DISSENTING OPINION OF VICE-PRESIDENT AL-KHASAWNEH

Colombian preliminary objection not of exclusively preliminary nature — Where decision on preliminary objection also determinative of important aspect of the merits of the dispute — Where decision on alleged invalidity of 1928 Treaty requires analysis of complex issues of fact and law — Requirement that judgments be reasoned — No presumption in favour of party raising preliminary objection in Article 79, paragraph 9, of the Rules of Court — Limits on Court's discretion to define the subject-matter of the dispute — Jurisdiction under Pact of Bogotá and optional clause declarations distinct and independent bases of the Court's jurisdiction.

1. I am unable to concur with the majority view that the 1928 Treaty between Colombia and Nicaragua is valid (Judgment, para. 81), nor with the finding, directly flowing from that view, and predicated upon it, that Colombia's first preliminary objection to jurisdiction is upheld in so far as it concerns sovereignty over the Islands of San Andrés, Providencia and Santa Catalina (Judgment, subparagraph (1)*(a)* of operative para. 142).

2. I should, however, hasten to add, before a misunderstanding occurs, that in saying this I do not imply that the Treaty and Protocol in question are necessarily invalid, nor that the Islands referred to above consequently necessarily appertain to Nicaragua. All I say is that I belong to the party of the "don't knows" who believe that crucial and intricate questions, of the nature encountered in this case, can only be determined definitively after thorough consideration at the merits phase, and not in a summary, unconvincing and premature manner as was the case in the present instance, especially since there was no compelling judicial reason to have done so.

3. I am of course not oblivious to the fact that in order to establish its jurisdiction and to ascertain the limits thereof, the Court may need, on occasion, to touch on the merits to better inform itself of facts that help it achieve that purpose of ascertaining its jurisdiction and which can only be gleaned by looking at the merits. That such recourse to the merits is permissible is beyond doubt. It is necessitated by considerations of common sense and rests on a long chain of precedents. As was rightly observed by Judge Shahabuddeen in a learned separate opinion,

> "[t]he idea that, in determining preliminary objections, the Court's enquiry could 'touch' on the merits went back to the 1920s" (*Oil Platforms (Islamic Republic of Iran* v. *United States of America),*

Preliminary Objection, Judgment, I.C.J. Reports 1996 (II), separate opinion of Judge Shahabuddeen, p. 830; see *Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 15).

4. At the same time, such permissibility should be balanced against the well-established principle that the integrity of the merits must be preserved and not prejudged or predetermined at the preliminary objections phase. To be sure, this principle and, indeed, the division of proceedings into jurisdictional and merits phases are not ends in themselves but they are indispensable tools for the fair and proper administration of justice and can be tampered with only at peril to those ideals and to the judicial function itself.

5. With these considerations in mind, I feel that, in the present case, the issue of whether the 1928 Treaty and the 1930 Protocol are valid and in force could have been safely — and should have been — left to the merits. As indicated above (para. 2), at no point in the Judgment is a compelling case made as to why it was necessary to dispose of the validity of the Treaty and Protocol at the preliminary objections stage thereby effectively deciding the question of sovereignty over the islands of San Andrés, Providencia and Santa Catalina with virtually no discussion as is required in an adversarial system of litigation. Thus for example the question of the alleged coercion of Nicaragua (which if proven may, subject to resolving certain questions about the status in customary law of the rules now codified in Articles 45 and 52 of the Vienna Convention on the Law of Treaties at the material time, produce an *ab initio* invalid treaty, incurable by the subsequent practice of the Parties[1]) was not adequately discussed in the oral proceedings (in complete contrast to the written proceedings where Nicaragua devoted a substantial part of its written comments to it) and then mostly to require that it be decided at the merits phase (Nicaragua) or to oppose that argument (Colombia). The substance of the issue, however, was not even properly discussed or subsequently considered by the Court. This is reflected in the summary

[1] Cf. paragraph 79 of the Judgment. The fact that acquiescence cannot validate a treaty obtained by coercion was clearly described in the Commentaries to the Draft Articles on the Law of Treaties:

> "The effects and the implications of coercion in international relations are of such gravity that the Commission felt that a consent so obtained must be treated as absolutely void in order to ensure that the victim of the coercion should afterwards be in a position freely to determine its future relations with the State which coerced it. To admit the application of the present article [the draft Article that became Article 45 of the Vienna Convention on the Law of Treaties on acquiescence] in cases of coercion might, in its view, weaken the protection given by articles 48 and 49 to the victims of coercion." (Draft Articles on the Law of Treaties with Commentaries, *Yearbook of the International Law Commission*, 1966, Vol. II, pp. 239-40).

sentences dealing with the issue of coercion (Judgment, paras. 75-80) which, arguably, do not even meet the requirement that judgments should be reasoned. The only motivation proffered by the Judgment for deciding the issue at the present stage (in effect prejudging the outcome of the merits phase) is to be found in paragraphs 50 and 51 of the Judgment. Paragraph 50 reads:

> "The Court believes that it is not in the interest of the good administration of justice for it to limit itself at the present juncture to stating merely that there is a disagreement between the Parties as to whether the 1928 Treaty and 1930 Protocol settled the matters which are the subject of the present controversy within the meaning of Article VI of the Pact of Bogotá, leaving every aspect thereof to be resolved on the merits."

6. With great respect to the majority view — or belief — for the paragraph starts by stating that "the Court believes", it can be said that anyone persuaded by the logic of this paragraph will be persuaded by any argument. No attempt is made to explain why it is inimical to the interests of the good administration of justice to leave to the merits stage the central question of whether the 1928 Treaty and the 1930 Protocol were valid and hence settled the dispute (referred to in the best traditions of *oratio obligua* as "disagreement" or "controversy"). Nor is there anything in the subject matter of the dispute that would suggest irreversibility or perishability and hence warrant haste. Nor has there been a delay in justice for "the case became ready for hearing in respect of the preliminary objections" only in 2004 (Judgment, para. 6) — a normal delay by the standards of other cases before this Court. Nor can justification be found in the general proposition that preliminary points should be dealt with and eliminated before moving to the merits for that presupposes that they have an exclusively preliminary nature.

7. In short, no element in the paragraph, whether expressly stated or implied therein, comes near an answer to Nicaragua's contention that "[it] is difficult to find a better example of an objection that 'does not possess, in the circumstances of the case, an exclusively preliminary character'" (Judgment, para. 46).

8. Building on paragraph 50, the subsequent paragraph seeks to adduce reasons for dealing with the issue of the validity of the Treaty and Protocol at this stage. It reads:

> "In principle, a party raising preliminary objections is entitled to have these objections answered at the preliminary stage of the proceedings unless the Court does not have before it all facts necessary

> to decide the questions raised or if answering the preliminary objection would determine the dispute, or some elements thereof, on the merits. The Court finds itself in neither of these situations in the present case. The determination by the Court of its jurisdiction may touch upon certain aspects of the merits of the case (*Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6,* p. 15). Moreover, the Court has already found that the question of whether the 1928 Treaty and the 1930 Protocol settled the matters in dispute does not constitute the subject-matter of the dispute on the merits. It is rather a preliminary question to be decided in order to ascertain whether the Court has jurisdiction." (Judgment, para. 51.)

9. The paragraph rests on a number of misconceptions: it posits a non-existent presumption in favour of the Party making the objections. Article 79, paragraph 9, of the Rules of Court — recalled in paragraph 48 of the Judgment — states that the Court "shall either uphold the objection, reject it, or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character". It is plain that the third possibility, i.e., declaring the objection not to be of an exclusively preliminary nature, carries as much weight, and constitutes as much an answer to the objection in question as the first two, although it entails delaying the answer to the objection until the merits phase.

10. In other words, the Party making the preliminary objections is, of course, entitled to an answer within the meaning of Article 79, paragraph 9, of the Rules of Court, but it is not entitled to a positive answer in all circumstances.

11. Paragraph 51 of the Judgment then provided two criteria for deciding that the objection is not of an exclusively preliminary character, or effectively joining the objection to the merits:

(a) that the Court is not in possession of all the facts necessary to give an answer; or,
(b) that by giving an answer it will determine the dispute, or some elements thereof, on the merits.

In the same paragraph the Court comes to the conclusion that it found itself in neither situation and therefore goes on to pronounce on the validity of the Treaty and the Protocol. With respect, nothing is more debatable. I have already indicated that, in my opinion, the Court did not appraise itself as it should have of the necessary facts (para. 5). I can only add, by way of example, that no recourse was made to the negotiating history of the Pact of Bogotá which would have shed light on the historical background necessary to come to a reasoned interpretation of what was meant by the terms "settled" or "governed"; nor was there any consideration of the important and relevant question of inter-temporal law, namely whether by 1928, the strong body of opinion which held "that

treaties brought about by the threat or use of force should no longer be recognized as legally valid"[2], had attained the status of customary law. Such consideration would have been indispensable because Nicaragua did not contest the factual existence of the Treaty and Protocol nor their relevance to the Pact of Bogotá; it impinged the very validity of the Treaty and Protocol themselves.

In other words, it questions the first premise on which Colombia based its contention that the Treaty and Protocol settled or governed the present dispute within the meaning of Article VI of the Pact of Bogotá.

12. With regard to the second criterion, i.e. that the answer should not determine the dispute on the merits, the Judgment sought to avert this eventuality by resort to the simple device of first defining the subject-matter of the dispute narrowly so as to exclude the status of the Treaty and Protocol from its ambit.

13. In doing this, the Judgment relied on precedents supporting the contention that the Court retains freedom to define the subject-matter of the dispute on the basis of the submissions of the Parties (see *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998,* pp. 447-449, paras. 29-32; *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974,* p. 262, para. 29; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974,* p. 466, para. 30). Such freedom however cannot be unlimited if only because of considerations of legitimacy and of common sense. In this respect and in the context of this case, it would have been prudent for the Court to heed the sentiment expressed by Judge Vereshchetin in his dissenting opinion in the *Fisheries Jurisdiction* case, where he stated:

> "The point of departure for the Court's resolution of this dispute within the dispute should be Article 40, paragraph 1, of the Statute, which provides that it is for the applicant State to indicate the subject of the dispute. Hence, while it is true that '[t]he Court's jurisprudence shows that the Court will not confine itself to the formulation by the Applicant when determining the subject of the dispute' (para. 30 of the Judgment), it must be equally true that, in characterizing the main dispute between the Parties, the Court cannot without well-founded reasons redefine the subject of the dispute in disregard of the terms of the Application and of other submissions by the Applicant. Yet this appears to be what the Court has done in its Judgment . . ." (*Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, dissenting opinion of Judge Vereshchetin, p. 571, para. 4.)

[2] Draft Articles on the Law of Treaties with Commentaries, *Yearbook of the International Law Commission*, 1966, Vol. II, p. 246.

Indeed, in the present case I cannot find any well-founded reasons for the defining of the subject-matter of the dispute in complete disregard of the submissions of Nicaragua.

14. Additionally, the Judgment's approach to this problem is not free of contradictions. Thus, in paragraph 42 the Judgment acknowledges, *inter alia*, that sovereignty over territory (namely the islands and other maritime features claimed by the Parties) and the course of the maritime boundary between the Parties are "questions which are in dispute between the Parties on the merits". However, the Court had, in paragraph 40, stated that

> "Nicaragua submitted that issues relating to the validity and alleged termination of the 1928 Treaty as well as the question whether the Treaty and its 1930 Protocol covered or resolved all the contentious matters between the Parties, including the geographical scope of the San Andrés Archipelago, sovereignty over Roncador, Quitasueño and Serrana and maritime delimitation, all formed part of the dispute before the Court . . .
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> In the Court's view, all those issues relate to the single question whether the 1928 Treaty and 1930 Protocol settled the matters in dispute between the Parties concerning sovereignty over the islands and maritime features and the course of the maritime boundary. The Court considers, however, that this does not form the subject-matter of the dispute between the Parties and that, in the circumstances of the present case, the question is a preliminary one . . ."

15. This reasoning gives rise to a fundamental question: can an issue (the validity of the 1928 Treaty) central to the resolution of a question acknowledged to be in dispute between the Parties on the merits (sovereignty over the named islands of the San Andrés Archipelago) not be part of the subject-matter of the dispute? The answer must obviously be not.

16. With respect to this question, the all too apparent logical absurdity bears testimony to the artificiality of the distinction. In particular, it shows that the question of the validity of the Treaty and Protocol is not a secondary line of argument but a crucial and indispensable logical step in resolving the dispute on the merits regarding the sovereignty over the islands of San Andrés, Providencia and Santa Catalina. The question is part and parcel of the dispute and is preliminary only in the sense that it has an antecedent nature in the logical process of resolving the dispute but is not a pre-dispute point that can be disposed of separately. In other words, the preliminary objection in this case is so interwoven with the merits that to decide the question of the validity of the 1928 Treaty and the 1930 Protocol either way is to decide the dispute on the merits in favour of one Party or the other as it relates to the aforementioned islands and to affect the outcome of any maritime delimitation. Indeed

this case is an example *par excellence* of a circumstance in which the Court should find

> "that the objection is so related to the merits, or to questions of fact or law touching the merits, that it cannot be considered separately without going into the merits (which the Court cannot do while proceedings on the merits stand suspended under Article 62), or without prejudging the merits before these have been fully argued" (*Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), Preliminary Objections, Judgment, I.C.J. Reports 1964,* p. 43).

17. I have no desire to attempt, in this relatively brief opinion, to offer theoretical formulae which govern which preliminary objections should be declared not to possess an exclusively preliminary nature, and in any event, I doubt whether such an attempt would succeed, given that every case turns on its own facts and circumstances, but I can state with reasonable confidence that where the claim underlying the objection is not frivolous, and where it is moreover arguable and plausible, the Court should not snuff attempts to argue the merits fully[3]. As was stated by Judge Read in his dissenting opinion in the *Anglo-Iranian Oil Co.* case:

> "It is impossible to overlook the grave injustice which would be done to an applicant State, by a judgment upholding an objection to the jurisdiction and refusing to permit adjudication on the merits, and which, at the same time, decided an important issue of fact or law, forming part of the merits, against the applicant State. The effect of refusal to permit adjudication of the dispute would be to remit the applicant and respondent States to other measures, legal or political, for the settlement of the dispute. Neither the applicant nor the respondent should be prejudiced, in seeking an alternative solution of the dispute, by the decision of any issue of fact or law that pertains to the merits." (*Anglo-Iranian Oil Co., Preliminary Objection, Judgment, I.C.J. Reports 1952*, dissenting opinion of Judge Read, p. 149.)

18. Lastly, it is obvious to me that the jurisdiction of the Court under Article 36, paragraph 2 of its Statute is both independent of and wider than the jurisdictional system erected by the Pact of Bogotá. Nevertheless, to establish its jurisdiction in this concrete case, the Court would have been forced, had it started with the optional clause jurisdiction, to

[3] For an earlier well-reasoned case in this respect see *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, separate opinion of Judge Shahabuddeen, pp. 824-825.

deal with the question of whether there existed a "legal dispute" between the Parties. As the Court notes in paragraph 138 of its Judgment, the question of whether the 1928 Treaty settled the dispute brought before the Court is, thus, equally relevant to determining the Court's jurisdiction under the optional clause as it is to determining the Court's jurisdiction under the Pact of Bogotá. For the reasons set out in my opinion above, however, it is also my view that the decision in paragraph 138 of the Judgment that there is no "extant legal dispute between the Parties" is a decision so interwoven with the merits that it should have been left to be determined at the merits stage.

19. In this context, it is worth emphasizing that in no case decided by the Permanent Court of International Justice or this Court has the plea that there is no legal dispute within the meaning of Article 36, paragraph 2, of the Statute been accepted in *limine litis*. Rather such questions have always been deferred to the merits[4]. Further, it should be noted that the citation from the *South West Africa* case in paragraph 138 of the Judgment on which the Court relies in part to hold that there is no extant dispute between the Parties is incomplete. The quote omits the very important statement that a dispute exists if it can be "shown that the claim of one party is positively opposed by the other" (*South West Africa Ethiopia* v. *South Africa; Liberia* v. *South Africa) Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328). The test of whether there exists a dispute is thus one of opposability and not of unfettered freedom for the Court. In this case it seems undeniable that Nicaragua's claim that the 1928 Treaty is invalid is positively opposed by Columbia.

(*Signed*) Awn Shawkat AL-KHASAWNEH.

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[4] See Shabtai Rosenne, *The Law and Practice of the International Court 1920-2005*, 2006, Vol. II, para. II.195.