

**DOUGHNUT HOLE IN THE CARIBBEAN  
SEA: THE MARITIME BOUNDARY  
BETWEEN NICARAGUA AND COLOMBIA  
ACCORDING TO THE INTERNATIONAL  
COURT OF JUSTICE**

*M. Imad Khan and David J. Rains\**

I.	INTRODUCTION.....	589
II.	BACKGROUND.....	591
III.	ICJ DECISION.....	594
	<i>A. Sovereignty Over the “Islands”.....</i>	594
	<i>B. Maritime Boundary Between Nicaragua and         Colombia.....</i>	596
	1. <i>Applicable Law.....</i>	597
	2. <i>Delimiting the Maritime Boundary.....</i>	598
IV.	EFFECT OF THE ICJ DECISION AND EFFECTS ON NICARAGUA AND COLOMBIA.....	604
V.	CONCLUSION.....	608

I. INTRODUCTION

On November 19, 2012, the International Court of Justice

---

\* Mr. Khan is an adjunct professor at the University of Houston Law Center and an Associate in the Complex Commercial Litigation Group at Vinson & Elkins LLP. Mr. Rains is an Associate at Hogan Lovells.

(ICJ) unanimously<sup>1</sup> resolved a multi-year maritime boundary dispute between Nicaragua and Colombia by establishing a single maritime boundary.<sup>2</sup> The decision was complicated by the question of Colombian sovereignty over certain islands located about 100 to 150 nautical miles (nm) off the eastern coast of Nicaragua and about 380 nm from mainland Colombia.<sup>3</sup> Having found in favor of Colombian sovereignty over the islands, the ICJ carved out a “rectangular-esque” shaped maritime area around most of Colombia’s islands in the relevant area; furthermore, it enclaved two Colombian islands<sup>4</sup> to account for Colombia’s maritime areas that fall within what would have been Nicaraguan waters absent Colombian sovereignty over the islands.<sup>5</sup>

The ICJ’s opinion in *Territorial and Maritime Dispute between Nicaragua and Colombia* materially expands Nicaraguan maritime territory in the Caribbean Sea.<sup>6</sup> This newly-established maritime boundary may affect those with oil, gas, or fishery interests in the Caribbean Sea, considering the countries had been using the 82nd meridian as the *de facto* maritime boundary.<sup>7</sup> Colombia’s president Juan Manuel Santos has declared that the ICJ is “seriously wrong” in its decision to hand over large chunks of sea around the island of San Andres

---

1. *Territorial and Maritime Dispute (Nicar. v. Colom.)*, 2012 I.C.J. 33, ¶ 251 (Nov. 19).

2. *Id.*

3. *Id.* ¶¶ 18, 22–23.

4. *Id.* at 89 (Sketch-map No. 11).

5. *See id.* ¶ 229.

6. Tim Rogers, *Caribbean Crisis: Can Nicaragua Navigate Waters It Won from Colombia?*, TIME (Nov. 28, 2012), <http://world.time.com/2012/11/28/caribbean-crisis-can-nicaragua-navigate-waters-it-won-from-colombia/>. This decision has important repercussions for both Nicaragua and Colombia because according to the United Nations Convention on the Law of the Sea, “[t]he coastal State shall have the exclusive right to authorize and regulate drilling on the continental shelf for all purposes.” United Nations Convention on the Law of the Sea art. 81, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]. For additional analysis of the ICJ’s decision, see *A Maritime Doughnut Hole in the Caribbean Sea: The International Court of Justice Establishes Maritime Boundary Between Nicaragua and Colombia*, VINSON & ELKINS LLP (Nov. 27, 2012), [http://www.velaw.com/resources/pub\\_detail.aspx?id=21928](http://www.velaw.com/resources/pub_detail.aspx?id=21928).

7. Rogers, *supra* note 6.

to Nicaragua.<sup>8</sup> However, there is very limited recourse for Colombia given the formal legal finality of the ICJ's decision.<sup>9</sup>

## II. BACKGROUND

Colombia traditionally claimed maritime territory, including exclusive mineral rights, east of the 82° West meridian.<sup>10</sup> This means that both Banco Tyra and Banco Isabel border the seabed territory traditionally claimed by Colombia.<sup>11</sup> According to Nicaragua, the Colombian military has, on several occasions, endeavored to enforce its claims by intercepting and seizing Nicaraguan vessels around the 82nd meridian.<sup>12</sup> In response, Nicaragua brought proceedings against Colombia in the ICJ claiming, *inter alia*, that Colombia's military presence at the 82nd meridian was illegal and that Nicaragua should be granted a maritime boundary that extends east of the 82nd meridian.<sup>13</sup>

In its application, Nicaragua asked the ICJ to find that Nicaragua had sovereignty over the islands of Providencia, San Andrés, and Santa Catalina, along with all appurtenant islands and keys (*i.e.* the San Andrés Archipelago).<sup>14</sup> Additionally, it sought sovereignty over the Roncador, Serrana, Serranilla and Quitasueño keys, though it would not concede that these form part of the San Andrés Archipelago.<sup>15</sup> Nicaragua further asked the ICJ to “determine the course of the single maritime boundary between the areas of continental shelf and exclusive economic zones appertaining respectively to Nicaragua and

---

8. *Id.*

9. Statute of the International Court of Justice art. 60, June 26, 1945, 33 U.N.T.S. 993.

10. Rogers, *supra* note 6.

11. See *Nicaragua Dice Que Repsol está Interesada en Explorar Petróleo en el Caribe*, FOX NEWS LATINO (Dec. 5, 2012), <http://latino.foxnews.com/latino/espanol/2012/12/05/nicaragua-dice-que-repsol-esta-interesada-en-explorar-petroleo-en-el-caribe/#ixzz2K6FieffM>; Joel Narváz Campbell, *Sobre las Concesiones Petroleras en el Caribe*, EL NUEVO DIARIO (June 16, 2011), <http://www.elnuevodiario.com.ni/opinion/105083>.

12. Territorial and Maritime Dispute (Nicar. v. Colom.), 2012 I.C.J. 33, ¶ 248 (Nov. 19).

13. *Id.* ¶ 16.

14. *Id.* ¶ 15. The appurtenant keys are often also referred to as “cays” in the case materials.

15. *Id.* ¶¶ 15, 43.

Colombia.”<sup>16</sup>

In response, Colombia filed preliminary objections with the ICJ, arguing that the issues before the Court had already been settled under the Barcenas-Esguerra Treaty of 1928 and the related Protocol of Exchange of Ratifications (Protocol), signed at Managua on May 5, 1930 (together the 1928 Treaty).<sup>17</sup> The 1928 Treaty contains various provisions that arguably settled many of the issues in the dispute.<sup>18</sup>

First, the first paragraph of the 1928 Treaty contains dual acknowledgements by Colombia and Nicaragua.<sup>19</sup> Nicaragua recognizes Colombia’s sovereignty over the San Andrés Archipelago and Colombia recognizes Nicaragua’s sovereignty over the Mosquito Coast and the Corn Islands.<sup>20</sup> The second paragraph of the 1928 Treaty provides that it did “not apply to the reefs of Roncador, Quitasueño, and Serrana, sovereignty over which [was] in dispute between Colombia and the United States of America.”<sup>21</sup> Additionally, the Protocol included the statement that “the San Andrés and Providencia Archipelago mentioned in the first clause of the [1928 Treaty] does not extend west of 82nd degree of longitude west of Greenwich.”<sup>22</sup>

The ICJ delivered its judgment on the preliminary objections in December of 2007 (2007 Judgment).<sup>23</sup> The Court upheld Colombia’s preliminary objection regarding the issue of sovereignty over the San Andrés Archipelago islands of San Andrés, Providencia, and Santa Catalina, as well as adjacent islets and keys. The Court reasoned that sovereignty over these islands was settled by the 1928 Treaty, under which Nicaragua

---

16. *Id.* ¶ 15.

17. Territorial and Maritime Dispute (Nicar. v. Colom.), Preliminary Objections, 2007 I.C.J. 832, ¶ 60 (Dec. 13) [hereinafter Preliminary Objections].

18. *Id.*

19. Treaty Concerning Territorial Questions at Issue Between Colombia and Nicaragua, Colom.-Nicar., Mar. 24, 1928, 105 L.N.T.S. 340.

20. *Id.* art. 1.

21. *Id.*

22. Territorial and Maritime Dispute (Nicar. v. Colom.), 2012 I.C.J. 33, ¶ 41 (Nov. 19).

23. *Id.* art. 6.

recognized Colombian sovereignty over the Archipelago.<sup>24</sup> However, the ICJ rejected Colombia's objection with respect to the following issues that had not been resolved pursuant to the 1928 Treaty: (a) the issue of maritime features that form other parts of the Archipelago;<sup>25</sup> (b) the issue of sovereignty over the Roncador, Serrana, and Quitasueño keys because the 1928 Treaty explicitly states that it does not apply to those keys;<sup>26</sup> and (c) the issue of a single, maritime boundary between Nicaragua and Colombia.<sup>27</sup> The ICJ found that it had jurisdiction and would subsequently set a maritime boundary between Nicaragua and Colombia.<sup>28</sup>

Following the 2007 Judgment, the parties altered their arguments. Nicaragua, though still making statements intended to retain its argument of the invalidity of the 1928 Treaty,<sup>29</sup> explicitly altered its claim and proposed a method of delimitation.<sup>30</sup> It also requested that the ICJ determine the relevant delimitation by use of continental shelf delimitation.<sup>31</sup> Colombia also altered its claims to a degree. It backed away from its arguments that the 82nd meridian formed the maritime boundary between Nicaragua and Colombia.<sup>32</sup> Colombia argued that a maritime delimitation should be drawn, using the equidistance method of delimitation, from base points on the islands of the San Andrés Archipelago (including Quitasueño and Albuquerque Cay) to basepoints on the Miskito Cays and

---

24. *Id.* ¶¶ 91–97.

25. *Id.* ¶ 97.

26. *Id.* ¶ 104.

27. *Id.* ¶¶ 117, 120.

28. *Id.* ¶ 120.

29. Territorial and Maritime Dispute (Nicar. v. Colom.), Reply of Nicaragua, ¶ 10 (Sept. 18, 2009), *available at* <http://www.icj-cij.org/docket/files/124/16971.pdf>.

30. *Id.* ¶¶ 25–29.

31. *Id.* ¶¶ 25–30. It should be noted that Colombia argued strenuously that this “new” claim is inadmissible. Territorial and Maritime Dispute (Nicar. v. Colom.), Rejoinder of Colombia, ¶¶ 4.15–.34 (June 18 2010), *available at* <http://www.icj-cij.org/docket/files/124/16973.pdf>. Additionally, Colombia disputes the factual basis for Nicaragua's continental shelf claim and argues that Nicaragua has failed to comply with Article 76(8) of UNCLOS, which requires claims to greater than 200 nautical miles of the continental shelf be submitted to an “Annex II Commission.” *Id.* ¶¶ 4.36–.41.

32. *Id.* ¶ 2.17.

the Corn Islands.<sup>33</sup> Before determining the maritime boundary between the two States, however, the Court had to determine the question of sovereignty.

### III. ICJ DECISION

#### A. *Sovereignty Over the “Islands”*

Given the location of the islands and formations in question, the issue of determining sovereignty over them became a threshold question of sorts.<sup>34</sup> The ICJ already determined in its 2007 Judgment that sovereignty over the islands of San Andrés, Providencia, and Santa Catalina belonged to Colombia pursuant to the 1928 Treaty.<sup>35</sup> However, there remained two significant questions the ICJ had to answer with regards to sovereignty over the islands and other maritime features.<sup>36</sup> These islands and maritime features include the Caribbean islands at Alburquerque, Bajo Nuevo, East-Southeast Cays, Quitasueño, Roncador, Serrana and Serranilla (Sketch Map 1 provides the necessary geographical context for the sovereignty and maritime dispute).

First, the ICJ had to decide whether the islands and features were capable of appropriation.<sup>37</sup> Only “islands” (as defined in Article 121 of the United Nations Convention on the Law of the Sea (UNCLOS) and discussed below) may be appropriated, but low-tide elevations may not be.<sup>38</sup> Though Nicaragua and Colombia agreed that most of the maritime features were islands, their agreement diverged with respect to the Quitasueño feature. Nicaragua argued that Quitasueño was merely a low-tide elevation, not an island.<sup>39</sup> Despite its small

---

33. *Id.* ¶¶ 6.45–.47.

34. Preliminary Objections, *supra* note 17, ¶¶ 86–90.

35. *Id.*

36. *Id.* ¶ 11.

37. Territorial and Maritime Dispute (Nicar. v. Colom.), 2012 I.C.J. 33, ¶ 25 (Nov. 19).

38. *Id.* ¶¶ 26–27. Specifically, Article 121 of UNCLOS defines an “island” as “a naturally formed area of land, surrounded by water, which is above water at high tide.” UNCLOS, *supra* note 6, art. 121(1).

39. *Id.* ¶¶ 26–28.

size, the fact that it is only 0.7 meters above water at high tide, and the fact that it is composed of coral, the ICJ determined that Quitasueño was capable of appropriation as it met all the requirements of UNCLOS Article 121.<sup>40</sup>

Second, the ICJ had to determine the trickier question of sovereignty over the islands.<sup>41</sup> The ICJ rejected the use of the *uti possidetis juris*<sup>42</sup> principle to determine the sovereignty question. This Latin-American principle dictates that the boundaries established by colonial powers are to be maintained when post-colonial States are created after the latter gain independence.<sup>43</sup> However, the ICJ concluded that the evidence before it afforded the Court “inadequate assistance in determining sovereignty over the maritime features in dispute . . . because nothing clearly indicates whether these features were attributed to the colonial provinces of Nicaragua or of Colombia prior to independence.”<sup>44</sup> In the absence of sufficient evidence that established colonial boundaries, the Court was unable to rely on this principle. Consequently, the Court had to turn to the principle of *effectivités* to determine the sovereignty issue.<sup>45</sup>

The principle of *effectivités* is based on State acts that manifest a display of authority over a given territory. The relevant query regarding a claim of title to territory under this principle concerns (a) occupation of said territory, (b) acquisition of territory through prescription, or (c) analysis of factual elements that demonstrate the exercise of governmental authority over said territory.<sup>46</sup>

Under its *effectivités* analysis, the Court first determined the

---

40. *Id.* ¶¶ 37–38 (finding Quitasueño to be an island under international law).

41. *Id.* ¶ 39.

42. Roughly, “as you possess under law.” *Uti possidetis juris* is a principle of international law that states that newly formed sovereign States should have the same borders that their preceding dependent area had before their independence.

43. Tomás Bartos, *Uti Possidetis. Quo Vadis?*, 18 AUSTL. Y.B. INT'L L. 37, 39 (1997).

44. Territorial and Maritime Dispute (Nicar. v. Colom.), 2012 I.C.J. 33, ¶ 65 (Nov. 19).

45. *Id.* ¶¶ 64–66.

46. See *Sovereignty over Pulau Ligitan and Pulau Sipadan* (Indon./Malay.), 2002 I.C.J. 625 (Dec. 17); *Territorial and Maritime Dispute in the Caribbean Sea* (Nicar. v. Hond.), 2007 I.C.J. 659 (Oct. 8).

“critical date” or the date on which the dispute between Nicaragua and Colombia as to sovereignty over the islands in the Caribbean crystallized.<sup>47</sup> This date is significant because the Court only takes into account events occurring *prior* to the critical date to ascertain which State has sovereignty.<sup>48</sup> The ICJ concluded that June 12, 1969—the date on which Nicaragua responded to Colombia’s June 4, 1969 note protesting Nicaragua’s grant of oil exploration concession in the area of Quitasueño—was the critical date. Events occurring prior to June 12, 1969, led the Court to conclude that Colombia held sovereignty. The Court found sufficient evidence to determine that Colombia held sovereignty over all the islands at issue.<sup>49</sup> The ICJ was led to this conclusion based on Colombia’s (a) public administration and legislation concerning the islands, (b) regulation of economic activities in the area, (c) law enforcement measures, and (d) consular representations. Therefore, the Court found that Colombia maintained sovereignty over the islands at Alburquerque, Bajo Nuevo, East-Southeast Cays, Quitasueño, Roncador, Serrana and Serranilla.<sup>50</sup>

#### *B. Maritime Boundary Between Nicaragua and Colombia*

Based on evidence that Colombia has sovereignty over the San Andrés Archipelago, both Nicaragua and Colombia had overlapping maritime claims in the Caribbean Sea.<sup>51</sup> The Colombian islands intersect Nicaragua’s maritime area.<sup>52</sup> That is, the Court found:

There is . . . an overlap between Nicaragua’s entitlement to a continental shelf and exclusive economic zone extending to 200 nautical miles from its mainland coast and adjacent islands and Colombia’s

---

47. Territorial and Maritime Dispute (Nicar. v. Colom.), 2012 I.C.J. 33, ¶ 67 (Nov. 19).

48. The Court cannot take into account events occurring after the critical date because States may take actions after the sovereignty dispute has arisen to buttress their claims of sovereignty.

49. *Id.* ¶¶ 82–84.

50. *Id.* ¶ 103.

51. *Id.* ¶¶ 129–32.

52. *Id.* ¶ 132.

entitlement to a continental shelf and exclusive economic zone derived from the islands over which the Court has held that Colombia has sovereignty.<sup>53</sup>

In such a case, the ICJ had to balance competing considerations of providing both mainland Nicaragua and the Colombian islands with their maritime entitlements under the applicable international law.<sup>54</sup>

### 1. *Applicable Law*

In this case, the Court relied on customary international law—one of the three primary sources of law on which the Court may rely pursuant to Article 38(1) of its statute—to be the applicable law, as the parties had agreed.<sup>55</sup> The Court so decided because Nicaragua and Colombia were not both parties to a treaty applicable to maritime delimitations; therefore, they had not affirmatively agreed as to the law that would apply to maritime delimitations between them previously.<sup>56</sup> However, the Court noted that Nicaragua was a party to UNCLOS, though Colombia was not.<sup>57</sup> It also found that several of the important provisions of UNCLOS had crystallized into customary international law, in particular, “the provisions of Articles 74 and 83, on the delimitation of the exclusive economic zone and the continental shelf, and Article 121, on the legal régime of islands.”<sup>58</sup> Therefore, the Court decided to apply these provisions to determine the maritime boundary between Nicaragua and Colombia.<sup>59</sup>

Article 121(3) of UNCLOS, which governs the regime of islands and defines an island, provides that an island generates

---

53. *Id.*

54. *Id.* ¶¶ 134, 137.

55. *Id.* ¶¶ 114; *see also* Statute of the International Court of Justice art. 38, June 26, 1945, 33 U.N.T.S. 993 (listing primary sources of law the Court shall apply).

56. Territorial and Maritime Dispute (Nicar. v. Colom.), 2012 I.C.J. 33, ¶¶ 105, 137 (Nov. 19).

57. *Id.* ¶ 137.

58. *Id.* ¶ 138. The Court had previously recognized the principles of maritime delimitation enshrined in Articles 74 and 83 to reflect custom in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*. It had not, however, recognized UNCLOS Article 121(3) to reflect custom until its decision in the present case.

59. *Id.* ¶¶ 138–41.

a full territorial sea, exclusive economic zone, and continental shelf, so long as the island can sustain human habitation or economic life.<sup>60</sup>

Article 74 addresses the delimitation of the exclusive economic zone between States.<sup>61</sup> In relevant part, it provides that “[t]he delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law . . . in order to achieve an *equitable solution*.”<sup>62</sup> Similarly, Article 83, which concerns the delimitation of the continental shelf between States,<sup>63</sup> provides that “[t]he delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law . . . in order to achieve an *equitable solution*.”<sup>64</sup>

Although Articles 74 and 83 of UNCLOS envisage that each maritime zone be *separately* delimited,<sup>65</sup> these delimitations are increasingly being parceled together through agreements and judicial settlements, resulting in the drawing of a single maritime boundary to delimit these various maritime zones.<sup>66</sup> The ICJ in *Territorial and Maritime Dispute between Nicaragua and Colombia* does not specifically state as such, but its decision to delimit the boundary between the two States adheres to the practice of drawing a single maritime boundary.<sup>67</sup>

## 2. *Delimiting the Maritime Boundary*

The ICJ determined a single maritime boundary—purportedly achieving an equitable result for both States—by

---

60. UNCLOS, *supra* note 6, art. 121(3).

61. *Id.* art. 74.

62. *Id.* art. 74(1) (emphasis added).

63. *Id.* art. 83.

64. *Id.* art. 83(1) (emphasis added).

65. *See id.* arts. 74, 83.

66. *See* Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar/Bahr.), Judgment, 2001 I.C.J. 40, ¶¶ 173–74 (Mar. 16) (explaining the Court must first apply the principles of customary international law while taking into account the ultimate task is to draw a single maritime boundary when coincident boundaries arise between two states).

67. Territorial and Maritime Dispute (Nicar. v. Colom.), 2012 I.C.J. 33, ¶ 251 (Nov. 19).

effectively applying a five-step process.<sup>68</sup>

First, the ICJ defined the relevant coasts of the two States. Doing so served two purposes: (1) determining the overlapping claims to maritime areas in order to delimit such areas; and (2) confirming, in the final stage of delimitation, whether any disproportionality exists in the ratios of the coastal length of each State and the maritime areas awarded to each State.<sup>69</sup>

Nicaragua's coast was defined as its entire coast with the exception of a short stretch, which faces south and thus does not project into the area of the overlapping claims.<sup>70</sup> As for Colombia, the ICJ confined the relevant coast to the coasts of the islands over which Colombia has sovereignty. Notably—and not surprisingly—the Court ignored the mainland coast of Colombia since it “does not generate any entitlement in that area.”<sup>71</sup> The Court calculated the ratio of the relevant Nicaraguan and Colombian coasts (1:8.2 in favor of Nicaragua) to verify, in the final step, that the ICJ's newly established maritime boundary was not disproportionate, as compared to the relevant maritime area.<sup>72</sup> Sketch-Map No. 6 illustrates the Court's determination of the States' relevant coasts.

Second, the ICJ defined the relevant maritime area, which comprises that part of the maritime space in which the potential entitlements of the parties overlap and which was subject to division based on the maritime boundary.<sup>73</sup> Determination of the relevant area, too, is important in the last stage of delimitation to verify whether the result of the drawing a single, maritime boundary is disproportionate.<sup>74</sup>

The ICJ concluded that the relevant area extends from the

---

68. *Id.* at 3–4.

69. *Id.* at ¶ 141.

70. *Id.* ¶ 145. However, it is worth noting the Mosquito Coast, or the stretch of islands lying parallel to the Nicaraguan Coast, were used in determining the baseline (described below) from which Nicaragua's entitlement was to be measured. However, given their relatively small size, the islands were not considered to add to the length of the coast.

71. *Id.* ¶ 151.

72. *Id.* ¶¶ 153, 243–47.

73. *Id.* ¶¶ 155, 159, 163.

74. *Id.* ¶ 158.

Nicaraguan coast to a line in the east 200 nm from Nicaragua's baselines.<sup>75</sup> In doing so, the ICJ rejected Colombia's argument that the relevant area stops at the western coasts of the Colombian islands, and found that Nicaragua's coast projects "a potential maritime entitlement across the sea-bed and water column *for 200 nautical miles . . .* [which extends] to the east of the Colombia islands."<sup>76</sup> The Court thus indicated that the presence of another State's island(s) in the maritime area of a mainland State cannot completely deprive the latter of most of its maritime area.

Having dealt with the issue of the presence of another State's territory in another State's maritime projection, the ICJ began to draw the maritime area boundary. In doing so, the Court excluded those areas that would affect the rights of third-party States and areas over which neither Nicaragua nor Colombia had an overlapping maritime claim.<sup>77</sup> The carving of this maritime area—as described below—demonstrates this.

As to the north, the boundary of the relevant area in the north followed the maritime boundary between Nicaragua and Honduras.<sup>78</sup> That boundary then continued due east until it reached the boundary of the Joint Regime Area between Colombia and Jamaica—which area was excluded from the relevant area since most of that area fell beyond the line 200 nm from Nicaragua.<sup>79</sup> The northern boundary stops when it intersects with the line 200 nm from Nicaragua.

As to the south, the ICJ found that the relevant area boundary began in the east, at the point where the line 200 nm from Nicaragua intersected with the agreed maritime boundary between Colombia and Panama. The southern boundary followed the Colombia-Panama boundary to the west until it reached the maritime boundary between Colombia and Costa Rica. From that point, the boundary followed westward and northward, accounting for the hypothetical equidistance line

---

75. *Id.* ¶ 159.

76. *Id.* (emphasis added).

77. *Id.* ¶ 163.

78. *Id.* ¶ 164.

79. *Id.* ¶ 163–64.

between the coasts of Costa Rica and Nicaragua.<sup>80</sup> Sketch-Map No. 7 shows the relevant maritime area the Court identified for purposes of delimiting the maritime boundary between Colombia and Nicaragua.

The third step in the Court's five-step analysis concerned the method of delimitation. Here, the ICJ reiterated that the standard method of delimitation involved construction of a provisional median line between the coasts of Nicaragua's mainland and Colombia's islands. This median line was constructed by determining points which are equal distance from the nearest base points of the Nicaraguan and Colombian coasts.<sup>81</sup>

The Court decided that Nicaragua's base points are located at the cays and islands off the Nicaraguan coast because these features form a part of the coast itself.<sup>82</sup> The base points of Colombia were held to be located at the major islands, like Santa Catalina, Providencia, and San Andrés islands. Smaller islands were not included in the base points for Colombia, for they were very small maritime features that would "distort the relevant geography."<sup>83</sup> The Court then constructed the provisional median line (depicted in Sketch-map No. 8).<sup>84</sup>

Fourth, the ICJ considered factors necessitating adjustment or shifting of the provisional, median line in order to achieve an equitable result.<sup>85</sup> As it has done in previous cases, the ICJ considered the following factors applicable to the specific situation in this case:

- *Disparity in the Lengths of the Relevant Coasts:* The ICJ had previously considered this factor to shift the provision, median delimitation line; however, the Court indicated that only a "substantial" disparity would yield an adjustment. Here, the disparity between the Nicaraguan and Colombian coasts (1:8.2 in favor of Nicaragua) was found to be

---

80. *Id.* ¶ 165.

81. *Id.* ¶¶ 185, 191.

82. *Id.* ¶¶ 200–01.

83. *Id.* ¶¶ 202–03.

84. *Id.* ¶ 76.

85. *Id.* ¶ 205–07.

“substantial” so as to necessitate an adjustment of the provisional delimitation line.<sup>86</sup>

- *Geography and Cut-off Effect*: Rejecting Nicaragua’s argument, the ICJ concluded that the location of the Colombian islands on Nicaragua’s continental shelf should not be given any weight. The Court reasoned that, as has been repeated before, “geological and geomorphological considerations are not relevant to the delimitation of overlapping entitlements within 200 nm of the coasts of States.”<sup>87</sup> Nevertheless, the Court did consider relevant the fact that Colombian islands’ prevented Nicaragua from producing its full maritime effect in the Caribbean Sea. It found that the delimitation line should allow coasts to “produce their effects in terms of maritime entitlements in a reasonable and mutually balanced way.”<sup>88</sup> Here, the median line cut Nicaragua off from about three-quarters of the area into which its coast projects and, thus, the cut-off effect was found to be a relevant consideration, requiring adjustment of the provisional line.<sup>89</sup>
- *State Conduct*: Though it acknowledged that the conduct of the parties might need to be taken into account as a relevant circumstance in some instances, the ICJ refused to do so in this case. It found that the conduct of the parties east of the 82nd meridian was not an exception so as to constitute a relevant circumstance for purposes of determining whether the provisional line required adjustment.<sup>90</sup>
- *Security and Law Enforcement*: As to this factor, the Court merely noted that it “recognized that legitimate security concerns might be a relevant consideration if a maritime delimitation was effected particularly near to the coast of a State . . . .”<sup>91</sup> This element, however, seems not have affected

---

86. *Id.* ¶¶ 208–11.

87. *Id.* ¶ 214.

88. *Id.* ¶ 215.

89. *Id.* ¶ 215–16.

90. *Id.* ¶ 220.

91. *Id.* ¶ 222.

a shift in the resultant maritime boundary as it was not particularly close to the relevant border of either Nicaragua or Colombia.

- *Access to Natural Resources*: Noting that this factor must be treated cautiously, the Court found that the present delimitation issue did not present “issues of access to natural resources so exceptional as to warrant treating them as a relevant consideration.”<sup>92</sup>

Having determined the relevant circumstances for purposes of the present dispute affect, the ICJ then considered the approaches to give effect to them, which in turn would move the provisional, median line. The Court noted that there are various techniques that allow for relevant circumstances to be considered in order to achieve an equitable result, but it used the infrequent approach of weighting to construct the maritime boundary dividing the maritime area between Colombia and Nicaragua.<sup>93</sup> It weighted as one each Colombian base point and weighted as three each Nicaraguan base point, thereby using a 3:1 ratio between Nicaragua and Colombian base points, respectively, to construct the boundary.<sup>94</sup> The Court then defined the points on the boundary, known as an “equiratio” line, by this constant ratio of its distance from the nearest point of the baselines (depicted in Sketch-Map Nos. 9 and 10).<sup>95</sup> It was this equiratio line whose endpoints in the north and south were extended east to the 200 nm line.<sup>96</sup> Thus, the “doughnut” hole was carved in the Caribbean Sea for Colombia, with the rest of the pre-determined relevant maritime area awarded to Nicaragua (*see* Sketch Map No. 11).

---

92. *Id.* ¶ 223.

93. *Id.* ¶ 233.

94. *Id.* ¶ 234.

95. *Id.* ¶ 234; *see also* Wijnand Langeraar, *Maritime Delimitation: The Equiratio Method—A New Approach*, 10 MARINE POL’Y 3, 7 (1986) (defining the equiratio method of delimitation as “a boundary line between the offshore areas under the jurisdiction of two coastal states [that is 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”).

96. Territorial and Maritime Dispute (Nicar. v. Colom.), 2012 I.C.J. 33, 89 (Nov. 19).

Lastly, the ICJ tested the result achieved by the delimitation exercise to determine whether *significant* disproportionality would require further adjustments of the provisional median line.<sup>97</sup> At this stage, the ICJ compared the ratio of the relevant coasts (from step one) and the ratio of the relevant maritime area awarded to each State, based on the calculation of the relevant maritime area (from step two).<sup>98</sup> The Court concluded that the result of its maritime boundary was *not significantly* disproportionate even where the divided, relevant maritime area had a ratio of about 1:3.44 (Colombia to Nicaragua), while the ratio of the relevant coasts was about 1:8.2.<sup>99</sup>

#### IV. EFFECT OF THE ICJ DECISION AND EFFECTS ON NICARAGUA AND COLOMBIA

As this decision provides Nicaragua with additional maritime territory than the States' previous practice, Colombia has expressed its discontent with the ICJ decision. Colombian president Juan Manuel Santos, for example, declared that the ICJ made a "serious error is [sic] judgment" by giving Nicaragua a considerable amount of territory around the island of San Andres.<sup>100</sup> He also declared that Colombia will "not rule out any action" and that Colombia would not accept the ICJ's decision.<sup>101</sup> Noemí Sanín (former Colombian foreign secretary) and Miguel Ceballos (former Justice vice minister) have recently accused Judge Xue Hanqin (the Chinese ICJ judge) of illegitimately influencing the *Nicaragua v. Colombia* decision for Chinese business interests in the region.<sup>102</sup> To date, however, Colombia has not taken any action against the ICJ ruling, probably

---

97. *Id.* ¶ 239.

98. *See id.* ¶¶ 243–44.

99. *Id.* ¶ 247.

100. Simon Willis, *ICJ Ruling on San Andres a 'Serious Judgement Error': Santos*, COLOM. REP. (Nov. 20, 2012), <http://colombiareports.com/icj-ruling-on-san-andres-a-serious-judgement-error-santos/>.

101. *Id.*

102. *See* Santiago Wills, *Is China Behind Nicaragua's Recent Diplomatic Victory at The Hague?*, ABC NEWS (May 2, 2013), [http://abcnews.go.com/ABC\\_Univision/china-nicaraguas-recent-diplomatic-victory-hague/story?id=19085917#.UZKR67WG18E](http://abcnews.go.com/ABC_Univision/china-nicaraguas-recent-diplomatic-victory-hague/story?id=19085917#.UZKR67WG18E).

because Colombia's options are limited.<sup>103</sup>

The judgment in this case is final and binding as to Nicaragua and Colombia, and without possibility of appeal.<sup>104</sup> While it is possible for a party to request revision of the Court's judgment, the Court is unlikely to admit the matter to revise its decision absent a compelling new fact that would be decisive as to the maritime boundary issue.<sup>105</sup> Therefore, the States' only recourse to avoid the effect of the judgment is to reach an agreement and enter into a treaty regarding their maritime border, though in this case Nicaragua is unlikely to negotiate and cede the expanded maritime area it has won.<sup>106</sup> The decision of the ICJ in *Territorial and Maritime Dispute between Nicaragua and Colombia* is binding on Nicaragua and Colombia as of the date of the reading of the judgment.<sup>107</sup>

Pursuant to Article 94 of the UN Charter, both Nicaragua and Colombia must undertake "to comply with the decision of the International Court of Justice."<sup>108</sup> If either party fails to perform the obligations incumbent upon it under the ICJ's judgment in *Territorial and Maritime Dispute between Nicaragua and Colombia*, the other party may take the matter "to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give

---

103. See Michael Shifter & Cameron Combs, *Colombia-Nicaragua ICJ Case Tests Region's Crisis Resolution Mechanisms*, WORLD POL. REV. (Dec. 5, 2012), <http://www.worldpoliticsreview.com/articles/12544/colombia-nicaragua-icj-case-tests-regions-crisis-resolution-mechanisms> (explaining that after a "a good deal of waffling[.]" Colombia had no choice but to abide by the court's decision; however, shortly after Colombia withdrew from the Bogota Pact, "an agreement recognizing the court's jurisdiction in settling territorial disputes among Latin American nations.").

104. Statute of the International Court of Justice art. 60, June 26, 1945, 33 U.N.T.S. 993.

105. *Id.* art. 61.

106. See Heather L. Jones, *Why Comply? An Analysis of Trends in Compliance with Judgments Of the International Court of Justice Since Nicaragua*, 12 CHI.-KENT J. INT'L & COMP. L. 1, 17-18 (2012) ("States are always free to modify their rights through agreements, whether confirmed by adjudication or not . . .").

107. Statute of the International Court of Justice art. 60, June 26, 1945, 33 U.N.T.S. 993; Rules of the Court, 1978 I.C.J. Acts & Docs. No. 6, art. 94(2) [hereinafter Rules of the International Court of Justice].

108. U.N. Charter art. 94.

[effect] to the judgment.”<sup>109</sup>

Arguably, the United States has not complied with the decision of the ICJ in *Avena and Other Mexican Nationals (Mexico v. United States)* concerning alleged violations of the Vienna Convention on Consular Relations; in response, Mexico has instituted proceedings before the ICJ to interpret the Court’s previous judgment in order to gain clarity regarding the United States’ obligations.<sup>110</sup> Additionally, in *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* Libya formally recognized the ICJ judgment’s delimitation of its border at the Aouzou area on numerous occasions, but failed to comply with the Court’s decision when it continued its presence in the area.<sup>111</sup> Later, however, it ceded control to the area when Chad threatened to take the matter to the Security Council.<sup>112</sup>

If a dispute arises as to the “meaning or scope of the judgment[.]” any party may make a request to the ICJ to interpret its decision.<sup>113</sup> Recently, for example, Cambodia filed an application requesting interpretation of the judgment rendered on June 15, 1962 by the ICJ in the *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)* regarding a territorial dispute.<sup>114</sup> This does not change the judgment of the ICJ; this mechanism merely allows for the interpretation of the meaning or scope of a judgment previously rendered.<sup>115</sup>

---

109. *Id.*

110. Request for Interpretation of the Judgment of 31 Mar. 2004 in the Case concerning *Avena and Other Mexican Nationals (Mex. v. U.S.)*, Judgment, 2009 I.C.J. 3, ¶¶ 1, 9, 10(b)–(c), 11 (Jan. 19).

111. *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, 1994 I.C.J. 6, ¶¶ 2–5, 18–22 (Feb. 3); Aloysius P. Llamzon, *Jurisdiction and Compliance in Recent Decisions of the International Court of Justice*, 18 EUR. J. INT’L L. 815, 830 (2007).

112. Llamzon, *supra* note 111, at 830–32.

113. Statute of the International Court of Justice art. 60, June 26, 1945, 33 U.N.T.S. 993; Rules of the International Court of Justice, *supra* note 107, art. 98(1).

114. Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the *Temple of Preah Vihear (Cambodia v. Thai.)*, Request for the Indication of Provisional Measures (July 18, 2011), available at <http://www.icj-cij.org/docket/files/151/16564.pdf>.

115. Statute of the International Court of Justice art. 60, June 26, 1945, 33 U.N.T.S. 993.

A party may ask the ICJ for revision of its judgment if it satisfies the conditions laid down in Article 61 of the ICJ Statute.<sup>116</sup> Under Article 61, these conditions are as follows:

- The request must be based upon the discovery of a fact;
- The fact must be of such a nature as to be a decisive factor;
- The fact should have been unknown to the Court and to the party claiming revision when the judgment was given;
- Ignorance of the fact must not be due to negligence; and
- The request for revision must be made at least within six months of the discovery of the new fact and before ten years have elapsed from the date of the judgment.<sup>117</sup>

If any of these conditions are not satisfied, the request for revision will be dismissed by the Court.<sup>118</sup> In the *Case Concerning the Land, Island and Maritime Frontier Dispute (El. Sal. v. Hond.)*, El Salvador's application for revision was dismissed for lack of introducing decisive factors, in that the "new" fact, if true, did not alter the Court's prior opinion.<sup>119</sup>

Based on the information we have, it seems unlikely that in this case between Nicaragua and Colombia any new facts will give rise to a revision of the Court's judgment concerning the maritime boundary, although we cannot rule it out entirely.<sup>120</sup> Although the judgment in *Territorial and Maritime Dispute between Nicaragua and Colombia* is considered final, any revision will be precluded after ten years have elapsed from the date of judgment.<sup>121</sup>

---

116. Rules of the International Court of Justice, *supra* note 107, art. 99.

117. Statute of the International Court of Justice art. 61, June 26, 1945, 33 U.N.T.S. 993.

118. *Id.*; see also Application for Revision of the Judgment of 11 Sept. 1992 in the Case Concerning the Land, Island and Maritime Frontier Dispute (El Sal. v. Hond.), 2002 I.C.J. 392, ¶¶ 17–20 (Sept. 10) [hereinafter *Island and Maritime Frontier Dispute*].

119. See *Island and Maritime Frontier Dispute*, *supra* note 118, ¶¶ 41, 44–45, 58, 60.

120. See Rogers, *supra* note 6.

121. Statute of the International Court of Justice arts. 60, 61(5), June 26, 1945, 33

## V. CONCLUSION

The Court's decision reiterates the key modern principles of international maritime delimitation, but also formally recognizes that maritime delimitation is not a science.<sup>122</sup> Instead, specific facts surrounding each maritime delimitation case will affect the application of the established law, often substantially.<sup>123</sup> Given a maritime boundary dispute, the principles, methods and techniques of delimitation are predictable, but predicting the maritime boundary an adjudicative body would draw is challenging given the different ways in which they have been drawn.<sup>124</sup> Indeed, this case underlines this point, as the Court drew a "maritime doughnut-hole" in the Caribbean Sea to give effect to customary principles concerning delimitation.<sup>125</sup>

Additionally, though States may politically challenge the decision of the ICJ that binds them, their recourse against such judgments is limited.<sup>126</sup> Once the ICJ has delivered its decision, including one on a maritime dispute by drawing a maritime boundary, a State's only recourse is to reach an agreement with the other State(s) involved to reach a more agreeable result, though this would be difficult to do for a losing party with one that has essentially won the day in court.<sup>127</sup> In the context of a maritime dispute, for example, Colombia's only option to replace the ICJ's decision in this case is to enter into a maritime treaty with Nicaragua, though Colombia would have to entice Nicaragua to come to the table to negotiate a maritime boundary

---

U.N.T.S. 993.

122. Territorial and Maritime Dispute (Nicar. v. Colom.), 2012 I.C.J. 33, ¶¶ 137–39 (Nov. 19).

123. *See id.* ¶ 141.

124. Vladimir-Djuro Degan, *Consolidation of Legal Principles on Maritime Delimitation: Implications for the Dispute between Slovenia and Croatia in the North Adriatic*, 6 CHINESE J. OF INT'L L. 601, 601–02, 611, 617, 619, 630 (2007).

125. Territorial and Maritime Dispute (Nicar. v. Colom.), 2012 I.C.J. 33, 127 (Nov. 19) (Sketch-Map No. 11); *see also* Margaret L. Tomlinson, *Recent Developments in the International Law of the Sea*, 32 INT'L LAW. 599, 605 (1998).

126. Statute of the International Court of Justice art. 61, June 26, 1945, 33 U.N.T.S. 993.

127. *See Jones, supra* note 106.

2013]

*DOUGHNUT HOLE IN THE CARIBBEAN*

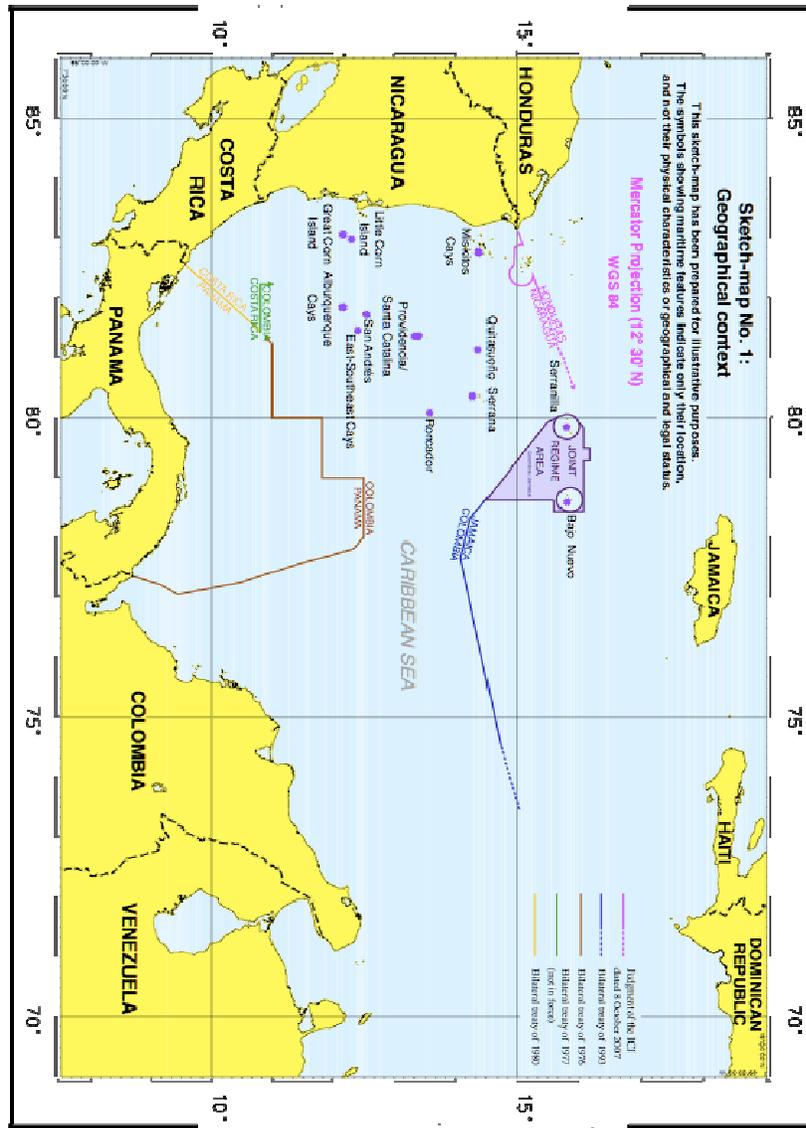
609

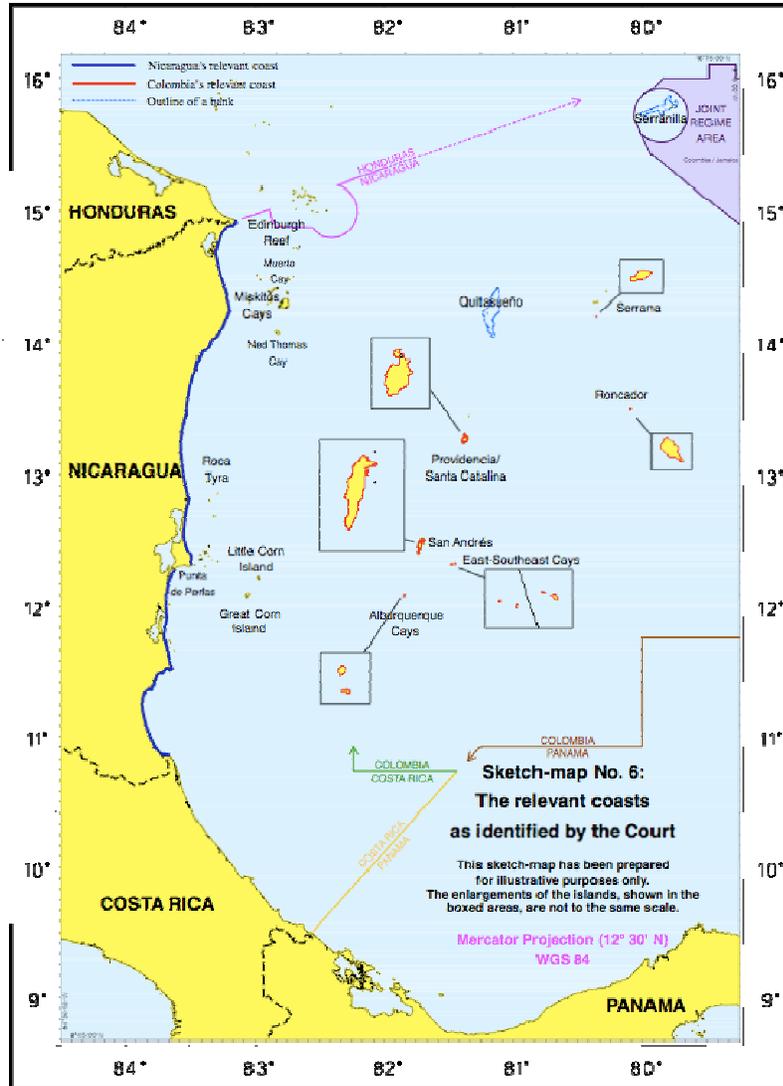
that is now favorable to its interests.<sup>128</sup>

---

128. *See id.*

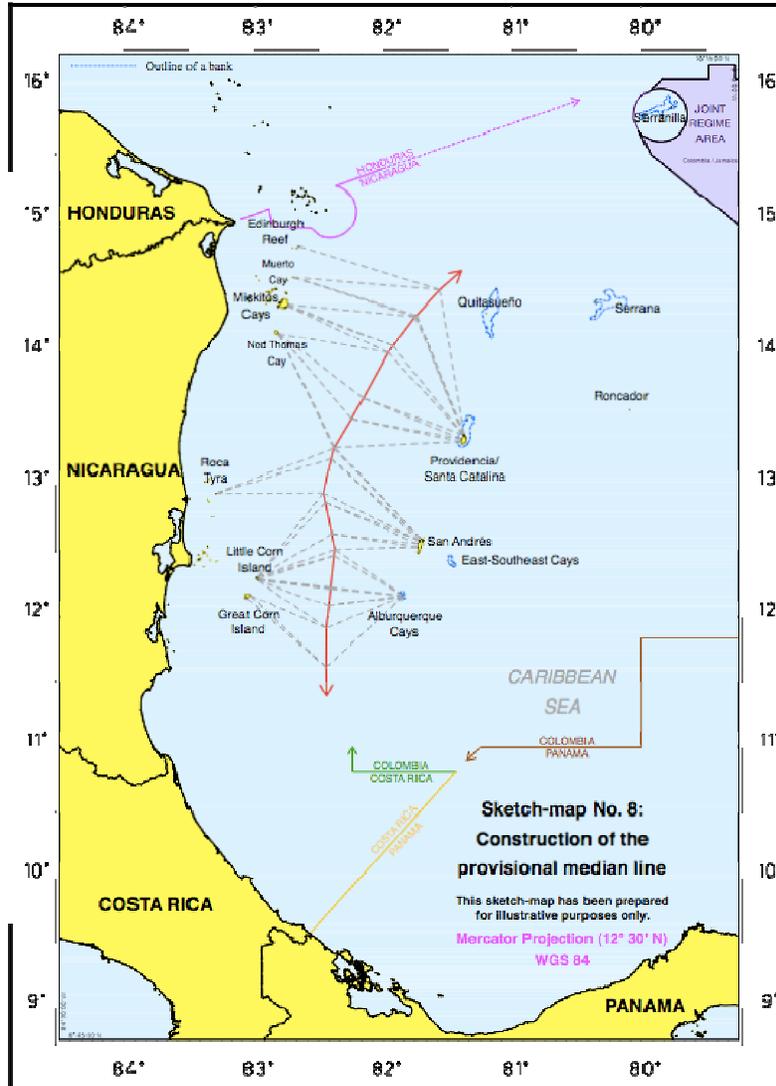
APPENDIX

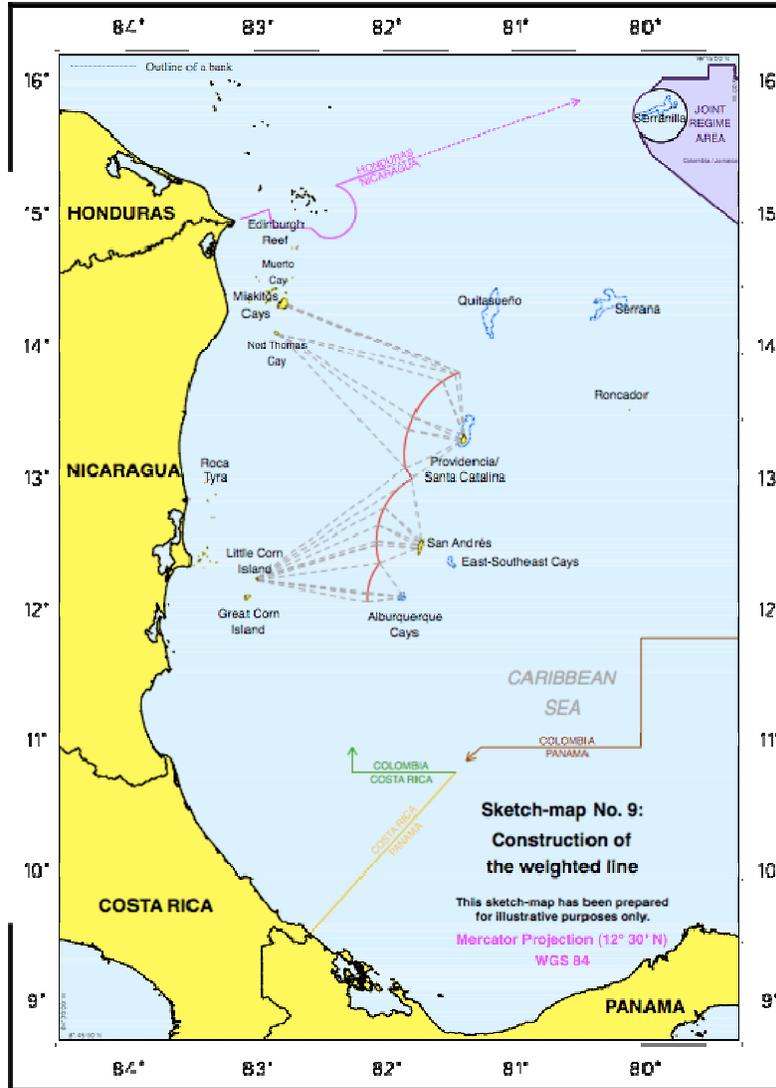






- 109 -





2013]

*DOUGHNUT HOLE IN THE CARIBBEAN*

615

- 125 -

