INTERNATIONAL COURT OF JUSTICE

TERRITORIAL AND MARITIME DISPUTE
(NICARAGUA v. COLOMBIA)

WRITTEN STATEMENT OF THE GOVERNMENT OF NICARAGUA

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WRITTEN STATEMENT OF THE GOVERNMENT OF NICARAGUA

INTRODUCTION

1. The case concerning the *Territorial and Maritime Dispute (Nicaragua v. Colombia)* was brought before the Court by means of an Application filed by The Republic of Nicaragua against the Republic of Colombia on 6 December 2001. The Order of the Court of 26 February 2002 fixed 28 April 2003 for the filing of the Nicaraguan *Memorial* and 28 June 2004 for the filing of the Colombian *Counter-Memorial*. Nicaragua filed her *Memorial* within the time limit fixed by the Court. Colombia for her part on 21 July 2003 filed not only preliminary objections to the jurisdiction of the Court but also a request that the Court adjudge and declare the controversy ended.

2. The Order of the Court of 24 September 2003 fixed 26 January 2004 as the time limit within which the Republic of Nicaragua may present a written statement of her observations and submissions on the preliminary objections made by the Republic of Colombia. This Written Statement is filed pursuant to this Order.

3. The case filed by the Republic of Nicaragua against the Republic of Colombia concerns a dispute over title to territory and maritime delimitation in the Caribbean Sea. On 24 March 1928 Nicaragua signed a treaty with Colombia concerning Territorial Questions at Issue between the Parties. These questions involved *inter alia* sovereignty over the Archipelago of San Andrés that was claimed by both Parties. The Nicaraguan Congress ratified this Treaty on 6 March 1930. The position of Nicaragua is that this Treaty was invalid *ab initio* because it openly violated the Constitution in force at that time that prohibited any disposition of Nicaraguan Territory and also that this signature and

ratification were concluded whilst Nicaragua was under the occupation of the United States of America and her Government was deprived of its international capacity and could not freely consent to be bound by treaties. Furthermore, that the occupying State had a special national interest in the conclusion of the Treaty.[1]

4. In the event that this Treaty was found to have been validly concluded then the position of Nicaragua is that the unilateral interpretation Colombia made of it in 1969 constituted a violation and a breach of the Treaty that entitled Nicaragua to invoke the breach as a ground for termination. These issues are dealt with in paragraphs 1.85 to 1.92 below, and in the Nicaraguan *Memorial* in paragraphs 2.254 to 2.263, Section IV, Chapter II. In short, when the Nicaraguan Congress ratified the Treaty in 1930, two years after its signature, and more than a year after the Colombian Congress had ratified the Treaty, it added that it was ratifying it in the understanding that the Archipelago of San Andrés did not extend west of the Meridian 82° W. The reason that the Nicaraguan Congress had for adding this understanding was that it was afraid that if this issue was not clarified, Colombia might contend in the future that the Archipelago comprehended all islands and cays off the Nicaraguan Atlantic Coast. This Meridian lies between 70 and 100 miles from the Nicaraguan coast and around 20 miles from San Andrés. It is plainly untenable that in 1930 this understanding could possibly have been made with the intention of fixing limits in what at the time were considered to be the high seas over which no nation had sovereignty or other exclusive rights. The unilateral interpretation that this Meridian constitutes a maritime boundary made by Colombia in 1969, nearly 40 years after the ratification of the 1928 Treaty, is an open breach of a Treaty that in its

[1] See below para. 1.15.

own words aimed to resolve the "territorial conflict pending between" the parties.

5. The further contention of Nicaragua is that in the event that the Treaty is considered still in force -in spite of its original invalidity or its subsequent breach- then the unilateral interpretation made by Colombia of the "understanding" added by the Nicaraguan Congress when ratifying it, did not involve the fixing of maritime limits but was merely an alignment effecting the allocation of islands.

6. At issue is also the determination of the extent of the Archipelago of San Andrés. According to the interpretation made by Colombia the Archipelago of 17 square miles[2] extends for hundreds of miles from the Island of San Andrés. Nicaragua contends that the Archipelago as defined in Article I of the 1928 Treaty does not include cays and reefs that were expressly excluded from the Treaty or to cays and reefs that could not have been considered as geographically forming part of the Archipelago in 1928[3].

7. Colombia has tried to portray the position of Nicaragua as a new claim stemming from the Government in power in Nicaragua during the 1980s. This is not true. Colombia claimed for the first time in June 1969 that the line of allocation of islands that was understood to be part of the 1928 Treaty at the moment of ratification was really a line of delimitation of maritime areas. This was contradicted by Nicaragua just a few days later[4]. The issue of the sovereignty over the cays that are not considered part of the San Andrés Archipelago flared up when the negotiations of

[2] According to *Encyclopædia Britannica 2001*, Standard Ed. CD-ROM, 1994-2000, Publisher Britannica.com Inc.
[3] See below paras. 1.26, 1.31, 1.33, 1.35, 1.41, 1.43, 1.44 and 1.45.
[4] See below para. 1.64 and 2.38.

Colombia and the United States of America over the claim of sovereignty over the cays began in June 1971[5]. The issue of the invalidity of the Treaty also stems from before 1980. On 8 September 1972 Colombia and the United States entered into a Treaty regarding the Quitasueño bank and the small cays emerging from the banks of Roncador and Serrana. On 8 October 1972 the Foreign Minister of Nicaragua, Mr. Lorenzo Guerrero, sent two protest notes to the signatories of that Treaty. The texts of both letters have the following paragraph:

> "*Without, for the moment, going into the validity of the Bárcenas Meneses-Esguerra Treaty, its historical and legal background, nor the circumstances surrounding its conclusion,* Nicaragua reiterates that the banks located in that zone are part of her continental shelf, and because of this it is willing to use all peaceful procedures contemplated by International Law to safeguard its legitimate rights."[6] (Emphasis added)

8. The jurisdiction of the Court is founded on Article 36, paragraphs 1 and 2 of the Statute. In accordance with the provisions of Article 36 paragraph 1 of the Statute, the Court has jurisdiction based on Article XXXI of the American Treaty on Pacific Settlement (Pact of Bogotá) adopted in Bogotá, Colombia on 30 April 1948 and to which Nicaragua and Colombia are parties. The jurisdiction of the Court is also founded on the Declarations made by both Parties accepting the compulsory jurisdiction on the basis of Article 36 paragraph 2 of the Statute of the Court.

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[5] NM, Vol. I, paras. 2.158, 2.159 and 2.165.
[6] NM, Vol. II, Annexes 34 and 35.

9. The juncture that decided the Government of Nicaragua to bring this case before the Court was the ratification by Honduras on 30 November 1999 of the 2 August 1986 Treaty of delimitation with Colombia[7]. The Nicaraguan Government then publicly announced at the highest level that it would bring a case against Colombia. The only reason why it was not done immediately was because it was a heavy burden for Nicaragua in human and economic resources to have two cases going simultaneously in the Court at the same pace. The case against Colombia was originally planned to be brought to the Court at the beginning of the year 2001 after Nicaragua had filed her *Memorial* against Honduras in the case concerning *Maritime Delimitation between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*.

10. The case was not brought before the Court as planned at the beginning of the year 2001 because the Colombian Foreign Minister requested his Nicaraguan counterpart not to bring the case immediately but to first give an opportunity for negotiations. What the Nicaraguan Foreign Minister did not know was that the real object of the request was for the Colombian Authorities to gain time to go through the necessary internal legal process for withdrawing the acceptance of the jurisdiction of the Court made in her Declaration of 30 October 1937 in accordance with Article 36, paragraph 2, of the Statute of the Court. [8] In effect, less than 24 hours before Nicaragua filed her Application on 6 December 2001, Colombia attempted to withdraw her 1937 Declaration. In fact, when Nicaragua filed her Application she was not aware that the Secretary General of the United Nations had received a letter from Colombia notifying the intention of withdrawing the Declaration. Due to the time

[7] *Application of Nicaragua*, para. 7.
[8] The reasons for the delay are given in the Affidavit of the Foreign Minister of Nicaragua during the year 2001. See NWS, Vol. II, Annex 22.

difference between The Hague and New York it is even probable that as the Registrar was receiving the Application, the Secretary General was only just circulating notice of this action by Colombia.

11. The other basis of jurisdiction invoked by Nicaragua is Article XXXI of the Pact of Bogotá. In a *sui generis* interpretation of the Pact, Colombia, allegedly in application of article 79 of the Rules, requests the Court to adjudge and declare that pursuant to Articles VI and XXXIV, the Court does not have jurisdiction to hear the controversy and, furthermore, declare the controversy ended. Nothing in the Pact of Bogotá indicates that this declaration, if it is found by the Court to be applicable, should be made in the phase of a judgment on preliminary objections. Precisely in application of article 79 of its Rules the Court cannot declare a controversy ended in the preliminary objections phase of this case. The only way the Court's Rules allow it to declare a controversy ended is by going into the merits of the case. Colombia is well aware of this and that is why, in spite of the express mandate of Article 79, paragraph 7, of the Rules of Court to the effect that the pleading shall be confined to those matters that are relevant to the objection, the Colombian Pleading goes extensively into the merits. A simple browse through the pleading introduced by Colombia as *preliminary objections* will show that considerably more than half of the substance of those pleadings is devoted to arguments on the merits of the present case.

12. Colombia's attempt to escape the jurisdiction of the Court must be seen against the background of the permanent threats of the use of force to maintain her alleged rights to the San Andrés archipelago, the cays in dispute and the continental shelf and the waters east of the 82° W Meridian. Apart from the threatening reality of the permanent patrol of the Colombian Navy over the area in dispute, *de facto* barring the use by

Nicaragua and her people of these resources, Colombia at the highest level threatened Nicaragua with the use of force. On 24 April 2003, that is just a few days before Nicaragua filed her *Memorial* against Colombia, her President, Mr. Álvaro Uribe stated in an interview that if Nicaragua started oil explorations "we would proceed to stop it with the Navy, of course we would."[9]

13. The following day Vice Admiral David René Moreno, Inspector General of the Colombian Navy, stated:

> "(T)here is a security mechanism in the area of San Andrés and Providencia that permits the country to bar the illegal use of our jurisdictional maritime waters
>
> (…)
>
> The officer added that the Specific Command of San Andrés and Providencia, naval units, navy infantry troops and a component of the Air Force guarantee the security of San Andrés.
>
> El Tiempo stated that the Navy patrols San Andrés with a reconnaissance plane, several patrol boats, two frigates and about 600 troops from the Marine Corps.
>
> The Navy plans the construction of a coast guard station and a radar for San Andrés in order to increase the scale of the operations."[10]

[9] NWS, Vol. II, Annex 8.
[10] NWS, Vol. II, Annex 9.

14. The Colombian Minister of Defence, Ms. Marta Lucía Ramírez, during a visit to the San Andrés Archipelago a few months later in the company of Colombian President Uribe, reiterated the Government's intention of building a coast guard station:

> "This objective is a priority of the Ministry of Defence for the coming year. It is a plan in which we expect to work together with the Authorities of San Andrés and the local leaders because the coast guard station has an strategic importance for exerting maritime sovereignty."[11]

15. These examples are only some of the more recent cases of military threats by Colombia. But these menaces have been a constant since the dispute erupted in 1969. The details of this initial phase of the dispute are described in the Nicaraguan *Memorial*[12]. In brief, Nicaragua granted a concession for oil exploration to Western Caribbean Petroleum Co. on 17 February 1967 that extended to maritime areas east of the 82° Meridian W. Colombia protested this concession in a diplomatic note dated 4 June 1969. The diplomatic note was followed by the announcement of military manoeuvres in the area in dispute:

> "…the National Navy has ordered that two destroyers…should permanently patrol the maritime area in dispute in order to enforce respect for the sovereignty over the cays…"[13]

16. In order to understand fully the implications of this announcement, the military situation must be understood. The Nicaraguan National Army

[11] NWS, Vol. II, Annex 10.
[12] NM, Vol. I, paras. 2.204, 2.205 and 2.212.
[13] NWS, Vol. II, Annex 11.

(*Guardia Nacional*) did not have in 1969, any patrol boats that could go beyond the islands and cays located near to the mainland coast. The presence of two Colombian destroyers, added to the usual patrol boats displayed in the area, was a formidable threat for Nicaragua.

17. The conduct of Colombia speaks for itself. On the one hand Colombia is attempting to avoid the jurisdiction of the Court alleging, *inter alia*, that the controversy has been already settled by arrangement between the Parties when it obviously has not. On the other hand Colombia has been using force and the threat of the use of force in order to impose her unilateral interpretation of a Treaty she claims to be in force.

18. The allegation of Colombia that the dispute has already been settled by arrangement between the Parties is belied by her conduct. In 1977 the then President of Colombia, Mr. Alfonso López Michelsen, announced publicly that negotiations would be started with Nicaragua in order to reach a maritime delimitation in the Caribbean. This announcement was followed by several visits of Colombian Ambassador Julio Londoño to Managua to discuss the issues with the Foreign Minister of Nicaragua[14]. Nearly 20 years later, in September 1995, the then President of Colombia, Mr. Ernesto Samper Pizano, and his Foreign Minister, Mr. Rodrigo Pardo García-Peña, announced that negotiations would begin with Nicaragua on maritime delimitation and other pending issues.[15]

19. Finally, there were offers of diplomatic negotiations by the Colombian Authorities in 2001. Of course, as pointed out in paragraph 10 above, this offer turned out to be simply a manoeuvre for gaining the necessary time

[14] See below, para. 1.67.
[15] See below, para. 1.70.

for attempting to withdraw her acceptance of the Court's jurisdiction on the basis of her optional clause declaration[16].

20. This Written Statement deals with the Colombian *Preliminary Objections* in the following manner:

Chapter I summarizes Nicaragua's position on the legal status of the 1928 Treaty.

Chapter II deals with the *Preliminary Objections* related to the Pact of Bogotá.

Chapter III deals with the *Preliminary Objections* related to the Optional Clause Declarations.

Chapter IV deals with the existence of a dispute in the context of both the Pact of Bogotá and the Optional Clause jurisdiction.

[16] See below, paras. 1.82-1.84.

CHAPTER I
THE LEGAL STATUS OF THE 1928 TREATY

I. Introduction

1.1 Chapter II of the Nicaraguan *Memorial* deals at length with the legal status of the Bárcenas-Esguerra Treaty of 1928. Nicaragua will not reiterate the statements of facts and other arguments on the merits that are dealt with throughout the more than 120 pages of that Chapter. But as pointed out in the Introduction, more than half the Colombian *Preliminary Objections* are really arguments on the facts and merits of the case. This makes it necessary to put the record straight even if it involves going into facts and arguments that should properly be left to the merits.

1.2 Section I of Chapter II of the Nicaraguan *Memorial* explains in detail the historical background and contemporaneous events that led to the signature and ratification of the 1928 Treaty. The contents of this Section will not be reiterated in this Statement except by cross-reference. Therefore the present Chapter will involve the following issues on the merits that are raised by Colombia in her *Preliminary Objections*: (i) The reasons for the invalidity of the 1928 Treaty; (ii) The content and juridical analysis of the Treaty; and, (iii) The reasons why the Treaty, in the eventuality -which Nicaragua does not accept- that it is considered to have entered into force, has been terminated as a consequence of its breach by Colombia.

II. Invalidity of the 1928 Treaty

1.3 In the Submissions of the Nicaraguan *Memorial*, the Court is requested to adjudge and declare that,

> "(4) the Barcenas-Esguerra Treaty signed in Managua on 24 March 1928 was not legally valid and, in particular, did not provide a legal basis for Colombian claims to San Andrés and Providencia."

1.4 The legal basis for the Nicaraguan request is twofold. Firstly, with full Colombian knowledge of the fact, the Treaty was concluded in open violation of the Nicaraguan Constitution of 1911 that was in force in 1928. Secondly, the Nicaraguan Government at the time the Treaty was concluded, did not have the international capacity to freely express its consent to be bound by treaties.

A. The 1928 Treaty Was Concluded in Manifest Violation of the Nicaraguan Constitution

1.5 The question whether the conclusion of the 1928 Treaty was in manifest violation of the Nicaraguan Constitution is dealt with in paragraphs 2.103 to 2.121 of the Nicaraguan *Memorial*. Colombia deals with this question in paragraphs 1.108 to 1.111 of her *Preliminary Objections*.

1.6 The arguments of Colombia against this Nicaraguan claim are that:

(i) "the alleged violation of the Nicaraguan Constitution was not only not (*sic*) manifest to Colombia or any third State.";

(ii) "the Constitution then in force (did not) specify that the San Andrés Archipelago was part of the territory of Nicaragua; in point of fact, no Constitution of Nicaragua has ever so provided." (CPO, Vol. I, para. 1.110)

1.7 The Nicaraguan Constitution in force in 1928 was the Constitution of 1911. The meaning of the Nicaraguan Constitutional provisions relevant to this case were put before the Central American Court of Justice in a case brought by El Salvador. El Salvador alleged that the Chamorro-Bryan Treaty concluded by Nicaragua with the United States in 1914, whereby Nicaragua leased part of her territory to the United States, violated the Nicaraguan Constitution. The Court on 9 January 1917 concluded that entering into the Treaty indeed violated the Nicaraguan Constitution that "required the maintenance of territorial integrity."[17]

1.8 This decision was well known locally and even internationally. It was published, for example in its entirety in the *American Journal of International Law*[18]. It involved a Treaty to which the United States was a party and not just a question of a minor local dispute. Thus Colombia was very well informed of these Constitutional provisions, as were third States like the United States, which was really the Colombian counterpart in the negotiations and conclusion of the 1928 Treaty[19].

1.9 The question why the Nicaraguan Constitution in force in 1928 did not specify that San Andrés was part of the Nicaraguan territory is not surprising or meaningful. No Constitution of Nicaragua has ever expressly referred by name to any of the islands appertaining to her

[17] NM, Vol. I, para. 2.110.
[18] *The American Journal of International Law*. Vol. 11. 1917, p. 650 at pp. 674-730.
[19] NM, Vol. I, Sec. I, Chap. II.

territory. The Nicaraguan Constitutions, including that of 1911, traditionally referred in general to the "adjacent". There is no specific mention of San Andrés as there is no specific mention of any other island claimed by Nicaragua such as the Corn Islands (*Islas del Maíz*) or the Miskito Cays.

1.10 But the point is of no relevance. Colombia was perfectly aware of the Nicaraguan claim to San Andrés. She cannot even avoid recognizing the fact in her *Preliminary Objections*. Just by reading paragraphs 11 to 13 of the Introduction to Colombian *Preliminary Objections* it becomes clear that Colombia was aware that Nicaragua considered San Andrés to be part of her territory and that this claim arose from her claim to sovereignty over the Atlantic Coast based on the *uti possidetis iuris* of 1821.

1.11 Colombia misleadingly states, "In 1913 Nicaragua for the first time advanced claims to certain islands of the Archipelago of San Andrés."[20] Presumably this statement is an attempt to set the foundations for later arguing that the 1911 Constitution preceded the claim of Nicaragua to San Andrés and that was then the reason why these islands were not specifically mentioned in the Constitution.

1.12 One example giving the lie to this statement is the Arbitral Award of French President Loubet of 1900. The Award concerned territorial claims by Colombia and Costa Rica. Colombia had included San Andrés among her claims against Costa Rica. Costa Rica had no claims to San Andrés and did not contest the issue and President Loubet decided for Colombia. Nicaragua was not a Party to the Arbitration and protested the decision declaring San Andrés to be under Colombian sovereignty. The French

[20] CPO, Vol. I, Introduction, para. 13.

Minister of Foreign Affairs, Théophile Delcassé, on 22 October 1900, acknowledged the rightness of the protest and confirmed "the rights of Nicaragua over these islands stand unaltered and intact as heretofore".[21]

1.13 As stated in paragraph 1.10 above, the claims of Nicaragua over the Archipelago are based on the *uti possidetis iuris* of 1821 and naturally date from that time. This question will of course be addressed when the merits of this case are before the Court. At this point the example of the *Loubet* affair is given as simple and incontrovertible proof of the specious nature of the Colombian statements.

1.14 In sum, the Treaty, plainly and manifestly and to the knowledge of Colombia, violated the Nicaraguan Constitution.

B. The Nicaraguan Government Did Not Have the International Capacity to Be Bound by Treaties

1.15 The position of Nicaragua on the question of the invalidity of the 1928 Treaty is that at the time of its conclusion, Nicaragua did not have the legal capacity to freely express her consent to be bound by that Treaty. The incapacity of the Nicaraguan Government to act freely is documented in great detail in Nicaragua's *Memorial* in Section I of Chapter II and will not be repeated in this Statement. Suffice it to quote paragraph 2.132 of the Nicaraguan *Memorial*:

> "(T)he situation of Nicaragua at the time of the signing and ratification of the Bárcenas-Esguerra Treaty was that her

[21] NM, Vol. I, para. 1.108 at p. 53, fn. 89.

territory was under the military occupation and the *de facto* financial and political control of the United States. The following facts, for example, are irrefutable and based directly on documents made public by the State Department of the United States and detailed above in Section I, paragraphs 2.41-2.81:

- there were more than 5000 United States marines occupying Nicaragua at the time the Treaty was concluded;

- the chief of the National Guard of Nicaragua was a United States General and the officers were United States marines;

- the elections were run under the absolute control of the United States marines. The President of Nicaragua was forced to bypass Congress and dictate an unconstitutional Executive Decree giving absolute powers over the elections to the United States marines. This unconstitutional Decree was dictated on 21 March 1928 three days before the conclusion of the also unconstitutional Bárcenas-Esguerra Treaty of 24 March 1928;

- customs revenues were collected by an officer appointed by the State Department;

- finances were controlled by persons designated *de facto* by United States General McCoy; and

- the only Bank and the only railroad in Nicaragua were under the control of persons appointed with the approval of the State Department." (Footnotes omitted)

1.16 The Colombian *Preliminary Objections* simply dismiss the historical record with political invective:

> "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…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."[22]

1.17 This portrayal is carried over to Nicaragua's *Memorial*,

> "In its Memorial, Nicaragua adopts and expands upon the 'patriotic and revolutionary' analysis in its 'White Paper' of 1980."[23]

1.18 In sum, the Colombian arguments are *ad hominem*, attempting to portray the whole issue of the invalidity of the Treaty as a matter of "revolutionary" zeal: "The alleged nullity of the 1928 Treaty was discovered by the Revolutionary Junta in 1980…"[24]

1.19 In relation to the Colombian portrayal of the Nicaraguan Government in 1980, Nicaragua merely points out that Colombia might get a better focus upon the situation by considering the 1986 Judgment of the Court in the case concerning *Military and Paramilitary activities in and against Nicaragua (Nicaragua v. United States of America)*. This might also give

[22] CPO, Vol. I, para. 1.93.
[23] CPO, Vol. I, para. 1.99.
[24] CPO, Vol. I, para. 1.105.

her an insight into what was happening in Nicaragua in 1928 to 1930 when she was occupied by the United States.

1.20 With respect to the subject of the conduct of the Parties it is necessary to set the record straight and point out how different the conduct of Nicaragua and Colombia has been. Although Nicaragua is not a party to the Vienna Convention of 1969, she has respected the norms of that Convention that reflect customary law. Specifically Nicaragua was careful where applicable to follow the procedure set forth in articles 65 and 67 of the Vienna Convention on the Law of Treaties. Thus, when the Nicaraguan Government declared the invalidity of the Bárcenas-Esguerra Treaty, the statement was read before all the diplomatic corps accredited in the country including the Ambassador of Colombia. The Statement also explained the reasons on which the declaration was based and the measures that it planned to take. These measures were spelled out in the announcement of the declaration of invalidity of the Treaty. The announcement of the Nicaraguan Government stated:

> "It is our firm desire and purpose to solve this problem, which unfortunately seems to place at odds two brother peoples, in a bilateral manner and within the strictest norms of respect and friendship recognized by International Law, without implying in any way that Nicaragua gives an validity to the Bárcenas Meneses-Esguerra Treaty, but instead simply that we are defenders to the utmost of the unity and harmony of Latin America, the regional community of which our two nations form a part."[25]

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[25] Nicaragua's White Paper on the case of San Andrés and Providencia. *Libro Blanco sobre el caso de San Andrés y Providencia,* Ministerio de Relaciones

1.21 It is true that Nicaragua unilaterally declared that the Treaty was null and void but, aside from the declaration itself, Nicaragua has not taken a single unilateral step that affects the situation. That is to say, Nicaragua has not attempted, following her declaration, to take over San Andrés or dictate the policy of those islands. It was perfectly clear to Nicaragua that the only way to achieve this goal was through the mechanisms provided by international law. If Nicaragua did not do this in the 1980s, following the declaration of invalidity, it was clearly because of the difficult situation the country was going through at the time. It was very difficult for the Nicaraguan Government in that period to consider recourse to judicial or arbitral solutions, when it had its hands full on all fronts, including several cases pending before the Court. It was not until the nineties, and specifically after having concluded the last matter Nicaragua had before the Court which ended with the Judgment in 1992 in the case concerning *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, that Nicaragua for the first time was able to seriously think about confronting this case. In fact, in 1995 Nicaragua and Colombia began negotiations that were frustrated by internal opposition in Colombia.[26]

1.22 The conduct of Colombia has been very different from that of Nicaragua. First, she self-servingly interpreted the 1928 Treaty -in effect, inventing a non-existent border that severs more than half of Nicaragua's maritime spaces along her entire Caribbean coast. Secondly, this interpretation, which had radical and serious consequences that violently affected the situation, was not submitted to bilateral dialogue or resolution by a third party, but instead Colombia imposed respect for this self serving

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Exteriores de la República de Nicaragua, Managua, 4 Feb. 1980, p. 4. NM, Vol. II Annex 73.

[26] See below paras. 1.70-1.79.

interpretation by the use of force and by the threat of the use of force. In fact, the *Preliminary Objections* themselves are a continuation of this policy of refusing to solve the dispute in conformity with international law. There was nothing to prevent Colombia from submitting her "interpretation" of the Treaty to a third body before imposing it by force. Nicaragua, quite to the contrary, has not tried to impose her will through *de facto* actions but rather has resorted to peaceful means of resolution.[27]

1.23 Again, Nicaragua whishes to make clear that these questions are briefly dealt with in this Section since Colombia devotes more than 90 pages out of the 145 pages of text of her *Preliminary Objections* to discussing them; however, Nicaragua reiterates that they belong to the very substance of the case, not to the present preliminary stage.

1.24 The other aspect of the Colombian characterization of the Nicaraguan Declaration of Invalidity of the 1928 Treaty is that it was simply a revolutionary matter that exploded *ex nihilo* by spontaneous combustion in 1980. This is simply not true. The Introduction to this Written Statement quotes a Diplomatic Note sent by the Nicaraguan Foreign Minister in 1972 to both Colombia and the United States in which he expresses Nicaragua's position that there is a question pending with respect to the "validity of the Bárcenas Meneses-Esguerra Treaty, its historical and legal background, nor the circumstances surrounding its conclusion". Later, when there was a discussion in Nicaragua about the Colombian offer of negotiations,[28] Dr. Alejandro Montiel Argüello, the then Foreign Minister of Nicaragua, reiterated in a press interview on 30

[27] The question of the conduct of the Parties can be seen below in paras. 1.46-1.84 and 3.91-3.104.
[28] See below para. 1.67.

January 1977, that the question of the validity of the 1928 Treaty was not a closed subject.

> "With regards to the Bárcenas Meneses-Esguerra Treaty, this Chancellery submitted it for study, both from the historical point of view, as well as the judicial and geographical aspects. I cannot say in advance what the results of that study will be, as my opinion is that on international affairs that affect the nation's sovereignty, no anticipated conclusions should be formulated because in many cases lead to a lost litigations. All Nicaraguans who have knowledge of the subject, can collaborate with this study, or provide data and arguments. Besides, as you will understand, Mr. Journalist, any opinion that I may give as Chancellor, will compromise Nicaragua's position; yet, a private individual can express any opinion without causing any damage."[29]

The Nicaraguan Government in 1980 only drew the logical conclusions from the traditionally existing position on this issue. The three Nicaraguan Governments that have followed the Governments of the 1980s have maintained this position. It has been a consistent national policy.

[29] Montiel Argüello, Alejandro. *Diálogos con el Canciller*. Ministerio de Relaciones Exteriores. Imprenta Nacional. Managua, pp. 14-16. NWS, Vol. II, Annex 2.

III. The Content and Juridical Analysis of The 1928 Treaty

1.25 This Section is devoted to two central questions that are at issue between Nicaragua and Colombia. The first question refers to the extent of the Archipelago of San Andrés that was recognized as under Colombian sovereignty in the 1928 Treaty. Colombia contends that this Archipelago, with an area of 17 square miles[30], extends over hundreds of miles in the Caribbean Sea and that it generates thousands of square miles of maritime areas to the benefit of Colombia and the detriment of Nicaragua. This is dealt with in Subsection A below. The second issue is the Colombian interpretation, made for the first time in 1969, that the language used in the Protocol of Exchange of Ratifications of the 1928 Treaty, implied a radical change in the nature of this instrument that was converted from a treaty concerning sovereignty over territory, into a treaty of delimitation in the high seas; a maritime delimitation covering a distance of more than 250 nautical miles. This is dealt with in Subsection B, below.

A. THE EXTENT OF THE ARCHIPELAGO OF SAN ANDRES

1.26 The *Memorial* of Nicaragua maintains that the Archipelago of San Andrés only includes the islands of San Andrés and Providencia and adjacent islets and cays, but does not include, among others, the features of Serrana, Roncador, Quitasueño, Serranilla and Bajo Nuevo.[31] The *Memorial* concludes that the features of Roncador, Serrana and

[30] See above fn. 2.
[31] NM, Vol. I, paras. 2.139 ff.

Quitasueño, which were "explicitly excluded from the Bárcenas-Esguerra Treaty are not legally or geographically part of the Archipelago of San Andrés and Providencia".[32] The *Memorial* further observes that,

> "The Bárcenas-Esguerra Treaty did not mention Serranilla or Bajo Nuevo, since at that time Colombia was not claiming these features. The fact that these features are not mentioned in the treaty, and that they are located respectively 165 and 205 nautical miles from the nearest island of the Archipelago of San Andrés, the Island of Providencia, is proof that they are not geographically or legally part of the 'Archipelago of San Andrés'. They appertain to Nicaragua since they are located on her continental shelf and, as a result of the application of the *uti possidetis iuris*, they also appertain to Nicaragua given their greater proximity to her mainland".[33]

1.27 On the other hand, in the *Preliminary Objections* Colombia maintains that the Archipelago of San Andrés includes the features of Serrana, Roncador, Quitasueño, Serranilla and Bajo Nuevo.[34] Colombia asserts that her position is supported by geographical, historical and legal arguments.[35] As will be shown in the following paragraphs none of these arguments is convincing or supported by any tangible evidence.

[32] NM, Vol. I, para. 2.187.
[33] NM, Vol. I, para. 2.188 (footnote omitted).
[34] See, for instance, CPO, Vol. I, paras. 1.72, 2.26 and 2.27.
[35] CPO, Vol. I, paras. 2.26 and 2.28.

1.28 As far as geographical and historical arguments are concerned, the *Preliminary Objections* observe that:

> "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".[36]

1.29 Colombia does not adduce any evidence that historically the Archipelago was understood in this sense. On the other hand, Nicaragua in the *Memorial* presents proof that the Archipelago historically was considered to consist only of the islands of San Andrés, Providencia, Santa Catalina and the Corn Islands, surrounded by several islets and cays of the same type.[37]

1.30 The Colombian assertion that the Archipelago of San Andrés as defined by Colombia is a string of islands, islets and banks or constitutes a single island chain stretches the ordinary meaning of the terms 'string' and 'single chain'. As can be appreciated from Map No. 3 to which Colombia refers, the features of Serrana, Roncador, Quitasueño, Serranilla and Bajo Nuevo are scattered far and wide apart over a large area of the Western Caribbean. For instance, the bank of Serrana lies 80 nautical miles from Providencia, the closest island of the Archipelago, and Low Cay on the

[36] CPO, Vol. I, para. 2.26. The reference to Map No. 3 concerns Map No. 3 contained in CPO, Vol. III.
[37] NM, Vol. I, para. 2.141.

bank of Bajo Nuevo lies 205 nautical miles from that same island.[38] As it was already pointed out in the Nicaraguan *Memorial*, all of these features are situated on top of isolated banks.[39] This is further proof that geographically and geomorphologically, these features are separate and do not form a single unit.

1.31 Practice contemporary to the conclusion of the 1928 Treaty shows that these features also did not constitute a single archipelago in legal terms. The definition of the term 'archipelago' was the subject of some debate at The Hague Codification Conference of the League of Nations of 1930. The report of the Second Sub-Committee noted in this respect:

> "With regard to a group of islands (archipelago) and islands situated along the coast, the majority of the Sub-Committee was of [sic] opinion that a distance of ten miles should be adopted as a basis for measuring the territorial sea outward in the direction of the high sea."[40]

1.32 The features of Serrana, Roncador, Quitasueño, Serranilla and Bajo Nuevo are at a much larger distance from the islands of San Andrés and Providencia than the 10 miles proposed at The Hague Conference.

1.33 The legal concept of archipelagos, and archipelagic States, has been further developed under the modern law of the sea. This development of the law is not of relevance for the definition of the Archipelago of San Andrés under the 1928 Treaty. However, Nicaragua would like to

[38] For figures on the other features concerned see NM, Vol. I, paras. 3.118-3.123.
[39] NM, Vol. I, paras. 3.115 ff.
[40] League of Nations, *Acts of the Conference for the Codification of International Law, Vol. III Minutes of the Second Committee; Territorial Waters*, p. 219. The subject of archipelagos was not discussed further in the plenary of the Conference.

observe that none of the islands in the area of relevance for the delimitation can be considered to form part of an archipelago in the present day legal sense and that the establishment of straight archipelagic baselines between any of the islands in the area of relevance for the delimitation between Nicaragua and Colombia is not permitted.

1.34 Colombia also argues that traditionally and historically "the cays" -no specification is given which cays are exactly concerned- have been the fishing grounds for the people of the Archipelago of San Andrés.[41] The *Preliminary Objections* do not corroborate this statement with any evidence, just as they fail to substantiate that these activities historically were regulated by Colombia. In any case the mere fact of fishing activities of nationals in a specific area is not relevant for establishing a title to territory.

1.35 Finally, Colombia maintains that published maps show that the islands comprising the Archipelago of San Andrés also include the features of Serrana, Roncador, Quitasueño, Serranilla and Bajo Nuevo.[42] A first point to be noted in respect of these maps is that they have been published by Colombia. There was no map annexed to the 1928 Treaty, which defines the extent of the Archipelago of San Andrés. It is the text of this Treaty that first of all is relevant and not the maps referred to by Colombia. As will be argued below in paragraph 1.43, the text of the Treaty indicates that the Archipelago of San Andrés as defined for the purposes of the Treaty does not comprise the features of Serrana, Roncador, Quitasueño, Serranilla and Bajo Nuevo.

[41] CPO, Vol. I, para. 1.15.
[42] CPO, Vol. I, para. 2.27.

1.36 Careful inspection of the maps presented by Colombia indicates that it is far from clear from these maps what islands and other features Colombia considered to be included in the Archipelago of San Andrés. For instance, the insert of the Map published in 1931, to which Colombia refers in paragraph 2.27 of the *Preliminary Objections* and which is reproduced as Map 4 *bis* in Volume III of the same, does not indicate which islands are included in the archipelago by attaching a label to each of the features included in the map. The placement of the label 'República de Nicaragua' to the west of the islands of San Andrés and Providencia, and not further to the north also suggests that Colombia at that time considered that the 1928 Treaty was concerned with these islands and not the various banks located further to the north.

1.37 A note included in the insert to the 1931 Map makes it even clearer that the insert does not prove which islands and cays were included in the Archipelago of San Andrés. The note states that within the limits of the insert certain islands are not included. This concerns among others the rock of Vigía to the north of the mouth of the Magdalena River, which is located on the Colombian mainland coast bordering the Caribbean Sea. If the Colombian assertion that the insert shows the extent of the Archipelago of San Andrés is accepted this note would imply that the rock of Vigía is part of the Archipelago. This clearly is not the case, and this fact indicates that the features included in the insert also do not of necessity form part of the Archipelago. The observations in respect of the insert reproduced as Map 4 *bis* also apply to the inserts of Colombian maps reproduced as Maps 5 *bis* to 8 *bis* in Volume III of the *Preliminary Objections* of Colombia.

1.38 The inserts included in the Colombian maps reproduced as Maps 9 *bis* to 11 *bis* in Volume III of the *Preliminary Objections* do not make any

reference to the Archipelago of San Andrés and Providencia. Thus, these maps do not provide any indication of the extent of the Archipelago of San Andrés.

1.39 Colombia asserts that, legally, Nicaragua had already acknowledged in the 1928 Treaty that Roncador, Quitasueño and Serrana were part of the Archipelago of San Andrés and Providencia. To reach this conclusion, Colombia gives a specific interpretation of the 1928 Treaty. Colombia argues that article I of the Treaty refers to the islands of San Andrés, Providencia and all the other islands, islets and cays that form part of the said archipelago of San Andrés. Colombia further argues that the inclusion of a reference to Roncador, Quitasueño and Serrana in the following paragraph of this article implied a recognition by Nicaragua that these features formed part of the Archipelago and would, but for that statement, have been dealt with as the islands mentioned in the first part of article I.[43]

1.40 In the *Memorial*, Nicaragua already has set out the reasons for rejecting that she had renounced her sovereignty over the features of Serrana, Roncador and Quitasueño under the terms of the 1928 Treaty.[44] The *Preliminary Objections* of Colombia necessitate some further comment on this point.

1.41 The Colombian argument starts from the proposition that the definition of the Archipelago of San Andrés in the 1928 Treaty includes the features of Roncador, Quitasueño and Serrana. Nicaragua considers that this interpretation of Article I of the 1928 Treaty is mistaken. As can be appreciated, this definition only refers to three islands by name, to wit

[43] CPO, Vol. I, para. 2.27.
[44] NM, Vol. I, paras. 2.149 ff.

San Andrés, Providencia and Santa Catalina. Other features are included on the basis of their forming a part of the Archipelago of San Andrés. As was argued in paragraph 1.29 above, historically, the Archipelago was not considered to include the features of Serrana, Roncador and Quitasueño. This makes it impossible to accept that they are included in the definition under the 1928 Treaty solely by a general reference to the Archipelago of San Andrés. In this connection, it can be noted that the Court in a similar situation, involving the islets of Ligitan and Sipadan, observed that,

> "…the relations between the Netherlands and the Sultanate of Bulungan were governed by a series of contracts entered into between them. The Contracts of 12 November 1850 and 2 June 1878 laid down the limits of the Sultanate. These limits extended to the north of the land boundary that was finally agreed in 1891 between the Netherlands and Great Britain. For this reason the Netherlands had consulted the Sultan before concluding the Convention with Great Britain and was moreover obliged in 1893 to amend the 1878 Contract in order to take into account the delimitation of 1891. The new text stipulated that the islands of Tarakan and Nanukan, and that portion of the island of Sebatik situated to the south of the boundary line, belonged to Bulungan, together with "the small islands belonging to the above islands, so far as they are situated to the south of the boundary-line". The Court observes that these three islands are surrounded by many smaller islands that could be said to "belong" to them geographically. The Court, however, considers that this cannot apply to Ligitan

and Sipadan, which are situated more than 40 nautical miles away from the three islands in question."[45]

1.42 Roncador, Quitasueño and Serrana are located at a similar or larger distance from the islands mentioned by name in Article I of the 1928 Treaty as Ligitan and Sipadan from Tarakan, Nanukan and Sebatik.

1.43 Having concluded that the definition of the Archipelago of San Andrés in Article I of the 1928 Treaty does not include Roncador, Quitasueño and Serrana, the question remains if the explicit reference to these features in the Treaty brings them within this definition, as is argued by Colombia. There is nothing in the treaty to suggest that this is the case. As the title of the treaty indicates, it is concerned with territorial questions between Colombia and Nicaragua. Similarly, the preamble of the treaty refers to the territorial dispute pending between them. This indicates that the treaty was not only concerned with features forming part of the Archipelago of San Andrés, but also with other territory. Furthermore, the second section of Article I of the treaty provides 'The Roncador, Quitasueño and Serrana cays are not considered to be included in *this Treaty'*.[46] Thus, it does not state that these three features are included in the Archipelago. If it had been the intention of the drafters of the Treaty to provide that these features formed part of the Archipelago, the second section of Article I could be expected to have provided that Roncador, Quitasueño and Serrana were not considered "to be included in the definition of the Archipelago of San Andrés for the purposes of this Treaty."

1.44 These arguments concerning the definition of the Archipelago of San Andrés apply *a fortiori* to Serranilla and Bajo Nuevo. These features are

[45] Case concerning *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment*, para. 64.
[46] Emphasis added.

at an even greater distance from the islands mentioned by name in Article I of the 1928 Treaty, and historically they also were not considered to be part of the Archipelago. Unlike the other three features no reference whatsoever is made to Bajo Nuevo and Serranilla in the 1928 Treaty. Consequently, the Colombian assertion that these features are included in the definition of the Archipelago of San Andrés of the 1928 Treaty[47] has to be rejected. As was set out in the *Memorial*, through application of the principle of *uti possidetis iuris* the features of Roncador, Quitasueño, Serrana, Serranilla and Bajo Nuevo appertain to Nicaragua.[48] As was argued, there is no explicit mention of these features in the acts of the Spanish Crown. In this case, the application of the *uti possidetis iuris* principle should be understood in terms of attachment to or dependence on the closest continental territory, that of Nicaragua.[49]

1.45 Nicaragua and Colombia also differ over the effect of the reference to the features of Roncador, Quitasueño and Serrana in the 1928 Treaty. Colombia considers that this provision implies that between them Nicaragua and Colombia agreed that they did not belong to Nicaragua.[50] On the other hand, Nicaragua in the *Memorial* concludes that this provision did not have as a consequence the relinquishment by Nicaragua of her rights but rather that there was a third party involved, the United States.[51] This conclusion is based on the wording of the provision concerned and its drafting history.[52] The fact that Nicaragua did not intend to renounce her rights over the features of Roncador, Quitasueño and Serrana by the 1928 Treaty is confirmed by the circumstances

[47] PCO, Vol. I, para. 2.25.
[48] NM, Vol. I, paras. 2.179-2.188.
[49] NM, Vol. I, para. 2.179.
[50] CPO, Vol. I, para. 2.29.
[51] NM, Vol. I, para. 2.156.
[52] NM, Vol. I, paras. 2.140-2.155.

surrounding the conclusion and ratification of the Saccio-Vázquez Treaty of 1972 between Colombia and the United States under which the United States renounced her rights to these features. As is recounted in detail in the *Memorial*, Nicaragua made every effort to safeguard her rights in respect of the three features during this whole process.[53] In conclusion, the *Memorial* observes that,

> "…the United States relinquished all her hypothetical rights over the cays through the Saccio-Vázquez Treaty, but she did not do so by acknowledging Colombia's rights. To the contrary, when ratifying the Treaty, the United States was careful to express her neutrality regarding the legitimate interests of third parties, particularly Nicaragua, stating clearly that the treaty did not grant Colombia more rights than those she possessed before, nor did it prejudice the rights of Nicaragua".[54]

B. REFERENCE TO THE 82° MERIDIAN IN THE PROTOCOL OF RATIFICATION OF THE 1928 TREATY

1.46 In her *Memorial* Nicaragua devotes more than 30 pages (pages 146 to 177) to explaining the history and purpose of the reference to Meridian 82° W that was made by the Nicaraguan Congress when it ratified the 1928 Treaty. Nicaragua understands that the question of the interpretation of this reference is an essential part of the decision on the merits of the case and not one that can be decided during the phase of the question of

[53] NM, Vol. I, paras. 2.162-2.178.
[54] NM, Vol. I, para. 2.178.

Preliminary Objections. Nicaragua in this section will first briefly review again the history and purpose of this reference to Meridian 82° W made in 1930 to show that it was not intended as a delimitation of maritime areas. Then it will be undeniably shown that the subsequent practice of the Parties, far from confirming the allegations of Colombia (CPO, Vol. I, para. 2.56), completely contradicts them: Two different Colombian Governments -one in 1977 and another in 1995- negotiated with Nicaragua the issues now before the Court and, in particular, recognized publicly and unambiguously that a maritime delimitation with Nicaragua was needed and hence that the 82° W Meridian was not a line of delimitation.

1. The understanding in 1930

1.47 The 1928 Treaty is crystal clear. Its Preamble states the purpose of the Treaty:

> "The Republic of Colombia and The Republic of Nicaragua desirous of putting an end to the territorial dispute between them and to strengthen the traditional ties of friendship which unite them, have decided to conclude the present Treaty…"

1.48 The unambiguous purpose was to put an end to a territorial dispute and not to achieve a maritime delimitation.

1.49 The pertinent Article of the Treaty does not in any way contradict its Preamble.

> "Article I. The Republic of Colombia recognizes the full and entire sovereignty of the Republic of Nicaragua

> over the Mosquito Coast between Cape Gracias a Dios and the San Juan River, and over Mangle Grande and Mangle Chico Islands in the Atlantic Ocean (Great Corn Island and Little Corn Island). The Republic of Nicaragua recognizes the full and entire sovereignty of the Republic of Colombia over the islands of San Andrés, Providencia, and Santa Catalina and over the other islands, islets and reefs forming part of the San Andrés Archipelago. The present Treaty does not apply to the reefs of Roncador, Quitasueño and Serrana, sovereignty over which is in dispute between Colombia and the United States of America."[55]

1.50 The Treaty simply recognizes sovereignty over territory and no mention is made of maritime delimitation.

1.51 It could not have been otherwise. In 1930 Nicaragua claimed a 3-mile territorial sea and Colombia had just raised her claim to a territorial sea of 6 miles. Neither Party claimed fishing rights beyond this area and much less had claims to a continental shelf nor to any of the other entitlements to sea areas that developed after the 1945 Truman Proclamation. To assert that in 1930 Nicaragua and Colombia were fixing maritime limits that were located nearly 60 miles from the nearest territory of Nicaragua and dozens of miles from the San Andrés Archipelago is simply a historical absurdity.

1.52 Colombia herself recognizes this in her *Preliminary Objections*. In paragraph 2.53 Colombia admits that, "No doubt, in 1930 Meridian 82° W could not be understood as a maritime boundary in the modern sense of the word." And yet this boundary, that is not "a maritime boundary in

[55] NM, Vol. II Annex 19.

the modern sense", is used by Colombia to take over more than half of the continental shelf and the exclusive economic zone of Nicaragua.

1.53 Colombia tries to seek a way out of this conundrum in what she refers to as the *travaux préparatoires* of the ratification process of the 1928 Treaty in the Nicaraguan Congress. The real *travaux préparatoires* were the negotiations that led to the signing of the Treaty on 24 March 1928 and these never referred to any then inexistent maritime dispute but only to the territorial dispute. Colombia attempts to brush this off admitting that,

> "It is true that the 1928-1930 settlement related in the first place to sovereignty over land…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."[56]

1.54 This statement by Colombia is simply not true. The negotiations on sovereignty over land were the *only* negotiations that took place under the very constraining auspices of the United States. Colombia does not offer and cannot offer records of any negotiations ever referring to maritime delimitation. There were discussions in the Colombian Congress prior to the offer she made to Nicaragua of what finally came to be the 1928 Treaty. These authentic *travaux préparatoires* of the 1928 Treaty do not have any mention of disputes over maritime areas but only of territorial sovereignty. In the period between 1928 and 1930 there could not have been a maritime issue when San Andrés is located at a distance of more

[56] CPO, Vol. I, para. 2.41.

than 105 miles from the mainland of Nicaragua and 385 miles from that of Colombia.

1.55 In any case the whole approach of Colombia is preposterous. Simply on the basis of certain words used by some Nicaraguan Senators during the ratification discussions Colombia cannot demonstrate that the purpose of a Treaty putting an end to a territorial dispute in unambiguous wording has been changed to a Treaty establishing limits in what was considered the high seas in 1930. The words of some Nicaraguan Senators that do not even have the real meaning read into them by Colombia is her whole basis for stating that the purpose of Meridian 82 W was conceived as,

> "a dividing line, as a line separating whatever Colombian or Nicaraguan jurisdictions or claims then existed or might exist in the future."[57]

1.56 This is the whole argument of Colombia in her attempt to prove that the Meridian was conceived as a maritime delimitation. She asserts that the Parties regarded the Meridian as separating whatever jurisdictions or claims then existed between them, but she does not indicate what these claims or jurisdictions of the Parties were in 1930. There is no proof whatsoever that Nicaragua or Colombia in 1930 had any claims to maritime areas beyond their respective claims to a territorial sea. Colombia does not offer and cannot offer any proof to back this contention. To salvage this abysmal gap, Colombia goes to the extreme absurdity of alleging that the Nicaraguan Senators had a crystal ball to the future and that this Meridian was set as a limit to any jurisdictions or claims that might exist in the future.

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[57] CPO, Vol. I, para. 2.53.

1.57 Colombia asserts that the debate in the Nicaraguan Congress,

> "…leaves no doubt as to the meaning of the 82° 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 línea divisoria*)- in other words: a maritime boundary."[58]

1.58 The only phrase cited that might be construed as incompatible with the purpose of the Treaty is that used by one Senator when he imprecisely spoke of a dividing line of the waters in dispute. The fact that others used the word delimitation or border is perfectly understandable: they were putting a limit to the archipelago. The more precise modern English terminology that would now be used to describe clearly the purpose of the Meridian would be that of "a line of allocation of islands". The Nicaraguan Senators were not modern experts on these matters and even nowadays it is quite conceivable that laymen on these matters might also use this erroneous phrase.

1.59 Paragraph 2.192 of the Nicaraguan *Memorial* deals with the moment during the discussions in the Nicaraguan Senate when the Nicaraguan Minister of Foreign Affairs was called to explain the purpose of the understanding that was being proposed be made as part of the ratification of the 1928 Treaty. The Minister explained to the Senators,

> "that the explanation does not reform the Treaty, because it only intends to indicate a limit between the archipelagoes

[58] CPO, Vol. I, para. 2.41.

> that had been reason for the dispute and that the Colombian Government had already accepted that explanation by means of its Minister Plenipotentiary, only declaring, that this explanation be made in the ratification act of the Treaty: that this explanation was a necessity for the future of both nations because it came to indicate the geographic limit between the archipelagoes in dispute without which it would not be defined the matter completely; and that therefore he requested to the Honourable Chamber the approval of the Treaty with the proposed explanation..."[59]

1.60 The words used by the Minister indicate that the purpose of the proposed Declaration (or "explanation") to be made upon ratification was to put a limit "between the archipelagoes". This expression is probably a good definition of the meaning of the phrase "a line of allocation of islands".

1.61 This condition was included in the Congressional Decree of ratification of 6 March 1930, which was promulgated by the President of Nicaragua in the Gazette, the official bulletin of the Republic of Nicaragua on 22 July 1930.[60] This decree ratifies the Treaty,

> "…in the understanding that the San Andrés archipelago mentioned in the first clause of the Treaty does not extend to the West of Meridian 82 of Greenwich in the chart published in October 1885 by the Washington Hydrographic Office under the authority of the Secretary of the Navy of the United States of North America."

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[59] NM, Vol. II, Annex 80. NWS, Vol. II, Annex 24b.
[60] *La Gaceta*, Diario Oficial, Año, XXXIV, Managua, D.N., Wednesday, 2 July 1930, N° 144, pp. 1145-1146.

1.62 It should not go unobserved that Colombia offers no records or *travaux préparatoires* of her own but relies entirely on the words used by certain Nicaraguan Senators. Colombia cannot produce these records because neither those preceding the signature of the 1928 Treaty nor those following the Nicaraguan ratification with the understanding on the 82 Meridian provoked any discussions about maritime delimitation in the Colombian Minister of Foreign Affairs or in her Congress.

2. From 1930 to 1969

1.63 During the next nearly 40 years after the ratification, Colombia did not claim that the Meridian was a line of delimitation of maritime areas. The maps presented by Colombia are advanced as the only practice purportedly proving that Colombia understood the Meridian as a maritime limit. No proof is offered of any other kind: no legislation, no fishing practice, nothing but maps. The question of the maps is dealt in paragraphs 1.36 to 1.38. At this point suffice it to say that none of the maps presented at least up to 1958 have any indication of a maritime limit.

1.64 The question of the interpretation of the meaning of the 82° Meridian first came out in the open when Nicaragua granted an oil exploration concession in 1967 to Western Caribbean Petroleum Co. This concession was partially located in maritime areas to the east of the 82° West Meridian. Colombia protested this concession on 4 June 1969 and for the first time asserted that this Meridian of longitude was a delimitation line of the maritime areas of Nicaragua and Colombia. This Colombian interpretation was immediately refuted by Nicaragua[61].

[61] NM,Vol. II, Annex 29.

1.65 Nonetheless, since that period Colombia has imposed this limit by force of arms. To declare a treaty void is not in itself an international illegality as Colombia asserts in paragraph 1.111 of her *Preliminary Objections*. On the other hand, to unilaterally interpret a treaty on the flimsiest of basis, 40 years after its ratification, and then impose that reinterpretation by use of force is an international illegality and a true outrage.

1.66 The truth in this whole issue is that with the development of the law of the sea, particularly after the first United Nations Conference on the Law of the Sea in 1958, Colombia saw a chance of gaining enormous maritime areas at the expense of Nicaragua. Even if her title to San Andrés were valid and upheld Colombia decided that to invoke the Meridian was a safe bet compared to what maritime areas she could hope to get in any equitable delimitation between the 17 square miles[62] of the Archipelago of San Andrés and the extensive coast line of Nicaragua.

3. First round of negotiations 1977

1.67 In 1977 the Government of Colombia commissioned Ambassador Julio Londoño Paredes to negotiate with the Government of Nicaragua on the question of the territorial and frontier dispute in the Caribbean Sea. In carrying out this mandate, Ambassador Londoño met on several occasions with the then Foreign Minister of Nicaragua, Dr. Alejandro Montiel Argüello. No agreement was reached and Nicaragua decided to bring to an end the negotiations because the Colombian offer was unacceptable to Nicaragua as is explained in the affidavit of Dr. Montiel Argüello on the subject of these negotiations.[63] The revolution that

[62] See above, paragraph 1.25.
[63] NWS, Vol. II, Annex 20.

began in 1978 in Nicaragua put the lid on any possibility of reviving the subject of negotiations with Colombia until the 1990s.

1.68 The nature and existence of these first negotiations can be verified with the declarations given by the then President of Colombia, Mr. Alfonso López Michelsen. In March 1977 President López stated: "We aspire to reach agreements on delimitations by direct negotiation not only with Nicaragua but also with Venezuela which is more difficult…"[64]

1.69 President López made this statement on the occasion of a State visit to Nicaragua's neighbour, Costa Rica, with the object of signing a treaty of maritime delimitation in the Caribbean. Although this Treaty was protested by Nicaragua and has not yet been ratified by Costa Rica the fact that the statement was made in this context makes it even more forceful and its meaning perfectly clear.

4. Second round of negotiations 1995

1.70 In 1995 Nicaraguan and Colombian delegations headed by their respective Ministers of Foreign Affairs were attending a meeting in the headquarters of the United Nations in New York. On that occasion, the Colombian Foreign Minister, Mr. Rodrigo Pardo García-Peña, invited the Nicaraguan Foreign Minister Mr. Ernesto Leal Sanchez to a lunch meeting. The Ambassador of Colombia to the United Nations at that time, Mr. Julio Londoño Paredes, was also present at that lunch. It must be recalled that Ambassador Londoño had been in charge of the Colombian negotiations with Nicaragua in 1977 (see paragraph 1.67 above). The other participant was Ambassador Mauricio Herdocia

[64] NWS, Vol. II, Annex 12.

Sacasa, then legal and political advisor to the Nicaraguan Foreign Minister.

1.71 An affidavit of former Minister of Foreign Affairs, Mr. Ernesto Leal, is joined to the present Written Statement; it explains the substance of the negotiations that took place in that meeting and at a subsequent meeting at the level of the Presidents of Nicaragua, Mrs. Violeta Barrios de Chamorro and that of Colombia, Mr. Ernesto Samper Pizano. This took place in the context of the IX Summit of Heads of State and Government of Latin American Countries (Rio Group) that was held in Quito, Ecuador, on 4 September 1995.

1.72 The purpose of these meetings, as expressed by the former Minister, Mr. Leal in his affidavit,

> "was to begin discussions about the negotiations related to the territorial and maritime differences between Colombia and Nicaragua in the Caribbean Sea, in order to improve the political environment and remove all the obstacles that affect the friendly and cooperative relationship that could exist between both countries.
>
> In this opportunity, Colombia was willing to review with Nicaragua the issues related to Meridian 82º, indicating that this subject was easier to treat than the San Andrés topic, affirming that prominent Colombian personalities recognized that the Colombian thesis of Meridian 82º was questionable under the view of International Law and International Courts' judgments. That position facilitated the treatment of the subject. The Nicaraguan representation expressed that the San Andrés issue was as important as the

> subject of Meridian 82º, they also expressed that these subjects where closely interconnected, but that the conversations could begin with the first matter, but in a global context, and without implying any renunciation, having them in a very quiet environment far from the press."[65]

1.73 The Colombian Foreign Minister explained the purpose of the negotiations in an article published on 10 September 1995 in the newspaper "El Tiempo", section "Invited Editor", under the title "Towards a Good Neighbourhood" In this context, he wrote:

> "What is it about? It is about initiating an ample dialogue over all the matters that are obviously pending or require mutual work: on the issues that are not defined or settled by the agreements in force, among them, the Esguerra-Bárcenas Treaty. For two bordering countries, such a dialogue is simply essential."[66]

1.74 Mr. Pardo further noted that these negotiations will

> "…analyse in a cordial and constructive conversation, the arguments of the parties about the character of the Meridian 82. The conversations that the Ministries of Foreign Affairs of both countries will soon begin, based on a Presidential mandate, will consequently include this important subject."[67]

[65] NWS, Vol. II, Annex 21.
[66] NWS, Vol. II, Annex 4.
[67] NWS, Vol. II, Annex 4.

1.75 The Foreign Minister ended his note indicating that:

> "From the point of view of the national interests and the cooperation between both countries, to clear out any doubt on the nature of Meridian 82º, will contribute to clear out the scenery."[68]

The importance of these events and these statements cannot be over emphasized. At a distance of nearly 20 years, first in 1977 and then in 1995, two different Colombian Presidents and Governments, publicly announced negotiations with Nicaragua on maritime delimitation and other issues presently before the Court. Colombia now denies that any issues were left pending by the 1928 Treaty and yet two different Colombian Governments tell a radically different story.

1.76 The distinguished Colombian, Judge Rafael Nieto Navia, former Judge and president of the Interamerican Court of Human Rights and until recently Judge of the Tribunal for the Former Yugoslavia in The Hague, had this to say about the public statements of the highest authorities of his country.

> "I heard the President say in the television…that the Ministers of Foreign Affairs of Colombia and Nicaragua will have to meet to talk 'about the nature of Meridian 82' west of Greenwich, indicated by the Esguerra-Bárcenas Treaty as a boundary of the Archipelago of San Andrés … And, if this is accepted, taking into consideration that the Treaty says that the Archipelago will not extend to 'the west', it is obvious that if it is negotiated, it is to discuss to the east, that is, the zone that has been traditionally

[68] NWS, Vol. II, Annex 4.

> Colombian… What did the President mean with the 'nature' of the Meridian? Well, he is referring, as it is obvious, to whether the Meridian is or is not a limit. He is doubting that characteristic. He is giving an opportunity for the Nicaraguan maritime and sub-maritime areas, to go east of the Meridian… Attention, Mr. President, what you are saying represents the official position of Colombia. Tomorrow, Nicaragua will put out these declarations before the International Court."[69]

1.77 In fact, what Judge Nieto anticipated is precisely what Nicaragua is now doing: putting these declarations before the International Court.

1.78 Unfortunately, the political pressure created inside Colombia by the announcement of these negotiations apparently forced the Government of Mr. Samper to go back on the agreement to negotiate and further meetings were cancelled.

1.79 This event was highlighted by Nicaragua in her Application of 6 December 2001:

> "Diplomatic negotiations have failed. The last real attempt at the highest level occurred on 6 September 1995, on occasion of the IX Meeting of Heads of States and Governments of the Group of Rio in Quito, Ecuador. At that meeting, the President of Colombia, His Excellency Mr. Ernesto Samper, declared that he was instructing his Minister of Foreign Affairs to meet with his Nicaraguan counterpart before the end of that month of September in

[69] NWS, Vol. II, Annex 3.

order to discuss the bilateral issues that separated their countries. In the words of President Samper, these issues included 'possible differences that existed on the subject of frontiers' (*posibles diferencias que existen en materia de límites*). This meeting was cancelled at the request of Colombian Minister of Foreign Affairs, who stated on 12 September 1995 that Colombia would never discuss with Nicaragua the Caribbean possessions because 'this was a matter that had been totally decided by an international treaty'. Five days later, the Minister of Defence of Colombia, accompanied by high-ranking members of the Colombian military, members of Government and Congress, presided over a so-called act of sovereignty that consisted of a naval demonstration on the 82 Meridian at the altitude of parallel 12. On 6 August 1996 the Minister of Foreign Affairs of Colombia asserted that the question of sovereignty over Providencia and San Andrés 'is not subject to discussions' and on the 14th of that same month reiterated 'that there was nothing to talk about' in this affair."

5. Third round of "negotiations" 2001

1.80 Mention is made of these conversations between the then recently appointed Foreign Minister of Nicaragua, Mr. Francisco X. Aguirre Sacasa and his Colombian counterpart Mr. Guillermo Fernández de Soto, not because of their importance in demonstrating that Colombia agreed in 2001 that there were pending territorial and delimitation issues to be negotiated with Nicaragua, but to bring to light the conduct of Colombia

towards Nicaragua in relation to the bringing of this case before the Court.

1.81 The facts are as follows. A few weeks after Honduras ratified on 30 November 1999 the delimitation Treaty of 2 August 1986 the then President of Nicaragua Mr. Arnoldo Alemán Lacayo publicly announced that Nicaragua would be filing an Application with the International Court of Justice against Colombia.[70] This announcement was repeated on several occasions.[71] Ambassador Londoño, Agent of Colombia, in an interview given shortly after the Application of this case was filed, recognized that they were aware that Nicaragua was going to bring this case because "they had been announcing it for the past two years".[72]

1.82 The fact that this case was being brought to the Court was well known by Colombia. The Nicaraguan Foreign Minister during the year 2001, Mr. Aguirre, in an affidavit[73] tells the story of how his Colombian counterpart, Mr. Fernández de Soto, requested that the filing of the Nicaraguan Application be postponed in order to give an opportunity for negotiations on the territorial and delimitation questions pending between their respective States. Mr. Aguirre agreed in good faith only to later receive the surprise that the purpose of that request and the offers of negotiations were only made in order to gain time for Colombia to complete the legal and political steps she needed to take in order to withdraw her 1937 acceptance of the jurisdiction of the Court.

1.83 These attempts by Colombia to abuse the good faith of the Nicaraguan Authorities in order to gain time for withdrawing her acceptance of her

[70] NWS, Vol. II, Annex 13.
[71] NWS, Vol. II, Annexes 14, 15 and 16.
[72] NWS, Vol. II, Annex 7 and see below, paras. 3.103-3.104.
[73] NWS, Vol. II, Annex 22.

optional clause Declaration are -to borrow a Colombian self-righteous statement[74]- an outrage.

1.84 The consequence of this conduct by the Government of Colombia is that it was estopped from changing the jurisdictional status quo without reasonable notice. In the event, a notice of less than 24 hours could not by any definition be considered reasonable. The legal consequences of the Colombian conduct are dealt with below in Chapter III, Section IV.

IV. Breach of Treaty

1.85 The 5th Submission of the Nicaraguan *Memorial* requests the Court to adjudge and declare that:

> "(I)n case the Court were to find that the Bárcenas-Esguerra Treaty had been validly concluded, then the breach of this Treaty by Colombia entitled Nicaragua to declare its termination."

1.86 This question is dealt with in paragraphs 2.254 to 2.263 of the Nicaraguan *Memorial*. The premise for this declaration of termination is that the Meridian 82° W is not a line of delimitation of maritime areas but a line of allocation of sovereignty over islands.[75] If this premise is correct then the question is whether the unilateral interpretation of Colombia in 1969, that has been followed since then with what amounts to a blockade against the use by Nicaragua and her citizens of the resources of the

[74] CPO, Vol. I, para. 1.111.
[75] See above Sec. III, para. 1.58.

maritime areas east of Meridian 82° W, amounts to a material breach of the Treaty.

1.87 The answer to this question is an issue concerning the interpretation of a treaty, which clearly falls within the jurisdiction of the Court. It is precisely the first type of legal dispute to which Article 36 (2) of the Statute of the Court refers. If the answer is, as Nicaragua contends, that Colombia has interpreted this Treaty in a self-serving manner and not according to its objectives or the clear meaning of its text, then we enter into the question of determining if this interpretation would constitute a breach of an international obligation. This last issue would fall under the third type of legal dispute contemplated by Article 36 (2) of the Statute.

1.88 In any case, what is clear is that this issue is patently a matter that must be decided in the merits phase of this case. At this stage it will suffice to offer a rebuttal of certain allegations of Colombia.

1.89 Firstly, Colombia asserts in paragraph 1.116 of her *Preliminary Objections* that,

> "As a matter of law, even if it were true that Colombia 'unilaterally converted' the 82° 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."

1.90 The question clearly is that Colombia not only converted a Treaty that was aimed at resolving the "territorial dispute pending between them" into a new territorial and delimitation dispute, but that Colombia has not limited her "construction" of the Treaty to paper and diplomatic conversations. To take a Treaty involving the determination of

sovereignty over territory, and by "construction" determine that in fact the Treaty was also a Treaty of delimitation of a 250 nautical mile maritime border, cannot be anything other than a material breach of it.

1.91 Colombia quotes, in paragraph 1.117, article 45 of the Convention on the Law of Treaties to attempt to prove that Nicaragua has lost her right to invoke this ground of termination because she has acquiesced in this interpretation. This interpretation was first asserted by Colombia in 1969 and Nicaragua immediately protested and has reiterated this protest at every adequate opportunity. There cannot be any question of acquiescence.

1.92 Colombia sees this acquiescence in a series of maps she has filed with her *Preliminary Objections*. This question is dealt with above in paragraphs 1.36 to 1.38. For present purposes Nicaragua points out that these maps prove none of the assertions of Colombia. On the other hand it must be reiterated that the only evidence for acquiescence advanced by Colombia consists of those maps. There are no acts of sovereignty by Colombia such as laws or decrees defining her maritime areas or the granting of fishing or oil exploration concessions before 1969.

CHAPTER II
PRELIMINARY OBJECTIONS RELATED TO THE PACT OF BOGOTÁ

2.1 In the Application of 6 December 2001 the Republic of Nicaragua invoked, in accordance with Article 36, paragraph 1 of the Statute of the Court, Article XXXI of the American Treaty on Pacific Settlement (Pact of Bogotá), adopted on 30 April 1948, as one of the bases of jurisdiction in the dispute submitted to the Court[76].

2.2 According to Article XXXI of the Pact of Bogotá:

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

2.3 Both the Republic of Nicaragua and the Republic of Colombia are parties to the Pact of Bogotá. Nicaragua ratified the Pact on 21 June 1950

[76] *Application of Nicaragua*, para. 1; NM, Vol. I, Introduction, para. 3.

without any pertinent reservation, and Colombia ratified it on 14 October 1968 with no reservations.

2.4 Nevertheless, on 21 July 2003 the Republic of Colombia submitted to the Court *Preliminary Objections*, requesting the Court to adjudge and declare that:

> "…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"[77].

2.5 According to Article VI of the Pact of Bogotá, the procedures established in that Treaty,

> "…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".

2.6 According to Article XXXIV of the Pact of Bogotá:

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

[77] CPO, Vol. I, Chap. V, p. 145.

2.7 Colombia affirms that "matters were definitively settled" by the Treaty of 1928, and thus, "by instituting these proceedings Nicaragua is seeking to reopen a matter which has long since been settled"[78]. Nicaragua considers that that conclusion is completely erroneous and this will be demonstrated in the following paragraphs.

2.8 The main argument presented by Colombia in her efforts to establish that the Court lacks jurisdiction is based on the joint interpretation of Articles VI, XXXI and XXXIV of the Pact of Bogotá[79]. According to Colombia the Court should declare itself incompetent and declare the controversy ended as it concerns a matter already settled by agreement between the parties and governed by agreements or treaties in force when the Pact of Bogotá was concluded. Colombia affirms that Nicaragua and Colombia had signed the Bárcenas-Esguerra Treaty in 1928 and ratified it through the Protocol of Exchange of Ratifications in 1930, in order to resolve territorial matters, including their maritime delimitation, and that these agreements were in force when the Pact of Bogotá was entered into[80].

2.9 The Colombian argument is incorrect for many reasons; first among these is that of the very interpretation of the pertinent articles of the Pact of Bogotá.

2.10 The text that ultimately became Article VI of the Pact was not part of the Interamerican Peace System Project adopted by the Interamerican Juridical Committee, which was the basis for discussion at the IX

[78] CPO, Vol. I, Introduction, para. 8.
[79] *Ibid*, Introduction, paras. 27 ff; and paras. 2.5 ff.
[80] *Ibid,* Introduction, paras. 14; and paras. 1.44 ff., 2.9, 2.35, 2.50, 2.63, 2.64; 4.6, 4.13, 4.14. The text of the Treaty and the Protocol of Exchange of Ratifications are in Vol. II, Annex 10. These instruments have already been reproduced in the NM. Vol. II, Annex 19.

International Conference of American States[81], but rather emerged from a proposal for an additional article put forth by Peru[82].

2.11 It is clear from the text -and this is confirmed by the *travaux préparatoires*- that the limitation imposed by Article VI of the Pact refers not to the jurisdiction of the Court, but rather to the operation of all procedures foreseen by the Pact, as Colombia must recognize[83], and has for its objective to avoid the use of the procedures contemplated in the Pact, being used for the review of treaties or for bringing appeals against final and enforceable judgments.

2.12 The reservations formulated by countries such as Bolivia and Ecuador when signing the Pact confirms that this was the purpose of Article VI. These reservations, as Colombia herself recognizes, intend "to protect the

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[81] See the project, published under classification CB-6 in the IX International Conference of American States, Proceedings and Documents/Novena Conferencia Internacional Americana, Actas y Documentos, Vol. IV, MRE, Actas y Documentos, Vol. IV, MRE, Bogotá, 1953, Third Commission, Commission Documents, pp. 6-21. See pertinent part in NWS, Vol. II, Annex 18.

[82] Given that Article II of the project had recognised the commitment of the parties to make use of the procedures established by the Treaty in case a controversy could not be resolved, in the opinion of one of them, through direct negotiations, the Peruvian delegation proposed to add several articles, one of which reads as follows: "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". (The text in Spanish reads: "Tampoco podrán aplicarse dichos procedimientos a los asuntos ya resueltos por arreglo de las partes, o por solución arbitral o judicial, o que se hallan regidos por acuerdos internacionales en vigencia en la fecha de la celebración del presente Tratado" (*Proposal for Amendments to the Interamerican Peace System Project*, published under the classifications CB-191/C.III-10 y CB-199/C. III-12, in IX International Conference of American States, Proceedings and Documents/Novena Conferencia Internacional Americana, Actas y Documentos, Vol. IV, cit., Third Commission, Commission Documents, p. 69). See NWS, Vol. II, Annex 18).

[83] CPO, Vol. I, paras. 2.10, 2.13 and 2.20.

possibility that their existing territorial treaties with Chile and Peru, respectively, might be opened to review"[84]. Bolivia intended to leave open a means by which to apply the procedures of the Pact to "controversies arising from matters settled by arrangement between parties, *when said arrangements affect the vital interests of a State*"[85] (emphasis added). For its part, the Ecuadorian reservation "leaves open the possibility of the review of treaties" [86], as stated in the report of the Ecuadorian Senate's International Relations Committee, to which the Pact had been submitted[87].The fact that Peru put forth the proposal that resulted in Article VI, and Chile supported the motion, was due to its importance as a mechanism to prevent the review of treaties[88].

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[84] CPO, Vol. I, para. 2.15.

[85] See Bolivian Reservation to the Pact of Bogotá.

[86] "The Delegation of Ecuador, upon signing this Pact, makes an express reservation with regard to Article V [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 Organisation of American States or the Constitution of the Republic of Ecuador". The text in Spanish reads: "La Delegación del Ecuador, al suscribir este Pacto, hace reserva expresa del Artículo V [VI], y, además, de toda disposición que esté en pugna o no guarde armonía con los principios proclamados o las estipulaciones contenidas en la Carta de las Naciones Unidas, o en la Carta de la Organización de Estados Americanos, o en la Constitución de la República del Ecuador" (IX International Conference of American States, Proceedings and Documents/Novena Conferencia Internacional Americana, *Actas y Documentos,* Vol. I, MRE, Bogotá, 1953, Proceedings of the Seventh Plenary Session, p. 232. See NWS, Vol. II, Annex 17).

[87] Record of the afternoon session of the Honourable Chamber of the Senate of the Ecuadorian Congress (*Acta de la Sesión Vespertina de la Honorable Cámara del Senado*), October 31, 1949, Item XXV, First Discussion of Bill number 157, Pact of Bogotá, pp. 1923 ff., cited by Colombia in CPO, Vol. I, para. 2.15, fn. 110.

[88] CPO, Vol. I, paras. 2.11, 2.12 and 2.16.

2.13 This is the only possible explanation for the fact that although her proposal was accepted[89], Peru formulated a reservation to Article XXXIV, considering, *inter alia*, that the cases,

> "resolved by settlement between the parties or governed by agreements and treaties in force, determine, in virtue of their objective and peremptory nature, the exclusion of these cases from the application of every procedure"[90].

2.14 To the Peruvian delegate who interpreted the *quieta non movere* it even seemed inadmissible that there should be an intervention by the Court declaring the controversy "ended" when, in accordance with Article VI, it lacked jurisdiction. Obviously the Court may remove from its list of cases a dispute if it finds no basis for its jurisdiction, but it would exceed its competencies if it declared the controversy as such ended.

2.15 Colombia has not taken into account the need for caution when recurring to the *travaux préparatoires* of the Pact of Bogotá called for by the Court in the judgment handed down on 20 December 1988 -*Border and Transborder Armed Actions. Jurisdiction and Admissibility, (Nicaragua v. Honduras)*- when it warned that "not all stages of the drafting of the

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[89] There were only slight modifications in form that in no way affected the substance of the article. Thus the reference to "arbitral or judicial decisions" was changed to "arbitral award or … decision of an international court (*laudo arbitral o ... sentencia de un tribunal internacional*)", the expression "international agreements (*acuerdos internacionales*)" was substituted for "agreements or treaties (*acuerdos o tratados*)", and the final allusion to "Treaty (*Tratado*)" was replaced by "Pact (*Pacto*)".

[90] The text in Spanish reads: "resuelta por arreglo de las partes o regida por acuerdos o tratados vigentes, determinan, en virtud de su naturaleza objetiva y perentoria, la exclusión de estos casos de la aplicación de todo procedimiento" (IX International Conference of American States, Proceedings and Documents/Novena Conferencia Internacional Americana, *Actas y Documentos,* Vol. I, cit., Acta de la Séptima Sesión Plenaria, p. 233). See NWS, Vol. II, Annex 17.

texts of the Bogotá Conference were the subject of detailed records"[91]. However, the same quotations Colombia uses to support her thesis[92] in fact contradict it. Thus, when the delegate of Ecuador, Mr. Viteri, suggests in the debates of the Third Commission at the Conference that a formula be found to soften the terms of Article VI, the delegate of Peru, Mr. Belaúnde, rejects this suggestion as it concerns matters governed by agreements or treaties in force, arguing that 1) "these 'treaties in force' usually indicate the manner to settle matters"[93], which would appear to indicate that for the Peruvian delegate the final paragraph of Article VI is intended to submit differences regarding treaties in force to the means of settlement as set forth in the treaties themselves[94]; and, that, 2) to attenuate the formula "would open the *door to provoke a dispute, which is exactly what we wish to avoid*"(emphasis added)[95]. "An American

[91] *I.C.J. Reports 1988*, p.86, para. 37.
[92] CPO, Vol. I, paras. 2.10 ff.
[93] The text in Spanish reads: "esos 'tratados vigentes' generalmente indican la manera de resolver las cuestiones".
[94] "There is a treaty; surely that treaty has its procedures. That is why the last part [of Article VI] is important…[A] treaty that settles a problem generally provides a procedure by virtue of which those difficulties can be settled…In this way everything is ready, because that which is subject to treaties in force, generally has its procedure, and that procedure, as we have agreed, should take precedence over any other", concludes Mr. Belaúnde. (Text in Spanish: "Hay un tratado; seguramente ese tratado tiene sus procedimientos. Por eso es que la última parte [del Artículo VI] tiene tanta importancia...(U)n tratado que resuelve un problema generalmente establece un procedimiento en virtud del cual esas dificultades puedan resolverse...De manera que está todo listo, porque lo que está regido por tratados en vigencia generalmente tiene su procedimiento; y ese procedimiento, conforme lo hemos acordado, debe primar sobre cualquier otro") (IX International Conference of American States, Proceedings and Documents/Novena Conferencia Internacional Americana, *Actas y Documentos,* Vol. IV, Comisión Tercera, Sesión Tercera, pp. 135-136). NWS, Vol. II, Annex 18. See also excerpts in CPO*,* Vol. II, Annex 21.
[95] The text in Spanish reads: "sería abrir la puerta a provocar un litigio, que es precisamente lo que queremos evitar".

peace system", adds Mr. Belaúnde, "should not only settle disputes, but also prevent them"[96].

2.16 Likewise, when the delegate from Cuba, Mr. Dihigo, after reminding his listeners that "the first part of Article [VI] says: 'The aforesaid procedures, furthermore, shall not be applied to matters already settled...', asks Mr. Belaúnde: "If they are already settled, what is the problem?"[97], Mr. Belaúnde replies: "The danger lies in its *being reopened, in wanting to reopen them. It is the exception of* res judicata" (emphasis added)[98].

2.17 This insistence upon *res judicata* invites consideration of the frequent inclusion in arbitration treaties among Latin America countries of clauses prohibiting the reopening of issues already settled. This is also the intention of Article VI of the Pact, as Colombia herself recognizes: Article VI "is meant as a shield against any possible use of the procedures provided for by the Pact in order to reopen previously settled disputes"[99].

[96] The text in Spanish reads: "un sistema americano de paz debe no sólo resolver los litigios, sino también impedir que se provoquen".
[97] The text in Spanish reads: "La primera parte del Artículo dice: 'Tampoco podrán aplicarse dichos procedimientos a los asuntos ya resueltos...'Si están resueltos, ¿cuál es el problema?".
[98] The text in Spanish reads: "El peligro está en que se reabra, en que se quiera reabrir. Es la excepción de cosa juzgada". IX International Conference of American States, Proceedings and Documents/Novena Conferencia Internacional Americana, *Actas y Documentos,* Vol. IV, Comisión Tercera, Sesión Tercera, p. 136. NWS, Vol. II, Annex 18, see also Excerpts in CPO*,* Vol. II, Annex 21.
[99] CPO, Vol. I, paras. 2.10, 2.13 and 2.20; see also Introduction, para. 34.

2.18 Nicaragua does not seek a review of the Bárcenas-Esguerra Treaty nor of any other instrument linked to it, contrary to that which is asserted by Colombia[100]. Rather, Nicaragua holds: 1) that the aforementioned Treaty, for a number of reasons as set forth in her *Memorial*[101], is not a valid instrument; 2) that the Treaty, even if it were valid, which Nicaragua does not accept, is affected by a cause of termination as a consequence of its serious breach by Colombia[102]; 3) that the Treaty does not include the cays of Roncador, Serrana, Quitasueño, Serranilla and Bajo Nuevo[103]; and 4) that a maritime delimitation is not the purpose of the Treaty nor of the agreement reflected in the Protocol of Exchange of Ratifications[104].

2.19 These differences had not emerged at the date the Pact was concluded. As Colombia recognizes: "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"[105]. However, these differences do exist today, are undeniable, have been objectively established, have not been settled and the limit that Article VI imposes to the use of the procedures of the Pact, does not apply.

2.20 Clearly, upon examining the Colombian objection, it is necessary to distinguish between the different points that Colombia, in a self-interested fashion, attempts to present as a single and sole issue.

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[100] CPO, Vol. I, Introduction, paras. 8, 18 and 4.10, 4.21.
[101] NM, Vol. I, Chap. II, Sec. II, para. 2.102 ff.
[102] *Ibid*, Chap. II, Sec. IV, paras. 2.254 ff.
[103] *Ibid*, Chap. II, Sec. III, paras. 2.140 ff.
[104] *Ibid*, Chap. II, Sec. III, paras. 2.189 ff.
[105] CPO, Vol. I, para. 2.4.

2.21 The first such point is the validity and effectiveness of the 1928 Treaty and the 1930 Protocol of Exchange of Ratifications[106]. Whatever the objective meaning one may wish to ascribe to the phrase "matters already settled by arrangements between the parties (*asuntos ya resueltos por arreglos de las partes*)", to which Article VI of the Pact makes reference[107], the imperative that an agreement or treaty be in force at the date of the conclusion of the Pact is explicit. This excludes from the scope of the Article those controversies that relate specifically to the validity of the "arrangements between the parties" and, as a result, the legal effect of the 1928 Treaty and the 1930 Protocol of Exchange of Ratifications.

2.22 Further, the controversy regarding the invalidity of the Treaty emerged after the Pact entered into force, although some of the events from which it originates precede that date. The validity of the Treaty was challenged by the Minister of Foreign Affairs of Nicaragua Mr. Lorenzo Guerrero, in the Notes Nº 053 and 054, of 7 October 1972[108] and the controversy only became apparent on 5 February 1980, once Colombia replied to the Nicaraguan Declaration of Invalidity of the Treaty of the day before[109].

2.23 In any case, Nicaragua does not believe that the Court can reach a conclusion on this point without going into the merits of the case. This in

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[106] See NM, Vol. I, Chap. II, Sec. I (paras. 2.4-2.101) and II (paras. 2.102-2.138).
[107] See above para. 2.5.
[108] "*Without, for the moment, going into the validity of the Bárcenas Meneses-Esguerra Treaty, its historical and legal background, nor the circumstances surrounding its conclusion,* Nicaragua reiterates that the banks located in that zone are part of her Continental Shelf..." (emphasis added). See the Note in NM, Vol. II, Annexes 34 and 35. See also Montiel Argüello, Alejandro. *op. cit.*, p. 15. NWS, Vol. II, Annex 2.
[109] See the Colombian Note of 5 February 1980 in CPO, Vol. II, Annex 19. The Nicaraguan Declaration of 4 February 1980 in NM, Vol. II, Annex 73.

itself would make it impossible at this juncture to implement any of the consequences that Article XXXIV of the Pact imposes if and when the assumptions underlying Article VI are verified.

2.24 For Colombia, the 1928 Treaty is not only valid and in force, but its purpose and provisions must be forcibly interpreted (and apparently there is no room for discussion) in the sense determined by Colombia and imposed on Nicaragua. A declaration of lack of jurisdiction by the Court on the validity of the 1928 Treaty and its complementary instruments cannot encompass the other points of the controversy, which are not "matters already settled" and, even less so, those matters that were not even considered at the time said Treaty and its complementary instruments were entered into.

2.25 The Colombian claim is unfounded, and the Court should reject an exegesis of Article VI of the Pact that considers settled those controversies regarding the scope and interpretation of a treaty that emerge, as in the present case, after the conclusion of the Pact, alleging that said controversies were the object of the agreement between the parties. If the negotiators of the Pact had intended to exclude from its scope of application those "new" controversies that might emerge, and that are related to matters already settled, they would have expressly stated such an intention, something they clearly did not do.

2.26 That this is the case is indirectly confirmed by the declaration formulated by the delegation of the Republic of Argentina to justify her reservations to the Pact as concerns judicial procedures and arbitration:

> "[T]he Delegation cannot accept the form in which the procedures for their application have been regulated, since,

in its opinion, *they should have been established only for controversies arising in the future and not originating in or having any relation to causes, situations or facts existing before the signing of this instrument*" (emphasis added)[110].

2.27 Thus Article VI did not cover these differences, as Argentina would have liked.

2.28 It is obvious that the purpose of Article VI of the Pact cannot have been to remove from the scope of application of Article XXXI all differences regarding the validity of a treaty in force. Article XXXI follows literally the wording of Article 36, paragraph 2, of the Statute of the Court that includes among the legal disputes that fall under its jurisdiction, "the existence of any fact which, if established, would constitute a breach of an international obligation". Apart from this type of dispute it must be recalled that this Article also admits the jurisdiction of the Court in all legal disputes concerning "the interpretation of a treaty" or of "any question of international law".

2.29 Taking the above as a starting point, it is worth noting that the termination of the Bárcenas-Esguerra Treaty as a result of a material breach by Colombia is the outcome of something that occurred long after the conclusion of the Treaty and of the Pact of Bogotá, namely the Colombian claim in 1969 that the 82º Meridian W, agreed in 1930 as the western limit of the San Andrés Archipelago, constituted the maritime border between herself and Nicaragua. According to Nicaragua, this

[110] Pact of Bogotá. The text in Spanish reads: "la Delegación no puede aceptar la forma en que se han reglamentado los procedimientos para su aplicación, ya que a su juicio debieron establecerse sólo para las controversias que se originen en el futuro y que no tengan su origen ni relación alguna con causas, situaciones o hechos preexistentes a la firma de este instrumento". See Argentina's reservation to the Pact of Bogotá.

radical shift in the common and authentic interpretation of the Treaty constitutes a material breach which fulfils the conditions established by the general principles of international law and Article 60 of the Vienna Convention on the Law of Treaties, according to which Nicaragua has the right to terminate the Treaty[111].

2.30 Issues of international law linked to the interpretation of treaties attract the other points in the Nicaraguan Application, namely the determination of the insular components of the San Andrés Archipelago in the framework of the 1928 Treaty, and the interpretation of the reference made to the 82º Meridian W in the 1930 Protocol of Exchange of Ratifications.

2.31 These are differences that are very much alive and clearly raise questions of international law related to the interpretation of Treaties that emerged after the conclusion of the Pact in 1948. The claim that the Court is incompetent to hear the case by invoking Article VI of the Pact is unfounded.

2.32 It is to be recalled that in the past Colombia did not reject out of hand the holding of negotiations with Nicaragua by alleging that the 1928 Treaty had settled all controversies. In Chapter I, Section III, paragraphs 1.67 to 1.79 above, there is a detailed account of the statements made by Colombian Heads of State and Ministers of Foreign Affairs proving that Colombia did not consider the issue of the 82° W Meridian as a line of delimitation finally settled. Furthermore, there were at least two serious offers of negotiations made by Colombia that openly included the question of maritime delimitation. Colombian Presidents López, in 1977, and Samper, in 1995, made public announcements that negotiations on

[111] NM, Vol. I, Chap. II, Sec. IV (paras. 2.254-2.263).

delimitation in the Caribbean Sea would begin with Nicaragua. That these negotiations failed to produce results was due to the internal opposition in Nicaragua in 1977[112] and to the internal opposition in Colombia in 1995[113].

2.33 The neighbouring countries have recognized the lack of definition of a maritime limit and the existence of a dispute between Nicaragua and Colombia. Colombia dares to point to the treaty signed with Costa Rica on 17 March 1977 as one of the successful results of her maritime delimitation policy in the Caribbean, asserting, "(I)t has been applied *bona fides* by the parties since the very moment of its signature"[114]. Colombia pretends to ignore the fact that nineteen years after its signature, in 1996, the Costa Rican Minister of Foreign Affairs, Fernando Naranjo, stated in public that his country would not ratify that Treaty whilst Colombia did not settle her differences with Nicaragua[115]. Colombia does not reveal the fact that in order to make possible the ratification by Costa Rica of the maritime delimitation treaty concerning the Pacific, of 6 April 1984, its Article III had to be modified. This Article provided for the simultaneous ratification of both delimitation Treaties: that of 1977 concerning the Atlantic and that 1984 concerning the Pacific (see exchange of notes of 29 May 2000)[116].

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[112] NWS, Vol. II, Annex 20.
[113] NWS, Vol. II, Annex 21.
[114] CPO, Vol. I, para. 1.6. The text of the treaty in CPO, Vol. II, Annex 1, c.
[115] NWS, Vol. II, Annex 5. *El Espectador,* 15 de marzo de 1996, p. 9-A. Later on, in the Final Document of the Binational Commission Nicaragua-Costa Rica (May 1997) Minister Naranjo reiterated "his Government's firm commitment not to act about its boundary claim in the Northern Caribbean until the Governments of Nicaragua and Colombia reach an agreement that will allow them to overcome the differences originated between those two friendly nations" See NWS, Vol. II Annex 26.
[116] NWS, Vol. II, Annex 27.

2.34 The controversy regarding the meaning of "San Andrés Archipelago"[117] to the effect of considering the Cays of Roncador, Serrana, Quitasueño, Serranilla, Bajo Nuevo, Cayos de Albuquerque, Este or Sudeste to be included in the archipelago, only emerged in the late 1960s, once Colombia entered upon negotiations with the United States with the aim of appropriating these territories[118]. These negotiations became pressing due to the unexpected Colombian doctrine of claiming Meridian 82° W to be the maritime border with Nicaragua, thus breaking with the peaceful consideration for four decades of this Meridian as a line for purposes of attribution of title to islands.

2.35 In the 1928 Treaty, whose validity Nicaragua challenges, she recognized Colombian sovereignty over the Archipelago of San Andrés to the east of Meridian 82° W or, expressed in other terms, that there were no islands belonging to the Archipelago to the west of the Meridian On the other hand, this did not imply acceptance that all islands in the Caribbean to the east of Meridian 82° form part of the Archipelago and are presumed to be Colombian[119]. It is worth reading Article I of the Treaty, first paragraph, with care:

> "...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*" (emphasis added).

[117] See above paras. 1.26-1.45.
[118] NM, Vol. I, Chap. II, Sec. III, A (paras. 2.140-2.188); and Vol. II, Annexes 31, 34 and 35.
[119] *Ibid,* paras. 2.249 ff.

2.36 The geographic and historical description presented by Colombia of the San Andrés Archipelago today[120] is not canonical nor was it relevant yesterday, as demonstrated in the *Memorial* of Nicaragua[121].

2.37 It is revealing that when, in the late spring of 1969, Colombia objected to the concessions for oil exploration made by Nicaragua to the east of Meridian 82° W, the Colombian diplomatic note of 4 June 1969 expressly distinguished between the concession of the "Quitasueño block" and the other concessions, reserving for the latter the invocation of Meridian 82° W as the maritime border[122].

2.38 The delimitation of maritime areas between Nicaragua and Colombia is the object of a dispute between the Parties that has not been resolved by any treaty[123] and it very clearly falls under the jurisdiction of the Court, in accordance with Article XXXI of the Pact of Bogotá. Colombia claimed Meridian 82° W as a maritime border for the first time in Note No. 092 of 4 June 1969, when she attempted to reserve these supposed rights vis-à-vis the Nicaraguan exercise of jurisdiction over the continental shelf to the east of the Meridian[124]. To this Note Nicaragua gave an immediate and full answer in Note No. 0021, on 12 June of that same year[125].

2.39 In her *Preliminary Objections* of 21 July 2003 Colombia is unable to provide any proof whatsoever of any prior claim, or even of her dogmatic

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[120] CPO, Vol. I, paras. 1.8 and 2.26.
[121] NM, Vol. I, paras. 2.141 ff., 2.179 ff.
[122] See this Note in NM, Vol. II, Annex 28; excerpts in CPO, Vol. II, Annex 18.
[123] NM, Vol. I, Chap. II, Sec. III, B, paras. 2.189-2.253.
[124] NM, Vol. I, para. 2.203 ff. See the Note No. 092 of Colombia, of 4 June 1969, in NM, Vol. II, Annex 28; excerpts of this Note in CPO, Vol. II, Annex 18, Colombia insisted on this point in a Note of 22 September 1969 (see the Note in NM, Vol. II, Annex 30).
[125] NM, Vol. I, paras. 2.212 ff. Text of the Note NM, Vol. II, Annex 29.

affirmation that since the 1928 to 1930 agreements she has always acted on the basis that this was the agreed maritime border[126].

2.40 The wearisome insistence upon linking the Sandinista Government, which came to power in 1979, to the objection against the "maritime settlement" that was supposedly agreed upon in 1930[127] does not coincide with the fact that it was Nicaragua, not Colombia, who upon exercising her jurisdiction over the continental shelf to the east of Meridian 82° in the nineteen sixties, awakened Colombian greed.

2.41 If the Court considers, as it indeed should, that the Protocol of Exchange of Ratifications of 1930 has nothing to do with the establishment of a maritime dividing line, then Article VI of the Pact is lost in irrelevance. Obviously this is not a matter resolved by a Treaty in force.

2.42 It must be pointed out in particular that the Colombian discourse regarding the meaning of Meridian 82° W as a maritime dividing line is as grandiloquent as it is empty, and merely reflects a circular and repetitive rhetoric belied in advance by the *Memorial* of Nicaragua, in which the rules regarding the interpretation of treaties supported by the jurisprudence of the Court have been correctly applied[128]. At the end of the day the Colombian allegations are reduced to an allusion made by a Nicaraguan senator to "the dividing line of the waters in dispute (*la línea divisoria de aguas en disputa*)" in the parliamentary debate ratifying the

[126] CPO, Vol. I, Introduction, paras. 15, 17, 40, 46; and paras. 1.29, 1.30, 1.34, 1.89, 1.91, 2.56, 4.7, 4.8.
[127] *Ibid,* paras. 1.93 ff.
[128] NM, Vol. I, paras. 2.225 ff.

1928 Treaty[129] and the mention of Meridian 82º in Colombian maps starting in 1931[130].

2.43 One sentence uttered by a senator in the throes of a parliamentary debate lacks the weight to alter the grammatical, logical and systematic interpretation of the Protocol of Exchange of Ratifications, or even to alter the sense of the *travaux préparatoires* that Colombia intends to exploit[131]. It is absolutely false that from the *travaux* -which, in any case, are a complementary means of interpretation[132]- it can be inferred that the Nicaraguan intention upon proposing a provision regarding Meridian 82º W was "to define a limit in the seas between the jurisdictions of both countries"[133]. The very declaration by the Minister of Foreign Affairs in the process of authorizing the 1928 Treaty in the Colombian Senate, which Colombia quotes, reveals most clearly how far removed the Colombian authorities were from the idea of drawing a maritime boundary with Nicaragua. "*This arrangement*", said the Minister,

> "…*forever consolidates the Republic's situation in the Archipelago of San Andrés and Providencia*, erasing any claim to the contrary, and perpetually recognizing the sovereignty and right of full domain of our country over that important section of the Republic"[134].

[129] CPO, Vol. I, paras. 1.61, 2.37, 2.48, 2.56, 2.63.
[130] *Ibid,* Introduction, paras. 46; 1.92, 1.115, 2.47, 2.56, 4.8.
[131] See, for instance, *ibid,* para. 2.56.
[132] Article 32 of the Vienna Convention on the Law of Treaties, of 23 May 1969. The Convention was ratified by Colombia on 10 April 1985. Nicaragua is not a party. However, she accepts that, with respect to the interpretation of treaties (Articles 31 and 32), the Convention codifies existing rules of customary international law (See NM*,* Vol. I, para. 2.3).
[133] CPO, Vol. I, paras. 2.49, 2.50, 2.53, 2.57.
[134] *Ibid,* para. 1.47.

2.44 In order to arrive at an authentic interpretation of the Treaty, an analysis must be made of all parliamentary records and public statements of the Nicaraguan Executive Branch regarding the inclusion of a reference to Meridian 82° W, as well as the negotiation with the Colombian Minister in Managua, which Colombia herself cites in her *Preliminary Objections*[135] and partially records in the annexes[136], as also the texts of the Decree authorizing the ratification of the Treaty that emanated from the Nicaraguan Congress[137] and the text of the 1930 Protocol of Exchange of Ratifications[138]. All of these confirm that its purpose was to establish "the geographical boundary between the archipelagos in dispute (*el límite geográfico entre los archipiélagos en disputa*)"[139], and not a delimitation of maritime areas. A delimitation of the high seas was something which was not imagined by any of them, and which in any case would have presupposed a qualitative alteration of the Treaty's purpose[140]. As Colombia cannot find documents to support her assertions she has no qualms in using arguments to distort phrases or statements that have another meaning[141].

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[135] CPO, Vol. I, paras. 1.52 ff.
[136] *Ibid,* Vol. II, Annexes 7-9, which reproduce excerpts of the Records of the Sessions XLVIII (Annex 7) and XLIX (Annex 8) of the Chamber of the Senate (4 and 5 March 1930), and of the Session LVIII (Annex 9) of the Chamber of Deputies (1 April 1930) of the Nicaraguan Congress. Texts in Spanish in *La Gaceta, Diario Oficial,* 1 May 1930, No. 94, pp. 746 ff., 7 May 1930, No. 98, pp. 777 ff., and 20 August 1930, No. 182, pp. 1457 ff. Excerpts from the Records of the Sessions of the Chamber of the Senate are also to be found in NM, Vol. II, Annex 80. Nicaragua reproduces now the records of the mentioned sessions of the Chambers in NWS, Vol. II, Annexes 24a, 24b, 25.
[137] CPO, Vol. I, para. 1.67, Vol. II, Annex 10.
[138] *Ibid,* para. 1.69. See the Instrument of Ratification and Protocol of Exchange of Ratifications of the *Bárcenas-Esguerra* Treaty in NM, Vol. II, Annex 19.
[139] CPO, Vol. I, para. 1.67; Vol. II, Annex 10.
[140] NM, Vol. I, paras. 2.191 ff.
[141] See, for example, CPO, Vol. I, Introduction, paras. 38 and 40.

2.45 The reference to Meridian 82° W came up in the debate held in the Nicaraguan Senate due to the perception that Colombia might later claim that all islands not recognised *eo nomine* as being part of Nicaragua (the Mangles Islands) form part of the Archipelago of San Andrés. At that time, in the words of senator Demetrio Cuadra "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"[142]. This concern was justified because the Mangles Islands had been claimed by Colombia as part of the Archipelago prior to the Bárcenas-Esguerra Treaty. Even now, in her *Preliminary Objections*, Colombia's references to the Archipelago of San Andrés sometimes do and sometimes do not include references to the Mangles Islands, depending upon the perspective she wishes to highlight[143].

2.46 The Colombian statement that it was the Nicaraguan Senate Study Committee that had the idea that to put an end to the dispute with Colombia, it was necessary to define the borders between the two countries, as regards both land and sea[144], lacks any basis in reality. The literal wording of the agreement reached by the Committee, and which Colombia records in the *Preliminary Objections*[145] (and reproduces partially in an annex[146]) is very explicit. The Committee notes that "The Treaty brings to an end the question pending between both States regarding the Archipelago of San Andrés and Providencia and the Nicaraguan Mosquitia", and recommends ratification "in the

[142] CPO, Vol. I, para. 1.64 and Vol. II, Annex 8.
[143] *Ibid,* Introduction, paras. 8; and paras. 1.1, 1.17, 1.19,1.23, 1.24, 1.26, 1.29-1.32, 1.34, 1.35, 1.38, 1.71, 2.26.
[144] *Ibid*, paras. 2.44 and 1.114.
[145] *Ibid*, para. 1.59.
[146] *Ibid*, Vol. II, Annex 7.

understanding that the Archipelago of San Andrés mentioned in the first clause of the Treaty does not extend west of Greenwich Meridian 82°..." The Minister of Foreign Affairs, Manuel Cordero Reyes, is clear in his explanations to the Senate: "the explanation does not reform the Treaty, because it only intends to indicate a limit between the archipelagos that have been reason for the dispute..."[147].

2.47 If, as Colombia maintains, "the determination of the 82° W Meridian as a maritime limit was a fundamental element of the agreement"[148], then it becomes inexplicable that the Colombian Congress did not hear of it. Constitutional and parliamentary practice in Colombia proves that Congress, as a matter of law, compulsorily intervened whenever an already authorized treaty was the object of modifications by the other party.

2.48 This was the case, for example, with the treaty signed by Colombia and the United States on 6 April 1914 "for purposes of solving their differences stemming from events occurring on the Isthmus of Panama in November 1903". Approved in Colombia by Law 14 of 9 June of that same year, the treaty was sent back to the Colombian Congress following a resolution of 20 April 1921 in which the United States Senate agreed to and recommended the ratification of the treaty, though with a number of modifications. The Colombian Congress approved the modified treaty through Law 56 of 22 December 1921, and the Protocol of Exchange of

[147] NM, Vol. II, Annex 80 and NWS, Vol. II, Annex 24b (Minutes of the Sessions of the Chamber of the Senate of Nicaragua, 4 and 5 March 1930. Text in Spanish: "la aclaración no reforma el tratado; pues sólo tenía por objeto señalar un límite entre los archipiélagos que habían sido motivo de la disputa...". Colombia translates as follows: "the clarification did not revise the Treaty, as its only purpose was to establish a boundary between the archipelagos which had been the reason for the dispute..." (CPO, Vol. II, Annex 8).
[148] *Ibid*, para. 2.47.

Ratifications included a declaration of conformity with the United States' demand of excluding a free right of passage for Colombian troops, materials and warships through the Panama Canal in case of war with any other country. This was accepted by the Colombian Senate, in the understanding ("en la inteligencia")[149] that Colombia would herself not be placed in a disadvantageous situation regarding any other nation in similar circumstances[150].

2.49 From1928 to1930 there were no "waters in dispute", and therefore there was no reason to conclude, as Colombia now claims, that maritime delimitation was necessary to satisfy the aim of the treaty, which was to settle all territorial disputes then pending between the parties[151].

2.50 The Explanatory Preamble (*Exposición de Motivos*) of the bill sent to the Colombian Senate on September 1928 submits for the Senate's consideration "a treaty concerning territorial issues (*tratado sobre cuestiones territoriales*)" between Colombia and Nicaragua, in the spirit of "putting an end to the territorial dispute pending between them (*poner término al litigio territorial entre ellas pendiente*)"[152], an expression

[149] In passing, "this understanding" added by the Colombian Senate on ratification was not considered to have altered the object of the treaty and the United States' Government saw no need for further action. Equally, the "understanding" added by the Nicaraguan Senate upon ratifying the 1928 Treaty, did not alter its object and no further action was taken by the Colombian Government.

[150] See in G. Cavalier, *Tratados de Colombia,* Vol. 2, 1911-1936, Kelly, Bogotá, 1984, pp. 85 ff.

[151] CPO, Vol. I, para. 2.41.

[152] República de Colombia, *Historia de las Leyes,* Vol. XI, 1928, Legislature. Edition ordered by the Chamber of Representatives and edited by its Secretary Fernando Restrepo Briceño, Bogotá, Imprenta Nacional, 1930, p. 523. NWS, Vol. II, Annex 1.

taken from the preamble of the Treaty[153] itself and which is reiterated in Law 93 of 17 November 1928 passed by the Colombian Congress[154].

2.51 What the dispute consisted of and what its solution was is reflected in Article I of the Treaty and was subsequently paraphrased in successive documents that formalized the parliamentary procedures leading to its ratification by Colombia. This arrangement, it is stated in the Explanatory Preamble of the aforementioned bill,

> "…definitively consolidates the status of the Republic in the Archipelago of San Andrés and Providencia … In exchange, Nicaraguan sovereignty in the Mosquitia … and the Mangles Islands… is recognised"[155].

2.52 The Senate Foreign Affairs Committee Report of 18 October 1928 expresses itself in very similar terms: "This Pact consolidates in perpetuity our sovereign dominion over the Archipelago" and "puts an end to a prolonged and annoying dispute" [156]. Likewise, the report issued by the equivalent Committee in the Chamber of Representatives declares that,

> "by means of this Treaty the Government of the Republic has wished to bring to a friendly conclusion the old dispute between the High Contracting parties regarding the sovereignty of the Mosquito Coast and the Mangles

[153] CPO, Vol. II, Annex 1.a.
[154] República de Colombia, *Historia de las Leyes*, Vol. XI, 1928 Legislature p. 534. See NWS, Vol. II, Annex 1.
[155] *Ibid*, p. 523. See NWS, Vol. II Annex 1.
[156] *Ibid*, p. 530. See NWS, Vol. II, Annex 1.

Islands, as well as the Nicaraguan pretensions over the Archipelago of San Andrés and Providence".[157].

2.53 Although Colombia dares make reference to "appurtenant maritime areas" of the islands, cays and banks of the Archipelago, as well as of the cays from Albuquerque to Serranilla and Bajo Nuevo[158], Colombian legislation -as well as international law- did not at the time recognize the notion of an archipelago as a legally relevant concept for areas of maritime sovereignty and jurisdiction. The same is true for maritime areas that have only developed over the past fifty years.

2.54 On this same point Colombia betrays herself when in the *Preliminary Objections* she recognizes that "no doubt, in 1930, Meridian 82º W could not be understood as a maritime boundary in the modern sense of the word"[159]. However, Colombia now claims that in 1930 a maritime boundary on the high seas was agreed upon "governing whatever changes there might have been since then in the law of the sea"[160]. Apparently the parties were unwittingly speculators who invested in the futures market. Colombia not only transforms the Bárcenas-Esguerra Treaty into a maritime delimitation treaty, but also pretends to interpret it with the contemporaneous International Law of the Sea. It is clear that at the very least there is a dispute between the Parties involving a conflict of interpretation of the Bárcenas-Esguerra Treaty and its subsequent instruments.

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[157] República de Colombia, *Historia de las Leyes*, Vol. XI, 1928 Legislature, p. 531. See NWS, Vol. II, Annex 1.
[158] CPO, Vol. I, paras. 2.26 and 1.89.
[159] *Ibid,* para. 2.53.
[160] *Ibid,* para. 2.55.

2.55 The fact that Colombian maps starting in 1931 mention Meridian 82° W is not of itself proof that the Meridian was being conceived as a maritime boundary and there is no legend or other indication in the maps to that effect. By logic, if the boundary of the archipelago for purposes of attribution of sovereignty over the islands and cays were at Meridian 82°, it would have been opportune to indicate this in the maps. As this is the extent of the information provided in these maps, it is perfectly understandable that Nicaragua issued no protest in relation to a fact that was in accordance with the stipulations of the treaty.

2.56 It must be stressed that the conventional Colombian maritime delimitation policy, as can be deduced from the copious data and annexes she proffers[161], began in the 1970s, in the wake of an evolution in the law of the sea characterized by the expansion of sovereignty and jurisdiction of coastal states. According to the sudden Colombian thesis[162], the 1928 Treaty with Nicaragua was a precocious and solitary treaty that for forty years silently provided, in a dormant state, for a maritime delimitation. However, the Bárcenas-Esguerra Treaty was termed a "treaty concerning territorial matters (*tratado sobre cuestiones territoriales*) at issue between Colombia and Nicaragua". Even *eo nomine* "boundary treaties (*tratados de límites*)" contemporary with the 1928 Bárcenas-Esguerra, such as, for example, the Colombia-Panama Treaty of 20 August 1924[163], had to be completed half a century later with the delimitation of maritime spaces[164].

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[161] CPO, Vol. I, para. 1.5 and in Vol. II, Annex 1.
[162] *Ibid,* paras. 2. 60 and 2. 61.
[163] See in G. Cavalier, *op. cit.*, pp. 102 ff.
[164] Treaty on the Delimitation of Marine and Submarine Areas and Related Matters between the Republic of Colombia and the Republic of Panama, 20 November 1976 (CPO*,* Vol. II, Annex 1, b).

2.57 The 1928 Treaty is not the finger with which Colombia can cover the blazing sun of controversy that separates the Parties. The reason why Nicaragua is now before the Court is precisely due to the failure of her various efforts to reach an agreement through bilateral negotiations. The Colombian claim that the Court should declare the controversy ended is equivalent to inviting it to ignore extant controversies that endanger peace. This would be a perverse result considering that the objective, mentioned on several occasions in the Pact, was that there be "a procedure of a mandatory nature, that concludes with a final resolution, in such a way that no controversy can be left without resolution within a reasonable time period". This is an option for which the participants at the Conference voted unanimously[165] and which is in all aspects in accordance with the provisions of the Charter of the Organization of American States, which in its Article 26 (current Article 27) provided that,

> "A special Treaty (the Pact) will establish adequate procedures for the pacific settlement of disputes and will determine the appropriate means for their application, so that no dispute between American States shall fail of definitive settlement within a reasonable period"[166].

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[165] See *Informe de la Subcomisión encargada del estudio de una fórmula fundamental sobre el Sistema Interamericano de Paz* (CB-381/C.III-Sub A-7), IX International Conference of American States, Proceedings and Documents / Novena Conferencia Internacional Americana, *Actas y Documentos,* Vol. IV, MRE, Bogotá, 1953, Comisión Tercera, Cuarta Sesión, pp. 79-80; 187. See NWS, Vol. II, Annex 18.

[166] The text in Spanish reads: "Un Tratado especial (el Pacto) establecerá los medios adecuados para resolver las controversias y determinará los procedimientos pertinentes a cada uno de los medios pacíficos, en forma de no dejar que ninguna controversia que surja entre los Estados Americanos pueda quedar sin solución definitiva dentro de un plazo razonable".

2.58 In a report on the outcome of the Conference presented to the Council of the Organization of American States by the Secretary-General on 3 November 1948 a reminder is issued that no system of peaceful settlement of disputes that does not include a final mandatory stage, will, in the future, be in harmony with the will of the American States as expressed in the Charter[167]. In a judgment handed down on 20 December 1988 *(Border and Transborder Armed Actions. Jurisdiction and Admissibility, Nicaragua v. Honduras)* the Court observed that it was "quite clear from the Pact that the purpose of the American States in drafting it was to reinforce their mutual commitments with regard to judicial settlement"[168].

2.59 It is interesting to recall that the Pact was called "Pact of Bogotá"[169] as a consequence of a Nicaraguan motion put forth at the conclusion of the IX International Conference of American States, intended to honour the role played by the host country[170]. At this event, in effect, Colombia distinguished herself by the special vigour with which she defended the mandatory judicial procedure as the definitive way in which to settle controversies[171].

2.60 To affirm the principle of definitive solution of controversies, only to immediately hamper it by means of an abusive interpretation of Article

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[167] Ninth International Conference of American States. *Annals of the Organization of American States*, Washington D.C. Department of Public Information, Pan-American Union, 1949-1958, Vol. I, N. 2, 1949 p. 48. See NWS, Vol. II, Annex 19.
[168] *I.C.J. Reports 1988*, p. 90, para. 46.
[169] Article LX of the American Treaty on Pacific Settlement ("Pact of Bogotá").
[170] IX International Conference of American States, Proceedings and Documents/Novena Conferencia Internacional Americana, *Actas y Documentos,* vol. IV, MRE, Bogotá, 1953, Comisión Tercera, Cuarta Sesión, pp. 204 ff. See NWS, Vol. II, Annex 18.
[171] Ninth International Conference of American States. *op. cit.* p. 50. See NWS, Vol. II, Annex 19.

VI runs counter to the object and purpose of the Pact. The Pact, which is at the service of a peaceful and final solution of controversies, should therefore not be interpreted in such a way that controversies that do not concern the review of treaties or challenges to *res judicata* remain unsettled. Furthermore, it must be recalled what was stated by the Peruvian delegate (who proposed what became Article VI of the Pact of Bogotá) in relation to the reference in this Article to "agreements or treaties in force". He indicated that most treaties provided their own mechanisms for settling disputes arising from the application or interpretation and these would not be affected by the Pact. Clearly the 1928 Treaty does not fall into this category.

2.61 As was opportunely pointed out by the Secretary-General, quoted earlier in the Report on the Results of the Bogotá Conference presented to the Council of the Organization of American States:

> "In the history of the law between nations the compulsory solution of controversies has been closely linked to the concept of sovereignty, for a simple reason, which is, the decision *not* to resolve a dispute by pacific means always leaves open the possibility of a resort to force. Weak nations have always championed arbitration and juridical settlement. The strong ones have hesitated to take a step that would amount to divesting themselves before the judges and the courts of all the prerogatives of their physical power, descending to the level of another nation in the presentation of the facts of the case and the juridical

> exposition of the circumstances that gave rise to the dispute."[172]

2.62 The Court must in any event reject the objections formulated by Colombia regarding its jurisdiction, but what it cannot in any case do, is to admit them at this preliminary stage of the proceedings. It is difficult to find a better example of an objection that "does not possess, in the circumstances of the case, an exclusively preliminary character"[173]. To pronounce itself in the terms required by Colombia, the Court must first consider the case on its merits, since the Court could only declare the controversy ended by deciding the merits of the case.

2.63 Although Colombia couches her reasoning in respect of the Pact of Bogotá in terms of a preliminary objection, what she really is seeking to achieve by asking the Court to uphold this objection is to rule in her favour on the merits of the matters Nicaragua has submitted to the Court. This concerns the disputes over the validity and termination of the 1928 Treaty and the interpretation of its provisions. In this connection, it is appropriate to quote an observation of the Court in its Judgment on preliminary objections in the *Lockerbie* cases:

> "50.The Court must therefore ascertain whether, in the present case, the United Kingdom's objection based on the Security Council decisions contains 'both preliminary aspects and other aspects relating to the merits' or not.

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[172] Ninth International Conference of American States. *op. cit.* p. 47. See NWS, Vol. II, Annex 19.

[173] *Rules of Court,* Art. 79, para. 9. See *Lockerbie Case* (*Prel. Objs*.), *I.C.J. Reports 1998*, pp. 26-29, paras. 46-51; *Cameroon v. Nigeria Case* (*Prel. Objs*.) *I.C.J. Reports 1998*, pp. 322-325, paras. 112-117.

That objection relates to many aspects of the dispute. By maintaining that Security Council resolutions 748 (1992) and 883 (1993) have rendered the Libyan claims without object, the United Kingdom seeks to obtain from the Court a decision not to proceed to judgment on the merits, which would immediately terminate the proceedings. However, by requesting such a decision, the United Kingdom is requesting, in reality, at least two others which the decision not to proceed to judgment on the merits would necessarily postulate: on the one hand a decision establishing that the rights claimed by Libya under the Montreal Convention are incompatible with its obligations under the Security Council resolutions; and, on the other hand, a decision that those obligations prevail over those rights by virtue of Articles 25 and 103 of the Charter.

The Court therefore has no doubt that Libya's rights on the merits would not only be affected by a decision, at this stage of the proceedings, not to proceed to judgment on the merits, but would constitute, in many respects, the very subject-matter of that decision. The objection raised by the United Kingdom on that point has the character of a defense on the merits. In the view of the Court, this objection does much more than 'touch[ing] upon subjects belonging to the merits of the case' (*Certain German Interests in Polish Upper Silesia, Jurisdiction*, Judgment *No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 15); it is 'inextricably interwoven' with the merits (*Barcelona*

Traction, Light and Power Company, Limited Preliminary Objections, Judgment, *I.C.J. Reports 1964*, p. 46).

The Court notes furthermore that the United Kingdom itself broached many substantive problems in its written and oral pleadings in this phase, and pointed out that those problems had been the subject of exhaustive exchanges before the Court; the United Kingdom Government thus implicitly acknowledged that the objection raised and the merits of the case were 'closely interconnected' (*Barcelona Traction, Light and Power Company, Limited*, Preliminary Objections, Judgment, *I.C.J. Reports 1964*, p. 46, and the reference to Pajzs, Csáky, Esterházy, Order of 23 May 1936, *P.C.I.J., Series A/B, No. 66*, p. 9).

If the Court were to rule on that objection, it would therefore inevitably be ruling on the merits; in relying on the provisions of Article 79 of the Rules of Court, the Respondent has set in motion a procedure the precise aim of which is to prevent the Court from so doing.

The Court concludes from the foregoing that the objection of the United Kingdom according to which the Libyan claims have been rendered without object does not have 'an exclusively preliminary character' within the meaning of that Article"[174].

[174] *I.C.J. Reports 1998*, pp. 28-29.

2.64 That the Colombian exception is intimately bound to the merits is confirmed by the very contents of the *Preliminary Objections* of Colombia of 21 July 2003. Although the Rules of Court declare rigorously that the presentation of facts and law in the various stages of the proceedings regarding an objection "shall be confined to those matters that are relevant to the objection"[175], Colombia devotes more than half of her document on *Preliminary Objections* responding to substantial aspects put forth in the *Memorial* of Nicaragua[176]. Her purpose appears obvious: to anticipate and trivialize the debate on the merits by way of her *Preliminary Objections*.

2.65 Under the title "Background of the Case", Chapter I of the *Preliminary Objections*, Colombia presents a heap of dogmatic affirmations lacking all documentary basis or proof[177]. Much the same can be said for Sections IV and VI of the Chapter titled "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'". Nicaragua manifests her most absolute reservation regarding Colombia's affirmations on the merits of the case and stands by that which she stated and proved in her *Memorial*.

2.66 According to Colombia, once the Court declares the controversy ended on the basis of Articles VI and XXXIV of the Pact of Bogotá, the declarations of acceptance of the Court's jurisdiction based on Article 36, paragraph 2 of the Statute, made by the Parties[178], and which Nicaragua also invoked in her Application[179], become ineffective.

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[175] *Rules of Court,* Art. 79, para. 7.
[176] CPO, Vol. I, Chap. I, pp. 23-72.
[177] *Ibid*, paras. 1.26, fn. 21, which fails to mention the source; 1.43, 1.83, 1.91.
[178] CPO, Vol. I., Introduction, paras. 50, 51; 3.2-3.11, 3.50, 4.15.
[179] *Application of Nicaragua*, para. 1; NM, Vol. I, para. 3.

2.67 However, it cannot be admitted that the fact that the Pact "governs" the jurisdiction, destroys the value of the Optional Clause declarations as an independent basis of jurisdiction. The declarations have an intrinsic value in and of themselves, and their operation is not predetermined by other titles of jurisdiction. This was stated by the Court itself in the case concerning *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988, page 69*, in which the Court stated that the Pact's provisions were independent of the declarations *ex* Article 36, paragraph 2, of the Statute[180], an autonomy that, logically, also runs the other way[181]. The parties to the Pact of Bogotá have neither explicitly nor implicitly agreed upon anything different. According to the Pact, if the situation foreseen in Article VI should occur, the Court in declaring itself without jurisdiction is to declare the controversy ended (Article XXXIV), but the latter must be understood within the framework of the Pact itself: the controversy is ended only as concerns the possibility of invoking the Pact as a basis of jurisdiction.

[180] *I.C.J. Reports 1988*, pp. 84-88, paras. 32-41, in particular in paras. 36 and 41. See also S. Rosenne, 1997, II, pp. 670-677.
[181] See below, paras. 4.15-4.17.

CHAPTER III
PRELIMINARY OBJECTIONS RELATED TO THE OPTIONAL CLAUSE

3.1 In relation to the Optional Clause jurisdiction Colombia presents several preliminary objections. The presentation of these objections is flawed and a certain amount of construction is necessary.

I. First Preliminary Objection
Colombia contends that 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

3.2 This objection rests upon the premise that the Pact of Bogotá provisions dominate in all respects and for all purposes. This premise has been challenged in Chapter II above. It has also been pointed out that the wording of Article VI of the Pact of Bogotá involves the determination of issues which are not themselves preliminary in character.

3.3 This objection also involves a similarly awkward reading of Article XXXIV of the Pact of Bogotá.

II. Second Preliminary Objection
There Is No Jurisdiction Under The Optional Clause Because Colombia's Declaration Was Not in Force on The Date of The Filing of Nicaragua's Application

3.4 Colombia purported to terminate her Declaration dated 30 October 1937 'with immediate effect' on 5 December 2001. The Declaration is 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."

3.5 The Declaration has no temporal clause and Colombia asserts that such a declaration may be terminated without notice: *Preliminary Objections*, Volume I, pages 114 to 115.

3.6 The jurisprudence of the Court decisively contradicts this assertion. In its Judgment in the *Nicaragua* case the Court made the following determination:

> "The maintenance in force of the United States Declaration for six months after notice of termination is a positive undertaking, flowing from the time-limit clause, but the Nicaraguan Declaration contains no express restriction at

all. It is therefore clear that the United States is not in a position to invoke reciprocity as a basis for its action in making the 1984 notification which purported to modify the content of the 1946 Declaration. On the contrary it is Nicaragua that can invoke the six months' notice against the United States- not of course on the basis of reciprocity but because it is an undertaking which is an integral part of the instrument that contains it.

63. Moreover, since the United States purported to act on 6 April 1984 in such a way as to modify its 1946 Declaration with sufficiently immediate effect to bar an Application filed on 9 April 1984, it would be necessary, if reciprocity is to be relied on, for the Nicaraguan Declaration to be terminable with immediate effect. *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 withdrawal from or termination of treaties that contain no provision regarding the duration of their validity.* Since Nicaragua has in fact not manifested any intention to withdraw its own declaration, the question of what reasonable period of notice would legally be required does not need to be further examined: it need only be observed that from 6 to 9 April would not amount to a 'reasonable time'." (emphasis supplied)[182]

[182] *I.C.J. Reports 1984*, pp. 419-420.

3.7 The decision of the Court was eleven votes to five (paragraph 1(a) of the Dispositif). Of the five negative votes only three Judges disagreed with the reasoning set out in the above passage: see the Dissenting Opinions of Judges Oda, Jennings and Schwebel.

3.8 The jurisprudence of the Court has confirmed the requirement of a reasonable time for withdrawal from or termination of treaties which contain no provision regarding duration. Thus in the Preliminary Objections phase of the *Cameroon v Nigeria* case, the Court referred to this reasoning in these passages:

> "30. The Court notes that the régime for depositing and transmitting declarations of acceptance of compulsory jurisdiction laid down in Article 36, paragraph 4, of the Statute of the Court is distinct from the regime envisaged for treaties by the Vienna Convention. Thus the provisions of that Convention may only be applied to declarations by analogy *(Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 420, para. 63).
>
> […]
>
> 32. Nigeria maintains however that, in any event, Cameroon could not file an application before the Court without allowing a reasonable period to elapse 'as would … have enabled the Secretary-General to take the action required of him in relation to Cameroon's Declaration of 3 March 1994'. Compliance with that time period is

essential, the more so because, according to Nigeria, the Court, in its judgment of 26 November 1984 in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, required a reasonable time for the withdrawal of declarations under the Optional Clause.

33. The Court, in the above Judgment, noted that the United States had, in 1984, deposited with the Secretary-General, three days before the filing of Nicaragua's Application, a notification limiting the scope of its Declaration of acceptance of the Court's jurisdiction. The Court noted that the Declaration contained a clause requiring six months' notice of termination. It considered that that condition should be complied with in cases of either termination or modification of the Declaration, and concluded that the 1984 notification of modification could not, with immediate effect, override the obligation entered into by the United States beforehand (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America*), *Jurisdiction and Admissibility*, *I.C.J. Reports 1984*, p. 421, para. 65).

The Court noted, moreover, in relation to Nicaragua's Declaration upon which the United States was relying on the grounds of reciprocity, that, in any event,

> '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 required a reasonable time for withdrawal from or termination of treaties that contain no provision regarding the duration of their validity' (*ibid*, p. 420, para. 63).

The Court added: "the question of what reasonable period of notice would legally be required does not need to be further examined: it need only be observed that [three days] would not amount to a 'reasonable time'." (*ibid*)

34. The Court considers that the foregoing conclusion in respect of the withdrawal of declarations under the Optional Clause is not applicable to the deposit of those declarations. Withdrawal ends existing consensual bonds, while deposit establishes such bonds. The effect of withdrawal is therefore purely and simply to deprive other States which have already accepted the jurisdiction of the Court of the right they had to bring proceedings before it against the withdrawing State. In contrast, the deposit of a declaration does not deprive those States of any accrued right. Accordingly no time period is required for the establishment of a consensual bond following such a period.

35. The Court notes moreover that to require a reasonable time to elapse before a declaration can take effect would be to introduce an element of uncertainty into the operation of the Optional Clause system. As set out in paragraph 26 above, in the case concerning Right of Passage over Indian Territory, the Court had considered that it could not create

such uncertainty. The conclusions it had reached then remain valid and apply all the more since the growth in the number of States party to the Statute and the intensification of inter-State relations since 1957 have increased the possibilities of legal disputes capable of being submitted to the Court. The Court cannot introduce into the Optional Clause an additional time requirement which is not there."[183]

3.9 This reasoning was not the subject of criticism in the Separate and Dissenting Opinions which were written.

3.10 It is to be emphasized that in both these cases the issues of good faith, and the requirement of reasonable time, had been the object of full argument.

3.11 Faced with this jurisprudence Colombia, not very surprisingly, is forced to resort to a series of essays in reductionism and simplistic conjuring tricks. These will now be reviewed.

(a) *It is stated that the holding in the Nicaragua case was not unanimous: there were three Judges holding a different view* (see the *Preliminary Objections*, Vol. I, p. 116, para. 3.17). However, in response to this undoubted fact, it must be pointed out that thirteen Judges either supported the majority position or omitted to single out the point for criticism. In the *Cameroon v Nigeria* case the reasoning in question was adopted by all seventeen Judges.

[183] *I.C.J. Reports 1998*, pp. 293, 294-296.

(b) *The opinion of Sir Humphrey Waldock as Special Rapporteur of the International Law Commission*.

Colombia states that:

> "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"[184]

This refers to Waldock's Second Report on the Law of Treaties: *Yearbook*, International Law Commission, 1963, Volume II, page 68.

3.12 In response it must be pointed out that the Reports of the International Law Commission to the General Assembly are not legislative in character, and, still less, the Reports of the Special Rapporteurs, however distinguished. The fact is that draft Article 17 in Waldock's Second Report on the Law of Treaties of 1963 did not survive. In the Report of the Commission to the General Assembly in 1966 the counterpart provision has a substantially different content, as follows:

> "Article 53 Denunciation of a treaty containing no provision regarding termination:
>
> 1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to

[184] CPO, Vol. I, p. 116, para. 3.17.

denunciation or withdrawal unless it is established that the parties intended to admit the possibility of denunciation or withdrawal.

2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1 of this article."

3.13 The Commentary to the draft Article makes no reference to treaties of arbitration, conciliation or judicial settlement, and no reference to the Optional Clause. In any event the Commentary includes two paragraphs of relevance for present purposes:

"(5) The article states that a treaty not making any provision for its termination or for denunciation or withdrawal is not subject for denunciation or withdrawal unless 'it is established that the parties intended to admit the possibility of denunciation or withdrawal'. Under this rule, the character of the treaty is only one of the elements to be taken into account, and a right of denunciation or withdrawal will not be implied unless it appears from the general circumstances of the case that the parties intended to allow the possibility of unilateral denunciation or withdrawal.

(6) The Commission considered it essential that any implied right to denounce or withdraw from a treaty should be subject to the giving of a reasonable period of notice. A period of six months' notice is sometimes found in termination clauses, but this is usually where the treaty is of the renewable type and is open to denunciation by a notice

given before or at the time of renewal. Where the treaty is to continue indefinitely subject to a right of denunciation, the period of notice is more usually twelve months, though admittedly in some cases no period of notice is required. In formulating a general rule, the Commission considered it to be desirable to lay down a longer rather than a shorter period in order to give adequate protection to the interests of the other parties to the treaty. Accordingly, it preferred in paragraph 2 to specify that not less than twelve months' notice must be given of an intention to denounce or withdraw from a treaty under the present article."[185]

3.14 In these two paragraphs the Commission shows a strong disinclination to favour unilateral denunciation or withdrawal.

3.15 The provision eventually adopted (as Article 56) in the Vienna Convention on the Law of Treaties is as follows:

> " Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal,
>
> 1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:
>
> (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or

[185] *Yearbook, I.L.C.*, 1966, II, 251.

(b) a right of denunciation or withdrawal may be implied by the nature of the treaty.

2. A party shall give not less than twelve months' prior notice of its intention to denounce or withdraw from a treaty under paragraph 1."

3.16 The Government of Colombia seeks to rely upon the opinion of Sir Humphrey Waldock as expressed in his Report in 1963. This reliance is unrealistic in several distinct respects. First, the International Law Commission functions collectively and the Special Rapporteurs are responsive to the collegiate will. Secondly, as appears from the materials quoted above, the final products of the work of the Commission did not refer to the Optional Clause and showed little favour toward denunciation without notice.

(c) *General reference is made to publications by 'students of the Court's procedures and jurisprudence'* (see *Preliminary Objections*, Vol. I, p. 116).

3.17 The references appear in a long footnote but no attempt is made to examine the passages supposed to be relevant. To give some illustrations. There is a reference to Professor Greig's major article in the *British Year Book*, Volume 62 (1994), page 119, but no specific passage is indicated. However, the point is that in general Professor Greig is not dissatisfied with the Court's reasoning on the nature of declarations. The comments by Professor Orrego Vicuña on the precise issue of reasonable notice are moderate and the writer avoids dogmatism: see Oda, *Liber Amicorum,* 2002, Volume I, page 463 at pages 475 to 476.

(d) *Colombia contends that the Court's references to a 'reasonable time' were* obiter dicta (*Preliminary Objections*, Vol. I, p. 117)

3.18 The adoption of this mode of defence on the part of Colombia is conspicuously weak. The passages relating to the question of 'reasonable time' constitute a major formulation concerning the legal character of declarations and the legal consequences which follow. The passages were relied upon by the full Court in the *Cameroon v. Nigeria* case precisely because of their importance. To seek to minimize the importance of the Court's reasoning by resort to the Common Law term *obiter dicta* is maladroit and inappropriate to an effective discussion of the issues of jurisdiction.

3.19 Professor Orrego Vicuña states that the 'remarks' about termination 'were considered *obiter dicta*' and cites Professor Merrills. In fact Merrills uses carefully chosen language. What he actually says is as follows:

> "In view of the Court's ruling on the issue of reciprocity, its discussion of the hypothetical termination of Nicaragua's declaration is strictly speaking no more than *obiter dicta*. *It is nevertheless clearly of some significance*. The conclusion that declarations which are silent as to termination can be terminated on reasonable notice, though controversial, avoids the uncertainties of *rebus sic stantibus*, while at the same time emphasizing the concept of good faith and giving some meaning to the idea of an indefinite commitment. It would no doubt have been useful if more could have been said on the question of what constitutes a 'reasonable time', but to expect this in a case

where the point was not in issue would hardly be realistic. For the thirteen States with declarations of indefinite duration the precise scope of their commitment is therefore still a matter of uncertainty."[186] (emphasis supplied)

3.20 In any event, in the light of the interactive nature of the Court's reasoning it is far from clear that 'the Court's ruling on the issue of reciprocity' justifies the description of the reasoning on the issue of termination as '*obiter dicta*'. The Court's finding on the character of Nicaragua's Declaration in this context was a response to a significant element in the United States argument. The reference to the character of the Declaration was not 'hypothetical' in any proper sense, but was a necessary part of the analysis.

3.21 In this connection the relevant passages of the Judgment in 1984 reveal the weakness in the analysis of Professor Merrills. What the Court said was this:

> "61. The most important question relating to the effect of the 1984 notification is whether the United States was free to disregard the clause of six months' notice which, freely and by its own choice, it had appended to its 1946 Declaration. In so doing the United States entered into an obligation which is binding upon it vis-à-vis other States parties to the Optional-Clause system. Although the United States retained the right to modify the contents of the 1946 Declaration or to terminate it, a power which is inherent in any unilateral act of a State, it has, nevertheless assumed an inescapable obligation towards other States accepting the

[186] *British Year Book*, Vol. 64, p. 197 at pp. 208-209.

Optional Clause, by stating formally and solemnly that any such change should take effect only after six months have elapsed as from the date of notice.

62. The United States has argued that the Nicaraguan 1929 Declaration, being of undefined duration, is liable to immediate termination, without previous notice, and that therefore Nicaragua has not accepted "the same obligation" as itself for the purposes of Article 36, paragraph 2, and consequently may not rely on the six months' notice proviso against the United States. The Court does not however consider that this argument entitles the United States validly to act in non-application of the time-limit proviso included in the 1946 Declaration. The notion of reciprocity is concerned with the scope and substance of the commitments entered into, including reservations, and not with the formal conditions of their creation, duration or extinction. It appears clearly that reciprocity cannot be invoked in order to excuse departure from the terms of a State's own declaration, whatever its scope, limitations or conditions …

The maintenance in force of the United States Declaration for six months after notice of termination is a positive undertaking, flowing from the time-limit clause but the Nicaraguan Declaration contains no express restriction at all. It is therefore clear that the United States is not in a position to invoke reciprocity as a basis for its action in making the 1984 notification which purported to modify the content of the 1946 Declaration. On the contrary it is

> Nicaragua that can invoke the six months' notice against the United States- not of course on the basis of reciprocity, but because it is an undertaking which is an integral part of the instrument that contains it.
>
> 63. Moreover, since the United States purported to act on 6 April 1984 in such a way as to modify its 1946 Declaration with sufficiently immediate effect to bar an Application filed on 9 April 1984, it would be necessary, if reciprocity is to be relied on, for the Nicaraguan Declaration to be terminable with immediate effect. 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 withdrawal from or termination of treaties that contain no provision regarding the duration of their validity. Since Nicaragua has in fact not manifested any intention to withdraw its own declaration , the question of what reasonable period of notice would legally be required does not need to be further examined: it need only be observed that from 6 to 9 April would not amount to a 'reasonable time'."[187]

3.22 The reasoning from paragraph 61 through to paragraph 63 focuses upon the question of the character of the relationship between the States parties to the Optional-Clause system as consisting of the unilateral acts or as creating some other type of relationship. This issue was central to the Court's reasoning.

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[187] *I.C.J. Reports 1984*, pp. 419-420.

3.23 Before leaving this question one other matter calls for attention. The reasoning of the Court, with its reference to the analogy with the law of treaties, is by no means novel or radical in character. It is unfortunate that the *Preliminary Objections* gives no picture of the antecedents. Thus, the Permanent Court recognised the contractual nature of the obligation in the *Electricity Company of Sofia* case: (1938), *Series A/B, No. 74* at page 22. Moreover, Waldock was entirely comfortable with this view and in the nineteen-fifties he analysed the *Anglo-Iranian Oil Company* case in the following terms:

> "In the *Anglo-Iranian Oil Company* case the new Court had occasion to consider the legal nature of declarations under the Optional Clause in connexion with the interpretation of the Iranian declaration. Iran contended that the declarations do not set up a contractual relation between the States concerned but that, to the extent to which they coincide, they create obligations for each State *vis-à-vis* the Court. The United Kingdom, on the other hand, contended that any given pair of declarations sets up an essentially contractual relation between the states concerned. The Court, in dealing with a United Kingdom argument that the Iranian declaration must, if possible, be so interpreted as to give meaning to all the words, commented:
>
> > 'It may be said that this principle should in general be applied when interpreting the text of a treaty. But the text of the Iranian Declaration is not a treaty text resulting from negotiations between two or more States. It is the result of unilateral drafting by the Government of Iran, which appears to have

> shown a particular degree of caution when drafting the text of the Declaration. It appears to have inserted, *ex abundanti cautela*, words which, strictly speaking, may seem to have been superfluous.'
>
> It will be noted that the Court, while emphasizing the unilateral *drafting* of the instrument, did not deny its legal character as a *treaty text*. Nevertheless, it does seem from this passage and from the passage from the *Phosphates in Morocco* judgment which has already been cited, that for the purpose of interpreting their terms the unilateral original of the individual declarations will be taken into account."[188]

3.24 Waldock's conclusions on 'the nature of the juridical bond under the Optional Clause' include the following striking passage:

> "The origins and the treaty character of the Optional Clause, the role of the Secretary-General of the United Nations in receiving and registering notices of declarations under the Optional Clause, the practice of States in making their declarations, and the jurisprudence of the Court, it is considered, leave no real doubt of the consensual nature of the juridical bond established between States by their declarations. This is not to deny the unilateral character of the act by which a State gives its adherence to the obligations of the Optional Clause. The settlement of the terms of its declaration is not a matter for negotiation with

[188] *British Year Book*, Vol. 32 (1955-1956) p. 244 at pp. 252-253.

other States but is entirely within its own discretion so long as it keeps within the framework of the Statute. The unilateral making of the instrument, the Court has said, may affect the application to it of the ordinary principles of treaty interpretation. But the making of the instrument is a unilateral act only in the same sense that adhering to a pre-existing treaty or ratifying a previously negotiated treaty text is a unilateral act. Judge Alvarez, indeed, termed a declaration under the Optional Clause a 'multilateral act of a special character'. It is multilateral in the sense that it results in relations with a number of States; but the relation between any given pair of States which have made declarations is not, it is believed, precisely of the same character as that which exists between the parties to a multilateral treaty. The relation between two States under the Optional Clause appears to be more a bilateral than a multilateral relation."[189]

3.25 These antecedents provide the analytical milieu in which the issue of termination was considered in 1984. In this milieu the character of the obligation was central to the legal analysis. In the result it can be seen that the *obiter dictum* approach is superficial and involves a curious insistence on focusing upon the periphery of things rather than the centre.

[189] *Ibid*, p. 254.

(e) *Colombia contends that Nicaragua and Colombia have in practice treated their declarations as terminable on notice* (*Preliminary Objections*, Vol. I, p. 118).

3.26 The legal effect of the practice invoked by Colombia remains obscure: in particular, there is no evidence that the intention in each case was to terminate, or amend, the pertinent declaration with immediate effect.

3.27 In the first place the test is the intention of the respective States: see the *Anglo-Iranian Oil Company* case (*Preliminary Objections*), *I.C.J. Reports 1952*, pages 103 to 107.

3.28 With respect to the Declaration filed by Colombia on 30 October 1937 the text does not state that the instrument may be terminated on notice. Moreover, when the Declaration was terminated on 5 December 2001 the Colombian Government made no statement relating to the question whether the termination had immediate effect or otherwise.

3.29 Similarly, when Nicaragua notified the Secretary-General of the inclusion of a reservation in the Nicaraguan Declaration of 1929, the notification (dated 7 November 2001) contained no reference to the question of its having immediate effect: see the *Preliminary Objections*, Volume II, Annexes 23 and 24.

3.30 Finally, when Colombia purported to terminate her 1937 Declaration on 5 December 2001, no statement was made clarifying the legal position. As noted already, the 1937 Declaration makes no reference to the modalities of termination.

3.31 The practice invoked by Colombia does not produce sufficient evidence of the *intention* lying behind these few episodes. In the circumstances

there is no proof of a pattern of clear and consistent conduct which could, in law, amount to a practice binding upon Nicaragua. And, in particular, there is no proof that Nicaragua has waived the benefit of the analysis provided by the Court in the Judgment of 1984, that is to say, the requirement of a reasonable time for withdrawal from or termination of declarations that contain no provision regarding the termination of their validity.

3.32 In any event, there is recent *cogent* evidence that in her practice Nicaragua does not accept that declarations are subject to modification or termination on notice. Thus in the Agreement concluded between Costa Rica and Nicaragua on 26 September 2002 paragraph 3 provides as follows:

> "The Government of Nicaragua commits itself to maintain the legal situation as it exists at present for a period of three years starting this day as concerns its declaration of the acceptance of the jurisdiction of the International Court of Justice. For its part, and during the same period, the Government of Costa Rica commits itself to not commence any international action or claim against Nicaragua before the said Court, nor at any other international entity regarding any matter or claim regarding the Treaties or Agreements presently in force between the two countries."[190]

3.33 The background to this provision is the belief on the part of Costa Rica that the reservation made by Nicaragua on 7 November 2001 would come into effect one year later. Thus, in September 2002 the Costa Rican

[190] NWS, Vol. II, Annex 28.

Government faced the apparent difficulty that, if litigation was not initiated against Nicaragua before 1 November 2002, then the reservation would come into effect and any litigation after that date would place Costa Rica at a disadvantage. In the result the intention of the paragraph was to freeze the situation of the Nicaraguan Declaration as it was on the day of signature.

3.34 The Agreement with Costa Rica was concluded on behalf of Nicaragua by Mr. Caldera, the Minister of Foreign Affairs at the material time. The motivation lying behind paragraph 3 of the Agreement with Costa Rica is described clearly in the Affidavit of Mr. Caldera[191]

3.35 It is abundantly clear that in the circumstances of the present case, the Government of Colombia has by its conduct created an obligation not to terminate its acceptance of jurisdiction without reasonable notice. This question will be examined further in Section IV, below.

III. Third Preliminary Objection
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

3.36 Nicaragua has shown in the above Sections of the present Chapter that the 1937 Colombian Optional Declaration was still in force when Nicaragua filed her Application. Probably conscious of this fact, Colombia asserts that,

[191] NWS, Vol. II, Annex 23.

> "[i]f contrary to the position of Colombia, the Court were to find that both the Declaration 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 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."[192]

3.37 The objection of Colombia in this respect is based on an erroneous interpretation of the case-law of the Court and on a complete distortion of the subject matter of the dispute.

A. THE SUBJECT MATTER OF THE DISPUTE

3.38 The core of the dispute relates to the maritime delimitation between the Parties. This is clearly so in view of both Nicaragua's Application and *Memorial*. And, as the Permanent Court made clear in the case concerning the *Prince von Pless Administration (Preliminary Objection)*: "under Article 40 of the Statute, it is the Application which sets out the subject of the dispute."[193]

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[192] CPO, Vol. I, para. 3.30.

[193] Order, 4 February 1933, *Series A/B, N° 52*, p. 14; see also I.C.J., Judgment, 21 March 1959, *Interhandel (Preliminary Objections), I.C.J. Reports 1957*, p. 21.

3.39 For its part, the *Memorial* "may elucidate the terms of the Application" provided "it does not go beyond the limits as set out" in the Application[194].

3.40 In her Application of 6 December 2001, Nicaragua indicated that:

> "the Court is asked 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 keys, and also over the Roncador, Serrana, Serranilla and Quitasueño keys (in so far 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" (para. 8).

3.41 The drafting of these requests might, if taken in isolation, have been slightly clumsy in that it seems to indicate that the "first" request made to the Court is to adjudicate on the title over the islands and cays and,

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[194] *Ibid*, see also, e.g.: P.C.I.J., Judgment, 15 June 1939, Société commerciale de Belgique, *Series A/B, N° 78*, p. 173; I.C.J., Judgment, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua, I.C.J. Reports 1984*, p. 427, para. 80; Judgment, 26 June 1992, *Certain Phosphates Land in Nauru, I.C.J. Reports 1992*, p. 267, para. 69.

"second" to delimit the respective maritime areas of the Parties. But, in view of both the context in the Application itself and the clarifications made in the *Memorial*, it will become apparent:

- that the subject-matter of the dispute is the determination of a single maritime boundary between the areas of continental shelf and exclusive economic zones appertaining respectively to Colombia and Nicaragua; and

- that, to this effect, the Court cannot but decide on the sovereignty over the islands and cays mentioned in the Application.

3.42 As is indicated in the paragraph of the Application immediately following the one quoted above:

> "…the principal purpose of this Application is to obtain declarations concerning title and *the determination of maritime boundaries*…" (para. 9-emphasis added).

3.43 Moreover, as made clear in paragraph 3 of the Application:

> "The questions of the title indicated above have a particular significance in so far as the definitive settlement of such issues of title must constitute a condition precedent to the complete and definitive determination of the maritime areas appertaining to Nicaragua and for any eventual delimitation that might be necessary with those that could appertain to Colombia".

3.44 There is therefore no doubt that the issue of title is not the subject-matter of the dispute but a necessary prerequisite, "a condition precedent to the

complete and definitive determination of the maritime areas" (para. 3), which can only be made "in the light of the determinations concerning title" (para. 8).

3.45 This is further confirmed by the account of the relevant facts in the Application, which makes extremely clear that Nicaragua bases herself on the development of general international law since 1945 which,

> "has developed in such a way as to encompass sovereign rights to explore and exploit the resources of the continental shelf together with rights to an exclusive economic zone 200 miles in breadth. The provisions of the 1982 Law of the Sea Convention have recognized and confirmed these legal interests of coastal States" (para. 3).

3.46 The Application further explains that the claims by Colombia over huge maritime spaces appertaining to Nicaragua seriously imperils the livelihood of the Nicaraguan people and gave rise to serious naval incidents in the 1990s.

3.47 Similarly, the Application explains that the negotiations between the two countries definitely failed in 1995 (para. 6) and that the launching factor for the lodging of Nicaragua's Application was the ratification by Colombia, in 1999, of the Treaty signed in 1986 with Honduras, which violates her territorial sovereignty and rights (para. 7).

3.48 In her *Memorial*, Nicaragua has further stressed the links between the claim of sovereignty over the Archipelago of San Andrés and other relevant islets and cays on the one hand, and the maritime delimitation on the other hand. As explained in paragraph 3.1:

> "The present part of the *Memorial* will assess the delimitation of maritime boundaries between Nicaragua and Colombia, in the light of the outcome of the determination of sovereignty to be made by the Court. A number of possibilities can be envisaged in this respect. The Court can make a determination that all of the San Andrés and Providencia group is Nicaraguan or Colombian. Apart from that, the Court may also determine that the islands referred to in Article I, para.1, of the 1928 Treaty are Colombian and that the other features not included in this Treaty are Nicaraguan. The fact that the outcome of the territorial dispute is not known makes it necessary to address these and other possible outcomes and this will be done in the relevant section below".

3.49 In the subsequent Sections of her *Memorial*, Nicaragua argues her case on the basis of the applicable rules and principles of the law of the sea, taking into account the relevant legislation and claims of the Parties since the late 1950s[195]. Then, Nicaragua examines the maritime delimitation in the region of San Andrés

- "on the basis of Nicaraguan title"[196];
- then "on the basis of the alleged Colombian title"[197].

3.50 Nicaragua then goes on to discuss the impact of "[t]he presence of small cays in the maritime delimitation areas"[198]. Here again, Nicaragua

[195] NM, Vol. I, paras. 3.25-3.36.
[196] *Ibid*, paras. 3.93-3.96.
[197] *Ibid,* paras. 3.97-3.113.
[198] *Ibid,* paras. 3.114-3.136.

maintains that she has sovereignty over these maritime features but she adds:

> "However, it cannot be excluded that the Court reaches different conclusions in respect of this issue. The present section will address the role of the cays in the maritime delimitation between Nicaragua and Colombia, taking into account the different outcomes that are possible in respect of the question of sovereignty"[199].

3.51 Nicaragua concludes this part of her *Memorial* by explaining that her assessment of the coasts defining the delimitation area "is not substantially affected by the question whether San Andrés and its dependencies are determined to be Nicaraguan or Colombian"[200]. However, she envisages separately the hypothesis where the Court would find that either Nicaragua or Colombia has sovereignty in respect of the islands of San Andrés and Providencia[201] and over various cays or other maritime features[202].

3.52 This is confirmed in the Submissions which make a series of distinctions in matters of maritime delimitation depending:

- on whether or not the Bárcenas-Esguerra Treaty has been validly concluded and is still in force; and

- on whether Nicaragua or Colombia has sovereignty over the islands of San Andrés and Providencia on the one hand, and the cays on the other hand (NM, Vol. I, p. 266).

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[199] NM, Vol. I, paras. 3.122 and 3.126.
[200] *Ibid*, para. 3.139.
[201] *Ibid*, para. 3.143.
[202] *Ibid*, paras. 3.144-3.147.

3.53 This all shows, without the shadow of a doubt that:

a) the very subject-matter of the present dispute is the maritime delimitation of the respective maritime areas belonging either to Colombia or to Nicaragua; and
b) this crucial issue cannot be decided without determining first which of the two States has sovereignty over the islands and cays lying in the relevant area.

B. THE RELEVANT RULES APPLICABLE TO THE JURISDICTION OF THE COURT'S *RATIONE TEMPORIS*

3.54 The relevant rules applicable to the jurisdiction of the Court *ratione temporis* must be checked against this background -of which Colombia takes no account when she endeavours to describe the case-law of the Court and its application to the present case.

3.55 Colombia attaches great importance to the Judgment of the Permanent Court of 14 June 1938 on preliminary objections in the case of *Phosphates in Morocco* between Italy and France (*Series A/B, N° 74*) to which it devotes six full pages of her *Preliminary Objections*[203]. Nicaragua does not question that that Judgment is relevant in several respects for the present case. However, Colombia's interpretation of that decision is biased from several points of view and Colombia ignores the crucial point that the facts of that case were different from those of the present case in various fundamental aspects.

[203] CPO, Vol. I, paras. 3.34-3.39.

3.56 Nicaragua wishes to make clear straightaway that she does not deny that the jurisdiction of the Court "only exists within the limits within which it has been accepted"[204]. This means that she fully accepts that the Colombian Optional Declaration "applies only to disputes arising out of facts subsequent to 6 January 1932"[205]. Therefore,

> "the only … facts falling under the compulsory jurisdiction are those which are subsequent to [6 January 1932] and which regard to which the dispute arose, that is to say, those which must be considered as being the source of the dispute" ("*c'est-à-dire ceux qui doivent être considérés comme générateurs du différend*" in the French authoritative text)[206].

3.57 However, it must be noted that:

> "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, just as the situations or facts with regard to which the dispute arose must be decided in regard to each specific case"[207].

3.58 It is precisely in this respect that the present case is entirely different from that of the *Phosphates in Morocco*.

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[204] Judgment of 1938, p. 23.
[205] *Ibid*, see also: I.C.J., Judgment, 4 December 1998, *Fisheries Jurisdiction (Preliminary Objections), I.C.J. Reports* 1998, p. 453, para. 44 or, Order, 2 June 1999, *Legality of Use of Force (Yugoslavia v. Belgium)(Interim Measures), I.C.J. Reports 1999*, p. 135, para. 30.
[206] *Series A/B, N° 74*, p. 23.
[207] *Ibid*, p. 24.

3.59 In that case, the Italian Government had presented the subject of the dispute "under two separate aspects: a general aspect, … which is concerned with what that Government describes as the 'monopolization of the Moroccan phosphates'", and a 'more limited aspect' relating "to the decision of January 8th, 1925, in which the Department of Mines rejected M. Tassara's claim[208], and to the alleged denial of justice to him and his successors"[209]. In both respects, the Court found that the dispute "did not arise with regard to situations of facts subsequent to" the "critical date" fixed in the French Optional Declaration[210].

3.60 These findings were obvious:

- regarding the "general aspect" of the dispute, the Italian Government had consistently presented the "monopolization of the Moroccan phosphates" "as a régime instituted by … dahirs of 1920"[211]; and

- in respect with the more limited aspect "[t]he Italian Government [did] not deny that the alleged dispossession of M. Tassara [resulted] from the Mines Department's decision of 1925"[212].

3.61 There could therefore be no doubt that the dispute had arisen after what the Court had named the "critical date"[213], that is the date after which France had accepted the compulsory jurisdiction of the Court "with

[208] Mr. Tassara was the Italian owner of the licenses to prospect for phosphates in Morocco.
[209] *Ibid*, p. 25.
[210] *Series A/B, N° 74*, p. 29.
[211] *Ibid*, p. 25.
[212] *Ibid*, p. 27.
[213] *Ibid*, p. 23.

regard to situations or facts subsequent to" the ratification of her Declaration, which occurred on 25 April 1931[214].

3.62 The present case is factually (and, by way of consequence, legally) entirely different.

3.63 As explained above, the very subject-matter of the dispute is the delimitation of the respective maritime areas on which Colombia and Nicaragua have jurisdiction. This issue could simply not arise before 1932.

3.64 According to Colombia,

> "…the conclusion of the 1928 Treaty and its 1930 Protocol of Exchange of Ratifications … settled the dispute regarding sovereignty over certain territories and *established the maritime boundaries between the two countries*"[215].

3.65 This can simply not be so. As Nicaragua has explained in her *Memorial*:

> "Not only was there no need for delimitation between the two countries [in 1928 or 1930], but, at the time, this was simply unthinkable: the usually accepted maximum permissible breadth of the territorial sea was three miles, at most six (as Colombia decided in 1930) and there was no question of continental shelf, a concept which only

[214] *Ibid*, p. 22.
[215] CPO, Vol. I, para. 3.39.

appeared in the legal sphere in 1945, and even less that of an exclusive economic zone"[216].

3.66 The issue put before the Court is precisely to determine this maritime boundary, a boundary that has not been and could not have been the object of the 1928 Treaty. This is the issue on which the Parties have not been able to agree since 1969 and it is this lack of determination that has given rise to numerous naval incidents since then[217].

3.67 Contrary to Colombian allegations and by contrast with Italy's argument in the *Phosphates in Morocco* case, it is not Nicaragua's case that "because the 1928 Treaty and its 1930 Protocol of Exchange of Ratifications have continuing effects, jurisdiction obtains"[218]. Nicaragua simply notes that her case bears upon the delimitation of the respective continental shelf and economic exclusive zone of the Parties and that this issue, which could not have arisen before the mid-1960s at best, has divided the Parties since 1969, when Colombia notified Nicaragua, on 4 June of that year[219], that the 1928 Treaty established a maritime boundary and that, therefore, Nicaragua had no maritime areas, including continental shelf and exclusive economic zone, east of the 82nd Meridian[220].

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[216] NM, Vol. I, paras. 2.240 and 2.246; see also, e.g.: the *Arbitral Award between Guinea-Bissau and Senegal* of 31 July 1989, quoted in NM, Vol. I, para. 2.245.
[217] NM, Vol. I, paras. 2.203-2.224; see also Nicaragua's Application, paras. 3 and 5-7.
[218] CPO, Vol. I, para. 3.38.
[219] Nicaragua apologizes for a typing mistake she made in her *Memorial*, Vol. I, (p. 8, para. 18), where she dates that Note *6* June 1969 instead of *4*.
[220] NM, Vol. II, Annex 28.

3.68 Far from being in the presence of "a continuing and progressive unlawful action" since 1928[221], the Government of Nicaragua was confronted with an entirely new claim by Colombia, a radical change, a novation of the legal situation. This novation is the fact from which the present dispute has arisen, well later than 6 January 1932. Contrary to Colombia's assertions, it is not Nicaragua that tries to revive an already settled dispute[222], but Colombia that has created an entirely new dispute in 1969.

3.69 By contrast, in the *Phosphates in Morocco* case, the breach of the existing situation was the fact of the 1920 dahirs and of the 1925 decision as the Italian Government itself had recognized,

> "In those dahirs [and in that decision] are to be sought the essential facts constituting the alleged monopolization and, consequently, the facts which really gave rise to the dispute"[223].

3.70 Similarly, in the case concerning the *Legality of the Use of Force (Yugoslavia v. Belgium)*, the legal dispute "arose" "when the bombings in question began on 24 March 1999", that is "well before 25 April 1999", the date of the signature of the Declaration by which Yugoslavia had accepted the jurisdiction of the Court "in all disputes arising or which may arise … with regard to the situations or facts subsequent to this signature"[224]. On the contrary, in the present case, "the essential fact … which really gave rise to the dispute" is the denial by Colombia, beginning in 1969, of any maritime area on which Nicaragua enjoyed

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[221] See P.C.I.J., *Phosphates in Morocco*, *Series A/B, N° 74*, p. 26; see also: I.C.J., Order, 2 June 1999, *Legality of Use of Force (Yugoslavia v. Belgium) (Interim Measures), I.C.J. Reports 1999*, p. 134, para. 28.
[222] CPO, Vol. I, para. 3.49 and para. 3.50 (g).
[223] *Series A/B, N° 74*, p. 26; see also p. 27.
[224] I.C.J., Order on *Interim Measures*, *I.C.J. Reports 1999*, p. 133, para. 25.

sovereign rights east of the 82nd Meridian. Contrary to Colombian allegations[225], this was just the opposite of "[c]onfirmation, after the crucial date, of facts anterior to the Declarations"; it was their very negation.

3.71 Colombia cannot therefore escape acceptance of the jurisdiction of the Court by relying on the temporal reservation made in her Optional Declaration of 1937. It was indeed her right to exclude certain anterior disputes from her acceptance, but is now bound by it, in the terms she has freely chosen (*tu patere legem quem fecisti*), and she is not entitled to artificially expand her reservation to subsequent facts which clearly call into question the existing situation.

3.72 This conclusion is confirmed by other cases settled by the Court and its predecessor, certain of which -but not all- are called upon by Colombia.

3.73 This is the case in the first place of the Judgment of the Permanent Court on the Preliminary Objection in the case of the *Electricity of Sofia and Bulgaria*[226]. As aptly noted by Ambassador Rosenne, it can be argued that, in the *Phosphates in Morocco* case, "the Permanent Court may have over simplified the issues" resulting from a temporal reservation contained in an Optional Declaration such as the one made by France in that case or by Colombia in the present case; the *Electricity of Sofia and Bulgaria* case, judged the following year, was the occasion the Court seized in order to clarify the remaining uncertainties[227].

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[225] CPO, Vol. I, para. 3.39.
[226] *Series A/B, N° 77*, 4 April 1939.
[227] *The Law and Practice of the International Court, 1920-1996*, Nijhoff, The Hague/Boston/London, 1997, Vol. II, *Jurisdiction*, pp. 793-794.

3.74 In that case, Belgium had recognized the compulsory jurisdiction of the Court by a Declaration ratified on 10 March 1926 "in any disputes arising after the ratification of the present declaration with regard to situations or facts subsequent to this ratification…". As a consequence of the condition of reciprocity, the Bulgarian Government alleged that,

> "Although the facts complained of by the Belgian Government in the submissions of its Application … all date from a period subsequent to March 10th, 1926, the situation was created by the awards of the Belgo-Bulgarian Mixed Arbitral Tribunal and in particular by the formula established by the awards of July 5th, 1923, and May 27th, 1925… It has also been argued that, since the situation resulting from that formula dates from before the material date, namely, March 10th, 1926, the Bulgarian Government is justified in holding that the dispute which has arisen in regard to it falls outside the Court's jurisdiction by reason of the limitation *ratione temporis* contained in the Belgian declaration"[228].

3.75 As Colombia herself concedes in passing, "[t]he Court did not accept Bulgaria's view"[229]. But, if it is true that the Permanent Court recalled its Judgment in the *Phosphates of Morocco* case, Colombia omits to quote the relevant passage in full[230] which gives extremely important clarifications on the scope of the previous Judgment:

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[228] *Series A/B, N° 77*, p. 81.
[229] CPO, Vol. I, para. 3.40.
[230] *Idem*.

> "It is true that a dispute may presuppose the existence of some prior situation or fact, but it does not follow that the dispute arises in regard to that situation or fact. 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 with regard to a particular application of the formula …which form the centre point of the argument and must be regarded as constituting the facts with regard to which the dispute arose. The complaints made in this connection by the Belgian Government relate to the decision of the Bulgarian State Administration of Mines of November 24th, 1934, and to the judgments of the Bulgarian courts of October 24th, 1936, and March 27th, 1937. Accordingly, the Court considers that the argument based on the limitation *ratione temporis* in the Belgian declaration is not well-founded"[231].

3.76 This argument can be transposed *mutatis mutandis* in the present case, nearly word by word, by just changing the dates and the facts:

> "In the present case it is the subsequent acts with which the Nicaraguan Government reproaches the Colombian authorities with regard to a particular application of the 1928 Treaty … which form the centre point of the argument and must be regarded as constituting the facts with regard to which the dispute arose. The complaints made in this

[231] *Series A/B, N° 77*, p. 82; see also the Dissenting Opinion of Jonkheer Van Eysinga and the Separate Opinion of Mr. Cheng Tien-Hsi appended to the P.C.I.J. Judgment in *the Phosphates in Morocco* case, *Series A/B, N° 74*, p. 35 and 37, which also note the ambiguity of the Court's Judgment in that case.

connection by the Nicaraguan Government relate to the decision of the Colombian Government of June 4th, 1969. Accordingly, the Court must consider that the argument based on the limitation *ratione temporis* in the Colombian declaration is not well-founded"

3.77 Such a clarification was not necessary in the case concerning the *Phosphates in Morocco*, where, clearly, the "causal acts" (*faits générateurs*) of the dispute were anterior to the "critical date" resulting from the French Declaration under the optional clause (the same is true concerning the Order of the present Court on the Request for the Indication of Interim Measures in the case concerning the *Legality of the Use of Force (Yugoslavia v. Belgium)*[232]. It was, on the other hand, indispensable in the *Electricity of Sofia and Bulgaria* case, as it is in the present case, where the "facts from which the dispute arose" precisely result from the calling into question, after the "critical date", of the previous situation by the Respondent State.

3.78 The narrowed -and, indeed, logical- interpretation of the *Phosphates of Morocco* principle made in *Electricity of Sofia* has been firmly maintained by the present Court. In the *Interhandel* case, the Court laconically stated that "the facts and situations which have led to a dispute must not be confused with the dispute itself"[233]. This statement was expanded and made explicit the following year in the case concerning *Right of Passage over Indian Territory*, in which the Court declared in respect of the meaning of the words "source" or "real cause" of the dispute in its predecessor's Judgment of 1939:

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[232] 2 June 1999, *I.C.J. Reports 1999*, pp. 132-135, paras. 22-30.
[233] Judgment on *Preliminary Objections*, 21 March 1959, *I.C.J. Reports 1959*, p. 22; see also, I.C.J., Judgment, 12 November 1991, *Arbitral Award of 31 July 1989*, *I.C.J. Reports 1991*, p. 62, para. 24.

> "The Permanent Court thus drew a distinction between the situations or facts which constitute the source of the rights claimed by one of the Parties and the situations or facts which are the source of the dispute. Only the latter are to be taken into account for the purpose of applying the Declaration accepting the jurisdiction of the Court"[234].

3.79 In the present case, "the situations or facts which constitute the source of the rights" of Nicaragua are a pattern of facts, decisions and treaties dating back as early as the early 1800s as Nicaragua has explained in her *Memorial*. But the facts which are the source of the dispute, from which the dispute arises, are constituted by the decisions of Colombia of 1969, subsequently maintained, to deny any sovereign rights of Nicaragua over the continental shelf (and an exclusive economic zone) east of the 82nd Meridian.

3.80 Colombia wrongfully alleges that,

> "[i]n 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 definitely settled the dispute … establishing a maritime boundary between Colombia and Nicaragua"[235].

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[234] I.C.J, Judgment on the *Merits*, 12 April 1960, *I.C.J. Reports 1960*, p. 35.
[235] CPO, Vol. I, para. 3.44.

3.81 But this is simply not true: as recalled above in Subsection B of Section III, Chapter I and in paras. 3.65-3.66, and explained more fully in Nicaragua's *Memorial*, the 1928 Treaty could not have established a maritime boundary between the Parties and it is because Colombia alleged the contrary from 1969 onwards that the dispute arose.

3.82 What is true on the other hand is that, on the occasion of this dispute, the Court must take into account the situation regarding the sovereignty over the Archipelago and various cays in the area and has the inherent power to do so. But this is another matter, about which the 1960 Judgment in the *Right of Passage* case casts a light very different from the Colombian views.

3.83 In that case, the Court found that it was only in 1954 -that is well after 5 February 1930, the date limiting India's acceptance of the Court's jurisdiction- that the dispute arose in respect with "both the existence of a right of passage to go into the enclaved territories and to India's failure to comply with obligations which, according to Portugal, were binding upon it in this connection". And the Court added:

> "This whole, whatever may have been the earlier origin of one of its parts, came into existence only after 5 February 1930. The time-condition to which acceptance of the jurisdiction of the Court was made subject by the Declaration of India is therefore complied with"[236].

[236] *I.C.J. Reports 1960*, p. 35.

3.84 It also made clear that:

> "It would be idle to argue that the contentions put forward with regard to the right of passage would, if that question had been argued before 1930, have been the same as when it is today. Apart from the fact that that consideration relates only to a part of the present dispute, it overlooks the fact that the condition to which the Court's jurisdiction is subject does not relate to the nature of the arguments susceptible of being advanced. The fact that a treaty, of greater or lesser antiquity, that a rule of international law, established for a greater or lesser period, are invoked, is not the yardstick for the jurisdiction of the Court according to the Indian Declaration. That Declaration is limited to the requirement that the dispute shall concern a situation or facts subsequent to 5 February 1930: the present disputes satisfies that requirement"[237],

exactly in the same way as the dispute now before the Court satisfies the requirement imposed in the Colombian Declaration.

3.85 Having thus dismissed the sixth Indian Preliminary Objection, the Court, in its Judgment of 1960, proceeded to consider the merits of the case. To that effect, it considered first the question of "[t]he existence in 1954 of a right of passage in Portugal's favour"[238]. For that matter, the Court discussed the arguments of both Parties concerning the *validity* of a treaty concluded *in 1779* together with that of decrees issued *in 1783 and 1785*

[237] *I.C.J. Reports 1960*, p. 36.
[238] *Ibid*.

by the Maratha Ruler (that is 150 years before the "critical date")[239]. It then considered the arguments of the Parties as to the scope of these instruments and, more precisely, the question of whether or not they had *transferred sovereignty* over the enclaves to Portugal[240]; the Court concluded that this was not the case, but "that the situation underwent a change with the advent of the British as sovereign of that part of the country in place of the Marathas"[241], that is, again, for the most part, *before* 1930. It then appears that, in that case, the Court considered all the historical facts pertaining to the dispute with a view to appreciating their validity and legal scope.

3.86 In doing so, as the Court made clear, it did not give "any retroactive effect to India's acceptance of the compulsory jurisdiction"[242], exactly as, in the present case, it will not overlook the temporal condition included in Colombia's Optional Declaration by considering the validity and scope of the Bárcenas-Esguerra Treaty in so far as such a determination is necessary in order to determine the maritime areas belonging respectively to the Parties- that is in settling the dispute which has arisen from the Colombian claims to huge parts of maritime areas over which Nicaragua has rights and jurisdiction.

3.87 In conclusion on this aspect of the Colombian *Preliminary Objection*, Nicaragua wishes to stress that her position in this respect must be understood notwithstanding the jurisdiction of the Court on all the Nicaraguan Submissions on the basis of the Pact of Bogotá.

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[239] *Ibid*, p. 37.
[240] *Ibid*, p. 38.
[241] *Ibid*, p. 39.
[242] *Ibid*, p. 35.

3.88 As the Permanent Court, stressed in the *Electricity of Sofia and Bulgaria* case:

> "the multiplicity of agreements concluded accepting the compulsory jurisdiction is evidence that the contracting Parties intended to open up new ways of access to the Court rather than to close old ways or to allow them to cancel each other out with the ultimate result that no jurisdiction would remain"[243].

3.89 In the present case, the jurisdiction of the Court is based on the Pact of Bogotá and the Optional Clause Declarations of the Parties that, far from being exclusive of each other, are complementary. It is for the Court to decide which of those two legal basis is more relevant in the present case[244] or to combine them. It is Nicaragua's conviction that each of them "confers jurisdiction upon the Court to entertain the dispute submitted to it"[245].

IV. Fourth Preliminary Objection
Colombia's Acceptance by Conduct of an Obligation to Give Reasonable Notice of Termination

3.90 The political circumstances prevailing in the region provide the necessary background to the contention of Nicaragua that Colombia has by her

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[243] *Series A/B, N° 77*, p. 76.
[244] See e.g.: I.C.J., Judgment, *Border and Transborder Armed Actions, Nicaragua v. Honduras (Jurisdiction of the Court and Admissibility of the Application), I.C.J. Reports 1988*, p. 90, para. 48.
[245] *Ibid*.

conduct accepted an obligation to give reasonable notice of termination of her Declaration under the Optional Clause, and that, consequently, the Colombia notification of 5 December 2001 could not have the legal consequences asserted by Colombia.

A. THE PUBLIC STATEMENTS BY PRESIDENT ALEMÁN LACAYO IN 2001

3.91 A few weeks after Honduras on 30 November 1999 ratified the Treaty of delimitation of 2 August 1986, Mr. Arnoldo Alemán, then President of Nicaragua announced that a case would be filed with the Court against Colombia. This announcement was made on 24 December 1999[246] (see below paragraphs 3.93 and 3.102).

3.92 This decision by President Alemán was reiterated publicly on different occasions. For example, after returning from a meeting of the III Summit of the Americas that took place in Canada, he stated, "We are also going to bring a case against Colombia as we have done with Honduras."[247]

3.93 Later on in that same year, on 9 October 2001, President Alemán announced that the case against Colombia was going to be filed in the Court.

> "We are going to file the case against Colombia. We will also guarantee in the national budget the continuation of this case, because you must know that these cases are contended before international courts and this implies

[246] NWS, Vol. II, Annex 13.
[247] NWS, Vol. II, Annex 14.

> enormous expenses. But as I have pointed out, the sovereignty of our Country must prevail above any other thing."[248]

3.94 The Colombian press picked up these statements. For example, the latter announcement read as follows in the Colombian newspaper El Espectador:

> "The President of Nicaragua, Arnoldo Alemán, announced yesterday that prior to 10 January, when he must hand over power, an application against Colombia will be filed with the International Court of Justice in The Hague, over a boundary treaty signed with Honduras that would affect Nicaragua."[249]

B. NEGOTIATIONS AT FOREIGN MINISTER LEVEL IN 2001

3.95 This was the political background when Mr. Francisco Aguirre was appointed Foreign Minister of Nicaragua in October 2000. Mr. Aguirre, in an affidavit[250] tells the story of how his Colombian counterpart, Mr. Fernández de Soto, requested that the filing of the Nicaraguan Application be postponed in order to give an opportunity for negotiations on the territorial and delimitation questions pending between their respective States.

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[248] NWS, Vol. II, Annex 15.
[249] NWS, Vol. II, Annex 6.
[250] NWS, Vol. II, Annex 22.

3.96 This offer was not received as coming out of the blue by Mr. Aguirre. There had been previous attempts at negotiations that went back a quarter of a century (see above Chap. I, paras. 1.67-1.84).

3.97 Mr. Aguirre agreed in good faith only to later receive the surprise that the purpose of that request and the offers of negotiations were only made in order to gain time for Colombia to complete the legal and political steps she needed to take in order to withdraw her 1937 acceptance of the jurisdiction of the Court.

3.98 In the outcome the Government of Nicaragua had been placed in a situation in which the Government of Colombia had, by its conduct, undertaken not to change the jurisdictional status quo in relation to the International Court of Justice. This was the necessary legal consequence of requesting a postponement of the filing of the Nicaraguan Application. The conduct of Colombia must be interpreted in the light of a presumption of good faith. The request by the Colombian Foreign Minister for a postponement of the filing of the Nicaraguan Application included an implicit undertaking not to withdraw Colombia's Declaration accepting jurisdiction without reasonable notice.

3.99 In the result the Government of Colombia was estopped from changing the jurisdictional status quo without reasonable notice. There is a considerable weight of authority for the view that estoppel is a general principle of international law resting essentially on the principle of good faith.

3.100 The Court has defined the conditions for the existence of an estoppel on several occasions. Thus, in its Judgment in the *North Sea Continental Shelf Cases* the Court observed:

> "Having regard to these considerations of principle, it appears to the Court that only the existence of a situation of estoppel could suffice to lend substance to this contention, - that is to say if the Federal Republic were now precluded from denying the applicability of the conventional regime, by reason of past conduct, declarations, etc., which not only clearly and consistently evinced acceptance of that regime, but also had caused Denmark or the Netherlands, in reliance on such conduct, detrimentally to change position or suffer some prejudice. Of this there is no evidence whatever in the present case."[251]

3.101 This definition was adopted by the Chamber of the Court in the *Gulf of Maine Case*, *I.C.J. Reports 1984*, page 309, paragraph 145; and by the full Court in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), I.C.J. Reports 1984*, pages 414 to 415, paragraph 51, and the *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria*, *I.C.J. Reports 1998*, page 303, paragraph 57.

3.102 In the circumstances of the present case, both the President of Nicaragua and the Foreign Minister had made public announcements of the intention of Nicaragua to file an Application with the Court in which Colombia was to be the Respondent State. These public statements covered the period from December 1999 until the end of November 2001 and were reported in the press of both Nicaragua and Colombia. There can be no question that Colombia was not aware of Nicaragua's

[251] *I.C.J. Reports 1969*, p. 26, para. 30.

intention, more especially in view of the negotiations at Foreign Minister level in the same period.

3.103 The Colombian Agent, Ambassador Julio Londoño, in an interview given shortly after the Application of this case was filed, recognized that Colombia had been aware for the previous two years of the Nicaraguan decision of bringing this case before the Court. The comments of Ambassador Londoño were made in the context of answering the question asked by many whether it was a coincidence or something else that Nicaragua filed her Application on 6 December 2001 and Colombia had withdrawn her acceptance the day before.

> "The Colombian explanation is only one: it was a coincidence. The Ambassador in Cuba, Julio Londoño, charged with coordinating the group that will defend Colombia before the Court, said that the withdrawal of the declaration that came about on 5 December was made without knowing exactly the date in which Nicaragua would file the case. What was known was that it would be filed at some moment, since they had been announcing it for the past two years."[252]

3.104 It was against this background that the Colombian Foreign Minister, Mr Fernández de Soto, requested the Nicaragua Foreign Minister, Mr Aguirre, to postpone the filing of the Application. No reference was made by him to any modification or withdrawal of the Colombia acceptance of the Court's jurisdiction.

[252] NWS, Vol. II, Annex 7.

CHAPTER IV
THE EXISTENCE OF A DISPUTE IN THE CONTEXT OF BOTH THE PACT OF BOGOTÁ AND THE OPTIONAL CLAUSE JURISDICTION

4.1 Article VI of the Pact of Bogotá provides as follows:

> "The aforesaid procedures, furthermore, may not be applied in 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" (emphasis supplied)

4.2 In her *Preliminary Objections* Colombia argues that the issues raised in the Application of Nicaragua are 'already settled' by the Esguerra-Bárcenas Treaty of 1928 and the Protocol of Exchange of Ratifications of 1930: see the *Preliminary Objections*, Volume I, paragraphs 2.1 to 2.35, 2.63 to 2.64 and 3.1 to 3.9.

4.3 Colombia also invokes Article XXXIV of the Pact of Bogotá which provides as follows:

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

4.4 Colombia invokes the *travaux préparatoires* of Articles VI and XXXIV of the Pact of Bogotá: *Preliminary Objections*, Volume I, paragraphs

2.10 to 2.14. In reality the materials deployed in these paragraphs leave the issue entire. The *travaux préparatoires* of the two Articles do nothing but confirm that the workings of these provisions stand in need of clarification. The *travaux* merely confirm this fact.

4.5 In the final analysis the term 'already settled' has to be applied *in concreto* and is inevitably question-begging. The question which remains is whether the subject-matter of the Application has been 'already settled by arrangement between the parties'.

4.6 In analytical terms the preliminary but the determining issue is whether there is a dispute between the parties. The content of the dispute would include the question whether the matters had been 'already settled …'. This question clearly pertains to the merits of the case.

4.7 In any event, there is a logical presumption that the phrase 'already settled' connotes a settlement in accordance with the principles of public international law. Thus, the locution 'settled' calls for recension and the recension itself may constitute a dispute.

4.8 In this context international tribunals, and the Court, in particular, have approached the identification of a dispute in a spirit of realism. Fairly typical in this respect are the following passages from the Advisory Opinion in the Headquarters Agreement case:

> "34. In order to answer the question put to it, the Court has to determine whether there exists a dispute between the United Nations and the United States, and if so whether or not that dispute is one 'concerning the interpretation or application of' the Headquarters Agreement within the meaning of section 21 thereof. If it finds that there is such

a dispute it must also, pursuant to that section, satisfy itself that it is one 'not settled by negotiation or other agreed mode of settlement'.

35. As the Court observed in the case concerning *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, 'whether there exists an international dispute is a matter for objective determination' (*I.C.J. Reports 1950*, p. 74). In this respect the Permanent Court of International Justice, in the case concerning *Mavrommatis Palestine Concessi*ons, had defined a dispute as 'a disagreement on a point of law or fact, a conflict of legal views or of interest between two persons' (*P.C.I.J., Series A, No. 2*, p. 11). This definition has since been applied and clarified on a number of occasions. In the Advisory Opinion of 30 March 1950 the Court, after examining the diplomatic exchanges between the States concerned, noted that 'the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations' and concluded that 'international disputes have arisen' (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, I.C.J. Reports 1950*, p. 74). Furthermore, in its Judgment of 21 December 1962 in the *South West Africa* cases, the Court made it clear that in order to prove the existence of a dispute

> 'it is not sufficient for one party to a contentious case to assert that a dispute exists with the other party. A mere assertion is not sufficient to prove

> the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence. Nor is it adequate to show that the interests of the two parties to such a case are in conflict. It must be shown that the claim of one party is positively opposed by the other' (*I.C.J. Reports 1962*, p. 328).
>
> The Court found that the opposing attitudes of the parties clearly established the existence of a dispute (*ibid*; see also *Northern Cameroons, I.C.J. Reports 1963*, p. 27)."[253]

4.9 And in the *Northern Cameroons* case the Court had observed that:

> "The Court is not concerned with the question whether or not any dispute in relation to the same subject-matter existed between the Republic of Cameroon and the United Nations or the General Assembly. In the view of the Court it is sufficient to say that, having regard to the facts already stated in this Judgment, the opposing views of the Parties as to the interpretation and application of relevant Articles of the Trusteeship Agreement, reveal the existence of a dispute in the sense recognized by the jurisprudence of the Court and of its predecessors, between the Republic of Cameroon and the United Kingdom at the date of the Application."[254]

4.10 These passages apply very appositely to the circumstances of the present case. The opposing attitudes of the parties clearly establish the existence

[253] *I.C.J. Reports 1988*, p. 27.
[254] *I.C.J. Reports 1963*, p. 27.

of a dispute. This dispute has a varied subject matter but this subject matter includes questions as to the legal status of the treaty obligations (see above Chap. I).

4.11 The subject-matter of the Nicaraguan *Memorial* studied in conjunction with the text of Volume I of the *Preliminary Objections* of Colombia provides ample proof of the opposing attitudes of the parties in respect of a whole series of issues of law and fact. This is demonstrated by reference to the subject-matter of Chapters I and II of the *Preliminary Objections*.

4.12 The Colombian argument seeks to build upon the findings of the Court in the *Border and Transborder Armed Actions* case in order to contend that, even if there is jurisdiction in accordance with Article 36, paragraph 2, of the Statute, the Court is still bound to make a determination in accordance with Article VI of the Pact of Bogotá. On this basis, Colombia concludes:

> "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'."[255]

4.13 This submission by Colombia involves a misunderstanding of the Court's determination in the *Armed Actions* case. In that case Honduras had argued as follows:

[255] CPO, Vol. I, para. 3.6.

> "Under the most literal, and therefore the most simple, interpretation of the terms of the Pact, Article XXXI, in establishing the obligatory jurisdiction of the Court, at the same time requires the additional subscription, by each of the Parties, of a unilateral declaration of acknowledgement of its jurisdiction, as provided for by Article 36.2 of the Statute of the Court, to which Article XXXI of the Pact makes express reference. The reservations attached to such declarations, as in the case of the declaration of Honduras of 22 May 1986 [quoted in paragraph 24 above], therefore apply both in the context of the application of Article XXXI and on the sole basis of the Honduran declaration itself."[256]

4.14 The Court rejected the contention and came to the conclusion that:

> "…the Court has to conclude that the commitment in Article XXXI of the Pact is independent of such declarations of acceptance of compulsory jurisdiction as may have been made under Article 36, paragraph 2, of the Statute and deposited with the United Nations Secretary-General pursuant to paragraph 4 of that same Article. Consequently, it is not necessary to decide whether the 1986 Declaration of Honduras is opposable to Nicaragua in this case; it cannot in any event restrict the commitment which Honduras entered into by virtue of Article XXXI. The Honduran argument as to the effect of the reservation

[256] *I.C.J. Reports 1988*, p. 82.

> to its 1986 Declaration on its commitment under Article XXXI of the Pact therefore cannot be accepted."[257]

4.15 This determination by the Court is, quite simply, to the effect that jurisdiction on the basis of Article XXXI of the Pact results from an autonomous commitment of the parties, independently of the Optional Clause jurisdiction[258]. However, this decision did not establish a general hegemony of the Pact, and the principle of autonomy, applied logically, would militate against such a hegemony. The position is that the obligations by virtue of the Pact cannot be modified by means of a unilateral declaration made subsequently under the Statute.[259]

4.16 The inference to be drawn is that, unless there is a clear indication to the contrary, the concept of dispute applicable is identical in respect of both sources of jurisdiction. There is no reason to assume that the phrasing of Article VI of the Pact of Bogotá results in the confection of an independent and specialised criterion for the existence of a dispute. Indeed, the wording of Article XXXI of the Pact of Bogotá rules out such an assumption. Thus it provides as follows:

> "Article XXXI. 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 an special agreement so long as the present Treaty is in force,

[257] *I.C.J. Reports 1988*, p. 88.
[258] *I.C.J. Reports 1988*, p. 85, para. 36.
[259] See the Judgment in the *Armed Actions* case, *I.C.J. Reports 1988*, p. 84, para. 34.

in all disputes of a juridical nature that arise among them concerning:

(a) The interpretation of a treaty;

(b) Any question of international law;

(c) The existence of any fact which, if 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."

4.17 This form of drafting strongly suggests that the two sources of jurisdiction share the same universe of concepts. Moreover, there can be no presumption that the concept of dispute is to be a varied content depending on the source of jurisdiction.

SUBMISSIONS

1. For the reasons advanced, the Republic of Nicaragua requests the Court to adjudge and declare that the *Preliminary Objections* submitted by the Republic of Colombia, both in respect of the jurisdiction based upon the Pact of Bogotá, and in respect of the jurisdiction based upon Article 36, paragraph 2, of the Statute of the Court, are invalid.

2 In the alternative, the Court is requested to adjudge and declare, in accordance with the provisions of Article 79, paragraph 7, of the Rules of Court that the objections submitted by the Republic of Colombia do not have an exclusively preliminary character.

3 In addition, the Republic of Nicaragua requests the Court to reject the request of the Republic of Colombia to declare the controversy submitted to it by Nicaragua under Article XXXI of the Pact of Bogotá 'ended', in accordance with Articles VI and XXXIV of the same instrument.

4 Any other matters not explicitly dealt with in the foregoing Written Statement, are expressly reserved for the merits phase of this proceeding.

The Hague, 26 January 2004

Carlos J. ARGÜELLO GÓMEZ

Agent of the Republic of Nicaragua

LIST OF ANNEXES

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