

Sovereignty-related Issues behind ICJ Decision on Dispute over Territorial and Maritime Boundary Delimitation between Nicaragua and Colombia

The International Court of Justice (ICJ) made a ruling about the dispute over territorial and maritime boundary delimitation between Nicaragua and Colombia on November 19, 2012. The judgement made by the ICJ came in 11 years after Nicaragua filed a lawsuit. The legal case was ignited by Nicaragua claiming to its sovereignty over three islands including San Andrés, Providencia, and Santa Catalina, and seven reefs including Alburquerque Cays, Bajo Nuevo, East-Southeast Cays, Quitasueño, Roncador, Serrana, and Serranilla. The parties concerned, Nicaragua and Colombia, had made assertions for the sovereignty based on their interpretations of a territory-related treaty signed in 1928 between the two countries, namely, whether the disputed islands and reefs are subject to the sovereignty under the treaty, determination of the sovereignty in accordance with the *status quo* principle (*uti possidetis juris*), presence of a continued and consistent execution of sovereignty (*acts à titre de souverain*), and application of the effectiveness principle (*effectivités*).

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Interpretation of 1928 Treaty

In 1928, Nicaragua and Colombia concluded a treaty on a territorial issue between the two countries. Clause 1 of the treaty is as follows: “Colombia admits a sufficient and complete sovereignty of Nicaragua over Mosquito Coast encompassing Mangle Grande Island (grand corn island) and Mangle Chico Island (small corn island) in the region between the rivers of Cape Gracias a Dios and San Juan and in the Atlantic Ocean. Whereas Nicaragua admits a sovereignty of Colombia over the islands of San Andrés, Providencia, and Santa Catalina and the other islands, islets, and reefs constituting San Andrés Archipelago.”

The treaty is not applied to the reefs of Roncador, Quitasueño, and Serrana, which were in dispute between Colombia and the United States over sovereignty in 1930. Meanwhile, the second paragraph of the protocol for exchange of the amendment to the 1928 treaty, which was adopted in 1930, stipulates that: the “San Andrés and Providencia Archipelago mentioned in the first clause of the said treaty does not extend west of the 82nd degree of longitude west of Greenwich.”

In accordance with the 1928 treaty, the Court verified that Colombia possesses the sovereignty over the rest of the islands or reefs constituting San Andrés, Providencia, Santa Catalina, and San Andrés Archipelago. However, constituent islands and reefs of San Andrés Archipelago should be determined to confirm the sovereignty over the disputed islands and reefs.

The Court noted that San Andrés Archipelago is not definitely defined in the treaty and the protocol. The 1928 treaty does not specify the constituent islands and reefs of San Andrés Archipelago, and the 1930 protocol defines the western boundary of Sam Andres Archipelago to be

the 82nd degree of longitude, although the protocol fails to define the eastern boundary. The decision made in 2007 regarding the preliminary objection to the case declares that “based exclusively on the first clause of the 1928 treaty, it is not clear whether islands and reefs separated from San Andrés, Providencia, and Santa Catalina under the sovereignty of Colombia are the constituent islands and reefs of San Andrés Archipelago.”

The Court stated that the islands and adjacent maritime features mentioned in detail in the first clause of the 1928 treaty are considered to be, at least, in San Andrés Archipelago. In other words, Alburquerque Cays and East-Southeast Cays, which are 20 nautical miles and 16 nautical miles, away respectively, from San Andrés Archipelago, are not considered to be the constituent islands and reefs. Serranilla and Bajo Nuevo, which are far away from the Archipelago, are not considered to be the constituent islands and reefs. However, the Court stated that the key point of the issue is whether the constituent islands and reefs of San Andrés Archipelago stipulated in the 1928 treaty should be determined based on geographical locations or on historical materials. The Court continued that the materials presented by the countries involved in the dispute do not suffice to solve the issue.

The second paragraph of the first clause of the 1928 treaty stipulates that the said treaty is not applied to the reefs of Roncador, Quitasueño, and Serrana under the dispute between Colombia and the United States over sovereignty. However, the Court stated that the phrase does not indicate that the reefs of Roncador, Quitasueño, and Serrana are not excluded when determining the constituent islands and reefs of San Andrés Archipelago, a core issue in the dispute between Nicaragua and Colombia.

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The Court stated that historical materials submitted by the two countries quarreling about the constituent islands and reefs of San Andrés Archipelago do not suffice to be adopted as a decisive evidence. In other words, any historical materials do not specify the constituent islands and reefs of San Andrés Archipelago.

Court's View on *status quo* principle (*uti possidetis juris*)

The two countries claimed their sovereignty over the concerned geographical features based on the *status quo* principle, or *uti possidetis juris*, inherited from the time when the two countries became independent from Spain.

However, detailed statement on the disputed islands and reefs was not found in any colonization orders of the materials submitted by the two. Thus, the Court gave a decision on the case as follows by citing the ruling made by the ICJ in 1992 on the case between El Salvador and Honduras: “in the *uti possidetis juris* principle, law (*ius*) does not refer to international law, but to constitutional law or an administrative law (in this case, Spain colonial law) prior to the sovereign independence. However, the law fails to present a definite answer regarding marginal areas or sparsely populated areas showing minimum economic indicators.”

The Court decided that applying the *uti possidetis juris* principle to determine the sovereignty over the disputed islands and reefs is not deemed appropriate because the two countries concerned in the case failed to present a detailed explanation as to why the disputed islands and reefs should belong to the concerned colonies before the independence of the two countries. Thus, the Court stated that Nicaragua and Colombia cannot invoke the principle to back up their claims to the distributed islands and reefs.

Court's View on effectiveness principle (*effectivités*)

The Court decided that it is difficult to determine the sovereignty over the disputed islands and reefs based on the 1928 treaty and the *uti possidetis juris* principle and thus, the Court focused on a sovereignty establishment issue based on the effectiveness principle, or *effectivités*.

In the case of territorial sovereignty, a date on which a dispute is determined, i.e. critical date, has a great significance. The Court stated that the execution of the sovereignty, or *acts à titre de souverain*, occurred prior to the critical date is a factor to be considered in the process of establishing or verifying the sovereignty over the disputed islands and reefs. In general, “any acts performed after the critical date are considered insignificant in making the decision by the Court because the acts may be made, after the legal dispute is already started, for the purpose of sustaining the arguments set forth by the parties concerned.”

Prior to the case, Nicaragua approved of the oil development business in Quitasueño in 1967 through 1968 and Colombia remonstrated about the approval by Nicaragua on June 4, 1969, while arguing that the 82nd degree of longitude is the boundary between the two countries. Nicaragua rebutted the argument made by Colombia, stating that the argument violates the exclusive right to Nicaraguan EEZ and continental shelf, on June 12, 1969. Based on the foregoing, Nicaragua asserted that the critical date falls in the year of 1969. Also, Colombia accepted the assertion through a hearing procedure. Thus, the Court adopted “June 12, 1969” asserted by Nicaragua as the critical date to determine the *effectivités*.

Colombia submitted materials related to the *effectivités* in order to set forth the grounds of its claim to the maritime features, whereas Nicaragua did

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not submit any evidences related to the exertion of the sovereignty but focused mainly on the *uti possidetis juris* principle.

Colombia continued exerting the sovereignty over Alburquerque, Bajo Nuevo, East-Southeast Cays, Quitasueño, Roncador, and Serranilla, in various forms - territorial organization, restriction on fishing, legislative measures of installation, operation, and maintenance of lighthouses and buoys, and visit by the navy. In contrast to Nicaragua having no evidence on the exertion of the sovereignty, Colombia took these administrative actions. Noting this fact, the Court considered the fact to be a strong ground for the sovereignty of Colombia over the submarine features in dispute.

Others

What is noteworthy in the case is that diplomatic customs of third countries and maps of the countries involved in the dispute were used to determine the sovereignty claims set forth by the two countries

Colombia presented a variety of diplomatic documents, e.g. reports, memoranda, and notes, and argued that the British government confirmed that the San Andrés Archipelago consists of the maritime features including Serranilla, Bajo Nuevo, and Alburquerque and thus, reconfirmed that the mentioned features belong to the territory of Colombia. In response to this, the Court stated that customs or evidences of a third country are not considered recognition of the Colombian sovereignty by the third country, although they can be considered a measure to support the claim set forth by Colombia.

Nicaragua had not published maps indicating that the disputed submarine features belong to Nicaragua until 1980, while Colombia presented

evidences for the case by submitting maps issued by Colombia and maps by Nicaragua indicating that the disputed islands and reefs belong to Colombia. The Court gave more weight to the argument made by Colombia by adopting the maps as evidence, albeit limited.

Implications for Dokdo

Two issues can be considered regarding the dispute between Korea and Japan over Dokdo. One is whether an international agreement or a treaty exists to support the claims made by the countries involved in the dispute. The other is related to the *effectivités*.

The grounds Korea can present to back its claim are as follows: (C) of the Cairo Declaration issued on November 27, 1943; the 8th clause of the Potsdam Declaration issued on July 26, 1945; (a) of the 3rd clause of SCAPIN No. 677 issued on January 29, 1946; (a) of the 2nd clause of San Francisco Peace Treaty issued on September 8, 1951. However, there lie some issues such as binding force of each ground and interpretation of the ground with no indication of Dokdo.

As shown in the case, although the appellation of “San Andrés Archipelago” is used in the 1928 treaty and the 1930 protocol, no detailed examples of the appellation are found. For this reason, the Court suspended its decision on the grounds. In consideration of the fact, it may be difficult for Korea to push on its claim based on a treaty such as the San Francisco Peace Treaty which does not explicitly exclude Dokdo from the territory of Japan.

In respect to the *effectivités*, the critical date, a date determining the dispute, can be January 18, 1952, which can be selected as a first suggestion, when Korea declared the Peace Line and Japan submitted a

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note of objection. However, the critical date can be considered critical, when postulated in front of the international Court, and thus, it can be considered strategically, rather than theoretically, to enhance a possibility of actual winning in the case.

Further, regarding the evidences backing the *effectivités*, historical materials indicating legislative, administrative, and judicial activities conducted in association with Dokdo should be discovered, and indications in customs and on maps of third nations should not be overlooked. Japan started using Japan Sea and Takeshima for international or foreign maps earlier, whereas Korea makes a belated effort to indicate East Sea and Dokdo in maps issued by other countries. Korea should make more diversified efforts to exert sovereignty over Dokdo and secure relevant historical materials.