The Implications of Maritime Delimitation Judgments for Third States: The *Nicaragua v. Colombia* and *Costa Rica v. Nicaragua* Cases Revisited

Resilience of the UN Convention on the Law of the Sea: 40 Years

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Outline

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Introduction

- A tension between rest and motion in a treaty
  - Whether and how, under the UN Convention on the Law of the Sea (UNCLOS), one can address issues unknown at the time of the adoption of the Convention → Resilience of UNCLOS

- The concept of resilience

  A capacity to adapt the existing legal system to a new or changing situation so that the legal system continues to function

- Professor Oxman's view

  'Stability in the law is not possible without adaptation to new circumstances'

  (BH Oxman, 'The Fortieth Anniversary of the United Nations Convention on the Law of the Sea' (2022) 99 *International Law Studies* 865-873, at p. 871).

Three Approaches to the Maintenance of Resilience of UNCLOS

I. Resilience through the interpretation

1) The systemic interpretation
2) The evolutionary interpretation
3) Rules of reference
4) Subsequent agreement and practice

II. Resilience through the law-making

1) Adoption of a new 'implementation' agreement
2) Law-making through international organisations
3) *De facto* amendments through the Meeting of the Parties

III. Resilience through the jurisprudence

1) Judicial creativity through the creative interpretation
2) Judicial creativity by institutional circularity

Development of the Law of Maritime Delimitation through the Jurisprudence

- Articles 74(1) and 83(1) UNCLOS

  'The delimitation of the exclusive economic zone [the continental shelf] between States with opposite and adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution'.

- The *Bangladesh/Myanmar* case (ITLOS Judgment of 14 March 2012)

  'International courts and tribunals have developed a body of case law on maritime delimitation which has reduced the elements of subjectivity and uncertainty in the determination of maritime boundaries and in the choice of methods employed to that end' (ITLOS Reports 2012, 72, para. 226).

Application by Costa Rica for Permission to Intervene in the *Nicaragua v. Colombia* Case

- Article 62(1) of the ICJ Statute: 'Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene'.

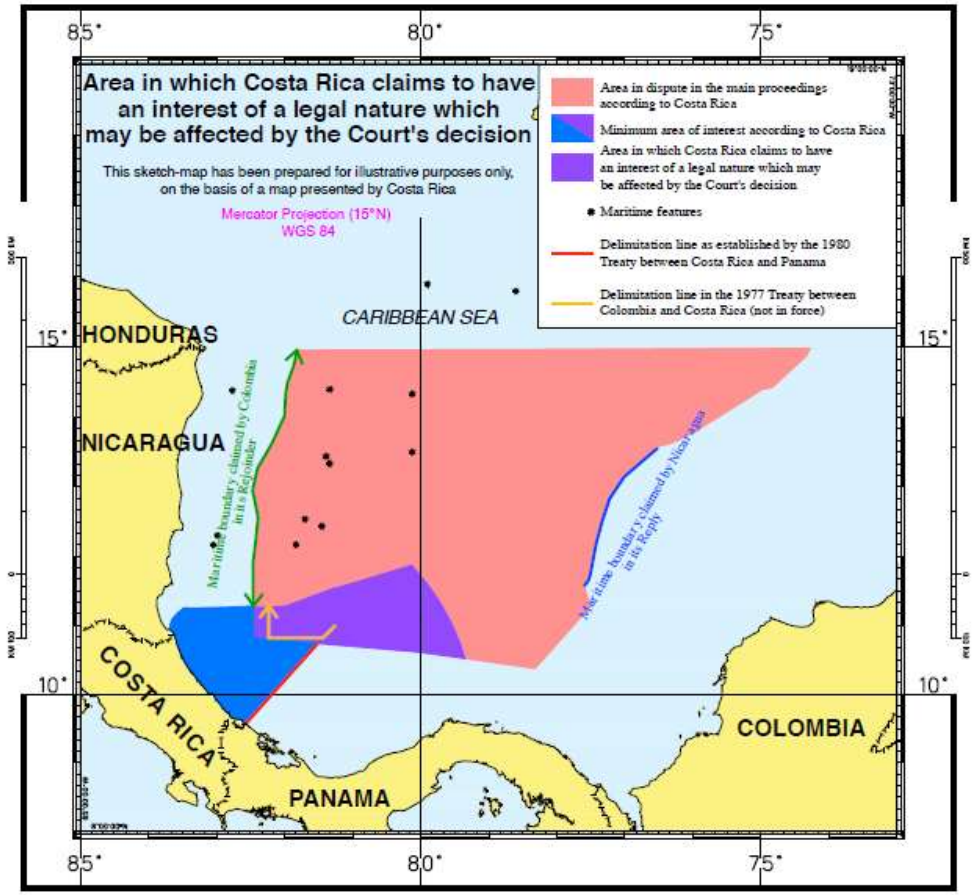
▶ Key elements

- Legal basis: Article 62 of the ICJ Statute
- Status of intervener: Non-party
- Purposes: To inform the ICJ of the nature of Costa Rica's legal rights and interests and to protect them
- Essential issues:

1) The existence of an interest of a legal nature of the part of Costa Rica
2) The effects that the Court's eventual decision on the merits might have on this interest

The 'minimum area of interest' in the Caribbean Sea

Source: ICJ Reports 2011, 364, para. 55.



Application by Costa Rica for Permission to Intervene in the *Nicaragua v. Colombia* Case

- The ICJ's view on the first issue

'The indication of this maritime area is… not sufficient in itself for the Court to grant Costa Rica's Application for permission to intervene…; it must also demonstrate that this interest may be affected by the decision in the main proceedings…' (ICJ Reports 2011, 368, para. 67).

'Costa Rica has acknowledged that the 1977 Treaty does not itself constitute an interest of a legal nature that may be affected by the decision in this case and that it does not seek any particular outcome from this case in relation to this Treaty' (ICJ Reports 2011, 369, para. 71).

Application by Costa Rica for Permission to Intervene in the *Nicaragua v. Colombia* Case

▶ The ICJ's view on the second issue

'[A] third State's interest will, as a matter of principle, be protected by the Court, without it defining with specificity the geographical limits of an area where that interest may come into play' (ICJ Reports 2011, 372, para. 86).

'The Court, following its jurisprudence, when drawing a line delimiting the maritime areas between the Parties to the main proceedings, will, if necessary, end the line in question before it reaches an area in which the interests of a legal nature of third States may be involved' (ICJ Reports 2011, 372, para. 89).

→ The ICJ, by nine votes to seven, declined the Costa Rica's Application for permission to intervene under Article 62 of the ICJ Statute.

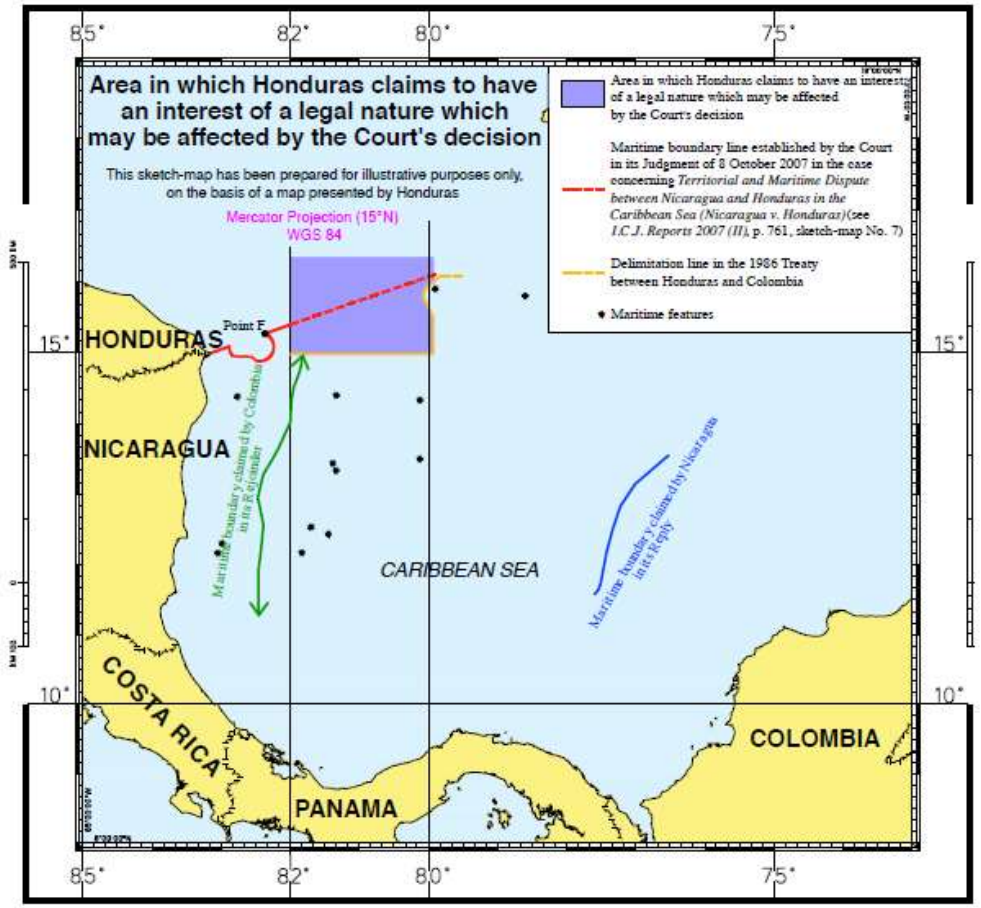
Application by Honduras for Permission to Intervene in the *Nicaragua v. Colombia* Case

▶ Key elements

- Legal basis: Article 62 of the ICJ Statute
- Status of intervener: Party; alternatively non-party
- Purposes: To protect the rights of Honduras in the Caribbean Sea and to inform the Court of the nature of the legal rights and interests of Honduras which could be affected by the decision of the Court
- Essential issue: The effect of the Court's decision on the rights that Honduras enjoys under the 1986 Maritime Boundary Treaty between Honduras and Colombia

The zone of interest of a legal nature submitted by Honduras

Source: ICJ Reports 2011, 441



Application by Honduras for Permission to Intervene in the *Nicaragua v. Colombia* Case

▶ The ICJ's view

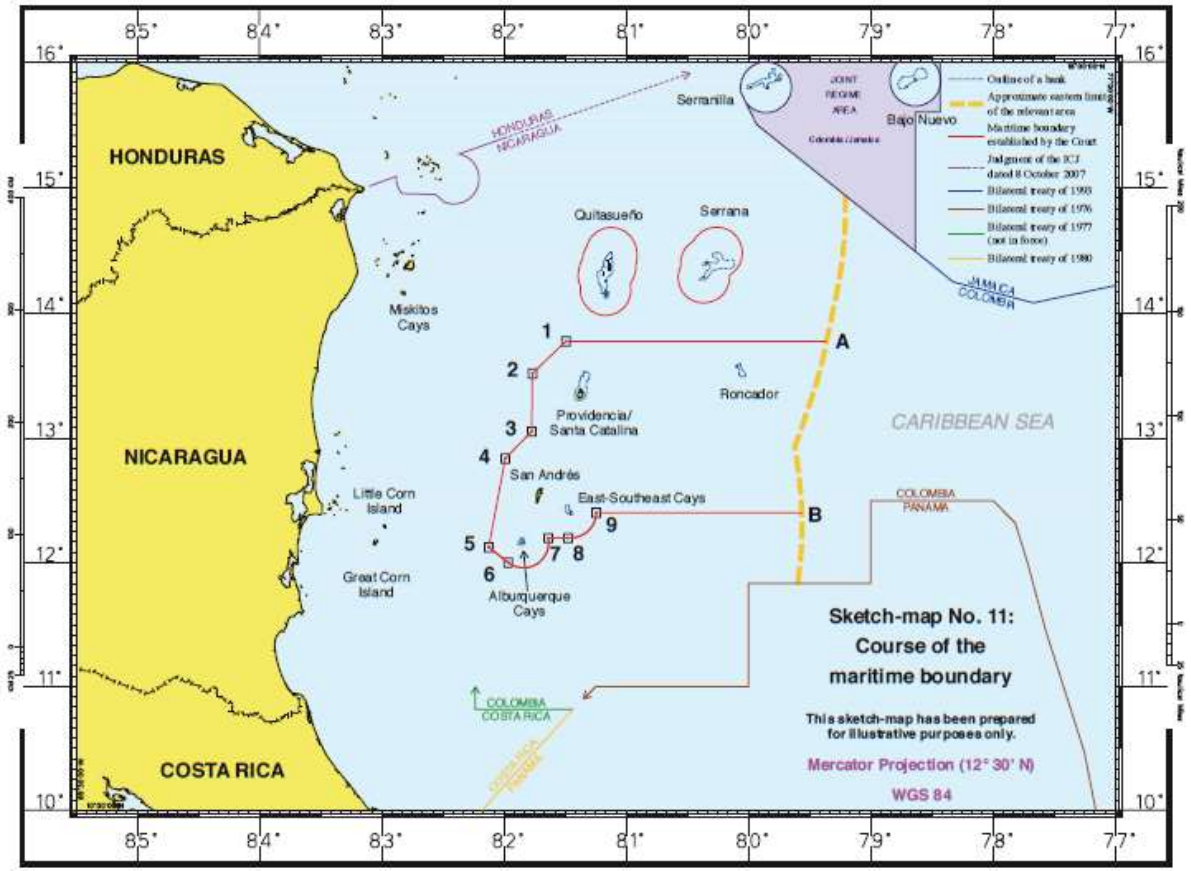
'In conformity with the principle of *res inter alios acta*, the Court in the 2007 Judgment did not rely on the 1986 Treaty' (ICJ Reports 2011, 444, para. 72).

'... the Court will place no reliance on the 1986 Treaty in determining the maritime boundary between Nicaragua and Colombia' (ICJ Reports 2011, 444, para. 73).

→ The ICJ, by thirteen votes to two, declined the Honduras's Application for permission to intervene in the proceedings, either as a party or as a non-party.

The *Nicaragua v. Colombia* Case (Judgment of 19 November 2012)

Source: ICJ Reports 2012, 714.



The 2012 *Nicaragua v. Colombia* Case

- Judge ad hoc Cot's view

'The problem is that those treaty-based delimitations no longer exist, since their object disappears with the substitution of Nicaragua for Colombia as the holder of sovereignty or of sovereign rights in the spaces concerned'

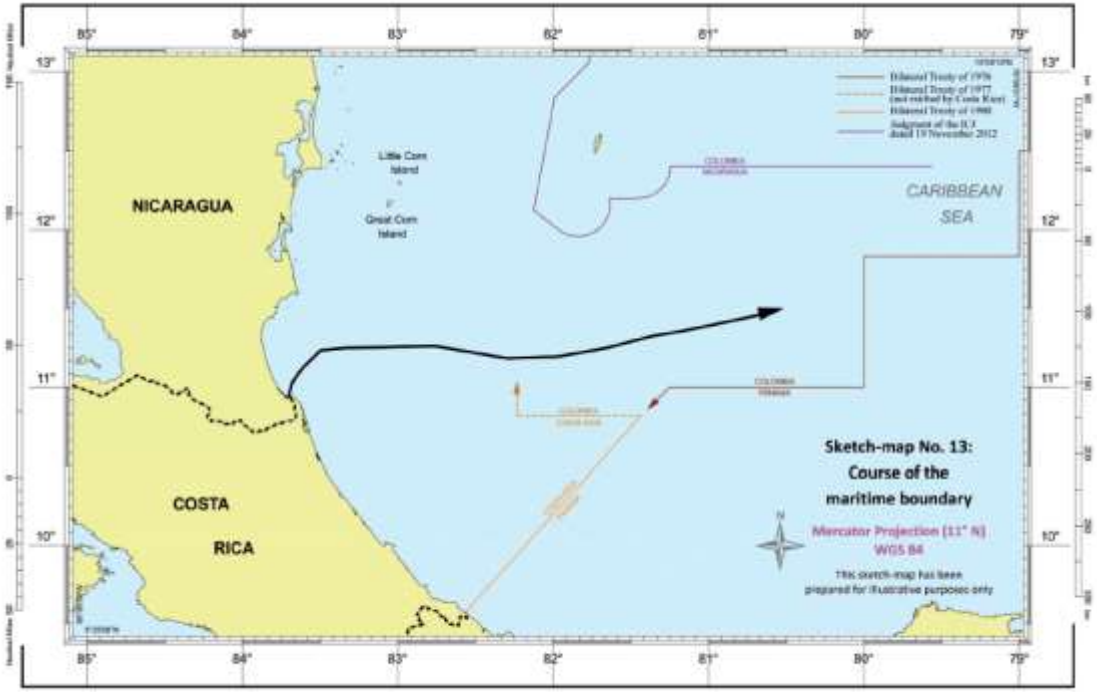
(Declaration of Judge ad hoc Cot in the *Nicaragua v. Colombia* case, ICJ Reports 2012, p. 769, para. 10).

- Judge Xue's view

'The boundary line in the south would virtually produce the effect of invalidating the existing agreements on maritime delimitation that Colombia has concluded with Panama and Costa Rica respectively and drastically changing the maritime relations in the area' (Declaration of Judge Xue, ICJ Reports 2012, p. 750, para. 15).

The *Costa Rica v. Nicaragua* Case

Source: ICJ Reports 2018, p. 204.



Analysis

▶ Inconsistency of the Jurisprudence

1) The cut-off approach

- ICJ: The 1982 *Tunisia v. Libya* case, *the* 1985 *Libya v. Malta* case, the 2001 *Qatar v. Bahrain* case, the 2002 *Cameroon v. Nigeria* case, the 2007 *Nicaragua v. Honduras* case, the 2009 *Black Sea* case, the 2021 *Somalia v. Kenya* case
- Arbitration: The 2006 *Eritrea/Yemen* case, the 2006 *Barbados/Trinidad and Tobago* case, the 2012 *Bangladesh/Myanmar* case

2) The *res inter alios acta* approach

- ICJ: The 2012 *Nicaragua v. Colombia* case and the 2018 *Costa Rica v. Nicaragua* case
- Arbitration: The 1977 *Anglo-French Continental Shelf* case

Analysis

▶ Legal Effect of Article 59 of the ICJ Statute

- Article 59: 'The decision of the Court has no binding force except between the parties and in respect of that particular case'.

1) The ICJ's view in the *Nicaragua v. Colombia* case

'[A]s Article 59 of the Statute of the Court makes clear, it is axiomatic that a judgment of the Court is not binding on any State other than the parties to the case' (ICJ Reports 2012, p. 707, para. 228).

2) The ICJ's view in the *Cameroon v. Nigeria* case

'[I]n particular in the case of maritime delimitations where the maritime areas of several States are involved, the protection afforded by Article 59 of the Statute may not always be sufficient' (ICJ Reports 2002, p. 421, para. 238).

Analysis

▶ Effect of Article 59 of the ICJ Statute

- Judge Xue's view

Photo: https://cil.nus.edu.sg/about-us/judge-xue-hanqin/

'The principle *res inter alios acta* and Article 59 of the Statute do not help in the present situation' (Declaration of Judge Xue, ICJ Reports 2012, p. 750, para. 13).

- Judge Oda's view

Photo: https://www.japan-acad.go.jp/japanese/members/2/oda_shigeru.html

'Article 59 of the Statute may not be accepted as guaranteeing that a decision of the Court in a case regarding the title *erga omnes* will not affect a claim by a third State to the same title' (Dissenting Opinion of Judge Oda in the *Libya/Malta* case, ICJ Reports 1984, p.109, para. 37).

Conclusion

1. Judicial creativity by institutional circularity as a means to secure resilience of UNCLOS

2. Reactive nature of international adjudication

3. Inconsistency of the jurisprudence

4. The consistency and predictability of the jurisprudence as requirements for ensuring resilience of UNCLOS