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ASSESSING ICJ'S EFFECTIVENESS IN MAINTAINING STABILITY AMIDST MARITIME DISPUTES

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Introduction

The UN Charter establishes the peaceful resolution of international conflicts as one of its core responsibilities. However, there are doubts about the effectiveness of the International Court of Justice (ICJ) from the perspective of the so-called 'predictability paradox.' For example, in the late 1960s/early 1970s, when the ICJ ruled on the North Sea Continental Shelf cases, the Court had no fixed criteria for making determinations and relied instead on the equitable principles methodology¹. Since that time, the ICJ has adopted a more fixed approach, using a three-step boundary delimitation process. The fact that the requested delimitation process has become standardized has created a crisis of compliance to the ICJ's rulings².

On July 13, 2023, the ICJ handed down a ruling on the *Question of Delimitation of the Continental Shelf Between Nicaragua and Columbia Beyond 200 Nautical Miles*³. The most significant aspect of that ruling was that the ICJ ruled against Nicaragua's claim for an extended continental shelf which was Nicaragua's territorial sea that overlaps with Columbia's 200 nautical mile entitlement. By denying Nicaragua's claim completely, the ICJ used this ruling as an opportunity to legally stabilize the claim⁴.

Nevertheless, from an empirical research perspective, there is a major problem with the legitimacy of the ICJ's ruling given Columbia's prior denunciation of the Pact of Bogotá and subsequent withdrawal from the ICJ's jurisdiction namely, the conflict between whether a

¹ Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), Judgment, 1984 I.C.J. 246, 299 (Oct. 12).

² Thirlway Hugh, 'The Law and Procedure of the International Court of Justice 1960–1989: Part Nine' (1999) 69 British Yearbook of International Law 1, 4 (emphasis original).

³ Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2023, p. 413.

⁴ Pranav Ganesan, Laia Roxane Guardiola, The ICJ judgment on *Nicaragua v Colombia* (2022): applying an established jurisdictional test or a problematic invention?, *Journal of International Dispute Settlement*, Volume 14, Issue 3, September 2023, Pages 375–390, <https://doi.org/10.1093/jnlids/idad009>

ruling is Legally enforceable according to the UN Convention on the Law of the Sea (UNCLOS) and whether it is “Politically Effective” to promote peace and security in the region⁵.

The Legal Conceptual Structure of Maritime Delimitation

This dissertation discusses the history of international maritime delimitation law as it developed from a result-driven notion (equitable entitlement at land/sea boundaries) to one that seeks to establish a predictable methodology subject to observable and systematic rules⁶.

The ICJ's Three-Stage Methodology.

Since its inception, the International Court of Justice has used an internationally accepted framework to determine a fair maritime boundary. The ICJ's methodology consists of three sequential phases:

Phase One - Establishing a provisional equidistant boundary between two coastal states based on their geographic coordinates⁷.

Phase Two -Determining Relevant Circumstances

The Court reviews the initial Equidistant Line to determine if there is inequity related to the specific Coastal Configurations (concave coasts, Islands, etc.) of Nicaragua and Colombia, and how the feature of Islands, like the San Andres Islands, influences determining the overlapping area of a 200 NM Exclusive Economic Zone⁸.

Phase Three- Proportionality Check

Finally, after conducting the analysis for all three Phases, the Court uses the measurable length of the Coastline for each State to determine if the final distribution of maritime areas between the two states will produce a grossly disproportionate distribution of maritime area between the two states⁹.

⁵ Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia) (Application Instituting Proceedings filed in the Registry of the Court on 26 November 2013) <https://www.icj-cij.org/public/files/case-related/155/17978.pdf>

⁶ Duvat, Virginie K. E. “A Global Assessment of Atoll Island Platform Changes over the Past Decades.” *WIRES Climate Change*, vol. 10, no. 1, 2019, <https://doi.org/10.1002/wcc.557>.

⁷ Freestone, David, and Duygu Çiçek. *International Law Aspects of Sea Level Rise*. World Bank, 2023.

⁸ Pranav Ganesan, Laia Roxane Guardiola, The ICJ judgment on *Nicaragua v Colombia* (2022): applying an established jurisdictional test or a problematic invention?, *Journal of International Dispute Settlement*, Volume 14, Issue 3, September 2023, Pages 375–390, <https://doi.org/10.1093/jnlids/idad009>.

⁹ Arindam Basu, Sharda Mandal & Ananya Das. (2024) On Tragedy of Commons, State Sovereignty and BBNJ Treaty: Reconnoitring for Harmony. *Lex Portus* 10:6.

UNCLOS & Customary International Law

Even though Colombia is not a party to the United Nations Convention on the Law of the Sea, the ICJ's treatment of Articles 74 and 83 pertaining to the delimitation of the EEZ and continental shelf indicates that the Court considers those articles to reflect Customary International Law¹⁰. Thus, the ICJ's recent decision, which is based on an interpretation of UNCLOS Article 76, raises the question of whether a state's rights to a continental shelf beyond 200 nautical miles can displace the EEZ and/or the 200 nautical mile EEZ of an adjacent state¹¹.

Critical Analysis

One of the key indicators for measuring how effective the International Court of Justice is being based on how well it has developed the support for compliance by States buy-in.

Formalism versus Equity:

Scholars, such as Yoshifumi Tanaka, argue that for delimitation and the rule of law, predictability is paramount. But the Nicaragua v. Colombia saga has demonstrated that there are many instances where following a strict or rigid formula for determining a dispute may result in the Court enforcing a rigid standard at the expense of any *political equity*, meaning that although the Court upheld the 200-nm zone to protect Nicaragua's rights when it ruled narrowly, the Court's adherence to that standard resulted in Colombia avoiding its obligation to recognize the Court's ruling on its rights¹². In this way, it appears that legal criteria can become overly formalized and therefore may exclude the historical application of equitable principles that enabled States to save face in their domestic political arenas.¹³

Legitimacy Crisis of Non-Compliance:

An example of how the ICJ's legitimacy is threatened is indicated by what is sometimes referred to as the Grey Area (e.g., Nicaragua v. Colombia) created by an injured State when it has

¹⁰ International Law Commission (ILC), "Draft conclusions on identification of customary international law, with commentaries," UN Doc A/73/10, 2018, available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf

¹¹ *Submission by the People's Republic of China Concerning the Outer Limits of the Continental Shelf beyond 200 Nautical Miles in Part of the East China Sea*, https://www.un.org/depts/los/clcs_new/submissions_files/chn63_12/executive%20summary_EN.pdf.

¹² Sohn, Louis B., and others. *Law of the Sea in a Nutshell*, 2ed. US: Thomson Reuters, 2010. Tanaka, Yoshifumi. *The International Law of the Sea*, 2nd ed. Cambridge, New York: Cambridge University Press, 2015.

¹³ *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, Dissenting Opinion of Judge Evensen, I.C.J. Reports 1982.

removed itself from a treaty (such as the Pact of Bogotá) after an adverse ruling is rendered¹⁴. If The Court takes a final and binding decision and it is ignored by one of the parties, then the Court's ruling has moved from being an instrument of peace to a source of ongoing conflict.¹⁵ In the Caribbean Sea area, Colombia's refusal to accept the 2012 and 2023 adjustments in maritime jurisdiction continues to impede any cooperation at sea and creates the potential for future conflict there¹⁶.

Comparative jurisprudence and sovereignty (International Court of Justice and International Tribunal for the Law of the Sea)

The ICJ and ITLOS's approaches to the relevance of island features (Bangladesh/Myanmar) differ in their treatment of relevant circumstances used by the ICJ¹⁷. The applicable case law in domestic systems, such as the Supreme Court of India's finding of Maritime Jurisdiction in *Enrica Lexie*, illuminates the tensions associated with international jurisprudence and national sovereignty.¹⁸ The perspective taken by India indicates that for there to be a relationship between international and local maritime jurisprudence, there must be an alignment between the two. There currently appears to be no such link between Nicaragua and Colombia.¹⁹

Conclusion

Although the Court applied a technically sound interpretation of the relevant rules of international maritime law in limiting Nicaragua's extended continental shelf, its political effectiveness is still in doubt²⁰. The evolution toward standardized delimitation formulas from the formerly fluid equitable principles to the now rigid three-stage methodology has created a

¹⁴ Maritime Delimitation and Expanding Categories of Relevant Circumstances. *International and Comparative Law Quarterly*, vol. 40, No. 1 (January 1991).

¹⁵North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgement, I.C.J Reports 1969.

¹⁶ Malcolm D. Evans and Nicholas A. Ioannides, "A Commentary on the 2023 Nicaragua v Colombia case," *EJIL: Talk!*, August 4, 2023, available at: <https://www.ejiltalk.org/a-commentary-on-the-2023-nicaragua-v-colombia-case>.

¹⁷ Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgment of 14 March 2012, ITLOS Reports 2012, [428]–[437].

¹⁸ Dissenting Opinion of Judge Tomka, *Nicaragua v Colombia* (2023), note 5, available at: <https://www.icj-cij.org/sites/default/files/case-related/154/154-20230713-jud-01-01-en.pdf> (accessed November 23, 2023), [46]–[47].

¹⁹ Lathrop, M. L., Donald R. Rothwell, and Tim Stephens. *The International Law of the Sea*. 3rd ed., Hart Publishing, 2023.

²⁰ Kevin Jon Heller, "Specially-Affected States and the Formation of Custom" (2018) 112 *American Journal of International Law* 191, 216–217.

predictability paradox²¹. This means that the more mathematically certain a legal outcome has become; the more politically dissatisfied people are with that same legal outcome. In the case of Colombia, the loss of perceived maritime sovereignty has led to a major fracture in diplomatic relations namely, Colombia's denunciation of the Pact of Bogotá and its withdrawal from ICJ jurisdiction, exhibiting one of the major limitations on the ICJ: whereas a decision may be legally correct in accordance with UNCLOS, it can also be politically ineffective if it creates non-compliance with it, thus defeating the peaceful resolution that the court was trying to achieve²². The ICJ must align itself with its role as a guardian of maritime stability and reconcile black letter law with the issue of state sovereignty if it is to maintain its legitimacy by achieving not only legally sound decisions, but also decisions that will last long enough to avoid future conflicts²³.

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