

**International Court of Justice — Jurisdiction — Treaty — Pact of Bogotá — Effect of denunciation — Whether termination of Pact by Colombia precluding the Court from having jurisdiction over claim filed before expiry of one year from denunciation — Articles XXXI and LVI of Pact — Requirement of dispute — Whether there existed a dispute on subject-matter of claim brought by Nicaragua — Dispute over alleged violation by Colombia of sovereign rights — Dispute over alleged violation by Colombia of prohibition of use of force — Whether precondition under Article II of Pact satisfied — Prospect of negotiated settlement — Inherent jurisdiction of the Court — Whether Nicaragua's claim was an attempt to enforce 2012 judgment**

**International Court of Justice — Counterclaims — Jurisdiction in respect of counterclaims — Requirement of connection between counterclaim and main claim — Article 80 of Rules of Court — Admissibility of counterclaims — Direct connection — Direct connection in fact — Direct connection in law — Whether Colombia's counterclaims directly connected with Nicaragua's original claim — Jurisdiction — Whether lapse of a title of jurisdiction affecting Court's jurisdiction over Colombia's counterclaims — Whether there existed a dispute concerning subject-matter of Colombia's third and fourth counterclaims — Whether precondition under Article II of Pact was met in relation to the third and fourth counterclaims**

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

(NICARAGUA *v.* COLOMBIA)<sup>1</sup>

<sup>1</sup> At the preliminary objections phase, the Republic of Nicaragua, represented by HE Mr Carlos José Argüello Gómez, as Agent and Counsel; Mr Vaughan Lowe, Mr Alex Oude Elferink, Mr Alain Pellet, Mr Antonio Remiro Brotons, as Counsel and Advocates; Mr César Vega Masís, Mr Walner Molina Pérez, Mr Julio César Saborio, as Counsel; Mr Edgardo Sobenes Obregon, Ms Claudia Loza Obregon, Mr Benjamin Samson, Ms Gimena González, as Assistant Counsel; Ms Sheryly Noguera de Argüello, as Administrator.

The Republic of Colombia, represented by HE Ms María Angela Holguín Cuéllar, HE Mr Francisco Echeverri Lara, as National Authorities; Mr Carlos Gustavo Arrieta Padilla, as Agent; HE Mr Manuel José Cepeda Espinosa, as Co-Agent; Mr W. Michael Reisman, Mr Rodman R. Bundy, Sir Michael Wood, Mr Tullio Treves, Mr Eduardo Valencia-Ospina, Mr Matthias Herdegen, as Counsel and Advocates; HE Mr Juan José Quintana Aranguren, HE Mr Andelfo García González, Ms Andrea Jiménez Herrera, Ms Lucía Solano Ramírez, Mr Andrés Villegas Jaramillo, Mr Giovanni Andrés Vega Barbosa, Ms Ana María Durán López, Mr Camilo Alberto Gómez Niño, Mr Juan David

*International Court of Justice*

*Preliminary Objections.* 17 March 2016

(Abraham, *President*; Yusuf, *Vice-President*; Owada, Tomka, Bennouna, Cañado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Gevorgian, *Judges*; Daudet, Caron, *Judges ad hoc*)

*Counterclaims.* 15 November 2017

(Abraham, *President*; Yusuf, *Vice-President*; Owada, Tomka, Bennouna, Cañado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Gevorgian, *Judges*; Daudet, Caron, *Judges ad hoc*)

SUMMARY:<sup>2</sup> *The facts*.—On 19 November 2012, the International Court of Justice (“the Court”) handed down its judgment on the merits in *Territorial and Maritime Dispute (Nicaragua v. Colombia)*<sup>3</sup> (“the 2012 Judgment”), by which it established the maritime boundary in the Caribbean Sea between Nicaragua and Colombia’s islands of the San Andrés Archipelago.

On 26 November 2013, Nicaragua filed with the Court an Application instituting proceedings against Colombia in a case concerning the alleged violations by the latter of the sovereign rights and maritime spaces which, in the 2012 Judgment, the Court had adjudged to pertain to the former. Nicaragua maintained that the Court’s jurisdiction was founded upon Article XXXI of the American Treaty on Pacific Settlement, 1948 (“the Pact”);<sup>4</sup> alternatively, Nicaragua invoked what it described as the inherent jurisdiction of the Court to pronounce on compliance with its judgments.

*Judgment on Preliminary Objections (17 March 2016)*

Colombia raised five preliminary objections to the Court’s jurisdiction.

(1) Colombia had denounced the Pact on 27 November 2012 with immediate effect. Accordingly, Colombia maintained that the Court lacked jurisdiction *ratione temporis*. Colombia interpreted Article LVI of the Pact<sup>5</sup> to

Veloza Chará, as Legal Advisers; Rear Admiral Luís Hernán Espejo, CN William Pedroza, CF Hermann León, Mr Scott Edmonds, Mr Thomas Frogh, as Technical Advisers; Ms Charis Tan, Mr Eran Shoeger, Mr Renato Raymundo Treves, Mr Lorenzo Palestini, as Legal Assistants.

<sup>2</sup> Prepared by Dr M. Lando.

<sup>3</sup> 169 ILR 1.

<sup>4</sup> The text of Article XXXI is set out in para. 21 of the Judgment.

<sup>5</sup> The text of Article LVI is set out in para. 22 of the Judgment.

entail that the Court lacked jurisdiction over proceedings started after the denunciation of the treaty by a party. Nicaragua replied that the effect of Article LVI was that Article XXXI of the Pact ceased to be in force on expiration of a one-year period following the denunciation of the Pact.

(2) Colombia maintained that, prior to the filing of the application, there had been no dispute between the Parties. Colombia asserted that Nicaragua had never suggested that the former was either in breach of the latter's rights, or of the prohibition on the use of force. Nicaragua stated that, following the 2012 Judgment, Colombia had commenced military operations in the former's maritime areas and started issuing fishing licences relating to those areas. Moreover, on 9 September 2013 Colombia had established the "Integral Contiguous Zone" by Presidential Decree 1946, which overlapped with those same maritime areas.

(3) Colombia argued that Nicaragua had not met the precondition to jurisdiction set out in Article II of the Pact<sup>6</sup> requiring both Parties to be of the opinion that their dispute could not be settled by negotiation before the Court was seised. Nicaragua replied that whether the dispute could be settled by negotiation was to be determined objectively. Nicaragua maintained that the events leading up to its Application showed that the dispute could not be settled by negotiation.

(4) Colombia submitted that Nicaragua's invocation of the Court's inherent jurisdiction lacked basis both in the Statute and the Rules, and in the Court's jurisprudence.

(5) Colombia argued that Nicaragua's Application was an attempt to enforce the 2012 Judgment by way of proceedings in the Court, whereas enforcement was the province of the Security Council under the Charter of the United Nations. Nicaragua rejected both the premise of Colombia's fifth objection, and Colombia's interpretation of the Charter as imposing a clear division of roles between the Court and the Security Council.

*Held* (by fourteen votes to two, Judge Bhandari and Judge ad hoc Caron dissenting):—The Court possessed jurisdiction.

(1) (unanimously) The first preliminary objection of Colombia was rejected.

(a) Whether or not jurisdiction existed was a matter to be determined as at the date on which the Application was filed. If jurisdiction existed at that date, then even if the title of jurisdiction lapsed subsequently, the Court had jurisdiction. The Pact was in force between the Parties when Nicaragua filed the Application (paras. 33-4).

(b) An *a contrario* interpretation of a treaty provision was justified only when appropriate in the light of the text and context of that provision, and the object and purpose of the treaty concerned. It was important to

<sup>6</sup> The text of Article II is set out in para. 81 of the Judgment.

determine what inference could be drawn from an *a contrario* interpretation. Colombia's interpretation of Article LVI of the Pact ran counter to the explicit statement in Article XXXI that the Parties recognized the ICJ's jurisdiction "so long as" the Pact was in force, and the provision of Article LVI that a party might denounce the Pact upon one year's notice. This interpretation was confirmed by the context and the object and purpose of the Pact. In determining the meaning of the second paragraph of Article LVI, the Court could not adopt an interpretation which would deprive its first paragraph of effect. Nothing in the language of other treaties or in the *travaux préparatoires* supported Colombia's interpretation of the Pact (paras. 37-47).

(2) (by fifteen votes to one, Judge ad hoc Caron dissenting) The second preliminary objection of Colombia had to be rejected insofar as it concerned the existence of a dispute on the alleged violations by Colombia of Nicaragua's rights in the maritime zones to which the 2012 Judgment related. That the Parties were open to a dialogue when the Application was filed did not show that there was no dispute; statements made by Colombia's and Nicaragua's highest officials showed that the Parties held opposing views as to their respective rights in the maritime areas concerned. Even if formal diplomatic protest could be useful to bring a claim to the other Party's attention, it was not necessary for a dispute to exist. There existed a dispute on the rights of the Parties in the maritime spaces concerned (paras. 68-74 and 79).

(3) (unanimously) The second preliminary objection of Colombia had to be upheld insofar as it concerned the existence of a dispute on the alleged violation by Colombia of its obligation not to use force or threaten to use force. Nothing in the evidence suggested that Nicaragua had indicated that Colombia had violated the prohibition to use force under Article 2(4) of the Charter. The incidents alleged by Nicaragua related to its claim concerning its rights in the maritime areas concerned. There was no dispute, at the critical date, between the Parties concerning the alleged violation of the prohibition of the use of force (paras. 75-9).

(4) (unanimously) The third preliminary objection of Colombia had to be rejected. Statements to which the Parties referred had been made by their highest representatives, and could be relied on as such. Each Party indicated in several statements that it was open to dialogue with the other. That the Parties stated that the situation at sea was "calm" and "stable" did not indicate that they believed that the dispute could be solved by negotiation; no evidence showed that the Parties, at the date when the Application was filed, contemplated solving the dispute by negotiation (paras. 96-100).

(5) (unanimously) There was no ground to decide on the fourth preliminary objection of Colombia. Since the Court had already decided to uphold its jurisdiction on the basis of Article XXXI of the Pact, there was no need to deal with Nicaragua's argument relating to "inherent jurisdiction" (para. 104).

(6) (by fifteen votes to one, Judge Bhandari dissenting) The fifth preliminary objection of Colombia had to be rejected. Nicaragua was not asking the Court to enforce the 2012 Judgment but to declare that Colombia had breached the rights of Nicaragua within the maritime spaces appertaining to it under the 2012 Judgment (paras. 106-9).

*Separate Opinion of Judge Cançado Trindade:* (1) Interpretation pursuant to the principle *ut res magis valeat quam pereat* was applicable both to substantive legal provisions and procedural legal provisions. The Court could not continue to pay lip service to the “will” of States, which was a “rule” at most, not a “principle”, and certainly not an element of treaty interpretation. This also emerged from some of the most important writing in international law (paras. 22-37).

(2) International tribunals had a duty to ensure that proceedings before them did not lead to injustice. International tribunals have acknowledged that inherent powers can be used in order to discharge this duty. That international tribunals could count on another organ to ensure compliance with their judgments did not necessarily mean that they had no part to play in regard to this issue (paras. 59-68).

*Declaration of Judge Bhandari:* If Nicaragua wished to enforce the 2012 Judgment, its only avenue was resort to the Security Council under Article 94(2) of the Charter. Nicaragua had obviously attempted to circumvent the correct procedure. The Court’s finding in respect of the fifth preliminary objection ignored that the thrust of the case was Colombia’s alleged non-compliance with the 2012 Judgment (paras. 4-5 and 14).

*Dissenting Opinion of Judge ad hoc Caron:* (1)(a) This case was the first one in which it was held that a dispute had arisen without any protest having been made by the applicant State. While it was appropriate for the Court to infer positive opposition to a claim, it was not appropriate to infer the assertion of the claim; an inferred claim was not a claim. The dispute between the Parties could not have arisen unless Nicaragua made a claim communicated to Colombia, which Colombia positively opposed. The Court’s decision was flawed in respect of both aspects of the dispute: the alleged violation of sovereign rights and the alleged violation of the prohibition of the use of force (paras. 14-27).

(b) Nicaragua had not sent a letter of diplomatic protest to Colombia; also, the evidence included very few statements by Nicaraguan officials, as most statements were evidenced by means of press reports. The evidence submitted by the Parties showed that Nicaragua had never framed the confrontation with Colombia by reference to the rights it sought to put before the Court; moreover, the evidence did not indicate that the Parties’ claims were “positively opposed”, but that they concerned their attempts to implement the

2012 Judgment. Overall, Nicaragua had never made a claim to which Colombia could have responded, from which it followed that there was no dispute between the Parties (paras. 28-53).

(2) Concerning the negotiation precondition, the Court's conclusion that the Parties were not of the opinion that their dispute could be settled by negotiation was contradicted by the evidential record (paras. 61-73).

*Order on Counterclaims (15 November 2017)*

Colombia filed four counterclaims: (1) that Nicaragua had breached Colombia's sovereign rights by failing to prevent its vessels from fishing in Colombian waters; (2) that Nicaragua had breached Colombia's sovereign rights by failing to comply with its obligations relating to the protection and preservation of the marine environment; (3) that Nicaragua had failed to respect the traditional fishing rights of the inhabitants of the San Andrés Archipelago; (4) that Nicaragua's Decree 33-2013 establishing straight baselines was unlawful under international law.

Colombia argued that all of its counterclaims arose out of the same factual complex as Nicaragua's principal claim, insofar as they referred to the same geographical area, they concerned the conduct of the Parties in respect of their duty to protect and preserve the marine environment, and they related to events which took place in the same period of time. Colombia added that its counterclaims were connected in law because both Parties relied on the customary rules of international law of sovereign rights over maritime areas, and pursued the same legal aim by requesting the Court to establish the international responsibility of the opposing Party in relation to the legality of its conduct under those rules. Nicaragua replied that the facts to which Colombia referred took place in the territorial sea around Colombia's cays, while the ones on which Nicaragua relied took place in the EEZ; Nicaragua also contended that the facts were of a different character, as while Colombia complained of Nicaragua's omissions, Nicaragua took issue with Colombia's actions. Nicaragua stated that the claims and counterclaims were not based on the same legal instruments, which entailed that they had no direct connection in law.

Concerning jurisdiction, Nicaragua argued that the Court had no jurisdiction to decide on Colombia's counterclaims because they had been submitted after the termination of the Pact with respect to Colombia. Nicaragua added that Colombia did not meet the precondition set out in Article II of the Pact. According to Nicaragua, Colombia had also failed to show that there was a dispute concerning the third counterclaim. Colombia replied that the Court's jurisdiction over counterclaims had to be assessed by reference to the date of the Application, and that all facts alleged by Colombia took place before the termination of the Pact. Colombia

contended that there was no need to establish the existence of a dispute in relation to counterclaims.

*Held:*—(1) (by fifteen votes to one, Judge ad hoc Caron dissenting) The first counterclaim by Colombia was inadmissible (para. 82).

(2) (by fifteen votes to one, Judge ad hoc Caron dissenting) The second counterclaim by Colombia was inadmissible (para. 82).

(3) (by eleven votes to five, Judges Tomka, Gaja, Sebutinde, Gevorgian and Judge ad hoc Daudet dissenting) The third counterclaim by Colombia was admissible (para. 82).

(4) (by nine votes to seven, Judges Tomka, Greenwood, Donoghue, Gaja, Sebutinde, Gevorgian and Judge ad hoc Daudet dissenting) The fourth counterclaim by Colombia was admissible.

(a)(i) In relation to the first and second counterclaims, the events to which Colombia referred had taken place both in Nicaragua's EEZ and in Colombia's territorial sea; however, most incidents took place in the EEZ of Nicaragua, thus the counterclaims took place in the same geographical area as the principal claim. The acts of which Colombia complained were alleged predatory fishing by Nicaraguan vessels, whereas Nicaragua had alleged that the Colombian navy had violated its sovereign rights by preventing vessels from navigating in Nicaragua's EEZ; therefore, the acts of which the Parties complained were of a different nature. The Parties also relied on different legal rules: Colombia invoked instruments on the protection and preservation of the marine environment, while Nicaragua referred to the United Nations Convention on the Law of the Sea, 1982. There was no direct connection between Colombia's first and second counterclaims and Nicaragua's principal claim (paras. 36-9).

(ii) Colombia's third counterclaim concerned the alleged conduct of Nicaragua in marine areas in the latter's EEZ. Colombia's third counterclaim concerned the exercise, under certain conditions, of the rights of the nationals of a State to access fishing resources of the sea for the purposes of exploitation; the rights invoked by Nicaragua stemmed from rules relating to a coastal State's sovereign rights in its EEZ. It followed that the third counterclaim was directly connected in fact and in law to the principal claim (paras. 44-6).

(iii) Both Parties complained of the provisions which each of them had adopted under its domestic law in the wake of the 2012 Judgment, including their applicability to the same geographical area. Nicaragua's rights in its own EEZ depended on the lawfulness of Decree 33-2013, which Colombia challenged; moreover, the Parties pursued the same legal aim, requesting the Court to declare that the domestic law rules of the opposing Party were not consistent with the obligations of each State under international law. The fourth counterclaim was thus directly connected with the principal claim (para. 524).

(b) Once the Court had established its jurisdiction over the principal claim, it had jurisdiction to deal with all phases of that claim, including counterclaims. The termination of the Pact in respect of Colombia did not deprive the Court of jurisdiction over its counterclaims. The existence of a dispute concerning the counterclaims was a precondition imposed by the Pact as the title of jurisdiction. In relation to the third and fourth counterclaims, there was an opposition of views between the Parties concerning the subject-matter of such counterclaims. Concerning both counterclaims, the precondition set out by Article II of the Pact was also met (paras. 67-76).

*Declaration of Vice-President Yusuf:* There was no need to establish the Court's jurisdiction *de novo* in respect of each counterclaim if counterclaims relied on the same title of jurisdiction as the principal claim. Counterclaims were functionally autonomous, but at the same time had to be incidental to the principal claim. It was unnecessary for the Court to address whether a dispute existed in relation to the third and fourth counterclaims, since it had already done so in its judgment on Colombia's preliminary objections (paras. 2-9).

*Joint Opinion of Judges Tomka, Gaja, Sebutinde, Gevorgian and Judge ad hoc Daudet:* (1) Even if the counterclaims were to be directly connected and the Court had jurisdiction over them, there was a discretionary power to decline to entertain them. Counterclaims were autonomous of principal claims, insofar as they could survive even the withdrawal of the applicant's claim. It would have been more logical for the Court first to analyse its jurisdiction, and only subsequently the direct connection of the counterclaims (paras. 4-10).

(2) None of the counterclaims could be considered to be an aspect of the dispute between the Parties; Colombia's counterclaims either widened the dispute before the Court, or introduced new claims, and were thus inadmissible. Colombia used the counterclaims procedure to bring claims which could not have otherwise been brought due to the lapse of the Pact as a title of jurisdiction (paras. 15-17).

*Declaration of Judge Cançado Trindade:* By taking into account, in past cases, the traditional fishing rights of local inhabitants, as well as other kinds of rights of the individual, the Court looked beyond the inter-State dimension of international law. This case brought to the Court the rights of States alongside the rights of individuals. After all, State sovereignty could not make abstraction of the needs of the populations concerned (paras. 9-23).

*Separate Opinion of Judge Greenwood:* (1) Article 80 of the Rules of Court gave no clear indication as to the time at which the Court's jurisdiction in respect of counterclaims had to be ascertained. However, the statement of



principle made by the Court in *Nottebohm*<sup>7</sup> indicated that jurisdiction to deal with the original claim also embraced counterclaims, whether or not the title of jurisdiction for the original claim lapsed. The subject-matter of the claim and of the third counterclaim were one and the same, which meant that there was no need for the Court to ascertain whether it had jurisdiction over the latter (paras. 5-12).

(2) Whether Decree 33-2013 was lawful or not was irrelevant to the issue of whether the incidents of which Nicaragua complained took place within or outside its EEZ; therefore, the fourth counterclaim lacked a direct connection with the claim (para. 13).

*Separate Opinion of Judge Donoghue:* The Court had jurisdiction over Colombia's counterclaims only to the extent that they fell within the scope of the dispute which the Court established to exist at the preliminary objections phase. The Court's reasoning in *Nottebohm*<sup>8</sup> was instructive as to the jurisdictional issues at stake. First, it was necessary to ascertain the subject-matter of the dispute submitted by Nicaragua, and subsequently whether the counterclaims by Colombia fell within the scope of the dispute thus ascertained; the evidence indicated that, while the first, second and fourth counterclaims were inadmissible, the third counterclaim fell within the scope of the dispute submitted by Nicaragua and was, as a result, admissible (paras. 2-32).

*Dissenting Opinion of Judge ad hoc Caron:* (1) That counterclaims had to be directly connected to the "subject-matter" of the dispute before the Court focused on the scope of that dispute rather than the shape of the claim given by the applicant State in formulating that claim. The Court exercised a measure of discretion in deciding whether there existed a direct connection between counterclaims and claims, but that did not justify the reaching of any decision in that respect; discretion had to be exercised on the basis of reasons (paras. 7-9).

(2) A central part of Nicaragua's claim was the Colombia decree instituting an Integral Contiguous Zone (Decree 1946 of 9 September 2013); that Decree was thus critical for analysing the direct connection requirement. Article 80 of the Rules of Court did not require there to be a direct connection both in law and in fact between claims and counterclaims; the latter sufficed (paras. 16-18).

(3) The Court could be considered to have distilled, in its jurisprudence, some principles which governed the admissibility of counterclaims (paras. 22-8).

<sup>7</sup> 20 ILR 567.

<sup>8</sup> *Ibid.*

The text of the Judgment and Order of the Court and Opinions and Declarations is set out as follows:

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The following is the text of the judgment of the Court on Preliminary Objections:

## JUDGMENT ON PRELIMINARY OBJECTIONS

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[9] 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”.