 January 1932".

4.21 Nicaragua's Application involves in substance an attempt to reopen a dispute already settled in the 1928 Treaty and its Protocol of Exchange of Ratifications of 1930. Nicaragua's challenge is to the meaning, and even the very existence in law, of that Treaty and Protocol, which are at the heart of the alleged dispute which Nicaragua is seeking to bring before the Court.

4.22 The alleged dispute is thus, one which arises out of facts which pre-date 6 January 1932. And consequently, it would fall outside the scope of Colombia's 1937 Declaration if that Declaration were to be found to be in force on the date of Nicaragua's Application.

CHAPTER V

COLOMBIA'S SUBMISSIONS

For the reasons set out in the preceding Chapters, Colombia respectfully requests the Court, in application of Article 79 of the Rules of Court, to adjudge and declare that:

(1) under the Pact of Bogotá, and in particular in pursuance of Articles VI and XXXIV, the Court declares itself to be without jurisdiction to hear the controversy submitted to it by Nicaragua under Article XXXI, and declares that controversy ended;

(2) under Article 36, paragraph 2, of the Statute of the Court, the Court has no jurisdiction to entertain Nicaragua's Application; and that

(3) Nicaragua's Application is dismissed.

The Hague, 28 July 2003.

Julio LONDOÑO PAREDES
Agent of the Republic of Colombia

VOLUME II: LIST OF ANNEXES

VOLUME III: LIST OF MAPS