

Maritime and Territorial Boundary Disputes in Latin America: Regional Implications of the 2012 ICJ Ruling in Nicaragua v. Colombia

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Abstract

This paper examines the International Court of Justice ruling in favor of Nicaragua over Colombia, regarding the long-standing maritime and territorial dispute in the Caribbean Sea. The ruling sets a precedent for disregarding previous international treaties and agreements in Latin America and could threaten already negotiated decisions to resolve territorial and maritime disputes, as well as challenge diplomatic solutions to outstanding disputes in the region. It may also impact the willingness of states to submit to ICJ adjudication in the future and choose instead to seek self-help remedies that may lead to conflict, particularly over disputes concerning access to economic resources.

Keywords

Latin America, International Court of Justice, territorial disputes, maritime disputes, conflict, resources, treaties, international law

In 2001, Nicaragua took Colombia to the International Court of Justice (ICJ) over a territorial and maritime dispute in the Caribbean Sea involving islands claimed by both countries. At stake were the delimitation of territorial seas and exclusive economic zones surrounding the islands. Both countries were bound by the 1948 American Treaty of Pacific Settlement (or Pact of Bogotá as it is more commonly known), to agree to adjudication by the ICJ to settle disputes peacefully. Furthermore, the ICJ had already decided in 2007 that it did not have jurisdiction over part of the dispute, since a 1928 treaty signed by Nicaragua and Colombia, already settled the question of sovereignty over three of the disputed islands (San Andrés, Providencia, and Santa Catalina) named in the dispute (*M2 Presswire*, 2012). After 11 years, the ICJ finally ruled in 2012, that Colombia did, in fact, have sovereignty over all the disputed islands; however, in its attempt to practice the wisdom of Solomon, the Court awarded Nicaragua exclusive economic rights to 75,000 square kms of sea previously controlled by Colombia: areas rich in fishing and potential oil reserves (*Economist*, 2012).

This article provides an examination of the territorial and maritime dispute between Nicaragua and Colombia and its implications for other outstanding disputes in the region, as well as its potential impact on previously decided cases. It begins by examining the historical context of territorial and maritime disputes in Latin America and the resort to force vs. peaceful conflict resolution. Next, it explores the role of the ICJ and the acceptance of its adjudication process by states in the region. The article then provides a case study of *Nicaragua v. Colombia* and their specific dispute over maritime and territorial issues in the Caribbean Sea. The article concludes by examining other outstanding disputes in the region and the implications of the ICJ ruling on these disputes as well as other “settled” disputes in the region. This article argues that although Latin America has had a history of settling disputes between states peacefully and accepting the Court’s rulings, this recent case may change state perception of the need for adjudication, and instead may usher in a new era of “self-help” that risks conflict, especially when critical economic and resource issues are at stake.

Historical Context of Territorial and Maritime Disputes in Latin America

Compared to other regions of the world, Latin America has seen less international conflict over territorial disputes between states (Kacowicz, 2005; Bercovitch & Fretter, 2004). Most conflicts, particularly those in the 20th century, have been of the intrastate variety with nationalism, revolutionary ideologies, and insurgencies posing the greatest threats to states, rather than military confrontations with neigh-

boring states (Hrsgroup.org, 2013). Occasionally, states within the region have resorted to armed conflict to force a resolution to a territorial claim, such as the 1995 border dispute between Ecuador and Peru (Kilroy, 2010).

Latin America's history, as primarily Spanish colonies, with similar political, religious, and cultural institutions, helped to reduce conflict between states, after the colonial Viceroyalties gave way to newly independent states with recognized borders, governments, and people groups. Although interstate conflict did occur, often along the lines of the old Spanish Viceroyalty system (e.g., War of the Pacific and War of the Triple Alliance), the international legal principle of *uti possidetis* served as a basis for helping to resolve conflicts in the region (Lalonde, 2002).¹ Such principles failed to prevent conflict in cases involving other colonial powers in the region, such as Great Britain, and unresolved disputes based on issues of continuous occupation and sovereignty claims, such as the ongoing dispute with Argentina over the Malvinas-Falkland Islands (Gustafson, 1988). Argentina continues to stake its claim to the islands based on nationalist arguments; however, the real incentive for continuing to press its claims appears to be economic and the potential for vast oil deposits in the South Atlantic within the surrounding waters of the islands (Neild & Gilbert, 2013).

The last major inter-state conflict within Latin America occurred during the Chaco War (1928-1935) between Bolivia and Paraguay. The war was fought over a contested region, the Chaco Boreal, which Bolivia sought from Paraguay in order to gain access to a fluvial route to the Atlantic Ocean. Bolivia had previously lost its access to the Pacific Ocean to Chile, during The War of the Pacific (1879-1883), a conflict fought over resources (primarily nitrate deposits) and access to trade routes (Burns, 1990, p. 104).²

There are currently a number of outstanding territorial and maritime disputes in the region, to include the following:

- Argentina – Chile: Southern Ice Fields
- Guatemala – Belize: Guatemala claims half of Belize's territory
- Nicaragua – Costa Rica: access to Rio San Juan
- Dominica, et al. – Venezuela: Aves Island
- El Salvador – Honduras: Conejo Island
- Guyana – Venezuela: Essequibo River border

1 The principle of *uti possidetis* is based on decolonization, primarily in Latin America, where new states accepted the international boundaries based on the lines of colonial administrations.

2 There have been other conflicts in the region that led to limited wars, such as the Soccer War between El Salvador and Honduras in 1969 and the Peru-Ecuador War of the Upper Cenepa in 1995.

Bolivia – Chile – Peru: access to Atacama and Pacific Ocean
Chile – Peru: contested territorial waters (CIA, 2013a)

In the last case, both Chile and Peru have taken a keen interest in the ICJ ruling in *Nicaragua v. Colombia*, since the stakes are high for both countries. If Peru wins its case currently before the ICJ, Chile stands to lose over 34,000 square kms of sea as part of its 200 mile Exclusive Economic Zone (EEZ). Chile believes it has the stronger argument in the case since it has controlled the contested waters since the 1800s; however, after the ICJ ruling giving Nicaragua access to waters that had been controlled by Colombia for decades, Chile is not so sure the ICJ ruling will go in its favor (*América Economía*, 2012).

Disputes over contested territories or maritime boundaries between countries within Latin America have rarely resorted to military force as a means to settle the dispute. The most recent example of a dispute that did lead to a military confrontation, occurred in 1995 between Ecuador and Peru, where a resort to force actually helped produce a settled outcome, which favored the aggressor, Ecuador, in this case (Kilroy, 2010). By invoking the 1942 Rio Protocol under the auspices of the Four Guarantor nations (Argentina, Brazil, Chile, and the United States), Ecuador and Peru did support a diplomatic outcome, in the end. Yet, the actual results and what really changed is debatable. What is significant in this case is that what David Mares calls “militarized bargaining” on the part of Ecuador did work, to some extent, in addressing the country’s historical grievances (Mares, 2001). Also, this case reflected a change in a disputed territorial boundary that had previously been settled by an international treaty in 1942. Although Ecuador had always maintained that it agreed to the previous demarcation reluctantly, nonetheless, the provisions of the treaty had remained in effect for over 50 years and were recognized by all other parties to the agreement.

Territorial and maritime disputes in Latin America can have their roots in colonial legacies, due to previous Spanish colonial jurisdictions, revolutionary changes, or even geological shifts. For example, “A number of territorial disputes emerged as a result of the break-up of the Spanish colonial empire, many following the administrative boundaries of the Spanish Viceroyalty structure: an example being the border between Ecuador and Peru, the former as part of the Viceroyalty of New Granada and the later, the Viceroyalty of New Castile” (Kilroy, 2010, p. 87). Following independence from Spain, Latin American states sought to consolidate their new national territories, carved out of the colonial jurisdictions, such as the United Provinces of Central America which emerged from the Captaincy General of Guatemala, and later fragmented into 5 independent countries (Guatemala, Honduras, Nicaragua, El Salvador, and Costa Rica). In some cases, “Territorial consolidation

often followed political consolidation, as regions then opted to stake their identities with one new nation over the other, as in the case of Chiapas, deciding to join with Mexico, rather than Guatemala, or Panama remaining part of Grand Colombia, rather than Central America” (p. 87). For the most part, however, states have been hesitant to risk a military confrontation over a continuing territorial dispute, even those rooted in these colonial legacies, unless they feel directly threatened by issues of governance or loss of sovereignty.

Today, much of Latin America remains ungoverned spaces, which are often where the disputed lands are located. Since these areas are typically located along borders, a state’s inability to control its border can also lead to conflict, as in the case of Colombia and Ecuador in 2008, when the Colombian military made an incursion into Ecuador pursuing elements of the Revolutionary Armed Forces of Colombia (FARC). Colombia argued that Ecuador’s failure to police its border allowed the terrorist group unencumbered ingress and egress, necessitating the cross-border action. Ecuador identified the incursion as an act of aggression that warranted a regional response, soliciting the support of countries like Venezuela. At a meeting of the Organization of American States and the Rio Group, tensions were lessened and a potential military confrontation averted (Walser, 2008).

In the case of *Nicaragua v. Colombia* and the dispute over the contested islands and territorial seas, both countries showed constraint by allowing the ICJ process to proceed for 11 years before a decision was rendered. Yet, that did not mean that both countries waited passively. Each country made its position clear and attempted to sway both public opinion and the Court’s decision in its favor. In agreeing to accept adjudication by the Court, both countries followed a tradition in the region of recognizing the role of the Court in settling disputes as a juridical arm of the United Nations system which seeks to prevent conflict. The Court has also been viewed as exercising its jurisdiction equitably, without prejudice toward either party to a dispute.

The Role of the ICJ in Settling Territorial and Maritime Disputes in Latin America

Since its inception in 1946, there have been 18 cases referred to the ICJ representing disputes between countries within Latin America. Not all of these, however, have involved territorial or maritime disputes between states. Of the 18 cases, all but 6 have been decided by the Court. All six of the pending cases do involve outstanding territorial or maritime (ICJ Website, 2013). Of the 12 cases decided by the Court, the states were signatories to the ICJ Statute and accepted the compulsory

jurisdiction of the Court to hear the case, render an opinion, and be bound by the decision of the Court. Only in the recent case of *Nicaragua v. Colombia*, did a party to the ICJ adjudication process (Colombia) not agree to be bound by the Court's decision, after it was rendered, and take the unprecedented step of withdrawing Colombia from the 1948 Pact of Bogotá, which obligated signatories to be bound by ICJ decisions (Hsf-arbitrationnotes, 2012).³ Colombia's refusal to accept the ICJ ruling sets a new precedent for countries in Latin America, but also for the jurisdiction of the Court.

The ICJ can and does hear cases referred by states in Latin America that are signatories to the ICJ Statute or other treaties that support ICJ jurisdiction, even when the plaintiff state is not a signatory, or has a reservation clause. An example of this would be the 1984 case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, including the mining of harbors, arming rebels, etc. (ICJ Cases, 1984). In this case, the United States argued that by virtue of its reservation clause to the 1946 ICJ Statute, it was not bound to accept the Court's ruling regarding "disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction" (paras, 36-56). The United States argued that it was exercising the right of collective self-defense, in support of El Salvador (due to Nicaragua's support of the insurgent Farabundo Martí National Liberation Front-FMLN) which would be endorsed by the United Nations Charter (Art. 51) and the OAS Charter (Art. 21). The ICJ, however, countered that the United States was in violation of the OAS Charter itself by supporting and arming guerrillas (the Contras) in Nicaragua. The Court, therefore, took the position that the case had standing for both Nicaragua and the United States and agreed to adjudicate it. "In its Judgment of 26 November 1984 the Court found, on the basis of Article 79, paragraph 7, of the Rules of Court, that the objection to jurisdiction based on the reservation raised 'a question concerning matters of substance relating to the merits of the case' and that the objection did 'not possess, in the circumstances of the case, an exclusively preliminary character.' Since it contained both preliminary aspects and other aspects relating to the merits, it had to be dealt with at the stage of the merits" (paras, 36-56).

In 1986, the Court ruled on the case that the United States was in violation of both international treaties in existence and customary international law and the collective self-defense argument used by the United States in its defense was not valid. The Court ordered the United States to cease and desist from all acts of mili-

3 It should be noted that despite Colombian President Juan Manuel Santos's decision to immediately withdraw from the Pact, given the provisions of the Treaty, this can only take place after 12 months.

tary aggression against Nicaragua and to make reparations for damages. The United States did not accept the Court's ruling and continued to support the counterinsurgency against the Nicaraguan government, maintaining that US actions were in defense of El Salvador and the threat Nicaragua's Sandinista regime posed to its neighbor (Turner, 1987).

In light of its win in the ICJ, Nicaragua launched two additional cases in 1986 against Costa Rica and Honduras, making similar arguments against both countries, for their support of the Contras and allowing their territory to be used as staging areas for military interventions into Nicaragua. The ICJ accepted jurisdiction in both cases, arguing that the Pact of Bogotá did provide grounds for the Court hearing the cases, and that the parties to the Pact were bound to accept compulsory jurisdiction of the Court (Dipublico.com, 1988). Honduras attempted to negate the provisions of the Pact for signatories to accept the Court's jurisdiction by citing Article II and the on-going Contadora peace process as a 'special procedure' to resolve the Central American conflict, and that the current negotiations took precedence over any previous agreements (para, 60). The Court took the position that the Contadora process did not negate the provisions of the Pact of Bogotá; ruling in favor of the Court's jurisdiction to adjudicate Nicaragua's case against Honduras in 1988. The case against Costa Rica, however, was dropped by Nicaragua and the Court accepted its dismissal in August 1987 (ICJ, 1987).

In later cases brought before the Court between states in Latin America that were party to the Pact of Bogotá, the ICJ has consistently ruled that it did have standing to adjudicate the case and states were obliged to accept the compulsory jurisdiction of the Court. An example is *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, December 1999. In this case, Nicaragua argued that,

the Court is asked to determine the course of the single maritime boundary between the areas of territorial sea, continental shelf and exclusive economic zone appertaining respectively to Nicaragua and Honduras, in accordance with equitable principles and relevant circumstances recognized by general international law as applicable to such a delimitation of a single maritime boundary.

This request for the determination of a single maritime boundary is subject to the power of the Court to establish different delimitations, for shelf rights and fisheries respectively, if, in the light of the evidence, this course should be necessary in order to achieve an equitable solution (ICJ, 1999, p. 6).

This case followed the ratification of the López-Ramírez Treaty between Colombia

and Honduras in 1999 which codified maritime boundaries that Nicaragua did not accept as settled disputes (Diemer & Šeparović, 2006, p. 168).

The Court rendered an opinion on the case in 2007, using the principle of finding equitable solutions laid out in the United Nations Conference on Law of the Sea (UNCLOS) as the primary means of demarcation of maritime borders. The Court opinion, however, did not apply the precedent of *uti possidetis* or the equidistance principle, which placed one judge in opposition to the ruling, due to concern over the impact on third parties, such as Colombia, and previous maritime treaties. Judge Torres Bernárdez was particularly concerned with how this ICJ ruling on maritime boundaries between Honduras and Nicaragua could impact future territorial and maritime rulings in the area (ICJ, 2007, p. 44).

Territorial and Maritime Dispute (Nicaragua v. Colombia)

On 6 December 2001, Nicaragua presented a case before the ICJ making an argument, under the provisions of *uti possidetis*, that a group of Caribbean islands and keys around San Andrés, Santa Catalina, and Providencia, owned by Colombia, were the property of Nicaragua (see figure 1). Despite the existence a 1928 Treaty awarding control of the islands to Colombia, Nicaragua argued that the treaty was executed when Nicaragua was effectively under U.S. control by virtue of a U.S. Marine occupation, and as such, the treaty was null and void. The application by Nicaragua for adjudication before the Court requested the following:

First, that the Republic of Nicaragua has sovereignty over the islands of Providencia, San Andrés and Santa Catalina and all the appurtenant islands and keys, and also over the Roncador, Serrana, Serranilla and Quitasueno keys (in so far as they are capable of appropriation);

Second, in the light of the determinations concerning title requested above, the Court is asked further to determine the course of the single maritime boundary between the areas of continental shelf and exclusive economic zone appertaining respectively to Nicaragua and Colombia, in accordance with equitable principles and relevant circumstances recognized by general international law as applicable to such a delimitation of a single maritime boundary (ICJ, 2001, p. 8).

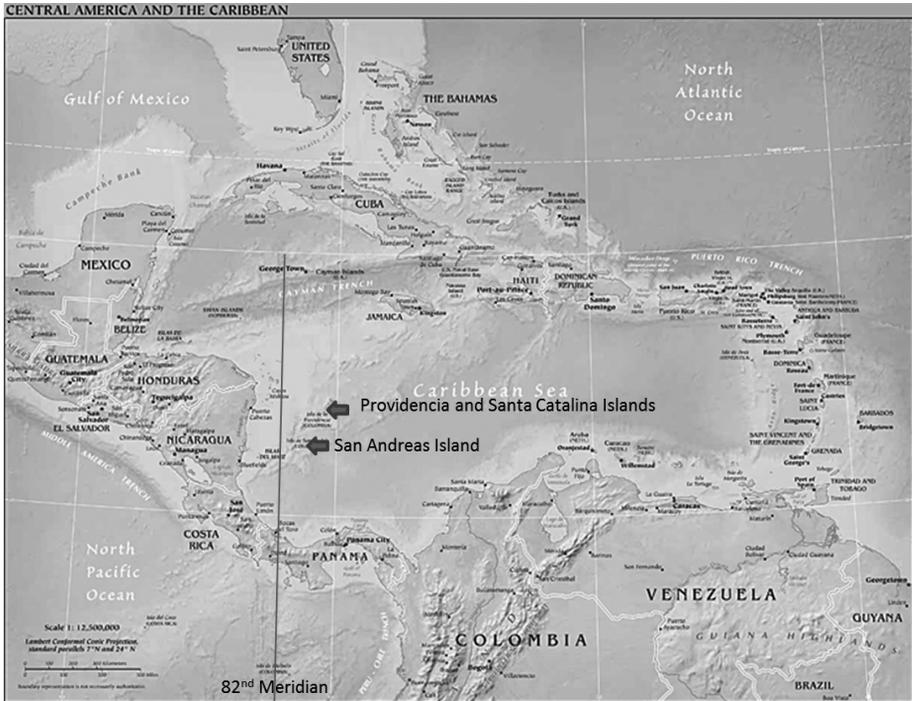


Figure 1
CIA World Fact Book, 2013b (“The Caribbean and Disputed Islands”)

Nicaragua’s case before the ICJ rested on a presumptive argument that the 1928 Barcenas-Esquerria Treaty was invalid, due to the fact that it was negotiated by a government that then President Arnaldo Alemán of Nicaragua declared illegitimate in 2001, when application was made to the ICJ. He was making the case that the international legal principle of *rebus sic stantibus* (things thus standing) was applicable to a change in government due to a revolution, which should then be considered paramount to another international legal principle of *pacta sunt servanda* (treaties made must be obeyed). Yet, most international legal scholars argue that changes in the form of government alone, or from one ruler to a different administration, do not meet the criteria of *rebus sic stantibus* and necessarily invoke the termination of treaty obligations made by previous administrations (Bishop, 1971, p. 220). If such were the case, every treaty made would become invalid when a change of administration, even a democratic election, would take place. The most pertinent examples of where treaties made can be subject to review and revision deal with the termination of a state or creation of a new state. The break-up of the former Soviet Union (USSR) in 1991 and creation of the Russian Federation and other newly independent states in Eastern Europe and the Caucasus is an example of such an event. Even that major realignment of global geopolitics did not auto-

matically terminate many of the treaties negotiated between the United States and the USSR; e.g., the Anti-Ballistic Missile (ABM) Treaty, negotiated in 1972, lasted until 2002, when it was unilaterally terminated by the United States (Perez-Rivas, 2001).

Nicaragua's case for territorial control of the contested islands and a remarking of maritime boundaries also rests on a reinterpretation of the colonial borders established after independence from Spain in the 1800s, using the principle of *uti possidetis*. Under this principle, the borders that were in place when the Federation of Central American States (or United Provinces of Central America) gained independence in 1821 would align with the original boundaries under the Captaincy General of Guatemala. Nicaragua argues that at this time, the contested islands were part of the Captaincy General and thus became the property of the newly formed Central America. However, in 1803, Carlos IV of Spain ordered that San Andrés Island and the Mosquito Coast of Central America belonged to the Viceroyalty of New Granada, which included the contemporary states of Colombia and Panama (Woodward, 1985, pp. 291-292).

In 1838, the Federation was dissolved and the break-up led to the creation of the five independent Central American nations of Guatemala, Honduras, El Salvador, Nicaragua, and Costa Rica. At that time, Nicaragua claims that the contested islands of San Andrés, Providencia, Santa Catalina, and the surrounding cays and islets came under its sovereign control (ICJ, 2001, p. 1). However, historical records show that in the 1840s, Colombia laid claim to the islands and the Mosquito Coast based on the original Spanish colonial borders between the Viceroyalty of New Grenada and the Captaincy General of Guatemala. It was Costa Rica that had to give up claims to San Andrés and Providencia islands to Colombia in order to gain sovereign control over its Caribbean coastline (Woodward, 1985, p. 135). Thus, Nicaragua's argument that *uti possidetis* supports its claim to the contested islands and associated maritime boundaries is specious at best.

In 1928, the Barcenas-Esguerra Treaty settled the dispute between the two countries over the contested islands, awarding control to Colombia, acknowledging, "the full and entire sovereignty of the Republic of Colombia over the islands of San Andrés, Providencia and Santa Catalina and over the other islands, islets and reefs forming part of the San Andrés Archipelago." (Diemer & Šeparović, 2006, p. 171). The treaty confirmed all previous decisions and historical documentation over Colombia's effective control of the islands for over 200 years (the customary international law of effectiveness-*effectivités*). In exchange for this recognition by Nicaragua, Colombia gave up any territorial claims to the Mosquito Coast. The fact that the law was not contested by Nicaragua until 1980, when the Sandinistas took control of the country by military revolution, also reinforces another custom-

ary international law principle of estoppel. Nicaragua acted in a way, “giving the impression to Colombia over a period of more than 50 years that it had accepted the provisions of the treaty without any reservation. Colombia therefore had reason to place trust in the territorial delimitation imposed by said treaty. It appears, as a result, that Nicaragua is estopped from making any territorial claims with respect to the San Andrés archipelago” (p. 176).

While the Barcenas-Esguerra Treaty dealt with the major islands in the San Andrés archipelago, it failed to address some of the smaller, uninhabited islets that geographically are considered part of the archipelago. The United States staked a claim to the islands under the 1856 Guano Islands Act (as *tierra nullus*), in order to establish navigation aids in that part of the Caribbean. It allowed Colombia access to the fishing grounds around the islands and in the Vásquez-Saccio Treaty with Colombia, ratified in 1981, the United States acknowledged that these islands are regarded as an integral part of the Colombian “Departamento de San Andrés y Providencia” (p. 176).

The issue of maritime demarcation of boundaries and territorial seas does come into play, however, when one considers the physical geography of the disputed region. The San Andrés archipelago clearly lies on the Continental Shelf, within Nicaragua’s 200 nautical mile (nm) EEZ. The Barcenas-Esguerra Treaty declared the meridian 82°00’00” W longitude as the maritime boundary, with the area west assigned to Nicaragua and the area east to Colombia (see Figure 1). There is legal precedent under customary international law to apply various interpretations of equidistance and equity in determining maritime boundaries in cases such as this where islands belonging to one state reside within the territorial waters of another state. Since Colombia and Nicaragua are not conjoined or have shared territorial waters based on their geographical locations, there is not an obvious solution. Instead, the 82nd meridian has served as the maritime boundary for over 50 years in and around the islands. This accepted determination is further supported by customary international law, where archipelagos, such as San Andrés are treated as contiguous for purposes of delimitation of both territorial seas (and EEZs), thus avoiding the need for convoluted demarcations that only lead to further conflict and dispute.

Taking all these factors into consideration, Colombia had every right to believe that when Nicaragua took its case before the ICJ in 2001, that the Court would rule in its favor. In the interim, however, both Nicaragua and Colombia have acted out their national interests, with leaders making public statements for their position, as well as taking what the other would view as provocative actions to reaffirm each other’s rights to the disputed islands and maritime regions. For example, in June 2002, Nicaraguan president Enrique Bolaños issued a call for bids for foreign oil

companies to explore parts of the Caribbean that were in the contested regions with both Honduras and Colombia. Both Honduran and Colombian governments vigorously protested Nicaragua's decision, arguing that each had a right to take actions to protect their maritime territories (Ferrer, 2002). Nicaragua's announcement occurred shortly after Colombia's national oil company, Ecopetrol, announced its intention to begin oil exploration in the contested waters, which Colombia claimed. Both Nicaragua and Colombia were taking actions to secure their claims to maritime regions that oil industry experts estimate could hold up to 4.3 billion barrels of oil, which is three times what Colombia currently has in proven reserves (Ferrer, 2002).

In 2006, on the heels of Daniel Ortega's reelection victory in Nicaragua, renewed tensions arose over the contested maritime regions. Ortega had been a leader in the Sandinista revolution which brought the leftist regime to power in 1979. It was the Sandinista regime that first made the claim that the 1928 Barcenas-Esguerra Treaty with Colombia was invalid, since it was negotiated by a government under U.S. occupation. Ortega was expected to renew Nicaraguan claims to the contested islands and waters (Oxford Analytica, 2007). There had been a series of recent actions of provocation in the disputed region where Nicaraguan coast guard vessels had confronted Colombian fishing boats, as well as renewed bids by both Nicaragua and Colombia to allow foreign firms to conduct oil explorations. Both countries were facing an uncertain future with regard to energy resources—Nicaragua experiencing oil shortages and rising import bills and Colombia also concerned that it would become a net importer of oil (Oxford Analytica, 2007).

Both countries have contributed to the escalation of tensions. In July 2007, Colombian president Alvaro Uribe celebrated Colombia's independence day on San Andrés island. At a following meeting of Central American leaders, Nicaragua president Daniel Ortega made it clear that President Uribe was not welcome to attend (Kraul, 2007, p. A4). Complicating the matter even further is the status of the 80,000 inhabitants of San Andrés and surrounding islands, which is comprised of different ethnic groups. A third of the population is part of the black Raizal people group, which reject Colombian government control of the islands and are petitioning for recognition as an independent nation. They argue that they have been mistreated by the Colombians, had their land expropriated, and are relegated to second-class citizen status on the islands (A4). The Raizal do not, however, want to be annexed by Nicaragua, rejecting the possibility of a change of government over the islands.

Thus, prior to the ICJ ruling in 2012, both Colombia and Nicaragua pursued policies that supported their claims to control of the contested islands, as well as the maritime boundaries surrounding the islands. Colombia maintained its posi-

tion of effective control of the islands for over 200 years and legal authority by virtue of the bilateral 1928 Barceñas-Esguerra Treaty granting Colombia sovereign control of the islands and the surrounding waters. Nicaragua's case has always been more circumspect, relying on a pretty loose interpretation of *uti possidetis* and, more importantly, *rebus sic stantibus*, and the illegitimacy of the treaty itself. What has changed, however, are the high-level stakes involving access to resources, such as hydrocarbons and fisheries. Nicaragua stood much to gain, should the ICJ move beyond customary international law interpretations of the dispute and rule in favor of equity issues, particularly with regard to the maritime boundaries and access to the contested 200 nm EEZ of Nicaragua, which the islands lie within. Colombia stood much to lose as maritime areas under its effective control for the last 80+ years hold promise of development of resources and revenues.

The November 2012 ICJ Ruling and Its Consequences

After 11 years of deliberation, the ICJ finally rendered its decision on Nicaragua v. Colombia. To no one's surprise, the Court determined that all contested islands within the San Andrés archipelago, to include the major islands of San Andrés, Providencia, and Santa Catalina, belonged to Colombia. To most everyone's surprise the Court determined that new methods of boundary adjudication should be applied in determining the maritime boundaries surrounding the islands, reneging on the previously agreed to 82nd meridian in the 1928 Barceñas-Esguerra Treaty, and instead awarding EEZ control over regions of the surrounding Caribbean Sea to Nicaragua. Colombia would be limited to retaining control to the 12 nm of territorial sea surrounding the islands of Providencia and Santa Catalina, and the broader swath around the islets and cays in the San Andrés archipelago, but still much smaller than it previously controlled, almost 75,000 square kms (*Economist*, 2012).

Nicaragua's president, Daniel Ortega, celebrated the ICJ ruling as a victory, sending his navy into the new Nicaraguan waters in a show of force and stating, "The court has given to Nicaragua what belonged to us: thousands of kilometers of natural resources" (*BBC News*, 2012). Colombia's president, Juan Manuel Santos, responded by refusing to withdraw the Colombian navy, and more significantly, threatened to withdraw Colombia from the Pact of Bogotá, signaling his country's refusal to abide by the ICJ ruling, or subsequent rulings impacting Colombia (*Economist*, 2012). Since the initial saber-rattling both leaders have taken a step back and pledged to not resort to any military actions.

The Court's action may appear to evince Solomon-like wisdom, in trying to appease both parties, applying both standing treaty law and customary law, with

regard to territorial sovereignty disputes, but it opened up new legal precedence by applying principles of equity with regard to EEZs, that completely negated previously agreed to boundaries. Under international law, Article 38 (1) of the Statute of the International Court of Justice, the following are to be recognized as grounds for juridical opinions:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice of law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provision of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

In theory, there is no hierarchy among these sources of international law; however, in practice, there has been deference by international lawyers to look toward existing treaties first, then customary law, and finally general principles. There is another stipulation in the Statute, Article 38 (2) that states, “this provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.” This criterion would allow the Court to consider a decision that was “fair and equitable” as long as both parties agreed to allow the Court to do so. In the case of *Nicaragua v. Colombia*, it appears that the Court took it upon itself to determine what was “fair and equitable” without giving the parties an option of deciding whether they were in agreement, knowing full well that Colombia would not accept the decision. Instead, it appears that the Court invoked the criteria of the Pact of Bogotá which required the parties to accept the compulsory jurisdiction of the Court and to accept the decision as binding, without recourse or redress.

For the nations in Latin America, the ICJ ruling had both domestic and international consequences. Domestically, Colombia’s embattled president, Juan Manuel Santos, saw his approval ratings fall 15 percent, while 85 percent of the population agreed with the former president, Álvaro Uribe, that the ICJ ruling should be ignored (Shifter & Combs, 2012). In Nicaragua, President Daniel Ortega received a boost in his support, reviving Nicaraguan nationalism. Internationally, the ruling impacted the maritime jurisdiction over sea-lanes which are heavily used by fishermen, but also drug traffickers. Nicaragua does not have the naval assets that Colombia possesses to be able to enforce security in its newly acquired EEZ and extended authorization for U.S. vessels to access the waters on drug patrols (Shifter & Combs, 2012).

The ICJ ruling also has a number of implications for on-going territorial and

maritime disputes in Latin America. Peru and Chile currently have a case before the ICJ (*Maritime Dispute Peru v. Chile*), which Peru began proceedings in January 2008. In its petition, Peru argued that the current maritime border between the two countries, based on the outcome of a treaty signed at the end of the War of the Pacific in 1879, granting Chile control of the maritime region once held by Peru, is invalid, despite Chile having controlled the maritime region as part of its EEZ for over 130 years (*América Economía*, 2012). Peru is seeking redress through the Court, based on both parties being signatories to the 1948 Pact of Bogotá, and accepting of the compulsory jurisdiction of the Court (as in *Nicaragua v. Colombia*). Prior to the Court's recent ruling overturning Colombia's historical claims to established maritime boundaries, Chile felt its position was pretty solid, and was not threatened by the Peruvian action. Now, Chile's leaders are expecting a likely rendering by the Court in favor of Peru and the potential loss of 37,500 square kilometers of its EEZ (*América Economía*, 2012). While the actual territorial implications are minimal, the political impact is substantial as the precedence of applying "fair and equitable" principles in Court rulings trumps established treaties and historical outcomes of previous territorial disputes.

As an example of the fallout, Bolivia filed a new petition in April 2013, taking Chile to the ICJ over its territorial loss during the War of the Pacific in 1879, demanding a "useful and sovereign outlet to the sea" (*MercoPress*, 2013). Bolivia lost its access to the Pacific Ocean, as a result of the outcome of the War, with Chile and Peru possessing the 400 kilometers of coastline that had belonged to Bolivia. Numerous attempts had been made by both Bolivia and Peru to regain lost territory to Chile, to include important resource-rich areas around the cities of Tacna and Arica in the Atacama Desert region. From Chile's perspective, the issue was resolved in 1904 with the signing of the Peace, Commerce, and Friendship Treaty with Bolivia. An agreement allowed Bolivia commercial access to the Chilean port of Arica, by virtue of a railroad that was completed in 1913 (St. John, 1994, p. 17). Like the *Nicaragua v. Colombia*, case, the Bolivian government argument is that the treaty signed in 1904 was signed "under duress" and is therefore not a legitimate treaty (*MercoPress*, 2013). Interestingly, Bolivia tried to make a similar argument in 1921, taking the case before the newly established League of Nations after World War I, only to have the case rejected by the League, arguing that the dispute had been settled by the 1904 Treaty and the League had no grounds to modify an existing treaty (St. John, 1994, p. 18).

As a result of the November 2012 ICJ ruling in *Nicaragua v. Colombia*, it is conceivable that the Court could expect a number of other new cases brought by Latin American states, in particular, seeking redress of previous border and maritime disputes, which had been settled by treaties, banking on the Court's applica-

tion of “fair and equitable” principles for settlement, in lieu of respecting existing international treaties, or even established principles of customary international law. The primary factor that is compelling states to push for an ICJ judgment appears to be the possibility of gaining access to resources in the disputed regions, such as fisheries and hydrocarbons in the Caribbean Sea, or nitrate deposits in South American deserts. The vehicle which allows for the ICJ to take on these disputes is the 1948 Pact of Bogotá, where 16 nations had signed and ratified the Treaty, agreeing to compulsory jurisdiction of the ICJ to settle disputes peacefully and accept the ICJ determination. Before the decision in *Nicaragua v. Colombia*, only one state had denounced its membership in the Treaty (El Salvador in 1973), arguing that since all signatory nations had yet to ratify the Treaty after 25 years, it was an insufficient means by which to resolve disputes in Latin America (OAS, 1948). El Salvador did not reject the principle of resolving disputes peacefully in the Americas. Rather, it stated a position whereby if all states in the region did not agree to the provisions of the Treaty, those states that had, put themselves at risk by accepting the Court’s jurisdiction in a case, while other states did not. Colombia’s denouncement of the Treaty in 2012 communicated a lack of confidence in the ICJ itself and its willingness to uphold standing international treaties and respect the traditions and norms established within Latin America to resolve disputes and avoid conflict.

Whether there exists an international society of nations in Latin America is more a question of international relations theory, leaning toward the constructivist argument; however, there is evidence to support the existence of certain norms for avoiding conflict and preferring peaceful settlement of disputes. Traditions such as *convivencia* (peaceful coexistence) and *concertación* (consensus-building) do characterize the interaction of states in the region, and more often than not, states have agreed to the acceptance of a normative justification for conflict avoidance (Kacowicz, 2005). To this end, Latin American states have generally agreed to a dispute settlement mechanism involving third states (United States, United Kingdom, Spain, Contadora Group, etc.), permanent or ad hoc courts or tribunals (ICJ), or other international government or non-government organizations (United Nations, League of Nations, Organization of American States, the Catholic Church, etc.) over the resort to force to settle their disputes. And when the outcome favors one party over the other, the loser rarely takes up arms to seek redress, generally accepting the norms of peaceful settlement of disputes, respect for sovereignty, and respect for the rule of law, as expressed in existing treaty obligations.

What is challenging these accepted norms of state behavior in Latin America and may impact the continued willingness of states to seek redress through adjudication is the concern that: 1) the International Court of Justice continues to apply

its interpretation of “fair and equitable” rulings over established treaties, laws and customs; 2) access to resources, such as fisheries, hydrocarbons, or minerals, will accelerate conflict in a strained international political economy; and 3) the lack of a regional hegemon (such as the United States) or any perceived threat to states within the region, may contribute to the increase of more self-help solutions in the future.

Conclusion

This article was written shortly after the ICJ ruling on *Nicaragua v. Colombia* in 2012. It remains to be seen whether the ruling will have a long-term impact on the community of nations within Latin America and their willingness to continue to accept ICJ adjudication regarding territorial and maritime boundary disputes. One possibility would be for nations to eschew the ICJ in favor of other means of arbitration and redress.

In 2004, two Caribbean nations, Trinidad and Tobago and Barbados, agreed to submit their dispute over contested waters and access to resources such as fisheries and hydrocarbons to the Permanent Court of Arbitration (PCA) Tribunal established under the United Nations Convention on the Law of the Sea (UNCLOS), of which both Trinidad and Tobago and Barbados were signatories. Despite years of trying to resolve their dispute bilaterally, through diplomatic means, both nations were at an impasse and were concerned that conflict could occur due to both nations’ economic needs and access to the resource-rich waters (Griffin, 2007, pp. xiv-xviii). The regime set in place under UNCLOS established the mechanisms states agree to abide by when confronting a maritime dispute. Both nations followed their interpretation of the “rules” set forth in Article 51 with regard to “existing agreements, fishing rights and existing submarine cables” (p. xv). Yet, the lack of a formal bilateral agreement to govern fishing rights, access to hydrocarbon reserves, and ultimately a proposed pipeline between Trinidad and Tobago and Venezuela, that would encroach on Barbados’ EEZ, led to the decision to accept PCA adjudication and “an affirmation of their faith in the process” (p. viii).

The UNCLOS Treaty and arbitration mechanisms established proved successful in helping Trinidad and Tobago and Barbados settle their dispute: however, as Glenn Gifford notes, just in the Caribbean alone, there are many more existing disputes and “whether countries should wait until a conflict erupts or until resources are discovered remains an open question” (p. 155). The recent ICJ ruling in *Nicaragua v. Colombia* throws another wrench in the process, should states “lose faith” in legal proceedings and no longer believe that international tribunals will, in

fact, serve as “honest brokers” in the process. The status quo state in a dispute will always want the judges to respect the established treaties or conventions in place, regardless of the circumstances of their origin, while the revisionist state hopes for a redress from the judges that will seek a “fair and equitable” solution. In the end, “dividing the baby” does not always work, and states with the most to lose may not be as accommodating as the real mother of the child was in Solomon’s case (NASB, 1973, p. 251).

Territorial and maritime boundary disputes are often complex issues. If they were not, then most would have been settled by now. Since many remain, particularly in Latin America, any act of final agreement, whether through adjudication rendered by the International Court of Justice, arbitration by the Permanent Court of Arbitration under UNCLOS, or dispute settlement through the efforts of a third party, is going to be watched carefully by international jurists, legal scholars, and most importantly by states themselves. International law remains a field of jurisprudence where international norms and rules of state behavior continue to evolve, and until the day that some supranational enforcement regime comes into existence to punish violators, states are bound to accept the rulings on these international legal bodies only in as far as they view it to be in their long-term self-interest to do so.

Colombia’s decision to remove itself from the 1948 Pact of Bogotá and to no longer be compelled to accept the compulsory jurisdiction of the ICJ to settle disputes between states that are signatories to the Pact is a political reaction that plays to the domestic audience, reflecting the state’s nationalist sentiments. If the ICJ were to rule in favor of Peru in its current dispute with Chile before the Court (which is very likely), and Chile were to follow suit, for similar reasons, in either ignoring the ruling or also pulling out of the 1948 Pact of Bogotá, then a dangerous precedent would be established. Latin America may no longer be looked at as a region that has evolved into an international society where the existence of norms and behaviors has helped to avoid conflict. Instead, states with contests over resources in disputed territories or maritime zones, may forego international legal mechanisms, having lost faith in the process.

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