Territorial Questions and Maritime Delimitation with Regard to Nicaragua's Claims to the San Andrés Archipelago

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I. Introduction

The case at issue was filed by the Republic of Nicaragua on 6 December 2001 at the Registry of the International Court of Justice[1]. It involves a long-standing dispute in connection with the territorial sovereignty over several islands belonging to the archipelago of San Andrés and Providencia (hereinafter: San Andrés archipelago) in the western Caribbean Sea, which had been in possession of the Republic of Colombia since the nineteenth century. In her application, Nicaragua has asked the Court to clarify legal uncertainties which allegedly exist[2].

First, the Court was requested to adjudge that Nicaragua has sovereignty over the San Andrés archipelago and all appurtenant islands and keys, including the islands of Roncador, Serrana, Quitasueño, and Serranilla, insofar as they are assumed to be capable of appropriation. Second, Nicaragua has asked, based on her alleged title to this territory, to determine the course of the single maritime boundary between the areas of the Continental Shelf and Exclusive Economic Zone appertaining respectively to Nicaragua and Colombia, in accordance with equitable principles and relevant circumstances recognized by international law.

While not being officially part of her application to the Court, Nicaragua has also reserved her right to claim compensation for elements of unjust enrichment resulting from Colombian possession of the San Andrés archipelago and maritime spaces east of the 82nd meridian in the absence of a lawful title. This further relates to Nicaragua's alleged right to claim compensation for Colombia's interference with fishing vessels of Nicaraguan nationality or vessels licensed by Nicaragua.

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1 ICJ Press Release 2001/34 (6 December 2001).

2 Application Instituting Proceedings – Territorial and Maritime Dispute, Embassy of Nicaragua, para. 8, under <http://www.icj-cij.org/icjwww/idocket/inicol/inicolorder/inicol_iapplication_20011206.pdf>.

Nicaragua's action against Colombia followed the ratification of a treaty on maritime delimitation between Colombia and Honduras on 30 November 1999[3]. In response to the role Colombia played in said treaty, Nicaragua has submitted that its ratification of the treaty with Honduras would frustrate any agreement with Colombia on open questions of territory and maritime boundaries still considered contentious by Nicaragua. Signed on 2 August 1986 and ever since denounced by Nicaragua as an apparent violation of her territorial sovereignty, the ratification of the so-called López-Ramirez Treaty has provoked immediate protest by Nicaragua, which on 8 December 1999 filed a case against Honduras at the International Court of Justice[4].

In contrast, Colombia insists on the unlimited validity of a treaty concluded with Nicaragua in 1928, known as Barcenas-Esguerra Treaty, in which Colombia's sovereignty over the San Andrés archipelago was formally recognised[5]. Colombia therefore denies all allegations of a still unresolved dispute which could potentially impede the ratification of the treaty with Honduras. Consequently, the actions filed at the Court by Nicaragua are regarded by Colombia as interference with a treaty between two sovereign states safeguarding the legitimate rights of each.

In this paper it will be shown that Colombia can rely on a stronger title to sovereignty over the disputed land and maritime area. With regard to Nicaragua's request for determination of a single maritime boundary between the area of Continental Shelf and Exclusive Economic Zone the intervention of the International Court of Justice seems unnecessary. In the authors' opinion the matter of maritime delimitation of the areas in question was already resolved by a valid bilateral treaty of delimitation. Nevertheless, since the Court may decide to address this issue, we shall to this end also provide a detailed suggestion of applicable law and methods.

II. Statement of Facts

1. Geographical and Economical Facts

The San Andrés archipelago is made up of three major inhabited islands, namely San Andrés, Providencia (Old Providence) and Santa Catalina. The total population amounts to a reported 83,000 inhabitants, who live mainly from tourism and fishing. The archipelago itself, situated on the Nicaraguan Rise, an estimated 100 nautical miles (approximately 185 kilometres) off the Nicaraguan coast, is said to contain large hydrocarbonic deposits and oil fields. It has a total land area of some

[3] Caribbean Sea Maritime Limits Treaty (López-Ramirez Treaty); Text available in: Charney/Alexander, International Maritime Boundaries, Vol. I, 1993, 503.

[4] Maritime Delimitation Between Nicaragua and Honduras in the Caribbean Sea, International Court of Justice, Press Communiqué 99/52 (8 December, 1999); Crook, The 2001 Judicial Activity of the International Court of Justice, 96 American Journal of International Law (AJIL) 408 (2002).

[5] Treaty Concerning Territorial Questions At Issue (Bárcenas Meneses – Esguerra Treaty), 105 LNTS 337; 1 Foreign Rel. US 703 (1928).

44 square kilometres and an overall coastline of about 20 kilometres. This includes two other uninhabited islands, Albuquerque and Bolivar, as well as a number of uninhabited keys, namely Crab Cay, Cotton Cay, Johnny Cay, Haynes Cay, Rose Cay, Three Brothers Cay and Rocky Cay.

Similarly, the islands of Roncador, Serrana and the bank of Quitasueño, which geographically form a part of the San Andrés archipelago, encompass various islets, cays and sand banks, on which several small military posts and lighthouses have been installed. The possession of these islands and cays, which are all within 200 nautical miles of Nicaraguan shores, also involves a dominion over more than 50,000 square kilometres of maritime space located around them. The Serranilla Bank finally, situated north-north-east of the island of San Andrés, consists of several small cays which emerge above the water to form the bank's islands.

2. Historical Background

While the San Andrés archipelago is situated closer to Nicaragua than to the Colombian mainland, it belongs to Colombia as a part of its colonial heritage. In fact, Colombia's original claims to the archipelago go back to a Royal Order issued by the Spanish Crown in 1803[6]. By this, the right to defend the archipelago, and so to prevent pirate attacks in the region, had been delegated to the Viceroyalty of Santa Fé de Bogotá, which then was at least partly formed by the present territories of Colombia and Panama[7]. After a brief British occupation in 1806, the islands were formally administered by the Governor of Cartagena, at that time part of Nueva Grenada, following its independence from Spain in 1810. Between 1818 and 1821, however, the San Andrés archipelago was controlled by pirates and used as base in their fight against the Spanish Crown, which tried to recapture the islands[8]. Only five years after Nicaragua had become a province of the Federation of Central American States that had emerged out of the Captaincy-General of Guatemala in 1821, it declared her independence. In the 1826 Declaration of Independence, Nicaragua claimed sovereignty over all islands appurtenant to her territory, which above all concerned the islands off the Mosquito coast. Nevertheless, by referring to the "natural boundaries" principle, Nicaragua is adamant today that the San Andrés archipelago pertains to those groups of islands and keys that in 1821 had allegedly become a part of the Federation of Central American States. However, this view is contradicted by the fact that the archipelago was declared the sixth dis-

[6] The 1803 Royal Order reads as follows: "The King has resolved that the San Andrés islands along with the Mosquito Coast (…) stay separated from the Captaincy-General of Guatemala and are under the control of the Viceroyalty of Santa Fé (…)" [own translation]; "Los Escenarios Institucionales de la Defensa Nacional en Nicaragua", Ch. 17, Red de Seguridad y Defensa de América Latina (RESDAL), available at <http://www.resdal.org/Archivo/esc-17.htm>.

[7] Bell, Border and Territorial Disputes, 1982, 358.

[8] Eastman Arango, El Archipiélago de San Andrés y Providencia – Formación Histórica hasta 1822, Revista Credencial Historia, Vol. III, Diciembre 1992, 25.

trict of the Province of Cartagena on 23 June 1822, which expressly included all islands[9].

Despite the described historical development, Nicaragua asserts that, at the latest after the dissolution of the Federation of Central American States in 1838, these islands and keys became a part of the sovereign territory of Nicaragua. However, this appears doubtable, as there is no proof whether the San Andrés archipelago was at any time included in the claim to what is only mentioned as "adjacent islands" in Nicaragua's subsequent constitutions as well as in the Spanish-Nicaraguan treaty of 1850, in which Spain recognized the independence of Nicaragua[10].

Also, other treaties of the same time are not capable of substantially supporting Nicaragua's claim, as they only implicitly awarded Central American states the right to exercise sovereignty over Central American territory[11]. Even the Treaty of Managua of 1860 between Great Britain and Nicaragua, the most notable of the few treaties of that period that specifically dealt with Nicaragua's territorial rights, recognised Nicaragua's sovereignty only over the Mosquito Coast, where a number of British settlements existed until the late nineteenth century[12]. The scope of this recognition was clarified neither by the 1894 Treaty between Nicaragua and Honduras nor by the Altamirano-Harrison Treaty between Nicaragua and Great Britain of 1905[13]. Moreover, it is undisputed that Colombia remained in control of the San Andrés archipelago ever since she gained independence. As the distance from Panama's coastline, itself a part of Colombia until 1903, is only marginally greater than that from the Nicaraguan Mosquito Coast, the argument that the proximity of the islands favours Nicaragua's claim is historically misleading. Moreover, Nicaragua seems also to ignore that the Mosquito Coast was controlled by Nueva Grenada until the early 19th century, as mentioned in the 1803 Royal Order, which included a dominion over the coastline until Cabo Gracias a Dios. This territory was originally administered from Cartagena and only later from Portobelo, a city that now belongs to Panama. Even though Panama may still have dormant claims to the archipelago today, no known action was undertaken in this regard since her independence from Colombia.

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[9] It became the "Intendencia de San Andrés y Providencia" in 1912 and was renamed to "Departamento de San Andrés y Providencia" in 1991; ibid.

[10] In this treaty Spain "renounced in perpetuity in the most formal and solemn manner for itself and its successors the sovereignty, rights and action which correspond to it over the American territory situated between the Atlantic Ocean and the Pacific with its adjacent islands, formerly known under the denomination of the province of Nicaragua and now a province of the same name"; Bell, *supra* note 7, 360.

[11] Namely Clayton-Bulwer Treaty, 1850, and Crampton-Webster Treaty, 1852 (both between Great Britain and the United States), see Karnes, The Latin American Policy of the United States, 1972, 89-92.

[12] Report on the Situation of Human Rights of a segment of the Nicaraguan Population of Miskito origin, Part 1, Organization of American States (OAS) – Inter-American Commission of Human Rights, para. 7.

[13] Ibid., para. 8.

In the Barcenas-Esguerra Treaty, signed in Managua on 24 March 1928, Nicaragua finally recognised "the full and entire sovereignty of the Republic of Colombia over the islands of San Andrés, Providencia and Santa Catalina and over the other islands, islets and reefs forming part of the San Andrés Archipelago"[14]. This declaration was made in exchange for Colombia's formal recognition of Nicaraguan sovereignty over the Mosquito Coast and the adjacent Corn Islands. The treaty was, however, not ratified until 6 March 1930 and ratification occurred only after a liberal government had come to power in Managua. Eventually, the Treaty came into force on 5 May 1930 with the exchange of the ratification documents between the two parties. A diplomatic note attached to the instruments of ratification further indicated that Colombia would not make claims west of the 82nd meridian. The Barcenas-Esguerra Treaty from its scope of application expressly excludes the islands of Roncador, Quitasueño and Serrana. The United States had taken over these islands in 1869 under the U.S. "Guano laws", according to which uninhabited islands were treated as *terrae nullius*[15] if guano was found on them[16]. Colombia itself never recognised any such claims until April 1928, when Colombia and the United States agreed on the juridical status of the mentioned islands in a move to settle their dispute over the installation of lights and navigational aids[17]. According to this agreement Colombia was entitled to fish around the islands, while the United States obtained the right to maintain navigational aids in the area.

The United States has eventually withdrawn all previous claims by a treaty with Colombia signed on 8 September 1972 in Bogotá, also known as the Vásquez-Saccio Treaty[18]. However, the US Department of State's testimony supporting the treaty pointed out at that time that it was not intended to affect any dispute that may arise between Nicaragua and Colombia on territorial claims[19]. This statement was eventually included in Article 7 of the treaty. Nevertheless, the Vásquez-Saccio Treaty expressed the intention "to relinquish any rights" the United States may have gained in the past[20]. The treaty was ratified by the US Senate on 31 July 1981 and came into force on 17 September 1981[21]. The island of Serranilla, however, now included in Nicaragua's claims, was mentioned in neither agreement be-

[14] *Supra* note 5.

[15] Territory which immediately before acquisition belonged to no state, see Malanczuk, Modern Introduction to International Law, 1997, 148.

[16] On the "Guano Laws" of 18 August 1856 and related U.S. claims, see State Territory, 1980 Digest § 1, 439.

[17] Exchange of notes on 10 April 1928; Foreign Rel. US 637 (1928); Finch, Clearing Up Titles to Islands in the Western Caribbean Sea, 23 AJIL 155 (1929).

[18] Treaty Concerning the Status of Quita Sueño, Roncador and Serrana, 1307 UNTS 379; 33 USTS 1405.

[19] 1975 Digest, § 3, 768 in: 67 AJIL 771 (1973).

[20] *Supra* note 18.

[21] US Senate action on the treaty was delayed for years by the Senate's Foreign Relations Committee's belief that U.S. claims should be resolved through adjudic and ICJ Judicial settlement, see 1974 Digest § 3, 669.

tween the United States and Colombia. Its legal status was, in fact, subsequently clarified by a treaty between Jamaica and Colombia[22].

On 4 February 1980 the new Sandinista government revived Nicaragua's territorial claims by unilaterally declaring the Barcenas-Esguerra Treaty null and void[23]. This move was based on allegations that the treaty had been signed under duress and therefore lacked legal validity. According to Nicaragua, it had ostensibly been concluded under political pressure by the United States, which at that time had strategic interests in the area. Colombia, nevertheless, has always emphasised that she still regarded the treaty as final settlement of any territorial dispute, which could not be terminated unilaterally.

III. Territorial Questions

1. The Barcenas-Esguerra Treaty

Colombia has always held the view that her sovereignty over the San Andrés archipelago is validly based on international law, i.e. not only by virtue of having been in possession of the islands for almost two hundred years, but also because of the Barcenas-Esguerra Treaty of 1928. By that treaty, Nicaragua abandoned her territorial claims to the San Andrés archipelago *vis-à-vis* Colombia, albeit in exchange for the recognition of Nicaraguan sovereignty over the Mosquito Coast and two adjacent islands, Great and Little Corn Island, which previously were claimed by Colombia[24]. This would seem to correspond with Colombia's submission that all islands and keys in question, if not already considered to be an integral part of her territory under the rules of international customary law, have ultimately become a part of Colombia through the Barcenas-Esguerra Treaty. As a consequence, all claims made by Nicaragua with respect to sovereignty could be rejected by Colombia on this ground.

1.1. Legal Validity of the Barcenas-Esguerra Treaty

In contrast to Colombia's assertion, Nicaragua holds the opinion that the Barcenas-Esguerra Treaty lacks legal validity and consequently cannot provide the basis of a Colombian title with respect to the San Andrés archipelago[25]. This claim

[22] Here, a Joint Regime Area around Serranilla has been agreed; see Caribbean Sea Maritime Limits Treaty between Jamaica and Colombia; Charney/Alexander, International Maritime Boundaries, Vol. IV, 1993, 2200.

[23] Junta de Gobierno de Reconstrucción Nacional de Nicaragua, Declaración y Libra Blanco del Gobierno de Nicaragua acerca del diferendo con Colombia sobre las Islas de San Andrés y Providencia. Reprint in: Relaciones Internacionales, 1 (1) 1980, 133-142.

[24] Woolsey, Boundary Disputes in Latin America, 25 AJIL, No. 2, 328 (1931).

[25] Application Instituting Proceedings – Territorial and Maritime Dispute, *supra* note 2, para. 2.

rests mainly on allegations that the treaty was signed under pressure from the United States, which is said to have been in control of Nicaragua at that time. Additionally, Nicaragua claims having lacked authorisation to act, for the treaty had been signed by Dr. Don José Bárcenas Meneses, then Under-Secretary for Foreign Affairs. The 1969 Vienna Convention on the Law of the Treaties (hereinafter: Vienna Convention) is not directly applicable, as according to Article 4 it applies only to treaties concluded after its entry into force on 27 January 1980. It is, however, generally agreed that most parts of the Vienna Convention merely express rules which existed under customary international law or are recognised as general principles of international law. Therefore, it is understood that pursuant to Article 28 of the Vienna Convention[26] any such rule can be invoked without reference to the present convention, provided it was previously part of customary international law[27]. Consequently, the source of the binding force of rules for non-parties is custom, not treaty law[28]. According to Article 38 of the Statute of the International Court of Justice, the Court can take account of international custom as evidence of a general practice accepted as law and as such it can establish binding obligations for states.

In accordance with the provisions of Article 51 of the Vienna Convention, the notion that coercion directed against the representative of a state may be invoked in order to invalidate its consent to be bound by a treaty goes directly back to customary international law[29]. The same applies for the invalidity of a treaty due to an illegal threat or use of force, which is *lex lata* in international law[30]. As a result, coercion, whether exercised against a state's representative by threat or use of force, would indeed leave a treaty void. Nicaragua's claims that it was forced into the Barcenas-Esguerra Treaty is mainly backed by the fact that United States forces landed in Nicaragua in May 1926 to protect the interests of the United States and to mediate in the ongoing civil war[31]. Between 1926 and early 1933 they came and went intermittently. Yet, it is doubtful whether this alone may be seen as proof that the governments during the civil war years were acting under pressure from the United States.

Even if so, this would raise the question whether the Barcenas-Esguerra Treaty itself was actually signed under coercion. It further remains unclear why the

[26] Art. 28 of the Vienna Convention: "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party." Vienna Convention on the Law of the Treaties, 23 May 1969, 1155 UNTS 331, 8 ILM 679.

[27] Sinclair, The Vienna Convention on the Law of Treaties, 1984, 9-10.

[28] Reports of the International Law Commission on the Second Part of Its 17th and 18th Session, 1966, 61.

[29] Sinclair, *supra* note 27, 20.

[30] Reports of the International Law Commission, *supra* note 28, 75.

[31] Country Studies: Nicaragua, Federal Research Division of the Library of Congress, December 1993, available under: <http://countrystudies.us/nicaragua/2.htm>.

United States would have had reason to force the Nicaraguan government into said treaty. Moreover, it should not be ignored that at the time of both the signing and the ratification of the treaty a truce between the government under the newly elected liberal president, General José María Moncada, and the rebels remained in effect[32]. It is obvious that the onus to prove that any form of coercion was used in this specific case is clearly on the party who claims the invalidity of a provision or the treaty itself. As Nicaragua has not come forward with any convincing evidence whatsoever that it was indeed forced into the Barcenas-Esguerra Treaty by the United States, it can as a result not invoke any principle in customary international law that would render the Barcenas-Esguerra Treaty void.

As to the representative authority, it generally rests upon national law to attribute the field and scope of respective competences[33]. Yet, there are certain subjects such as the conclusion and adoption of treaties for which customary international law does attribute specific competences to the foreign secretary or authorised organs of a country with accordingly delegated powers[34]. Moreover, in a situation where a state organ is involved, those acts are attributed to the state itself, which is why treaties concluded by unauthorized organs according to domestic law are valid on the international level and are subsequently to be treated under the rules of international law[35]. A parallel provision to this rule of customary law exists in Article 46 of the Vienna Convention on the Law of Treaties.

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

Consequently, Nicaragua's claim that the delegation of authority to an Under-Secretary of the Nicaraguan Ministry of Foreign Affairs to conclude the Barcenas-Esguerra Treaty with Colombia violated a domestic rule of fundamental importance appears to be unfounded. Further, it is far from clear that or better why this delegation of power should not been considered as having been conducted in accordance with normal practice. Hence, the argument brought forward by Nicaragua that her representative, Under-Secretary of Foreign Affairs Dr. Don José Bárcenas Meneses, lacked the authorisation of the Nicaraguan government is hardly convincing and cannot be held to have effect as to the validity of the Treaty.

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[32] US Department of State, Bureau of Western Hemisphere Affairs (WHA), Background Note, Nicaragua, January 2002.

[33] Barberis, Representatives of States in International Relations, in: Bernhardt (ed.), Encyclopedia of Public International Law, Vol. IV, 1997, 195, 196.

[34] Ibid.

[35] Ibid.

1.2. Termination of the Treaty by Nicaragua

The Barcenas-Esguerra Treaty does not contain any cancellation provisions or temporal limitation of its validity or scope. Therefore the treaty itself would give no legal ground for Nicaragua to terminate it without Colombia's consent. This conclusion corresponds with Colombia's view that Nicaragua lacked any legal ground to terminate the Barcenas-Esguerra Treaty unilaterally as happened on 4 February 1980. According to the principle of *pacta sunt servanda*, a fundamental principle in customary international law concerning the law of treaties, "every treaty in force is binding upon the parties to it and must be performed by them in good faith"[36], a maxim which in similar terms is also included in Article 26 of the Vienna Convention[37]. Above all, this principle is of great importance where political shifts may occur. In such cases it serves as a safeguard for treaties and other international transactions, provided they have not become void otherwise[38].

Similarly, in the event of unilateral termination of a treaty or a provision thereof, the principle of good faith may be invoked by the other party, if she can rely on a position of trust established over a certain period of time[39]. Thus, treaty provisions not only require parties to fulfil all obligations provided for, but also to refrain from acts that could defeat the object and purpose of the Treaty[40]. This rule is particularly important for treaties that have been in force for some time. The principle of good faith therefore reflects the necessity that states must be able to rely upon statements made by any other states[41].

As Nicaragua claimed the nullity of the Barcenas-Esguerra Treaty more than 50 years after it had been signed, Colombia could rightfully rely, at least for the preceding period, on the maxim of *pacta sunt servanda* and thus on the performance of the treaty by Nicaragua. Consequently, the termination of the treaty by Nicaragua was not consistent with accepted principles of international law and Nicaragua's declaration could in no way affect the validity of the treaty.

Likewise, Colombia could rely on the principle of *venire contra factum proprium*, which is similar to the doctrine of estoppel in the common law[42]. By virtue of this principle, a treaty provision remains legally valid and continues to impose obligations on the parties, even if it has subsequently been declared void by one party, provided there are no reasons to assume that the same provision has

[36] Reports of the International Law Commission, *supra* note 28, 42: The *pacta sunt servanda* principle was designated by the International Law Commission as "the fundamental principle of the law of the treaties".

[37] *Supra* 26, Preamble; Para. 3 states: "Noting that the principles of free consent and of good faith and the pacta sunt servanda rule are universally recognized."

[38] Lukashuk, The Principle of Pacta Sunt Servanda and the nature of obligation under International Law, 83 AJIL 515 (1989).

[39] Ibid.

[40] Ibid.

[41] *Nuclear Tests* Case (*New Zealand v France*), Judgment, ICJ Rep. 1974, 473, para. 49.

[42] Klabbers, The Concept of Treaty in International Law, 1996, 94.

otherwise become invalid. This principle has been applied by the ICJ in the Temple of Preah Vihear Case, where the Court ruled that, by its behaviour, Thailand had given Cambodia the impression that it had accepted a territorial delimitation[43]. As Cambodia could rely on this behaviour, Thailand was ruled to be estopped from later claiming otherwise.

In view of the fact that the Barcenas-Esguerra Treaty has not otherwise been terminated any time before 1980, Nicaragua has acted in a similar manner to Thailand in the above-mentioned case by giving the impression to Colombia over a period of more than 50 years that it had accepted the provisions of the treaty without any reservation. Colombia therefore had reason to place trust in the territorial delimitations imposed by said treaty. It appears, as a result, that Nicaragua is estopped from making any territorial claims with respect to the San Andrés archipelago.

2. The Principle of Effectiveness

Even if the Barcenas-Esguerra Treaty were considered void, Colombia's title to the archipelago may nevertheless be based on another general principle of customary international law, that is on acquisitive prescription. This legal concept is naturally linked with the principle of effectiveness (*effectivités*), which in general terms describes the effective occupation and control of a territory[44]. Having its origins in Roman Law, effectiveness is an important factor of legal stability. It refers to the effective, that is public, peaceful and continuous exercise of state authority over a certain period[45].

In the 1986 Frontier Dispute Case, the notion of effectiveness was described by the ICJ as "conduct of administrative exercise of territorial jurisdiction in the region during the colonial period"[46]. It was also taken into account by the Court in the *Qatar v Bahrain* Case concerning a dispute over several islands off the Qatari coast, which involved an even shorter period of time than in the present case. Although the question was largely evaded by the Court, several separate opinions found that Bahrain had title to the disputed islands based upon the *effectivités* of its exercise of authority[47].

As set out earlier, Colombia can rely on a sustained history of possession. Moreover, she exercised her authority over the San Andrés archipelago and effectively administrated it for an estimated 200 years, both with regard to *effectivités*

[43] *Temple of Preah Vihear* Case, (*Cambodia v Thailand*), Judgment, ICJ Rep. 1962, 6.

[44] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Judgment, ICJ Rep. 2001 (16 March 2001), cf. Separate Opinion Torres Bernárdez, paras 73, 76.

[45] Torres Bernárdez, Territory, Acquisition, in: Bernhardt (ed.), Encyclopedia of Public International Law, Vol. I, 1997, 838.

[46] *Frontier Dispute* Case (*Burkina Faso v Mali*), Judgment, ICJ Rep. 1986, 586, para. 18.

[47] Maritime Delimitation and Territorial Questions between Qatar and Bahrain, *supra* note 44, cf. Separate Opinion Kooijmans, para. 44-79.

coloniales and to state effectivity. This assessment mainly goes back to the Spanish Royal Order issued in 1803, in which the archipelago was formally transferred to the territorial jurisdiction of Nueva Grenada before subsequently becoming a part of Greater Colombia in 1822. As already mentioned, the archipelago remained a district within the Province of Cartagena even after the dissolution of Greater Colombia in 1830, out of which the Republic of Colombia emerged.

Nevertheless, it is acknowledged that the principle of effectiveness contains several somewhat vague conditions, most notably the passage of time, which must be met in order for it to apply[48]. Additionally, there is also some degree of uncertainty as to the intensity and nature of any counter-claim the other party must communicate in the course of any given time period, which would so to constitute an interruption to this process[49]. Nicaragua, it seems however, was neither in a position to engage in direct acts of authority on the islands at any time in her history nor made attempts to do so through diplomatic channels or by means of peaceful settlement of conflicts prior to her unilateral declaration in 1980. Therefore, any uncertainties that may have arisen in theory seemingly disappeared in view of the substantial delay of Nicaragua's territorial claims to the San Andrés archipelago.

3. The Principle of "*Uti Possidetis Juris*"

The maxim of *uti possidetis juris* basically provides that states which emerge from colonisation are to inherit the administrative border they hold at the time of their independence[50]. This was found by the International Court of Justice to be a general principle "logically connected with the phenomenon of obtaining independence" and primarily aimed at securing "respect for the territorial boundaries at the moment when independence is achieved"[51]. Additionally, the Court observed that by this principle "administrative boundaries were transformed into international frontiers in the full sense of term"[52]. Although the principle of *uti possidetis juris* certainly is not mandatory for solving border disputes, as parties have frequently agreed to modify it or have even resorted to different legal schemes, it has been largely accepted as a general principle of customary international law. Especially in Latin America this maxim has been applied on a number of occasions in order to determine borders and sovereignty over territory, based on divisions drawn in the nineteenth century[53]. A major obstacle to applying *uti*

[48] Torres Bernárdez, *supra* note 45.

[49] Ibid.

[50] Ratner, Drawing a Better Line: Uti possidetis and the Borders of New States, 90 AJIL 590 (1996).

[51] *Frontier Dispute* Case, *supra* note 46, 554.

[52] Ibid., 556, para. 23.

[53] Wooldridge, Uti possidetis doctrine, in: Bernhardt (ed.), Encyclopedia of Public International Law, Vol. IV, 1997, 1261.

possidetis are the often somewhat vague border drawings, especially when attempts are made to rely on administrative units formed in the colonial era[54]. In this regard the Court has confirmed that neither the effective display of state functions in disputed areas nor economic inequality following colonial delimitations are sufficient to exclude the applicability of the *uti possidetis* principle[55]. Accordingly, it is undeniable that the principle may be applied in the present case. Having said that, it should be noted that the *effectivités*, as set out before, are the most significant evidence to be considered in allowing for the use of *uti possidetis*. More importantly, however, the principle of effectiveness may even serve as a substitution for the application of *uti possidetis*, even though the former cannot wholly exclude it[56].

Such an exclusion, however, seems to be demanded by the present circumstance. In a number of legal disputes, for instance in the *El Salvador v Honduras* Case[57], the Court gave weight to *effectivités* and examined which areas adjacent to the disputed territory were under actual control of various Spanish colonial authorities. This applies also to republican titles in the form of grants made after independence, in the above-mentioned case with respect to the Central American Federation in the years between 1821 and 1838[58]. In the present case, Nicaragua claims that her sovereignty over the islands at issue was based on the fact that they became a part of the Federation of Central American States in 1821 and so, by virtue of *uti possidetis juris*, came under Nicaraguan sovereignty after Nicaragua's independence in 1838.

First, as far as the actual control of the disputed territory is concerned, this does not reflect the historical facts. The San Andrés archipelago had been assigned to be under the control of Nueva Grenada by the aforementioned Royal Order of 1803, before it was to become a district within the Province of Cartagena in 1822. Second, relating to the scope of *uti possidetis*, even if Nicaragua could successfully invoke the principle under normal circumstances, it is in this particular case replaced by the *effectivités*. Deciding otherwise would lead to an unequitable result, failing to do justice to the historical and factual situation. This argument is supported by the fact that neither before nor after 1822 has Nicaragua ever engaged directly in the administration of the islands. Ultimately, it seems that there is no reason that Nicaragua should be entitled to invoke the maxim of *uti possidetis juris* in her favour and thus be allowed to challenge the *status quo*, which has been a result of peaceful historical development during the course of the last two centuries.

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[54] Ibid.

[55] *Land, Island and Maritime Frontier Dispute* Case (*El Salvador v Honduras*; Nicaragua intervening), Judgment, ICJ Rep. 1992, 355.

[56] Wooldridge, *supra* note 53.

[57] *Land, Island and Maritime Frontier Dispute* Case, *supra* note 55.

[58] Ibid., 395-401.

4. The Legal Status of Roncador, Serrana, Quitasueño and Serranilla

Even though the islands of Roncador, Serrana, Quitasueño and Serranilla geographically and legally form a part of the San Andrés archipelago, they are, except for the Serranilla bank, expressly excluded from the scope of the Barcenas-Esguerra Treaty. The legal status of Roncador, Serrana and Quitasueño was initially regulated by an agreement in April 1928 between Colombia and the United States, after the latter had taken them over several decades earlier as *terrae nullius* under the 1856 U.S. Guano Act[59], a legal ground which has been disputed by Colombia[60]. The agreement, concluded through an exchange of notes, provided that in view of the claims both countries had to the islands the *status quo* should be upheld[61]. As a result, Colombia was permitted to continue to fish around the islands, while she refrained from objecting to the maintenance of navigation aids by the United States. As mentioned earlier, the United States renounced all claims to these islands by virtue of the Vásquez-Saccio Treaty, which was signed in 1972. Since the ratification of the treaty in 1981 the islands are regarded as an integral part of the "Departamento de San Andrés y Providencia".

Serranilla, in turn, was mentioned neither in the Barcenas-Esguerra Treaty with Nicaragua nor in the 1928 Agreement or the Vásquez-Saccio Treaty with the United States. Likewise, previous to 2001, it was not part of any claim communicated by Nicaragua. While it could be claimed that the United States acquired the Serranilla bank under the 1856 Guano Islands Act as well, no further territorial claims were made since the Vásquez-Saccio Treaty was signed. Regarding the maritime delimitation treaties with Jamaica[62] and with Honduras[63], both countries in each case accepted Colombian sovereignty over the Serranilla bank. Likewise, before the present application was filed, Nicaragua had neither communicated nor manifested any known claims to Serranilla.

IV. Maritime Delimitation

1. Legal Delimitation

In the case at hand the primary source of the delimitation law is the Barcenas-Esguerra Treaty. If the Court holds the treaty invalid, or declares it to be valid but not applicable as treaty of delimitation, customary law shall prevail. In considering this case, the Court may not apply the UN Conventions on the Law of the Sea,

[59] *Supra* note 16.

[60] Gaviria Lievano, Las Pretensiones de Nicaragua sobre San Andrés, Revista Credencial Historia, Edición 161, Mayo 2003.

[61] Exchange of notes on 10 April 1928, *supra* note 17.

[62] Caribbean Sea Maritime Limits Treaty between Jamaica and Colombia, *supra* note 22.

[63] Caribbean Sea Maritime Limits Treaty between Honduras and Colombia, *supra* note 3.

since of both sides only Colombia is a party to the 1958 UN Convention on the Continental Shelf and only Nicaragua has so far ratified the 1982 UN Convention on the Law of the Sea (hereinafter: "LOS Convention").

The Barcenas-Esguerra Treaty, to begin with, may certainly be considered as treaty of delimitation. This follows not from the text of the treaty itself, but rather from the attached "Protocol of Exchange of Ratifications", which was signed on 5 May 1930 and constitutes an integral part of the treaty. Under paragraph 2 of the Protocol the parties declare "that the San Andrés and Providencia Archipelago (…) does not extend west of 82nd degree of longitude west of Greenwich", thereby prescribing maritime delimitation by method of meridian.

It is important to note that the delimitation line, as drawn by the treaty, separates Nicaraguan from Colombian maritime territory, leaving all of the islands presently claimed by Nicaragua under Colombian sovereignty. At the same time, the delimitation line seems to provide for an equitable solution, because it leaves enough maritime space under Nicaraguan sovereignty and does not deprive it of the continental shelf, as asserted in the application. Starting from the vertical delimitation line along the meridian 82°00'W longitude, and then following other maritime boundaries that were determined in the meantime between other coastal states in the region, in each case based on bilateral treaties, the delimitation process in the western Caribbean appears to be complete. Therefore the need for alterations by the Court seems at least questionable.

2. *De Facto* Delimitation (Demarcation)

The fact that the Nicaraguan and Colombian coasts are opposite and not adjacent to each other means that they have to be separated by a frontal delimitation line, in this case in the north-south direction. As mentioned earlier, the Barcenas-Esguerra Treaty prescribes the use of a certain meridian (of longitude) as a method of determining the maritime boundary with Nicaragua. This method is usually combined with parallels (of latitude), something unnecessary in this case, because delimitation lines in the West-East direction were not part of mutual delimitation between Nicaragua and Colombia. A look at the map reveals that delimitation lines in the north and south of this part of the Caribbean Sea were the object of the delimitations of both Nicaragua and Colombia *vis-à-vis* other coastal states in the region[64].

In this circumstance the meridian method provides that the line of maritime delimitation simply follows the vertical line of the meridian 82°00'00'' W longitude, assigning the maritime area to the west to Nicaraguan sovereignty and the maritime area to the east to Colombian sovereignty. Yet, the resulting delimitation remains a bit vague, as the parties omitted to specify, whether this line is meant as a

[64] To the north – Nicaragua/Honduras, Colombia/Honduras, Colombia/Jamaica, and to the south Nicaragua/Costa Rica, Colombia/Costa Rica and Colombia/Panama.

single maritime boundary between the areas of Exclusive Economic Zone and Continental Shelf appertaining respectively to Nicaragua and Colombia. Nevertheless, the meridian method should reasonably apply to this case, since it offers the benefit of simplicity, while avoiding the "cut-off" phenomenon[65]. Colombia, moreover, has also used this method in maritime delimitation treaties with other countries in the region[66].

Alternatively, in absence of a solution conditioned by a treaty of delimitation, the following delimitation methods may help to provide an acceptable solution. Using baselines, the breadth of the territorial sea can be measured. In this specific case the drawing of normal baselines[67] along the Colombian mainland may provide a solution, if they are drawn straight across the Gulf de Uraba and the Gulf of Morrosquillo. However, this would require that these bays be considered historic bays[68]. In fact, they have undoubtedly been treated as part of Colombian territory for centuries and considered internal waters.

Likewise, the San Andrés archipelago is to be treated as archipelago in a legal sense[69] and therefore has to be connected with straight baselines[70]. The common components of every definition of an archipelago are: i) a substantial group of islands, that is at least three islands; ii) compactness and adjacency, meaning that the islands are situated sufficiently close to each other to form a compact geographic whole; and iii) unity (cohesion) as a natural feature, but also with regard to economic, political and historical cohesiveness. The main purpose of the archipelagic concept is to treat a group of islands and the waters surrounding them as single entity for the purpose of delimiting maritime zones. Such a concept finds its justification in the relationship between the land, water and the people inhabiting the islands of the archipelago[71]. As small geographic features to the south of the San Andrés archipelago, such as the Cayos del E.S.E. and Cayos de Albuquerque, are likely to be ignored as basepoints, these should rather be drawn from the island of

[65] United Nations, Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, Handbook on the Delimitation of Maritime Boundaries, 2000, 57.

[66] For example the treaty between Colombia and Honduras of 2 August 1986 or the treaty between Colombia and Panama of 11 November 1976, in: Charney/Alexander, *supra* note 3, 503-518 and 532-535.

[67] Art. 5 of the 1982 LOS Convention defines normal baselines.

[68] Under customary international law a state may validly claim title to a bay on historic grounds, if it can show that it has "for a considerable period of time claimed the bay as internal waters and effectively exercised its authority therein, and that during this time the claim has received the acquiescence of other states"; Malanczuk, *supra* note 15, 181.

[69] The 1982 UN LOS Convention defines an archipelago as a group of islands, including parts of islands, interconnecting waters and other natural features, which are so closely inter-related that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such.

[70] Munavvar, Ocean States – Archipelagic Regimes in the Law of the Sea, 1995, 6.

[71] Ibid., 107-115.

San Andrés, as provided for in the treaty of delimitation between Colombia and Honduras[72].

In dealing with straight baselines, the 1982 LOS Convention[73] determines the circumstances in which they may be applicable, *inter alia* in cases of coasts with a fringe of islands[74]. The straight baselines, also according to the Convention, must be drawn so as to satisfy several requirements. First, they must not depart from the general direction of the coast. Second, the sea areas lying within the lines must be sufficiently closely linked to the land domain in order to be subject to the regime of internal waters. Third, they shall not be drawn to and from low-tide elevations, and they shall not cut off the territorial sea of another state from the high seas or an Exclusive Economic Zone[75]. In the given circumstances all of these requirements are met.

The role islands play within the baseline system can differ according to the effect they have been given. Thus, in the process of delimitation they can be accorded either full or partial (or reduced) effect, or they may be given no effect at all, meaning that they are to be ignored. Correspondingly, their significance depends on their actual features, since there are differences in the legal treatment of islands, low-tide elevations, and rocks[76]. Basically, it can be said that "the smaller the feature, the more limited a role, if any, it will play in the delimitation"[77]. In Art. 47 of the LOS Convention, references are made to "reefs", "atolls" and "low tide elevations", but apart from the latter these terms are neither defined nor otherwise explained in the Convention.

Even though the Barcenas-Esguerra Treaty uses the term "reef" for Roncador, Quitasueño and Serrana, it can be assumed that all of the land features are to be considered as islands. Therefore, they should be given full effect in the delimitation process, which means that they give rise to a right to possess marine space around them, that is they include a territorial sea belt of 12 nautical miles, an Exclusive Economic Zone and Continental Shelf of 200 nautical miles.

Further, making use of the method of equidistance, any map of the region will show that the Continental Shelf and Exclusive Economic Zone of both the Colombian mainland and the San Andrés archipelago are overlapping. And since both maritime areas fall under Colombian sovereignty, there is no need to draw a delimitation line between them. The only relevant delimitation line is, thus, to be drawn between the archipelago and the Nicaraguan mainland, taking all islands

[72] The text of the treaty, along with the comments is available in: Charney/Alexander, *supra* note 3, 503-518.

[73] Art. 7, para. 1 of the LOS Convention.

[74] The term "fringe of islands" implies a number of off-lying islands spread over some distance so as to form a continuous fringe along the coast.

[75] Art. 7, paras 3, 4 and 6 of the LOS Convention.

[76] The 1982 LOS Convention defines an island (Art. 121, para. 1), a low-tide elevation (Art.13, para. 1) and rocks (Art. 121, para. 3).

[77] Handbook on the Delimitation of Maritime Boundaries, *supra* note 65, 34.

into account[78]. The parties may, therefore, agree on the drawing of a single delimitation line, since the Exclusive Economic Zone and the Continental Shelf are coterminous and a single line is practical for multipurpose delimitation, as the Court stated in the Gulf of Maine Case[79].

In our opinion, the use of the equidistance line would yield a more reasonable outcome in the present dispute; we note that it has become a part of customary international law and has been found to produce equitable results of maritime delimitation[80]. In this regard, reference may be had to the 1958 Geneva Convention on the Continental Shelf, which provides in Art. 6 (1): "Where the same continental shelf is adjacent to the territories of two or more states whose coasts are opposite to each other, the boundary of the continental shelf appertaining to such states shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest point of the baselines from which the breadth of the territorial sea of each state is measured." This provision has become customary law through state practice, so it would be applicable to this case.

Both equity and equidistance, however, are not mutually exclusive, but can complement each other in yielding an equitable result[81]. This point of view was confirmed in the *Libya v Malta Continental Shelf* Case, which was the first case involving delimitation exclusively between opposite states[82]. Here, the Court restated its position that the method of equidistance is not a mandatory rule of customary international law, yet acknowledged at the same time that the numerous delimitation agreements between states constituted "impressive evidence that the equidistance method can in many different situations yield an equitable result"[83].

The principle of distance, itself being already a rule of customary international law governing entitlement to the Exclusive Economic Zone and the Continental Shelf, enhanced the role of equidistance as an equitable principle applicable to delimitation of these areas in general, and delimitation between opposite states in particular[84]. Thus, Nicaragua may insist on a different delimitation line, based on the geographical fact that the archipelago is situated within her Continental Shelf ex-

[78] This option is one of the three theoretical alternatives for drawing the median line in the presence of islands. The median line can be drawn between the mainland coasts disregarding the presence of islands or, in this case, between the island and the mainland coast of the State to which the island does not belong; Jayewardene, The Regime of Islands in International Law, 1990, 337.

[79] *Gulf of Maine* Case (*Canada v United States of America*), Judgment, ICJ Rep. 1984, 246.

[80] The Colombian government has always been a very active member of the "pro-equidistance" group at UNCLOS III, and has concluded delimitation treaties with Haiti and the Dominican Republic, based on the equidistance line; Jacob, The Legal Determination of International Maritime Boundaries, 1990.

[81] Kwiatkowska, Equitable Maritime Boundary Delimitation – A Legal Perspective, 1988, 244.

[82] *Continental Shelf* Case (*Libya v Malta*), Judgment, ICJ Rep.1985, 13.

[83] Jayewardene, *supra* note 78, 327.

[84] Kwiatkowska, *supra* note 81, 255.

tending 200 nautical miles from the mainland[85]. And because of the archipelago's relative vicinity to the mainland, it may be argued that it represents a coastal archipelago under Nicaraguan sovereignty. Colombia in turn could counter this argument by referring to the *Qatar v Bahrain* Case[86], which concerned a similar issue. In this case, the Hawar Islands were claimed by Qatar based on their proximity to the Peninsula, which, it was argued, required that they therefore be considered as an integral part of the mainland coast. Referring to this, Bahrain subsequently countered that "a mere proximity is not, by itself, a basis for title to territory when the proximate islands are subject to the lawful and long-time authority of another state"[87], a line of reasoning which was ultimately approved by the Court in the judgment of 16 March 2001[88].

V. Conclusion

In the authors' opinion, Colombia has reason to claim sovereignty over all islands which are subject to Nicaragua's application to the Court. This claim can primarily be based on the provisions of the Barcenas-Esguerra Treaty, which has been validly concluded and could not be terminated by Nicaragua's unilateral declaration. Even if one chose to agree with Nicaragua's line of argumentation, the onus is on Nicaragua to present evidence of either invalidity or termination of the treaty. Until today, Nicaragua has proven neither. Since all this only allows the conclusion that the Barcenas-Esguerra Treaty and the maritime delimitation it provided still has binding force on the parties, Colombia's sovereignty over the San Andrés archipelago must be considered incontestable.

This conclusion also applies as far as customary international law is concerned. It is clear that whatever claims Nicaragua might have had in the past, they have slipped away as time has passed so that the authority of Colombia has become gradually consolidated. The *status quo* was in fact recognised by Nicaragua in the Barcenas-Esguerra Treaty of 1928, more than 50 years before she eventually communicated her territorial claim. The unilateral declaration made by Nicaragua in 1980 can, therefore, not be interpreted as an interruption in the sense that it challenged the position of Colombia based on the principle of effectiveness. Moreover, the present territorial sovereignty of Colombia over the San Andrés archipelago corresponds to the administrative subdivision of the Spanish colonial era.

In view of the described historical events, the principle of *uti possidetis juris* cannot replace the effective rule of Colombia over the islands in this case. Thus, the

[85] The islands are part of the Nicaraguan Continental Shelf, but only based on the principle of distance, and not on the principle of natural prolongation.

[86] *Supra* note 44.

[87] Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Bahrain's memorial (on merits) of September 30, 1996, and Bahrain's counter-memorial of December 31, 1997.

[88] P l a n t, International Decisions, 96 AJIL 198 (2002).

principle is deemed to be inapplicable, at least to the extent it relates to Nicaragua's claims.

As for the islands of Roncador, Serrana, Quitasueño and Serranilla, which geographically and legally form a part of the San Andrés archipelago, no indications were found as to why these islands should be treated differently whether in regard to the principle of *effectivités* or to the aforementioned maxim of *uti possidetis juris*.