

INTERNATIONAL DECISIONS

EDITED BY DAVID P. STEWART

United Nations Convention on the Law of the Sea—territorial dispute—maritime boundary delimitation—methodologies—exclusive economic zone—continental shelf beyond 200 nautical miles

TERRITORIAL AND MARITIME DISPUTE (Nicaragua v. Colombia). At <http://www.icj-cij.org>. International Court of Justice, November 19, 2012.

On November 19, 2012, the International Court of Justice rendered its judgment in a dispute involving territorial and maritime claims raised by Nicaragua against Colombia in the Caribbean Sea.¹ The Court considered Nicaragua's requests for a declaration of Nicaraguan sovereignty over seven disputed maritime features and delimitation of a single maritime boundary between the continental shelves and exclusive economic zones appertaining to Nicaragua and Colombia. The Court awarded all disputed territory to Colombia and delimited the maritime boundary between the states' continental shelves and exclusive economic zones by using a novel mix of weighted base points, geodetic lines, parallels of latitude, and enclaving.

Nicaragua lies in the southwestern portion of the Caribbean Sea, bordering Honduras to the north and Costa Rica to the south, while Colombia's mainland is located in the south of the Caribbean Sea (see map, Southwestern Caribbean Sea, p. 397). San Andrés, Providencia, and Santa Catalina Islands are situated about 100 nautical miles from the Nicaraguan coast and about 380 nautical miles from Colombia's mainland coast. Various reefs, cays, atolls, and banks lie in the western Caribbean, within 200 nautical miles of Nicaragua's coast, but beyond 200 nautical miles of Colombia's mainland coast.

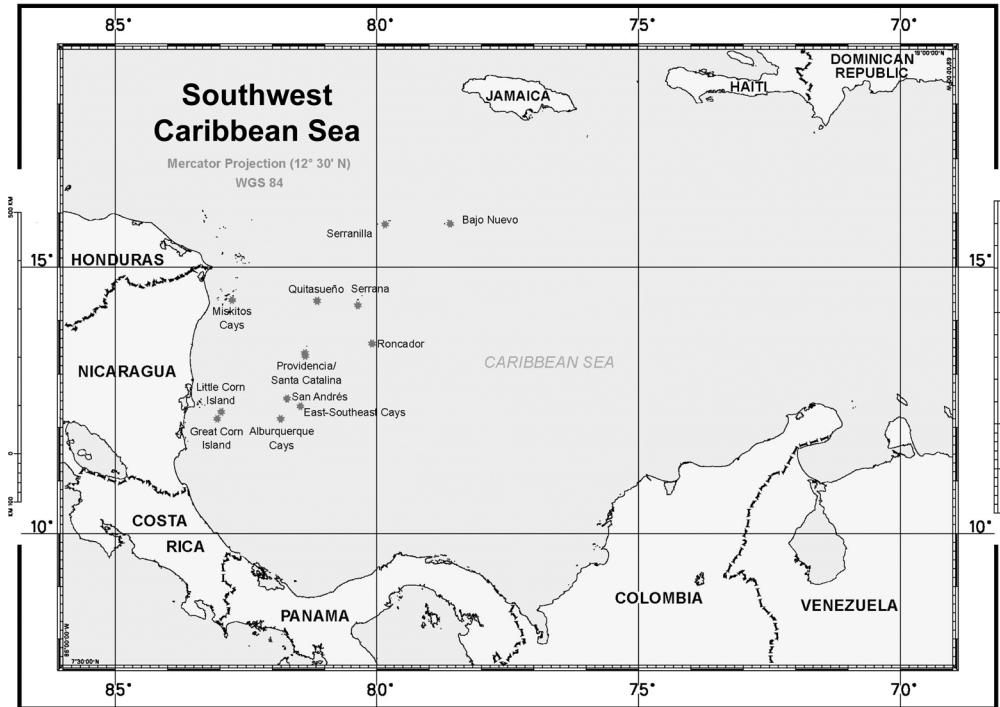
Nicaragua filed its application with the Court on December 6, 2001. In addition to the disputed claims examined by the Court in the judgment on the merits, Nicaragua claimed sovereignty over San Andrés, Santa Catalina, and Providencia. It sought to base jurisdiction on the Pact of Bogotá,² as well as the parties' declarations under Article 36 of the Statute of the Permanent Court of International Justice.³ Colombia raised preliminary objections to jurisdiction on July 21, 2003. In a judgment of December 13, 2007, the Court concurred with Colombia that a 1928 treaty and 1930 protocol between the parties had "settled" any dispute over San Andrés, Providencia, and Catalina within the meaning of Article XXXI of the Pact of Bogotá.⁴ Consequently, the issue of title to these three islands lay outside its jurisdiction. The

¹ Territorial and Maritime Dispute (Nicar. v. Colom.) (Int'l Ct. Justice Nov. 19, 2012) [hereinafter Judgment]. Decisions of the Court cited herein are available at its website, <http://www.icj-cij.org>.

² American Treaty on Pacific Settlement, Apr. 30, 1948, OASTS Nos. 17 & 61, 30 UNTS 55 [hereinafter Pact of Bogotá].

³ Statute of the International Court of Justice Art. 36(5); Statute of the Permanent Court of International Justice Art. 36.

⁴ Territorial and Maritime Dispute (Nicar. v. Colom.), Preliminary Objections, 2007 ICJ REP. 832 (Dec. 13).



Editor's note: Derived from the judgment of the International Court of Justice of November 19, 2012, in *Territorial and Maritime Dispute* (Nicar. v. Colom.), Sketch-map No. 1, at 16.

Court upheld its jurisdiction concerning title to the seven remaining maritime features and the maritime delimitation, and in separate judgments rendered on May 4, 2011, rejected requests to intervene on the merits by Honduras and Costa Rica.⁵

The Court began its judgment of November 19, 2012, by addressing sovereignty over the maritime features (para. 25). The parties agreed that six of the seven features were islands, remaining above water at high tide, and were therefore capable of appropriation consistent with the Court's practice. They presented conflicting evidence, however, regarding the status of Quitasueño. The Court found that only one of its features, QS 32, was an island despite its small size and coral debris composition, relying on *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain*⁶ and the absence of any minimum size requirement for islands (para. 37).

The Court based its award of title over all disputed territory to Colombia on *effectivités* after deeming historical evidence regarding interpretation of the 1928 treaty and 1930 protocol concerning the geographic scope of the "San Andrés Archipelago" inconclusive (paras. 66,

⁵ *Territorial and Maritime Dispute* (Nicar. v. Colom.), Application by Costa Rica for Permission to Intervene (Int'l Ct. Justice May 4, 2011); *Territorial and Maritime Dispute* (Nicar. v. Colom.), Application by Honduras for Permission to Intervene (Int'l Ct. Justice May 4, 2011).

⁶ *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain* (Qatar v. Bahr.), 2001 ICJ REP. 40, 99, para. 195 (Mar. 16) [hereinafter *Qatar v. Bahrain*].

103). Further, neither Colombia nor Nicaragua had established title to the disputed features by virtue of *uti possidetis juris* at the time of independence from Spain. After tracing the critical date to a 1969 exchange of notes between the parties (para. 71), the Court determined that Colombia had acted *à titre de souverain* concerning all of the disputed features through public administration and legislation, regulation of economic activities, public works, law enforcement measures, naval visits and rescue operations, and recognition of consular representation (paras. 82–84). The Court found additional support for Colombia's claims in Nicaragua's failure to protest a 1900 arbitral award involving Colombia and Costa Rica (para. 88),⁷ maps, and third-state practice, including the 1972 Vázquez-Saccio Treaty between Colombia and the United States, in which the United States renounced sovereignty over two of the disputed cays (para. 95).⁸ Nicaragua provided no evidence of having acted *à titre de souverain* over the disputed maritime features.

In its reply and final submissions, Nicaragua for the first time claimed an extended continental shelf generated by the natural prolongation of its landmass beyond 200 nautical miles from its baselines, creating an area of overlapping entitlements with Colombia's continental shelf. While acknowledging Nicaragua's claim as new, the Court held it admissible because it did not transform the subject matter of the dispute.⁹ Rather, it changed the legal basis for the delimitation claim from distance to natural prolongation and modified the solution sought from a single maritime boundary to a continental shelf delimitation. But the Court refrained from adjudicating the extended continental shelf claim, finding that Nicaragua had not established that its continental margin extended far enough to overlap with Colombia's 200-nautical-mile continental shelf entitlement (para. 129). Moreover, Nicaragua had not provided any examples of courts tasked with determining the outer limits of an extended continental shelf (para. 125). The Court distinguished the recent decision of the International Tribunal for the Law of the Sea in *Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal* because of the unique circumstances of the Bay of Bengal (*id.*).¹⁰ Further, the Court stated that parties to the United Nations Convention on the Law of the Sea (UNCLOS)¹¹ must submit extended continental shelf claims to the Commission on the Limits of the Continental Shelf (Commission), in accordance with Article 76, and Colombia's non-party status did not relieve Nicaragua of this obligation (para. 126). Finally, the Court noted Nicaragua's admission that the "Preliminary Information" it had submitted to the Commission did not meet Article 76's requirements (para. 127).

Both the Court and the parties concurred that the law applicable to the delimitation included UNCLOS Articles 74 (exclusive economic zone), 83 (continental shelf delimitation), and 121 (legal regime of islands) (para. 138). The Court had previously recognized the first two

⁷ Boundary Dispute (Colom./Costa Rica), 28 R.I.A.A. 341, 345 (1900) (in French).

⁸ Treaty Concerning the Status of Quita Sueño, Roncador, and Serrana [Vázquez-Saccio Treaty], U.S.-Colom., Art. 1, Sept. 8, 1972, 33 UST 1405, 1307 UNTS 379 (entered into force Sept. 17, 1981).

⁹ The Court relied on its previous judgments in *Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea* (Nicar. v. Hond.), 2007 ICJ REP. 661, 695 (Oct. 8) [hereinafter *Nicaragua v. Honduras*]; and *Ahmadou Sadio Diallo* (Guinea v. Dem. Rep. Congo), 2010 ICJ REP. 639, 657, para. 41 (Nov. 30).

¹⁰ *Delimitation of the Maritime Boundary in the Bay of Bengal* (Bangl. v. Myan.), Case No. 16 (ITLOS Mar. 14, 2012), at <http://www.itlos.org> (reported by D. H. Anderson at 106 AJIL 817 (2012)).

¹¹ United Nations Convention on the Law of the Sea, opened for signature Dec. 10, 1982, 1833 UNTS 3, available at <http://www.un.org/depts/los/> [hereinafter UNCLOS].

paragraphs of Article 121 as customary international law.¹² In this judgment, the Court added paragraph 3, which denies an exclusive economic zone and continental shelf to rocks “which cannot sustain human habitation or economic life,”¹³ leaving them only a territorial sea (para. 139). Also, it emphasized the “indivisible” nature of the legal regime of islands established in Article 121 (*id.*).

The Court determined that Nicaragua’s relevant coast was the mainland coast projecting into the area of overlapping entitlements, and it measured the 200-nautical-mile continental shelf and exclusive economic zone from the islands fringing the Nicaraguan coast (para. 145). Colombia’s relevant coasts were limited to the islands over which Colombia has sovereignty since no overlapping entitlement exists between the mainland coasts of Colombia and Nicaragua projected out to a distance of 200 nautical miles (para. 151). The entire coastlines of the Colombian islands were deemed relevant because the area of overlapping entitlements extends to the east of the islands. In defining the relevant area, the Court took pains to avoid the numerous other maritime boundaries in the Caribbean Sea and emphasized that its decision in this case would not prejudice the position of any third states. In measuring the relevant coastal length, the Court excluded the Nicaraguan islands’ east-facing coasts as being parallel to the mainland, and some Colombian maritime features as being too small to affect Colombia’s coastal length. The final ratio between the relevant coasts was 1:8.2 in favor of Nicaragua (para. 153).

The Court agreed with the parties that San Andrés, Providencia, and Santa Catalina are entitled to a territorial sea, continental shelf, and exclusive economic zone. It rejected Nicaragua’s argument for a 3-nautical-mile territorial sea for four additional maritime features, Roncador, Serrana, the Albuquerque Cays, and the East-Southeast Cays, emphasizing that it has never restricted a state’s right to establish a 12-nautical-mile territorial sea because of overlap with another state’s continental shelf and exclusive economic zone (paras. 178–80). The Court declined to determine whether any of these features fall within UNCLOS Article 121(3), and are therefore not entitled to a continental shelf and exclusive economic zone, because any such entitlement within the relevant area would overlap entirely with the entitlements of San Andrés, Providencia, and Santa Catalina to a continental shelf and exclusive economic zone (para. 180). In addition, Colombia could use low-tide elevations within 12 nautical miles of QS 32 for the purpose of measuring the breadth of Quitasueño’s territorial sea, in accordance with Article 13, which the Court had deemed part of customary international law in *Qatar v. Bahrain* (paras. 182–83).

The Court reiterated its commitment to its long-established three-step methodology for maritime delimitation: (1) construction of a provisional equidistance/median line, (2) consideration of relevant circumstances requiring adjustment or shifting of the line, and (3) determination of whether the parties’ “respective shares of the relevant area are markedly disproportionate to their respective relevant coasts” (para. 193). It rejected Nicaragua’s arguments for a different methodology because of the unique geographical circumstances in this case, but it noted that the methodology could be used in conjunction with the enclaving of islands (paras. 197–99).

To construct the provisional equidistance line, the Court selected base points for Nicaragua because Nicaragua had not indicated any base points in its presentation (para. 200). Some, but

¹² *Qatar v. Bahrain*, 2001 ICJ REP. at 91, para. 167; 97, para. 185; 99, para. 195.

¹³ UNCLOS, *supra* note 11, Art. 121(3).

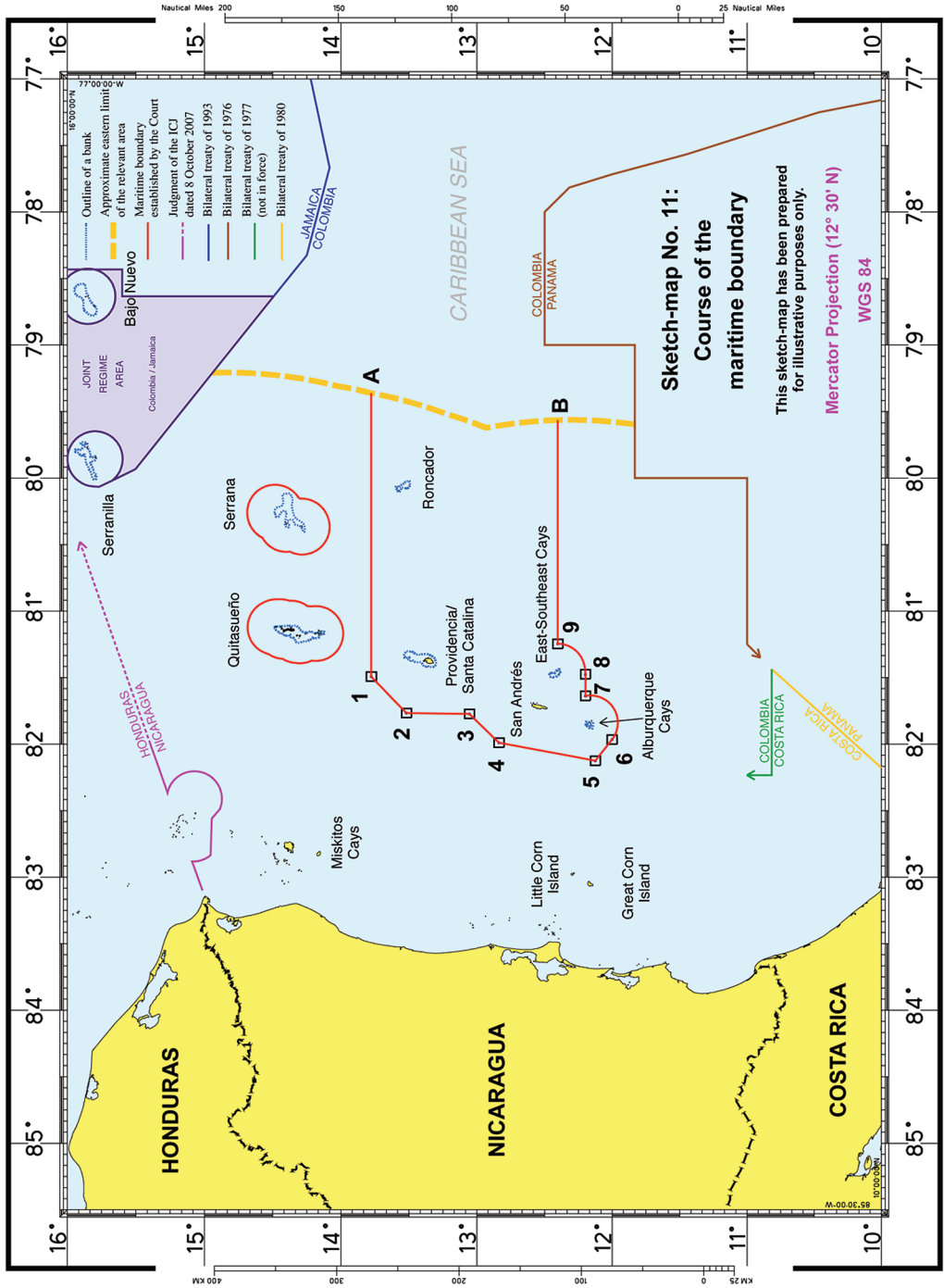
not all of the base points suggested by Colombia were used. For example, the Court disregarded a base point placed on QS 32, stating that it was minuscule and would unduly distort the relevant geography (para. 202).

According to the Court, two relevant circumstances merited shifting the provisional equidistance line, namely, the significant disparity in length between the relevant coasts and the cutting off of maritime areas into which Nicaragua's coastline projects by small island territories located far apart from each other (paras. 211, 215). The Court rejected arguments that Colombia's conduct east of the 82nd meridian, security and law enforcement considerations, and equitable access to natural resources constituted relevant circumstances (paras. 220, 222). Nonetheless, it noted that security concerns may be relevant if a maritime delimitation is effected particularly close to a state's coast and that it would "bear this consideration in mind" in deciding what adjustments to make to the provisional median line or how to shift it (para. 222). Colombia's agreements with third states were deemed irrelevant because they cannot afford Colombia rights in a dispute with Nicaragua, an independent third party (para. 227). Similarly, the Court emphasized that its decision in this dispute is without prejudice to third states' claims or claims by one of the parties against a third state (para. 228).

The Court found that the disparity in coastal lengths merited a meaningful shift of the equidistance line eastward (para. 233). The methodology of weighted base points adopted by the Court afforded Nicaraguan base points three times as much weight as those of Colombia in constructing the line. Consequently, each point on the line is three times as far away from the Nicaraguan base points as from the Colombian base points (para. 234). The Court simplified the weighted line by connecting several turning points with geodetic lines (para. 235). It chose not to extend the line north of the northernmost point or south of the southernmost point to avoid giving Colombia a larger share of the relevant area in view of the much greater length of Nicaragua's relevant coast (para. 236). Instead, the Court continued the boundary line along parallels of latitude to 200 nautical miles from Nicaragua's baselines to give proper weight to the relevant circumstances previously identified (*id.*).

From the northernmost point of the 12-nautical-mile area around Roncador, the delimitation line follows a parallel of latitude out to 200 nautical miles from Nicaragua's baselines (para. 237) (see the Court's Sketch-map No. 11, p. 401). Since Nicaragua has not yet established baselines from which its territorial sea is measured, the Court noted that the location of the end point is approximate (*id.*). From the southernmost point of the adjusted line, the delimitation line travels southeast until it reaches the 12-nautical-mile envelope of arcs of the South Cay of Alburquerque Cays. A parallel connects this area to the 12-nautical-mile envelope of arcs of the East-Southeast Cays at the latter's southernmost point. The delimitation line follows the envelope of arcs until the East-Southeast Cays' easternmost point and then runs out to 200 nautical miles from Nicaragua's baselines along a parallel of latitude.

The Court turned, next, to Quitasueño and Serrana, Colombian features on the Nicaraguan side of the delimitation line. It chose not to extend the boundary line to these islands because of their size, remoteness, and distance from the larger Colombian islands, finding that the "use of enclaves" would yield the "most equitable solution" (para. 238). After determining that Quitasueño was a rock within the meaning of Article 121(3), the Court ruled that it was entitled only to a 12-nautical-mile territorial sea (*id.*). By virtue of its small size and remoteness, Serrana was granted only a 12-mile territorial sea (*id.*).



The Court checked the resulting delimitation line for significant disproportionality, which could render it impermissibly inequitable (para. 239). Although the delimitation generated a ratio of 1:3.44 in Nicaragua's favor, while the ratio of relevant coasts was 1:8.2 in Nicaragua's favor (para. 243), the Court considered the delimitation equitable in light of previous judgments.¹⁴ Given the area attributed to Colombia by the new delimitation line, the Court rejected Nicaragua's request for a declaration concerning its rights to natural resources east of the 82nd meridian (para. 250).

Although Judge Owada dissented as to the admissibility of Nicaragua's continental shelf claim, the remainder of the judgment was unanimous on all points. On November 27, 2012, eight days after the Court issued its judgment, Colombia denounced the Pact of Bogotá.¹⁵

* * * *

The judgment is noteworthy for its application of innovative and numerous techniques for maritime boundary delimitation, interpretation of states' obligations pursuant to UNCLOS Article 76(8) concerning extended continental shelf claims, and potential to influence other delimitations in the area. The Court constructed an equiratio line using weighted base points,¹⁶ utilized geodetic lines to simplify the equiratio line, and employed parallels of latitude from the end points of the boundary to 200 nautical miles from Nicaragua's base points and enclaving. When faced with similarly challenging geographic circumstances, the Court has adopted varied methods and techniques such as applying angle bisectors, granting half effect to islands, and shifting equidistance lines,¹⁷ but this appears to be its first use of equiratio lines. A maritime boundary line is an equiratio line "when every point of it will be defined by a constant ratio of its distances from the nearest points of the baselines from which the breadth of the territorial sea of each state is measured."¹⁸ By weighting the base points 1:3 in Nicaragua's favor, each point on the maritime boundary line is three times as far from Nicaraguan base points as from Colombian ones. The use of novel and varied approaches by a unanimous court may signal renewed flexibility for achieving equity in complex maritime boundary delimitations. Nonetheless, the Court's creativity resulted in a somewhat complicated line between Nicaragua and Colombia¹⁹ and may be unsettling to states comfortable with more conventional approaches.

The judgment is remarkable, too, for its discussion of states' obligations under UNCLOS Article 76(8), concerning extended continental shelf claims. The Court ultimately refrained from delimiting Nicaragua's extended continental shelf claim on burden-of-proof grounds;

¹⁴ See, e.g., *Maritime Delimitation in the Area Between Greenland and Jan Mayen (Den. v. Nor.)*, 1993 ICJ REP. 38 (June 14).

¹⁵ OAS Dep't of International Law, *Pact of Bogotá: Signatories and Ratifications*, at <http://www.oas.org/juridico/english/sigs/a-42.html>.

¹⁶ Shortly after UNCLOS was concluded, Wijnand Langeraar proposed equiratio lines as an alternative when equidistance lines engender inequitable results. Wijnand Langeraar, *Maritime Delimitation: The Equiratio Method—A New Approach*, 10 MARINE POL'Y 3 (1986), available at http://www.csc.noaa.gov/mbwg/_pdf/biblio/Langeraar.pdf.

¹⁷ See, e.g., *Nicaragua v. Honduras*, 2007 ICJ REP. at 695 (angle bisectors); *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can./U.S.)*, 1984 ICJ REP. 246 (Oct. 12) (half effect to islands); *Continental Shelf (Libya/Malta)*, 1985 ICJ REP. 13 (June 3) (shifting equidistance lines).

¹⁸ Langeraar, *supra* note 16, at 7.

¹⁹ Decl. Cot. J. *ad hoc*, para. 14.

Nicaragua had failed to establish the existence of overlapping continental shelves generated by Colombia and its own mainland coasts. Yet the Court stressed that Nicaragua had also failed to comply with its obligation to submit adequate information to the Commission on the Limits of the Continental Shelf pursuant to UNCLOS Article 76(8) and that Colombia's nonparty status did not alter Nicaragua's obligation. Several judges expressed concerns about the Court's reasoning and its implications in separate opinions.²⁰ First, treaty provisions generally do not give rise to rights and obligations between a state party and a nonstate party.²¹ The Court did not engage in any analysis to demonstrate that this procedural requirement reflects a customary international law obligation, relying instead on the object and purpose of UNCLOS derived from its preamble (para. 126).²² Second, the discussion of Article 76(8) raises questions about whether submission of extended continental shelf claims to the Commission is a prerequisite to delimitation by a court.²³ Several of the Court's judges, in separate opinions, sought to dispel this notion.²⁴ For example, Judge Donoghue emphasized that it may be appropriate to delimit a continental shelf area beyond 200 nautical miles from a state's coast before the outer limits of an extended continental shelf are identified, as in the recent *Bay of Bengal* case.²⁵

The judgment's potential impact on third states in the Caribbean Sea region remains to be seen. While the Court repeatedly emphasized that the judgment would not prejudice third states with maritime boundary claims in the area, four judges disagreed,²⁶ asserting that it could affect interpretation of the Court's judgment in *Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea*²⁷ and bilateral agreements between states in the Caribbean Sea.²⁸ Time will tell whether new claims or requests for interpretation of previous judgments arise as a result of this case.

Colombia's denunciation of the Pact of Bogotá, named after its capital city, raises concerns for future pacific resolution of disputes in the region. Despite the unanimous judgment, Colombian president Juan Manuel Santos declared, "Never again should we have to face what happened to us on November 19th."²⁹ Colombia is the second state to withdraw from the pact since its entry into force in 1948.³⁰

NIENKE GROSSMAN

University of Baltimore School of Law

²⁰ See sep. op. Donoghue, J., paras. 26–30; decl. Cot, J. *ad hoc*, para. 19. See generally decl. Mensah, J. *ad hoc*.

²¹ See Vienna Convention on the Law of Treaties, Arts. 34–38, *opened for signature* May 23, 1969, 1155 UNTS 331, 8 ILM 679 (1969).

²² Decl. Cot, J. *ad hoc*, para. 18; see also decl. Mensah, J. *ad hoc*, paras. 2–3.

²³ Decl. Mensah, J. *ad hoc*, para. 12; sep. op. Donoghue, J., para. 2.

²⁴ Decl. Mensah, J. *ad hoc*, para. 12; sep. op. Donoghue, J., paras. 2, 19.

²⁵ Sep. op. Donoghue, J., para. 19.

²⁶ *Id.*, para. 30; decl. Cot, J. *ad hoc*, para. 9; decl. Mensah, J. *ad hoc*, para. 13; decl. Xue, J., paras. 11–13.

²⁷ Sep. op. Donoghue, J., para. 35.

²⁸ Decl. Cot, J. *ad hoc*, paras. 4–7, 9.

²⁹ *An Islet for a Sea*, ECONOMIST, Dec. 8, 2012, available at <http://www.economist.com/news/americas/21567986-colombia-smarts-loss-territorial-waters-islet-sea>.

³⁰ El Salvador notified denunciation of the treaty on November 24, 1973. OAS Dep't of International Law, *supra* note 15.