17 MARCH 2016

JUDGMENT

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

(NICARAGUA *v.* COLOMBIA)

PRELIMINARY OBJECTIONS

VIOLATIONS ALLÉGUÉES DE DROITS SOUVERAINS ET D'ESPACES MARITIMES DANS LA MER DES CARAÏBES

(NICARAGUA c. COLOMBIE)

EXCEPTIONS PRÉLIMINAIRES

17 MARS 2016

ARRÊT

TABLE OF CONTENTS

INTERNATIONAL COURT OF JUSTICE

YEAR 2016

2016
17 March
General List
No. 155

17 March 2016

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

(NICARAGUA *v.* COLOMBIA)

PRELIMINARY OBJECTIONS

Colombia's first preliminary objection.

Contentions by Colombia — The Court lacks jurisdiction ratione temporis *under Pact of Bogotá — Denunciation of Pact governed by Article LVI — Immediate effect of notification of denunciation.*

Contentions by Nicaragua — Article XXXI of Pact grants jurisdiction so long as treaty remains in force — Under Article LVI, Pact remains in force for one year from date of notification of denunciation — The Court has jurisdiction ratione temporis *as Nicaragua's Application was filed less than one year after Colombia gave notification of denunciation.*

Analysis of the Court — Critical date for establishing jurisdiction — Effects of denunciation determined by first paragraph of Article LVI — Question whether second paragraph of Article LVI alters effect of first paragraph — Second paragraph confirms that procedures instituted before notification of denunciation can continue irrespective of that denunciation — Proceedings instituted during one-year notice period are proceedings instituted while Pact still in force —

Colombia's interpretation would result in most of the Articles of the Pact losing effect while Pact still in force — Colombia's interpretation not consistent with object and purpose of Pact — Colombia's interpretation not necessary to give effet utile *to second paragraph of Article LVI — Colombia's first preliminary objection rejected.*

*

Colombia's second preliminary objection according to which no dispute existed between the Parties prior to filing of Application.

Critical date — Existence of a dispute between the parties a condition of the Court's jurisdiction — Two principal claims submitted by Nicaragua — First claim concerns Colombia's alleged violations of Nicaragua's rights in the maritime zones declared by the Court in 2012 Judgment to appertain to Nicaragua — Second claim concerns alleged breach of Colombia's obligation not to use or threaten to use force.

Contentions by Colombia — Prior to critical date, Nicaragua never raised any complaints regarding alleged violations by Colombia — Colombia never repudiated 2012 Judgment — Presidential Decree 1946 on an "Integral Contiguous Zone" did not concern any issue addressed by the Court — No evidence of confrontation between naval forces of both Parties.

Contentions by Nicaragua — Senior Government officials of Colombia publicly repudiated 2012 Judgment — "Integral Contiguous Zone" contained in Decree 1946 not consistent with international law — Decree 1946 purports to attribute to Colombia maritime areas that the Court determined in its 2012 Judgment appertain to Nicaragua — Colombia alleged to have regularly harassed Nicaraguan fishing vessels in Nicaraguan waters.

Analysis of the Court — Nicaragua's first claim — Parties took different positions on legal implications of Colombia's proclamation of an "Integral Contiguous Zone" in Decree 1946 — No rebuttal by Colombia that it continued exercising jurisdiction in maritime spaces that Nicaragua claimed as its own — Formal protest not a necessary condition for existence of a dispute — At date of filing of Application, a dispute existed concerning Nicaragua's first claim — Nicaragua's second claim — No evidence that Colombia used or threatened to use force in area in question before critical date — Colombia's second preliminary objection rejected with regard to Nicaragua's first claim and upheld with regard to its second claim.

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Colombia's third preliminary objection.

Contentions by Colombia — The Court lacks jurisdiction because requirements contained in Article II of Pact have not been met — Opinion of both parties that dispute could not be settled by negotiations is necessary — The two sides remained willing to settle their differences through direct negotiations.

Contentions by Nicaragua — Article II of Pact requires that one of the parties was of opinion that dispute could not be settled by negotiations — Parties did not consider settlement of dispute possible — Nicaragua's willingness to negotiate a treaty with Colombia limited to implementation of 2012 Judgment — Subject-matter for negotiations between the Parties entirely unrelated to subject-matter of dispute.

The Court's consideration of Article II of Pact — Discrepancy between French text and other three official texts of Article II — Approach taken in 1988 Judgment — No need to resolve problem posed by textual discrepancy — The issues identified for possible dialogue between the Parties are different to subject-matter of dispute — No evidence that the Parties contemplated negotiations on subject-matter of dispute at date of filing of Application — Colombia's third preliminary objection rejected.

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Colombia's fourth preliminary objection according to which the Court has no "inherent jurisdiction" to entertain dispute.

Jurisdiction already established on basis of Article XXXI of Pact to entertain Nicaragua's first claim — No need for the Court to deal with Nicaragua's allegation of "inherent jurisdiction" — No ground for the Court to rule upon Colombia's fourth preliminary objection.

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Colombia's fifth preliminary objection according to which the Court cannot entertain a dispute related to compliance with a prior judgment.

No need to rule on Colombia's fifth preliminary objection in so far as it relates to inherent jurisdiction — The fifth preliminary objection to be addressed in so far as it relates to jurisdiction under Pact of Bogotá — Nicaragua does not seek to enforce 2012 Judgment — Colombia's fifth preliminary objection rejected.

JUDGMENT

Present: *President* ABRAHAM; *Vice-President* YUSUF; *Judges* OWADA, TOMKA, BENNOUNA, CANÇADO TRINDADE, GREENWOOD, XUE, DONOGHUE, GAJA, SEBUTINDE, BHANDARI, ROBINSON, GEVORGIAN; *Judges* ad hoc DAUDET, CARON; *Registrar* COUVREUR.

In the case concerning alleged violations of sovereign rights and maritime spaces in the Caribbean Sea,

between

the Republic of Nicaragua,

represented by

H.E. Mr. Carlos José Argüello Gómez, Ambassador of the Republic of Nicaragua to the Kingdom of the Netherlands,

as Agent and Counsel;

Mr. Vaughan Lowe, Q.C., member of the Bar of England and Wales, Emeritus Professor of International Law, Oxford University, member of the Institut de droit international,

Mr. Alex Oude Elferink, Director, Netherlands Institute for the Law of the Sea, Professor of International Law of the Sea, Utrecht University,

Mr. Alain Pellet, Emeritus Professor at the Université Paris Ouest, Nanterre-La Défense, former member and Chairman of the International Law Commission, member of the Institut de droit international,

Mr. Antonio Remiro Brotóns, Professor of International Law, Universidad Autónoma de Madrid, member of the Institut de droit international,

as Counsel and Advocates;

Mr. César Vega Masís, Deputy Minister for Foreign Affairs, Director of Juridical Affairs, Sovereignty and Territory, Ministry of Foreign Affairs,

Mr. Walner Molina Pérez, Juridical Adviser, Ministry of Foreign Affairs,

Mr. Julio César Saborio, Juridical Adviser, Ministry of Foreign Affairs,

as Counsel;

Mr. Edgardo Sobenes Obregon, Counsellor, Embassy of Nicaragua in the Kingdom of the Netherlands,

Ms Claudia Loza Obregon, First Secretary, Embassy of Nicaragua in the Kingdom of the Netherlands,

Mr. Benjamin Samson, Ph.D. Candidate, Centre de droit international de Nanterre (CEDIN), Université Paris Ouest, Nanterre-La Défense,

Ms Gimena González,

as Assistant Counsel;

Ms Sherly Noguera de Argüello, Consul General of the Republic of Nicaragua,

as Administrator,

and

the Republic of Colombia,

represented by

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

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

as National Authorities;

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

as Agent;

H.E. Mr. Manuel José Cepeda Espinosa, former President of the Constitutional Court of Colombia, former Permanent Delegate of Colombia to UNESCO and former Ambassador of Colombia to the Swiss Confederation,

as Co-Agent;

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

Mr. Rodman R. Bundy, former *avocat à la Cour d'appel de Paris*, member of the New York Bar, Eversheds LLP, Singapore,

Sir Michael Wood, K.C.M.G., member of the Bar of England and Wales, member of the International Law Commission,

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

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

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

as Counsel and Advocates;

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

H.E. Mr. Andelfo García González, Ambassador of the Republic of Colombia to the Kingdom of Thailand, Professor of International Law, former Deputy Minister for Foreign Affairs,

Ms Andrea Jiménez Herrera, Counsellor, Embassy of the Republic of Colombia in the Kingdom of the Netherlands,

Ms Lucía Solano Ramírez, Second Secretary, Embassy of the Republic of Colombia in the Kingdom of the Netherlands,

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

Mr. Giovanny Andrés Vega Barbosa, Group of Affairs before the ICJ, Ministry of Foreign Affairs,

Ms Ana María Durán López, Group of Affairs before the ICJ, Ministry of Foreign Affairs,

Mr. Camilo Alberto Gómez Niño, Group of Affairs before the ICJ, Ministry of Foreign Affairs,

Mr. Juan David Veloza Chará, Third Secretary, Group of Affairs before the ICJ, Ministry of Foreign Affairs,

as Legal Advisers;

Rear Admiral Luís Hernán Espejo, National Navy of Colombia,

CN William Pedroza, International Affairs Bureau, National Navy of Colombia,

CF Hermann León, National Maritime Authority (DIMAR), National Navy of Colombia,

Mr. Scott Edmonds, Cartographer, International Mapping,

Mr. Thomas Frogh, Cartographer, International Mapping,

as Technical Advisers;

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

Mr. Eran Sthoeger, LL.M., New York University School of Law,

Mr. Renato Raymundo Treves, Associate, Curtis, Mallet-Prevost, Colt & Mosle LLP, Milan,

Mr. Lorenzo Palestini, Ph.D. Candidate, Graduate Institute of International and Development Studies, Geneva,

as Legal Assistants,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 26 November 2013, the Government of the Republic of Nicaragua (hereinafter "Nicaragua") filed with the Registry of the Court an Application instituting proceedings against the Republic of Colombia (hereinafter "Colombia") concerning a dispute in relation to "the violations of Nicaragua's sovereign rights and maritime zones declared by the Court's Judgment of 19 November 2012 [in the case concerning *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*] and the threat of the use of force by Colombia in order to implement these violations".

In its Application, Nicaragua seeks to found the jurisdiction of the Court on Article XXXI of the American Treaty on Pacific Settlement signed on 30 April 1948, officially designated, according to Article LX thereof, as the "Pact of Bogotá" (hereinafter referred to as such).

Nicaragua states that, alternatively, the jurisdiction of the Court "lies in its inherent power to pronounce on the actions required by its Judgments".

2. In accordance with Article 40, paragraph 2, of the Statute of the Court, the Registrar immediately communicated the Application to the Government of Colombia; and, under paragraph 3 of that Article, all other States entitled to appear before the Court were notified of the Application.

3. Since the Court included upon the Bench no judge of the nationality of either of the Parties, each Party proceeded to exercise the right conferred upon it by Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case. Nicaragua first chose Mr. Gilbert Guillaume, who resigned on 8 September 2015, and subsequently Mr. Yves Daudet. Colombia chose Mr. David Caron.

4. By an Order of 3 February 2014, the Court fixed 3 October 2014 as the time-limit for the filing of the Memorial of Nicaragua and 3 June 2015 for the filing of the Counter-Memorial of Colombia. Nicaragua filed its Memorial within the time-limit so prescribed.

5. On 19 December 2014, within the time-limit set by Article 79, paragraph 1, of the Rules of Court, Colombia raised preliminary objections to the jurisdiction of the Court. Consequently, by an Order of 19 December 2014, the President, noting that, by virtue of Article 79, paragraph 5, of the Rules of Court, the proceedings on the merits were suspended, and taking account of Practice Direction V, fixed 20 April 2015 as the time-limit for the presentation by Nicaragua of a written statement of its observations and submissions on the preliminary objections raised by Colombia. Nicaragua filed its statement within the prescribed time-limit. The case thus became ready for hearing in respect of the preliminary objections.

6. Pursuant to the instructions of the Court under Article 43 of the Rules of Court, the Registrar addressed to States parties to the Pact of Bogotá the notifications provided for in Article 63, paragraph 1, of the Statute of the Court. In accordance with the provisions of Article 69, paragraph 3, of the Rules of Court, the Registrar moreover addressed to the Organization of American States (hereinafter the "OAS") the notification provided for in Article 34, paragraph 3, of the Statute of the Court. As provided for in Article 69, paragraph 3, of the Rules of Court, the Registrar transmitted the written pleadings to the OAS and asked that Organization whether or not it intended to furnish observations in writing within the meaning of that Article. The Registrar further stated that, in view of the fact that the current phase of the proceedings related to the question of jurisdiction, any written observations should be limited to that question. The Secretary General of the OAS indicated that the Organization did not intend to submit any such observations.

7. Referring to Article 53, paragraph 1, of the Rules of Court, the Government of the Republic of Chile asked to be furnished with copies of the pleadings and documents annexed in the case. Having ascertained the views of the Parties in accordance with that same provision, the President of the Court decided to grant that request. The Registrar duly communicated that decision to the Government of Chile and to the Parties.

Pursuant to the same provision of the Rules, the Government of the Republic of Panama also asked to be furnished with copies of the pleadings and documents annexed in the case. This request was communicated to the Parties in order to ascertain their views. By letter dated 22 July 2015, the Agent of Nicaragua stated that his Government had no objection to Panama being furnished with copies of the pleadings and documents annexed in the case. For its part, by letter dated 27 July 2015, the Agent of Colombia indicated that although his Government had no objection to Panama being furnished with copies of the preliminary objections filed by Colombia and Nicaragua's written statement of its observations and submissions, it did object to the Memorial of Nicaragua being made available to Panama. Taking into account the views of the Parties, the Court decided that copies of the preliminary objections filed by Colombia and Nicaragua's written statement of its observations and submissions on those objections would be made available to the Government of Panama. The Court, however, decided that it would not be appropriate to furnish Panama with copies of the Memorial of Nicaragua. The Registrar duly communicated that decision to the Government of Panama and to the Parties.

8. Pursuant to Article 53, paragraph 2, of the Rules of Court, the Court, after ascertaining the views of the Parties, decided that copies of the preliminary objections of Colombia and the written observations of Nicaragua would be made accessible to the public on the opening of the oral proceedings.

9. Public hearings on the preliminary objections raised by Colombia were held from Monday 28 September 2015 to Friday 2 October 2015, at which the Court heard the oral arguments and replies of:

For Colombia: H.E. Mr. Carlos Gustavo Arrieta Padilla,
Sir Michael Wood,
Mr. Rodman R. Bundy,
Mr. W. Michael Reisman,
Mr. Eduardo Valencia-Ospina,
Mr. Tullio Treves.

For Nicaragua: H.E. Mr. Carlos José Argüello Gómez,
Mr. Antonio Remiro Brotóns,
Mr. Vaughan Lowe,
Mr. Alain Pellet.

10. At the hearings, a Member of the Court put questions to the Parties, to which replies were given in writing, within the time-limit fixed by the President in accordance with Article 61, paragraph 4, of the Rules of Court. Pursuant to Article 72 of the Rules of Court, each of the Parties submitted comments on the written replies provided by the other.

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11. In the Application, the following claims were presented by Nicaragua:

"On the basis of the foregoing statement of facts and law, Nicaragua, while reserving the right to supplement, amend or modify this Application, requests the Court to adjudge and declare that Colombia is in breach of:

— its obligation not to use or threaten to use force under Article 2 (4) of the UN Charter and international customary law;

— its obligation not to violate Nicaragua's maritime zones as delimited in paragraph 251 of the ICJ Judgment of 19 November 2012 as well as Nicaragua's sovereign rights and jurisdiction in these zones;

— its obligation not to violate Nicaragua's rights under customary international law as reflected in Parts V and VI of UNCLOS;

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

12. In the written proceedings on the merits, the following submissions were presented on behalf of the Government of Nicaragua in its Memorial:

"1. For the reasons given in the present Memorial, the Republic of Nicaragua requests the Court to adjudge and declare that, by its conduct, the Republic of Colombia has breached:

(a) its obligation not to violate Nicaragua's maritime zones as delimited in paragraph 251 of the Court Judgment of 19 November 2012 as well as Nicaragua's sovereign rights and jurisdiction in these zones;

(b) its obligation not to use or threaten to use force under Article 2 (4) of the UN Charter and international customary law;

(c) and that, consequently, Colombia has the obligation to wipe out the legal and material consequences of its internationally wrongful acts, and make full reparation for the harm caused by those acts.

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

(a) cease all its continuing internationally wrongful acts that affect or are likely to affect the rights of Nicaragua.

(b) Inasmuch as possible, restore the situation to the *status quo ante*, in

(i) revoking laws and regulations enacted by Colombia, which are incompatible with the Court's Judgment of 19 November 2012 including the provisions in the Decrees 1946 of 9 September 2013 and 1119 of 17 June 2014 to maritime areas which have been recognized as being under the jurisdiction or sovereign rights of Nicaragua;

(ii) revoking permits granted to fishing vessels operating in Nicaraguan waters; and

(iii) ensuring that the decision of the Constitutional Court of Colombia of 2 May 2014 or of any other National Authority will not bar compliance with the 19 November 2012 Judgment of the Court.

(c) Compensate for all damages caused in so far as they are not made good by restitution, including loss of profits resulting from the loss of investment caused by the threatening statements of Colombia's highest authorities, including the threat or use of force by the Colombian Navy against Nicaraguan fishing boats [or ships exploring and exploiting the soil and subsoil of Nicaragua's continental shelf] and third State fishing boats licensed by Nicaragua as well as from the exploitation of Nicaraguan waters by fishing vessels unlawfully 'authorized' by Colombia, with the amount of the compensation to be determined in a subsequent phase of the case.

(d) Give appropriate guarantees of non-repetition of its internationally wrongful acts."

13. In the preliminary objections, the following submissions were presented on behalf of the Government of Colombia:

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

In the written statement of its observations and submissions on the preliminary objections raised by Colombia, the following submissions were presented on behalf of the Government of Nicaragua:

"For the above reasons, the Republic of Nicaragua requests the Court to adjudge and declare that the Preliminary Objections submitted by the Republic of Colombia in respect of the jurisdiction of the Court are invalid."

14. At the oral proceedings on the preliminary objections, the following submissions were presented by the Parties:

On behalf of the Government of Colombia,

at the hearing of 30 September 2015:

"For the reasons set forth in [its] written and oral pleadings on preliminary objections, the Republic of Colombia requests the Court to adjudge and declare that it lacks jurisdiction over the proceedings brought by Nicaragua in its Application of 26 November 2013 and that said Application should be dismissed."

On behalf of the Government of Nicaragua,

at the hearing of 2 October 2015:

"In view of the reasons Nicaragua has presented in its Written Observations and during the hearings, the Republic of Nicaragua requests the Court:

— to reject the preliminary objections of the Republic of Colombia; and

— to proceed with the examination of the merits of the case."

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* *

I. INTRODUCTION

15. It is recalled that in the present proceedings, Nicaragua seeks to found the Court's jurisdiction on Article XXXI of the Pact of Bogotá. According to this provision, the parties to the Pact recognize the Court's jurisdiction as compulsory in "all disputes of a juridical nature" (see paragraph 21 below).

16. Alternatively, Nicaragua maintains that the Court has an inherent jurisdiction to entertain disputes regarding non-compliance with its judgments and that in the present proceedings, such an inherent jurisdiction exists, given that the current dispute arises from non-compliance by Colombia with its Judgment of 19 November 2012 in the case concerning *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)* (*I.C.J. Reports 2012 (II)*, p. 624) (hereinafter the "2012 Judgment").

17. Colombia has raised five preliminary objections to the jurisdiction of the Court. According to the first objection, the Court lacks jurisdiction *ratione temporis* under the Pact of Bogotá because the proceedings were instituted by Nicaragua on 26 November 2013, after Colombia's notice of denunciation of the Pact on 27 November 2012. In its second objection, Colombia argues that, even if the Court does not uphold the first objection, the Court still has no jurisdiction under the Pact of Bogotá because there was no dispute between the Parties as at 26 November 2013, the date when the Application was filed. Colombia contends in its third objection that, even if the Court does not uphold the first objection, the Court still has no jurisdiction under the Pact of Bogotá because, at the time of the filing of the Application, the Parties were not of the opinion that the purported controversy "[could not] be settled by direct negotiations through the usual diplomatic channels", as is required, in Colombia's view, by Article II of the Pact of Bogotá before resorting to the dispute resolution procedures of the Pact. In its fourth objection, Colombia contests Nicaragua's assertion that the Court has an "inherent jurisdiction" enabling it to pronounce itself on the alleged non-compliance with a previous judgment. Finally, according to Colombia's fifth objection, the Court has no jurisdiction with regard to compliance with a prior judgment, which is, in its opinion, the real subject-matter of Nicaragua's claims in the present proceedings.

18. In its written observations and final submissions during the oral proceedings, Nicaragua requested the Court to reject Colombia's preliminary objections in their entirety (see paragraphs 13 and 14 above).

19. The Court will now consider these objections in the order presented by Colombia.

II. FIRST PRELIMINARY OBJECTION

20. Colombia's first preliminary objection is that Article XXXI of the Pact of Bogotá cannot provide a basis for the jurisdiction of the Court, because Colombia had given notification of denunciation of the Pact before Nicaragua filed its Application in the present case. According to Colombia, that notification had an immediate effect upon the jurisdiction of the Court under Article XXXI, with the result that the Court lacks jurisdiction in respect of any proceedings instituted after the notification was transmitted.

21. Article XXXI of the Pact of Bogotá provides:

"In conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice, the High Contracting Parties declare that they recognize, in relation to any other American State, the jurisdiction of the Court as compulsory *ipso facto*, without the necessity of any special agreement so long as the present Treaty is in force, in all disputes of a juridical nature that arise among them concerning:

(a) [t]he interpretation of a treaty;

(b) [a]ny question of international law;

(c) [t]he existence of any fact which, if established, would constitute the breach of an international obligation;

(d) [t]he nature or extent of the reparation to be made for the breach of an international obligation."

22. Denunciation of the Pact of Bogotá is governed by Article LVI, which reads:

"The present treaty shall remain in force indefinitely, but may be denounced upon one year's notice, at the end of which period it shall cease to be in force with respect to the State denouncing it, but shall continue in force for the remaining signatories. The denunciation shall be addressed to the Pan American Union, which shall transmit it to the other Contracting Parties.

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

23. On 27 November 2012, Colombia gave notice of denunciation by means of a diplomatic Note from the Minister for Foreign Affairs to the Secretary General of the OAS as head of the General Secretariat of the OAS (the successor to the Pan American Union). That notice stated that Colombia's denunciation "takes effect as of today with regard to procedures that are initiated after the present notice, in conformity with [the] second paragraph of Article LVI".

24. The Application in the present case was submitted to the Court after the transmission of Colombia's notification of denunciation but before the one-year period referred to in the first paragraph of Article LVI had elapsed.

* *

25. Colombia maintains that Article LVI of the Pact of Bogotá should be interpreted in accordance with the customary international law rules on treaty interpretation enshrined in Articles 31 to 33 of the 1969 Vienna Convention on the Law of Treaties (hereinafter, the "Vienna Convention"). Colombia relies, in particular, on the general rule of interpretation in Article 31 of the Vienna Convention, which requires that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". According to Colombia, the application of the general rule of treaty interpretation must lead to the conclusion that procedures initiated after transmission of a notification of denunciation are affected by the denunciation.

26. Colombia contends that the natural implication of the express provision in the second paragraph of Article LVI of the Pact that denunciation shall have no effect on pending procedures initiated *before* the transmission of a notification is that denunciation is effective with regard to procedures initiated *after* that date. Such effect must follow, according to Colombia, from the application to the second paragraph of Article LVI of an *a contrario* interpretation of the kind applied by the Court in its Judgment of 16 April 2013 in the case concerning the *Frontier Dispute (Burkina Faso/Niger)* (*I.C.J. Reports 2013*, pp. 81-82, paras. 87-88). Moreover, to adopt a different interpretation would deny *effet utile* to the second paragraph and thus run counter to the principle that all of the words in a treaty should be given effect. Colombia refutes the suggestion that its interpretation of the second paragraph of Article LVI would deny *effet utile* to the first paragraph of that provision. Even though Colombia accepts that its interpretation would mean that none of the different procedures provided for in Chapters Two to Five of the Pact could be initiated by, or against, a State which had given notification of denunciation during the year that the treaty remained in force in accordance with the first paragraph of Article LVI, it maintains that important substantive obligations contained in the other Chapters of the Pact would nevertheless remain in force during the one-year period, so that the first paragraph of Article LVI would have a clear effect.

27. Colombia argues that its interpretation of Article LVI is confirmed by the fact that if the parties to the Pact had wanted to provide that denunciation would not affect any procedures initiated during the one-year period of notice, they could easily have said so expressly, namely by adopting a wording similar to provisions in other treaties, such as Article 58, paragraph 2, of the 1950 European Convention on Human Rights, or Article 40, paragraph 2, of the 1972 European Convention on State Immunity. Colombia also observes that the function and language of Article XXXI are very similar to those of Article 36, paragraph 2, of the Statute of the Court and that States generally reserve the right to withdraw their declarations under Article 36, paragraph 2, without notice.

28. Finally, Colombia maintains that its interpretation is "also consistent with the State practice of the parties to the Pact" and the *travaux préparatoires*. With regard to the first argument, it points to the absence of any reaction, including from Nicaragua, to Colombia's notice of denunciation, notwithstanding the clear statement therein that the denunciation was to take effect as of the date of the notice "with regard to procedures . . . initiated after the present notice". It also emphasizes that there was no reaction from other parties to the Pact when El Salvador gave notice of denunciation in 1973, notwithstanding that El Salvador's notification of denunciation stated that the denunciation "will begin to take effect as of today". With regard to the *travaux préparatoires*,

Colombia contends that the first paragraph of Article LVI was taken from Article 9 of the 1929 General Treaty of Inter-American Arbitration (and the parallel provision in Article 16 of the 1929 General Convention of Inter-American Conciliation). Colombia maintains that what became the second paragraph of Article LVI was added as the result of an initiative taken by the United States of America in 1938 which was accepted by the Inter-American Juridical Committee in 1947 and incorporated into the text which was signed in 1948. According to Colombia, this history shows that the parties to the Pact of Bogotá intended to incorporate a provision which limited the effect of the first paragraph of Article LVI.

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29. Nicaragua contends that the jurisdiction of the Court is determined by Article XXXI of the Pact of Bogotá, according to which Colombia and Nicaragua had each recognized the jurisdiction of the Court "so long as the present Treaty is in force". How long the treaty remains in force is determined by the first paragraph of Article LVI, which provides that the Pact remains in force for a State which has given notification of denunciation for one year from the date of that notification. Since the date on which the jurisdiction of the Court has to be established is that on which the Application is filed, and since Nicaragua's Application was filed less than one year after Colombia gave notification of its denunciation of the Pact, it follows — according to Nicaragua — that the Court has jurisdiction in the present case. Nicaragua maintains that nothing in the second paragraph of Article LVI runs counter to that conclusion and no inference should be drawn from the silence of that paragraph regarding procedures commenced between the transmission of the notification of denunciation and the date on which the treaty is terminated for the denouncing State; in any event, such inference could not prevail over the express language of Article XXXI and the first paragraph of Article LVI.

30. That conclusion is reinforced, in Nicaragua's view, by consideration of the object and purpose of the Pact. Nicaragua recalls that, according to the Court, "[i]t is . . . 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" (*Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 89, para. 46). Colombia's interpretation of the second paragraph of Article LVI would, Nicaragua maintains, deprive of all meaning the express provision of Article XXXI that the parties to the Pact accept the jurisdiction of the Court so long as the Pact is in force between them, as well as the express provision of Article LVI that the Pact remains in force for one year after notification of denunciation. According to Nicaragua, it would also render the purpose of the Pact — as defined by the Court — unachievable during the one-year notice period.

31. Nicaragua disputes Colombia's argument that the Colombian interpretation of the second paragraph of Article LVI would still leave important obligations in place during the one-year period of notice. According to Nicaragua, the Colombian interpretation would remove from the effect of the first paragraph of Article LVI all of the procedures for good offices and mediation (Chapter Two of the Pact), investigation and conciliation (Chapter Three), judicial settlement

(Chapter Four) and arbitration (Chapter Five), which together comprise forty-one of the sixty articles of the Pact. Of the remaining provisions, several — such as Article LII on ratification of the Pact and Article LIV on adherence to the Pact — are provisions which have entirely served their purpose and would fulfil no function during the one-year period of notice, while others — such as Articles III to VI — are inextricably linked to the procedures in Chapters Two to Five and impose no obligations independent of those procedures. Colombia's interpretation of Article LVI would thus leave only six of the Pact's sixty articles with any function during the period of one year prescribed by the first paragraph of Article LVI. Nicaragua also notes that the title of Chapter One of the Pact is "General Obligation to Settle Disputes by Pacific Means" and contends that it would be strange to interpret Article LVI of the Pact as maintaining this Chapter in force between a State which had given notice of denunciation and the other parties to the Pact, but not the Chapters containing the very means to which Chapter One refers.

32. Finally, Nicaragua denies that the practice of the parties to the Pact of Bogotá or the *travaux préparatoires* support Colombia's interpretation. So far as practice is concerned, Nicaragua maintains that nothing can be read into the absence of a response to the notices of denunciation by El Salvador and Colombia as there was no obligation on other parties to the Pact to respond. As for the *travaux préparatoires*, they suggest no reason why what became the second paragraph of Article LVI was included or what it was intended to mean. Most importantly, the *travaux préparatoires* contain nothing which suggests that the parties to the Pact intended, by the addition of what became the second paragraph, to restrict the scope of the first paragraph of Article LVI. In Nicaragua's view, the second paragraph of Article LVI, while not necessary, serves a useful purpose in making clear that denunciation does not affect pending procedures.

* *

33. The Court recalls that the date at which its jurisdiction has to be established is the date on which the application is filed with the Court (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, pp. 437-438, paras. 79-80; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 613, para. 26). One consequence of this rule is that "the removal, after an application has been filed, of an element on which the Court's jurisdiction is dependent does not and cannot have any retroactive effect" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 438, para. 80). Thus, even if the treaty provision by which jurisdiction is conferred on the Court ceases to be in force between the applicant and the respondent, or either party's declaration under Article 36, paragraph 2, of the Statute of the Court expires or is withdrawn, after the application has been filed, that fact does not deprive the Court of jurisdiction. As the Court held, in the *Nottebohm* case:

> "When an Application is filed at a time when the law in force between the parties entails the compulsory jurisdiction of the Court . . . the filing of the Application is merely the condition required to enable the clause of compulsory jurisdiction to produce its effects in respect of the claim advanced in the Application. Once this condition has been satisfied, the Court must deal with the claim; it has jurisdiction to deal with all its aspects, whether they relate to jurisdiction, to admissibility or to the merits. An extrinsic fact such as the subsequent lapse of the Declaration, by reason of the expiry of the period or by denunciation, cannot deprive the Court of the jurisdiction already established." (*Nottebohm (Liechtenstein* v. *Guatemala), Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 123.)

34. By Article XXXI, the Parties to the Pact of Bogotá recognize as compulsory the jurisdiction of the Court, "so long as the present Treaty is in force". The first paragraph of Article LVI provides that, following the denunciation of the Pact by a State party, the Pact shall remain in force between the denouncing State and the other parties for a period of one year following the notification of denunciation. It is not disputed that, if these provisions stood alone, they would be sufficient to confer jurisdiction in the present case. The Pact was still in force between Colombia and Nicaragua on the date that the Application was filed and, in accordance with the rule considered in paragraph 33 above, the fact that the Pact subsequently ceased to be in force between them would not affect that jurisdiction. The only question raised by Colombia's first preliminary objection, therefore, is whether the second paragraph of Article LVI so alters what would otherwise have been the effect of the first paragraph as to require the conclusion that the Court lacks jurisdiction in respect of the proceedings, notwithstanding that those proceedings were instituted while the Pact was still in force between Nicaragua and Colombia.

35. That question has to be answered by the application to the relevant provisions of the Pact of Bogotá of the rules on treaty interpretation enshrined in Articles 31 to 33 of the Vienna Convention. Although that Convention is not in force between the Parties and is not, in any event, applicable to treaties concluded before it entered into force, such as the Pact of Bogotá, it is well established that Articles 31 to 33 of the Convention reflect rules of customary international law (*Avena and other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 48, para. 83; *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 502, para. 101; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 812, para. 23; *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 21, para. 41; *Arbitral Award of 31 July 1989 (Guinea-Bissau* v. *Senegal), Judgment, I.C.J. Reports 1991*, p. 70, para. 48). The Parties agree that these rules are applicable. Article 31, which states the general rule of interpretation, requires that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

36. Colombia's argument regarding the interpretation of the second paragraph of Article LVI is based not upon the ordinary meaning of the terms used in that provision but upon an inference which might be drawn from what that paragraph does not say. That paragraph is silent with regard to procedures initiated after the transmission of the notification of denunciation but before the

expiration of the one-year period referred to in the first paragraph of Article LVI. Colombia asks the Court to draw from that silence the inference that the Court lacks jurisdiction in respect of proceedings initiated after notification of denunciation has been given. According to Colombia, that inference should be drawn even though the Pact remains in force for the State making that denunciation, because the one-year period of notice stipulated by the first paragraph of Article LVI has not yet elapsed. That inference is said to follow from an *a contrario* reading of the provision.

37. An *a contrario* reading of a treaty provision — by which the fact that the provision expressly provides for one category of situations is said to justify the inference that other comparable categories are excluded — has been employed by both the present Court (see, e.g., *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Application by Honduras for Permission to Intervene, Judgment, I.C.J. Reports 2011 (II)*, p. 432, para. 29) and the Permanent Court of International Justice (*S.S. "Wimbledon", Judgment, 1923, P.C.I.J., Series A, No. 1*, pp. 23-24). Such an interpretation is only warranted, however, when it is appropriate in light of the text of all the provisions concerned, their context and the object and purpose of the treaty. Moreover, even where an *a contrario* interpretation is justified, it is important to determine precisely what inference its application requires in any given case.

38. The second paragraph of Article LVI states that "[t]he denunciation shall have no effect with respect to pending procedures initiated prior to the transmission of the particular notification". However, it is not the denunciation *per se* that is capable of having an effect upon the jurisdiction of the Court under Article XXXI of the Pact, but the termination of the treaty (as between the denouncing State and the other parties) which results from the denunciation. That follows both from the terms of Article XXXI, which provides that the parties to the Pact recognize the jurisdiction of the Court as compulsory *inter se* "so long as the present Treaty is in force", and from the ordinary meaning of the words used in Article LVI. The first paragraph of Article LVI provides that the treaty may be terminated by denunciation, but that termination will occur only after a period of one year from the notification of denunciation. It is, therefore, this first paragraph which determines the effects of denunciation. The second paragraph of Article LVI confirms that procedures instituted before the transmission of the notification of denunciation can continue irrespective of the denunciation and thus that their continuation is ensured irrespective of the provisions of the first paragraph on the effects of denunciation as a whole.

39. Colombia's argument is that if one applies an *a contrario* interpretation to the second paragraph of Article LVI, then it follows from the statement that "denunciation shall have no effect with respect to pending procedures initiated prior to the transmission of the particular notification [of denunciation]" that denunciation does have an effect upon procedures instituted after the transmission of that notification. Colombia maintains that the effect is that any procedures instituted after that date fall altogether outside the treaty. In the case of proceedings at the Court commenced after that date, Colombia maintains that they would, therefore, fall outside the jurisdiction conferred by Article XXXI. However, such an interpretation runs counter to the language of Article XXXI, which provides that the parties to the Pact recognize the jurisdiction of the Court as compulsory "so long as the present Treaty is in force".

The second paragraph of Article LVI is open to a different interpretation, which is compatible with the language of Article XXXI. According to this interpretation, whereas proceedings instituted before transmission of notification of denunciation can continue in any event and are thus not subject to the first paragraph of Article LVI, the effect of denunciation on proceedings instituted after that date is governed by the first paragraph. Since the first paragraph provides that denunciation terminates the treaty for the denouncing State only after a period of one year has elapsed, proceedings instituted during that year are instituted while the Pact is still in force. They are thus within the scope of the jurisdiction conferred by Article XXXI.

40. Moreover, in accordance with the rule of interpretation enshrined in Article 31, paragraph 1, of the Vienna Convention, the text of the second paragraph of Article LVI has to be examined in its context. Colombia admits (see paragraph 26 above) that its reading of the second paragraph has the effect that, during the one-year period which the first paragraph of Article LVI establishes between the notification of denunciation and the termination of the treaty for the denouncing State, none of the procedures for settlement of disputes established by Chapters Two to Five of the Pact could be invoked as between a denouncing State and any other party to the Pact. According to Colombia, only the provisions of the other chapters of the Pact would remain in force between a denouncing State and the other parties, during the one-year period of notice. However, Chapters Two to Five contain all of the provisions of the Pact dealing with the different procedures for the peaceful settlement of disputes and, as the Court will explain, play a central role within the structure of obligations laid down by the Pact. The result of Colombia's proposed interpretation of the second paragraph of Article LVI would be that, during the year following notification of denunciation, most of the Articles of the Pact, containing its most important provisions, would not apply between the denouncing State and the other parties. Such a result is difficult to reconcile with the express terms of the first paragraph of Article LVI, which provides that "the present Treaty" shall remain in force during the one-year period without distinguishing between different parts of the Pact as Colombia seeks to do.

41. It is also necessary to consider whether Colombia's interpretation is consistent with the object and purpose of the Pact of Bogotá. That object and purpose are suggested by the full title of the Pact, namely the American Treaty on Pacific Settlement. The preamble indicates that the Pact was adopted in fulfilment of Article XXIII of the Charter of the OAS. Article XXIII (now Article XXVII) provides that:

> "A special treaty will establish adequate means for the settlement of disputes and will determine pertinent procedures for each peaceful means such that no dispute between American States may remain without definitive settlement within a reasonable period of time."

That emphasis on establishing means for the peaceful settlement of disputes as the object and purpose of the Pact is reinforced by the provisions of Chapter One of the Pact, which is entitled "General Obligation to Settle Disputes by Pacific Means". Article I provides:

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

Article II provides:

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

Finally, the Court recalls that, in its 1988 Judgment in the *Armed Actions* case, quoted at paragraph 30 above, it held that "the purpose of the American States in drafting [the Pact] was to reinforce their mutual commitments with regard to judicial settlement" (*Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 89, para. 46).

42. These factors make clear that the object and purpose of the Pact is to further the peaceful settlement of disputes through the procedures provided for in the Pact. Although Colombia argues that the reference to "regional . . . procedures" in the first paragraph of Article II is not confined to the procedures set out in the Pact, Article II has to be interpreted as a whole. It is clear from the use of the word "consequently" at the beginning of the second paragraph of Article II that the obligation to resort to regional procedures, which the parties "recognize" in the first paragraph, is to be given effect by employing the procedures laid down in Chapters Two to Five of the Pact. Colombia maintains that its interpretation of the second paragraph of Article LVI would leave Article II — which contains one of the core obligations in the Pact — in effect during the one-year period. The Court observes, however, that Colombia's interpretation would deprive both the denouncing State and, to the extent that they have a controversy with the denouncing State, all other parties of access to the very procedures designed to give effect to that obligation to resort to regional procedures. As the Court has already explained (see paragraph 36 above), that interpretation is said to follow not from the express terms of the second paragraph of Article LVI but from an inference which, according to Colombia, must be drawn from the silence of that paragraph regarding proceedings instituted during the one-year period. The Court sees no basis on which to draw from that silence an inference that would not be consistent with the object and purpose of the Pact of Bogotá.

43. An essential part of Colombia's argument is that its interpretation is necessary to give *effet utile* to the second paragraph of Article LVI. Colombia maintains that if the effect of the second paragraph is confined to ensuring that procedures commenced before the date of transmission of the notification of denunciation can continue after that date, then the provision is superfluous. The rule that events occurring after the date on which an application is filed do not deprive the Court of jurisdiction which existed on that date (see paragraph 33 above) would ensure, in any event, that denunciation of the Pact would not affect procedures already instituted prior to denunciation.

The Court has recognized that, in general, the interpretation of a treaty should seek to give effect to every term in that treaty and that no provision should be interpreted in a way that renders it devoid of purport or effect (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, pp. 125-126, para. 133; *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgments, I.C.J. Reports 1949*, p. 24). There are occasions, however, when the parties to a treaty adopt a provision for the avoidance of doubt even if such a provision is not strictly necessary. For example, Article LVIII of the Pact of Bogotá provides that certain earlier Inter-American treaties shall cease to have effect with respect to parties to the Pact as soon as the Pact comes into force. Article LIX then provides that the provisions of Article LVIII "shall not apply to procedures already initiated or agreed upon" in accordance with any of those earlier treaties. While neither Party made reference to these provisions, if one applies to them the approach suggested by Colombia with regard to Article LVI, then Article LIX must be considered unnecessary. It appears that the parties to the Pact of Bogotá considered that it was desirable to include Article LIX out of an abundance of caution. The fact that the parties to the Pact considered that including Article LIX served a useful purpose even though it was not strictly necessary undermines Colombia's argument that the similar provision in the second paragraph of Article LVI could not have been included for that reason.

44. The Court also considers that, in seeking to determine the meaning of the second paragraph of Article LVI, it should not adopt an interpretation which renders the first paragraph of that Article devoid of purport or effect. The first paragraph provides that the Pact shall remain in force for a period of one year following notification of denunciation. Colombia's interpretation would, however, confine the effect of that provision to Chapters One, Six, Seven, and Eight. Chapter Eight contains the formal provisions on such matters as ratification, entry into force and registration and imposes no obligations during the period following a notification of denunciation. Chapter Seven (entitled "Advisory Opinions") contains only one Article and is purely permissive. Chapter Six also contains one provision, which requires only that before a party resorts to the Security Council regarding the failure of another party to comply with a judgment of the Court or an arbitration award, it shall first propose a Meeting of Consultation of Ministers of Foreign Affairs of the parties.

Chapter One ("General Obligation to Settle Disputes by Pacific Means") contains eight articles which impose important obligations upon the parties but, as has already been shown (see paragraph 42 above), Article II is concerned with the obligation to use the procedures in the Pact (none of which would be available during the one-year period if Colombia's interpretation were accepted), while Articles III to VI have no effect independent of the procedures in Chapters Two to Five. That leaves only three provisions. Article I provides that the Parties,

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

Article VII binds the parties not to exercise diplomatic protection in respect of their nationals when those nationals have had available the means to place their cases before competent domestic courts. Article VIII provides that recourse to pacific means shall not preclude recourse to self-defence in the case of an armed attack.

Colombia's interpretation of the second paragraph of Article LVI would thus confine application of the first paragraph of Article LVI to these few provisions.

45. Colombia, basing itself on the language employed in other treaties, argues that, had the parties to the Pact of Bogotá wished to provide that proceedings instituted at any time before the expiry of the one-year period stipulated by the first paragraph of Article LVI would be unaffected, they could easily have made express provision to that effect. Conversely, however, had the parties to the Pact intended the result for which Colombia contends, they could easily have made express provision to that effect — but they chose not to do so. The comparison with those other treaties is not, therefore, a persuasive argument in favour of Colombia's interpretation of the second paragraph of Article LVI. Nor is the fact that many declarations made under Article 36, paragraph 2, of the Statute of the Court are terminable without notice. Article 36, paragraph 2, of the Statute and Article XXXI of the Pact of Bogotá both provide for the compulsory jurisdiction of the Court. However, Article 36, paragraph 2, of the Statute confers jurisdiction only between States which have made a declaration recognizing that jurisdiction. In its declaration under Article 36, paragraph 2, a State is free to provide that that declaration may be withdrawn with immediate effect. By contrast, Article XXXI of the Pact of Bogotá is a treaty commitment, not dependent upon unilateral declarations for its implementation (*Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 84, para. 32). The conditions under which a State party to the Pact may withdraw from that commitment are determined by the relevant provisions of the Pact. The fact that many States choose to frame their declarations under Article 36, paragraph 2, in such a way that they may terminate their acceptance of the jurisdiction of the Court with immediate effect thus sheds no light on the interpretation of the provisions of the Pact.

46. The Court has noted Colombia's argument (see paragraph 28 above) regarding State practice in the form of the denunciation of the Pact by El Salvador in 1973 and Colombia itself in 2012, together with what Colombia describes as the absence of any reaction to the notification of those denunciations.

The two notifications of denunciation are not in the same terms. While El Salvador's notification stated that its denunciation "will begin to take effect as of today", there is no indication of what effect was to follow immediately upon the denunciation. Since the first paragraph of Article LVI requires one year's notice in order to terminate the treaty, any notification of denunciation begins to take effect immediately in the sense that the transmission of that notification causes the one-year period to begin. Accordingly, neither El Salvador's notification, nor the absence of any comment thereon by the other parties to the Pact, sheds any light on the question currently before the Court.

Colombia's own notification of denunciation specified that "[t]he denunciation [of the Pact] takes effect as of today with regard to procedures that are initiated after the present notice, in conformity with the second paragraph of Article LVI". Nevertheless, the Court is unable to read into the absence of any objection on the part of the other parties to the Pact with respect to that notification an agreement, within the meaning of Article 31 (3) *(b)* of the Vienna Convention, regarding Colombia's interpretation of Article LVI. Nor does the Court consider that the absence of any comment by Nicaragua amounted to acquiescence. The fact that Nicaragua commenced proceedings in the case concerning *Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia)* and in the present case within one year of the transmission of Colombia's notification of denunciation reinforces this conclusion.

47. Turning to Colombia's argument regarding the *travaux préparatoires*, the Court considers that the *travaux préparatoires* of the Pact demonstrate that what became the first paragraph of Article LVI was taken over from Article 9 of the 1929 General Treaty of Inter-American Arbitration and Article 16 of the 1929 General Convention of Inter-American Conciliation. The second paragraph of Article LVI originated with a proposal from the United States in 1938 which had no counterpart in the 1929 Treaties. However, the *travaux préparatoires* give no indication as to the precise purpose behind the addition of what became the second paragraph of Article LVI. The Court also notes that, if Colombia's view as to the significance of the second paragraph were correct, then the insertion of the new paragraph would have operated to restrict the effect of the provision which, even before the United States made its proposal, the parties were contemplating carrying over from the 1929 Treaties. Yet there is no indication anywhere in the *travaux préparatoires* that anyone considered that incorporating this new paragraph would bring about such an important change.

48. For all of the foregoing reasons the Court considers that Colombia's interpretation of Article LVI cannot be accepted. Taking Article LVI as a whole, and in light of its context and the object and purpose of the Pact, the Court concludes that Article XXXI conferring jurisdiction upon the Court remained in force between the Parties on the date that the Application in the present case was filed. The subsequent termination of the Pact as between Nicaragua and Colombia does not affect the jurisdiction which existed on the date that the proceedings were instituted. Colombia's first preliminary objection must therefore be rejected.

III. SECOND PRELIMINARY OBJECTION

49. In its second preliminary objection to the jurisdiction of the Court, Colombia contends that prior to the filing of Nicaragua's Application on 26 November 2013, there was no dispute between the Parties with respect to the claims advanced in the Application that could trigger the dispute resolution provisions of the Pact of Bogotá, in particular, those concerning the Court's jurisdiction.

50. Under Article 38 of the Statute, the function of the Court is to decide in accordance with international law disputes that States submit to it. By virtue of Article XXXI of the Pact of Bogotá, the States parties agreed to accept the compulsory jurisdiction of the Court, in conformity with Article 36, paragraph 2, of the Statute, for "all disputes of a juridical nature that arise among them".

The existence of a dispute between the parties is a condition of the Court's jurisdiction. Such a dispute, according to the established case law of the Court, is "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11; see also *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 84, para. 30). "It must be shown that the claim of one party is positively opposed by the other." (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328.) It does not matter which one of them advances a claim and which one opposes it. What matters is that "the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain" international obligations (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74).

The Court recalls that "[w]hether there exists an international dispute is a matter for objective determination" by the Court (*ibid.*; see also *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 442, para. 46; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 84, para. 30; *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 271, para. 55; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 476, para. 58). "The Court's determination must turn on an examination of the facts. The matter is one of substance, not of form." (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 84, para. 30.)

51. According to Article 40, paragraph 1, of the Statute and Article 38, paragraph 2, of the Rules of Court, the Applicant is required to indicate the "subject of the dispute" in the Application, specifying the "precise nature of the claim" (see also *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection*, Judgment of 24 September 2015, para. 25; *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 448, para. 29). However, "[i]t is for the Court itself . . . to determine on an objective basis the subject-matter of the dispute between the parties, that is, to 'isolate the real issue in the case and to identify the object of the claim' (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 262, para. 29; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 466, para. 30)" (*Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection*, Judgment of 24 September 2015, para. 26).

52. In principle, the critical date for determining the existence of a dispute is the date on which the application is submitted to the Court (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 85, para. 30; *Questions of Interpretation and*

Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 25-26, paras. 43-45; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 130-131, paras. 42-44).

* *

53. In its Application, Nicaragua indicates that the subject of the dispute it submits to the Court is as follows: "The dispute concerns the violations of Nicaragua's sovereign rights and maritime zones declared by the Court's Judgment of 19 November 2012 and the threat of the use of force by Colombia in order to implement these violations."

In the submissions set out in the Memorial (see paragraph 12 above), Nicaragua requests the Court to determine two principal claims; one relates to Colombia's alleged violations of Nicaragua's maritime zones as delimited by the Court in its 2012 Judgment "as well as Nicaragua's sovereign rights and jurisdiction in these zones", and the other concerns Colombia's alleged breach of its obligation not to use or threaten to use force under Article 2, paragraph 4, of the Charter of the United Nations and customary international law.

54. Nicaragua claims that, in the period between the delivery of the 2012 Judgment and the date of the filing of the Application on 26 November 2013, Colombia first asserted that the 2012 Judgment was not applicable. On 9 September 2013, it enacted Presidential Decree 1946 on the establishment of an "Integral Contiguous Zone" (hereinafter "Decree 1946") that partially overlapped with the maritime zones that the Court declared appertain to Nicaragua. Moreover, according to Nicaragua, Colombia started a programme of military and surveillance operations in those maritime areas. Nicaragua also states that Colombia took steps using military vessels and aircraft to intimidate Nicaraguan vessels and that it continued to issue licenses authorizing fishing in the waters concerned.

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55. In supporting its second preliminary objection, Colombia contends that at no time up to the critical date of 26 November 2013, the date on which Nicaragua filed its Application, did Nicaragua ever indicate to Colombia, by any modality, that Colombia was violating Nicaragua's sovereign rights and maritime zones declared by the 2012 Judgment or that it was threatening to

use force. It argues that Nicaragua had not raised any complaints with Colombia, either in writing or orally until almost ten months after it filed the Application and three weeks before it submitted its Memorial, namely, until it sent a diplomatic Note to Colombia on 13 September 2014. Colombia alleges that this Note "is a transparent effort to manufacture a case where none exists".

56. Colombia claims that Nicaragua's Application came as a "complete surprise", given the peaceful situation at sea and the Parties' repeated statements that they were intent on negotiating a treaty to implement the 2012 Judgment. It contends that, prior to the filing of the Application, and even for a significant period afterwards, there was no dispute over any allegations of violation by Colombia of Nicaragua's maritime spaces, or threat of the use of force, that could have formed the basis of negotiations.

57. With regard to Nicaragua's allegation that Colombia had repudiated the 2012 Judgment, Colombia states that

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

Colombia maintains that, under Article 101 of its Constitution, a change to its boundaries can only be effected by the conclusion of a treaty and that Nicaragua had expressed its willingness to enter into negotiations with Colombia regarding the possibility of concluding such a treaty.

58. With regard to Presidential Decree 1946 on an "Integral Contiguous Zone" enacted on 9 September 2013 and subsequently amended by Decree 1119 of 17 June 2014, Colombia argues that although its own entitlement to a contiguous zone around its islands was fully addressed by the Parties in the case concluded with the 2012 Judgment, the delimitation of that zone was not an issue addressed or decided by the Court. Colombia claims that, like all other States, it is entitled to such a maritime zone, which is governed by customary international law. It states that its

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

59. Moreover, Colombia maintains that, under Decree 1946, its right to sanction infringements of laws and regulations concerning the matters mentioned in the Decree would only be exercised in relation to acts committed in its insular territories or in their territorial sea, which, according to Colombia, "corresponds to customary international law".

60. Finally, Colombia denies that there existed, at the date of the filing of the Application, any dispute between the Parties concerning a threat of use of force at sea, let alone any violation of Article 2, paragraph 4, of the Charter of the United Nations. It maintains that it had given instructions to its naval forces to avoid any risk of confrontation with Nicaragua at sea. It claims that, as confirmed by members of Nicaragua's Executive and Military, "the situation in the south-western Caribbean was calm, and that no problems existed".

*

61. Nicaragua, for its part, first points to the declarations and statements of Colombia's senior officials, including its Head of State, its Foreign Minister and the Chief of its Navy, which, it claims, indicate that Colombia would not accept the delimitation of the maritime zones as determined by the Court in the 2012 Judgment. It particularly refers to the declaration made on 9 September 2013 by the President of Colombia on the "integral strategy of Colombia on the Judgment of the International Court of Justice", in which the President announced, *inter alia*, that the 2012 Judgment would not be applicable until a treaty had been concluded with Nicaragua. Nicaragua contends that, with the "integral strategy" and the subsequent actions taken in line with the instructions of the President, Colombia hardened its position in defiance of the 2012 Judgment. Nicaragua claims that Colombia could not fail to see that there was a dispute between the Parties.

62. Nicaragua states that Decree 1946 draws a contiguous zone joining together the contiguous zones of all the islands and cays of Colombia in the Western Caribbean Sea. It argues that neither the size of the contiguous zone, nor the nature of the rights and jurisdiction that Colombia claims within it, are consistent with the definition of the contiguous zone recognized by international law. Moreover, according to Nicaragua, Decree 1946 purports to attribute to Colombia maritime areas that the Court determined in its 2012 Judgment appertain to Nicaragua. By issuing that Decree, Nicaragua alleges, "Colombia transformed into national law its rejection and defiance of the . . . 2012 Judgment" of the Court.

63. Nicaragua also alleges that a series of incidents involving vessels or aircraft of Colombia occurred at sea. According to Nicaragua, a number of such incidents took place between the date of the 2012 Judgment and the date of the filing of the Application in the waters declared by the 2012 Judgment to be Nicaraguan. It claims that the conversations between the commanders of the Colombian Navy frigates and the agents of Nicaragua's Coast Guard during these alleged incidents demonstrate that the Parties held conflicting claims of maritime entitlements to the areas concerned.

64. Nicaragua points out that since the maritime boundary between the Parties out to 200 nautical miles from the Nicaraguan coast was fixed by the Court, both Nicaragua and Colombia have known for almost three years the geographical extent of each other's maritime

rights. According to Nicaragua, after the 2012 Judgment was rendered, however, Colombia has continued to assert its "sovereignty" and maritime entitlements in Nicaragua's waters and to issue fishing permits to its nationals to exploit the resources in Nicaragua's maritime area. Nicaragua explains that its purpose in referring to facts having occurred after the date of the filing of its Application is to demonstrate that the problem is a continuing one.

65. In relation to its allegations of Colombia's threat of use of force, Nicaragua contends that in furtherance of its assertion of "sovereignty", Colombia has regularly "harassed" Nicaraguan fishing vessels in Nicaraguan waters, particularly in the rich fishing ground known as "Luna Verde", located around the intersection of meridian 82° with parallel 15° in waters the Court declared to belong to Nicaragua. It asserts that Colombia has done so by directing Colombian navy frigates to chase away Nicaraguan fishing boats and fishing vessels licensed by Nicaragua, as well as by commanding its military aircraft to "harass" Nicaraguan fishing vessels by air.

66. Nicaragua claims that it "has consistently met Colombia's refusal to comply with the . . . 2012 Judgment and its provocative conduct within Nicaragua's waters with patience and restraint". Nicaraguan naval forces have been ordered to avoid any engagement with Colombia's navy and, in fact, have kept their distance from the Colombian navy as far as possible. Nicaragua emphasizes, however, that its "conciliatory, non-escalatory position . . . has in no way reduced the disagreement or made the dispute go away".

* *

67. The Court recalls (see paragraph 53 above) that Nicaragua makes two distinct claims — one that Colombia has violated Nicaragua's sovereign rights and maritime zones, and the other that Colombia has breached its obligation not to use or threaten to use force. The Court will examine these two claims separately in order to determine, with respect to each of them, whether there existed a dispute within the meaning set out in paragraphs 50 to 52 above at the date of filing of the Application.

68. The Court notes that, in support of their respective positions on the existence of a dispute with regard to Nicaragua's first claim, the Parties primarily refer to declarations and statements made by the highest representatives of the Parties, to Colombia's enactment of Decree 1946, and to the alleged incidents at sea.

69. Considering, first, the declarations and statements of the senior officials of the two States, the Court observes that, following the delivery of the 2012 Judgment, the President of Colombia proposed to Nicaragua to negotiate a treaty concerning the effects of that Judgment, while the Nicaraguan President, on a number of occasions, expressed a willingness to enter into negotiations for the conclusion of a treaty to give effect to the Judgment, by addressing Colombia's

concerns in relation to fishing, environmental protection and drug trafficking. The Court considers that the fact that the Parties remained open to a dialogue does not by itself prove that, at the date of the filing of the Application, there existed no dispute between them concerning the subject-matter of Nicaragua's first claim.

The Court notes that Colombia took the view that its rights were "infringed" as a result of the maritime delimitation by the 2012 Judgment. After his meeting with the President of Nicaragua on 1 December 2012, President Juan Manuel Santos of Colombia stated that "we will continue — and we said this clearly to President Ortega — looking for the reestablishment of the rights that this Judgment breached in a grave matter for the Colombians".

Nicaragua, for its part, insisted that the maritime zones declared by the Court in the 2012 Judgment must be respected. On 10 September 2013, following Colombia's issuance of Decree 1946, when President Santos reiterated Colombia's position on the implementation of the 2012 Judgment, President Daniel Ortega of Nicaragua reportedly stated that:

> "We understand the position taken by President Santos, but we cannot say that we agree with the position of President Santos . . . We do agree that it is necessary to dialogue, we do agree that it is necessary to look for some kind of agreement, treaty, whatever we want to call it, to put into practice in a harmonious way . . . the Judgment of the International Court of Justice . . ."

It is apparent from these statements that the Parties held opposing views on the question of their respective rights in the maritime areas covered by the 2012 Judgment.

70. With regard to Colombia's proclamation of an "Integral Contiguous Zone", the Court notes that the Parties took different positions on the legal implications of such action in international law. While Colombia maintained that it was entitled to such a contiguous zone as defined by Decree 1946 under customary international law, Nicaragua contended that Decree 1946 violated its "sovereign rights and maritime zones" as adjudged by the Court in the 2012 Judgment.

71. Regarding the incidents at sea alleged to have taken place before the critical date, the Court considers that, although Colombia rejects Nicaragua's characterization of what happened at sea as "incidents", it does not rebut Nicaragua's allegation that it continued exercising jurisdiction in the maritime spaces that Nicaragua claimed as its own on the basis of the 2012 Judgment.

72. Concerning Colombia's argument that Nicaragua did not lodge a complaint of alleged violations with Colombia through diplomatic channels until long after it filed the Application, the Court is of the view that although a formal diplomatic protest may be an important step to bring a claim of one party to the attention of the other, such a formal protest is not a necessary condition. As the Court held in the case concerning *Application of the International Convention on the*

Elimination of All Forms of Racial Discrimination (Georgia v. *Russian Federation)*, in determining whether a dispute exists or not, "[t]he matter is one of substance, not of form" (*Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 84, para. 30).

73. The Court notes that, although Nicaragua did not send its formal diplomatic Note to Colombia in protest at the latter's alleged violations of its maritime rights at sea until 13 September 2014, almost ten months after the filing of the Application, in the specific circumstances of the present case, the evidence clearly indicates that, at the time when the Application was filed, Colombia was aware that its enactment of Decree 1946 and its conduct in the maritime areas declared by the 2012 Judgment to belong to Nicaragua were positively opposed by Nicaragua. Given the public statements made by the highest representatives of the Parties, such as those referred to in paragraph 69, Colombia could not have misunderstood the position of Nicaragua over such differences.

74. Based on the evidence examined above, the Court finds that, at the date on which the Application was filed, there existed a dispute concerning the alleged violations by Colombia of Nicaragua's rights in the maritime zones which, according to Nicaragua, the Court declared in its 2012 Judgment appertain to Nicaragua.

75. The Court now turns to the question of the existence of a dispute with regard to Nicaragua's second claim, namely that Colombia, by its conduct, has breached its obligation not to use or threaten to use force under Article 2, paragraph 4, of the Charter of the United Nations and customary international law.

76. Although Nicaragua refers to a number of incidents which allegedly occurred at sea, the Court observes that, with regard to those which allegedly occurred before the critical date, nothing in the evidence suggests that Nicaragua had indicated that Colombia had violated its obligations under Article 2, paragraph 4, of the Charter of the United Nations or under customary international law regarding the threat or use of force. On the contrary, members of Nicaragua's executive and military authorities confirmed that the situation at sea was calm and stable. On 14 August 2013, on the occasion of the 33rd anniversary of Nicaragua's naval forces, the President of Nicaragua stated that:

> "[W]e must recognize that in the middle of all this media turbulence, the Naval Force of Colombia, which is very powerful, that certainly has a very large military power, has been careful, has been respectful and there has not been any kind of confrontation between the Colombian and Nicaraguan Navy . . ."

On 18 November 2013, the Chief of the Nicaraguan Naval Force stated that "in one year of being there we have not had any problems with the Colombian Naval Forces", that the forces of the two countries "maintain[ed] a continuous communication" and that "we have not had any conflicts in those waters".

77. Furthermore, the Court observes that the alleged incidents that were said to have occurred before Nicaragua filed its Application relate to Nicaragua's first claim rather than a claim concerning a threat of use of force under Article 2, paragraph 4, of the Charter of the United Nations and customary international law.

78. Given these facts, the Court considers that, at the date on which the Application was filed, the dispute that existed between Colombia and Nicaragua did not concern Colombia's possible violations of Article 2, paragraph 4, of the Charter of the United Nations and customary international law prohibiting the use or threat of use of force.

79. In light of the foregoing considerations, the Court concludes that, at the time Nicaragua filed its Application, there existed a dispute concerning the alleged violations by Colombia of Nicaragua's rights in the maritime zones which, according to Nicaragua, the Court declared in its 2012 Judgment appertain to Nicaragua. Consequently, Colombia's second preliminary objection must be rejected with regard to Nicaragua's first claim and upheld with regard to its second claim.

IV. THIRD PRELIMINARY OBJECTION

80. In its third preliminary objection, Colombia argues that the Court lacks jurisdiction because Article II of the Pact of Bogotá imposes a precondition on the recourse by the States parties to judicial settlement, which was not met at the date of Nicaragua's filing of its Application.

81. Article II of the Pact of Bogotá, which has already been quoted in paragraph 41, reads as follows:

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

82. Referring to the 1988 Judgment in the *Border and Transborder Armed Actions (Nicaragua* v. *Honduras)* case (hereinafter the "1988 Judgment"), Colombia claims that recourse to the pacific procedures of the Pact would be in conformity with Article II only if an attempt at negotiating a settlement had been made in good faith, and it is clear, after reasonable efforts, that a deadlock had been reached and that there was no likelihood of resolving the dispute by such means. Colombia asserts that, contrary to what Nicaragua claims, the term "in the opinion of the parties" in

Article II should refer to the opinion of both parties, as stated in the English, Portuguese and Spanish versions of the Pact, rather than the opinion of one of the parties. Colombia contends that, based on the conduct of both itself and Nicaragua, it could not be concluded that the alleged controversy, in the opinion of the Parties, could not be settled by direct negotiations through the usual diplomatic channels at the time of Nicaragua's filing of the Application.

83. Colombia claims that the fact that the Parties had been engaged in dialogue on the possibility of negotiating a treaty with a view to implementing the 2012 Judgment indicates that the two sides remained willing to settle their differences through direct negotiations. To demonstrate such intention on the part of Nicaragua, Colombia in its written pleadings refers to a number of statements and declarations made by the Nicaraguan President to that effect.

84. Colombia contends that even after the filing of its Application, it was reported that the Nicaraguan President on several occasions still talked about signing agreements with Colombia and proposed to set up a bi-national commission to co-ordinate the fishing operations, antidrug patrolling and the joint administration for the Seaflower Biosphere Marine Reserve in the Caribbean Sea, on the basis of the delimitation established by the Court.

85. Colombia asserts that the Chief of the Nicaraguan Naval Force and the Chief of Nicaragua's Army held the same view about peace and stability in the waters concerned. This fact confirms, according to Colombia, that up to the filing of the Application, Nicaragua was of the opinion that the two maritime neighbours maintained good relations, there had been no naval "incidents", and they could resolve their differences by way of negotiations. Colombia argues that Nicaragua's filing of its Application "was completely at odds with reality".

86. Colombia maintains that it also held the opinion that any maritime issues between the two Parties arising as a result of the Court's 2012 Judgment could be settled by way of direct negotiations. It claims that Nicaragua incorrectly inferred from the Colombian President's declaration of 19 November 2012 that Colombia rejected the Court's 2012 Judgment. Colombia points out that, upon instruction from its President, its Foreign Minister had already commenced discussions with her Nicaraguan counterpart on 20 November 2012. It further refers to the statement by its Foreign Minister on 14 September 2013, where she reiterated that "Colombia is open to dialogue with Nicaragua to sign a treaty that establishes the boundaries and a legal regime that contributes to the security and stability in the region".

87. Colombia explains that the protection of the historic fishing rights of the people of the Archipelago of San Andrés, Providencia and Santa Catalina is of paramount importance for the country. It underscores that the declarations made by Colombia's highest authorities in the wake of the 2012 Judgment must be understood in that context and, contrary to what Nicaragua seeks to

portray, they in no way imply any disregard for the Judgment of the Court. Colombia contends that the timing of Nicaragua's Application was due not to allegedly futile negotiations, but to the fact that the Pact of Bogotá would soon cease to be in force between the Parties.

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88. For its part, Nicaragua rejects the interpretation of Article II advanced by Colombia, maintaining that Colombia misreads the Court's 1988 Judgment. It contends that the Court, in that Judgment, explicitly declined to apply the jurisprudence relating to compromissory clauses in other treaties but referred to the opinion of the parties regarding the possibility of a negotiated settlement as provided for by Article II. Relying on the French version of the Pact, Nicaragua argues that Article II of the Pact requires the Court to determine whether, from an objective standpoint, one of the parties was of the opinion that the dispute could not be settled by direct negotiations.

89. Nicaragua contends that the present dispute arose from Colombia's actions subsequent to the delivery of the 2012 Judgment, with Colombia first rejecting the 2012 Judgment, then asserting new claims to the waters adjudged by the Court to appertain to Nicaragua and exercising purported sovereign rights and jurisdiction in those waters. According to Nicaragua, the events which occurred in the two and a half months leading up to the Application demonstrate that the Parties were of the opinion that their dispute concerning Colombia's violation of Nicaragua's sovereign rights and maritime zones could not be settled by direct negotiations. It points out that three days after the issuance of Decree 1946, President Juan Manuel Santos asked the Colombian Constitutional Court to declare Articles XXXI and L of the Pact of Bogotá unconstitutional, for, in his view, the Colombian Constitution only permits national boundaries to be modified by means of duly ratified treaties.

Nicaragua alleges that the President of Colombia also stated that, without a treaty with Nicaragua, Colombia would continue to "exercise sovereignty right up to the 82nd Meridian" which it had historically claimed as a maritime frontier, notwithstanding the Court's 2012 Judgment.

90. With regard to Colombia's reference to the declaration of its Foreign Minister that her country was open to dialogue (see paragraph 86 above), Nicaragua points out that following those remarks the Minister also added that the Government of Colombia "awaits the decision of the Constitutional Court before initiating any action". Nicaragua claims that, based on these declarations and statements, it was apparent to Nicaragua that Colombia was of the opinion that no negotiation was possible between the Parties to settle the dispute relating to Colombia's violations of Nicaragua's sovereign rights and maritime zones at the time of its filing of the Application.

91. Nicaragua, while reiterating its willingness to negotiate a treaty with Colombia for the implementation of the 2012 Judgment, emphasizes that the subject-matter for negotiations between the Parties is entirely unrelated to the subject-matter of the dispute in the present case. It claims that Colombia in its preliminary objections has "carefully chosen to elide the critical differences" between the two subject-matters. Nicaragua maintains that it is — and has always been — open to discussion with Colombia on the arrangements for fishing, environmental protection of the Seaflower Biosphere Marine Reserve and the fight against drug-trafficking in the Caribbean Sea, but it "is absolutely not prepared to give up the maritime boundaries that the Court has drawn" between the Parties.

* *

92. The Court recalls that in the 1988 Judgment, it decided that, for the purpose of determining the application of Article II of the Pact, it was not "bound by the mere assertion of the one [p]arty or the other that its opinion [was] to a particular effect". The Court emphasized that "it must, in the exercise of its judicial function, be free to make its own determination of that question on the basis of such evidence as is available to it" (*Border and Transborder Armed Actions, (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 95, para. 65).

93. The Court made clear that the parties are expected to provide substantive evidence to demonstrate that they considered in good faith that their dispute could or could not be settled by direct negotiations through the usual diplomatic channels. The critical date at which "the opinion of the parties" has to be ascertained for the application of Article II of the Pact is the date on which proceedings are instituted.

94. Moreover, in its 1988 Judgment, the Court took note of the discrepancy between the French text and the other three official texts (English, Portuguese and Spanish) of Article II; the former refers to the opinion of one of the parties ("de l'avis de l'une des parties"), while the latter three refer to the opinion of both parties. The Court, however, did not consider it necessary to resolve the problem posed by that textual discrepancy before proceeding to the consideration of the application of Article II of the Pact in that case. It proceeded on the basis that it would consider whether the "opinion" of both parties was that it was not possible to settle the dispute by negotiation, subject to demonstration of evidence by the parties.

95. In the present case, as in the 1988 Judgment, it will not be necessary for the Court to rehearse the arguments put forward by the Parties with regard to the interpretation of the term "in the opinion of the parties" ("de l'avis de l'une des parties") in Article II of the Pact. The Court will begin by determining whether the evidence provided demonstrates that, at the date of Nicaragua's filing of the Application, neither of the Parties could plausibly maintain that the dispute between them could be settled by direct negotiations through the usual diplomatic channels (see, in this regard, *ibid.*, p. 99, para. 75).

96. The Court recalls that statements and declarations referred to by the Parties in their written and oral pleadings are all made by the highest representatives of the two States. As the Court stated in the *Georgia* v. *Russian Federation* case,

> "in general, in international law and practice, it is the Executive of the State that represents the State in its international relations and speaks for it at the international level (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 27, paras. 46–47). Accordingly, primary attention will be given to statements made or endorsed by the Executives of the two Parties." (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 87, para. 37.)

The Court therefore considers that, in determining the Parties' positions with regard to the possibility of a negotiated settlement, it may rely on such statements and declarations to draw its findings.

97. The Court observes that, through various communications between the Heads of State of the two countries since the delivery of the 2012 Judgment, each Party had indicated that it was open to dialogue to address some issues raised by Colombia as a result of the Judgment.

The Nicaraguan President expressed Nicaragua's willingness to negotiate a treaty or agreement with Colombia so as to accommodate the latter's domestic requirement under national law for the implementation of the Judgment. The issues that the Parties identified for possible dialogue include fishing activities of the inhabitants of San Andrés, Providencia and Santa Catalina in waters that have been recognized as appertaining to Nicaragua by the Court, the protection of the Seaflower Biosphere Marine Reserve, and the fight against drug trafficking in the Caribbean Sea.

98. The Court notes, however, that the above-mentioned subject-matter for negotiation is different from the subject-matter of the dispute between the Parties. According to Nicaragua, negotiations between the Parties should have been conducted on the basis that the prospective treaty would not affect the maritime zones as declared by the 2012 Judgment. In other words, for Nicaragua, such negotiations had to be restricted to the modalities or mechanisms for the implementation of the said Judgment.

Colombia did not define the subject-matter of the negotiations in the same way. In the words of its Foreign Minister, it intended to "sign *a treaty that establishes the boundaries* and a legal regime that contributes to the security and stability in the region" (emphasis added).

99. The Court considers that Colombia's argument that the Parties remained open to dialogue, at least on the date of the filing of the Application, is not a decisive factor, because what is essential for the Court to decide is whether, on that date, given the positions and conduct of the

Parties in respect of Colombia's alleged violations of Nicaragua's sovereign rights and maritime zones delimited by the Court in 2012, the Parties considered in good faith a certain possibility of a negotiated settlement to exist or not to exist.

100. The Court notes that the Parties do not dispute that the situation at sea was "calm" and "stable" throughout the relevant period. That fact, nevertheless, is not necessarily indicative that, in the opinion of the Parties, the dispute in the present case could be settled by negotiations. From the inception of the events following the delivery of the 2012 Judgment, Nicaragua was firmly opposed to Colombia's conduct in the areas that the 2012 Judgment declared appertain to Nicaragua. Colombia's position on the negotiation of a treaty was equally firm during the entire course of its communications with Nicaragua. No evidence submitted to the Court indicates that, on the date of Nicaragua's filing of the Application, the Parties had contemplated, or were in a position, to hold negotiations to settle the dispute concerning the alleged violations by Colombia of Nicaragua's rights in the maritime zones which, according to Nicaragua, the Court declared in its 2012 Judgment appertain to Nicaragua.

101. Given the above considerations, the Court concludes that at the date on which Nicaragua filed its Application, the condition set out in Article II was met. Therefore, Colombia's third preliminary objection must be rejected.

V. FOURTH PRELIMINARY OBJECTION

102. Nicaragua claims two bases for the jurisdiction of the Court. It states that, should the Court find that it has no jurisdiction under Article XXXI of the Pact of Bogotá, its jurisdiction could be founded on "its inherent power to pronounce on the actions required by its Judgment[]". In its fourth preliminary objection, Colombia contends that the Court has no "inherent jurisdiction" upon which Nicaragua can rely.

103. Colombia maintains that Nicaragua's claim of "inherent jurisdiction" can find no support either in the Statute of the Court or in its case law. It argues that, if Nicaragua's position is to be taken seriously, it would strike at the foundation of consensual jurisdiction under Article 36 of the Statute of the Court, for Nicaragua's theory of "inherent jurisdiction" ignores any conditions which States may have attached to their consent to jurisdiction. It argues that, instead of applying the law and practice of this Court, Nicaragua referred to the law and practice of the European Court of Human Rights and the Inter-American Court of Human Rights; even by doing so, Nicaragua ignores the explicit statutory authority afforded to those courts for monitoring the implementation of their decisions.

* *

104. The Court notes that "inherent jurisdiction" claimed by Nicaragua is an alternative ground that it invokes for the establishment of the Court's jurisdiction in the present case. Nicaragua's argument, could, in any event, apply only to the dispute that existed at the time of filing of the Application. Since the Court has founded its jurisdiction with regard to that dispute on the basis of Article XXXI of the Pact of Bogotá, it considers that there is no need to deal with Nicaragua's claim of "inherent jurisdiction", and therefore will not take any position on it. Consequently, there is no ground for the Court to rule upon Colombia's fourth preliminary objection.

VI. FIFTH PRELIMINARY OBJECTION

105. Colombia's fifth preliminary objection is that the present Application is an attempt to enforce the 2012 Judgment even though the Court has no post-adjudication enforcement jurisdiction. Colombia maintains that the Charter of the United Nations and the Statute of the Court are based upon a division of functions according to which the Court is entrusted with the task of adjudication, while post-adjudication enforcement is reserved for the Security Council in accordance with paragraph 2 of Article 94 of the Charter, which provides:

> "If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment."

According to Colombia, the same division of functions is recognized in the Pact of Bogotá, Article L of which provides:

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

Colombia's position is that the heart of Nicaragua's case is an allegation that Colombia is in breach of the 2012 Judgment and that Nicaragua is entitled to obtain further relief from the Court to enforce compliance with that Judgment.

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106. Nicaragua denies that its Application in the present proceedings represents an attempt to obtain post-adjudicative enforcement measures. It maintains that the subject-matter of its Application is the violation by Colombia of Nicaragua's sovereign rights in maritime spaces adjudged by the Court in 2012 to belong to Nicaragua. Nicaragua also rejects Colombia's analysis

of Article 94, paragraph 2, of the Charter of the United Nations and Article L of the Pact of Bogotá. According to Nicaragua, neither provision operates in such a way as to preclude either the inherent jurisdiction of the Court (see paragraphs 102 to 104 above) or jurisdiction conferred by Article XXXI of the Pact of Bogotá.

* *

107. Colombia's fifth preliminary objection is directed first at Nicaragua's alternative argument that the Court has an inherent jurisdiction in relation to the present case. Colombia submits that, even if the Court were to find — contrary to Colombia's fourth preliminary objection — that it possesses an inherent jurisdiction, such "inherent jurisdiction" does not extend to a post-adjudicative enforcement jurisdiction.

The Court has already held that it does not need to determine whether it possesses an inherent jurisdiction, because of its finding that its jurisdiction is founded upon Article XXXI of the Pact of Bogotá (see paragraph 104 above). Accordingly, it is unnecessary to rule on Colombia's fifth preliminary objection in so far as it relates to inherent jurisdiction.

108. Nevertheless, Colombia indicated in its pleadings that its fifth preliminary objection was also raised as an objection to the jurisdiction of the Court under Article XXXI of the Pact of Bogotá. Colombia argues that "[e]ven assuming . . . that the Court still has jurisdiction in the instant case under Article XXXI of the Pact of Bogotá, such jurisdiction . . . would not extend to Nicaragua's claims for enforcement by the Court premised on Colombia's alleged non-compliance with the Judgment of 2012".

Since the Court has concluded that it has jurisdiction under Article XXXI, the fifth preliminary objection must be addressed in so far as it relates to jurisdiction under the Pact of Bogotá.

109. Colombia's fifth preliminary objection rests on the premise that the Court is being asked to enforce its 2012 Judgment. The Court agrees with Colombia that it is for the Court, not Nicaragua, to decide the real character of the dispute before it (see paragraph 51 above). Nevertheless, as the Court has held (see paragraph 79 above), the dispute before it in the present proceedings concerns the alleged violations by Colombia of Nicaragua's rights in the maritime zones which, according to Nicaragua, the Court declared in its 2012 Judgment appertain to Nicaragua. As between Nicaragua and Colombia, those rights are derived from customary international law. The 2012 Judgment of the Court is undoubtedly relevant to that dispute in that it determines the maritime boundary between the Parties and, consequently, which of the Parties possesses sovereign rights under customary international law in the maritime areas with which the present case is concerned. In the present case, however, Nicaragua asks the Court to adjudge and

declare that Colombia has breached "its obligation not to violate Nicaragua's maritime zones as delimited in paragraph 251 of the Court['s] Judgment of 19 November 2012 as well as Nicaragua's sovereign rights and jurisdiction in these zones" and "that, consequently, Colombia has the obligation to wipe out the legal and material consequences of its internationally wrongful acts, and make full reparation for the harm caused by those acts" (see paragraph 12 above). Nicaragua does not seek to enforce the 2012 Judgment as such. The Court is not, therefore, called upon to consider the respective roles accorded to the Meeting of Consultation of Ministers of Foreign Affairs (by Article L of the Pact of Bogotá), the Security Council (by Article 94, paragraph 2, of the Charter) and the Court.

110. Colombia's fifth preliminary objection must therefore be rejected.

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111. For these reasons,

THE COURT,

(1) *(a)* Unanimously,

Rejects the first preliminary objection raised by the Republic of Colombia;

(b) By fifteen votes to one,

Rejects the second preliminary objection raised by the Republic of Colombia in so far as it concerns the existence of a dispute regarding the alleged violations by Colombia of Nicaragua's rights in the maritime zones which, according to Nicaragua, the Court declared in its 2012 Judgment appertain to Nicaragua;

IN FAVOUR: *President* Abraham; *Vice-President* Yusuf; *Judges* Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Gevorgian; *Judge* ad hoc Daudet;

AGAINST: *Judge* ad hoc Caron;

(c) Unanimously,

Upholds the second preliminary objection raised by the Republic of Colombia in so far as it concerns the existence of a dispute regarding alleged violations by Colombia of its obligation not to use force or threaten to use force;

(d) By fifteen votes to one,

Rejects the third preliminary objection raised by the Republic of Colombia;

IN FAVOUR: *President* Abraham; *Vice-President* Yusuf; *Judges* Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Gevorgian; *Judge* ad hoc Daudet;

AGAINST: *Judge* ad hoc Caron;

(e) Unanimously,

Finds that there is no ground to rule upon the fourth preliminary objection raised by the Republic of Colombia;

(f) By fifteen votes to one,

Rejects the fifth preliminary objection raised by the Republic of Colombia;

IN FAVOUR: *President* Abraham; *Vice-President* Yusuf; *Judges* Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Robinson, Gevorgian; *Judges* ad hoc Daudet, Caron;

AGAINST: *Judge* Bhandari;

(2) By fourteen votes to two,

Finds that it has jurisdiction, on the basis of Article XXXI of the Pact of Bogotá, to adjudicate upon the dispute between the Republic of Nicaragua and the Republic of Colombia referred to in subparagraph 1 *(b)* above.

IN FAVOUR: *President* Abraham; *Vice-President* Yusuf; *Judges* Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Robinson, Gevorgian; *Judge* ad hoc Daudet;

AGAINST: *Judge* Bhandari; *Judge* ad hoc Caron.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this seventeenth day of March, two thousand and sixteen, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Nicaragua and the Government of the Republic of Colombia, respectively.

(Signed) Ronny ABRAHAM,
President.

(Signed) Philippe COUVREUR,
Registrar.

Judge CANÇADO TRINDADE appends a separate opinion to the Judgment of the Court; Judge BHANDARI appends a declaration to the Judgment of the Court; Judge *ad hoc* CARON appends a dissenting opinion to the Judgment of the Court.

(Initialled) R. A.

(Initialled) Ph. C.