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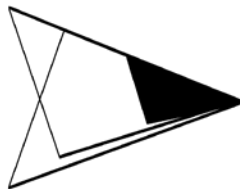
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**Making and Unsettling the Maritime Order in the  
South West Caribbean**  
Nicaragua, Colombia, and the ICJ

**Lucas Solimano**

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MAKING AND UNSETTLING THE MARITIME ORDER IN THE SOUTH WEST  
CARRIBEAN: NICARAGUA, COLOMBIA, AND THE ICJ

*Lucas Solimano\**

**Abstract**

This paper discusses the maritime order in the Caribbean Sea. First it explains how Colombia from the late 1970's to 1990's created an order through several delimitation agreements with all the riparian states, except Nicaragua. This first order was built under the assumption that the San Andrés Archipelago was Colombian and that there was a delimitation agreement between Nicaragua and Colombia following the 82nd meridian west.

This order was resisted by Nicaragua and contested its basic assumptions in a case before the ICJ. Although the Court confirmed the first Colombian assumption, it rejected the second. Thus the Court unsettled the order created by Colombia without creating a new one to replace it.

The paper explores the relationship between this competing orders and the shortcomings of bilateral delimitation (either by agreement or judicial settlement) in a context of conflicting interests of multiple parties. In particular, the paper discusses the problems presented by the traditional understanding of the relative effect of the Court's Judgments as established in article 59 of the Statute of the Court.

Additionally, the paper explores possible solutions to this situation and the subsequent actions of the interested parties. Both Colombia and Nicaragua have insisted with their preferred strategies. The former relies on bilateral or multilateral negotiation, taking advantage of its relative size and power in the area, while the latter insists on judicial proceedings, considering its experience before the ICJ. Finally, the paper discusses the role of third parties, especially Costa Rica's, in this dispute.

**I. Introduction**

The South West Caribbean is a semi-enclosed sea with many riparian states. Every point in this area is at less than 200 miles from the coast of one or more State. Accordingly there are several overlapping maritime claims and their delimitation is particularly difficult.

Colombia is the main power in the South West Caribbean region. Although the Colombian main coast is somewhat farther away from the region, the Archipelago of San Andrés ("ASA") under Colombian sovereignty gives Colombia a large presence in the area.

There are currently two competing maritime orders in the area. As shown in section II, the traditional one was construed by Colombia through several bilateral agreements between the late 1970's and

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early 1990's. However, this order had a fundamental weakness in Nicaragua's opposition. Section III shows the unsettling efforts of Nicaragua before the ICJ. Several judgments of the Court have created a new maritime order in the Caribbean.

Section IV discusses the uneasy relationship between this competing orders. The order created by the Court is still incomplete, but large enough to unsettle the Colombian one. The boundaries drawn by the ICJ are incompatible with those agreed by Colombia and others. Accordingly, there are two different system that currently coexist but do not engage each other. This has led to a political fall out between Colombia and Nicaragua, where the former has rejected any judicial solution and has stressed the need of a bilateral (or multilateral agreement) while the later has insisted in bringing cases before the ICJ.

This competing maritime orders are unstable and eventually one will supersede the other. Section V discusses possible future outcomes and how this controversy could end, focusing particularly in the role of the other riparian states in the Caribbean.

## II. **Traditional Maritime Order in the South West Caribbean.**

After their independence from Spain, the newly formed Latin American States decided to follow the *uti possidetis* principle in their delimitation, that is, the old colonial limits would turn now to be their international boundaries. Although this principle is fairly simple in theory, its application in practice was particularly difficult as the colonial division of the Spanish Empire was vague and with little actual knowledge of the geographical situation of the area<sup>1</sup>.

This was the case of Nicaragua and Colombia regarding the Mosquitos Coast (current coast of Nicaragua in the Caribbean Sea) and ASA. Because of the remoteness of the area and the continuous British intervention, there was considerable ambiguity regarding to which Spanish province belonged the area at

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<sup>1</sup> For example, the Tribunal that had to decide part of the boundary between Honduras and Guatemala stated that: "It must be noted that particular difficulties are encountered in drawing the line of "uti possidetis of 1821", by reason of the lack of trustworthy information during colonial times with respect of a large part of the territory in dispute. Much of this territory was unexplored. Other parts which had occasionally been visited were but vaguely known. In consequence, not only had boundaries of jurisdiction not been fixed with precision by the Crown, but there were great areas in which there had been no effort to assert any semblance of administrative authority". Guatemala/Honduras Arbitration of 1933. RIAA vol 2, p 1325. Almost every Tribunal confronted with the application of *uti possidetis* has faced similar challenges. See also, Ospina, Mariano, Nicaragua v Colombia: A Stalemate in the Caribbean, Global Security Studies, Fall 2013, Volume 4, Issue 4, page 32.

the time of Nicaragua's and Colombia's independence. Accordingly, there was a dispute between Nicaragua and Colombia concerning the sovereignty of the Mosquito Coast and ASA for most of the XIX and the beginning of the XX century<sup>2</sup>.

This competing claims were partially settled by the Esguerra-Bárceñas Treaty of 1928 (the "1928 Treaty"). While Nicaragua was under military occupation of the US<sup>3</sup>, Nicaragua and Colombia agreed that the Mosquito Coast (with the Corn Islands located in front of it) would belong to Nicaragua and ASA would be under Colombian sovereignty. This treaty expressly excluded the Serrana, Quitasueño and Roncador cays that at the time were subject to a dispute between Colombia and the US<sup>4</sup>.

In 1930 when the parties exchanged ratifications of the treaty they signed a new Protocol ("1930 Protocol") by which they declared "that the San Andrés and Providencia Archipelago mentioned in the first article of the said Treaty does not extend west of the 82nd degree of longitude west of Greenwich". Pursuant this new agreement Colombia understood that the 82nd meridian west constituted the maritime boundary between the parties and acted upon this understanding enforcing this frontier.

Thus apparently the dispute was settled. However in 1969 the controversy arose again. At that time Nicaragua started granting oil exploration concessions to the east of the 82nd meridian around Quitasueño cay, an action that was promptly objected by Colombia<sup>5</sup>.

Later in 1972 the US and Colombia entered into the Vazquez-Saccio Treaty by which the US renounced to its claims to the Serrana, Quitasueño and Roncador cays<sup>6</sup>. Nicaragua protested against this new treaty<sup>7</sup>.

Afterwards, with the new developments of the Law of the Sea, Colombia entered in series of delimitation agreements with the other riparian states of the south west Caribbean. Thus, Colombia agreed

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<sup>2</sup> Riesenber, David, Introductory note to the International Court of Justice: Territorial and Maritime Dispute (Nicaragua v. Colombia), *International Legal Materials*, Vol. 52, No. 1 (2013), page 1.

<sup>3</sup> As discussed below this circumstance will be important later.

<sup>4</sup> *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 832, para. 18.

<sup>5</sup> Monroy Cabra, Marco, Análisis de la posición jurídica de Colombia ante la Corte de La Haya, in "Contribución de la Universidad del Rosario al debate sobre el fallo de La Haya: análisis del caso Nicaragua vs. Colombia", edited by Trujillo García, Carlos and Torres Villarreal, María Lucía, Editorial Universidad del Rosario, 2013, page 24; Ospina, Mariano, *op cit*, page 32.

<sup>6</sup> Monroy Cabra, Marco, *op cit*.

<sup>7</sup> Ospina, Mariano, *op cit*, page 32.

its maritime delimitation with Panama in 1976<sup>8</sup>, Costa Rica in 1977<sup>9</sup>, Dominican Republic<sup>10</sup> and Haiti in 1978<sup>11</sup>, Honduras in 1986<sup>12</sup> and finally Jamaica in 1993<sup>13</sup>.

Some of these treaties have special characteristics. The one with Costa Rica has not been ratified by the parties, although both States act as if it was in force<sup>14</sup>. The 1993 Treaty with Jamaica establishes a joint exploitation zone. Finally, Honduras at first was not willing to ratify its treaty because of a pending dispute relating to the Serrana key, and only ratified it in 1999 when the disputes with Nicaragua were under way<sup>15</sup>.

Despite minor differences between the treaties, all of them delimited the overlapping of the maritime projections of the riparian States and ASA, giving full effect to the Archipelago. Thus Colombia acquired a larger share of the south west Caribbean particularly considering the relative small size of ASA and the distance of its continental coast. For example, Costa Rica later claimed<sup>16</sup> that its own treaty with Colombia had two underlying assumptions: (i) that the 82nd meridian was the frontier between Colombia and Nicaragua and (ii) that ASA was entitled to full effect or weight in terms in a delimitation.

Additionally, in 1980 Costa Rica and Panama entered into a delimitation agreement in the Caribbean Sea recognizing a tripoint between them and Colombia<sup>17</sup>. Also, Honduras claimed that a tacit agreement existed with Nicaragua delimiting their maritime zones along the parallel 15 north<sup>18</sup>. Only the overlapping of maritime entitlements between Costa Rica and Nicaragua remained undefined.

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<sup>8</sup> Treaty of 20-11-1976.

<sup>9</sup> Treaty Facio-Fernández of 17-3-1977. This Treaty has not been ratified by Costa Rica and is not yet in force.

<sup>10</sup> Treaty Lievano-Jiménez of 13-1-1978.

<sup>11</sup> Treaty of 17-2-1978.

<sup>12</sup> Treaty Ramírez Ocampo-López Contreras of 2-8-1986. This treaty entered into force only in 1999, a few months prior that Nicaragua seized Court.

<sup>13</sup> Treaty Sanin-Robertson of 12-11-1993.

<sup>14</sup> There are several conflicting explanations as why the treaty has not been ratified. Costa Rica has recently argued that it was waiting for the dispute between Nicaragua and Colombia to be definitively settled. However there is some evidence that the Costa Rica's Congress disagree with the treaty giving equal weight to the relative large continental coast of Costa Rica and the small features of ASA. One possible explanation could be the delimitation in the Pacific Ocean where there is a kind of role reversal. Cocos Island, a small Costa Rican island whose maritime zones overlaps with the continental coast of Colombia was given full effect in a subsequent delimitation treaty in 1984. This treaty was ratified by both countries in 2001 and is still in force.

<sup>15</sup> Pratt, Martin, *The Maritime Boundary Dispute between Honduras and Nicaragua in the Caribbean Sea*, IBRU Boundary and Security Bulletin, Summer 2001, page 109.

<sup>16</sup> Oral hearing of 11 of October of 2010, Application by Costa Rica for permission to intervene, page 35.

<sup>17</sup> Treaty of 2-2-1980.

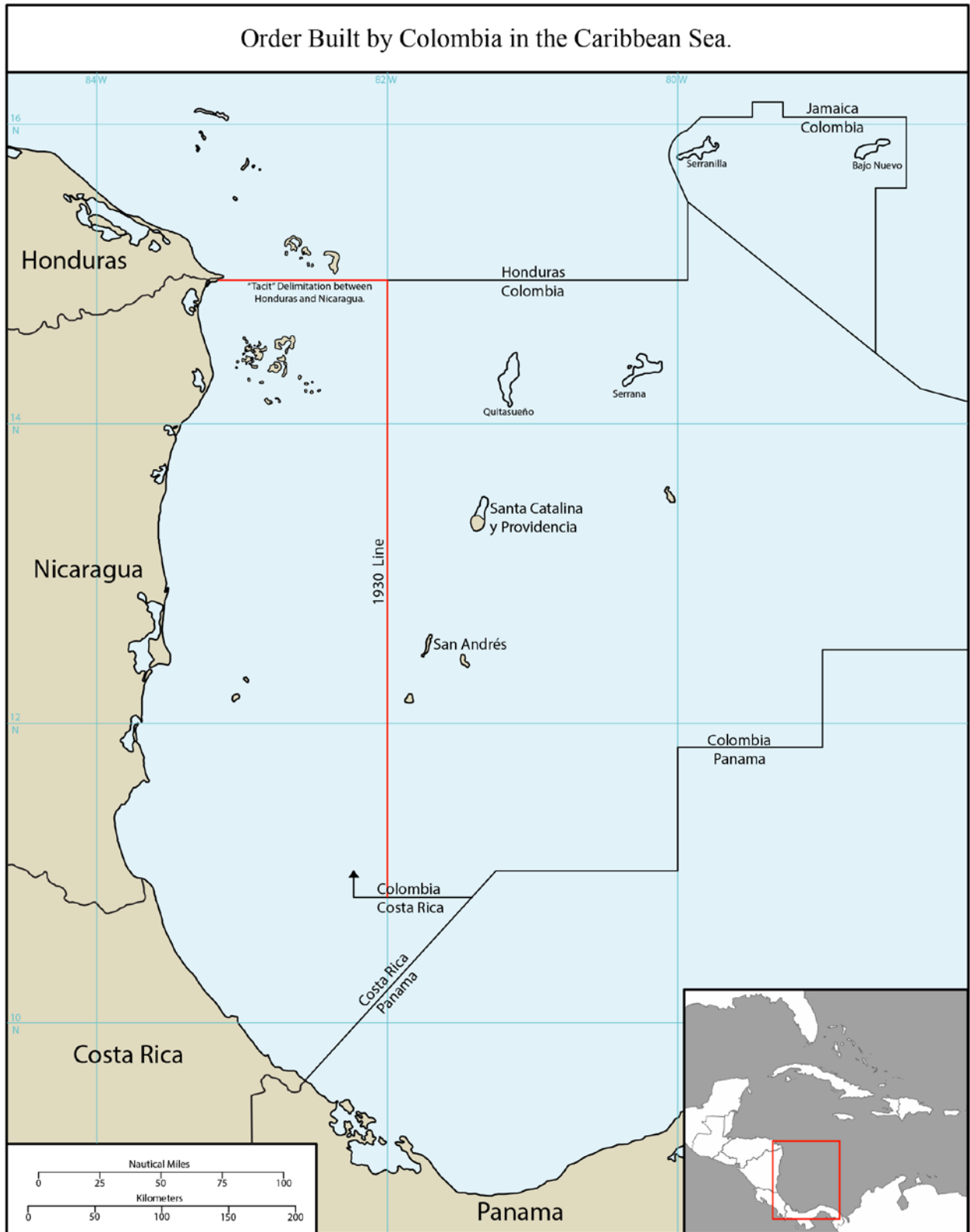
<sup>18</sup> *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, p. 659, paras. 87-90.

As shown in the following map<sup>19</sup>, all the treaties where consistent and all the parties involved (bar Nicaragua) recognized the Colombian sovereignty over ASA and delimited their maritime entitlements taking into account the 82nd meridian claimed by Colombia<sup>20</sup>. The South American State had successfully created an order in the Caribbean that was beneficial to its interests, despite its small presence in the area.

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<sup>19</sup> The map does not show the boundaries between Colombia and Haiti and Dominican Republic. Although they also form part of the order created by Colombia, their importance is peripheral and will not be analyzed in this paper.

<sup>20</sup> View for example Nweihed, Kaldone, *Middle America and Caribbean Maritime Boundaries*, page 274, in Charney and Alexander, editors, *International Maritime Boundaries*: “In pursuit of the objective of confirming the legal validity of meridian 82 W as an overall maritime boundary and not as a mere sovereignty designator by its eventual consolidation through third party recognition, Colombia has succeeded in concluding three agreements with third states in which each new maritime boundary was negotiated in such way as to fit into the course of meridian 82 W. This was accomplished by assuming the shape of parallels and meridians, free or stepped, which approximated the controversial meridian better than the equidistant lines or the prolongation of land boundaries, for example”.





However, this order had its weakness. There was not only the opposition of Nicaragua, which objected several of the acts of Colombia, but most importantly the indecision of Costa Rica and Honduras, the two neighbors of Nicaragua. Both countries signed delimitation treaties with Colombia but failed to ratify them (Costa Rica) or only did it belatedly (Honduras). Nicaragua lobbied somehow effectively against the ratification of those agreements, that would have almost sealed the order built by Colombia.

### III. Nicaragua's attempt to unsettle this order through the ICJ.

Nicaragua opposed this maritime order created by Colombia. This section will explain its different attempts to unsettle this order.

As early as 1969 Nicaragua showed dissatisfaction with the expansive claims of Colombia. That year Nicaragua started granting oil concessions in the area that Colombia claimed as its own<sup>21</sup>. Later in 1972 objected to the US Colombia treaty claiming rights over the Serrana, Quitasueño and Roncador cays, which were excluded from the 1928 Treaty<sup>22</sup>.

However the biggest change was in 1980, after the triumph of the Sandinista Revolution, the new government declared the 1928 Treaty null and void. As Nicaragua was under military occupation by the US between 1927 and 1933<sup>23</sup>, it claimed that the treaty was entered by Nicaragua under coercion. Accordingly, Nicaragua claimed sovereign rights over ASA. This was a direct blow to the maritime order that Colombia was building at the time as it was based mainly on sovereignty over ASA.

This new position of Nicaragua was opposed by Colombia, who reaffirmed its rights over the Archipelago. Partially motivated by this, Colombia entered into a delimitation treaty with Honduras that reaffirmed its sovereignty over ASA and used the 82nd meridian as a starting point of the new maritime boundary. Obviously, Nicaragua objected this new treaty that delimited an area where Nicaragua claimed rights. As discussed below, this treaty between Honduras and Colombia, when they were both aware of Nicaragua's claims could have been considered by the Court in its judgments against them.

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<sup>21</sup> Ospina, Mariano, op cit, page 32-33.

<sup>22</sup> Ospina, Mariano, op cit, page 32-33.

<sup>23</sup> Abello, Ricardo, Diferendo territorial y marítimo entre Nicaragua y Colombia: Once años de pleito, in "Contribución de la Universidad del Rosario al debate sobre el fallo de La Haya: análisis del caso Nicaragua vs. Colombia", edited by Trujillo García, Carlos and Torres Villarreal, María Lucía, Editorial Universidad del Rosario, 2013, pages 61- 62.

After failed negotiation during most of the 90's Nicaragua decided to challenge this maritime order before the ICJ. It started with the 2 weakest links in the Caribbean: the tacit delimitation with Honduras and the 82nd meridian with Colombia.

1. *Judgment in Nicaragua v. Honduras. 8-5-2007.*

In 1999, not long after the treaty between Colombia and Honduras was finally ratified, Nicaragua submitted an application before the ICJ asking the Court to delimit its maritime boundary with Honduras, and to define the sovereignty of some small cays near cape Gracias a Dios where the land boundary of the countries reaches the sea.

In the 2007 judgment the Court stated that “The establishment of a permanent maritime boundary is a matter of grave importance and agreement is not easily to be presumed”<sup>24</sup> and thus rejected the Honduran contention concerning the existence of a tacit agreement on maritime delimitation following the 15th parallel.

In its delimitation the Court did not follow the 15th parallel north but rather decided to establish the boundary at the bisector line following the general direction of the coast. This line would go only until the 82nd meridian and then will follow the same direction until it reached the area where rights of third States might be affected<sup>25</sup>.

With this judgment Nicaragua completed the first step in unsettling the established maritime order in the Caribbean. It started with the easiest case, as the tacit agreement argued by Honduras was rather weak.

2. *Judgment in Nicaragua v. Colombia, preliminary objections. 13-12-2007*

The case of Nicaragua v. Colombia is much more complicated and will be the center of the present paper.

As discussed previously, Nicaragua claimed that the 1928 Treaty was null and void. In its 2001 application, Nicaragua asked the Court to declare the invalidity of the Treaty and the Nicaraguan sovereignty

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<sup>24</sup> *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007*, para. 253.

<sup>25</sup> *Idem*, paras 312-319.

over ASA. Additionally asked to delimit the maritime entitlements of the continental coast of the parties, without considering the maritime projection of the Archipelago<sup>26</sup>.

If Nicaragua would have succeeded with this claim, it would have completely changed the maritime order in the Caribbean. It would have substituted Colombia as the principal power in the zone and would have acquired the majority of the maritime territory.

Nicaragua based the jurisdiction of the Court in the Article XXXI of the Pact of Bogotá<sup>27</sup>. However Article VI of the Pact excluded “matters already settled by arrangement between the parties, or by arbitral award or by decision of an international court, or which are governed by agreements or treaties in force on the date of the conclusion of the present Treaty”. As the Pact of Bogotá was concluded in 1948, Colombia objected the jurisdiction of the Court arguing that the 1928 Treaty and the 1930 Protocol had settled the territorial and maritime disputes respectively, and the case was outside the jurisdiction of the Court *ratione temporis*.

In the 2007 judgment the Court partially accepted the objection of Colombia. The ICJ declared that Nicaragua was barred from claiming the invalidity of the 1928 Treaty because it had recognized its validity for more than 50 years<sup>28</sup>. Accordingly, the 1928 Treaty and 1930 Protocol were in force in 1948. Thus, the next step was to determine if the dispute presented by Nicaragua was settled or governed by those instruments. The Court decided that the 1928 Treaty had already settled the dispute regarding the named features of ASA (San Andrés, Providencia and Santa Catalina). However the Treaty did not solve the dispute regarding the Serrana, Quitasueño and Roncador cays, which were expressly excluded, nor respect to other unnamed features (Serranilla, Bajo Nuevo, East Southeast and Albuquerque). Thus the Court declared that had jurisdiction to decide regarding the sovereignty of this 7 features.

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<sup>26</sup> *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 832, para. 12

<sup>27</sup> Also Nicaragua relied on the optional clause declarations of both parties, notwithstanding that Colombia withdrew its declaration one day before Nicaragua filed the application. Abello, Ricardo, op cit, page 52; Burke, Naomi, Nicaragua v Colombia at the ICJ: Better the Devil You Don't? Cambridge Journal of International and Comparative Law (2)2: (2013), page 315.

<sup>28</sup> *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 832, para. paras. 78-80.

Additionally the Court declared that the 1930 Protocol did not establish the maritime boundary between the parties and that dispute was within its jurisdiction.

With this judgment Colombia was able to keep one of the pillars of the order in the Caribbean: sovereignty over ASA. However, the Court allowed the revisionist attempt of Nicaragua to continue by denying the existence of a maritime delimitation agreement. With this judgment, the other pillar of the Colombian order, namely the 82nd meridian, fell through.

Apparently, Colombia considered this judgment as a big victory and did not acknowledged (at least publicly) the disruptive potential of the pending maritime delimitation<sup>29</sup>. This could explain its later reaction to the final judgment of the Court.

### 3. *Intervention applications by Costa Rica and Honduras. Judgements of 4-5-2011.*

In early 2010 both Honduras and Costa Rica requested to intervene in the case pursuant article 62 of the Statute. The former tried to intervene as a party, and only in the alternative as a non-party. The later requested only non-party status. Colombia welcomed this applications believing that they would help its case. Nicaragua on the other hand opposed the interventions. Finally in 2011 both applications were rejected by the Court.

Honduras requested the Court to set a tripoint where the 2007 judgment line, the 1986 Treaty between Colombia and Honduras and the future Nicaragua and Colombia delimitation would meet. Honduras, as a party to the Pact of Bogotá, asked that to be bound by the future judgment as a new party to the case<sup>30</sup>. On the alternative, Honduras argued that it had an interest of legal nature relating to the status of the 1986 Treaty with Colombia.

The Court rejected Honduras application to intervene on two grounds<sup>31</sup>. First, it considered to be veil attempt to appeal to the 2007 judgment which had *res judicata* effect. Second, as every intervention is

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<sup>29</sup> Abello, Ricardo, op cit, page 51.

<sup>30</sup> Although there has been plenty requests for intervention, this was the first time that a State had seek party status in a case.

<sup>31</sup> *Territorial and Maritime Dispute (Nicaragua v. Colombia), Application for Permission to Intervene, Judgment, I.C.J. Reports 2011*, p. 420, paras. 66-75.

incidental to the case is presented, Honduras could not ask the Court to change the nature and scope of the case introducing a new dispute.

Regarding the alternative claim by Honduras, the Court considered that Honduras did not show an “interest of legal nature which may be affected by the decision” as the relevant standard established in article 62. The Court said that the 1986 Treaty was *res inter alios acta* regarding Nicaragua and the 2007 judgement did not affect Colombia. Accordingly, the Court stated that in the future delimitation between Nicaragua and Colombia it would not rely on the 1986 Treaty in any way<sup>32</sup>.

The case of Costa Rica was more complicated<sup>33</sup>. The intervention was not explicitly defending the position of Colombia in the case. But in any case both countries had similar interests. Costa Rica was arguing generally for maintaining the status quo in the Caribbean Sea. Accordingly, Costa Rica saw the claims of Nicaragua as the main threat to its “interest of legal nature”.

At the same time, while Costa Rica was inviting the Court to maintain the existing maritime order, it also hinted that, if the Court would dismantle the maritime arrangement in the zone, it would claim against Nicaragua a greater maritime zone than the one agreed in 1977 with Colombia. Eventually Costa Rica followed this path and brought a new case against Nicaragua in early 2014.

The Court did find that Costa Rica had an interest of legal nature but decided that it would not be affected by virtue of the relative effect of the judgments of the Court pursuant article 59 of the Statute, and the careful manner in which the Court establishes maritime delimitation mindful of third States’ rights<sup>34</sup>.

The Court considered that the interventions were not necessary because it could protect third states’ rights without their participation. However, as will be discussed below, it is not clear that the Court kept the promise made to Honduras and specially Costa Rica.

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<sup>32</sup> Bonafé, Beatrice, Interests of a Legal Nature Justifying Intervention before the ICJ. *Leiden Journal of International Law*, Volume 25, Issue 03, September 2012, page 749.

<sup>33</sup> Costa Rica application was rejected by 9 votes to 7. For further discussion see Bonafé, Beatrice, op cit.

<sup>34</sup> *Territorial and Maritime Dispute (Nicaragua v. Colombia), Application for Permission to Intervene, Judgment, I.C.J. Reports 2011*, p. 348, paras 89-90.

4. *Judgment in Nicaragua v. Colombia, merits.*

After the 2007 Judgment the parties modified their position in the maritime portion of the case. Colombia argued for a purely equidistance based delimitation between ASA and the continental coast of Nicaragua. This proposal followed a similar pattern that the 82nd meridian and had an analogous effect of completely blocking Nicaragua of any major access to the Caribbean.

The changes in Nicaragua position were more complex. As ASA was definitively under Colombian sovereignty, Nicaragua initial position became untenable as the continental coast of both States are more than 400 nautical miles apart. Thus, Nicaragua asked the Court to delimit only the overlap in the continental shelf of Colombia's mainland and its own extended shelf, creating enclaves of 3 to 12 miles to each feature of ASA<sup>35</sup>.

Finally, after more than 11 years of litigation the Court handed its judgment in the merits of the case in 2012<sup>36</sup>. The judgment had three main parts:

- i) The Court decided that the 7 pending maritime features belonged to Colombia<sup>37</sup>.
- ii) The new claim concerning the delimitation of the continental shelf was admissible but the Court found that “[could not] uphold” it because Nicaragua at the time had not made a full submission to the Commission on the Limits of the Continental Shelf (CLCS) under UNCLOS. Despite Colombia is not party to the treaty, the Court found that article 76 reflected customary international law<sup>38</sup>.
- iii) The Court delimited the maritime entitlements of the parties between the continental coast of Nicaragua and ASA, with a considerable shift of the equidistance line considering the difference in length of the coast. This weighted equidistance or equiratio of 3:1 gives Nicaragua a greater share of the disputed area. Additionally, to avoid a cut off effect to Nicaragua, the boundary line follows the parallel of latitude to north and south of the main

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<sup>35</sup> Burke, Naomi, op cit, page 315.

<sup>36</sup> An insightful summary of the judgment can be found in Grossman, Nienke, Territorial and Maritime Dispute (Nicaragua v. Colombia), *The American Journal of International Law*, Vol. 107, No. 2 (April 2013), pages 396-403 and Tanaka, Yoshifumi, Reflections on the Territorial and Maritime Dispute between Nicaragua and Colombia before the International Court of Justice. *Leiden Journal of International Law*, / Volume 26, Issue 04, December 2013.

<sup>37</sup> *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012*, p. 624, para. 103.

<sup>38</sup> *Idem*, para 131.

islands of ASA. Meanwhile, Serrana and Quitasueño cays were enclaved with only a belt of 12 miles of territorial sea, without any EEZ.<sup>39</sup>

As shown by the next map, after the judgment the situation in the Caribbean was quite different from the order created by Colombia.

In the merits of the case, Colombia tried to maintain the status quo. The delimitation line proposed by Colombia, or for that matter, any line that goes roughly in north south direction between San Andres and the coast of Nicaragua would have preserved the order created by Colombia. Such line would have eventually reached the delimitation agreed by Costa Rica and Colombia in the 1977 treaty in the south and the boundaries established by the Court in 2007 between Honduras and Nicaragua, as well as the line set forth by Colombia and Honduras in their treaty. As usually does in this type of cases, the Court could have done a partial delimitation, indicating with arrows the general direction of the boundary, not fixing a tripoint (as it cannot do it) but acknowledging the possibility of a future agreement in this regard.

Any version of that delimitation, even one adjusted taking into account the disparities of the lengths of the respective coasts, would have been a victory for Colombia. Nicaragua could have won some maritime space, but a judgment in this mold would have been only a marginal correction of the existing order while leaving its core standing. In this scenario the Court would have definitively approved the maritime order created by Colombia, blocking any further attempt of Nicaragua to unsettling it.

On the other hand, any of the several lines proposed by Nicaragua during the long proceedings (a general boundary to the east of San Andres, between the archipelago and the continental coast of Colombia, plus the enclaving of each of the features of the archipelago) would have completely destroyed the boundary system carefully created by Colombia. In this scenario Nicaragua would have replaced Colombia as the center of the maritime order in the Caribbean Sea. With a judgment of this kind the Court would have not created a new order. It would simply have shattered the old one. It would have been Nicaragua's task to build a new one, either by agreement or litigation with the other riparian states.

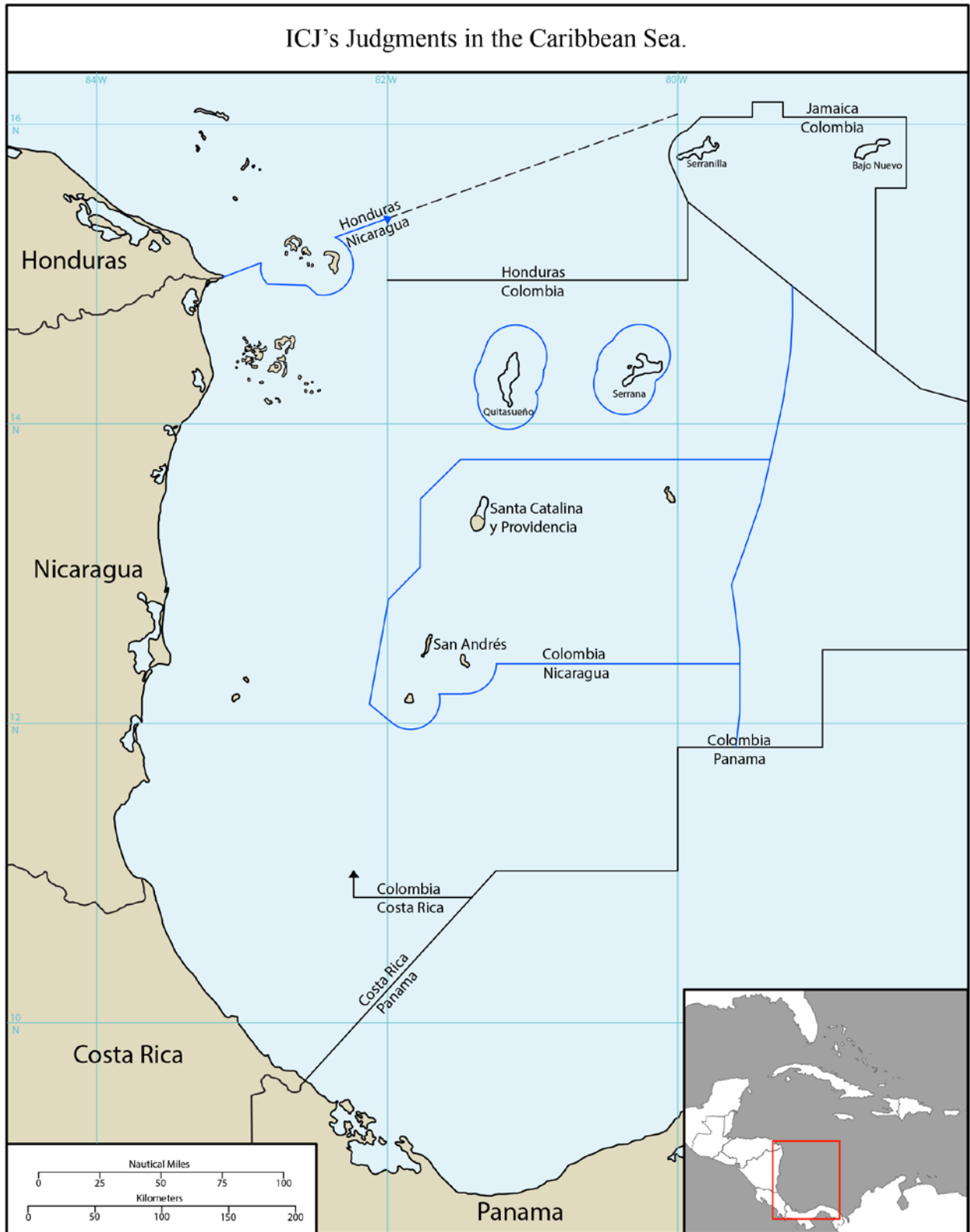
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<sup>39</sup> *Idem*, paras. 237-238.

Considering the above, it could be argued that the actual judgment was a compromise between the positions of the parties. Looking only to the bilateral dispute this idea makes sense. Colombia retained the sovereignty over all the features of ASA, the central part of the boundary is still roughly north south and between ASA and the continental coast of Nicaragua while the use of parallels of latitude in the northern and southern part allows Nicaragua access to the rest of the Caribbean Sea.

However, considering the maritime order existing up to that point, the judgment is completely at odds with it. The use of parallels of latitude is incompatible with the existing agreement in the zone. The specific line drawn by the Court does not intersect any of the other agreement that constitute the “old order” in the Caribbean, there are simply no possible tripoint to be agreed in the future without substantial modification of the existing agreements. So there are two different systems, superimposed in the same area but isolated from each other. Hence the question, how this orders relate to each other.





The answer of the Court, as anticipated in the interventions judgments, was that its decision was completely independent of the existing agreement and rights of third parties. In fact, at paragraph 228 of the Judgment the Court:

“observes that, as Article 59 of the Statute of the Court makes clear, it is axiomatic that a judgment of the Court is not binding on any State other than the parties to the case. Moreover, the Court has always taken care not to draw a boundary line which extends into areas where the rights of third States may be affected. The Judgment by which the Court delimits the boundary addresses only Nicaragua’s rights as against Colombia and vice versa and is, therefore, without prejudice to any claim of a third State or any claim which either Party may have against a third State”<sup>40</sup>.

However, as it will be discussed, it far from clear that the decision did not affect third states. In previous cases of maritime delimitation where third parties’ rights may be involved<sup>41</sup> the Court had a very minimalistic and conservative approach. In those occasions the Court restricted itself to only the parts that were undoubtedly bilateral and, where thirds parties may have had a claim, only indicated the general direction of the boundary. On the contrary, in this judgment the Court fully delimited the entitlement of the parties despite being a semi enclosed sea with up to 4 other states that could have claims in the zone.

##### 5. *Reactions to the 2012 judgment.*

Colombia strongly disagrees with the Court’s judgment. There was considerable public outcry in Colombia against the decision that was seen as a huge loss for the country. The judgment became a politically contested issue inside Colombia and there was a long debate between the current and former presidents and minister of foreign affairs regarding who was to blame for the result<sup>42</sup>. Several actors accused the government of misinforming the public and hiding the real state of the proceeding. After the victorious reaction of the government to the 2007’s judgment, the Colombian public was not aware of the risks of the pending maritime delimitation.

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<sup>40</sup> *Idem*, para. 238.

<sup>41</sup> For example *Libya/Malta, Cameroon v. Nigeria, Romania v. Ukraine, Nicaragua v. Honduras*, among others. Dissenting opinion judge Donohue in Honduras intervention.

<sup>42</sup> Monroy Cabra, Marco, *op cit*, pages 23.

As an answer to the previous concerns, only a week after the judgment Colombia denounced the Pact of Bogotá, claiming that they would never again submit a boundary delimitation to international adjudication<sup>43</sup>.

Colombia has come short of outright rejection of the 2012 judgment. Despite its strong criticisms, Colombia has never argued that the judgment is null and void or somehow without legal effect<sup>44</sup>. In fact, Colombia has recognized the validity of the judgment and its binding force as a matter of international law<sup>45</sup>. Instead, the official position of the government is that that, as a matter of Colombian constitutional law, the judgment is impossible to be applied until there is a treaty between Colombia and Nicaragua that is ratified by Colombia pursuant its Constitution<sup>46</sup>. This interpretation was confirmed by the Constitutional Court of Colombia in May 2014<sup>47</sup>.

In the immediate aftermath of the judgment, there were some informal conversations between the governments of Colombia and Nicaragua regarding the implementation of the Court's decision. Publicly Colombia claimed that its interest was to protect the fishing rights of the indigenous people of ASA and to comply with its internal law requiring that any modification of its boundaries had to be made through a duly ratified treaty<sup>48</sup>.

At first Nicaragua seemed open to a negotiated solution. It stated that it had no problem with an accommodation for the fishing rights of local people, and that it was willing to enter into a treaty to allow

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<sup>43</sup> Mateus Rugeles, Andrea, Denuncia del Pacto de Bogotá: Implicaciones jurídicas para Colombia, in "Contribución de la Universidad del Rosario al debate sobre el fallo de La Haya: análisis del caso Nicaragua vs. Colombia", edited by Trujillo García, Carlos and Torres Villarreal, María Lucía, Editorial Universidad del Rosario, 2013, page 13; Burke, Naomi, op cit, 322; Ospina, Mariano, op cit, page 38.

<sup>44</sup> Jaramillo, Mauricio, Política de fronteras, inserción global y el fallo de la CIJ. Lecciones para Colombia "Contribución de la Universidad del Rosario al debate sobre el fallo de La Haya: análisis del caso Nicaragua vs. Colombia", edited by Trujillo García, Carlos and Torres Villarreal, María Lucía, Editorial Universidad del Rosario, 2013, page 36; Mateus Rugeles, Andrea, op cit, page 18.

<sup>45</sup> See the for example the Constitutional Court decision (Decision C-269/14 of 2-5-2014).

<sup>46</sup> Mateus Rugeles, Andrea, op cit, page 3; for a comprehensive critique of this view see Arévalo Ramírez, Walter, El Fallo sobre San Andrés: El debate de la Supremacía del Derecho Internacional, la Obligatoriedad del Fallo y el Derecho Interno Constitucional Colombiano, in "Contribución de la Universidad del Rosario al debate sobre el fallo de La Haya: análisis del caso Nicaragua vs. Colombia", edited by Trujillo García, Carlos and Torres Villarreal, María Lucía, Editorial Universidad del Rosario, 2013, pages 114 to 119.

<sup>47</sup> Decision C-269/14 of 2-5-2014.

<sup>48</sup> <http://www.elespectador.com/noticias/judicial/sin-tratado-nicaragua-no-se-puede-cumplir-fallo-de-haya-articulo-490121>

Colombia to comply with its own legal requirements. However, Nicaragua was adamant that this negotiation did not include any modification of the boundary line drawn by the Court.

Meanwhile, Colombia has continued to act as if the judgment does not exist. After 2012 Colombia still has enforced its laws in the zone that the Court declared as Nicaraguan, granting fishing permits and seizing ships fishing with Nicaraguan permits from time to time. Not only Colombia try to maintain the status quo, but also enacted new regulations that purported to improve its position. In September 2013 Colombia issued Decree 1946 establishing an “integral contiguous zone” that covered all the features of ASA with a 24 miles zone that was completely at odds with the 2012 Judgment<sup>49</sup>. Shortly after the president of Colombia submitted a case to the Constitutional Court asking questions about the constitutional status of the Pact of Bogota and 2012 Judgment. In its decision of May 2014, the Constitutional Court declared that (i) as a matter of international law, the ICJ’s Judgment was valid and binding; (ii) that article XXXI of the Pact of Bogota was unconstitutional; and (iii) that any modification of the boundaries of Colombia could only be done by an international agreement ratified by the Legislative Power<sup>50</sup>.

Also Colombia declared that there would be no negotiations with Nicaragua while the decision of the Constitutional Court was pending<sup>51</sup>.

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<sup>49</sup> In one of the new cases before the ICJ, Colombia claimed, without much support, that the previous judgment of the Court did not delimited the contiguous zone, so Colombia could unilaterally regulated it.

<sup>50</sup> Decision C-269/14 of 2-5-2014.

<sup>51</sup> Also In early 2013 the Colombia press reported the existence of a contract between Nicaragua and a company, with ties to the Chines State, called HKND entered few days before the 2012 judgments. The contract’s purpose was the construction of an interoceanic canal connecting the Pacific Ocean and the Caribbean Sea through Nicaragua. It was argued by several political figures in Colombia that this was enough for an application for revision pursuant article 61 of the Statute (Such as former minister of Foreign Affairs Noemí Sanín Posada. See <http://www.semana.com/nacion/articulo/el-fallo-de-la-haya-triunfo-de-nicaragua-cuento-chino/341394-3>). In their view, the contract showed the interest of China in the region and could have influenced the vote of judge Xue. It was argued that all this was a “new fact” that could justify changing the Court’s decision. Apparently, this possibility was seriously considered by the Colombian government. But eventually it decided against presenting an application for revision without giving their reasons to do so. Although there is no official explanation it is easy to think of several reason why the application would have been a bad idea: (i) The Court has never accepted an application for revision under article 61 before and in this instance Colombia had a particularly weak case; (ii) At the time there were still two cases pending before the Court and application questioning judge Xue could alienate the Court; and (iii) more importantly, article 61 could require prior compliance by Colombia of the 2012 judgment. See also Khan, Imad and Rains, David, Doughnut Hole in the Caribbean Sea: The Maritime Boundary between Nicaragua and Colombia according to the International Court of Justice, 35 *Houston Journal of International Law*, 589, 2013, page 604.

6. *New Nicaragua's cases. "Enforcement" of the 2012 judgment and delimitation of the extended continental shelf. Judgments of 17-3-2016.*

Confronted with scenario, Nicaragua decided to present 2 new cases against Colombia few days before the one year term of Colombia denunciation of the Pact of Bogota. Nicaragua saw that the possibility of negotiations was shut and after that year term the Court would not have had jurisdiction. The first concerns the delimitation of the extended continental shelf once Nicaragua made a full submission to the CLCS. Costa Rica, Panama, Colombia and Jamaica opposed the submission<sup>52</sup>. In 2014 the CLCS decided to defer any recommendation on the matter considering the opposition of neighboring states<sup>53</sup>.

This new case attempted to continue the delimitation (in this case only the continental shelf) eastwards of the boundary established in 2012. The proceedings are still in written phase and there is no much information about the detailed position of the parties. However, from the information available after the preliminary objections of Colombia, it is clear that Nicaragua's position is very aggressive. Its proposed delimitation intrudes well into the EEZ of Colombia's continental coast. Additionally, the continental shelf claimed by Nicaragua overlaps significantly with the maritime zones of Panama<sup>54</sup>, as defined in the Treaty of 1976 with Colombia. Taken at face value the Nicaraguan claims stand little chances of success.

However, it is not possible to simply dismiss this case. Nicaragua is a talented and skillful litigator before the ICJ. It is highly likely that its stated case does not coincide with its real interest. This would be consistent with its strategy in the previous case against Colombia. In that occasion Nicaragua also presented an aggressive (and quasi unrealistic) case that was almost completely disregarded by the Court and nonetheless achieved a resounding victory with the final result. It is highly likely that Nicaragua could be aiming for a similar scenario. Considering this, the success of Nicaragua should not be measured against its stated position but against its still undisclosed real interest.

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<sup>52</sup> Costa Rica, Panama and Colombia sent a short joint note opposing Nicaragua's submission. Also in separate notes each country explained its opposition in further detail.

<sup>53</sup> Commission on the Limits of the Continental Shelf, CLCS/83, Thirty Fourth Session, 27 of January to 14 of March 2014, Item 14,

<sup>54</sup> Panama promptly opposed Nicaragua's submission to the CLCS, but has not yet said anything regarding the case before the ICJ. Nicaragua has declared that does not claim any Panamanian maritime zone but in any case Panama could consider an intervention under article 62 in this case.

The second one relates to alleged violations by Colombia of Nicaraguan sovereign rights over the area awarded by the 2012 judgment. Nicaragua claims that Colombia is preventing it from exercising its sovereignty over the maritime zones that the Court already decided that were Nicaraguan. The claimant is careful not to characterize its case as one of enforcement of the 2012 Judgment because that would be outside the scope of the Court and would correspond to the Security Council<sup>55</sup>. In any way, it is easy to see that Nicaragua is trying to force Colombia to accept and implement the 2012 Judgment.

This case would ultimately depend on the “facts on the ground” in the area. As mentioned before, Colombia claims that the Judgment is not applicable and still “enforces” the 82nd meridian as the boundary. On the other hand Nicaragua has tried to exercise some rights in the zone, granting fishing rights to private parties and taking the first steps to grant oil concessions<sup>56</sup>.

Somehow, the two competing states have been careful enough to avoid major incidents in the Caribbean. Colombia claims that the few incidents to date were created on purpose by Nicaragua to enhance its standing before the Court once the case was already initiated.

Colombia objected the jurisdiction of the Court on both cases. As a general matter, it argued that its denunciation of the Pact of Bogota had immediate effect. However the Court found that, according with article LVI of the Pact of Bogota, the treaty continued to be in force between the parties for a year after its denunciation by Colombia. As Nicaragua’s application was filed within that period, the Court declared that it had jurisdiction *ratione temporis*<sup>57</sup>.

Regarding the extended continental shelf case, Colombia argued that such claim was already been submitted to the Court, found admissible but rejected in 2012. In its opinion Nicaragua could not challenge the *res judicata* effect of that decision. In an 8 to 8 votes tie, decided by the casting vote of the president, the Court found that the issue was not decided in 2012 and thus not covered by *res judicata*. Despite great

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<sup>55</sup> Colombia in fact argued that was exactly what Nicaragua was doing and the case was outside the jurisdiction of the Court. The ICJ sided with Nicaragua and found this was not an “enforcement” request.

<sup>56</sup> See <http://www.elpueblopresidente.com/noticias/ver/titulo:17389-presidente-daniel-recuerda-a-colombia-que-debe-cumplir-con-la-aplicacion-del-fallo-de-la-cij> and also <http://www.eltiempo.com/archivo/documento/CMS-12990782>.

<sup>57</sup> *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, paras 31 to 46.

criticism from the minority<sup>58</sup>, the Court argued that when in 2012 declared that “Nicaragua, in the present proceedings, has not established that it has a continental margin that extends far enough to overlap with Colombia’s 200-nautical-mile entitlement to the continental shelf, measured from Colombia’s mainland coast”<sup>59</sup> and that “cannot uphold” the claim, it meant only to procedural requirements under UNCLOS and that it had not decided the merits of the claim. In short, the Court said that it “did not settle the question of delimitation in 2012 because it was not, at that time, in a position to do so”<sup>60</sup>.

The same day of the judgments, Colombia announced that considered the decisions flawed and would not appear before the Court for the second stage of the proceedings<sup>61</sup>.

With this Colombia definitely abandoned the judicial path. This was a striking decision as Colombia, for Latin-American standards, has always been a legalistic country committed to international law<sup>62</sup>. Apparently the main reason were the apparent contradictions regarding the extended continental shelf in the two judgments. In both instances the Court found a way to accommodate Nicaragua’s position and make opposable to Colombia UNCLOS even without being a party to it.

#### IV. Current situation

This section discusses the relationship between the two competing maritime orders in the Caribbean. On one hand there is the traditional order built by Colombia through a series of bilateral agreements. On the other there is a revisionist order created by Nicaragua through litigation before the ICJ. Each one built the order playing to its strengths. Colombia via negotiation relying in its relative power at the Caribbean and Nicaragua through litigation taking advantage of its considerable expertise before the ICJ.

Some of the riparian states discussed the effect of the ICJ judgments on the existing agreements on the area during the failed intervention of Costa Rica. While obviously Nicaragua, Colombia and Costa Rica

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<sup>58</sup> See joint dissenting opinion of Judges Yusuf, Cancado Trindade, Xue, Gaja, Bhandari, Robinson and Judge ad hoc Brower. For a slight different argument see dissenting opinion of Judge Donoghue.

<sup>59</sup> *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2012, p. 624, para. 103, para 129.

<sup>60</sup> *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, para 85.

<sup>61</sup> <http://www.eltiempo.com/politica/justicia/reaccion-de-santos-tras-decision-de-corte-de-la-haya/16539485>.

<sup>62</sup> Jaramillo, Mauricio, op cit pages 34 and 45; Monroy Cabra, Marco, op cit, page 27.

recognized the general validity of the principle of the relative effect of judgments and treaties, they inferred different consequences for the case.

The first point of disagreement was the unratified 1977 Treaty. All parties agreed that the treaty had not entered in effect, yet both Colombia and Costa Rica had complied with its terms. On one hand Costa Rica argued that said treaty only limits the maritime entitlements of Costa Rica concerning Colombia, but does not affect the claims that Costa Rica could have vis a vis Nicaragua.

On the other hand Nicaragua, while accepting the relative effect of the Treaty, claimed that Costa Rica had renounce any claim north or east of the 1977 line, thus its “interest of legal nature” was bounded by that treaty.

Regarding the effect of the future judgment in the case the position of Nicaragua and Costa Rica were the reverse. Nicaragua argued that because of article 59 of the Statute of the Court the judgment could not have any effect on Costa Rica. It would be *res inter alios acta* and accordingly there was not (and could not be) an interest or right of Costa Rica involved in the dispute.

Costa Rica’s position was more nuanced. It gave some sort of absolute effect of the Judgment arguing that if the Court would follow Nicaragua’s claim, the areas north and east of the 1977 line would cease to be Colombian, thus “rendering the agreement between Costa Rica and Colombia without purpose”<sup>63</sup>. Hence, for Costa Rica, treaties cannot affect the legal relationship of third parties but the Court could do it, removing Colombia from the other side of the 1977 line even without Costa Rica participating in the proceedings.

As discussed before, the Judgment 2012 contains the seed of a new order that ignores the old order created by Colombia. Both orders are incompatible and there is an uneasy relationship between them. The next sections explore different ways to understand the relationship between the two. The first take seriously the contention of the Court that its judgments have only relative effect. The second considers the possibility of the judgments being “a given fact” and having somewhat absolute effect.

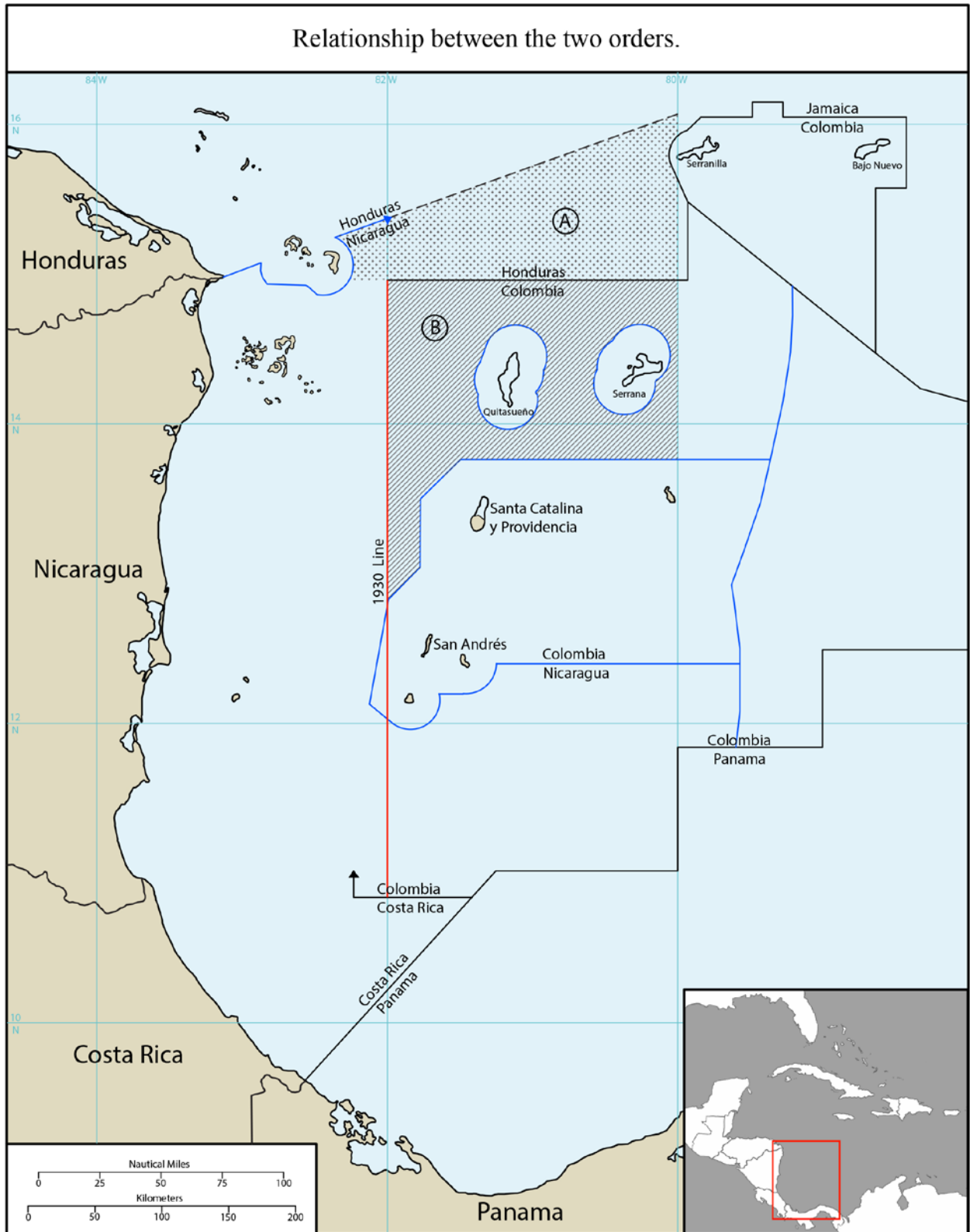
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<sup>63</sup> Public sitting held on Monday 11 October 2010, at 10 a.m., at the Peace Palace, in the case concerning the Territorial and Maritime Dispute (Nicaragua v. Colombia) Application by Costa Rica for permission to intervene, para 15.



1. *Relative effect*

The problems stem from the overlapping of multiple claim and the bilateral nature of both treaties and judgments. The Court has stressed in every occasion that its decision are not opposable to third parties and conversely that treaties do not affect States not parties to them. However, this principle applied to this case creates a series of difficulties as is illustrated in the following map:



In practical terms, strange situations arise if the treaties and judgments create only relative rights, opposable on a bilateral basis, but not to the international community at large. For example, the zone A in the previous map, that is north to the 1986 Treaty line but south of the 2007 delimitation, does not have a clear title holder. In fact, pursuant the 1986 treaty, Honduras can claim that area *vis a vis* Colombia, but not to Nicaragua because of the ICJ judgment. Conversely, in zone B (that is south of 15 parallel but north the 2012 boundary) Colombia can claim rights against Honduras but not Nicaragua.

The idea of not *erga omnes* territorial rights is counter intuitive and probably not feasible in the long run. The existence of two contradictory competing order that do not acknowledge each other is highly impractical<sup>64</sup>.

Obviously this is not the first time that the Court is confronted with a situation like this. This problem has existed since the expansion of maritime entitlements in the “new Law of the Sea” in the second half of the XX century. The relative effect of treaties and judgments makes situations similar to this quite likely when they are multiple states involved. Until 2012 when delimiting enclosed or semi enclosed seas as the Gulf of Guinea<sup>65</sup>, the Mediterranean Sea<sup>66</sup>, the Persian Gulf<sup>67</sup> or the Black Sea<sup>68</sup> the Court had avoided this kind of results by taking a very conservative approach<sup>69</sup>. In all those cases the Court did not delimited the full lengths of the parties’ entitlements, refraining from adjudicate in zones where third parties might be involved. This was achieved usually by indicating the general direction<sup>70</sup> of the boundary beyond a certain point where could be other countries’ claims. In neither of this cases, the Court established a boundary that was incompatible with existing agreements on the area.

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<sup>64</sup> Monroy Cabra, Marco, op cit, page 25; Burke, Naomi, op cit, page 326.

<sup>65</sup> *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, I.C.J. Reports 2002, p. 303, para 307.

<sup>66</sup> *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, p. 18, para 130 and *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I.C.J. Reports 1985, p. 13, paras 20-23 and 76.

<sup>67</sup> *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits*, Judgment, I.C.J. Reports 2001, p. 40, para 221.

<sup>68</sup> *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 61, paras 112-114, 209 and 218.

<sup>69</sup> Tanaka, Yoshifumi, op cit, page 927.

<sup>70</sup> This was usually represented with an arrow. See the interesting distinction of Costa Rica between “arrow that point” and “arrow that pierce” in the oral hearings regarding intervention. Public sitting held on Thursday 14 October 2010, at 3 p.m., at the Peace Palace, in the case concerning the Territorial and Maritime Dispute (Nicaragua v. Colombia) Application by Costa Rica for permission to intervene, para 10.

In the 2012 judgment the Court stated, as usual, that was mindful of third parties' rights and would not affect them<sup>71</sup>. As discussed, the line chosen by the Court did not intersect any of the previous agreements existing in the area. In some narrow sense, the Court protected third parties interests by not entering in the zones claimed by other states. But at the same time, the new boundary could not be integrated to the existing arrangements, thus unsettling an order where third parties were significant stakeholders. The Court was well aware of this claims as Costa Rica and Honduras tried to intervene in protection of those claims<sup>72</sup>.

In the end the Court could have avoided the current strange situation by either (i) continuing with its historical conservative approach by issuing a more constrained judgment. This would have modified the existing order but maintained its core characteristics; or (ii) allowing the interventions and giving a more comprehensive reach to its decision, including Honduras and/or Costa Rica. This scenario would have created a more complete new order.

The Court chose a middle ground, not keeping with the status quo but not completely replacing it either. This intermediate solution created two competing but independent orders.

The shortcoming of bilateral delimitation (either by agreement or adjudication) could be overcome if the delimitation instruments respond to some overarching sense of order. If they are not unrelated exercise but rather the expression of a more general order, most of the problems discussed in this section do not arise. This was clearly the case of the older order created by Colombia. However, in the case of the ICJ's order it is quite difficult to discern what that overarching order would be, if it exists at all. As will be discussed, the new delimitation between Nicaragua and Costa Rica and the extended continental shelf cases will allow the Court to signal a more complete system in the Caribbean.

Considering the case law of the Court and the procedural history of this case the obvious question is why the Court decided to draw a particular line that was incapable of creating tripoints or relate to the existing order. The Court must have been well aware of the consequences of its judgment in the overall order of the region. However, if the Court disagreed with the boundary line proposed by Colombia or found

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<sup>71</sup> Tanaka, Yoshifumi, *op cit*, page 928.

<sup>72</sup> *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2012, p. 624, Declaration Judge Xue.

it somehow inequitable, it did not have another option than disregard the whole order in the Caribbean. As the system was built with the 82nd meridian at its base, there were somehow inseparables. In the case, Colombia was proposing a line that was equivalent to the 82nd meridian. When the Court rejected that line, by implication rejected the order that stood upon it. There was no conservative approach that could have rejected the position of Colombia only in this case but kept the larger order built in the Caribbean.

Taking into account the limited jurisdiction of the Court, the ICJ is not capable of building a comprehensive order that completely replaces the one erected by Colombia. However, the Court does have the power to unsettle the existing order and nudge all the riparian states into entering a more equitable agreement.

## 2. *Absolute effect*

An alternative interpretation is to give an absolute effect to the judgments of the Court despite its clear words on the contrary. In this view, in 2012 the Court not only delimited the boundary between Nicaragua and Colombia, but decided with *erga omnes* effect which areas of the Caribbean appertained to each State.

Despite the clear text of article 59 of the Statute the international community will understand that the Court is engaged in an apportionment exercise rather than just delimitation<sup>73</sup>. This approach looks beyond the pure formal rules about opposability, and acknowledges the reality of the construction of a more general order<sup>74</sup>. This was apparently the position of Costa Rica in the intervention proceedings.

Applying this theory to this particular case has several consequences:

- i) Various treaties entered by Colombia would have “lapsed” or severely reduced their scope. For example the 1986 Treaty with Honduras, whatever its formal legal value, would have lost its purpose because now at both sides of the parallel 15 (the old boundary) there is Nicaraguan territory<sup>75</sup>. Nicaragua would be to the north pursuant the 2007 judgment and to the south of that line after 2012. In the same mold, in the southern sector Costa Rica

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<sup>73</sup> Tanaka, Yoshifumi, *op cit*, page 928-931

<sup>74</sup> *Ibid.*

<sup>75</sup> Abello, Ricardo, *op cit*, page 63.

considers that after the latter decision, Colombia is no longer to the other side of the line of the 1977 treaty and can claim a larger zone against Nicaragua.

- ii) New maritime dispute could arise. Under the old order there was no possibility of overlapping between Nicaragua and other riparian states. Now under the new regime, both Jamaica and Panama could have maritime boundaries with Nicaragua that have to be settled. The new case concerning the extended continental shelf could even create new overlapping, as Nicaragua claim now zones that were delimited by agreement between Panama and Colombia in 1976.

This view could make sense in territorial disputes. However maritime delimitations are different to land boundaries and an analogy does not work. The basic rule is that land dominate the sea, that is, maritime entitlements are the projection of the sovereignty over the territory. Accordingly, maritime delimitation is about settling the overlapping portion of those entitlements. This is done usually in a bilateral basis, considering only the coast of the respective states, without regard for third parties' coasts. In enclosed or semi enclosed seas, the delimitation on a bilateral basis of 3 or more states could lead to conflicting results<sup>76</sup>. As the cases of Nicaragua v. Honduras and Nicaragua v. Colombia show, the existence of tripoint in this situations are unlikely.

Apparently the other riparian States in the region (Jamaica, Costa Rica and Panama) have not invoked the protection of article 59 of the Statute. They have acknowledged the 2012 judgment as a *fait accompli*, and have acted accordingly. Jamaica and Panama have supported Colombia in its effort to negotiate a new understanding in the region<sup>77</sup>.

More interesting is the position of Costa Rica, who at the beginning acquiesced to the Colombian order by signing a treaty with Colombia and entering to a delimitation agreement with Panama that acknowledged the Colombian claims. The traditional order the Caribbean gave little maritime space to Costa Rica considering the concavity of its eastern coast. However, now Costa Rica has realized that the 2012

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<sup>76</sup> Tanaka, Yoshifumi, *op cit*, pages 928-931.

<sup>77</sup> Tanaka, Yoshifumi, *op cit*, pages 928-931.

judgment represents an opportunity for freeing itself from the previous order and is seeking to strike a better deal<sup>78</sup>. Costa Rica can now simply disregard the unratified Treaty of 1977 with Colombia.

Currently Costa Rica brought Nicaragua before the ICJ asking for a maritime delimitation between them. After the Court pushed Colombia back, Costa Rica is trying to occupy part of the space left behind by the South American State. If the Court follows the equidistance line (or something similar) it would mean that an area that 4 years ago the Court considered as Nicaraguan now could be adjudicated to Costa Rica. Eventually, the new boundary could intersect with the southern parallel of the Nicaragua-Colombia line and would block Nicaragua from most of the southern sector. This also would require a new agreement between Costa Rica and Colombia.

#### **V. Future developments in the case.**

The States driving each order are trying to consolidate them. Nicaragua presented two new cases against Colombia to reinforce and expand the 2012 judgment. Given its success is obvious that Nicaragua will insist in grounding the dispute before the Court. Colombia on the other hand has hardened its stance against the ICJ and definitely abandoned the judicial path. Colombia's focus is on a negotiated solution<sup>79</sup>.

The existence of competing orders in the Caribbean is not sustainable in the long run. Eventually one of these orders will dominate the other. However it is unlikely that the winning order will retain its current form. On one hand, after the judgments of the Court is not realistic for Colombia to simply reassert the old order unchanged. If Colombia is able to claim part of the traditional order it will be after significant concessions to Nicaragua, and probably Costa Rica.

On the other hand, as discussed before, the competing order created by the Court is not complete and cannot stand alone. To overcome the traditional order it necessarily requires an agreement between the parties that complete it.

The pending case between Costa Rica and Nicaragua will probably signal the future of the overall dispute. The Court will have to address the only undoubtedly non-delimited boundary in the region. Its

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<sup>78</sup> Abello, Ricardo, *op cit*, page 95.

<sup>79</sup> Monroy Cabra, Marco, *op cit*, page 27.

judgment could nudge the situation in favor of one of the competing orders. Something similar could occur with the extended continental shelf case between Colombia and Nicaragua.

Apparently Jamaica, Panama and Honduras have chosen the Colombian side and declared their intention to defend the older order<sup>80</sup>. As discussed, Costa Rica is pursuing its own agenda<sup>81</sup> and has realized the potential that has the unsettling effort of Nicaragua. Thus Costa Rica is emerging as one of the fundamental actors in this region and could become a new focal point in a dispute that until now has been monopolized by Colombia and Nicaragua.

All the parties involved are aware that a final solution necessarily goes through an agreement<sup>82</sup>. However, for now a 6 party agreement to definitely settle the maritime delimitation in the Caribbean is highly unlikely, while there are 3 pending cases before the ICJ. Only once this cases are over there is a real possibility of an agreement, and even then this is a difficult process. In the meantime the parties are trying to enhance their bargaining position: Nicaragua and Costa Rica through litigation and Colombia with the support of the other riparian states.

## VI. Conclusion

The paper explores the origins and the relationship of the 2 competing maritime orders in the South West Caribbean.

The order that was carefully constructed by Colombia through several agreements was unsettled by the Court. Once the 82nd meridian west “disappeared” after the 2007 Judgment, the Court had to replace with a new Nicaragua-Colombia boundary. As the Colombian order was built around that meridian, any line chosen by the Court that would preserve the old order would have been equivalent to the 82W meridian, that is, a north south line with a tripoint with Honduras in the north end and with Costa Rica in the southern part.

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<sup>80</sup> Mateus Rugeles, Andrea, *op cit*, page 11.

<sup>81</sup> However Costa Rica has not completely abandoned Colombia. An example of collaboration in the joint letter with Colombia and Panama to the CLCS opposing Nicaragua’s claims. Inasmuch Costa Rica and Colombia interest are still somewhat aligned, Costa Rica will continue to support some of Colombia’s actions.

<sup>82</sup> Khan, Imad and Rains, David, *op cit*, page 608; Ospina, Mariano, *op cit*, page 39.



As the subsequent agreements of Colombia stood over the 82nd meridian, once it was removed in 2007, the whole order became unstable. The 2012 Judgment just ratified it and signaled the Court's view of the new Caribbean order without actually building a complete one.

The current situation is wide open. The traditional order built by Colombia is no longer accepted. The ICJ in two different judgment undid the basic idea that underlies all the treaties entered by Colombia. However, the new emerging order is incomplete and does not regulate many of the relationships in the area. The Court may have dismissed the traditional order, but haven't still replaced by something new.

This situation, the coexistence of a dying old order with an emerging new one creates very interesting legal issues.

In the first place, it shows the limitations of the traditional theory of relative effect of treaties and judgments, particularly in cases of maritime delimitation. Maybe, considering the lack of compulsory jurisdiction of the Court, a situation like this is as good as it gets. However, the paper shows the problems, both practical and theoretical, of several delimitations in the same area without a sense of overarching order.

Second and related to the previous point, this case reveals the inadequacies of article 59 of the Statute of the Court. Notwithstanding the basic principle of opposability, Court's judgments create an objective legal fact, and third parties just recognize so. The practice of the concerned states shows that they cannot disregard judgments even if they weren't involved, and they consider them as a given political facts for their future actions.

Until now the Court have been able to avoid this kind of problems with a conservative approach to maritime delimitation. The expansive stance of the Court in 2012 did not create a new problem, just showed a limitation that has always been present.

The disputes over the maritime order in the South West Caribbean Sea are far from over. The unsettling of the traditional order has led to the main actor in the region (Colombia and Nicaragua, but now also Costa Rica) to try to enhance their bargaining position. Due to their institutional constraints, it is very hard for the Court to create a new comprehensive order. However, with the three pending cases it has an opportunity to influence the outcome of the final negotiated solution.

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