WHITE BOOK

OF THE

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1980

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MINISTER OF FOREIGN RELATIONS

ALLEGED DENUNCIATION OF THE
ESGUERRA-BARCENAS TREATY BY NICARAGUA

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N. B.: The citations herein were not on the whole transcribed from the original languages, but were rendered into English based on the spanish text: "Libro Blanco de la República de Colombia."

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INTRODUCTION

On February 4, 1980, the National Reconstruction Junta of Nicaragua issued a Declaration which purported to denounce to Treaty on Territorial Matters which that country had made with Colombia on March 24, 1928. It argued that the Treaty was null and void. This Declaration was issued together with a "memorial" known as the "White Book" in which, according to the Chancellor of Nicaragua, was set forth "a small portion of a whole accumulation of documents, proofs and other material supporting Nicaragua's legitimate rights in its fight to maintain and defend the whole of its insular lands and continental shelf . . ."

Nicaragua's unusual claim was rejected by the Colombian Government through Note DM-0053, signed by the Chancellor of Colombia the following day, February 5th. It has seemed, however, that a summary exposition would be generally beneficial, in order to present more fully Colombia's position in this matter from an historical-juridical point of view, bearing in mind that this summary makes no claim to be an exhaustive discussion.

This brief exposition is divided in three parts: the first gives a historical-juridical résumé of the background of and title to the Costa Mosquitia and the Archipelago of San Andrés; the next analyzes Nicaragua's claim vis-à-vis international law; and finally, with regard to their arguments concerning the Archipelago, some considerations arising from certain principles of the Law of the Sea are offered.

Furthermore, it must be clearly understood that this publication does not imply any express or tacit admission by the Republic of Colombia that litigation or further discussions of any kind might exist regarding the Treaty of March 24, 1928, which is perfect, in force and unchangeable; nor does it acknowledge that a case might exist to question ownership of the Colombian Archipelago of San Andrés.

DIEGO URIBE VARGAS
Minister of Foreign Relations

A BRIEF HISTORICAL-JURIDICAL REVIEW IN ORDER TO ESTABLISH THE UTI POSSIDETIS JURIS

Just to give a rough overview of how the different political divisions arose among the Spanish colonies which today make up the territory of some Central American countries and Colombia, a brief description will be given of the process that ended in 1810 —the date which marked the beginning of the revolution-for-freedom epic.

Recourse has been made here to fundamental citations from the more important decrees in order to afford a better understanding of the matter overall. However, it must be made clear that this long-drawn-out process of political demarcation was examined exhaustively for a century by illustrious jurists, diplomats and public figures of Costa Rica, Nicaragua, Panamá and Colombia. Further, arbitration was carried out several times and treaties on borders were drawn up, which are plainly in force and absolutely valid, and whose terms are final and unappealable.

Some maps have also been included, which should only be considered a help in following the course of events, not a detailed description of the same.

The coast between the Golfo de Urabá (the Gulf of Urabá) and the Cabo Gracias a Dios (Cape Gracias a Dios), discovered by Christopher Columbus on his fourth journey, was named "Veragua", and was given to that Genoese admiral by the Spanish Crown. On his death, the territory was placed under the leadership of Diego de Nicuesa through the Royal Charter of June 9, 1508, as follows:

> "Considering a certain settlement that the King my Lord and Father ordered established through Alonso de Ojeda and you Diego de Nicuesa, which by our mandate is to be in the gulf and lands of Urabá and Veragua... to you Diego de Nicuesa in the part of Veragua and to Alonso de Ojeda in the part of Urabá..." (1)

Although the borders between these two jurisdictions were not precisely determined, De las Casas and Herrera* stated that the jurisdiction

(1) Rivas, Pedro **Límites entre Honduras y Nicaragua en el Atlántico** (Tegucigalpa: Talleres Tipográficos Nacionales, 1938), p. 59.

* Two well-known Spanish chroniclers of the Sixteenth Century.

under Nicuesa extended from the Golfo de Urabá to the Cabo Gracias a Dios (see map). Difficulties of all kinds hindered the conquest and colonization assigned to Nicuesa. Therefore, on July 27, 1513, Pedrarias Dávila was designated Governor and Captain-General of "Castilla de Oro" (Golden Castile) a name given to a portion of the original Veragua but honouring Don Diego Colón's rights as Columbus's son and legitimate successor, which rights Colón had been reasserting over Veragua for many years:

> "...it is my wish and desire being within my jurisdiction, that you Pedrarias Dávila, have for us and in our name the governorship and captaincy-general of all the people and ships that are going on this armada, as well as of all the people and ships that may be there, or will be there of that may leave henceforth to this land of Castilla de Oro, so long as the province of Veragua is not infringed upon of included, as its governorship belongs to Admiral Don Diego Colón, since his father personally discovered it..." (2)

In 1534 the Crown appointed Felipe Gutiérrez as Governor of Veragua, whose jurisdiction was assigned as follows:

> "...the Province of Veragua which is on the coast of Tierra Firme in our Indies of the Ocean Sea, which extends from the outermost limits of Castilla de Oro, called Tierra Firme, which were marked out to Pedrarias Dávila and to Pedro de los Ríos, governors, to whom it was given, up to the Cabo Gracias a Dios..." (3)

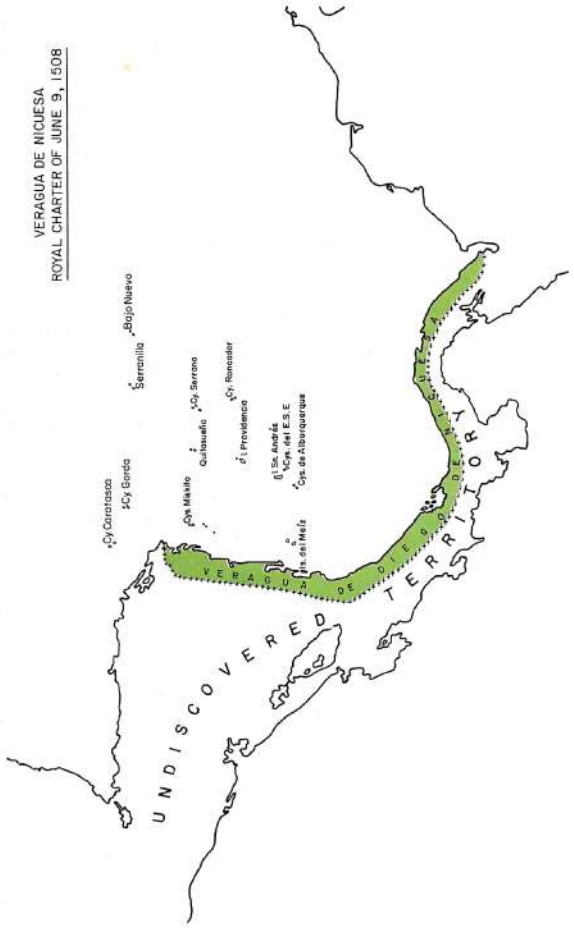
Through Royal decree of the same date, the rights which the Colón family had been claiming over the territory were honoured. However, it is clear that the mentioned rights did not extend over the whole Province of Veragua. The rapid increase and development of said territories prompted the Crown to create through Royal Charter of February 30, 1535, the Audiencia de Panamá, which was added in 1538, and whose appointed jurisdiction was as follows:

> "...the Province of Castilla de Oro, up to Portabelo and its land: the city of Natá and its land: **the Governorship of Veragua...**" (4)

(2) Rivas, P., **op. cit.**, p. 60.

(3) de Paralta, Manuel M., **Costa Rica, Nicaragua y Panamá en el siglo XVI: su historia y sus límites** (Madrid: Librería de M. Murillo, 1883), p. 89.

(4) Borda, Fidel, **Límites de Colombia con Costa Rica** (Bogotá: Imprenta Luz, 1896), p. 240.



In the year 1536, after a prolonged debate, Cardinal Fray García de Loaysa settled the matter which ended the case between the Crown and the Colón family, thus giving rights to Admiral Luis Colón over part of the Veragua province —a square of 25 leagues which extended towards the east to nearby Bahía de "Zarabaró o del Almirante" (the Bay of Zarabaró, or the Admiral's Bay)— as determined by the Royal Order of January 19, 1537:

> "Twenty five leagues of land squared out in **the Province of Veragua**, which begins at the Belén River, inclusive, and runs down a parallel as far as the western part of the Zarabaró Bay, and all the leagues that may yet be missing to complete the above... another twenty five leagues along a meridian running North to South, and let a few more extend from the Belén River along the meridian of that River..." (5)

Two months afterwards, since Felipe Gutiérrez had failed to accomplish the Commission of 1534, and thereafter went his way to Perú, the whole **Province of Veragua** came under to Governorship of Tierra Firme (as the Audiencia de Panamá was also called); through Royal Charter of March 2, 1537:

> "Let all the Province of Veragua belong to the Governorship of Tierra Firme." (6)

As can be appreciated, the vast Province of Veragua was bordered on the west by the Province of Nicaragua, which had been created in 1527. Regarding Veragua, as already described, certain rights and privileges were assigned to the Colón family within the square of 25 leagues. In any case, the whole Province was added to the Audiencia de Panamá or Tierra Firme by the Royal Charter of March 2, 1537.

The lack of an outlet to the Caribbean Sea continued to trouble the Province of Nicaragua, whose residents petitioned the Crown to alter the situation. The Spanish Government did not consent, and by the Royal Commission of November 29, 1540, Diego Gutiérrez was authorised to conquer and settle in the Province of Veragua. In the same document the borders of the latter province with Nicaragua were established:

> "And likewise, provided you do not bequeath the lake of Nicaragua and fifteen leagues, since these fifteen leagues and that lake shall remain and do remain part of the governorship of Nicaragua." (7)

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(5) Rivas, op. cit., p. 24.

(6) Pérez Soto, Antonio, **Recopilación de Leyes de Indias**, Tome 2, (3rd. Ed.) (Madrid, 1774).

(7) Rivas, op. cit., p. 76.

In 1542 the Audiencia de los Confines de Guatemala y Nicaragua was created, and was allotted its territory as follows:

> "And let it have for a district this Province of Guatemala and those of Nicaragua, Chapa, Higueras, Cape Honduras, the Verapaz, and Soconusco..." (8)

Patently, no mention is made of the governorship or Province of Veragua, which had already been added to the Audiencia de Panamá, as already mentioned.

In 1556 a final agreement was reached between the Crown and Admiral Luis Colón, who renounced the rights granted to him in the Province of Veragua. The Spanish Government in turn, indemnified him in the amount of seven thousand ducats. Thus through the Charter of January 21, 1557, the sector of the Province of Veragua which had been granted to the Colón family was added to the city of Natá and its lands, which in turn belonged to the Audiencia de Panamá:

> "Our governor who is or may be considered to be from the Province of Tierra Firme, called Castilla de Oro: on behalf of the Council, Justice, Aldermen, Gentlemen, Squires, Officers and Men of the city of Natá which is in this Province, I have been entrusted to announce that they, in order to serve you and augment our Royal Crown, will inhabit the Province, Land and Duchy of Veragua which we had previously awarded to Admiral Don Luis Colón..." (9)

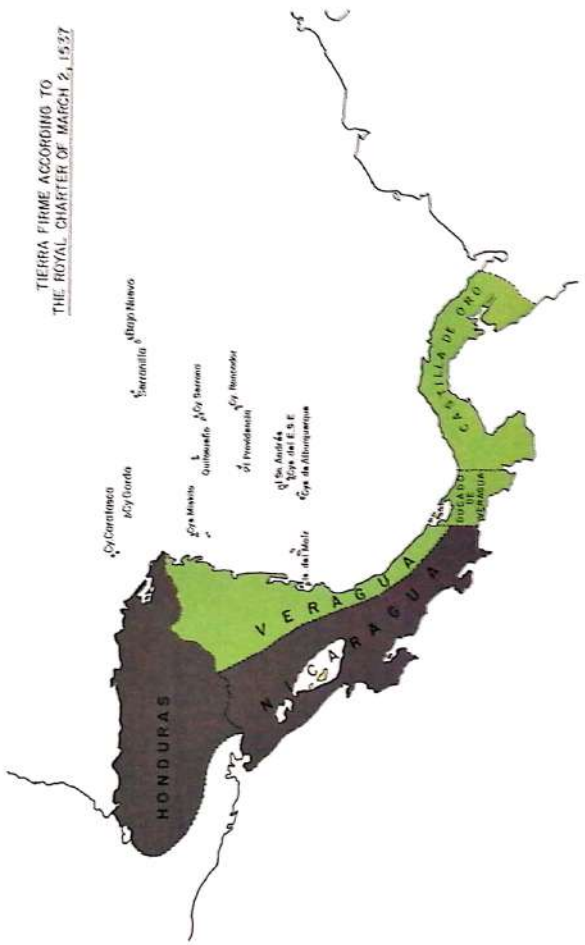
On May 18, 1680, the Recopilación de Leyes de Indias (Compilation of the Laws of the Indies) was promulgated —the fundamental code which included all the administrative and political decrees of the Crown touching its American Colonies. Since the code modified or abolished all previous decrees, the Spanish Crown took its opportunity here to clarify the situation:

> "We hereby agree and charge that the laws contained in this book and given for the proper governing and administering of justice by our Council of the Indies, Casa de Contratación de Sevilla (The Seville House of Commerce), East and West Indies, Islands and Tierra Firme on the Ocean Sea, etc., be kept, abided by and executed, and that by them all disputes and businesses that may arise in all of these Kingdoms be settled; though some be revised and ordered again, or not previously published or announced, and be different or contrary to other laws. Chapters

(8) de Paralta, op. cit., p. 454.

(9) Borda, op. cit., p. 254.

TIERRA FIRME ACCORDING TO THE ROYAL CHARTER OF MARCH 2, 1537




THE DUCHY OF VERAGUA WITHIN
THE PROVINCE OF THE SAME NAME
Cy. Caratasca
Cy. Gorda
Serranilla
Bajo Nuevo
HONDURAS
GUATEMALA
Cys Miskito
Quitasueño
Cy. Serrano
Cy. Roncador
I. Providencia
I. St. Andrés
Cys. del E.S.E
Cys de Alburquerque
Is. del Maiz
NICARAGUA
VERAGUA
DUCADO DE VERAGUA
CASTILLA DE ORO

of letters, and Pragmaticas of these our Kingdoms of Castile, Cédulas, Letters of Agreement, Provisiones, Ordenanzas, Instrucciones, Government declarations and other dispatches both handwritten and printed, it is our will that henceforth all of these have no authority and no judgement be based upon them, whenever they have been determined in another way expressly revoked as by this law. Furthermore, we revoke them, save only for the laws of this Compilation, retaining in their stead that which is ordered by Law I, Tittle I, Book II of this compilation, and allowing to remain in their force and effect the Cédulas and Ordenanzas ordered in our Royal Audiencias insofar as they do not contradict this Compilation." (10)

As authorised by the text just quoted, two basic provisions in the Compilation abolished all previous precepts regarding these jurisdictions. First, in Law IV, Book II, Title XV is described the jurisdiction covered by the Audiencia de Panamá according with the Royal Charters of February 30, 1535, and February 26, 1538; in other words, the Governorship of Veragua was included within the Audiencia de Panamá. Second, a rehearsal of the Royal Charter of March 2, 1537, is found in Law IX, Book XV, Title I, by which the Province of Veragua was added to the Audiencia de Panamá.

No substantial change took place in the following years until, through the Royal Charter of August 20, 1739, the Viceroyalty of Nueva Granada was set up once more, whose jurisdiction included the Province of Panamá and Veragua. Also under this Charter, the Audiencia de Quito and Audiencia de Panamá were to continue as organised previously but with absolute dependence on the Viceroyalty:

"...to set up once more the aforementioned Viceroyalty of the New Kingdom of Granada, the Viceroy I appoint being at once president of this my Royal Audience, and Governor and Captain-General of the jurisdiction of this new Kingdom and province that I have decided to add to this Viceroyalty: Chocó, Popayán, the Kingdom of Quito and Guayaquil, the Provinces of Antioquia, Cartagena, Santa Marta, Río de Hacha, Maracaibo, Caracas, Cumaná and Guyana, the islands of Trinidad, Margarita and the Orinoco River, the Provinces **of Panamá,** Portabelo, **Veragua,** and Darien, with all the cities, villas and places, the ports, anchorages, inlets and the like pertaining to them in one and the other ocean and mainland; and he shall have the same faculties, prerogatives and equal status as the Viceroys of Perú

(10) Esguerra, M. **La Costa de Mosquitos y el Archipiélago de San Andrés y Providencia** (San José: Imprenta María V. de Lines, 1925), p. 8.

and Nueva España have and do exercise in their respective districts... let the Audiencias de Quito and of Panamá remain as they are, but be likewise subject and subordinate to the Viceroy..." (11)

No changes arose as to the lands appointed to the Viceroyalty of Nueva Granada. Rather, the Crown had now to confront the presence of the English on the Costa de Mosquitos.

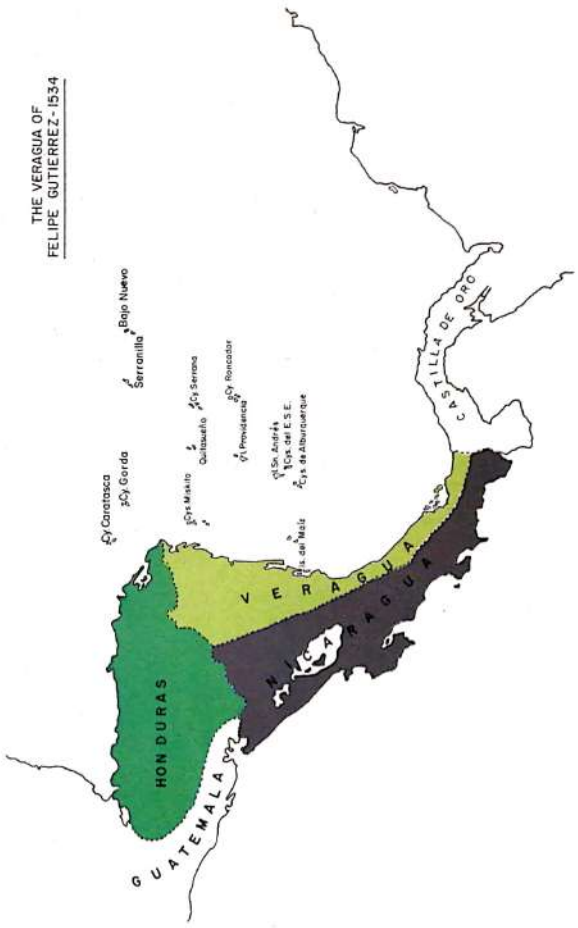
Since the beginning, in 1700, of the "Spanish War of Succession" between Spain and Portugal over the succession of Philip V of Anjou to the throne, hostilities had also spread to the American continent. The "Miskito" Indians, which for many years had inhabited the Central American coast —between the Chagres River and the Cabo de Honduras (Cape Honduras)— firmly supported the English and became dangerous rivals to the Spanish forces. Although the war ended thirteen years afterwards with the signing of peace treaties in Utrecht and Radstadt (in 1713 and 1714, respectively), relations between the English and the Spanish continued to be very strained.

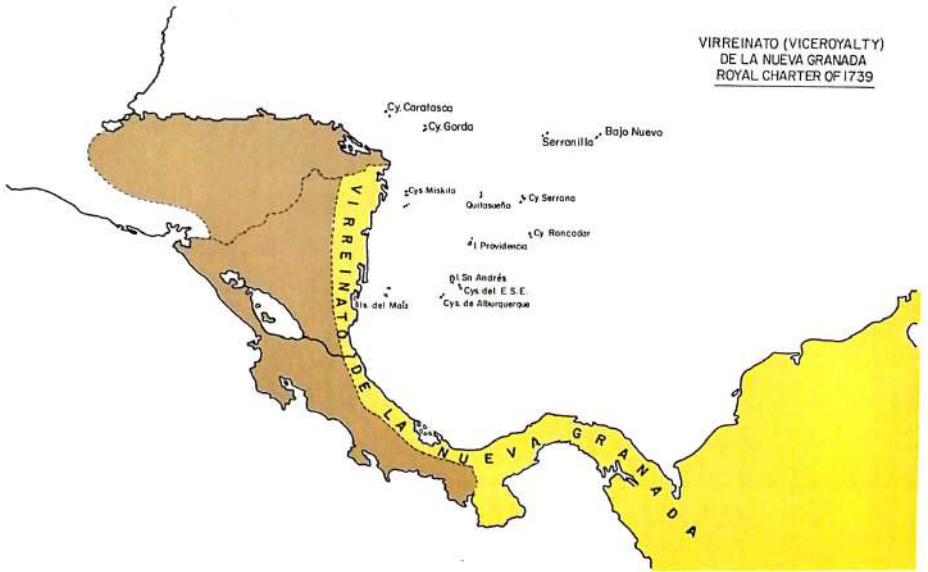
Meanwhile, in the Caribbean privateers operating out of Jamaica made incursions on the Spanish colonies, especially on the Costa Mosquitia where, as was mentioned earlier, they counted on the firm support of the "Miskito" Indians, their allies. Starting in 1742, the Governor of Jamaica ordered the occupation of Roatán Island and parts of the Costa Mosquitia, which only came under the control of Spain six years afterwards. After a long series of conflicts between Spain and England, the latter managed through the Treaty of Fontainebleau in 1763, to obtain authorization for its subjects to cut "palo de campeche" (campeche wood) in the Costa Mosquitia, making provision for the demolition of all strongholds built in the area. Since the Treaty of 1763 did not clearly establish a designated zone for the carrying out of such activities, the Treaty of Paris in September 3, 1783, established the boundaries of the zone: between the Wallis (or Belize) and Hondo Rivers.

As a result of the Treaty of Paris, a Convention between the two countries was signed in London on July 14, 1786, ordering the evacuation of the "Miskito" Indians from the Costa Mosquitia and adjacent islands:

"Article 1. The subjects of His Britannic Majesty, and other settlers who until now have enjoyed protection from England, will evacuate the Mosquitos countries, as well as the continent in general, and the adjacent islands, without exception, that fall outside the line set forth below, which is to be the borderline of the expanse of land granted by His Catholic Majesty to the

(11) Borda, F. de P., op. cit., p. 310.




VIRREINATO (VICEROYALTY)
DE LA NUEVA GRANADA
ROYAL CHARTER OF 1739
Cy. Caratasca
Cy. Gorda
Serranilla
Bajo Nuevo
Cys Miskito
Quitasueño
Cy Serrana
Cy Roncador
I Providencia
St Andrés
Cys del E.S.E.
Cys de Albuquerque
Its del Maíz
VIRREINATO DE LA NUEVA GRANADA

English for such uses as specified in Article 3 of this present Convention, in addition to the countries already granted to them by virtue of the provisions agreed upon by the envoys of the two crowns in the year 1783." (12)

In 1786 and 1787, the Spanish Government ordered the evacuation of the Miskitos and the English on the San Andrés and Providencia Islands directing them to go to Jamaica.

Those affected, however, petitioned the Viceroy of Santa Fe and the Governor of Cartagena to reconsider the measure, and offered to submit entirely to the Crown. At first the petition was rejected, despite the support of the Viceroy Caballero y Góngora. On the contrary, an expedition under the command of Captain Juan Castelón was sent to San Andrés in 1789 by Viceroy Ezpeleta y Galdeano, who had entered office on July 30th of the same year.

Later on, however, after earnest pleadings by the islanders, Charles IV directed the Royal Charters of April 12 and May 20 of 1792 to the Governor of Cartagena, ordering that the inhabitants of the islands be permitted to stay. They were to "render tribute and loyalty to the King, obey the Governor appointed, follow the Catholic religion, build the church at all costs, support the priest sent and completely submit to our laws."

In 1792, the Captain-General of Guatemala was commissioned to take up some responsibilities with regard to control over English subjects of San Andrés and the Costa Mosquitia.

The Captain-General of Guatemala was unenthusiastic about the mission entrusted him by the Crown. Indeed, once the warlike conflict between Britain and Spain had broken loose, on the pretext that the Archipelago of San Andrés was vulnerable to attack he appointed Thomas O'Neille —who had been the appointed governor of the islands— to fulfill different commissions on the mainland. On returning, O'Neille found his island jurisdiction in absolute chaos and anarchy. Therefore, together with his island neighbours, on December 5, 1802, he petitioned the Crown that the Archipelago be made directly dependent on the Viceroyalty of Nueva Granada, thereby ending the appointed commission of the Captain-General of Guatemala.

The Junta de Fortificación y Defensa ("The Committe on Fortification and Defense"), based on that request presented several reports to the Monarch on September 2 and October 21, 1803, in which it recommended that the islands and the Costa Mosquitia should come, once more, under the Viceroyalty of Nueva Granada.

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(12) García Bauer, Carlos, **La Controversia sobre el Territorio de Belice** (Guatemala: Editorial Universitaria, 1958), p. 166.

Certain portions of the September 2 report merit special notice:

"...those inhabitants, with a monthly endowment of thirty pesos such as is customary in similar places, subjecting themselves to the Bishop of Cartagena, from whom they may readily obtain the ecclesiastical help they may need, especially for the construction of the sanctuary and its corresponding appointments."

"...it is equally interesting and very important that the teacher of elementary letters be sent from Cartagena, or some other place, so that learning and understanding among native Spanish speakers be easier and speedier, and the children already baptized and those to be baptized have a better opportunity of being taught the dogmas of our sacred religion."

"...and to avoid the long delay that would be inevitable if the answer went by way of Guatemala, it would be convenient that you send it by way of Cartagena, whence they will receive it more easily and speedily since the island is closer to that port, which is why the settlers send their goods there..."

"...because without the fostering of agriculture and the arts, it is not possible that the population expand; which, having laws and regulations approved by the Viceroy of Santa Fe, so as to unite its members in a desirable and pleasant society, and having means enough to assure subsistence, would furnish men later on to defend it, and a livelihood to support those men and to augment the Royal treasury..."

"...but so that this have a better and speedier effect, it would be convenient that those establishments, up to Cabo Gracias a Dios, inclusive, depend on the Viceroyalty of Santa Fe, upon whose Viceroy the San Andrés Islands should depend in all respects (as they were before) not only because of its greater proximity but also because of the quick naval help they could receive, for which purpose the Viceroy should have orders given to the Commander of the Cartagena naval base, and Cartagena's Governor should likewise have instructions and authority from the Viceroy to facilitate aid, as circumstances may require, and so that the Governor of San Andrés, too, can bee free to ask him for such aid and handle matters with him in a straightforward manner; it would also be very appropiate that the Governor of San Andrés be sent on the terms he requests, the detachment of thirty men of proven honesty..." (13)

(13) Esguerra, op. cit., p. 34.

In the second report similar considerations were presented with new arguments added.

Finally, on November 20, 1803, the King, taking into account the reports of the Junta de Fortificaciones, issued a Royal Order that stated in a clear and peremptory manner that the Costa de Mosquitos —from the Cabo Gracias a Dios to the Chagres River— and the San Andrés Archipelago were to be separated from the Captaincy-General of Guatemala and to be dependent instead on the Viceroyalty of Nueva Granada:

"San Lorenzo, November 30, 1803. The King has decided that the San Andrés Islands and the area of the Costa de Mosquitos —from the Cabo Gracias a Dios up to the Chagres River— be set apart from the Captaincy-General of Guatemala and to be dependent on the Viceroyalty of Santa Fe. His Majesty has granted the Governor of said islands, D. Thomas O'Neille the salary of two thousand 'pesos fuertes' instead of the two thousand five hundred he is now enjoying." (14)

Patently, in view of the difficulties experienced by the Crown in controlling and keeping watch over the Costa de Mosquitos in particular, and the knowledge of frequent conflicts of jurisdiction between the authorities of the Captaincy-General and the Viceroyalty —due not only to the occasional special interests of the former, but also to the confused interpretations of royal orders— the Spanish Government decided to clarify the situation in clear-cut and final terms: the Costa de Mosquitos (from Cabo Gracias a Dios up to the Chagres River) belonged to the Viceroyalty.

There could not have been a clearer, more peremptory dictum: the Islas de San Andrés and the Costa de Mosquitos had to be **separated from** the Captaincy and **dependent on** the Viceroyalty.

However, to clarify the matter even further, some correspondence is worth noting. For example, Spain's Secretary of the Office of Grace and Justice, Don Miguel Cayetano Soler, on conveying the Royal order to the Captain of Guatemala, states:

"The Junta de Fortificaciones y Defensa de Indias, through consultations of September 2 and October 21 last, has expressed its opinion as to the development, inhabitants and defense of the Islas de San Andrés: their separation and that part of the Costa de Mosquitos which extends from Cabo Gracias a Dios inclusive, up to the Chagres River, from this Captaincy and to **incorporate**

(14) Esguerra, op. cit., p. 29.

them into the New Kingdom of Granada. The King having agreed with the Junta's decision. I am forwarding to Your Excellency (and to the Viceroy of that Kingdom, too), by order of His Majesty, copies of said consultations for your information and the fulfillment of that which concerns you." (15)

The note of June, 3, 1804, signed by the Captain-General of Guatemala affords an exact impression of that official's interpretation of the Order of 1803:

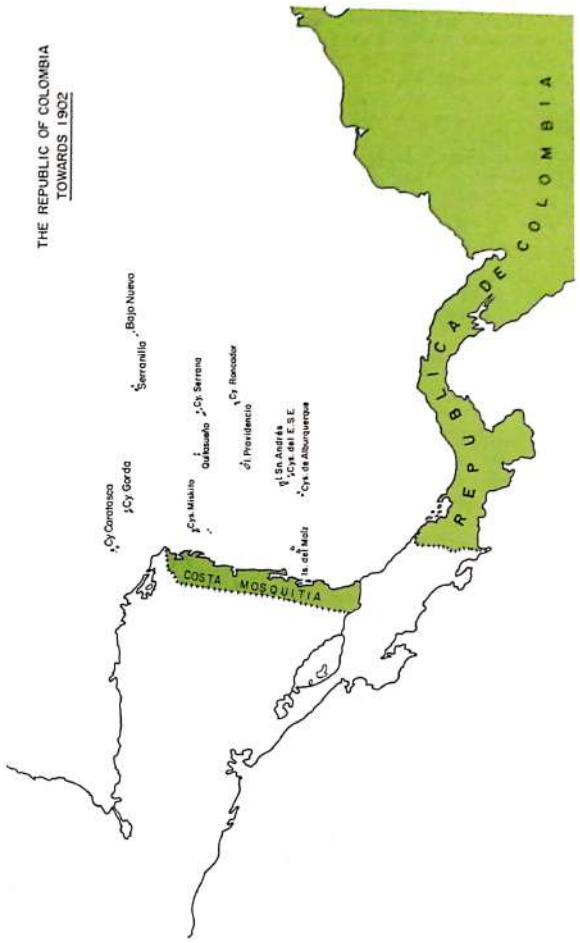
"I may only add, that the division of the territory, as determined by Your Majesty, is a great relief to me in this Captaincy-General." (16)

From 1803 on, with the sole exception of the English invasion of 1806, the Viceroyalty of Nueva Granada exercised uninterrupted jurisdiction over the Archipelago of San Andrés and the Costa Mosquitia. When the Bishop of Cartagena was notified from Madrid of the Royal Order of 1803 and of the incorporation of the San Andrés Islands into the Viceroyalty and into his diocese, he immediately carried out the measures under his jurisdiction. This is explained thus in a note to Spain's Secretary of State:

"Immediately upon receiving the tenth of this month the Royal Order of the twentieth of November that Your Excellency directs to me as of the thirtieth of November, 1903, by which Your Majesty has seen fit to incorporate the Catholic islands of San Andrés into the Viceroyalty of the New Kingdom of Granada and to my diocese and pastoral care of the city of Cartagena of the Indies, I obeyed the order blindly and issued a Decree for the establishment and provision of sanctuaries and priest, all in accordance to the Sovereign resolution. I immediately conveyed the Order to His Excellency Sir Viceroy Governor and Captain General, including a copy of the steps taken, that he may proceed as it seems good and issue corresponding dispositions that through the Royal Bursaries of those places or of this place the cost of building sanctuaries and the cost of priests with the allowance apportioned to them by the aforementioned Royal Order might be accommodated; I expect an opportune answer. I also had summons posted in public places in these Towns, in the Villa of Mompox in this Province, a rather populous place in the Metropolitan Capital and also in the superior Ecclesiastical [Institutions], as candidates should not only have the proper religious training as required by the Holy

(15) Esguerra, op. cit., p. 37.

(16) Ibid., p. 38.



Council of Trent but, as I understand, also a good command of the English or Irish language; I have therefore thought to spread the news to this Center of Learning, with hopes of attracting worthy individuals who would carry out faultlessly the delicate duties of wise priests. To obtain the maximum information and to share the information, if necessary. I already have requested the present Governor of the San Andrés Islands kindly to inform me of the number of villages who would embrace Catholicism, the number of catechized villages in need of sowing with the Sacred Evangelical seed, providing me as much information as he deems convenient for the Church builders and an expedient method for building them. This is all I can put forth for Your Excellency's esteemed consideration as proof of my exact obedience, that you may kindly let it be of His Majesty's Royal August Knowledge. God keep Your Excellency and Most Excellent Sir Don José Antonio Caballero. Secretary of State. Most Excellent Sir Gerónimo, Bishop of Cartagena." (17)

The procedure adopted in this case by the Spanish Government followed the general guidelines described in Law VII, Title II, Book II of the Recopilación de Leyes de Indias, taken from Philip II's Order in 1571:

"Because such numerous and extensive lands, islands and provinces can be understood and managed with more clarity and depth by those charged with their governance: we hereby order that those of your Council of the Indies take care to divide and partition all this territory, discovered, and yet to be discovered: **As to temporal affairs** into Viceroyalties, provinces of Audiencias and Royal Chancellorships, provinces of officers of the Royal Exchequer, adelantamientos, Governorships, Higher Mayoralties, Corregimientos (Chief Magistracies), Alcaldías Ordinarias y de la Hermandad (Ordinary and Brotherhood Mayoralties) Council of Spaniards and Indians; and **as to spiritual affairs**, into Archbishoprics and suffragan and wilderness Bishoprics, Parishes and Diezmarías (Tithe districts), Provinces of the Orders and Religions, **always seeing to it that the divisions for temporal affairs be conformed to those for spiritual affairs:** The Archbishoprics and Provinces of Religions with the districts of the Audiencias; **the Bishoprics with the Governorships** and Higher Mayoralties; the Parishes and Curacies with the Chief Magistracies and Ordinary Mayoralties." (18)

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(17) Restrepo, Tirado, **De Gonzalo Ximénez de Quesada a don Pablo Morillo: Documentos inéditos de la Nueva Granada** (Paris: Imprenta Moll y Pascaly, 1928), p. 62.

(18) Esguerra, op. cit., p. 24.

Relations between the Viceroy and Governor O'Neille were close and enduring. The former provided measures for tax collection, trade organisation especially with regard to the free entry of English goods, and many other diverse aspects. In addition, the Royal Bursary of Cartagena, until 1811, handled the payment of salaries to the Governor and the Priest of San Andrés.

At the end of March 1806, the 86-cannon English frigate "Surveillance", under Commander John Gligh, and the schooner "María", under Leiutenant Traver, attacked the San Andrés Island obtaining the surrender of the plaza. Thomas O'Neille gave account of the events to his superiors: to the Governor of Cartagena on April 8, 1806, and to Viceroy Antonio Amar on July 9, 1806. O'Neille was prosecuted and condemned by a Council of Generals. Two years after, once Spain and England had made an alliance due to the Napoleonic invasion, the San Andrés Governor returned to his headquarters where he remained until 1810 when by orders of Viceroy Amar on June 18, he was replaced on account of poor health by Captain Luis García of the Permanent Regiment of Cartagena. It fell on the Viceroyalty, in coordination with the War Junta of Cartagena, to take all necessary measures to restore Spanish domain throughout all of the Archipelago after the English withdrawal in 1807. In December 1809 the Crown approved the occupation of the islands carried out by the Viceroy of Nueva Granada.

In 1811, the first emancipation steps taken, the Supreme Junta of the Province of Cartagena sent to San Andrés the Cabildo (municipal council), which was charged with governing said territories in place of the Spanish Governor who was there at the time. In 1815, "El Pacificador" ("The Peacemaker"), Don Pablo Morillo issued a Decree Communicated to different governments and published in European and American newspapers declaring a blockade of the coast of the "Nuevo Reino de Granada" (the New Kingdom of Granada) up to Cabo Gracias a Dios. It is clear that, if that coast had belonged to the Captaincy-General, he would not have pointed out that it was situated in the Nuevo Reino de Granada.

In 1817, Luis Aury turned up at San Andrés, and with the support of ships, troops and sailors overthrew Governor Luis García and offered his services to Bolívar. The latter refused his offer, despite the good offices of Joaquín Acosta, Perú de Lacroix and Agustín Codazzi, in a note dated January 18, 1821:

> "Captain Sir Luis Aury: Against your efforts and without need of your services, the Republic of Colombia has been elevated to a state in which it does not need more corsairs who would degrade its flag in all the seas of the world. Consequently, you can get back into your boats and remove yourselves from Colombia's waters. Also, if you present this order to his Excellency Admiral Brion, you will have the open door [to leave]. God keep you. Bolívar." (19)

After Aury's death in 1821, the island of Providencia held a public meeting on June 23, 1822, and there proclaimed its adherence to the Constitution of Cúcuta. In this respect, the minutes of the meeting were signed by all the neighbourhood including 12 French officials who were there at the time. Similar ceremonies took place on July 21 on San Andrés where a seven-member Cabildo was formed, and on Corn Island, where Sargent Major Max Osternay presided over the proceedings. (20)

Sometime before, however, the Colombian Government had already adopted positive measures to incorporate the Archipelago into the Republic. On March 1822, even before the war of the independence had ended, the Governor of Cartagena, General Mariano Montilla, divided the province into cantons, one of which was the Canton of the Islas de San Andrés, which expressly included the Mangles Islands. Subsequently, the Colombian Government, through decrees dated April 19 and November 22 of 1822, adopted measures intended to encourage the Costa Mosquitia's culture and commerce.

During negotiations held in Bogotá in 1824 in order to agree on a Treaty of League, Union and Federation between Colombia and the United Provinces of Central America, the Colombian Chancellor, Pedro Gual, dealt with the matter of boundaries, concerning which the Central American Plenipotentiary, Don Pedro Antonio Molina, admitted that he lacked instructions. However, Molina neither objected to the Royal Charter of 1803 nor to the executive decrees which prohibited commerce with the Costa de Mosquitos. In the agreed-upon Document, the parties pointed out that the frontier between the States would be established according to the **Uti Possidetis.** They also agreed to exercise joint control and surveillance over the Costa de Mosquitos, from the Cabo Gracias a Dios to the Chagres River:

> "Article V. Both contracting parties mutually guarantee all their territories, as established before this war of independence, against the attempts and incursions by subjects and adherents of the King of Spain.

(19) Díaz Galindo, Félix, Monografía del Archipiélago de San Andrés (Bogotá: Ediciones Medio Pliego, 1978), p. 59.

(20) Parsons, James J., San Andrés y Providencia (Bogotá: Banco de la República, 1964), p. 52.

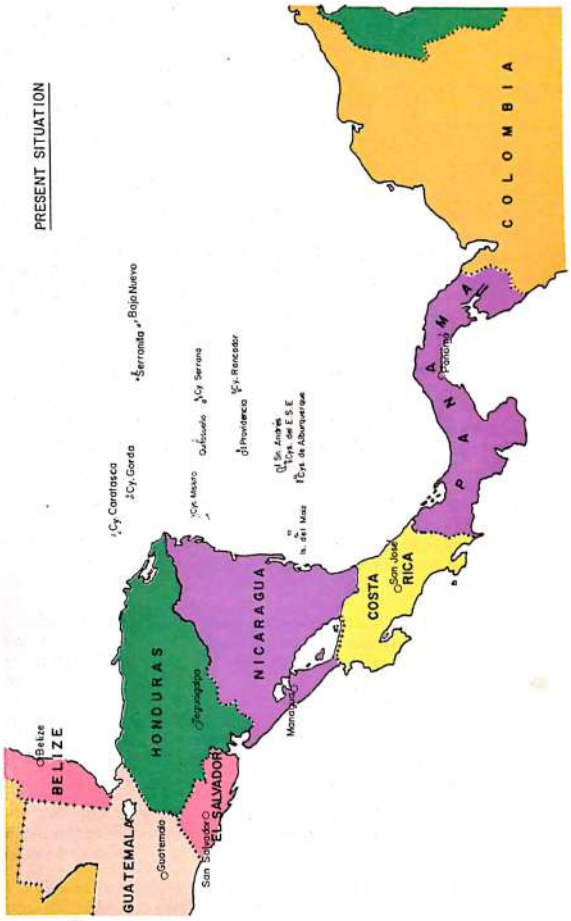
Article VII. The Republic of Colombia and the United Provinces of Central America obligate themselves and formally promise to honour their borders as they are today, reserving the right to make in friendly terms, by means of a special Convention, the line of demarcation between both States as soon as circumstances allow for it or as soon as one of the parties notifies the other of its willingness to enter into this negotiation.

Article IX. Both parties who have entered into by contract, desiring to provide a remedy against harm inflicted to both parties by the colonizations of unauthorised adventurers in that part of the Costa de Mosquitos, from the Cabo Gracias a Dios to the Chagres River, do promise and oblige themselves to employ their sea and ground forces against any individual or individuals who would atempt to organize settlements on the aforesaid Costas without prior authorization from the Government to which they would be answerable as regards dominion and lawful authority." (21)

From then on the actions pertaining to Colombia's jurisdiction and sovereignty over San Andrés are not singled out, since they are of identical characteristics as those usually exercised by a State over any part of its territory such as in Colombia's case the Special District of Bogotá, the Departments of Antioquia or Atlántico or the Administrations (Intendencias) of Arauca or Caquetá. Evidently, an account of the activities carried out in the Archipelago would take up many volumes, especially since the latter has merited special and preferential attention by the National Government.

It should only be emphasised that the Republic of Colombia's actions vis-à-vis its rights of sovereignty over the Costa de Mosquitos and the Mangles Islands continued actively during the whole of the nineteenth century, when it had to confront the British colonialist activity originating from Jamaica in collaboration with the Miskito Indians who, on several occasions, requested Colombia's cooperation in view of sporadic Nicaraguan expeditions against their territories.

(21) Esguerra M., op. cit., p. 61.



SOME CONSIDERATIONS ON THE HISTORICAL-JURIDICAL ASPECTS

The Government of Nicaragua has in its terms offered certain concepts regarding the historical-juridical aspects, which are well deserving of some brief commentary.

a) **The legal force of the Royal Order of 1803.** There are some very clear historical and juridical incongruities in Nicaragua's exposition. It stated that the Royel Order of 1803 lacked sufficient juridical force to order a territorial separation:

> "This Royal Order has been set on a par by some Colombian commentators with the Royal Charters which were completely different in content. With regard to borders, the Royal Charters were the only ones of juridical value, and they originated not from a Ministry of War, but from the Council of the Indies. Only those Royal Charters which came from the Council of the Indies were able to introduce changes to the Audiencias jurisdictional limits as declared by Law I, Title XV, Book II of the Compilation of the Indies."

Such an argument is clearly unfounded. The Royal Charters as much the Royal Orders contained the will of the Sovereign and one was just as binding as the other. The only difference lay in that the Royal Charter was symbolically signed by the King: it said, "I the King", it bore the signature of the minister of the appropiate branch of government, and was countersigned by a secretary of the administrative branch. The Royal Order was also a dispatch, signed by a Cabinet Minister, in which was expressed the will of the Monarch. Thus, there was no difference whatsoever as to legal obligation imposed by one vs. the other.

Decisions were always conveyed "by the order of the King", for which reason these orders we have been referring generally bore the name of Royal Orders.

The ex-President of Spain's Council of Ministers, Don Francisco Silvela, addresses this particular point:

"No Spanish jurist can doubt that the Legislative Power lay exclusively with the King throughout the whole historical period which covered Spain's Government in America, since its discovery up until the independence of the different nationalities which today inhabit that continent. Law XII, Title I, Book I and Law III, Title II, Book III of the Latest Compilation establish this organic principle which nowadays we would call constitutional. The Ley de Partidas, said that the Emperor or King can make the laws relating to people under his authority, and no one on earth has the power to do so as to the temporal, save with his approval. If these principles of Public law, inspired from the **Placitum Principis**, had their exceptions in Spain's history up to the Sixteenth Century, in the following centuries their Authority was unquestionably final. And so the Kings legislated exclusively by themselves or in consultation with the Council and had the power to establish rules and decrees on all matters of Public and Private Law. This doctrine in Spanish Law is clear in every way; no one doubts it. Furthermore, it is expressly acknowledged by the Supreme Tribunal's jurisdiction in its statement of May 27, 1858, which said that 'the Royal Orders made throughout the Monarchial epoch were and continue to be in force with respect to all their workings and in all kinds of matters.' Neither the laws of the Indies nor of the Kingdom established an appreciable juridical difference in the manner in which the decrees of the Royal Power were issued: some were known as Pragmáticas, some Royal Charters, other times, Royal Orders, or Provisiones as well, although these last, properly speaking, apply to decisions taken by the Council.

Alcubilla, in his **Diccionario de la Administración Española (Dictionary of the Spanish Administration)**, deals with this matter and declares that he does not find any basic difference between the Royal Charters, the Pragmáticas and the Royal Orders. Neither is there jurisprudence —he adds— to distinguish the character of the orders that emanate from the Executive Power nor can it be shown with rigorous precision which administrative actions require this or that form. This is true in modern Public Law and even more so in times prior to the constitutional system.

The Legislative Power resided in the Monarch, without limitation of any kind; according to the formal declaration of the Supreme Tribunal of Justice, the Royal Orders were of this nature and, therefore, any decision made through a Royal Order was absolutely binding on the authorities and the citizens. It was vested with the same efficacy, the same binding force

as the most solemn of the laws which nowadays are legislated by las Cortes, approved and promulgated by the King." (22)

Don Antonio Maura, who also was President of Spain's Council of Ministers, says:

> "Neither the label, which might be a Cédula (Charter), Pragmática, Orden (Order) or Provisión, nor the external formalities —large or small— by which the authority of the royal mandate was attested, established a difference or gradation of comparative efficacy of the Sovereign Statute. The definitions given by the Diccionario de Autoridades (the Authorities' Dictionary) of the Spanish Academy for the words Cédula, Real Orden, Pragmática and Provisión, confirm the fulness with which the Monarch exercised all the powers of State. The Encyclopedia Jurídica (Juridical Encyclopedia) by Arrázola teaches the same doctrine: concerning the Royal Orders and the Provisiones, the latter referred mainly to judicial or administrative matters and the former were frequently used in legislative matters. Fortunately, the majority or our laws in the last three centuries were established through Royal Orders.
>
> He adds that the latter were doubtless also used when conferring a title, a post or an honour. He could also have said that they were employed, as a matter of fact, for dealings of lesser importance since Law XVII, Title I, Book II dating from 1552, states: 'When we have ordered that Cédulas of recommedation be issued in favour of those who are going to inhabit our Indies and because of them they are to be provided with Corregimientos (Mayoralties) or other posts, the Viceroys, Audiencias and Governors should proceed as deemed convenient.' This Law demonstrates that Royal Charters of minor importance were issued. But on the other hand, the Royal Order of March 15, 1798, declares Chile's independence, just as the Royal Order of February 26, 1787, was sufficient to create the Audiencia de Cuzco." (23)

Finally, the Colegio de Abogados de Sevilla (Seville's School of Lawyers) in its exposition of April 13, 1900, states:

> "The Royal Orders are those established directly by the Monarch in exercise of his Sovereign Powers and his capacity

(22) Esguerra M., op. cit., pp. 45-47.

(23) **Différend de Limites entre la Colombie et le Costa Rica. Consultations et Mémoires présentés par la Colombie** (Paris, 1900), p. 35.

to settle all matters of Public and Private Law. The Royal Orders, in the regimen of the absolute Monarchy, had the same binding force as today's laws established by las Cortes." (24)

It should be added that, although the Junta de Fortificaciones y Defensa de Indias recommended the issue of the Royal Order, that nevertheless in no way modifies or alters its effect. The order was signed by the Ministry of War by order of the King, realizing that the immediate worry was to safeguard those territories effectively against British threats and actively and vigorously to maintain Spanish sovereignty over them. Furthermore, it was through the same means that the King of Spain communicated numerous orders relating to the Costa Mosquitia and the Archipelago.

To be sure, many laws also emanated from other authorities. From the context of these we can conclude that the Spanish Crown had always purposed to carry out a territorial separation via the Royal Order of 1803. The note from Spain's Secretary of Grace and Justice Don Miguel Cayetano Soler, to the Captain-General of Guatemala is an example of this:

> "The Junta de Fortificaciones y Defensa de Indias, through consultations of September 2 and October 21 last, has expressed its opinion as to the development, inhabitants and defense of the Islas de San Andrés: their separation, and that part of the Costa de Mosquitos, which extends from Cabo Gracias a Dios up to the Chagres River, from this Captaincy and to incorporate them into the New Kingdom of Granada. The King having agreed with the Junta's decision, I am forwarding to Your Excellency (and to the Viceroy of that Kingdom, too), by order of His Majesty, copies of said consultations for your information and the fulfillment of that which concerns you." (25)

The Captain-General of Guatemala, in a note dated June 3, 1804, states:

> "I may only add, that the separation of the territory, as determined by Your Majesty is a great relief to me in this Captaincy-General." (26)

(24) Esguerra M., op. cit., p. 7.
(25) Esguerra M., op. cit., p. 38.
(26) Ibid.

There is not doubt, therefore, as to the effects produced by the Royal Order in the sense of finally separating the San Andrés Archipelago and the Costa Mosquitia from the Captaincy-General of Guatemala and to incorporate them into the Viceroyalty of Nueva Granada.

b) **Speculation regarding "Special Commission".** The "White Book" of Nicaragua also indicates that the Royal Order of 1803 was only a "special commission" and not a territorial separation:

> "The Royal Order of November 20, 1803, merely contained a limited commission of 'comisión privativa' ('Special Commission') the name given in law to this kind of administrative order. In other words, the Royal Order of November 20, 1803, was merely administrative in nature, purely military and with the purpose of guaranteeing the best defense of the Costa de Mosquitos; for this reason, the ultimate origin of the Royal Order of 1803 was with the Junta de Fortificación y Defensa de las Indias —the organ which recommended that such an Order be given."

It should be remembered that "special commissions" were ones which the Crown occasionally gave to certain officials and authorities in order to carry out temporary assignments of a military, fiscal or ecclesiastical nature within a specific territory. The terms of the Royal Order of 1803 seem to say nothing of the sort:

> "The King has decided that the San Andrés Islands and the area of the Costa de Mosquitos —from the Cabo Gracias a Dios, inclusive, up to the Chagres River— be set apart from the Captaincy-General of Guatemala and to be dependent on the Viceroyalty of Santa Fe..."

The only thing clearly stipulated there was the territorial separation with no absolute, unconditional or restrictive limitations to it of any kind. There is nothing to make one believe that the Royal Order was assigning a simple administrative commission to the Viceroy.

But apart from a historical examination of the Order the intentions of the Spanish government can easily be inferred. In effect, as already stated in this chapter, the Royal Order originated as a result of a petition to the King from Governor O'Neille and from a group of people from nearby San Andrés and the Costa Mosquitia. The purpose of the petition was to incorporate the Archipelago and the Costa de Mosquitos definitevely into the Viceroyalty. Based on this request, the King ordered the Junta de Fortificación de Indias to give its opinions on the matter, which were submitted to the Monarch between September and October, 1803.

The first of these reports dated September 2 cleary expresses the convenience —for fiscal, administrative, legal, military, religious and humane reasons— of allowing the Costa Mosquitia and the San Andrés Archipelago to depend on the Viceroyalty. This report concludes:

> "...it is convenient that these establishments, up to and including the Cabo Gracias a Dios be dependent on the Viceroyalty of Santa Fe; the San Andrés Islands should also be dependent in all its concerns (as it was formerly) on the Viceroy..." (27)

However, the King requested the Junta to determine with precision some aspects, especially with regard to the Costa de Mosquitos, as follows:

> "In order to resolve the matter as to the separation of the Costa de Mosquitos establishments from the Captaincy-General of Guatemala, and their incorporation into and dependence on the Viceroyalty of Santa Fe, the Junta should explain how such a separation is to be undertood and accomplished..." (28)

It is not difficult to infer a more exact understanding of the Spanish Crown's purpose: it obviously had to do with a territorial separation. The beginning of the second report with regard to San Andrés is a follows:

> "The Junta de Fortificaciones y Defensa de Indias, through consultation of September 2..., expressed how useful and convenient it would be for the San Andrés Islands to be dependent on the Viceroyalty of Santa Fe, if they are to be developed and protected..." (29)

In another passage of the same document commenting on the request by Governor O'Neille, it states:

> "...and further on he said still more after declaring the powerful motives underlying his proposition that the San Andrés Islands should depend on the New Kingdom of Granada and not on Guatemala..." (30)

From none of the reports cited is there any indication that the Crown intended to appoint a commision or that it was up to the Viceroyalty to carry out certain administrative functions of a military or fiscal nature during a limited period of time; on the contrary, its purpose was obviously to separate definitively the Archipelago and the Costa Mosquitia from the Captaincy and to incorporate them into the Viceroyalty.

(27) Borda, F. de P., op. cit., p. 344.
(28) Ibid., p. 347.
(29) Ibid., p. 346.
(30) Ibid., p. 349.

One may also infer from these reports the motives behind the measure, such as the defense and development of its territories. However, to say that the Royal Order was "...merely administrative in nature, purely military..." is another matter altogether. Another circumstance which notably influenced the Royal decision was the fact that the residents and authorities of San Andrés and Mosquitia could not get from Guatemala the necessary aid to survive given the difficult communications between Guatemala and the Costa, and between the Costa and the islands of the Archipelago. In fact, anything that was sent that way, even supplies for defense against the British, took al least six to seven months:

> "But to have a better and quicker effect, it is convenient that these establishments, up to and including the Cabo Gracias a Dios, depend on the Viceroyalty of Santa Fe; the San Andrés Islands should also be dependent in all its concerns (as it was formerly) on the Viceroy, both because of its proximity and the prompt maritime aid which it could receive, to which end the Viceroy should issue orders to the Commandant of the Cartagena naval base." (31)

The second report also referred, among other things, to defense:

> "...it is necessary to see, once said establishments are dependent on the Kingdom of Santa Fe, how that command, for the peace and defense of the Costa de Mosquitos, will be able to accomplish these objectives and meet the extraordinary circumstances of a foreign invasion or Indian disorder." (32)

The Spanish Government always had similiar reasons in mind when undertaking big territorial and administrative changes over its American colonies. There are many examples which depict such characteristics: one of them was none other than the order separating the Cumaná, Guayana, Maracaibo and the islands of Margarita and Trinidad from the New Granada and their incorporation into de Captaincy-General of Venezuela in 1777:

> "...Keeping in mind the information given by the present Viceroy, Governor and Captain-General of the New Kingdom

(31) Borda, F. de P., op. cit., p. 345.
(32) Ibid., p. 348.

of Granada as well as that declared by the Governors of the Guayana and Maracaibo Provinces regarding the inconveniences these provinces suffer, as does the province of Cumaná and the islands of Margarita and Trinidad, in continuing to be united, as they are now, to the Viceroyalty and Captaincy-General of the New Kingdom of Granada. They suffer because the distance between these provinces and their capital, Santa Fe, is so delaying and seriously jeopardizing my royal services in these provinces."

Therefore, in order to avoid these and the greater problems that would be occasioned by an invasion I deemed it convenient to resolve the matter..."

One can see, too, from the historical-juridical review made at the beginning of this chapter, that the measures adopted by the Viceroyalty were not limited just to military aspects, but covered all matters in relation to the proper administration and government of a territory —as analyzed on the reports of September and October of 1803 already discussed. In 1804, amongst other things, the Viceroy imparted instructions to the Governor as to the management and collection of taxes; in 1805 and 1808 the Governor suggested to the Viceroy measures in connection with commerce; in 1809 he consulted about the possibility of allowing the introduction of English articles to the Archipelago; between 1804 and 1811 the Royal Bursary of Cartagena met the expenses of San Andrés and Mosquitia, etc., not to mention the ecclesiastical jurisdiction already explained in detail.

The Royal Order as a result is not merely a simple "special commission". It is impossible to arrive as such conclusion upon analyzing not only the text of the order but also the intention and actions adopted after its implementation as well as the historical events leading up to it. These are all means of interpretations comtemplated in section three of the 1969 Vienna Convention on the Law of Treaties. It is also evident that it did not comprise just one military order to guarantee the best defense for the Costa Mosquitia; this was only one of the reasons for deciding on the final separation of said territories from the Captaincy-General of Guatemala.

c) **The Supposed discharge of the Royal Order of 1803.** Nicaragua has also maintained that the Royal Order of 1803 was abrogated by the Royal Order of November 13, 1806:

"Now, the measure of the Spanish Crown was not well received by the Captaincy-General of Guatemala, which promptly requested the colonial government for a return of the jurisdiction to defend the Atlantic coast of said Captaincy. As a result of

such steps, the Royal Order of 1803 was discharged three years later by another Royal Order of San Lorenzo dated November 13, 1806, also originating from the Ministry of War and addressed to the Captaincy-General of Guatemala. The latter Royal Order of 1806, gave back to the Captaincy-General of Guatemala the same special commission which it had temporarily transferred to the Viceroyalty of Santa Fe. The Royal Order of June 8, 1810, shows clearly that the Mosquitia posts depended on Guatemala." (33)

Before referring to the above statement, it is worthwhile quoting the Royal Order cited since the Nicaraguan Government does not quote it in its "White Book", and it notably clarifies the matter in its context:

"War. Most Excellent Sir: To the Captaincy-General of Guatemala on this date I say the following: The King, having learned of your Lordship's letters of March 3, 1804, (Nos. 416 and 417) and of the documents included therein reporting the appointment of two ordinary mayors and syndic procurator (síndico procurador) in the Colony of Trujillo as well as the question posed by Colonel Don Ramón Anguiano, Governor Intendant of Comayagua, claiming to exercise the faculties of the Intendant and sole head of the Costa de Mosquitos settlements, in accordance with the Ordinance of Nueva España (New Spain), and being totally independent in the four areas of justice, police, finance, and war, which the Presidents of Guatemala have known in the new colonies. His Majesty has concluded that Your Excellency is the one who ought to deal exclusively, and with complete authority, with all the matters which may occur in the Colony of Trujillo, as well as military posts of the Costa de Mosquitos, in all four functions referred to above, in compliance with the Royal Order established since 1782. These Orders authorize you occupy, defend and inhabit that coast until that, when this matter has been clarified in whole or in part, His Majesty may deem it convenient to change the present system. Consequently Your Excellency did well in the use of your powers to appoint the mayors and syndic without infringing upon the powers which appertain to the Governor Intendant in the Ordenanza applicable to these employment positions, because [the Ordenanza], besides being general and not applicable to a special commission, has not been observed in the region of the Costa de Mosquitos since it was issued in 1786 and communicated to Guatemala the following year for compliance insofar as it might be adaptable.

(33) White Book of the Government of Nicaragua, p. 24.

By Royal Order I transfer it to Your Excellency according to that agreed for the 12th of the following month so that by the Ministry under your charge the necessary [instructions] be given for its compliance.

God keep Your Excellency many years. San Lorenzo November 13, 1806.

JOSEF CABALLERO
Secretary to the Office of Grace and Justice." (34)

One must remember beforehand that the Costa de Mosquitos extended not only from the San Juan River to the Cabo Gracias a Dios, but it went much further north, up to Omoa, near Cabo de Honduras or Cabo Camarón.

As may be grasped from its context, the Royal Order of 1806 was established with the plain intent of solving a conflict of jurisdictions between the Captain-General of Guatemala and the Intendant of Comayagua. This was because, the latter supposed that in accordance with the provisions of the "Ordenanza de Intendentes de Nueva España" (Ordinance of Intendants of New Spain) could appoint Trujillo's syndic and mayors, arguing that the Settlements of the Costa Mosquitia were within the Intendency.

As can be seen, the Royal Order decreed that the handling of the affairs of the colony of Trujillo and of other military posts in the Mosquitia Coast, was the sole charge of the President of Guatemala. With reference to the Mosquitia Coast, it is not difficult to ascertain that the phrase "and other military posts of the Mosquitia Coast" refers to the area between Omoa and Cabo Gracias a Dios, and not to the whole of the coast between Cabo Gracias a Dios and the San Juan River.

The memorial dated March 3, 1804, in which the Captain-General related the claims of the Intendant, states:

> "All the establishments along the Coast, from Cabo Gracias a Dios to Omoa, have an intimate bond. Even ship arrivals have it as most bring registers for the three ports of Trujillo, Omoa and the Golfo; they distribute among these [three ports] their cargo and obtain from each one their returns. This being the case, the dealings and rulings required must be uniform and all these matters dealt with by one hand... This being the case, the one [Intendant] of Comayagua, as a true dependent on this Captaincy-General has no part in these matters other than that assigned by this [Captaincy-General] in which case it will act as a delegate or substitute as did the first Intendants Quesada and García Conde." (35)

The Secretary of Grace and Justice, in a report dated August 30, 1806, with regard to the problems, he says:

> "Resumé: The President of Guatemala is authorized by several Royal Orders since 1782 to occupy, defend and settle Rontán Island and the nearby coast of Mosquitos where the Trujillo colony was founded. In effect he has been exclusively involved since that time with all matters of the four areas of police, justice, war and finance as well as appointing military commanders as his surrogates, who under his orders have exercised authority over Trujillo. In 1786, the Ordinance was drafted governing the Intendants of New Spain (Intendentes de Nueva España) which was transmitted in 1787 to the Kingdom of Guatemala for their compliance insofar as it was applicable. This Ordinance assigns jurisdiction to the Intendants to oversee the four main (governmental) functions in their respective provinces. The Province of Comayagua, that is Honduras, includes the Costa de Mosquitos. However, the first two Intendants established since 1787, not only abstained from arguing with the particular regarding all the matters with reference to the Costa de Mosquitos but were their surrogates and worked under the direction of the Presidents." (36)

There can be no doubt that the establishments to which the Royal Order of 1806 was referring to were the ones between Omoa and Cabo Gracias a Dios.

However despite the above, some preliminary conclusions can be drawn from the Royal Order of 1806:

a) The clear purpose of the document was to solve a conflict of jurisdictions between the Captaincy-General of Guatemala and the Intendant of Comayagua. No other conclusion can be taken from reading the Royal Order and analyzing its immediate historical background.

(34) Pasos Argüello, Luis, Enclave Colonialista en Nicaragua (Managua, 1978), pp. 32, 33.

(35) Esguerra, M., op. cit., p. 50.

(36) Ibid., p. 51.

The case of Royal Order of 1803 is very different in that its text does not allow for any other interpretation than that its purpose was to ordain a territorial separation —its background and consequences confirm that.

b) The Royal Order of 1806 is, without any doubt, an example of a "special commission": the same document refers to it as such. If the Royal Order of 1803 had been of the same nature, as suggested by Nicaragua, it would have had the same context as the Order of 1806, which suggestion deserves to be dismissed out of hand.

c) It should also be observed that the Royal Order of 1806 in no way refers to the San Andrés and Providencia Archipelago, including the Mangles Islands.

But some other observations can also be made. It is a fact that the Province of Comayagua or Honduras extended towards the east up to Cabo Gracias a Dios. This was demonstrated by Honduras and accepted by the Laudo Arbitral Español (Spanish Arbitral Award) in 1906. Therefore, the jurisdiction disputed by the Intendant of Comayagua could only go as far as Cabo Gracias a Dios and not as far as to the San Juan River. The Royal Order could not refer to anything else but the Omoa-Cabo Gracias a Dios stretch, over which the Intendant thought, contrary to the opinion of the Captain-General of Guatemala, to have the right of jurisdiction. One cannot presume that the Spanish Crown was able to solve a problem or conflicting jurisdictions in a given area by assigning to one of the parties jurisdiction which it had never claimed before. Nor can it be taken for granted that a document, intended to solve a problem of such nature, would set aside an order on territorial separation, such as the Royal Order of 1803.

Furthermore, if the Royal Order of 1806 had affected the territories or functions of the Viceroyalty of Nueva Granada, the Crown would have notified the Viceroyalty —the affected party— as was customary when similar measures were adopted. In this case, naturally enough, the notification or the report was never made. The Viceroyalty continued to exercise actively its full jurisdiction and authority over the territories of the Costa Mosquitos, and of course, over the San Andrés Archipelago.

Finally, we consider it useless to analyze any other issued after 1809 since it lacks relevance and disannuls the principle of Uti Possidetis 1810.

d) **Support for Colombia's titles in Treaties signed by Nicaragua with third-party States and the Costa Mosquitia.**

In its "White Book" Nicaragua makes a most unheard of and strange assertion, which has no backing at all in International Law:

> "Colombia's claims to a supposed annexation of the Central-American Costa Mosquitia to the Viceroyalty of Santa Fe also does not have the least backing in International Treaties signed by Nicaragua with other countries throughout the Nineteenth Century up to 1928; on the contrary, each Treaty is a rejection of those claims." (37)

It should be pointed out above all, that the Republic of Colombia does not have the territorial appetites which Nicaragua seems to have. The country only claims what is lawfully its possesion, in accordance with the international treaties in force. It is thus anachronistic, to say the least, to speak of supposed Colombian claims regarding the annexation or non-annexation of the Costa Mosquitia to Nicaragua. Such a matter had already been discussed for many years and in this regard, an International Treaty was signed and promptly ratified, which in fact is presently in force.

Nevertheless, some specific points must be made here.

It is absurd to suppose that Colombia "seeks support" for its thesis in treaties signed by Nicaragua and other States, since it is already backed by the titles which emanated from the Spanish Crown up to 1810.

It should be remembered that one of the most important principles in International Law is that of **Pacta Tertis — Res Inter alios acta— nec nocent, nec prosunt,** according to which treaties neither imperil, nor benefit, nor impose obligations, nor invest rights to third-party States. This principle, which has its origin in Roman Law and is universally recognized by international doctrine and jurisprudence, is supported not only by contractual law, but in the sovereignty and independence of States. Article 34 of the Vienna Convention on the Law of Treaties, states:

> "A Treaty creates neither duties nor rights for a third state without its consent."

In a comment regarding that article (Article 30 of the Project), the Commission on International Law, states:

> "Whether the principle **Pacta Tertis nec nocent nec prosunt** admits of any exception in international law is a very controversial question and led to differences in opinion amongst Commission members. The members were completely agreed that there is no exception at all with regard to duties; a treaty in itself never creates duties for States who are not party to it."

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(37) **White Book of the Government of Nicaragua, p. 21.**

Jurisprudence has also much to say on this matter. In the case of the Isla de Palmas (Isle of Palms) referring to the recognition of sovereignty on the said island, due to treaties made with others States, Judge Huber declares:

> "In addition, it seems evident that the treaties made by Spain with third powers, in which its sovereignty over the Philippines was recognized, could not impose duties on the Netherlands."

Further on he also states:

> "Whatever the true meaning of a treaty, it cannot be interpreted in the sense of giving rights to third powers."

With regard to the matter of the Free Zones of Upper Savoy and the District of Gex, the Court maintained that article 435 of the Treaty of Versailles is not binding on Switzerland:

> "It does not bind Switzerland, which is not a party to the Treaty except inasfar as this country may have accepted it."

Similar attitudes were adopted with regard to the territorial jurisdiction of the International Commission on the Oder River (38) when the Court did not consider the Barcelona Agreement —relative to the rules governing navigable waterways of international interest— as binding on Poland, since it had not signed it. It decided in the same way with regard to the "Statute of Eastern Carelia" relative to the Treaty of the League of Nations.

With regard to the "German interests in Upper Silesia" case (series A, N° 7, p. 20), it states:

> "A treaty only creates a right between the States which are parties to it."

With regard to the differences relative to the Chorzow Electrical Centre (TPJI, Series A 17. Sept. 17, 1929) it is said:

> "Poland cannot avail itself of the clauses of this Convention as it is not a party to it."

In the case of the Air Incident of July 27, 1955, between Israel and Bulgaria it is stated:

> "Concerning the States who are not signatories, the situation is different: in the absence of consent [from one of the parties], the statute can neither maintain nor transform its original binding force."

It seems unnecessary to dwell upon the matter any further, since the principle is clear and undisputable. Therefore, none of the legal instruments alleged by Nicaragua to prove recognition by other nations of Nicaragua's claims over the Costa Mosquitia can in any way be turned against Colombia's position.

The Cual-Molina Treaty of 1825, signed between Colombia and the United Provinces of Central America, far from affecting Colombia, favours it, and contradicts Nicaragua's thesis. In fact, it states that "the integrity of their respective territories are mutually guaranteed," as is shown in the historical-juridical review, and as in the protocol negotiations witness: there Molina the plenipotentiary signed the treaty in the knowledge of Colombia's titles in accordance with the Royal Order of 1803. Article VII reads:

> "The Republic of Colombia and the United Provinces of Central America oblige and commit themselves formally to respect their borders..."

If the Central American plenipotentiary had rejected the titles put forth by Colombia with respect to the Royal Order of 1803, he obviously would not have signed the instrument.

(38) PCIJ. 1929. Series A N° 23. pp. 13-22.

NICARAGUA'S ATTITUDE VIS-A-VIS INTERNATIONAL LAW

It is worth pointing out above all that the denunciation of a Treaty is, in general terms, the unilateral manifestation of the will of one of the contracting parties to withdraw from compliance with the obligations as established therein. There will be no attempt to analize here the arguments on which the denunciation could be founded, the terms in which it might be clothed, or its effects, much less the requirements that it ought to fulfill.

Nicaragua's unsual attitude vis-à-vis the Treaty of 1928, is in such a way contrary to rules and principles of international law that by that in itself it is annulled and destroyed, having broken even the minimun foundation which governs relations among nations no matter the political regime. Therefore, no State can avail itself of disorder and internal turmoil to put forth a thesis which in any place could easily lead to even an armed conflagration. One has only to consider the consequences if a country in Central Europe decided to "denounce" one of the treaties in force regarding territorial matters, such as the Potsdam Treaty (August 2, 1945), or if the Soviet Union decided to do the same with the Russian-American Agreement over Alaska (March 30, 1897), to mention only two of them.

1º THE PRINCIPLE OF "PACTA SUNT SERVANDA"

The Nicaraguan claim violates, above all, the principle of **Pacta Sunt Servanda**, which has remained throughout time as an evident truth.

This norm constitutes not only a fundamental principle of international law, but the essential foundation and cornerstone of peace and coexistence among States. This principle is found inthe Preamble to the Charter of the United Nations:

> "We, the peoples, having resolved to create conditions under which justice and respect for obligations emanating from treaties and other sources of International Law can be maintained..."

The second paragraph of Article 2 of the Charter it is likewise expressed that the members "will in good faith fulfill the obligations contracted by them in accordance with this Charter."

Authors and drafters of treaties from all juridical schools point it out as the primordial foundation of relations among nations:

"Security of international relations would be jeopardized if the fulfillment or non-fulfillment of pacts were left to will of the parties." (39)

"It is, then, even more necessary for human morality, therefore, to honour treaties than to honour particular conventions. Without it no international order of any kind could exist." (40)

"The principle of **Pacta Sunt Servanda** was embodied in the sphere of Roman Natural Law, then transmitted to Christian medieval scholastic natural law; later it became a principle of international common law; it is also accepted even in our days as a fundamental norm of the whole law of treaties." (41)

"International Treaties should be fulfilled under **Pacta Sunt Servanda**. This principle, of transcendent importance for International Law, expresses the attitude towards law of all progressive humanity, dedicated ever towards maintaining juridical traditions. Without a recognition of the axion that international treaties should be fulfilled, neither exchange among peoples, nor International Law are possible." (42)

"By definition, according to international practice, the treaty establishes a binding rule of conduct for the signing States." (43)

"The treaties have obligatory force by being the expression of the positive law which governs States in matters of international affairs. This positive law derives its force from natural law, which governs relations among groups of human beings who are organized politically." (44)

(39) Senra Vásquez, Modesto, **Derecho Internacional Público** (México: Editorial Porrúa, 1974), p. 57.

(40) Ulloa, Alberto, **Derecho Internacional Público** (Tome II, 4th. Ed.), p. 205.

(41) De la Guardia, Ernesto, and Delpech, Marcelo, **El Derecho de los Tratados y la Convención de Viena** (Buenos Aires: Editorial la Ley, 1970), p. 97.

(42) Kozhevnikov, F. J., **Derecho Internacional Público** (1st. Ed.) (México City: Editorial Grijalbo, 1963), p. 251.

(43) Rousseau, Charles, **Derecho Internacional Público** (3rd. Ed.) (Barcelona: Ediciones Ariel, 1966), p. 50.

(44) Núñez Escalante, Roberto, **Compendio de Derecho Internacional Público** (México City: Editorial Orión, 1970), p. 198.

"A principle of fundamental importance, which cannot be questioned in any way, is that on which the treaties have obligatory force among the contracting States." (45)

"It has also been observed, that in view of the continuing existence of States, treaties maintain their force and therefore produce the effects inherent in them **despite any change whatsoever in the form of government of the contracting States.**" (46)

"Many authors recognize the obligatory force of treaties in Natural Law, others, in religious and moral principles, and others, in the self-limitation of the State, which decides to become a contracting party. Some affirm that the will of the contracting parties is the original cause for the legal force of treaties. The right answer is probably the one that insures that treaties are juridically obligatory because a common rule in International Law declares it so. The binding effects of this rule proceed ultimately from the fundamental conviction that International Law has objectively obligatory force which is not consensual, nor necessarily juridical." (47)

"The validity and characteristics of international agreements are based on the common rules of international law." (48)

"It is not necessary to share Anzilotti's criterion that the force of International Law rests on the principle of **Pacta Sunt Servanda**, to admit that without a scrupulous respect for conventional obligations in relations among organized peoples, international order would inevitably end in chaos." (49)

"The force of International Law is based, as much for reasons of ethical principle as of international necessity, on the rule **Pacta Sunt Servanda** (Kelsen, Verdross, Anzilotti, Strupp). It is the fundamental normative theory by virtue of which every juridical system establishes a hierarchical ordering of norms, in which every one of them has a validity which is superseded by the norm that takes precedence. Thus it finally results in a

(45) Diena, Julio, **Derecho Internacional Público** (Barcelona: Bosch, Casa Editorial, 1948), p. 399.

(46) **Ibid.**, p. 415.

(47) Oppenheim, L., M. A., LL.D. **Tratado de Derecho Internacional Público** (Barcelona: Bosch, Casa Editorial, 1961), p. 469f.

(48) Reuter, Paul, **Instituciones Internacionales** (Barcelona: Bosch, Casa Editorial, 1959), p. 144.

(49) Jenks, C. Wilfred, **El Derecho Común de la Humanidad** (Madrid: Editorial Tecnos, 1968), p. 140.

stepped pyramid of norm, whose basic, fundamental norm, because it has a foundation that cannot be proven, is recognized to have the character of an axion. The rule discussed here, which forms apart of Canon Law, even though it has its origin in Roman Law, obliges compliance with whatever has been agreed upon. On the basis of the international community's juridical experience, International Law ultimately draws from this rule its own obligatory force. Today it has an axiomatic character, in that it rests on the proof of its universal aceptance. This is especially so when the problem transcends the juridical order finds its place on the philosophical plane." (50)

"The faithful performance of treaties is a primary condition of international coexistence: **Pacta Sunt Servanda.**" (51)

"The treaty is the basic regulator of international life and the chief instrument of stability and application of law. Its preeminent place owes as much to the supreme moral authority of the principle **Pacta Sunt Servanda** as to its adaptability to the present individualistic structure of international relations." (52)

"We most firmly maintain that pacts between Powers are obligatory and should be fulfilled with rigorous exactitude, in the spirit in which they were concluded." (53)

Vishinski, the Soviet specialist on treaties, points out:

"A strong juridical order can be achieved in international relations only when it is based upon mutual agreements among sovereign nations regarding matters in question and their recognition of mutual rights, necessities and interests. For this reason, the Soviet theory on International Law regards treaties —based on the principle of equality between sovereign nations and respect for their mutual rights and interests— as the main source of International Law. If International Law and its institutions are based upon agreement among the parties and obligations voluntarily accepted, it will have a double foundation

(50) Moreno Quintana, Lucio M., **Tratado de Derecho Internacional** (Tome I). (Buenos Aires: Editorial Sudamericana), p. 49f.

(51) Antokoletz, Daniel, **Tratado del Derecho Internacional Público** (5th. Ed. 3rd. Tome) (Buenos Aires: Editorial **La Facultad**, 1951), p. 108.

(52) De Visscher, Charles, **Teorías y Realidades en Derecho Internacional Público** (Barcelona: Bosch, Casa Editorial, 1962), p. 272.

(53) Paredes, Angel Modesto, **Manual de Derecho Internacional Público** (Buenos Aires: Editorial Depalma, 1961), p. 383.

of moral and legal support. Only in such conditions do international treaties acquire force both formally and practically, and their importance and juridical validity should be unconditionally observed."

One could go on indefinitely quoting the concepts of jurists of different tendencies and schools, but frankly it is considered altogether unnecessary in view of the evident weight and importance of the principle.

The principle of **Pacta Sunt Servanda** has been included in, besides the Charter of the United Nations, a multitude of international treaties and agreements as well as in numerous bilateral and multilateral declarations.

We shall only quote from the Convention on Treaties, signed in La Havana on February 20, 1928, on occasion of the Sixth International American Conference, **Nicaragua being a party to it**; and from the 1969 Vienna Convention on the Law of Treaties which is a fundamental compilation of the general rules and principles of International Law.

Article 10 of the 1928 La Havana Convention, states:

"No State can free itself from the engagements of a treaty, nor modify its terms, except with the assent, peacefully obtained, of the other contracting parties."

For its part, the Vienna Convention points out:

"Article 26: All treaties are binding to the parties, and to be performed by them in good faith."

Thus is quite clear that the Nicaraguan Government's intention of noncompliance with an international treaty in force violates the principle of **Pacta Sunt Servanda**. Since this principle is an imperative principle of International Law —indeed, it constitutes the very essence of it— there is no doubt that it is also a clear example of **Jus Cogens**. The disavowal of a treaty on territorial matters is thus a flagrant violation of the principle of **Pacta Sunt Servanda** as well as of **Jus Cogens**.

2° THE TERMINATION OF TREATIES

As already expressed, the pretension to abstain itself from the obligations of a bilateral treaty such as the Esguerra-Bárcenas Treaty without the consent of one of the parties, simply constitutes a violation of the most fundamental principle of International Law.

Only under certain conditions international treaties can be terminated.

It can generally be said that the causes which bring about the termination of a treaty can be divided into two main groups: First, by mutual agreement among the Parties, and secondly, by virtue of the norms of International Law.

In the first clasification we have the following:

a) **When the termination is provided in the selfsame treaty.** This is in the case of those treaties in force for a limited time and of those for a specific purpose or end, which once achieved, automatically leads to the termination of the treaty. As an example of this case, the Arbitration Agreement between Colombia and the United Kingdom, dated July 14, 1909, can be cited. Article III of this Agreement states:

> "The present agreement will remain in force for a term of five years starting from the date it is signed." (54)

b) **When denounced, using a principle which is specifically provided for in the Treaty itself.** There is no possibility of a denunciation of a treaty when there was not, or would have been no express or tacit assent by the parties in the matter concerned.

The Vienna Convention, which is primarily a compilation of common rules and principles of International Law, stipulated in Article 56 that the treaties which do not establish the power of the parties to denounce or withdraw from them, cannot be the object of denunciation or withdrawal, unless it is clear that such was the intention of the Parties when signing the treaty, or that the right of denunciation of withdrawal can be inferred from the nature of the Treaty.

The possibility of denunciation, in some cases, is expressly stated in the treaty. For example, the second paragraph on the Pacto Amazónico (The Amazon Pact) signed between eight States on July 3, 1978, States:

> "The intention of denouncing the present Treaty will be communicated by one of the Contracting Parties to the other Contracting Parties at least ninety days before the formal delivery of the denunciation to the Government of the Federal Republic of Brazil. Once the denunciation has been formalized, the effects of the Treaty for the denouncing Contracting Party will cease after one year's time."

(54) Tratados Públicos de Colombia (Bogotá: Imprenta Nacional, 1913), p. 128.

In the Esguerra-Bárcenas Treaty there is no provision at all on denunciation. Nor could it be inferred that the Parties even considered the possibility of denunciation of withdrawal. When States sign a Treaty which determines a frontier or defines a territorial question they never have the implicit intention of denouncing or withdrawing from it. Colombia and Nicaragua are no exceptions. For example, it is absurd to suppose that an Instrument in which the government of Nicaragua has stated: "**The Republic of Nicaragua recognizes sovereignty and full dominion of the Republic of Colombia** over the San Andrés Islands, Providencia, Santa Catalina and all the other islands, islets and cays, which form part of the Archipelago of San Andrés;" and in turn the Government of Colombia declared that it "recognizes the sovereignty and full dominion of the Republic of Nicaragua over the Costa de Mosquitos —between Cabo Gracias a Dios and the San Juan River— and over Mangle Grande (Great Corn Island) and Mangle Chico (Little Corn Island) on the Atlantic Ocean," that such an Instrument provided implicity for the possibility of denunciation by the parties. If two States sign a treaty with the implicit intention of allowing for its denunciation, each one would be making a grave error in stating on the same document **that they recognize the sovereignty and full dominion of the other** over a certain part of the territory to which it aspires. This is even more so when the State, to which it gives such recognition, starts immediately to exercise its sovereignty over the territory in question. This in fact and without the agreement would constitute a valid title of territorial acquisition, when such exercise is peaceful and is accompanied by the **animo domine** and the acquiescence of third parties.

Further, the already cited Article 56 of the Vienna Convention, which establishes the rules governing denunciation, was drawn up with the clear understanding that treaties on territorial questions and border disputes were not subject to denunciation. Evidence to that is the commentary of the International Law Commission with regard to this clause (Article 53 of the Proyect):

> "...the very nature of some treaties excludes the possibility that the contracting States would have had the intention of allowing one of the parties to denounce or withdraw from them at their free will. An example of these are the Treaties on the Demarcation of Territorial Frontiers." (55)

We believe, therefore, that the purported denunciation, or Nicaragua's will to unilaterally withdraw from its engagements acquired from the 1928 Treaty, is contrary to all the rules and principles of International Law, since it is clear and unquestionable the fact that the Parties never had the express or tacit purpose of allowing for it.

(55) Reports by the International Law Commission. (New York: United Nations, 21st. Session, Supplement Nº 9 (A/6309/Rev. 1, 1966).

c) Another possibility for the termination of a treaty occurs when, by means of a new treaty, **the parties decide to end the previous treaty.** The Concordat signed on July 12, 1973, between the governments of Colombia and the Holy See, states in its Article 30:

> "The present Concordat, except that agreed upon in Article 26, leaves without force and effect the treaty which the High Contracting Parties signed in Rome on December 31, 1887..." (56)

d) A Treaty can also be terminated, when **another treaty of equal rank is signed between the Contracting Parties but which on the whole is incompatible with the previous one.** Article 20 of the Pact of the League of Nations, declared:

> "...le présent Pacte abrogve toutes les obligations ou ententes 'interse' incompatibles avec ses termes et [les parties] s'engagent solennellement à ne pas en contracter..." (57)

The cases in which the termination of treaties has come about due to rules in International Law have been for a long time the object of heated juridical polemics.

a) **First, in the carrying out of the treaty's purpose.** When it can be concluded from the context that once its objetive has been achieved, the treaty ceases automatically, fulfilled. We can cite for example the Treaty between the Governments of Nicaragua and Honduras of July 12, 1957, regarding the procedures in order to submit to the International Court of Justice the differences regarding the Laudo Español of 1906.

b) Another reason for terminating treaties according to some treaty specialists, is the **"fundamental change of circumstances"** which constitutes one of the most complex and discussed chapters in International Law. Perhaps Article 62 of the Vienna Convention —which gathers together, as was said earlier, a good part of the principles of International Law based on jurisprudence and doctrine— is sufficiently clear to explain the matter. The article states:

> "Fundamental change of circumstances.
>
> 1. A fundamental change in circumstances in relation to existing ones, which was not foreseen by the parties at the time of making a treaty will not be a reason to terminate or withdraw from the treaty, except when: a) the existence of those circumstances constitutes an essential basis for consent by the Parties bound by the treaty; and b) that such change will have the effect of radically modifying the scope of the obligation which are still to be fulfilled by virtue of the treaty.
>
> 2. A fundamental change in circumstances **cannot be argued as a reason for terminating or withdrawing from a treaty:** a) if the treaty established a frontier, or b) if the fundamental change results from a violation by the arguing party, of an obligation derived from the treaty or of another international obligation with regard to any other part of the treaty.
>
> 3. When, consistent with the preceding paragraphs, one of the parties can argue that a fundamental change in the circumstances is a reason for terminating or withdrawing from a treaty, the party will also be able to cite this change as a reason for suspending the application of a treaty."

Jurisprudence has also been clear on the matter, especially with regard to the "Free Zones" case (PCIJ 1932, Series AB/46, pp. 156-158) when both Parties and the Tribunal were in agreement in that the clause did not apply to the treaties which created territorial rights.

It is superflous to formulate any commentary with respect to the treatment contemplated in the Vienna Convention in relation to the Esguerra-Bárcenas Treaty, since the selfsame Article 62 of the Convention, Numeral 2, establishes that the clause **Rebus Sic Stantibus** cannot be argued with regard to this kind of treaty.

c) Another reason for terminating is the subsequent impossibility to carry out or fulfill the treaty, provided that the impossibility is absolute and derives, in some way, from the intention of a State to evade an obligation or the negligence of one of the States in implementing a treaty.

Naturally that impossibility cannot even be referred to, when it is clear that the Treaty has been duly implemented for more than fifty years, as is the case with the 1928 Treaty.

As may be appreciated, the Treaty on Territorial Matters signed between Colombia and Nicaragua in 1928, cannot be terminated by the sole will of one of the parties. There exists no argument in International Law to back up the Government of Nicaragua's presumption in putting an end to the Treaty previously mentioned: it is incontrovertible that the Treaty is, without the least doubt, unmodifiable, obligatory, and perpetual.

(56) Vásquez Carrizosa, Alfredo, **El Concordato de Colombia con la Santa Sede** (Bogotá: Imprenta Nacional, 1974).

(57) de Olivart, Marqués, **El Derecho Internacional en los Ultimos Veinticinco Años** (Tome I) (Madrid: Espasa-Calpe, 1927), p. 521.

3º THE NULLITY OR INVALIDITY OF INTERNATIONAL TREATIES

The clear and definitive conclusion has been arrived at: Nicaragua's purported withdrawal from the fulfillment of a sacred obligation in an International Treaty on Territorial Matters is a flagrant violation of the basic and fundamental principle of International Law: Pacta Sunt Servanda. This fact alone would render unnecessary any consideration on the matter. However, by way of an overwhelming flood of arguments of proof, it has also been concluded that the 1928 Treaty is a perpetual instrument, not subject to denunciation, unless there exists an agreement to the contrary between both countries.

But dwelling more deeply on the matter for the sheer exercise of it, it is evident that in the supposed denials that Nicaragua's claim violated no rules of International Law, and that the Esguerra-Bárcenas Treaty could be denounced, the reasons put forth by the Government of Nicaragua for its nullity and invalidity are absurd.

To continue, we shall briefly study, the grounds for nullity which the Government of Nicaragua has put forth to support its claims in the light of its deeds and of conformity with the principles of International Law, since no State can pretend per se to establish its own rules for determining when an international agreement should be considered null.

a) The **"the position of the Archipelago in maritime areas supposedly belonging to Nicaragua."** We will not refer to Nicaragua's strange argument that the Archipelago of San Andrés belongs to it (the Esguerra-Bárcenas Treaty being therefore null), for being supposedly included on the continental shelf within that country's 200-mile maritime jurisdiction, which lacks technical and juridical veracity. Neither will we refer to their conclusion of nullity by reason of the impossibility of exercising sovereignty and jurisdiction over the continental shelf and other maritime areas adjacent to the Archipelago. Such opinions cannot withstand the least juridical examination. This aspect will be analyzed in another chapter exclusively from the viewpoint of the International Law of the Sea.

b) **"The Imposition of the Treaty."** Another argument put forward by the Nicaraguan Government in favour of the alleged nullity, is the following:

> "...the imposition upon our country of two Treaties absolutely injurious to Nicaragua... and the one known as the Bárcenas-Meneses-Esguerra, whose signature was imposed upon Nicaragua in 1928 and whose ratification effected in 1930 was equally due to reasons of force. That is to say, both events took place under the total military and political occupation of Nicaragua by the United States of America." (58)

It should be remembered first of all, that a detachment of American troops in Nicaragua was repeatedly requested by the Nicaraguan Government due to internal reasons in that country and, therefore, it is a matter quite apart from the negotiation, signing and ratification of the Esguerra-Bárcenas Treaty. Thus, it is absurd to suppose that the Treaty was the product of forcible imposition.

In effect, during the early part of this century, it was the custom amongst some Latin American nations, those of Central America and the Caribbean in particular, to resort to the aid of certain Powers in order to stifle or support revolutions, solve internal problems, and to neutralize or moderate direct or indirect threats from other countries. This attitude was especially evident with respect to the United States of America before which certain countries would plead to say the least, for their support and presence at various crises. We do not mention furthermore, the many requests for good offices, mediation and arbitration made to the United States for the solution of numerous problems of a territorial nature which they had to confront. We were in the "American era" before that, we had gone through the British predominance and the Spanish influence.

By way of an example, we can recall the exercise of good offices and mediation carried out by the United States in border differences between Nicaragua and Costa Rica, Nicaragua and Panamá, Colombia, Perú and Brasil, Perú and Ecuador, Perú and Chile, Venezuela and British Guiana, etc.

It is also interesting to note that whatever circumstances Nicaragua encountered between the years 1909 and 1930 in relation to the United States, it was Nicaragua who actually benefited most from American cooperation in forwarding certain claims against important Colombian territorial interests.

At the beginning of 1913, on occasion of the negotiation of the Treaty for the solution of the differences originating from the events of the Isthmus of Panamá in 1903, the Minister Plenipotentiary of the United States in Colombia, Mr. James T. Du Bois, in a memorandum delivered to the Chancellery of San Carlos, proposed the payment of $ 10'000.000 to Colombia in exchange for an "option to build an interocean canal through the Atrato and for the privilege of establishing coal-

(58) White Book of the Government of Nicaragua.

ing stations on the Islands of San Andrés and Providencia." Colombia did not accept that,nor any other of the suggested bases on that occasion for the conclusion of the Treaty,and insisted on submitting the matter to international arbitration.

The truth is, that the United States of America, already with the idea of going ahead with the construction of an inter-oceanic canal using the Nicaragua and Managua Lakes and the San Juan River, supported the Government of Nicaragua against the Colombian interests in the Archipelago of San Andrés, with the sole object of securing the construction of the inter-oceanic route. Along this line of thought, the Chamorro-Weitzel Treaty is signed on February 8, 1913, modified by the Chamorro-Bryan Treaty, whose Article II stated:

> **"In order to facilitate for the Government of the United States the protection of the Panamá Canal, and the exercise of its rights of property offered to the same Government, through the previous article,** and to facilitate also the adoption of any necessary measures for the purposes herein provided, the Nicaraguan Government hereby leases for ninety-nine years the Islands of the Caribbean Ocean known as Great Corn Island and Little Corn Island. Also granted for the same period of ninety-nine years, is the right to establish, develop and maintain a naval base on that part of Nicaragua's territory, on the Golfo of Fonseca, which the United States Government may select. The United States Government will have the option of renewing for another term of ninety-nine years the lease and the concesions referred to under the cited terms, being expressly agreed that the territory now in lease and the naval base which may be established by virtue of the above agreed concesion, will be subject exclusively to the laws and sovereign authority of the Unites States during the period of the lease and concession, and any extension of the same..." (59)

When the Colombian Government learned of the Agreement already referred to, it forwarded a protest to Nicaragua by means of Note dated August 9 of the same year, which at the same time renewed its protests, which had previously formulated on account of the occupation of the Mangles Islands in 1890. The Embassy in Washington was also instructed to inform the Government of the United States that the Chamorro-Weitzel Treaty could not be implemented because the Mangles Islands were the property of Colombia.

(59) Londoño, Julio, Derecho Territorial de Colombia (Bogotá: Imprenta de las Fuerzas Militares, 1973), p. 333.

The Treaty also earned general rejection by other Central American countries, El Salvador, Honduras and Costa Rica in particular, who saw their territorial integrity seriously threatened. The first two did so because of the clauses which authorised the United States to establish a naval base on the Golfo de Fonseca, to which they also had riparian rights; Costa Rica rejected the Treaty because Nicaragua permitted the construction of a Canal via the San Juan River, to which Costa Rica had navigation rights. The general rejection of the Treaty sustained the hope it would not be approved, in spite of all the efforts carried out to this end by Secretary of State William Bryan. However, the Contracting Parties redoubled their activity, modified the Managua Commitment (Chamorro-Weitzel), substituting for it, as was mentioned already, the Chamorro Bryan Treaty —basically the same as the previous one— which was approved by the American Congress on February 18, 1915.

America's attitude towards Colombia was not limited to this act alone. In 1917, the Secretary of State expressed to the Colombian Minister in Washington, Carlos Adolfo Urueta, the "convinience" of withdrawing a military detachment situated in San Andrés in order to facilitate the negotiations between Colombia and Nicaragua. The "suggestion" was, however, rejected by the Colombian Chancellery.

Since 1915, the Colombian Government had designated, as its Minister in Managua, Don Manuel Esguerra, who within a short time began long negotiations with the Nicaraguan Chancellery and a Special Advisory Commision of similar characteristics as the one which operated in Bogotá. In the period during which the Treaty was negotiated and debated, frequent internal convulsions troubled Nicaragua. However, throughout this interesting process members of the two Nicaraguan political parties participated, its clauses were widely known by the public opinion of that country, and the press was opened to various opinions, as much to defenders as to opponents of the possible agreement.

In February 1924, news appeared in Nicaragua's newspaper, to the effect that President Martínez and Chancellor Urtecho had held an interview with the Minister of the United States in Managua, Mr. Ramer, with the purpose of briefing the American official with regard to the state of differences between Colombia and Nicaragua, and delivering to him an extensive memorandum on the matter intended for the Department of State. Esguerra immediately protested before the President and the Chancellor to what he classified "an undue meddling in matters which solely pertain to Colombia and Nicaragua." Both dignataries averred that the newspaper accounts were baseless.

On January 3, 1925, the Minister of Foreign Relations of Nicaragua, Engineer José Andrés Urtecho solicited the "good offices" of the

Government of the United States to "convince" Colombia to submit the existing disagreement to arbitration, but only with regard to the Archipelago of San Andrés. Colombia's Chancellery rejected peremptorily Americas efforts, arguing that it could not put forth before an arbitration tribunal its rights over a territory, such as the Archipelago of San Andrés, which was, without any doubt, its possession and over which it had been exercising sovereignty uninterruptedly since the very days of American Independence. The United States's efforts before Colombia failed, despite Nicaragua's urgings.

It should also be remembered that not for one moment, neither between 1880 and 1890, nor between 1890 and 1928, did Nicaragua make any protests or claims of any sort regarding the Cays of the Archipelago of San Andrés —despite the actual steps the American Government carried out concerning them.

In 1907, Zaguerra, who was then in El Salvador, returned to Nicaragua to continue the negotiations already begun with one of the most illustrious men of Nicaragua in the modern era, Carlos Cuadra Pasos. Once the foundations of Convention had been agreed-upon, President Adams thus surprisingly declared to Zaguerra that he was going to discuss them with the Government of the United States "since this country still had interests in the area" (it had leased for 99 years the Corn Islands of "Los Mangles" to which the Colombo-Nicaraguan Agreement was referring and had absolutely built light-houses in the cays of Roncador, Quitasueño and Serrana). Although the Colombian Plenipotentiary rejected the Nicaraguan decision, in no way could he prevent it.

The Treaty was signed on March 24, 1928. Zaguerra returned towards the end of the year from Guatemala, to which he had been transferred after the signing of the Treaty, when President Alfonso Díaz was presenting the Treaty for the consideration of Congress at the opening of its sessions, December 29 of the same year.

In any case, in spite of the Government's interests, the fact that in just a few days General José Moncada was to assume power —he was a member of the Liberal party, after eighteen years of Conservative hegemony— caused a complete governmental paralysis, including the Congress. The new President, once in office, commented to Zaguerra that although he was unfamiliar with the terms of the Treaty, he promised to study it, nonetheless respecting Congress's absolute liberty and independence for approving or rejecting it. (60)

(60) Ministry of Foreign Relations, Correspondence with the Legation in Managua, 1928.

However, Congress did not take up the study of the Treaty and asked the Government for new information regarding the matter. Finally, in the month of December, 1929, documents on the Agreement submitted once more to the Parliamentary Commission on Foreign Relations. The Commission, after a detailed analysis, rendered to the House of the House its report favourable to the approval of the Treaty, recommending only the inclusion of a point of clarification to the effect that the Archipelago of San Andrés did not extend further than the 82° meridian.

In the Senate, discussions on the Treaty began on March 4, 1930. It was analyzed in detail, in the presence of Chancellor Manuel Cordero Reyes, who had replaced Carlos Cuadra Pasos. After a prolonged debate in the Senate, the Treaty was approved unanimously, there was no discrepancy of opinion at all, except with regard to the interpretation and scope of the clause which clarified the point about the 82° meridian which the Commission on Foreign Relations had recommended adding.

The Treaty passed from the Senate to the House, where it was subject to a preliminary analysis and then sent to a special Commission formed by Dr. Argüello, Dr. Irías, Dr. Garcia Lacayo-Pasos and Dr. Borgen. The Commission's report was submitted to the House for its consideration on March 18, 1930, where again it came under careful scrutiny —where both in favour and those against had the opportunity to study its history, projections and clauses. It was an honest and open debate, whose characteristics can be appreciated in some of the session's minutes:

> "Deputy Gringoire said that since the Treaty had arrived in the hands of the Commission some time ago, and that because they had been making a considerations study of it they had not presented their report before now, he therefore requested the House for the Treaty that discussion begin now, each one putting forth his reasons for accepting the majority report, or to oppose it, adding that he wishes to remind all that he will vote against the report now in discussion.
>
> Deputy Calero B. says they ought to wait for Deputy Dr. Borgen's opinion and the reasons that he will give, since he does not see the necessity for proceeding in so precipitous a manner.
>
> Deputy Garcia Lacayo-Pasos said: I must say to the Honourable House that this is a matter which as always preoccupied and not me alone, now that I am a member of the Honourable National Representation, but also all those who care about the territorial integrity of Nicaragua.

Therefore, I must protest against those who are pointing out to us that we must be Nicaraguans. We are Nicaraguans and we feel a deep, profound love for our homeland; but the love for our country does not mean that we are blinded so absolutely that we cannot understand that above certain interests of the moment, there are those permanent interests of the future which we ought to leave completely resolved, completely cleared up so that future generations may come and sow the seed of Nicaragua's progress.

The Commission on Foreign Relations, of which I am part, has studied this matter conscientiously. Our conclusion is that the territorial question with Colombia can only be solved in three ways:

First: By direct arrangement between both countries, as done by the Treaty that we all know;

Second: By arbitration; and

Third: By War."

In the session of April 3, 1930, the following was expressed:

"Deputy Largaespada requested that the opinion issued by the majority be inserted in the minutes. It reads as follows, verbatim:

Honourable House: Few times has the House been presented, in our judgement, with a matter of such interest and importance as the Treaty drawn between our Republic and the Republic of Colombia, which puts an end to the already long dialogue, regarding dominion over the islands of San Andrés and Providencia, and the Costa Mosquitia, which both countries have been disputing for a very long time. We also believe that only very rarely have the Statutory Commissions, charged with submitting reports regarding matters debated in the Houses, had upon them the study of a matter of deeper interest and profounder responsibility. We have been very preoccupied with handling this matter with the best possible investigation. We have dedicated long days of meditation and calm to this study. Everything, whatever has been written on the matter, from one and another source, has been the object of our attention."

The Commission, after a prolonged discussion, produced two reports: one in favour —the majority opinion— advocated by two Deputies and supported by four others; and one against, advocated by Deputy Borgen, with the support of three other legislators. Once the two reports were discussed and submitted to a vote, it was approved by a majority vote of 25 in favour, with 13 opposed. The ratification was formalized by Law on March 6, 1930.

It cannot be derived from the reading of this elaborate process of negotiation, signature and approval of the Treaty, that there might have existed any coercion whatsoever over the representatives of Nicaragua "through deeds or threats," as specified by International Law, in order to make that country conclude the Treaty with Colombia. Neither can it be affirmed that there existed such "deeds or threats of the use of force" against Nicaragua in order to force Nicaragua to the agreement.

Colombia, through its Minister in Nicaragua, Manuel Esguerra, pursued since 1915 extensive and difficult negotiations with each of the Chancellors who discharged that office over a period of fifteen years.

The terms of the Treaty were agreed upon with a Conservative Government through one of the most illutrious public men of the history of Nicaragua, and signed by a different Plenipotentiary. The Treaty was submitted to the National Congress, initially to the legislature of 1928 and then to the one of 1929. Once in Congress it was studied and approved by a Senate Commission and then by a plenary session of the same, later approved by a Commission of the House and then by a plenary session of the same, and finally approved by the Senate and the House together. **The ratification and exchange of notes of ratification were carried out by a Liberal Government** —furious opponent and rival of the Conservative party, the negotiator of the Treaty, who, as was said earlier, had established a governmental hegemony that lasted eighteen uninterrupted years.

Finally, we wish to point out that if the Government of Nicaragua has considered that between 1909 and 1979 it did not have sufficient liberty and autonomy to manifest its sovereign will to adhere to international treaties or not to —all of them therefore suffering from a grave lack of consent— it would be interesting to speculate what the situation would be with respect to the agreements made since 1909 until the present day (Annex). As will be observed, there are more than three hundred contractual engagements, ranging from the Charter of the United Nations to agreements of technical and financial assistance and cooperation for Nicaragua, which should be, according to the thesis of the Government Junta of that country, "null and void."

c) **The story about the "secret treaty."** Nicaragua also expressed in its Declaration:

> "This Bárcenas Meneses-Esguerra Treaty was kept in secret for some time and concluded in flagrant violation of the Nicaraguan Constitutions in force all the time, which prohibited,in absolute terms, the signing of treaties which imply injury to the country's sovereignty or the dismemberment of its territory."

It is incongruous to say that a Treaty that was the object, as has already been seen, of extensive debates in Nicaragua's Congress for almost two years —defended, opposed and commented on in Nicaraguan newspapers— could have been a "secret treaty." It is not worth the trouble even to begin analyzing this assertion: the reality is evident. But even if, assuming the contrary, the Treaty had been "secretly" drawn up, this fact would in no way affect the validity of the instrument, according to the established principles of International Law.

d) **The supposed violation of the Constitution.** In this matter, the Government of Nicaragua has also declared that the Treaty of 1928 was drawn up in open violation of the Constitution of 1911. On this Nicaragua states that "the decision to declare the Bárcenas Meneses-Esguerra Treaty null and void is in no way unfounded, but that it is firmly founded on Nicaragua's juridical-constitucional tradition..." With this respect it cites Articles 2 and 3 of the Constitution of 1911 —in force at the time the Treaty of 1928 was negotiated, signed and ratified:

> "Article 2°. Sovereignty is one, unalienable and unprescriptable and resides essentially in the people from whom officials derive their powers as the Constitution and the Law establish. Consequently, no treaties can be drawn up which are opposed to the nations's independence and integrity of that affect in some way its sovereignty, except those [treaties] which tend to unity with one or more of the Republics of Central America."
>
> "Article 3°. Public officials do not have more powers than those the law expressly gives them. Every action outside of it [the law] is null."

The Vienna Convention on the Law of Treaties dedicates two articles on the matter of the norms of national law vis-à-vis International Law. Article 27 states:

> "One of the Parties will not be able to invoke the governing principles of its national law as a means of justifying noncompliance with the treaty. This norm will be understood without prejudice to what is prescribed in article 46."

Article 46 is of the following tenor:

> "1. The fact that the assent of a State in binding itself by a treaty had been carried out in violation of a norm in its national law concerning its authority to make treaties, cannot be argued by such State as a defect in its assent, unless such violation be manifest and affects a norm of fundamental importance in its national law.
>
> 2. A violation is manifest if it turns out to be objectively evident to any State dealing with the subject in accordance with the usual practice and in good faith."

As can be appreciated, both articles are stated in negative form with the purpose of making note of the exceptional character of resorting to national law as grounds for the nullity of an international treaty. So, the general rule is clearly defined in Article 27, whilst Article 46 even through the form of its setting forth is equally negative.

Let us see what the "violated" norm of the Nicaraguan Constitution of 1911 might be, since the Government of that country does not point it out precisely in its exposition. We suppose that it could be the passage in Article 2 which says: "... No treaties opposed to the independence and integrity of the nation or that affect its sovereignty in any way may be drawn up..."

It is clear, as will be seen in another part of this exposition, the Treaty of 1928, far from affecting the integrity or sovereignty of Nicaragua, favoured both notably. The juridical entitlements granted Colombia not only the Mangles Islands but also the Costa Mosquitia, from Cabo Gracias a Dios up to the San Juan River. A definitive, clear and peremptory decree of the Spanish Crown —as the Royal Order of 1803 indeed was— ordered it as such. The Constitutional Charter which the Government of Nicaragua considers violated did not include as part of its territory the Archipelago of San Andrés (including the Mangles Islands): it could not do so and, as is just only natural to surmise, it never intended to.

A fundamental requisite stipulated by paragraph 2 of Article 46 of the Vienna Convention is that the violation be **manifest** —a term which is explained in the following paragraph of the Article in the sense that "it is evident to any State."

In this case, doubtless not only is the supposed violation not evident to any State, but it was not so for the Government of Nicaragua itself for more than half a century. Even more than that, the Treaty, as was explained and demostrated, underwent a long process of parliamentary

approval in two successive legislative sessions. With this respect the Commission on International Law points out in its article of commentary (Nº 43 of the Project):

> "When a treaty has been agreed upon except for its ratification, acceptance and approval, it can be said that the negotiating States have done all that can required of them with regard to the fulfillment of the requisites demanded by their respective constitutions. Is it not reasonable to expect that each government has then to pursue the internal processing of the treaty through every one of the other governments. Moreover, all inquiries by a government regarding the constitutional bases of the internal processing of a treaty would doubtless be considered an inadmisible interference in the internal affairs of the State." (61)

Further, this same document points out:

> "It is considered that the majority of diplomatic incidents, in which States have alleged their constitutional requirements as grounds for invalidating [a treaty], have been matters in which, for very different reasons, they wished to evade their contractual obligations." (62)

We have the clear impression that this case [with Nicaragua] bears the same characteristics as those to which the Commission on International Law alludes. What is more, Nicaragua seems to have used similar means on other occasions, even with its two closest neighbours: Costa Rica in 1871 and Honduras in 1912.

On analyzing the text of the two cited articles of the Constitution of 1911, it should also be pointed out that the majority of countries have similar norms in their respective Constitutional Charters. However, it cannot be affirmed that the Treaty on Territorial Matters, duly approved by the respective Congresses, and [followed by] an exchange of the instruments of ratification, implies a Constitucional violation because fifty years after its signing the Instrument is considered by the Government in office to have been "injurious" to the country. This is the more certain for as much as the territorial extension of the American States which arose with independence was not, in many cases, clearly defined, since the Uti Possidetis Juris of 1810 did not always set forth absolutely exact and precise borders. If it had been so, no problem of any sort would have arisen in the demarcation of the frontiers among these countries: it would have sufficed merely to refer to some sort of self-explanatory code, which would immediately have pointed out the frontiers of each State.

(61) Report of the Commission on International Law, A/6309/Rev. 1, p. 73.
(62) Ibid., p. 74.

4º THE IMPOSSIBILITY OF ALLEGING NULLITIES ON THE PART OF NICARAGUA

We have briefly examined the incongruencies of the purported reasons for nullity which the Nicaraguan Government has alleged in order to denounce a treaty which is not subject to denunciation and is of perpetual force. It should also be remembered that even if the reverse were true —that the grounds for abrogation did apply and the Treaty were susceptible of denunciation— Nicaragua, more than half a century since the Treaty's instruments of ratification were exchanged, would have lost its right to allege any grounds for discharge, termination, withdrawal or suspension of the Treaty of 1928. Article 45 of the Vienna Convention addresses this particular:

> "A State will not be able to allege a cause for annulling, terminating, withdrawing or to cease the application of a Treaty pursuant to that prescribed by Articles 46 to 50 or in Articles 60 and 62, if, after being aware of the facts, that State:
>
> a) Has expressly agreed that the Treaty is valid, continues in force or continues to be applied, as the case may be.
>
> b) It has acted in such a way that it should be considered to have assented to the validity of the Treaty or to its continuation in force or its application, as the case may be."

This fundamentally important principle of International Law within the law of treaties, according to which one party cannot gain advantages from its own inconsistencies, is supported by equity and good faith (**allegans contraria non audiendus est**).

In the case which concerns us, just reading this article brings us immediately to conclude that Nicaragua could scarcely argue a single ground for abrogating or considering the Esguerra-Bárcenas Treaty terminated.

It is axiomatic that this country [Nicaragua] for about 50 years has given its assent to the validity and force of the Treaty. Since 1930, not one of the governments of Nicaragua officially or privately, openly or tacitly, indicated that the Treaty was null. Throughout the administrations of José M. Moncada (1929-1932), Juan B. Sacasa (1933-1936), Brenes Jarquin (1936), Anastasio Somoza García (1937-1947), Leonardo Ar-

güello (1947), Lacayo Sacasa (1947), V. M. Román Reyes (1947-1950), Anastasio Somoza García (1951-1956), Luis Somoza D. (1956-1963), René Schick G. (1963-1966), Lorenzo García (1966-1967), Anastasio Somoza (1967-1972 and 1974-1979), nor even during the triumvirate Administration which governed Nicaragua between 1972 and 1974, never was there anything said to that effect.

When in the years 1969 and 1970, and later on in 1976 and 1977, some diferences had arisen between the two countries with respect to the nature of the 82° Greenwich meridian —referred to in the Minutes of the exchange of instruments of ratification of the 1928 Treaty— due to some concessions granted by Nicaragua for the exploration and development of hydrocarbons to the east of this meridian, never did the Government of that country argue any cause for the nullity of the Treaty. This is confirmed by the copious correspondence on this particular matter exchanged between the Parties, by the official and private declarations of the Chancellors and of the President of the Republic himself, and by the negotiations on the matter carried out by the commissions from either country: not for even a moment was the possible nullity of the 1928 Treaty mentioned by Nicaragua's Representatives. It is evident, however, that even if that country —to asume the contrary— had valid reasons to argue for the nullity, it would have lost the option to do so.

Jurisprudence clearly recognizes the loss of the option to allege nullity after a certain period of time:

> "Le fait que le Nicaragua n' ait émis de doute quant à la validité de la sentence que plusieurs années après avoir pris connaissance de son texte complet confirme la conclusion à laquelle la Cour est parvenue. L'attitude des autorités du Nicaragua au cours de cette période a été conforme à l'article VII du traité Gámez-Bonilla, d'aprés lequel la décision arbitrale quelle qu'elle soit —et, de l'avis de la Cour, cela s'applique également à la décision rendue par le roi d'Espagne en qualité d'arbitre— "sera considérée comme un traité parfait, obligatoire et perpétuel entre les Hautes Parties contractantes et ne sera susceptible d'aucun recours." (63)

With regard to the Préah Vihéar Temple case, the Court also takes this criterion:

(63) Affaire de la Sentence Arbitrale Rendue par le roi d'Espagne, C.I.J. Recueil, 1960, pp. 213-214.

> "Même s'il existait un doute sur l'acceptation par le Siam en 1908 de la carte, et par conséquent de la frontière qui y est indiquée, la Cour, tenant compte des événements ultérieurs, considére que la Thailande, en raison de sa conduite, ne saurait aujourd'hui affirmer qu'elle n'a pas accepté la carte. Pendant cinquante ans cet Etat a joui des avantages que la Convention de 1904 lui assurait, quand ce ne serait que l'avantage d'une frontiére stable. La France et, par l'intermédiaire de celle-ci, le Cambodge se sont fiés à son acceptation de la carte. Puisqu'aucune des deux Parties ne peut invoquer l'erreur, il est sans importance de rechercher si cette confiance était fondée sur la conviction de l'exactitude de la carte. La Thailande ne peut aujourd'hui, tout en continuant à invoquer les bénéfices du réglement et à en jouir, contester qu'elle ait jamais été partie consentante au règlement." (64)

Further on it states:

> "La Cour estime d'autre part que, considérée dans son ensemble la conduite ultérieure de la Thailande a confirmé et corroboré son acceptation initiale et que les actes accomplis par la Thailande sur les lieux n'ont pas suffi à l'annuler." (65)

Regarding the arbitration over the Beagle Canal between Argentina and Chile, the Court accepted Chile's argument on the matter, although this country did not actually invoke the "Estoppel":

> "In these circumstances, the lack of protests from Argentina during the thirty-four years that followed the making of the Treaty, constituted an acceptance or recognition of the territorial situation established by the terms of such instrument." (66)

The same principle has been considered in the verdicts given on the Jurisdiction of the European Commission on the Rhine (PCIJ, 1927), Juridical Status of East Greenland (PCIJ, 1933), the Losinger Case (PCIJ, 1936), and the Nottebohm Case (ICJ, 1955), to mention only a few.

(64) Affaire du Temple de Préah Vihéar, C. I. J. Recueil, 1962, p. 32.

(65) Ibid., pp. 32-33.

(66) Laudo Arbitral sobre la Controversia en la Región del Canal del Beagle, 1977, p. 261, paragraph 161.

5º EVEN IF THE TREATY ON TERRITORIAL MATTERS OF 1928 HAD NEVER BEEN MADE, THE ARCHIPELAGO OF SAN ANDRES LEGALLY BELONGED TO COLOMBIA

Within Nicaragua's Declaration and White Book certain affirmations appear that are notable and significant. The former states, for example, in one of its parts:

> "The historical circumstances which our country lived through after 1909, hindered a genuine defense of our continental shelf, jurisdictional waters and insular territories which arise from said continental shelf, an absence of sovereignty which was demostrated..." (67)

As was said earlier, both Nicaragua's public concession that it has not excercised sovereignty over the adjacent maritime areas, as well as its assertation about the physical situation on the Archipelago will be examined in another place.

It should be pointed out for now that Nicaragua's official declaration that it has not exercised sovereignty over foreign territory, as is the territory of the Archipelago of San Andrés is only the expression of compliance with an obligation imposed on it by International Law. It is the recognition of the fact that it is Colombia who, from time immemorial, has exercised sovereignty, in all its forms, over the Archipelago in a public, peaceful and uninterrupted way, with the consent of Nicaragua itself. Is Nicaragua now trying to modifiy this attitude?

It is interesting to note that Nicaragua's Declaration confirms and supports the fact that, even if the Esguerra-Bárcenas Treaty had not been signed and the plentiful and valid Colombian entitlement did not exist, the Archipelago would belong to our country anyway.

In effect, as we have pointed out already, the possession of a territory by a State for a long period of time in a peaceful and uninterrupted manner, joined with the **animo domine** and acquiescence of third-party States is as sufficient entitlement to sovereignty as that State could possibly exhibit. On this point all treaty specialists are in agreement and there is ample jurisprudence [to that effect].

Judge Max Huber in his sentence with regard to the Isla de Palmas, addresses this point:

(67) Declaración de la Junta de Gobierno de Reconstrucción Nacional (Managua, February, 1980).

> "Practice as well as doctrine recognizes, though under different legal formulas and with certain differences as to the conditions required, that the continous and pacific display of territorial sovereignty is as good as a title." (68)

The International Court of Justice, in the "Status of East Greenland" case, declared:

> "...it may be well to state that a claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority." (69)

Further on the Court states:

> "...the absence of all claim to sovereignty over Greenland by any other Power, Denmark must be regarded as having displayed during this period of 1814 to 1915 her authority over the uncolonized part of the country to a degree sufficient to confer a valid title to the sovereignty." (70)

With regard to the sovereignty over the Minquiers and Ecréhos Islands between France and Great Britain, the Court declares:

> "However, the Tribunal does not believe that it can come to a definitive conclusion regarding the sovereignty over Ecréhos and Minquiers from these considerations alone. This question should depend in the final analysis on the proofs which refer directly to the possesion of these groups." (71)

Even if the Treaty had been signed, but not ratified, it should be accepted that this fact alone would have created a point in favour of Colombia, especially so since it had been exercising exclusive and uninterrupted sovereignty over the Archipelago of San Andrés for a century and a half. If the Nicaraguan Government made a Treaty of such nature, it was because it clearly held the juridical and moral conviction that the Archipelago belonged to Colombia.

(68) Permanent Court of Arbitration. (International Bureau of the Permanent Court of Arbitration, April 4, 1928).

(69) PCIJ, Series A/B, Nº 53, pp. 45f.

(70) PCIJ, Series A/B, Nº 53, p. 54.

(71) Report of the International Court of Justice, p. 55.

On the matter of the lighthouses on the islands of Orvie and Sa-

ons, the Court declares:

> "In regard to relative to Orvie, the Treaty of London ex-
> pressly reads: 'Your Majesty, the Emperor of the Ottomans
> declares to cede to Your Majesties, the sovereign allies of the
> Island of Orvie, and to renounce in your favour, all the rights
> of sovereignty and any other rights which it might possess over
> this Island.' It would be very difficult to find a more explicit
> proof of the Sultan's persistent sovereignty until this date,
> than this solemn renunciation by the latter in an international
> document signed by Sweden." (72)

In the dispute relative to sovereignty over certain parcels of border territory of Belgium and Holland, the Court opines that an Agreement that has not been ratified does not create rights, but indicates the presumption in favour of Belgium because of [its] exercise of sovereignty:

> "Sans doute, la Convention non ratifiée de 1882 n'a défini ni
> droits ni obligations mais les termes de la Convention, elle-mê-
> me et les événements contemporains montrent qu'à cette époque
> la Belgique affirmait sa souveraineté sur les deux parcel-
> les et que les Pays-Bas ne l'ignoraient pas." (73)

From the preceding it may be concluded that, in conformity with doctrine and jurisprudence, even under the unimaginable supposition that the Esguerra-Bárcenas Treaty had never been drawn up, the entirety of the Archipiélago de San Andrés including all its cays and islets, would belong just as much to the Republic of Colombia by virtue of a public, peaceful, uninterrupted exercise of sovereignty from time immemorial, accompanied by the **animo domine** and by the acquiescence of the international community in general, and of the Republic of Nicaragua in particular.

(72) PCIJ, Series A/B, N° 72, pp. 106f.

(73) ICJ, Arrêts, 1959, p. 228.

ANNEX

AGREEMENTS, CONVENTIONS, TREATIES, ACTS, EXCHANGES OF NOTES, PACTS AND PROTOCOLS SIGNED BY NICARAGUA BETWEEN 1900-1979

BILATERAL

Convention on Arbitration before the Hague Tribunal, celebrated between Nicaragua and Portugal, 7-17-1900.

Treaties of Arbitration between Nicaragua and Belgium, Exchange of notes, 7-26-1900.

Convention on Postal packages with Mexico, Exchange of notes, 7-27-1900.

Convention on Cédulas de Ezeiza 9-1-01, approved (CEPEO) 10-17-1911.

Convention on Neutralization between Nicaragua and the U. S. A., exchange of notes 8-28-1912.

Conventions drawn up in Second Conference of Central American States in San Salvador, Feb. 1910, ratified 12-20-1911.

Convention on the Customs Monetary System to Promulgate in the First Conference of Central American States, 6-14-1912.

Convention of the Fourth Intl Conference of American States on Trademarks and Commerce, signed in Buenos Aires, 4-24-1912.

Convention on Literary and Artistic Copyrights, 4-24-1912.

Convention on patents of inventions, designs and industrial models, 4-24-1912.

BILATERAL

Convention with France regarding a 25% reduction in Rights relative to the Registration of Policies, 9-10-1913.

Convention with Panamá of 9-15-14 regarding Packages for Mail. 10-27-14.

Convention of 8-5-14 in Washington between Nicaragua and the United States regarding the Canalization of the San Juan River, 4-13-1916.

Briand-Chamorro Convention in Washington 8-5-14 on the Construction of the Interoceanic Canal, 7-25-1916.

Peace and Friendship Treaty in Washington, 12-17-13, between Nicaragua and the United States, 6-15-1916.

MULTILATERAL

Convention in Brussels for the Unification of certain rules on matters of collision, 5-21-1913.

Convention in Guatemala on 1-17-11 among five Central American Republics for the Exchange of parcel-post packages, 8-27-1913.

Convention on the Unification of Central American Consular Service, 5-20-1913.

Convention signed in Guatemala on 1-11-12 for the Establishment of Three Central American Institutions according to Article VII of the Peace and Friendship Treaty in Washington, 8-27-1913.

Convention concluded in Buenos Aires during the Fourth International American Conference regarding monetary claims, 10-16-1913.

Protocol among the five Central American Republics signed in Washington, 9-17-07, to unite in this city and sort out any differences among these countries, 7-27-1916.

Convention with Honduras, on Frontier Borders, 7-26 1916.

Convention on Nationality between Italy and Nicaragua, 4-25-1919.

Postal Convention, signed in San Salvador, 2-26-1919.

Convention on Postal Money Orders, 11-15-1919.

Convention on Postal Money Orders with El Salvador, 11-23-1923.

Treaty of Versailles, 6-28-1919.

Treaty (Sacoma) among El Salvador, Honduras and Nicaragua, 8-20-1922.

General Treaty of Peace and Friendship (Central American Convention in Washington). Ratified, 3-15-1923.

Convention for the Establishment of an International Central American Tribunal, 3-15-1923.

Convention to Unify Protective Laws for Labourers and Workers, 3-15-1923.

Declaration on Treaties among the Central American Republics at Conference on Central American Affairs which states that only the Spanish text is compulsory, 3-16-1923.

Convention for the Establishment of Centers for Agricultural Experimentation Regarding the Cattle Industries, 3-16-1923.

Convention on the Exercise of Liberal Arts, 3-16-1923.

Extradition Convention, 3-16-1923.

BILATERAL

Treaty regarding the Re-establishment of Peace in Honduras, 5-3-1924.

Treaty on Free Trade with Guatemala, 9-10-1924. In force since 10-30-1924.

MULTILATERAL

Convention on Free exchange, 3-16-1923.

Convention relative to the preparation of protection for the electoral laws, 4-16-1923.

Conventions for the Establishment of Permanent Central American Commissions, 3-16-1923.

Convention on Reciprocal Exchange of Central American Students, 3-16-1923.

Convention on Arms Limitations, 3-16-1923.

Protocol of an Agreement among the United States, Guatemala, El Salvador, Honduras, Nicaragua, and Costa Rica, from which and Intl. Central American Tribunal will be set up, 2-7-1923.

Additional Protocol, 2-7-1923.

Anti-war Treaty of 8-27-1923, by which all subversive propaganda is considered a violation of the obligations agreed upon by the nation in the Peace and Friendship Treaty of 2-7-23.

Convention for Protection of commercial, industrial, agricultural trade marks and commercial names (Fifth Inter-American Conference). Ratified, 1-11-1929.

Treaties to avoid or prevent conflicts among American States (Fifth Inter-American Conference), 3-16-1929.

Convention on Private International Law (Sixth Inter-American Conference), 1-31-1929.

Convention on Commercial Aviation (Sixth Inter-American Conference), 2-19-1929.

Convention on General Aviation (Sixth Intl. Conference of La Habana). Ratified, 2-19-1929.

Convention on Pan-American Union. Approved, 1-14-1929.

General Treaty of International Arbitration, signed in Washington, 1-5-1929.

Treaty of Inter-American Arbitration. Approved 4-22 1930.

General Convention on Inter-American Conciliation. Approved, 7-9-1930.

Treaty with Colombia to put an end to the pending question of the Archipiélago de San Andrés y Providencia and the Nicaraguan Mosquitia. Ratified, 5-5-1930.

Treaty of Free Trade or Exchange with Honduras. Ratified, 3-26-1930.

Sanitary Convention with Costa Rica to combat Smallpox, 7-29-1930.

Arrangement Protocol on the Question of Borders with Honduras (Irias-Ulloa Treaty). Ratified, 1-28-1931.

BILATERAL

Contract between the Govt. of Nicaragua and the Union Oil Co. of California regarding the supply of gasoline, kerosene, and lubricating oils, 10-2-1931.

Additional Convention to the one of 11-5-1904, Treaty of Extradiction with Belgium. Ratified, 2-1-1934.

Convention on Literary, artistic and scientific copyrights with Spain. Ratified 2-22-1935.

Convention with Spain on Prohibition of circulation or exhibition of films which would attack, defame, etc., either of the countries, 11-6-1935.

MULTILATERAL

Protocol of Progressive Arbitration. Approved, 5-20-1931. Ratified, 5-31-1932, among the American Nations, signed in Washington.

Intl. Convention on radiotelegraphy, General and Additional Regulations, signed in Washington, 8-11-1932.

Convention on Postal Union of the Americas and Spain, and Agreement on Packages for Mail. Ratified 6-7-1934.

General Convention on the Protection of Literary and Artistic Copyrights, 2-15-1934.

Convention for the Regulation of Labour in its different approved forms. Approved, 2-24-1934.

South American Anti-war Treaty (non-aggression and conciliation). Ratified, 2-16-1936.

General Convention to develop means to avoid war. Ratification, 3-2-1935.

Treaty on Protection of furniture of historical value, 2-17-1935.

Convention to facilitate circulation of educational films, 2-22-1935.

Commercial Convention with the United States of America. Ratified, 8-17-1936.

Pact of reciprocal offers from Honduras and Nicaragua for the withdrawal of frontier military posts. Approved, 12-15-1937.

Agreement to insure protection against White Slave Traffic, 7-15-1935.

Intl. Convention regarding repression of White Slave Traffic, 7-25-1935.

General Convention on Trade marks and commercial protection, 12-20-1935.

International Convention for the Suppression of the Traffic in Women and Children. Ratifed, 3-1-1935.

International Convention regarding the Traffic in Women of Full Age. Ratified, 3-1-1935.

Treaty of Central American Confraternity, 7-9-1935.

Central American Convention on Extradition, 7-12-1935.

Agreement on Rights and Duties of States. Ratified, 7-1-1935.

Convention on the Right of Asylum (Pan-American Conference in Havana), 2-9-1937.

Convention on Political Asylum. Ratified, 2-9-1937.

Agreement on Women's Nationality (Seventh Pan American Conference). Ratified, 2-5-1937.

Convention on the Teaching of History. Ratified, 2-9-1937.

BILATERAL

MULTILATERAL

Convention on Extradition (Seventh Pan-American Conference). Ratified, 5-24-1937.

Additional Protocol. Non-Intervention. Ratified, 6-15 1937.

Convention on maintenance, preservation, and re-establishment of peace. Ratified, 6-15-1937.

Convention on co-ordination, extension and execution of the existing treaties between the American States. Ratified, 6-15-1937.

Inter-American Treaty on good offices and mediation. Ratified, 6-15-1937.

Convention for the promotion of Inter-American cultural relations. Ratified, 6-15-1937.

Treaty on the prevention of controversies. Ratified, 6-15-1937.

Convention on Exchange of Publications. Ratified, 6-15-1937.

Convention on facilities for artistic exhibitions. Ratified, 6-15-1937.

Convention on facilities for educational films or for propaganda. Ratified, 6-15-1937.

Additional Protocol of Convention on Inter-American Conciliation. Ratified, 8-14-1937.

Commercial Convention between France and Nicaragua. Ratified, 5-24-1938.

Commercial Convention with France applicable to Italy, 7-17-1939.

Cordero Reyes-Zúñiga Montúfar Convention regarding canalization of the San Juan River. Ratified, 5-31-1940. (Between Nicaragua and Costa Rica).

Rules concerning Nicaragua's Neutrality in the face of European conflict, 10-18-1939.

Final Minutes of the Advisory Meeting among the Ministers of Foreign Affairs of the American Republics according to the Buenos Aires and Lima Agreements. Approved, 10-18-1939.

Declaration of Neutrality by the Republic of Nicaragua in the face of the present war among France, England, Poland and Germany, 10-18-1939.

Convention for the Protection of America's Flora and Fauna, 10-12-1940.

International Coffee Convention signed in Washington, 4-25-1941.

Convention on the Inter-American Indian Institute. Ratified, 12-27-1941.

War declared with Japan, 12-10-1941.

War declared with Germany and Italy, 12-11-1941.

War declared with Hungary, Rumania, and Bulgaria, 12-19-1941.

Convention on Provisional Administration of European Colonies and Possessions in America. Ratified, 12-19-1941.

International Convention regarding the creation of an Inter-American Indian Institute. Ratified, 12-19-1941.

Convention on International Civil Aviation, 12-7-1944.

Convention on Promotion of International air Services, 12-7-1944.

Agreement on International Air Transport, 12-7-1944.

Constitution of the United Nations Agricultural and Nutrition Organization, 10-1945.

Central American Coffee Convention, México City, 11-11-1945.

Convention on the International Monetary Fund and International Bank for Reconstruction and Development, 2-1-1946.

Convention on the International Bank for Reconstruction and Development, 2-28-1946.

Inter-American Convention on Authors' rights concerning literary, scientific and artistic works, 6-22-1946.

Central American Coffee Convention, México City. Ratified, 7-5-1946.

Convention which created the United Nations Educational, Scientific, and Cultural Organization, London, November 16, 1945. Came into force on November 4, 1946.

Friendship Pact between Nicaragua and Costa Rica, 2-21-1949.

Convention for the Establishment of Radio Communications between Nicaragua and the Dominican Republic, ratified 10-7-1949.

Agreement between Nicaragua and the United States of America to end Commercial Agreement of March 11, 1936, 2-28-1950.

Convention on Radio Communications between Nicaragua and México, 11-19-1946. Ratified, 9-28-1950.

Constitution of the World Health Organization, New York, June 22, 1946. The instruments of acceptance were deposited on November 5, 1976.

Protocol to prolong the International Sanitary Convention, 1944. Came into force on April 30, 1946.

Agreement of the Central American Conference of Agricultural Ministers, México City, 2-26-1947.

Additional Protocol to Convention for the Suppression of the Traffic in Women and Children, Geneva, 1921, and the Convention for the Suppression of the Traffic in Women of Full Age, Geneva, 1933. Came into force November 12, 1947.

International Agreement on Wheat, 3-23-1949.

Agreement on Campaign against the Locust, 6-22-1949.

Ratification and adhesion to the International American Institute for Infant Protection, 7-15-1949.

Agreement of the Third Conference of Agricultural Ministers, 7-20-1949.

Agreement on Inter-American Radio Communications FIAR, Washington, 1949.

American Treaty on Pacific Settlement "Pact of Bogotá," 4-30-1948 — 5-3-1950.

BILATERAL

Convention on Establishment of radio communications between Nicaragua and México, 9-3-1950.

Agreement concerning the activities of UNICEF in Nicaragua. Managua, January 17, 1950.

General Agreement for a technical co-operation between the United States of America and Nicaragua, December 23, 1950.

Exchange of notes constituting an Agreement relating to the establishment and operation of a Technical Agricultural Mission in Nicaragua. Came into force on January 1, 1950.

United Nations Organization and Nicaragua: Agreement concerning UNICEF's and Nicaragua's activities, January 17, 1950.

World Health Organization - Nicaragua: Agreement concerning a nation-wide insect control programme. Came into force on January 2, 1951.

World Health Organization - Nicaragua. Basic Agreement concerning technical advisory assistance or other services by the World Health Organization. Came into force on June 22, 1951.

MULTILATERAL

Letter of the Organization of American States, 4-30-1948. Approved, 4-28-1950.

Agreement on Radio Communications. Ratified 1-16-1950.

Agreement to suppress and prevent genocide, 2-15-1950.

Geneva Convention relative to the treatment of prisoners of war, August 12, 1949. Came into force on October 21, 1950.

Geneva Convention for the amelioration of the wounded, sick and shipwrecked members of the armed forces at sea. Came into force on October 21, 1950.

Geneva Convention relative to the protection of civilian persons in time of war. Came into force on October 21, 1950.

Exchange of notes constituting and Agreement between the United States of America and Nicaragua amending the Agreement of April 8, 1942, relating to the construction of the Inter-American Highway. Came into force on April 20, 1951.

Agreement between the United States of America and Nicaragua relative to a programme of educational cooperation. Came into force on January 31, 1951.

International Bank for Reconstruction and Development and Nicaragua. Guarantee Agreement—Agricultural Machinery Project. Came into force on August 22, 1951.

International Bank for Reconstruction and Development and Nicaragua. Loan Agreement—Highway Project. Came into force on August 17, 1951.

United States of America and Nicaragua. Agreement for a co-operative health and sanitation programme. Came into force on January 31, 1951.

United States of America and Nicaragua: Exchange of notes constituting an Agreement relating to air transit rights for military aircraft. Came into force on December 12, 1951.

United States of America and Nicaragua: Exchange of notes constituting an Agreement relating to reciprocal customs privileges for foreign service personnel. Came into force on October 9, 1952.

Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua: Charter of the Organization of Central American States (San Salvador Charter), San Salvador, October 14, 1951. Came into force on January 9, 1952.

BILATERAL.

United States of America and Nicaragua: Agreement relating to a United States Air Force Mission to Nicaragua. Came into force on November 19, 1952.

International Bank for Reconstruction and Development and Nicaragua: Loan Agreement—Second Highway Project. Came into force on October 15, 1953.

International Bank for Reconstruction and Development and Nicaragua: Loan Agreement—Managua Diesel Power Project. Came into force on October 15, 1953.

United States of America and Nicaragua: Agreement relating to a United States Military Mission to Nicaragua. Came into force on November 19, 1953.

United States of America and Nicaragua. Exchange of notes constituting an Agreement relating to the surveying and construction of the Rama Road. Came into force on September 2, 1953.

United States of America and Nicaragua: Agreement for a co-operative programme of agriculture. Came into force on June 30, 1953.

MULTILATERAL.

United Nations, International Labour Organization, United Nations Educational, Scientific and Cultural Organization, Intl. Civil Aviation Organization, World Health Organization and Nicaragua: Basic Agreement concerning technical assistance. Came into force on December 16, 1952.

International Wheat Agreement. Came into force on July 15, 1953.

United States of America and Nicaragua: Bilateral Military assistance Agreement. Came into force on April 28, 1954.

Intl. Bank for Reconstruction and Development and Nicaragua: Guarantee Agreement — Thermal Power Project. Came into force on October 8, 1955.

Intl. Bank for Reconstruction and Development and Nicaragua: Guarantee Agreement—Power Distribution Project. Came into force on October 13, 1955.

United States of America and Nicaragua: Agreement relating to passport visas. Came into force on October, 1955.

Intl. Bank for Reconstruction and Development and Nicaragua: Guarantee Agreement—Agricultural Development Project. Came into force on November 26, 1955.

Canada and Nicaragua: Trade Agreement. Came into force provisionally on December 19, 1946. Registered on April 30, 1956.

Intl. Bank for Reconstruction and Development and Nicaragua: Guarantee Agreement—Port of Corinto Project. Came into force on November 6, 1956.

International Convention on certain rules concerning civil jurisdiction in matters of collision. Came into force on May 10, 1955.

International Convention for unification of certain rules relating to penal jurisdiction in matters of collision or other incidents of navigation. Came into force on November 20, 1955.

United Nations; Intl. Labour Org., Food and Agr. Org., of the U. N. Educational, Scientific and Cultural Org.; Intl. Civil Aviation Org.; World Health Org.; and Nicaragua: Revised Standard Agreement concerning technical assistance. Came into force on June 2, 1956.

BILATERAL

United States of America and Nicaragua: Exchange of notes constituting an Agreement relating to radio communications between amateur stations on behalf of third parties. Came into force on October 6, 1956.

United States of America and Nicaragua: Agreement concerning packages, January 1956.

United States of America and Nicaragua. Exchange of notes constituting an Agreement relating to the construction of the Rama Road. Came into force on August 12, 1956.

Honduras and Nicaragua: Agreement for submitting to the International Court of Justice their differences with respect to the Award of His Majesty the King of Spain of December 23, 1906. Came into force on June 22, 1957.

United States of America and Nicaragua: Exchange of notes constituting an Agreement relating to a military assistance advisory group. Came into force on February 9, 1957.

United States of America and Nicaragua: Agreement for co-operation concerning civil uses of atomic energy. Came into force on March 7, 1958.

United States of America and Nicaragua: Agreement for the establishment of a transmitting station. Came into force on September 5, 1958.

MULTILATERAL

United Nations, Costa Rica, El Salvador, Honduras and Nicaragua: Agreement relating to technical assistance for the benefit of the Advanced School of Public Administration for Central America. Came into force on January 1, 1957.

United States of America and Nicaragua: Treaty of Friendship, Commerce and Navigation. Came into force on May 24, 1958.

United States of America and Nicaragua: Exchange of notes constituting and Agreement relating to the guarantee of private research. Came into force on April 14, 1959.

WMO and Nicaragua. Accession, February 27, 1959.

Perú and Nicaragua: Agreement for air services between their respective territories. October 1959.

Universal Postal Convention. Came into force on April 1, 1959.

Agreement concerning insured letters and boxes. Came into force on April 1, 1959.

Agreement concerning postal parcels. Came into force on April 1, 1959.

Agreement concerning transfers to and from postal cheque accounts. Came into force on April 1, 1959.

Convention on Privileges and Immunities of Specialized Institutes. Nicaragua, April 6, 1959.

Agreement concerning the collection of bills, drafts, etc. Came into force on April 1, 1959.

Agreement concerning the Draft International Service. Came into force April 1, 1959.

Agreement concerning subscriptions to newspapers and periodicals. Signed on October 3, 1957. Came into force on April 1, 1959.

International Sugar Agreement. Came into force on January 1, 1959.

Multilateral Treaty on Free Trade and Central American Economic Integration. Came into force on June 2, 1959.

BILATERAL

Intl. Bank for Reconstruction and Development and Nicaragua: Guarantee Agreement—Río Tuma Hydroelectric Project. Came into force on November 29, 1960.

United Nations Special Fund and Nicaragua: Agreement concerning assistance from the Special Fund. Came into force in January 20, 1961.

Republic of China and Nicaragua: Cultural Agreement. Came into force on November 10, 1961.

MULTILATERAL

Central American Agreement regarding overland traffic. Went into force December 17, 1959.

Declaration of acceptance of the obligations contained in the Charter of the United Nations, August 1960.

Exchange of notes constituting an Agreement relative to the guarantee of private investments. September 12, 1960.

Convention establishing the Central American Air Navigation Services Corporation. February 26, 1960.

Articles of Agreement of the International Development Association. Came into force on September 24, 1960.

Central American Agreement on the Equalization of Import Duties. Came into force on September 29, 1960.

General Treaty on Central American Economic Integration. Came into force on June 3, 1961.

Agreement constituting the Central American Bank for Economic Integration. Came into force on May 24, 1961.

BILATERAL

United States of America and Nicaragua: Exchange of notes constituting and Agreement relating to economic, technical and related assistance. Came into force on May 14, 1962.

International Development Association and Nicaragua: Development Credit Agreement—Managua Water Supply Project. Came into force on July 10, 1963.

Intl. Bank for Reconstruction and Development and Nicaragua: Loan Agreement—Rivas Irrigation Project. Came into force on October 3, 1963.

United Nations and Nicaragua: Agreement for the provision of operational, executive and administrative personnel. Came into force on December 3, 1963.

MULTILATERAL

Central American Agreement on Uniform Road Signs and Signals. Came into force on February 25, 1963.

International Coffee Agreement, 1962. Came into force provisionally on July 1, 1963.

Costa Rica, Guatemala, El Salvador and Nicaragua: Regional Agreement on the Temporary Importation of Road Vehicles. Came into force on July 10, 1963.

Treaty banning nuclear weapon tests in the atmosphere, in outer space and under water. Came into force on October 6, 1963.

United Nations, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and Panamá: Agreement concerning technical assistance for the benefit of the Advanced School of Public Administration for Central America (ESAPAC). Came into force on October 21, 1963.

Multilateral Convention on the Association of Spanish Language Academies. Came into force on November 14, 1963.

BILATERAL

Convention between the Dominican Republic and Nicaragua. Signed in Santo Domingo, March 23, 1963. Came into force on March 6, 1964.

Intl. Bank for Reconstruction and Development and Nicaragua: Guarantee Agreement concerning a Power Project. Came into force on October 25, 1966.

United States of America and Nicaragua: Exchange of notes constituting an Agreement relating to the reciprocal granting of authorizations to permit licensed amateur radio operators of either country to operate their stations in the other country. Came into force on September 20, 1966.

MULTILATERAL

Protocol relating to the amendment to the Convention on International Civil Aviation, July 17, 1962.

Guatemala, Nicaragua, Honduras, Costa Rica and Panamá: Agreement on the establishment and operation of the Central American Defense Council. Came into force on May 1, 1964.

Convention. Final Minutes of the United Nations Conference for the adoption of a Single Convention on Narcotic Drugs. Came into force on December 13, 1964.

Agreement establishing the Latin American Physics Centre. Came into force on June 10, 1965.

Constitution of the Universal Postal Union, January 1, 1966.

Universal Postal Convention. January 1, 1966.

Agreement concerning insured letters and boxes. Came into force on January 1, 1966.

Agreement concerning postal money orders and postal traveller's cheques. Came into force on January 1, 1966.

Agreement concerning transfers to and from postal cheque accounts. January 1, 1966.

Agreement concerning cash-on-delivery items. Came into force on January 1, 1966.

Agreement concerning the collection of bills, drafts, etc. Came into force on January 1, 1966.

Agreement concerning the international savings bank service. Put into effect on January 1, 1966.

Guatemala, El Salvador, Honduras and Nicaragua: treaty on telecommunications. Came into force on October 1, 1966.

Intl. Bank for Reconstruction and Development and Nicaragua: Agreement concerning technical assistance of the extension of the Corinto Port. Came into force on April 12, 1967.

Convention on facilitation of international maritime traffic. Came into force on March 5, 1967.

Treaty on principles governing the activities of States in the exploration and use of outer space, including the moon and other celestial bodies. October 10, 1967.

Guatemala, El Salvador, Honduras, Nicaragua and Costa Rica: Special Protocol on basic grains. Came into force on October 1, 1967.

Intl. Bank for Reconstruction and Development and Nicaragua: Loan Agreement—Education Project. Came into force on June 25, 1968.

Intl. Bank for Reconstruction and Development and Nicaragua: Guarantee Agreement—Power Project. Came into force on October 21, 1968.

Argentina and Nicaragua: Cultural Agreement. Came into force on March 22, 1968.

Treaty for the prohibition of nuclear arms in Latin America. Came into force, April 22, 1968.

International Coffee Agreement, 1968. Came into force provisionally on October 1, 1968.

Agreement on the rescue of astronauts, the return of astronauts and the return of objects launched into outer space. Came into force on December 3, 1968.

BILATERAL

United States of America and Nicaragua: Exchange of notes constituting an Agreement relative to investment guarantee. Came into force on September 21, 1968.

United States of America and Nicaragua: Exchange of notes constituting an Agreement concerning the Peace Corps. Came into force on May 25, 1968.

United States of America and Nicaragua: Exchange of notes constituting an Agreement relating to the importation into the United States, for consumption of meat, during calendar year 1970. Came into force on February 25, 1970.

Israel and Nicaragua: Agreement on technical co-operation. Came into force on July 16, 1970.

MULTILATERAL

Special Central American Agreement on the equalization of import duties on textiles manufactured from rayon or from other artificial or synthetic fibres. Came into force on January 18, 1968.

International Sugar Agreement. Came into force provisionally on January 1, 1969.

Exchange of notes constituting an Agreement between the United Kingdom of Great Britain and Northern Ireland, and Nicaragua concerning the abolition of visas. Came into force on March 7, 1969.

Guatemala, El Salvador, Honduras, Nicaragua and Costa Rica: Central American Agreement on fiscal incentives to industrial development. Came into force on March 22, 1969.

Exchange of notes constituting an Agreement relating to visas. Came into force on May 20, 1970.

United States of America and Nicaragua: Convention Terminating the Convention of August 5, 1914, respecting a Nicaraguan canal route. Came into force on April 25, 1971.

United States of America and Nicaragua: Exchange of notes constituting an Agreement concerning the export of meat to the United States during calendar year 1971. Came into force on March 30, 1971.

Intl. Bank for Reconstruction and Development and Nicaragua: Guarantee Agreement—Second Managua Water Supply Project. Came into force on April 26, 1972.

United States of America and Nicaragua: Exchange of notes constituting an Agreement regarding deposits for military assistance. Came into force on April 10, 1972.

United States of America and Nicaragua: Exchange of notes constituting an Agreement to prevent the entrance into Nicaragua of foot-and-mouth disease and rinderpest, to quickly detect the diseases and to provide for eradication. Came into force on April 13, 1972.

United Nations, Food and Agriculture Organization of the United Nations, on behalf of the World Food Programme and Nicaragua:
Basic Agreement concerning assistance from the World Food Programme. Came into force on August 24, 1971.

BILATERAL

United States of America and Nicaragua: Exchange of notes constituting an Agreement relating to the importation into the U. S., for consumption, of meat, during calendar year 1972. Came into force on April 24, 1972.

United States of America and Nicaragua: Exchange of notes constituting an Agreement concerning trade in cotton textiles. (Washington, September 5, 1972). Came into force on January 1, 1975.

Intl. Bank for Reconstruction and Development and Nicaragua: Guarantee Agreement—Second Port of Corinto Project. Came into force on March 23, 1973.

Intl. Development Association and Nicaragua: Development Credit Agreement—Earthquake Reconstruction Project. Came into force on August 7, 1973.

United States of America and Nicaragua: Grant Agreement relating to earthquake. Came into force on January 15, 1973.

Intl. Bank for Reconstruction and Development and Nicaragua: Guarentee Agreement relating to the Power Project. Came into force on January 15, 1973.

Intl. Bank for Reconstruction and Development and Nicaragua: Guarantee Agreement—Agricultural Credit Project. Came into force on April 10, 1974.

MULTILATERAL

World Administrative Conference on Telegraph and Telephone, Geneva, 1973.

Treaty on the non-Proliferation of Nuclear Weapons and other weapons of mass destruction on the seabed and the ocean floor and in the subsoil thereof. Came into force on February 7, 1973.

Convention on Censure of illicit acts directed towards civil aviation safety, November 6, 1973.

International Health Regulations. Adopted by the Twenty-second World Health Assembly on July 25, 1969. Came into force January 1, 1974.

United States of America and Nicaragua: Exchange of notes constituting an Agreement relating to military assistance. Came into force on July 10, 1974.

Canada and Nicaragua: Exchange of notes constituting an Agreement to provide for the exchange of third party communications between amateur radio stations of Canada and Nicaragua. Came into force on January 19, 1974.

United States of America and Nicaragua: Exchange of notes constituting an Agreement concerning the export of meat. Came into force on January 2, 1975.

Federal Republic of Germany and Nicaragua: Agreement concerning financial assistance. Came into force on January 20, 1975.

International Agency on Atomic Energy and Nicaragua: Agreement concerning financial assistance. Came into force on December 29, 1976.

Intl. Bank for Reconstruction and Development and Nicaragua: Loan Agreement concerning Second Education Project. Came into force on August 17, 1976.

Protocol relating to an amendment to article 56 of the Convention on International Civil Aviation. Came into force on December 19, 1974.

Central American Agreement for the protection of industrial property. Came into force on May 25, 1975.

Statutes of the World Tourism Organization (WTO). Came into force on January 2, 1975.

Convention. Distribution of Signs in order to transmit Programmes via Satelite. Ratified, December 1, 1975.

International Sugar Agreement, Genova, October 13, 1973. Came into force on December 31, 1976.

United Kingdom of Great Britain and Northern Ireland and Nicaragua: Exchange of notes constituting an Agreement concerning an interest-free loan by the Government of the United Kingdom of Great Britain and Northern Ireland to the Govt. of Nicaragua for the purchase of hospital equipment. Came into force on June 21, 1974. Agreement as modified came into force on June 15, 1976.

BILATERAL

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Convention on psychotropic substances. Came into force on January 1, 1976.

Convention concerning the medical aptitude exam for industry employees, children and adolescents. Adopted by the International Labour Organization in Montreal on October 9, 1946. Ratified on March 1, 1976.

Convention concerning the maximum weight of cargo permitted for a worker to carry. Came into force on March 1, 1976.

Convention concerning the fixing of the minimum salary especially in developing countries. Ratified, March 1, 1976.

Convention concerning the employment of women for work in the mines. Ratified March 1, 1976.

Convention concerning the protection of salary adopted by the International Labour Organization January 1, 1949. Ratified, March 1, 1976.

Agreement between Rumania and Nicaragua: Came into force on September 30, 1977.

Convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property. Adopted by UNESCO. Instrument deposited with the Director-General of UNESCO, April 19, 1977.

Extension of the International Sugar Agreement, 1973. Came into force on December 31, 1977.

International Telecommunications Convention. Ratified, March 25, 1977.

Conference of Plenipotentiaries, Malaga-Torremolinos. 1973. Deposit of instruments, March 25, 1977.

Convention on the prevention and punishments of crimes against internationally protected persons, including diplomatic agents. Came into force on February 20, 1977.

United Nations Development Programme and Nicaragua. Came into force on May 4, 1978.

Multilateral Agreement, Geneva, October 7, 1977. Came into force provisionally on January 1, 1978.

Intl. Bank for Reconstruction and Development, and Nicaragua. Came into force on May 26, 1978.

Convention. San Jose, December 22, 1969. Came into force on July 18, 1978.

Intl. Bank for Reconstruction and Development, and Nicaragua. Came into force on July 10, 1978.

Protocol. Geneva, July 8, 1979. Came into force on December 7, 1978.

Agreement made in Geneva on June 8, 1977. Came into force on November 7, 1978.

Convention for the protection of the world cultural and natural heritage. Adopted by the General Conference of UNESCO. Came into force on December 17, 1979.

Convention signed in Brussels on May 21, 1974. Came into force on August 25, 1979.

Final minutes of the World Administrative Conference on Radio Communications. (Geneva, 1979).

NICARAGUA'S ATTITUDE VIS-A-VIS THE INTERNATIONAL LAW OF THE SEA

As already mentioned, the Government Junta of Nicaragua in its Declaration of February 4, 1980, as well as in its "White Book" has advocated the attempted abrogation of the 1928 Treaty:

> "All those islands, islets, cays and banks (of the Archipelago of San Andrés) are an integral and indivisible part of Nicaragua's continental shelf —a submerged territory which is a natural prolongation of the mainland— and by the same token it is undisputably a sovereign territory of Nicaragua." (74)

The Government Junta has likewise declared that that country has not exercised sovereignty over the maritime areas which it considers as its possession:

> "The historical circumstances which our country lived through after 1909, hindered a genuine defense of our continental shelf, jurisdictional waters and insular territory which rises from said continental shelf, an absence of sovereignty which was demonstrated..." (75)

We shall now make a brief analysis of these assertions:

a) Although the Archipegalo of San Andrés is in no way found on the continental shelf of Nicaragua, as already stated earlier in another part of this document, no where in positive law, nor in doctrine, nor in jurisprudence has it ever been considered that just because an island belonging legally to one State is found in the continental shelf on the other, the latter can take to itself the right to incorporate the island into its own territory. What would the situation be of Great Britain with respect to France, of Cyprus in relation to Turkey, of Sri Lanka to India if this "doctrine" prospers?

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(74) Declaration of February 4, 1980.

(75) Ibid.

Now, if we hold to the novel thesis set forth by Nicaragua in the "White Book" regarding what it calls "Nicaragua's elevation," curious situations could present themselves. This criteria reads:

> "**Nicaragua's elevation** is situated between two deep valleys, that of the Yucatán on the north and of Colombia on the south. This last, with a width of hundreds of sea miles has an immense depth clearly defined, constituting a huge abyss which separates the underwater territories of Nicaragua and Colombia. On observing the map showing the marine depths of the Caribbean Sea, we can establish as from a bird's -eye view that Colombia's affirmation of sharing with Nicaragua a common continental shelf is a clear distortion of the actual geomorphological (sic) situation of the marine depths of the Caribbean Sea." (76)

Further on it adds:

> "...there is no doubt at all that all those lands are an integral part of Nicaragua's Continental Shelf. Which are the underwater extension of its mainland or principal territory, or, as already defined, those [land] formations to which we referred from a unity with the Central American continental mass, united in an undoubtable fashion —geographically and geomorphologically— to the Atlantic or Caribbean Coast of Nicaragua." (77)

On observing the curious map which is annexed to the "White Book", it is clear that not only would the Archipelago of San Andrés belong to "Nicaragua's elevation" but Jamaica, too, the Dominican Republic and Haití, with all their surrounding islands, would be part of it. Now, since the ultimate conclusion apparently is that the territories found in the cited "elevation" belong to Nicaragua, this country will then have to fulfill its duty to incorporate into its "sovereign territory" (78) the three States just mentioned.

Also, there doubtless must have been some mistake in the reading of various definitions and in the analysis of the continental shelf's form since from the first indirect references to the matter by Valin in 1681 any by Vattel in 1758, continuing with the Truman Proclamation in 1945, even up to Article 76 of the TION* project, never has an island been

(76) White Book of the Government of Nicaragua, p. 1.

(77) White Book of the Government of Nicaragua, p. 2.

(78) Ibid., p. 3.

* Texto Integrado Oficioso para foros de Negociación.

considered part of a State's [continental] shelf. In effect, as will be appreciated further on, the concept of the continental shelf has always been applied to the marine **sea-bed and subsoil**: an island may be found on the continental shelf of a State but never **be a part** of it.

b) It seems that the Government of Nicaragua is unaware of the concept and exact scope of what is considered continental shelf in International Law, not only according to the terms set forth in the Geneva Convention in 1958 —which presently governs it— but also with regard to its history leading up to its final incorporation within that branch of law, starting with President Truman's Proclamation in 1945.

It is evident, in accordance with the foregoing, that the continental shelf has an essentially economic connotation. Thus, Article 1 of the 1958 Geneva Convention reads:

> "For the purposes, of these articles, the term 'Continental Shelf' refers to: a) the sea-bed and subsoil of the submarine areas adjacent to the coasts, but situated outside the territorial waters, to a depth of 200 meters or, beyond this boundary, as far as the depth of the superjacent waters permits exploitation of the natural resources of these areas; b) the sea-bed and the subsoil of analogous underwater regions, adjacent to island coasts."

As can be appreciated from the article cited, the continental shelf is made up of the sea-bed and its subsoil for the purpose of exploring and exploiting the natural resources extant there; thus the continental shelf of a Stave will extend as far as the depth will allow it to be exploited. At present the limit fluctuates around a depth of 1,250 meters.

The continental shelf will have the same fundamentally economic character in the new Convention of the Law of the Sea, now being drafted:

> "Art. 77. 1. The Coastal State exercises sovereign rights over the continental shelf for the purpose of exploring it and exploiting its natural resources." (79)

Although it could be considered unnecessary to add any other argument to corroborate what has been set forth we will simply point out two commentaries by the Commission on International Law on articles of the project submitted in 1965, and one part of the dissenting opinion of Judge Fouad Ammoun in the matter of the continental shelf in the North Sea.

(79) Third Conference on the Law of the Sea. A/conf. 62/WP 10/Rev. 2. April 11, 1980.

In the first case, Article 68 of the project, incorporated in the Convention as paragraph 1 of Article 2 reads:

> "The coastal state exercises sovereign rights over the continental shelf for the purpose of exploring it and exploiting its natural resources." (80)

Following is one of the Commission's comments:

> "The Commission has wanted to avoid a text that would lend itself to interpretations which detour from an objetive to which it attributes decisive importance: respect for the principle of full liberty of the superjacent waters and of the airspace above that sea. For this reason it has not wanted to accept the sovereignty of the coastal state over the continental shelf's sea-bed and subsoil. On the other hand, as gathered unmistakably from the text, the recognized rights of the coastal State comprise all the rights which are necessary for the exploration and exploitation of the continental shelf's natural resources. Jurisdiction in regard to repressing of legal infractions also forms a part of those rights. The rights of the coastal State are exclusive in the sense that if the State does not exploit the continental shelf, no one else will be abe to do so without its consent." (81)

Article 69 of the same document, incorporated as Article 8 of the Geneva Convention, likewise reads:

> "The coastal State's rights over the continental shelf do not affect the legal doctrine of the high seas applicable to the superjacent waters nor to the airspace above the high seas." (82)

The commentary is a follows:

> "The object of Article 69 is to safeguard the respect for the liberty of the sea vis-à-vis sovereign rights of the coastal State over the continental shelf. It stipulates that the rights of the coastal State over the continental shelf do not affect the

(80) Report of the International Law Commission, Supplement N° 9 (A/3159), 1956, p. 43.

(81) Report of the International Law Commission, Supplement N° 9 (A/3159), 1956, p. 43.

(82) Ibid., p. 46.

> governance of the seas which cover it, nor the airspace above it. A claim of sovereign rights over the continental shelf cannot extend beyond the sea-bed and subsoil, but not to the superjacent waters; this claim cannot attribute any jurisdiction nor any exclusive right over said waters which are and continue to be part of the high seas. The articles referring to the continental shelf are for the purpose of determining the governance of the continental shelf, maintaining the overriding principle of liberty of the seas and of the airspace above it. No modifications of exceptions to this principle can be accepted except such as are expressly contained in the articles." (83)

For his part, Judge Ammoun explains:

> "Le contenu juridique des droits souverains reste limité aux actes strictement nécessaires à l'exploration ou à la protection des ressources du plateau continental, à l'exclusion des eaux et de l'espace surjacent." (84)

Therefore, if the jurisdiction of a State over the continental shelf is limited to certain exclusive rights for the purposes of economic exploration and exploitation, it is absurd that such a State, because it possesses a specific portion of the continental shelf, would be able to appropriate insular territory belonging to another State.

c) In accordance with the article of the 1958 Convention already quoted, it is clear that islands have a right to a continental shelf as long as they have the juridical status of an "island" as stipulated in Article 10 of the Convention on Territorial Waters, i. e., a natural extension of land which emerges in a permanent fashion at high tide. The islands of the Archipelago of San Andrés unquestionably have such status.

On the other hand, the International Court of Justice in regard to the case of the Continental Shelf of the North Sea recognized that Article 1 of the 1958 Convention reflected common International Law (85). Finally, too, the new project of the Convention of the Sea may possibly maintain both the definition of an island, as already cited (Article 121-1), as well as the stipulation that islands have a continental shelf:

> "Except as provided in paragraph 3, the territorial waters, the contigous zone, the exclusive economic zone and the

(83) Report of the International Law Commission, Supplement N° 9 (A/3159), 1956, p. 46.

(84) Vallée Charles, **Le Plateau Continental dans le droit positif actuel** (Paris: Editorial Pedone, 1971), p. 55.

(85) ICJ Reports, 1969, pp. 3-65.

continental shelf of and island will be fixed according to the terms of the present Agreement applicable to other terrestrial extensions." (86)

The exception pointed out in paragraph 2 appears in paragraph 3 of the same article:

> "Rocks not suited to maintain human life or economic life of their own will not have an exclusive economic zone nor a continental shelf." (87)

It is an axiom that the Archipelago of San Andrés is made up of islands and that these islands do generate a continental shelf.

It will be necessary to determine the magnitude of the continental shelf which the Archipelago can generate. According to that established in the 1958 Convention in Article 6:

> "When the one self-same continental shelf is adjacent to the territory of two or more States whose coasts are situated one against the other, its delimitation will be undertaken by agreement. If there is a lack of agreement, and except special circumstances justify another delimitation, this will do determined by the middle line whose points are all equidistant from the nearest points to the base lines from which the extension of territorial waters of each State are measured." (88)

It is clear that an archipelago of the characteristics of San Andrés and Providencia is not in any way a "special circumstance" as intented by the Convention. This is even more so since under the supposition that a demarcation were necessary, it would have to be drawn among islands and cays with similar characteristics, so that the continental coast would not serve as a base line for such delimitation, except as it would be supported by the fringe Nicaraguan islands which are between Nicaragua's continental territory and the Archipelago of San Andrés.

Since the norm of the convention points out that **"when the one selfsame shelf is adjacent...."** if it is considered that an archipelago is

(86) Third Conference on the Law of the Sea. A/Conf. 62/WP. 10/Rev. 1 p. 73.

(87) Ibid.

(88) Convention on the Continental Shelf, Geneva, 1958.

found on the same continental shelf as also belongs to another territory, in principle the demarcation should be drawn through applying the principle of the middle line, unless, of course, the area happens to be delimited already by another procedure.

The situation is not much different in the new project of the Convention. With regard to the shelf, a **minimum limit of 200 miles** is stipulated, and certain special norms are included under which its extension may be greater. Once established that an island is a natural extension of land which emerges in a permanent way at high tide (Article 121-1), that an island gives rise to a continental shelf (Article 121-2), that the minimum limit of the shelf is 200 miles (Article 76), and that an archipelago of the characteristics and position as that of San Andrés and Providencia does not create a special circumstance as established in International Law, one therefore concludes that the cited Archipelago should, in principle, be delimited with the Nicaraguan insular territory situated on the front of the coast of that country according the principle of the middle line, in the event that the cited maritime regions were not already delimited by another procedure.

Another point of the Convention's new project confirms this premise. In effect Article 55 establishes the new "Exclusive Economic Zone":

> "The exclusive economic zone is a zone situated outside the territorial waters and adjacent to them, subject to the specific juridical governance established in this part, such that the coastal State's rights and jurisdictions and the rights and liberties of other States will be governed by the applicable decrees of this present Convention." (89)

Article 56-1-a stipulates the State's rights over the cited zone:

> "Sovereignty rights for the purposes of exploration and exploitation, conservation and ordering of natural resources, both living and nonliving, of the sea-bed and subsoil and the superjacent waters, and with respect to other activities with a view to the economic exploration and exploitation of the zone as well as the production of energy derived from the water, the currents and the winds." (90)

(89) Third Conference on the Law of the Sea. A/Conf. 62/WP. 10/ Rev. 2. p. 49.

(90) Ibid., p. 49.

In Article 57 of the Project the width of the Economic Zone is indicated:

> "The exclusive economic zone will not extend further than 200 nautical miles measured from the base lines from which the territorial waters are measured." (91)

As was already indicated, the Archipelago of San Andrés and Providencia is not a "special circumstance" according to the Convention. Therefore, it would have the **right** to an economic zone of up to 200 miles, which carries with it the sovereignty over **its sea-bed and subsoil** at least up to the middle line drawn among the Nicaraguan islands facing that country's coast and the cited Archipelago, as long as a delimitation had not been effected before via a different procedure.

d) Nicaragua's demonstration that it has not exercised jurisdiction nor sovereignty over the continental shelf, jurisdictional waters and insular territories, has already been commented on partially, especially with respect to this last point. A brief commentary, however, will be made in regard to the maritime areas. As in the case of the insular territories of the Archipelago, so the fact that the Government of Nicaragua had not exercised sovereignty over the maritime areas belonging to Colombia, only demonstrates the faithful observance of the principles of International Law and the obligations contracted internationally. So it turns out to be a significant reversal that that country had exercised neither jurisdiction nor sovereignty over certain maritime zones adjacent to its continental and insular territories in contrast with the constant, and uninterrupted jurisdiction which the Republic of Colombia has been exercising from time immemorial over the cited maritime areas.

We do not think we need to prove the way in which our country has been exercising its sovereignty within the maritime areas adjacent to the Archipelago. It is only too clear and evident a fact.

On this matter we only wish to point out that Nicaragua's having declared the absence of sovereignty on its part in the maritime areas adjacent to its territory, and the effective and uninterrupted presence of Colombia over the maritime areas adjacent to the Archipelago carry with them the consequences that international doctrine and jurisprudence specify.

(91) Ibid., p. 50.

CONCLUSIONS

On February 4, 1980, the Junta of National Reconstruction of Nicaragua, in an act without precedents in modern International Law, published before the diplomatic corps accredited in Managua a "Declaration" by which it purported to denounce the Treaty on Territorial Matters between Colombia and Nicaragua, which has been in force since 1930. Simultaneously it distributed a booklet designated "The White Book" in which it develops the foundations of the position it has adopted.

The arguments set forth are for the most part confused and legally irregular such that in its argument over the supposed nullity [of the Treaty] there appear matters that have not the least relation to the causes for termination of treaties that are in conformity with the norms and principles of International Law.

Along this line they attempt to take the matter back to a discussion over the territorial title, previous to the drawing up of the Treaty, and advance a series of proposals with respect to the governance of maritime regions as well.

Furthermore, the Nicaraguan argumentation is contradictory, confused, and irregular, foreign to all law:

1. First of all, Nicaragua's pretense violates the most fundamental of principles of International Law: **Pacta Sunt Servanda.** According to this principle, every Treaty is binding on the Parties and must be fulfilled by them in good faith. This principle constitutes, logically, the cornerstone of relations among States, since without the recognition of the axiom that Treaties ought to be given faithful and strict compliance, international peace and security would run into grave danger.

Consequently, since **Pacta Sunt Servanda** is a fundamental principle of International Law, its violation automatically extends to **Jus Cogens.**

2. Evidently the Junta of National Reconstruction has attempted to denounce and terminate the Treaty of 1928 with the purpose of with-

drawing from the obligations which this instrument imposes. However, this Government forgot that Treaties cannot be terminated without express or tacit agreement between the Parties, or by virtue of principles clearly set forth in International Law. The case which concerns us cannot be found within the first hypothesis. As for the second, only the causes of the accomplishment of the Treaty's purpose, of a fundamental change of circumstances, or of the subsequent impossibility of carrying out the Treaty, can under specified conditions qualify as grounds for termination of an agreement.

We have deliberately excluded "denunciation" in our enumeration because there exists no agreement between the Parties to permit it. International Law prohibits a Treaty with the characteristics of the Esguerra-Bárcenas Treaty from being denounceable. This is inferred from Article 56 of the Vienna Convention on the Law of Treaties, which was annotated by the Commission on International Law in the following terms:

> "The particular character of some Treaties excludes the possibility that the contracting States would have had the intention of permitting one Party to denounce them or withdraw from them at its discretion. An example of these are the treaties on the demarcation of territorial frontiers." (92)

Neither could it be affirmed that a "fundamental change of circumstance" has been presented, since the clause **Rebus Sic Stantibus** is not applicable, according to Article 62-2 of the same Vienna Convention, to the Treaties which define territorial issues:

> "A fundamental change in circumstances cannot be argued as a cause to terminate a treaty or to withdraw from it:
>
> a) If the treaty establishes a frontier, or
>
> b) If the fundamental change is as a result of a violation on the part of the one who alleges it, of an obligation born out of the treaty or of any other international obligation with respect to any other part of the treaty."

3) It should be reiterated also that because the Treaty of 1928 is an instrument which settles territorial matters and establishes, therefore,

(92) Reports by the International Law Commission. Supplement N° 9 (A/6309 and Rev. 1) United Nations, Twenty First Session, N. Y., 1966.

an objetive governance (93), it is not susceptible to termination. Lastly, far from it being impossible to comply with the Treaty, the Treaty has been carried out in an honest, cordial and uninterrupted manner.

Under these conditions, since the Esguerra-Bárcenas Treaty is not susceptible of denunciation or termination by the sole will of one of the parties, the Government of Nicaragua should continue to abide by it, as it has been doing until now: it has no other choice.

Colombia for its part is attentive and vigilant to demand and enforce respect of the duties and obligations which, according to International Law, are derived from the Treaty on Territorial Matters between Colombia and Nicaragua.

4) The Archipelago of San Andrés and Providencia, due to its position and characteristics gives rise to territorial waters, a continental shelf and an exclusive economic zone in conformity to the norms and principles of International Law. To affirm that the cited Archipelago is situated on Nicaragua's continental shelf and that it therefore belongs to that country is simply a juridical absurdity.

5) All the Archipelago of San Andrés and Providencia, including the Mangles Islands and the territory included between Cabo Gracias a Dios and the San Juan River, belonged, in the fist place to the Kingdom of Tierra Firme and thereafter to the Viceroyalty of Nueva Granada. These territories were under such governance in 1810, when the events attending liberation commenced. The Governments of Colombia and Nicaragua freely agreed and exchanged the instruments of ratification of a valid and perfect international Treaty, through which our country recognized Nicaragua's sovereignty and full dominion over the Costa de Mosquitos between the Cabo Gracias a Dios and the San Juan River as well as over Great Corn and Little Corn Islands. The Republic of Nicaragua in turn recognized the sovereignty and full dominion of the Republic of Colombia over the San Andrés, Providencia, Santa Catalina and all the other islands, islets and cays which are part of the Archipelago of San Andrés.

The Republic of Colombia will fulfill with the obligations and enforce respect of the rights it derives from this instrument.

(93) Treaties that establish objective governance are those that stipulate in themselves valid conventional obligations and rights **erga ommes**. In Waldock's report to the International Law Commission in 1968, there is a rather complete definition on the matter: "Treaties that establish objective governance. 1. A treaty establishes an objetive governance when, according to the terms and the circumstances of its making, the intention of the parties is to create, for the interest of all, obligations and rights relative to a specific region, State, territory, locality, river, waterway, or a specific region of the sea, sea-bed or airspace as long as any State with territorial jurisdiction in connection with the purpose of the treaty is included among the Parties, or that the State has assented to the provision in question."

TREATY ON TERRITORIAL MATTERS BETWEEN COLOMBIA AND NICARAGUA

Signed in Managua on March 24, 1928.
Approved in Colombia by Law 93, 1928.
Approved in Nicaragua by Law of March 6, 1930.
Exchange of ratifications in Managua on May 5, 1930.
Promulgated by Decree 993, 1930.

The Republic of Nicaragua and the Republic of Colombia, desirous to put to an end the pending territorial litigation between them and to strengthen the links of traditional friendship which unite them, have resolved to enter into this treaty, and to this effect they have appointed their respective Plenipotentiaries, that is:

His Excellency the President of the Republic of Nicaragua has chosen Dr. Don José Bárcenas Meneses, Undersecretary of Foreign Relations; and

His Excellency the President of the Republic of Colombia has chosen Dr. Don Manuel Esguerra, Especial Envoy and Minister Plenipotentiary in Nicaragua.

Who, after having exchanged their full authorizations, which they found in due order, have agreed in the following stipulations:

ARTICLE I

The Republic of Colombia recognizes the sovereignty and full dominion of the Republic of Nicaragua over the Costa de Mosquitos found between the Cabo Gracias a Dios and the San Juan River, as well as over Great Corn Isand and Little Corn Island, in the Atlantic Ocean, and the Republic of Nicaragua recognizes the sovereignty and full dominion of the Republic of Colombia over the San Andrés and Providencia Islands, Santa Catalina and all the other islands, islets and cays which form part of said Archipelago of San Andrés.

Not considered included in this Treaty are the Roncador, Quitasueño and Serrana Cays: their dominion is in litigation between Colombia and the United States of America.

ARTICLE II

This Treaty will be submitted to the Congresses of both States to be validated and once approved by these, the exchange of ratifications will be verified in Managua or Bogotá, within the earliest possible time.

In witness whereof, we, the respective Plenipotentiaries do sign and seal.

Made in duplicate in Managua, on the twenty-fourth of March of nineteen hundred twenty-eight.

(Seal) J. BARCENAS MENESES

(Seal) MANUEL ESGUERRA

ACT OF EXCHANGE

Having met in the offices of the Ministry of Foreign Relations of the Government of Nicaragua, the most Excellent Dr. Don Manuel Esguerra, Special Envoy and Minister Plenipotentiary of Colombia in Nicaragua, and the most Excellent Dr. Don Julián Irias, Minister of Foreign Relations, with the object of proceeding with the exchange of ratifications of their respective Governments, relative to the Treaty drawn between Colombia and Nicaragua on the twenty-fourth of March, nineteen hundred twenty-eight, in order to end the pending matter between both Republics regarding the Archipelago of San Andrés and Providencia and Nicaragua's Mosquitia; seeing that the full powers conferred for this purpose are in good and due form, and having found these ratifications entirely conformable, they carried out the corresponding exchange.

The undersigned, by virtue of the plenipotentiary power which has been conferred upon them and on instructions of their respective Governments, declare: that the Archipelago of San Andrés and Providencia which is mentioned in the first clause of the aforementioned Treaty does not extend west of the 82nd. meridian of Greenwich.

In witness whereof, the undersigned sign these presents in duplicate sealing them with their respective seals.

Done in Managua, on the fifth day of the month of May, nineteen hundred thirty.

(Seal) MANUEL ESGUERRA

(Seal) J. IRIAS G.

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