Nicaragua v Colombia at the ICJ: Better the Devil You Don't?

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On 19 November 2012, the ICJ issued its decision in the case *Territorial and Maritime Dispute (Nicaragua v Colombia)*.¹ Nicaragua had requested the Court to determine sovereignty over several maritime features in the Caribbean Sea and to carry out a maritime delimitation of the continental shelf between Nicaragua and Colombia. The Court carried out a maritime delimitation unlikely to have been predicted, departing slightly from what had become an expected methodology. The decision was not well received by Colombia. This note briefly outlines the history of the case before analysing some of the issues raised by the decision. It also considers the possible impact of the decision on future maritime delimitation cases and on the role of the ICJ as a jurisdiction for maritime delimitation.

1 Procedural history of the dispute

The case began with the institution of proceedings by application of Nicaragua in December 2001. Nicaragua claimed that the ICJ had jurisdiction on two grounds namely: (a) under Article XXXIV of the American Treaty on Pacific Settlement 1948 ('the Pact of Bogotá'); and (b) on the basis of declarations made by both Nicaragua and Colombia accepting the compulsory jurisdiction of the Court in accordance with Article 36(2) of the Statute.² Article XXXI of the Pact of Bogotá provides that the parties 'recognize, in relation to any other American State, the jurisdiction of the Court as compulsory *ipso facto* ... in all disputes of a juridical nature that arise among them'.³ Colombia objected at the preliminary stage to jurisdiction on both grounds, arguing that the maritime boundary between the two countries had been settled by the 1928 Barcenas-Esguerra Treaty, and thus fell outside the scope of the compulsory jurisdiction provided for in the Pact

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¹ *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Merits, Judgment of 19 November 2012 (*Nicaragua v Colombia*).

² Memorial of the Government of Nicaragua, 28 April 2003, para 3.

³ American Treaty on Pacific Settlement, 30 April 1948, 30 UNTS 84, Art XXXI.

of Bogotá.⁴ Colombia argued that the 82nd meridian referred to in the 1930 Protocol to the Treaty was a line of maritime delimitation.⁵ The relevant article of the Protocol provided that the 'San Andrés and Providencia Archipelago ... does not extend west of the 82nd degree of longitude west of Greenwich'.⁶ In December 2007 the Court issued a decision on preliminary objections, finding that the 1928 Treaty and its Protocol did not effect a general delimitation of the maritime boundary and that accordingly, the Court had jurisdiction to determine the maritime boundary.⁷ The Court further held that the 1928 Treaty granted sovereignty over the islands of San Andrés, Providencia and Santa Catalina to Colombia but that the Treaty did not settle the question of the scope and composition of the rest of the San Andrés Archipelago or the issue of sovereignty over the features of Roncador, Quitasueño, and Serrana.⁸

Following the decision on preliminary objections, Nicaragua revised its request to the Court. Nicaragua had initially requested the Court to delimit a single maritime boundary of the Exclusive Economic Zone (EEZ) and the continental shelf.⁹ As the EEZ cannot extend beyond 200nm, the continental shelf claim of Nicaragua delimited by a single maritime boundary would have been limited to a maximum 200nm limit.¹⁰ In its Reply and during oral proceedings, Nicaragua requested that the Court only delimit the continental shelf (including areas beyond 200nm of the Nicaraguan coast, comprising the outer continental shelf).¹¹ Article 76 of UNCLOS provides that the continental shelf extends either to the outer edge of the continental margin or to a distance of 200nm where the natural edge of the margin does not extend to that distance.¹² In its Reply, Nicaragua claimed an extended continental shelf based

⁴ Preliminary Objections of the Government of Colombia, July 2003, para 31.

⁵ *Ibid*, para 38, 40.

⁶ Protocol of Exchange of Ratifications, 5 May 1930, 105 LNTS 337.

⁷ *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Preliminary Objections, ICJ Reports 2007, p 832, para 116 (*Nicaragua v Colombia, Preliminary Objections*).

⁸ *Ibid*, paras 97, 104.

⁹ Application Instituting Proceedings, Territorial and Maritime Dispute (*Nicaragua v Colombia*), 6 December 2001, para 8; Memorial of the Government of Nicaragua, above n 2, para 3.3.

¹⁰ United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 397, Art 57 (UNCLOS).

¹¹ Reply of the Government of Nicaragua, 18 September 2009, para 26.

¹² UNCLOS, Art 76(1): 'The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.'

on natural prolongation and requested the Court to delimit the overlap between Nicaragua's 'natural' continental shelf and Colombia's 200nm distance-based shelf.¹³ Colombia argued that this revision in fact amounted to a new claim and was therefore inadmissible.¹⁴

2 The decision of the Court

The case before the Court had two main components namely, the determination of sovereignty over certain maritime features (including Quitasueño, Roncador and Serrano) and a maritime delimitation based on the findings on sovereignty. Nicaragua claimed sovereignty over all maritime features off her Caribbean coast not proven to be part of the San Andrés Archipelago.¹⁵ Colombia, for its part, claimed sovereignty over all the maritime features in dispute between the parties, which it described as forming part of the San Andrés Archipelago.¹⁶ The Court held that sovereignty over all the features in dispute resided with Colombia.¹⁷

2.1 Admissibility of a revised claim

The Court then considered the admissibility of the Nicaraguan revised claim, finding that the extended continental shelf delimitation requested was formally a new claim.¹⁸ However, the Court considered that the claim to an extended continental shelf arose directly from the delimitation dispute defined by Nicaragua in its Application.¹⁹ The revised claim by Nicaragua still concerned the continental shelf, but on different legal grounds (that is on the basis of natural prolongation rather than distance) and was admissible. Judge Owada in his Dissenting Opinion found that Nicaragua's revised claim constituted a radical transformation of the subject matter of the dispute and should have been declared inadmissible. He distinguished jurisprudence where new claims had been added to an initial claim, including the *Diallo* case cited by the Court in its decision,²⁰ from cases such as

¹³ Reply of the Government of Nicaragua, above n 11, para 3.48.

¹⁴ Rejoinder of the Republic of Colombia, 18 June 2010, paras 4.14-4.35.

¹⁵ Reply of the Government of Nicaragua, above n 11, paras 1.96-1.97.

¹⁶ Counter-Memorial of the Republic of Colombia, 11 November 2008, para 2.32.

¹⁷ *Nicaragua v Colombia*, para 103.

¹⁸ *Ibid*, para 108.

¹⁹ *Ibid*, para 111.

²⁰ *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, ICJ Reports 2010 p 639.

the one at hand, where the initial claim was replaced by a different claim.²¹ The most relevant case in that regard was *Société Commerciale de Belgique*, where the PCIJ had considered a different request to that set out in the applicant's Memorial, noting the 'special circumstances', particularly the lack of objection of the respondent.²² While the admission of a substantially revised claim over the objection of the respondent may appear problematic, in practice, the Court avoided any potential issues related to the admissibility of the new claim at the next stage of the judgment.

2.2 Treatment of the outer continental shelf

In considering the delimitation of the outer continental shelf as requested by Nicaragua two key questions arose, namely (a) the customary law nature of UNCLOS rules on the continental shelf; and (b) the capacity of the ICJ to delimit the outer continental shelf. Regarding (a), as Colombia is not a party to UNCLOS, the case had to be decided in accordance with customary international law. The parties disagreed on the customary law nature of rules regarding the continental shelf beyond 200nm. During oral proceedings Judge Bennouna asked both parties whether the rules set out in Article 76 of UNCLOS could be considered as customary law rules. Nicaragua submitted that Article 76(1)–76(7) had the status of customary law while Colombia submitted that while 76(1) was customary law, there was no evidence that 76(4)–76(9) had customary law status. The Court held that Article 76(1) of UNCLOS (which defines the continental shelf as extending to the outer edge of the continental margin) constituted customary international law and that it need not decide on the status of the other paragraphs of that Article (which define the outer edge of the continental margin and how it should be determined).²³ While it is clear that the Court was concerned with its capacity to delimit the outer continental shelf in a case where one of the parties was not a party to UNCLOS, and thus chiefly concerned with whether the definition of the continental shelf in Article 76(1) was a rule of customary law, the finding is somewhat curious. The Court seems to have chosen a half-way stance—stating that while the rule that the continental shelf extends to the outer edge of the continental margin has the status of customary international law, the methods of establishing the edge of the margin may not necessarily be so. It is difficult to imagine that state practice could have coalesced around Article 76(1) but not

²¹ Dissenting Opinion of Judge Owada, para 5.

²² *Société Commerciale de Belgique* (1939), PCIJ Ser A/B No 78, 173.

²³ *Nicaragua v Colombia*, para 118.

around 76(4), that is, could states be said to agree that the shelf extends to the edge of the continental margin if there is no agreement on how the outer edge of the margin is to be measured?

As for the capacity of the Court to delimit the outer continental shelf, the ICJ was presented with a substantially different situation to that before ITLOS in the *Bangladesh/Myanmar* case.²⁴ In *Bangladesh/Myanmar* both states were parties to UNCLOS and had made full submissions to the Commission on the Limits of the Continental Shelf ('CLCS'). ITLOS drew a delimitation line that extended beyond the 200nm continental shelf until it reached an area where the rights of third states might be affected.²⁵ In contrast, Nicaragua had only submitted preliminary information on the extent of its continental shelf to the CLCS. The 'preliminary information' procedure was created in part to allow developing countries more time to prepare their submissions to the CLCS.²⁶ Under Article 4 of Annex II to UNCLOS, a state intending to establish the limits of the outer continental shelf is required to submit supporting data to the CLCS within ten years of entry into force of the Convention in that state. SPLOS/183 provides that this time limit can be satisfied by the submission of preliminary information indicative of the outer limits of the continental shelf as well as the intended date of full submission.²⁷ The preliminary information submitted by Nicaragua describes preparation for full submissions as 'well advanced' but does not give an intended date for the full submission.²⁸ The Court was therefore not presented with definitive evidence on the extent of Nicaragua's continental shelf. Nicaragua requested the Court to indicate a boundary line drawn with reference to the outer edge of its shelf, with the edge to be determined at a later stage when the CLCS had issued its recommendations.²⁹

The Court held that, as Nicaragua had not established that its continental

²⁴ *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal*, ITLOS, Judgment of 14 March 2012 (*Bangladesh/Myanmar*).

²⁵ *Ibid*, para 462.

²⁶ *Decision regarding the workload of the Commission on the Limits of the Continental Shelf and the ability of States, particularly developing States, to fulfil the requirements of article 4 of Annex II to the Convention, as well as the decision contained in SPLOS/72, paragraph (a)*, UN Doc SPLOS/183, 20 June 2008 (SPLOS/183).

²⁷ *Ibid*, para 1(a).

²⁸ Republic of Nicaragua, 'Preliminary information indicative of the outer limits of the continental shelf and description of the status of preparation of making a submission to the Commission on the Limits of the Continental Shelf', August 2009, para 24, <http://www.un.org/Depts/los/clcs_new/commis_sion_preliminary.htm> [accessed 29 March 2013].

²⁹ Verbatim Record of Public Sitting held on Tuesday 1 May 2012, CR 2012/15 Corr, paras 24-9.

margin extended to overlap with Colombia's 200nm continental shelf entitlement, it would not delimit the continental shelf boundary between Nicaragua and Colombia's mainland coast. However the judgment suggests that it was not only the lack of scientific evidence that prevented the Court from delimiting the boundary as requested by Nicaragua. Referring to the fact that both parties in *Bangladesh/Myanmar* had made full submissions to the CLCS, and to its finding in the *Nicaragua v Honduras* case (that any claim to the outer continental shelf must be reviewed by the CLCS) the Court stated '[g]iven the object and purpose of UNCLOS, as stipulated in its Preamble, the fact that Colombia is not a party thereto does not relieve Nicaragua of its obligations under Article 76'.³⁰ Taken as a whole, paragraphs 125–127 of the decision suggest that an UNCLOS party must make a full submission to the CLCS and receive its recommendations before any delimitation of the outer continental shelf, even if the delimitation involves a non-UNCLOS party.

Judge Donoghue, in her Separate Opinion, emphasised the distinction between the establishment of the outer limits of the shelf and a delimitation involving the outer continental shelf.³¹ While she agreed with the Court's finding on the basis that Nicaragua had not established the extent of its continental margin, she regretted the reaffirmation of the finding in the *Nicaragua v Honduras* case, and the suggestion that the Court would never delimit the continental shelf beyond 200nm in the absence of CLCS recommendations, even if one of the parties to the delimitation was not an UNCLOS party.³² Judge *ad hoc* Mensah also emphasised that the Nicaraguan claim should have been rejected on lack of evidence and not because Nicaragua had not made full submissions to the CLCS or because the CLCS had not made recommendations.³³ Judge *ad hoc* Cot expressed scepticism that Nicaragua was bound vis-à-vis Colombia to make submissions to the CLCS.³⁴

2.3 Delimitation methodology

Having found sovereignty over the relevant maritime features to reside with Colombia, and that Nicaragua had not established the existence of its continental shelf beyond 200nm, the Court then proceeded with a maritime delimitation

³⁰ *Nicaragua v Colombia*, para 126.

³¹ *Ibid*, Separate Opinion of Judge Donoghue, para 19.

³² *Ibid*, paras 2, 25–6.

³³ *Nicaragua v Colombia*, Declaration of Judge *ad hoc* Mensah, para 9.

³⁴ *Nicaragua v Colombia*, Declaration of Judge *ad hoc* Cot, para 19.

of the continental shelf and EEZ between the Nicaraguan mainland coast and adjacent islands and the Colombian islands. An analysis of the contribution of the judgment as a whole to delimitation jurisprudence, including the identification of relevant coasts and the rock/island distinction under UNCLOS Article 121(3) is beyond the scope of this note. However, a notable aspect of the delimitation that will be analysed is the methodology used in arriving at a line of delimitation, in particular the weighting of basepoints and the introduction of latitude lines.

The jurisprudence of the ICJ and arbitral tribunals carrying out maritime delimitations can be described by a narrative beginning with the equitable principles/relevant circumstances approach and moving towards the acceptance of the equidistance/relevant circumstances approach as standard practice.³⁵ Since the *Jan Mayen* case in 1993, delimitation practice has consolidated, for the most part, around a three-step approach.³⁶ The three-step approach involves (i) the establishment of a provisional equidistance line; (ii) the examination of this provisional line in the light of relevant circumstances, which are case specific, so as to determine whether it is necessary to adjust or shift the provisional equidistance line in order to achieve an equitable result; and (iii) an examination of the proportionality between the ratio of coastal lengths and the ratio of allocated maritime areas. In 2009, the ICJ in the *Romania/Ukraine* case confirmed that this three-step approach was the standard delimitation methodology used by the Court for the delimitation of the continental shelf.³⁷ This was also the approach taken by ITLOS in the *Bangladesh/Myanmar* case. In the present case, the ICJ held that notwithstanding arguments related to the geographical context of the case, it would proceed according to its standard method, starting with the construction of a provisional median line.³⁸ The Court confirmed that it would apply the three-step approach, however, the manner in which the second step was carried out, that is the adjustment of the provisional median line to take relevant circumstances into account, was somewhat unexpected. The Court had identified two major relevant circumstances calling for adjustment of the median, namely the disparity in coastal lengths and the relevant geographic context. The overlapping entitlements of Nicaragua and the Colombian islands to the east and west called for an adjustment of the median line to avoid cutting off either

³⁵ See Tanaka, who describes the shift from a 'results based equity approach' to 'corrective equity approach': Y Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation* (2006) 4-5.

³⁶ *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway)*, ICJ Reports 1993, p 38 (*Jan Mayen*).

³⁷ *Maritime Delimitation in the Black Sea (Romania v Ukraine)*, ICJ Reports 2009, p 61, paras 115-122.

³⁸ *Nicaragua v Colombia*, para 199.

party from the areas onto which its coast projected.³⁹ Up to this point, the case appeared to be one of standard application of the three-step approach.

The Court then proceeded to adjust the median line through the weighting of basepoints, using a 3:1 ratio between Nicaraguan and Colombian basepoints to adjust the line, then reducing the turning points to produce a more simplified line. This line was only applied in an area roughly stretching from north of Providencia to south of Alburquerque cays. The Court considered that the extension of this line further to the north or south would not lead to an equitable result. In an unusual move the Court held that relevant circumstances in these areas would properly be given weight 'by continuing the boundary line out to the line 200 nautical miles from the Nicaraguan baselines along lines of latitude'.⁴⁰ The features of Quitasueño and Serrana were then enclaved to avoid a disproportionate effect on the boundary.⁴¹ This delimitation was not dissimilar to the delimitation proposed by Nicaragua during the final round of oral proceedings before the Court.

It is questionable whether the introduction of parallel lines can really be described as an 'adjustment' or 'shifting' of the provisional median line. Previous cases where the equidistance line was 'shifted' to take relevant circumstances into account involved moving the line, or a section of the line, laterally for example in *Jan Mayen and Libya/Malta*.⁴² The introduction of parallel lines in the present case is a more radical adjustment. Although the line drawn by the Court was agreed upon by a majority of judges, the methodology used, or described as being used, by the Court generated significant commentary in separate opinions and declarations. Judge Xue in her Declaration emphasised that she did not disapprove of the concurrent use of enclaving and latitude lines, but questioned whether the three-step process was necessary in the present case.⁴³ She further questioned whether the weighting of basepoints was in fact a shifting of the provisional line or whether it constituted the construction of a new line with a 3:1 ratio between basepoints.⁴⁴ Judge Abraham, in his Separate Opinion noted that while the Court described itself as following the three-step approach, in reality it departed from it significantly. He questioned the description of the two

³⁹ Ibid, para 229.

⁴⁰ Ibid, para 236.

⁴¹ Ibid, para 238.

⁴² *Jan Mayen*, ICJ Reports 1993, p 38; *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, ICJ Reports 1985, p 13.

⁴³ *Nicaragua v Colombia*, Declaration of Judge Xue, para 9.

⁴⁴ Ibid, para 6.

latitudinal parallels as representing an 'adjustment' or 'shifting' of the median line, while acknowledging that the Court had reached the most reasonable solution.⁴⁵ In his view, the median line approach was inappropriate due to the geographic circumstances of the case.⁴⁶ Judge Keith in his Declaration essentially agreed with the maritime boundary drawn by the Court but considered that it could have been arrived at more directly by an approach using a number of different methods to achieve an equitable result in the unusual geographic context.⁴⁷ Judge *ad hoc* Cot described the methodology as 'overly complicated', the weighting of basepoints as 'bizarre' and the resulting line as a 'strange sinusoid'.⁴⁸

3 Impact of the decision

3.1 Colombian reaction

As a result of the introduction of two parallel lines, enclosing the large Colombian islands, and the enclaving of Quitasueño and Serrana, Colombia was granted significantly fewer maritime entitlements than it had claimed. The Colombian government made its dissatisfaction with the ICJ judgment clear in several public statements. In November 2012, Colombia withdrew from the Pact of Bogotá.⁴⁹ While this withdrawal will not have any effect on the binding nature of the decision in the *Nicaragua v Colombia* case, it will mean that in future, the ICJ will not have jurisdiction to hear disputes involving Colombia, unless by special agreement. The Colombian and Nicaraguan governments have been in contact regarding implementation of the decision.⁵⁰ Nicaragua has stated it will respect Colombia's historic fishing rights and on 22 February 2013 Nicaragua reportedly proposed the creation of a special fishing zone so that fishermen in the San Andrés peninsula could continue to access fishing grounds.⁵¹

⁴⁵ *Nicaragua v Colombia*, Separate Opinion of Judge Abraham, para 32.

⁴⁶ *Ibid*, para 34.

⁴⁷ *Nicaragua v Colombia*, Declaration of Judge Keith, para 10.

⁴⁸ Declaration of Judge *ad hoc* Cot, paras 14-15.

⁴⁹ 'Presidente Santos confirma que Colombia denunció el Pacto de Bogotá', *Press Release of the Office of the President*, 28 November 2012, <http://wsp.presidencia.gov.co/Prensa/2012/Noviembre/Paginas/20121128_01.aspx> [accessed 29 March 2013].

⁵⁰ 'An Islet for a Sea', *The Economist*, 8 December 2012.

⁵¹ N Buckley, 'Nicaragua proposes solution in maritime border dispute', *Colombia Reports*, 22 February 2013, <<http://colombiareports.com/colombia-news/news/28265-nicaragua-govt-proposes-solution-in-maritime-border-dispute.html>> [accessed 29 March 2013].

Dissatisfaction with a maritime delimitation decision is on some level to be expected when issues of access to resources are at stake. In the *Fisheries Jurisdiction* case, the ICJ ruled that Iceland's unilateral extension of its exclusive fishing area to 50nm was invalid and that the UK had fishing rights outside the 12nm limit.⁵² Iceland refused to comply with the decision and continued to prevent UK boats from fishing in the area following the decision. The matter was eventually settled by agreement between the UK and Iceland in June 1976. Guinea-Bissau also settled its maritime boundary with Senegal through negotiation, having previously objected to an award of an arbitral tribunal relevant to a maritime delimitation. Guinea Bissau claimed the award was invalid and instituted proceedings before the ICJ, seeking to have the award declared inexistent. The ICJ rejected the objections of Guinea-Bissau in its decision of November 1991, upholding the validity of the arbitral award.⁵³ Although Guinea-Bissau had filed an application with the Court, instituting a maritime delimitation case as 'a totally separate matter', the two countries entered into negotiations on the delimitation, resulting in an agreement in 1995 and the withdrawal of the maritime delimitation case from the Court's docket.⁵⁴

While pursuing negotiations with Nicaragua, the Colombian government has also announced the hiring of an international law firm to review the decision.⁵⁵ Article 61 of the Statue of the Court only allows for the revision of a judgment on the basis of discovery of a new decisive fact, unknown at the time of the judgment. In the absence of such facts, Colombia could still request an interpretation of the judgment from the Court, though the location of the boundary line itself is unlikely to be considered subject to interpretation.⁵⁶

⁵² *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v Iceland)*, ICJ Reports 1974, p 3.

⁵³ *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)*, ICJ Reports 1991 p 53.

⁵⁴ Application Instituting Proceedings, *Maritime Delimitation between Guinea-Bissau and Senegal*, 12 March 1991; T Daniel, 'African Maritime Boundaries', in J Charney, D Colson, L Alexander & R Smith (eds), *International Maritime Boundaries* (2005) 3429, 3431.

⁵⁵ 'Firma Inglesa Volterra Fietta Será La Encargada De Estudiar El Fallo De La CIJ' Canciller María Ángela Holguín, *Press Release of the Ministry of External Relations*, 20 December 2012, <<http://www.cancilleria.gov.co/newsroom/news/firma-inglesa-volterra-fietta-sera-la-encargada-estudiar-fallo-la-cij-canciller-maria>> [accessed 3 April 2013]

⁵⁶ Statute of the International Court of Justice, Art 60.

3.2 The Pact of Bogotá

The Pact of Bogotá has been the basis of jurisdiction for numerous cases at the ICJ, including the maritime boundary dispute between Honduras and Nicaragua.⁵⁷ Of the ten cases currently on the Court's docket, the Pact of Bogotá is cited as a source of jurisdiction in four cases, namely: *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)*, *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*, *Aerial Herbicide Spraying (Ecuador v Colombia)* and the *Maritime Dispute (Peru v Chile)*. The decision in *Nicaragua v Colombia* and the Colombian reaction to it, may give state parties to the Pact of Bogotá reason for reflection. While the decision may not lead to further withdrawals from the Pact, it certainly highlights the advantages of bilaterally negotiated boundary settlement, rather than the perceived imposition of a boundary from an external source. It may encourage Pact states to work harder on negotiated settlement of disputes, particularly as Article II of the Pact limits recourse to the dispute settlement procedures therein to cases which 'cannot be settled by direct negotiations through the usual diplomatic channels.'⁵⁸

3.3 Future delimitations

The next maritime delimitation case on the ICJ's docket is the *Peru v Chile* case. Oral proceedings were held in December 2012 and the case is currently under deliberation. Like *Nicaragua v Colombia*, the case concerns one UNCLOS party (Chile) and one non-UNCLOS party (Peru). A key element of the case is whether there is a maritime boundary already in existence. Peru maintains that there is no pre-existing maritime boundary between the parties, either arising from a treaty or other agreement, or resulting from a *de facto* line.⁵⁹ Chile submits that the parties delimited their maritime boundary by point IV of the Santiago Declaration of 1952 and that the boundary is the parallel of latitude of the point where their land boundary meets the sea.⁶⁰

Regarding delimitation methodology, Peru has requested the application of the three-step approach and in oral argument cited the Court in *Nicaragua*

⁵⁷ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)*, ICJ Reports 2007 p 659.

⁵⁸ Pact of Bogotá, Art II.

⁵⁹ Memorial of the Government of Peru, 20 March 2009, Chapter IV, 83.

⁶⁰ Rejoinder of the Government of Chile, 11 July 2011, para 1.5.

v Colombia describing the approach as the ‘*méthode de référence*’.⁶¹ The submissions did not make any reference to the manner in which the three-step approach was applied in *Nicaragua v Colombia*. As Chile argues that the respective maritime zone entitlements of Chile and Peru have been fully delimited by agreement, it made no submissions on an eventual delimitation methodology to be used by the Court in the case it found no maritime boundary to exist. If the Court does proceed to effect a maritime delimitation in *Peru v Chile*, it is unlikely that it would carry out an adjustment of the median line similar to that of *Nicaragua v Colombia*. The geographic context in *Peru v Chile* is different to the more complicated scenario presented in *Nicaragua v Colombia* and consists of a reasonably straightforward delimitation of adjacent continental shelves. It has been suggested elsewhere that the finding of the Court at the preliminary objections stage of *Nicaragua v Colombia*, to the effect that the 82nd meridian was not a delimitation line could have an impact on further maritime delimitations involving lines of allocation.⁶² It is submitted that the use of a line of latitude or longitude in an agreement regarding territorial or maritime boundaries has no impact on whether the line was intended as a line of maritime delimitation or a line of allocation. The Court at the preliminary objections stage of *Nicaragua v Colombia* found that the reference to the 82nd meridian in the Protocol to the 1928 Treaty was not a line of maritime delimitation, not because this was a pre-UNCLOS line, or a line of longitude but because the evidence did not suggest that the parties at the time considered the 1928 Treaty and Protocol to effect a maritime delimitation.⁶³

4 Conclusion

Each maritime delimitation takes place in a different set of geographic circumstances and the flexibility at the heart of the three-step approach allows these circumstances to be taken into account. At the same time, the significant consequences that result from a maritime boundary delimitation mean that states seek

⁶¹ Verbatim Record of Public Sitting held on Monday 3 December 2012, in the case concerning the Maritime Dispute (*Peru v Chile*), CR 2012/27, 25.

⁶² P Bekker, ‘The World Court Awards Sovereignty Over Several Islands in the Caribbean Sea to Colombia and Fixes a Single Maritime Boundary between Colombia and Nicaragua’ (2013) 17 *ASIL Insights* 1. On the distinction between a boundary line and a line of allocation see N M Antunes, *Towards the Conceptualisation of Maritime Delimitation: Legal and Technical Aspects of Political Process* (2003) 7–8.

⁶³ *Nicaragua v Colombia (Preliminary Objections)*, ICJ Reports 2007 p 832, para 116.

a certain amount of predictability before submitting delimitation to a dispute settlement body. The ICJ has now decided 13 maritime delimitation cases and it is possible to trace the emergence of a reasonably standard delimitation methodology.⁶⁴ In contrast, ITLOS has so far only carried out one maritime delimitation in the case of *Bangladesh/Myanmar*. As ITLOS is composed of judges specialised in the law of the sea and has less cases on its docket than the ICJ, it would appear to be the obvious choice for a state seeking a maritime delimitation. However, prior to the *Bangladesh/Myanmar* case, the approach of ITLOS towards the maritime delimitation jurisprudence methodology set out by the ICJ and arbitral tribunals was unclear. In the *Bangladesh/Myanmar* case, ITLOS made it clear that it would follow previous delimitation jurisprudence and the decision was generally well received.⁶⁵ ITLOS could be considered to be under greater pressure to produce predictable results so as to establish itself as a reliable delimitation jurisdiction. On the other hand, state parties to the Pact of Bogotá can compel fellow Pact states to appear before the ICJ whereas the Pact does not provide for compulsory dispute settlement before ITLOS. The ICJ has a further advantage as a maritime delimitation jurisdiction in that it can also settle territorial disputes antecedent to any maritime delimitation. In comparison, the jurisdiction of ITLOS is limited to disputes concerning the application or interpretation of UNCLOS or international agreements related to the purposes of UNCLOS.⁶⁶

This brings us to *Nicaragua v Colombia*, a delimitation involving complex geographic circumstances with no obvious linear equitable solution. The solution arrived at by the Court could be described as creative, and perhaps unpredictable. It is possible that states who felt that the ICJ was the maritime delimitation devil they knew, will be given pause for thought by the *Nicaragua v Colombia* judgment. The decision in *Peru v Chile* is likely to be highly anticipated in this regard (if the Court, in fact, proceeds to a maritime delimitation). The Pact of Bogotá offers state parties ease of access to the jurisdiction of the ICJ, in that consent of Pact states to the adjudication of a particular dispute is not required. Following the decision in *Nicaragua v Colombia*, it is likely that Pact of Bogotá states will examine whether such ease of access is still in their best interests.

⁶⁴ See Tanaka, above n 35; J Shi 'Maritime Delimitation in the Jurisprudence of the International Court of Justice' (2010) 9 *Chinese JIL* 271.

⁶⁵ *Bangladesh/Myanmar*, paras 238–40. For academic reaction to the case see R Churchill 'The Bangladesh/Myanmar Case: Continuity and Novelty in the Law of Maritime Boundary Delimitation' (2012) 1 *CJICL* 137; C Schofield & A Telesetsky 'Grey Clouds or Clearer Skies Ahead? Implications of the Bay of Bengal Case' (2012) 3 *Law of the Sea Reports*.

⁶⁶ UNCLOS, Art 288.