



International Court of Justice

Alleged Violations of Sovereign
Rights and Maritime Spaces
in the Caribbean Sea

Introduction

Colombia is a sovereign state located in the northwest of South America. Colombia shares a border to the northwest with Panama, to the east with Venezuela and Brazil and to the south with Ecuador and Peru. It shares its maritime limits with Costa Rica, Nicaragua, Honduras, Jamaica, Haiti and the Dominican Republic. Colombia occupies a landmass of 1,141,748 km² (440,831 square miles).

Nicaragua, officially the Republic of Nicaragua, is the largest country in the Central American isthmus, bordered by Honduras to the north, the Caribbean to the east, Costa Rica to the south, and the Pacific Ocean to the west. Nicaragua occupies a landmass of 130,967 km² (50,567 square miles).

Factual background

The relations between the two countries have evolved over the maritime conflicts concerning the Archipelago of San Andrés, Providencia and Santa Catalina (San Andrés and Providencia Islands), located in the Caribbean Sea, Nicaraguan coast and the maritime limits that cover 150,000 km² that included the islands of San Andrés, Providencia, Providencia and Catalina Island of Santa Catalina and the banks of Roncador, Serrana, Serranilla and Quitauaño, as well as the 82nd meridian west that Colombia claims as a frontier. But that the International Court of Justice has taken sides with Nicaragua in the negative. First, the archipelago has been under Colombian control since 1931, when a treaty was signed during the US occupation of Nicaragua. This gave to Colombia control over the islands. Therefore the archipelago historically has belonged to Colombia, since the times of the New Kingdom of Granada (Viceroyalty of New Granada, Spain). This kingdom extended from the Costa de los Mosquitos to what is now the border of Venezuela and Guyana.

Chronology of events¹:

1803 A Spanish Royalty grants the archipelago in conflict to New Granada, the former name of what is now Colombia.

March 24, 1928. The Bárcenas Meneses-Esquerre Treaty grants Colombian sovereignty over the archipelago in conflict, following the claim of Nicaragua since the beginning of the century.

1930. Both states sign an additional protocol of the Treaty in which they delimited the frontiers in the 82nd meridian.

February 4, 1980. The Sandinista Government of Nicaragua promulgates a law in which considered the Treaty null.

December 6, 2001. The Nicaraguan Government of Arnoldo Alemán presents a demand against Colombia before the ICJ to redefine the maritime borders in the

Caribbean Sea and to recognize the territory of the archipelago in conflict.

July 2003. Colombia presents preliminary objections in which it questions the jurisdiction of the ICJ in the case.

December 13, 2007. The ICJ declares itself competent in a preliminary ruling on the maritime border issue, but not on territorial sovereignty because it is already established in the 1928 Treaty.

November 11, 2008. Colombia presents its report on the case in the CIJ.

November 19, 2012. The ICJ grants Colombia sovereignty over the seven keys of the San Andrés archipelago and redefines the maritime border in which Nicaragua gains space in the Caribbean.

November 28, 2012. Colombia, dissatisfied with the ruling, withdraws from the Pact of Bogotá (1948), which recognizes the jurisdiction of the ICJ.

September 16, 2013. Nicaragua submits to the ICJ a new case against Colombia to declare the 'exact course' of the maritime border between both countries in the Caribbean, 'beyond' the limits of 200 miles defined in the sentence of November 2012.

November 27, 2013. Nicaragua requests ICJ protection so that Colombia complies with the 2012 ruling.

November 18, 2015. Colombia reiterates that the ICJ does not have the power to resolve the conflict.

March 17, 2016. The ICJ declares itself competent to judge the case that Nicaragua demanded against Colombia.

November 16, 2017. The ICJ accepted the counter demands that Colombia presented against Nicaragua.

1 - "Tiempo" Magazine, Colombia 2017.

General information

The International Court of Justice (commonly referred to as the ICJ) is one of the six main bodies and the principal judicial body of the United Nations. It was established under the UN Charter in 1945, as the successor to the Permanent Court of International Justice (one of the main organs of the League of Nations), and began work in April 1946². Apart from the UN Charter, it is constituted and regulated by the Statute; most procedural (as well as some other ones) matters are regulated by the Rules of Court, adopted in 1978.

The seat of the ICJ is located at the Peace Palace in the Hague. The Court is composed of 15 judges, elected for terms of office of nine years by the United Nations General Assembly and the Security Council and normally representing main civilizations and legal systems of the world. The ICJ is assisted by a Registry, its administrative body. The official languages of the Court are English and French³.

For the time being the ICJ is only international judicial body empowered to apply international law without restrictions to certain international treaties or thematic framework. There is no unanimity among experts assessing the effectiveness of the ICJ; sometimes it is asserted that limited jurisdiction and lack of proper authority do not allow the Court to play the role of an effective law enforcement organ within the UN⁴.

The Court may exercise jurisdiction on contentious cases (in contrast to another type of cases heard in the ICJ, the advisory ones) only between states and only on the basis of consent, which serves as a manifestation of the fundamental princi-

ple of the sovereign equality of states. The jurisdiction of the Court can be accepted by means of different procedures. Firstly, the Statute provides for jurisdiction on the basis of compromissory clauses in treaties or conventions, but with two necessary conditions: the treaty should be 'in force' between the parties to the dispute, and all of the litigating parties must be parties to the Statute. Secondly, jurisdiction of the ICJ can be accepted by special agreement (consent ad hoc), or compromis. One more way to agree to hear the case before the Court of the so-called advance consent, which concerns, as it is enshrined in the Statute, "all matters specially provided for...in treaties and conventions in force"; large number of treaties and conventions contain clauses granting jurisdiction in advance over disputes involving their interpretation or application. The Statute of the ICJ also provides a procedure commonly known as the optional clause: a state may at any time declare that it recognizes the jurisdiction of the ICJ in relation to any other state accepting the same obligation, in the field of treaty interpretation, any legal matter, breach of international obligation etc. Such unilateral declarations are deposited with the Secretary-General of the UN. Finally, the jurisdiction of the Court may be exercised by virtue of the principle of forum prorogatum: after the initiation of proceedings by an application, however joint or unilateral, the jurisdiction is granted to the Court with regard either to the entire dispute or to its certain aspects as the result of an agreement, express or implied. Apart from the above-described jurisdiction, the Statute also empowers the Court to decide a case *ex aequo et bono*, if the parties to the dispute agree thereto. However, this power has never been exercised yet; according to some opinions, such function is not easily reconciled with the judicial character of the Court⁵.

2 - The Official Website of the International Court of Justice. URL: <https://www.icj-cij.org/en/court>

3 - Ibid.

4 - Vitzthum G., Prölss A. *Völkerrecht*, 2 edn. De Gruyter, Berlin, 2013. P. 484.

5 - Crawford J. Brownlie's *Principles of Public International Law*, [8th edn], Oxford University Press, 2012. P. 728.

The Essence of the Dispute

The dispute described in the report touches upon alleged violations of Nicaragua's sovereign rights and maritime zones declared by the aforementioned (see previous chapter of the report) International Court's Judgment of 19 November 2012 (in the cases concerning Territorial and Maritime Dispute (Nicaragua v. Colombia), instituted in 2001) and the threat of use of force (that is prohibited under jus cogens of international law) by Colombia in order to implement such violations.

In its application instituting proceedings, Nicaragua refers to the aforementioned decision of the Court, in which it delimited, inter alia, the continental shelf and exclusive economic zone of Nicaragua and the maritime entitlements of the islands of which it was determined to be under Colombian sovereignty and found in respect of Nicaragua's claim for delimitation of its continental shelf extending beyond 200 nautical miles that it is not in a position to do so since Nicaragua had not established that its continental margin actually extends far enough to overlap with Colombia's 200-nautical-mile entitlement to continental shelf. In the aftermath, Nicaragua fulfilled its obligation to submit the necessary information to the Commission on the Limits of the Continental Shelf, or CLCS (a special body within the UN aimed at facilitating the implementation of the UNCLOS and ensuring equitable continental shelf delimitation), but the disputes between the two countries continued to linger⁶. Thus Nicaragua filed a lawsuit in the ICJ in two related cases: Question of the delimitation of the continental shelf between Nicaragua and Colombia beyond 200 nautical

miles from the Nicaraguan coast and Alleged violations of sovereign rights and maritime spaces in the Caribbean Sea, described herein. It is necessary to point out that before Nicaragua submitting these cases, Colombia denounced the American Treaty on Pacific Settlement (also known as Pact of Bogotá), which was adopted on the Ninth International Conference of American States in 1948 and served as the jurisdictional basis in the 'Territorial and Maritime Dispute' case (according to Article XXXI of the Treaty)⁷. This fact gave rise to one of Colombia's main contentions, namely its statement that after the denunciation the ICJ no longer could exercise jurisdiction over Nicaragua's claims. However, the Applicant pointed out that the Pact requires a 1-year's notice and since the applications in the aforementioned cases have been submitted within this period, they do fall within the competence of the ICJ. Nevertheless, bearing in mind the principles for treaty interpretation, and the principle of *effet utile* (all of the words in a treaty should be given effect) in particular, the Court decided that this preliminary objection of Colombia should be rejected since its interpretation of Article LVI from the Pact of Bogotá renders ineffective the first paragraph of the said provision. Another serious objection raised by Colombia concerned the principle of *res judicata*; the Respondent claimed that the Court had already decided on the question of the delimitation of the continental shelf extending beyond 200 nautical miles in its 2012 Judgment by rejecting Nicaragua's claim. Eventually, the ICJ held that "although in its 2012 Judgment it declared Nicaragua's submission to be admissible, it did so only in response to the objection to admissibility raised by

6 - Inna Uchkunova, 'The International Court of Justice: Delimitation of a Continental Shelf Extending Beyond 200 Nautical Miles', Kluwer Arbitration Blog, August 25 2016. URL: <http://arbitrationblog.kluwerarbitration.com/2016/08/25/international-court-justice-delimitation-continental-shelf-extending-beyond-200-nautical-miles/>

7 - International Court of Justice. Alleged violations of sovereign rights and maritime spaces in the Caribbean Sea (Nicaragua v. Colombia). 15 November 2017. Counter-claims. URL: https://www.informe.org/sites/default/files/court-decisions/Nicaragua%20v.%20Columbia%202017_11_15.pdf

Colombia that this submission was new and changed the subject-matter of the dispute. However, it does not follow that the Court ruled on the merits of the claim relating to the delimitation of the continental shelf beyond 200 nautical miles from the Nicaraguan coast”.

In its Application, Nicaragua gives various examples of Colombia’s official statements that, in its opinion, may be regarded as a threat of use of force: the statements made by President Santos, as well as the Vice-President of the country and the Commander of the Navy, all of whom underlined their willingness to protect Colombian fishermen in the waters that were the subject of the 2012 judgment and the continental shelf by military force. As indicated by the Applicant, those declarations culminated with the enactment of a presidential decree containing alleged violations of Nicaragua’s sovereign rights over its maritime areas in the Caribbean, Article 5 of which proclaims that “the contiguous zone of the Western Caribbean Sea insular territories of Colombia extends to a distance of 24 nautical miles measured from the baselines”. Self-proclaimed maritime boundaries of Colombia are further depicted in the map (see “Relevant geography”).

Finally, Nicaragua claims that prior and especially after the aforementioned decree “the threatening declarations by Colombian authorities and the hostile treatment given by Colombian naval forces to Nicaraguan vessels have seriously affected the possibilities of Nicaragua for exploiting the living and non-living resources in its Caribbean exclusive economic zone and continental shelf”.

Taking all the above-described facts into

account, Nicaragua requests the ICJ “to adjudge and declare that Colombia is in breach of:

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

b) 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;

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

d) 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”⁸.

8 - International Court of Justice. Alleged violations of sovereign rights and maritime spaces in the Caribbean Sea (Nicaragua v. Colombia). Application instituting proceedings. 26 November 2013. URL: <https://www.icj-cij.org/files/case-related/155/17978.pdf>

The Relevant Provisions of the United Nations Convention on the Law of the Sea

Out of the two states which are parties to the dispute described herein, only Nicaragua has both signed and ratified the United Nations Convention on the Law of the Sea (hereinafter referred to as "UNCLOS"), in 1984 and 2000 respectively. As for Colombia, it signed the Convention in 1982 but has not ratified it yet⁹. Anyway, most of the UNCLOS provisions at the time of their adoption declared already existing rules of international customary law; therefore the norms concerning maritime delimitation enshrined in the Convention may also contain rights appertaining to and obligations incumbent upon Colombia insofar as they reflect international customary rules.

The Convention was opened for signature on 10 December 1982 and entered into force on 16 November 1994 and replaced four 1958 Geneva conventions and an optional protocol concerning the basic aspects of international maritime law. It is often colloquially referred to as "a constitution for the seas"¹⁰ and regarded as a truly historic document. This instrument establishes a comprehensive global regime dealing with all matters concerning the oceans, seas and their resources. It embodies the historically formed principle of the freedom of the high seas and provides special legal regimes for jurisdictional zones, ones with state sovereignty exercised upon them, others with limited rights appertaining to coastal states in the respect of their use.

The first regime to be described herein is the one of the territorial sea. The baseline from which the breadth of the territorial sea is normally the coastal low-water line;

no universal standard by which states determine the line exists, although UNCLOS Article 5 defines the line 'as marked on large scale charts officially recognized by coastal states'. Anyway, in some of the UNCLOS articles and in various decisions of the ICJ there can be found certain criteria for determining the validity of straight baselines:

- a) the drawing of baselines must not depart to any appreciable extent from the general direction of the coast¹¹;
- b) a close geographical relationship between sea areas and land formations is a 'fundamental consideration' in deciding whether certain sea areas lying within the baselines are sufficiently closely linked to the land domains to be subject to the regime of internal waters¹²;
- c) there exist certain economic interests peculiar to a region, the reality and importance of which are evidenced by long usage¹³.

UNCLOS Article 3 establishes the breadth of the territorial sea up to a limit not exceeding 12 nautical miles. With respect to the territorial sea, the coastal state enjoys all the practical rights and bears the duties inherent in sovereignty, whereas foreign vessels enjoy certain privileges, with the main of which being the right of innocent passage. The coastal state is empowered to reserve fisheries for national use and may also exclude foreign vessels from cabotage, i.e. navigation and trade along the coast. It is also endowed with general police powers viz. fiscal regulation, sanitary and health controls, security, customs etc.

Another regime established in UNCLOS is the one of the contiguous zone. It is generally recognized as a zone giving the coastal state jurisdiction beyond the territorial sea for special purposes, in determining which UNCLOS Article 33 is the

9 - UNCLOS Table of ratifications/accessions, etc.
URL: http://www.un.org/Depts/los/reference_files/status2018.pdf

10 - Vitzthum G., Prölss A. Op. cit. P. 579.

11 - ICJ Reports 1951 p 133

12 - Ibid.

13 - Ibid, 128

starting point. It refers to the exercise of control necessary to prevent infringement of 'customs, fiscal, immigration or sanitary regulations within the territory or territorial sea of the coastal state'. Although the security purposes are not listed therein, some states have claimed jurisdiction in a zone contiguous to the territorial sea on this very basis. In this zone, coastal states are empowered to take various measures aimed at enforcing compliance with its laws, that is, the powers are limited to those of police and control.

The third legal regime on the list is the one of the continental shelf. Geographically, the continental shelf is a part of the continent, overlain by the relatively shallow waters of the continental margin. According to UNCLOS Article 77, the coastal states are endowed with the "sovereign rights for the purpose of exploring [the shelf] and exploiting its natural resources". These rights, however, do not affect the legal status of the superjacent waters or of the airspace above those waters. The continental shelf overlaps with the exclusive economic zone (v.i.) within 200 nautical miles but may extend further (under certain hydrographic and geological conditions its breadth may reach 350 nautical miles from the baseline). Although UNCLOS contains a very vague criterion for continental shelf delimitation between opposite of adjacent states, specific indicia have been elaborated throughout the time, mostly formed through the practice of the ICJ: the necessity of an agreement on the basis of international law; principle of non-encroachment; no undue cut-off of the seaward projection of the coast of either of the states concerned; equal division of the areas of overlap is desirable (although not obligatory). Delimitation must be conducted by practical methods and with regard to the geographical configuration of the area¹⁴.

The Exclusive Economic Zone (EEZ), which extends up to 200 nautical miles from the baseline, is optional; states claiming an EEZ thus secure their right for the exploitation and management of living and non-living resources. In such area, the coastal state also exercises jurisdiction with regard to: the establishment and use of artificial islands, installations and structures; marine scientific research; the protection and preservation of the marine environment. It has been stated by the ICJ that the rules concerning EEZ are part of international customary law. By now no less than 137 states have claimed an EEZ; these claims are recognized by states generally¹⁵.

14 - Crawford J. Op. cit. P. 288.

15 - Ibid, 277

Relevant geography

Image N°1: Maritime map of 1928 and 2012 after the decision of the HAYA

decision, Nicaragua obtiene un importante territorio de aproximadamente 75.000 km².

Figura 1. Delimitación marítima establecida por la Corte Internacional de Justicia



Fuente: Revista Semana (2016, marzo 18).

En el grafico anterior se puede observar el territorio de gran proporción establecido por la Corte a favor de Nicaragua, también se demuestra que los cayos de Quitasueño y

Image N°2: San Andres and Providencia



The list of official documents related to the dispute

1. Agreement Chamorro-Bryan of 1916 between Nicaragua and the USA
2. Agreement Esguerra Barcenas of 1928 between Colombia and Nicaragua.
3. Agreement CONVEMAR 1982
4. Memorandum of Understanding between the Republic of Colombia and the Republic of Nicaragua, signed in Bogotá, D.C., on June 28, 1991¹⁶.
5. Constitution of Colombia
6. Constitution of Nicaragua
7. Judgement of the International Court of Justice of 2012
8. Judgement of the International Court of Justice of 2016

The list of official documents related to the dispute

- Cavelier, G. (1997). The Archipelago of San Andrés and Providencia. International Politics of Colombia
- Judgment of the Court of The Hague in 2012 on the litigation between Colombia and Nicaragua
- <https://www.icj-cij.org/en/case/155>
- <https://www.eltiempo.com/mundo/latinoamerica/cronologia-del-fallo-en-la-haya-entre-colombia-y-nicaragua>
- <http://www.cancilleria.gov.co/content/el-caso-nicaragua-vs-colombia-relativo-al-archipi>