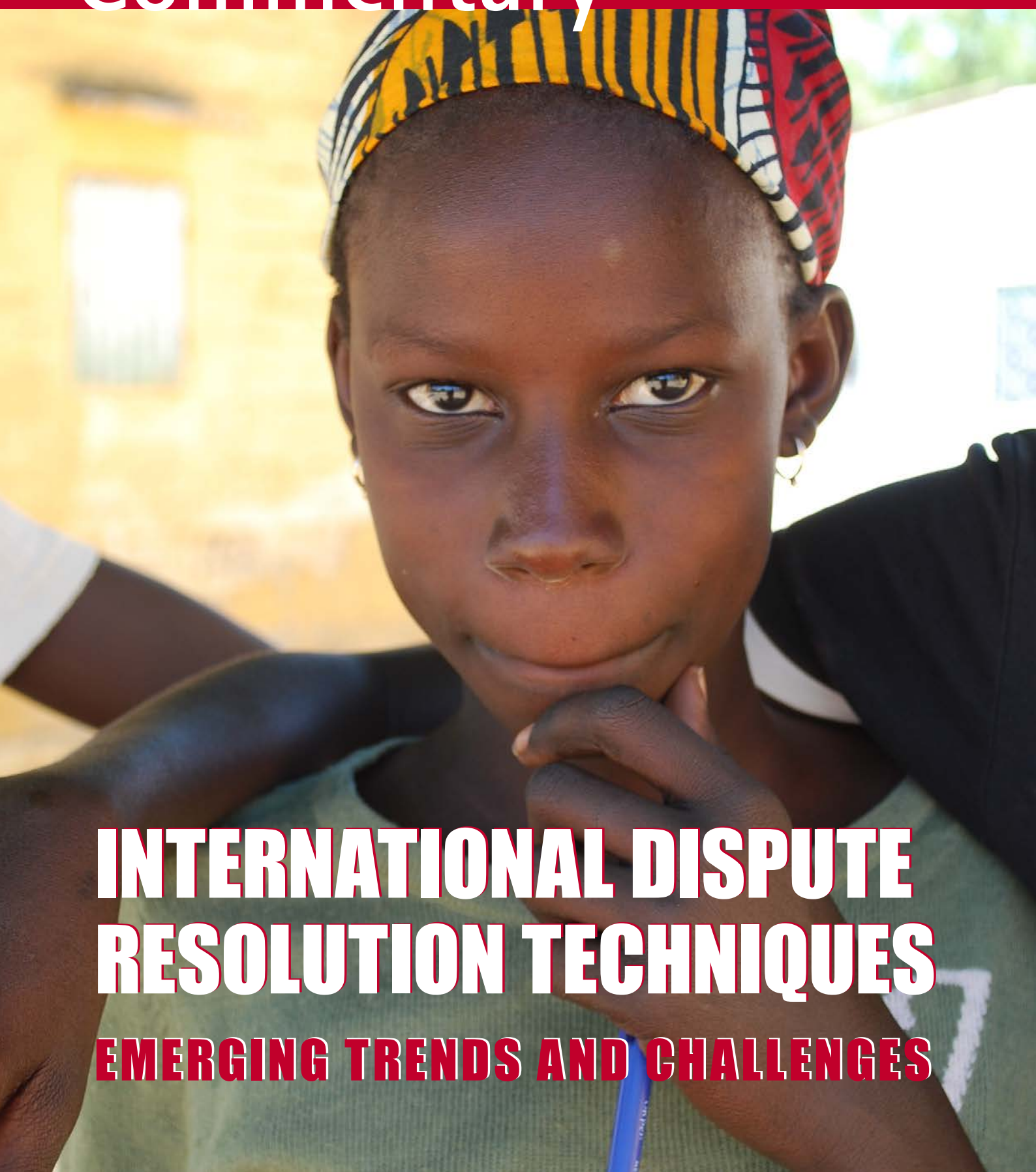


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**INTERNATIONAL DISPUTE
RESOLUTION TECHNIQUES
EMERGING TRENDS AND CHALLENGES**

The ITPCM International Commentary

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NON-COMPLIANCE WITH INTERNATIONAL JUDGMENTS:

RECENT TRENDS IN LATIN AMERICA

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Summary

The article analyses the far-reaching consequences of the ICJ judgment of 19 November 2012 on *Territorial and Maritime Dispute* case between Colombia and Nicaragua. By taking this recent case as reference, the article aims at introducing the issue of the non-compliance with international judgments. Colombia emphatically rejected and openly defied the ICJ ruling. Here it is argued that this Colombian irreverent attitude may induce other Latin American judgment debtor-states to adopt an analogous divergent behaviour in the foreseeable future, compromising the positive trend that the ICJ is experiencing in Latin America.

Key Words

Non-compliance – International Court of Justice (ICJ) – Territorial and maritime disputes – Colombia – Nicaragua

Introduction

Slightly more than half a century ago, States were allowed to 'legally' resort to the use of force for settling their controversies. Since then, substantial progress has undeniably been achieved in the international legal system of dis-

pute resolution. Following the creation of the United Nations (UN) system and the total ban of the use of force in 1945, States have both reinforced traditional means and designed new and innovative mechanisms for solving their disputes. Since the end of the Cold War, States have increasingly resorted to judicial means of dispute resolution, as shown by the growing case-load of the International Court of Justice (ICJ) and other international tribunals. In addition, referring disputes to international tribunals has emerged as a common trend among developing countries. In particular, it appears that the ICJ, after the well-known *Nicaragua* case and pre-eminently in this latest decade, gained broad consensus among Latin American countries¹. Thus, they have progressively turned to the ICJ as an authoritative tribunal to settle very sensitive territorial and maritime disputes (see Figure 1).

Unfortunately, this widespread trust in the ICJ did not prevent Colombia from emphatically rejecting the ICJ judgment of 19 November 2012 on *Territorial and Maritime Dispute* case, brought before

the Court by Nicaragua². Not only has Colombia fiercely contested the validity of the judgment but it has also withdrawn from the American Treaty of Pacific Settlement of 1948 (Pact of Bogotá)³. This article argues that this open and blatant defiance by Colombia may induce other Latin American judgment debtor-states to adopt the same irreverent attitude in the future. This would compromise the positive trend that the ICJ is experiencing in Latin America.

Nicaragua v. Colombia case: a long dispute, a contested judgment

On 6 December 2001, Nicaragua submitted an application to the ICJ insti-

² *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment*, ICJ Rep. 2012, p. 624.

³ Signed by the independent republics of America on 30 April 1948, with the main purpose of imposing on the parties a general obligation to settle their disputes by peaceful means. Under Art. 31 of the Treaty, the parties conferred to the ICJ the jurisdiction to decide on all the disputes of juridical nature that arise among them. The Pact of Bogotá is a pillar of the legal framework of the Organization of American States (OAS). Today, 14 out of 35 OAS member states are parties to the Pact. Before Colombia, just El Salvador denounced the Pact, on 24 November 1973.

¹ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. US), Provisional Measures*, ICJ Rep. 1984, p. 169; *Jurisdiction and Admissibility*, ICJ Rep 1984, p. 392; *Merits*, ICJ Rep. 1986, p. 14.

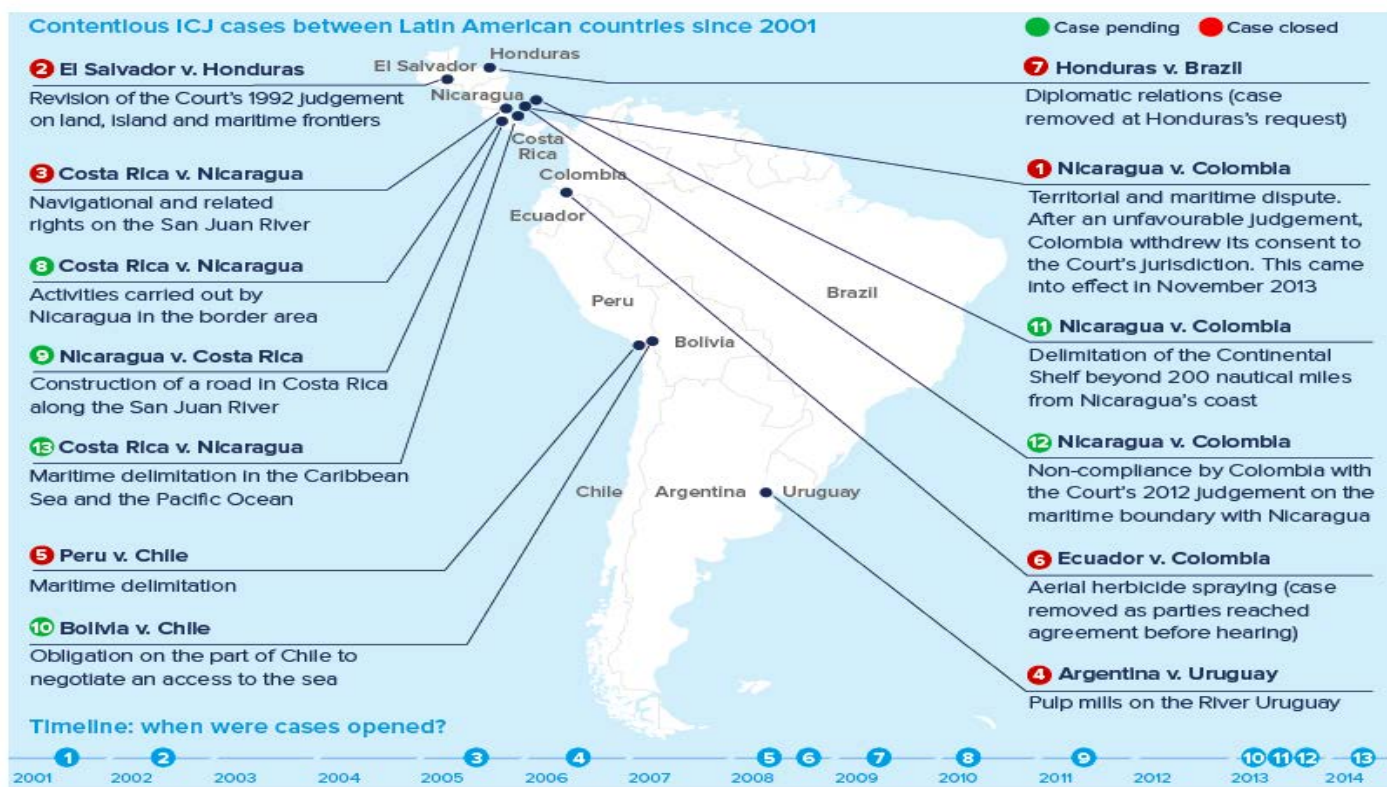


Figure 1. ICJ growing case-load in Latin America since 2001.

Source: Oxford analytica, <http://www.oxan.com/Default.aspx>

tuting proceedings against Colombia⁴. Nicaragua claimed for the sovereignty over the archipelago of San Andrés and other seven small islands in the Western Caribbean Sea, thus demanding the determination of its maritime areas and boundaries with Colombia⁵. According to Nicaragua, Colombia had unilaterally fixed a maritime delimitation that did not respect the criteria established in the UN Convention on the Law of the Sea of 1982 (UNCLOS), and widely accepted as international customary law.

The proceedings lasted 11 years; the ICJ delivered its judgment on 19 November 2012⁶. Basing its decision principally on

an analysis of the effective exercise of territorial jurisdiction in the post-colonial period, the Court unanimously decided that Colombia enjoys sovereignty over the San Andrés archipelago and the other small islands. Then, the Court used a multi-stage methodology to decide on the entitlements over the overlapping zone between Nicaraguan within-200-miles continental shelf and Colombian islands waters.⁷ After having established a 12 miles territorial sea for Colombian islands, the ICJ drew a provisional median line and, considering the mere application of the equidistance principle inappropriate for the case, it applied a

weighting ratio and adjusted the line further, ending in a simplified weighted line favouring Nicaragua. In sum, Nicaragua obtained from the ICJ ruling about 38,600 square miles of sea, rich of fish and other natural resources (see Figure 2).

On the same day in which the judgment was issued, the Colombian authorities vehemently rejected the ruling and denigrated the Court itself. President Santos declared: 'All of these are really omissions, errors, excesses, inconsistencies that we cannot accept. Taking into account the above, Colombia – represented by its Head of State – emphatically rejects that aspect of the judgment rendered by the Court today'⁸. Similarly, the Colombian Foreign Minister Angela Holguín labeled the ICJ as 'enemy', stating that it 'did not base its decision on

⁴ Application Instituting Proceedings, *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, ICJ Rep. 2012, p. 630.

⁵ The seven islands are Alburquerque Cays, Bajo Nuevo, East-Southeast Cays, Quitasueno, Roncador, Serrana, and Serranilla. After the independence from Spain in the 19th century, Colombia and Nicaragua ratified a Treaty in 1928 to settle their dispute on the sovereignty over these islands. However, the Treaty was denounced as null and void by Nicaragua in 1980.

⁶ For a brief insight into the ICJ Judgment, See: BEKKER, P. (2013), 'The World Court Awards Sovereignty Over Several Islands in the Caribbean Sea to Colombia and Fixes a Single Maritime Boundary between Colombia

and Nicaragua', *ASIL Insights*, [Online], 17(3). Available at: <http://www.asil.org/insights/volume/17/issue/3/world-court-awards-sovereignty-over-several-islands-caribbean-sea>. [Accessed: 10 November 2014].

⁷ The multi-stage methodology utilised by the Court is composed of: the establishment of an equidistance/median line, by reference to opposite base points (Stage 1); the examination of the line in the light of equitable factors (Stage 2); the application of a final proportionality check (Stage 3). The ICJ left the delimitation of the beyond-200-miles continental shelf to the Commission on the Limits of the Continental Shelf (CLCS) established under the UNCLOS, to which Nicaragua is a party.

⁸ 'Declaration of President Juan Manuel Santos on the judgment of the International Court of Justice' 19 November 2012, [Online]. Available at: http://wsp.presidencia.gov.co/Prensa/2012_Noviembre/Paginas/20121119_02.aspx. [Accessed: 22 November 2014]. See also: COLOMBIA REPORTS (2012), 'ICJ ruling on San Andrés a 'serious judgment error': Santos', [Online]. Available at: <http://colombiareports.co/icj-ruling-on-san-andres-a-serious-judgment-error-santos/> [Accessed: 22 November 2014].

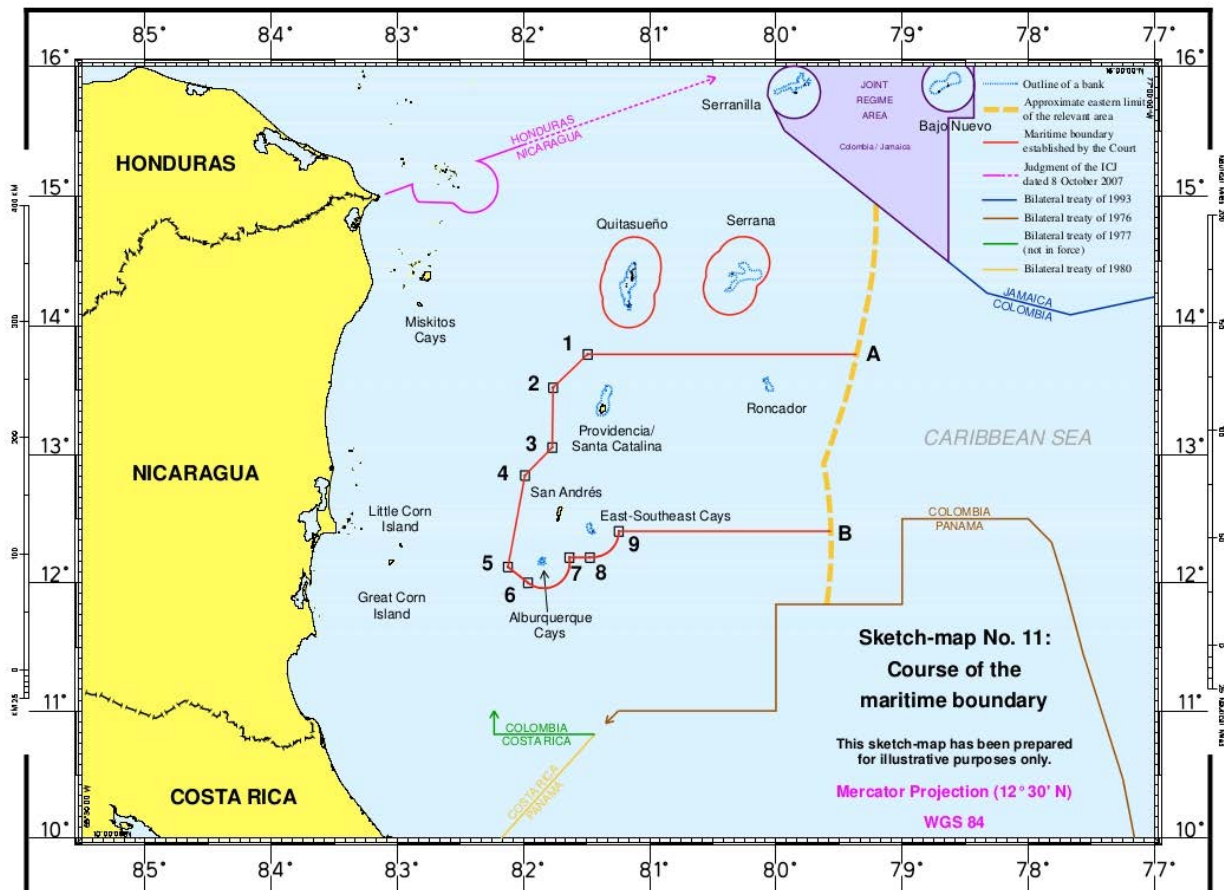


Figure 1. Course of the Maritime Boundary, Territorial and Maritime Dispute (Nicaragua v. Colombia)
Source: ICJ Rep. 2012, *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgement, p. 62.

the law⁹. In addition, on 28 November 2012, President Santos formally denounced the Pact of Bogotá, in order to exclude the ICJ jurisdiction from issues concerning Colombian sovereignty and avoid other territorial claims by neighbouring States¹⁰. Notwithstanding, since the withdrawal would have become effective only one year after the denunciation, Nicaragua seized the opportunity to bring again Colombia before the Court prior to the deadline on 28 November 2013.

⁹ EL NUEVO HERALD (2012), 'The Colombian Foreign Minister Calls The Hague an Enemy', [Online]. Available at: <http://www.elnuevoherald.com/2012/11/27/1353049/cancillercolombiana-califica.html> [Accessed: 22 November 2014].

¹⁰ See Letter from Colombia to Secretary-General of the Organization of American States dated 27 November 2012, GACIJ, No. 79357. See also BBC NEWS (2012), 'Colombia pulls out of International Court over Nicaragua', [Online], Available at: <http://www.bbc.co.uk/news/world-latin-america-20533659> [Accessed: 22 November 2014].

The day after: Colombia's non-compliance and Nicaragua's further aspirations

Thus, Colombia decided to behave in flagrant defiance of the ICJ judgment. Not only had President Santos openly declared his reluctance to comply with the ruling and denounced the Pact of Bogotá, but he also progressively increased the presence of Colombian warships in the contested waters, in such a way to guarantee Colombian alleged sovereignty and protect the fishing rights of the inhabitants of San Andrés and Providencia¹¹.

In the two years following the issuing of the judgment, Colombia has been advancing four main arguments to justify its non-compliant behavior. Yet they do

¹¹ EL ESPECTADOR (2012), 'Pescar en aguas disputadas con Nicaragua', [Online]. Available at: <http://www.elespectador.com/noticias/nacional/pescar-aguas-disputadas-nicaragua-galeria-518790> [Accessed: 15 November 2014].

not appear convincing and conclusive under international law, as none of them can impair Colombia international liability¹².

First, Colombia has repeatedly invoked its domestic law as evidence for its unfeasibility to comply with the ICJ judgment. Colombia has claimed that, according to its Constitution, the boundaries of the country can be re-drawn only through an international treaty approved by the Congress¹³.

Second, Colombia has clearly highlighted the possible risks to the maritime security of the area posed by a switch in the

¹² For an insight into the main arguments provided by Colombia, See GOBIERNO DE COLOMBIA (2013), 'Conoce el abecé de la estrategia del Gobierno frente al fallo de la CIJ', [Online], Available at: <http://www.urnadecristal.gov.co/gestion-gobierno/san-andres-colombia-fallo-inaplicable-haya> [Accessed: 20 October 2014].

¹³ Art. 101 of the 1991 Colombian Constitution states: 'The borders identified in the form provided for by this Constitution may be modified only by treaties approved by the Congress and duly ratified by the President of the Republic.'

jurisdiction over the contested waters. It has been argued that the presence of traffickers and drug-runners in the West Caribbean Sea might increase as a consequence of this transfer of control from the Latin American largest navy to one of the smallest ones¹⁴.

The third argument concerns the responsibility for the protection of the UNESCO 'Seaflower Biosphere Reserve', which includes the archipelago of San Andrés, Providencia and Santa Catalina. Since its establishment in 2000, this UNESCO 'Biosphere Reserve' has been subject to the jurisdiction of Colombia. However, it partially lies within the contested waters. Therefore, in November 2013 the UNESCO, acknowledging the ICJ judgment, identified part of the reserve as belonging to Nicaragua and invited the two countries to cooperate in the protection of the site and explore the possibility of creating a trans-boundary reserve¹⁵. Colombia vehemently opposed this proposal, recalling that the settlement of international disputes is not a field of UNESCO competence, and declared its willingness to protect the reserve under its own unique responsibility.

Fourth and last argument, Colombian authorities have denounced the economic issues underlying the ICJ judgment. In June 2013, Nicaraguan Assembly approved a multi-millionaire plan by a Honk Kong group for the construction of an inter-oceanic canal cutting across Nicaragua. The construction of this canal has been taken as evidence of the strong Chinese interest in the area and

the President of the Colombian Senate, Roy Barreras, denounced the presence of a Chinese judge among the members of the Court dealing with this case as an additional reason to reject the judgment¹⁶.

While Colombia behaved in open defiance with the ICJ judgment, Nicaragua was driving its aspirations forward at international level. Nicaragua initially sought to expand its continental shelf beyond the 200-nautical-miles limit from the baselines¹⁷. On 24 June 2013, Nicaragua submitted its final information to the Commission on the Limits of the Continental Shelf (CLCS), in which it is illustrated how its continental margins extend more than 200 nautical miles, up to partly overlap with an area lying within the 200 nautical miles of Colombian coasts¹⁸. Colombia strongly opposed these Nicaraguan claims at the CLCS, pointing out that they seriously affect its sovereign rights on maritime areas, as they emerge from customary international law of the sea¹⁹. As a consequence, Nicaragua brought back Colombia before the ICJ, in order to see its continental shelf beyond the 200-nautical-miles limit finally delimited²⁰.

¹⁶ For a brief insight into the Nicaraguan Canal, See: DAVIDOVIC, S. (2014) China creates new trade route through Nicaragua canal. Global Risk Insights. [Online] Available at: <http://globalriskinsights.com/2014/11/china-creates-new-trade-route-through-nicaraguan-canal/> [Accessed: 15 November 2014]. For the declarations of President of the Colombian Senate, Roy Barreras See: ELTIEMPO.COM (2013), Congreso no cambiará límites marítimos del país: Roy Barreras, [Online]. Available at: <http://www.eltiempo.com/archivo/documento/CMS-12869722> [Accessed: 15 November 2014].

¹⁷ The single maritime boundary between the continental shelf and the exclusive economic zones of Nicaragua and Colombia within the 200-nautical-mile limit from the Nicaraguan baselines was defined by the ICJ in paragraph 251 of its Judgment of 19 November 2012 in *Territorial and Maritime Dispute* (Nicaragua v. Colombia).

¹⁸ For Nicaragua final information to the CLCS, See: CLCS, Submissions to the Commission, Nicaragua Executive Summary, June 2013, Available at: http://www.un.org/depts/los/clcs_new/submissions_files/submission_nic_66_2013.htm [Accessed: 15 November 2014].

¹⁹ See: Note Verbale from the Permanent Mission of Colombia to the United Nations Secretary General, UN doc. A/67/852, 2 May 2013.

²⁰ Application Instituting Proceedings, *Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles From the Nicaraguan Coast* (Nicaragua v. Colombia), 16 September 2013.

In addition, on 27 November 2013, Nicaragua filed a further application to the ICJ against Colombia with regard to alleged violations of its sovereign rights and maritime spaces. In this latest application, Nicaragua claims against Colombia for its non-compliance with the previous ICJ judgment and its threat of the use of force in violation of Nicaraguan rights and customary international law²¹.

The impasse in the Western Caribbean Sea: harmful consequences and possible ways out

The open non-compliance of Colombia with the ICJ judgment resulted in an inextricable impasse that may have serious implications for the whole Latin America region. Besides endangering the maintenance of peace and security in the area, the defiant behaviour of Colombia and, in particular, the Colombia denunciation of the Pact of Bogotá might induce other Latin American judgment debtor-states to take analogous actions in the near future.

Within this context, the recent *Maritime Dispute case*, concerning the delimitation of the EEZ between Peru and Chile, may be instructive²². On 27 January 2014, the ICJ delivered its final judgment on the case and awarded the control of approximately 20,000 square kilometres of former Chilean waters to Peru. In the light of this ruling, major Chilean authorities have vehemently criticised the ICJ and pressed the then-President Piñera to seriously consider the Chile withdrawal from the Pact of Bogotá²³. After

²¹ Application Instituting Proceedings, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (Nicaragua v. Colombia), 26 November 2013.

²² *Maritime Dispute (Peru v. Chile)*, Judgment, I.C.J. General List 2014, No. 137.

²³ Among the others, the deputies Iván Moreira (UDI), Patricio Melero (UDI) and Jorge Tarud (PPD) urged President Piñera to withdraw from the Pact of Bogotá. Chile Foreign Minister Heraldo Muñoz put also the Pact into question. As a result, the then-President Piñera opened the debate and asked for an official report on the pros and cons of a withdrawal from the Pact. See: LASEGUNDAOnline (2014), Fuertes críticas de parlamentarios: "Aquí Chile no ha ganado nada... hemos perdido", [Online]. Available at: <http://www.lasegunda.com/Noticias/Politica/2014/01/910056/fuertes-criticas-de-parlamentarios-aqui-chile-no-ha-ganado-nada-hemos-perdido> [Accessed: 10 November 2014];

¹⁴ To this concern, it is interesting to notice that Nicaragua military expenditures correspond to less than 1% of Colombian ones, which are bigger than Nicaragua entire GDP. On the maritime security issue, See: ROGERS, T. (2012) 'Caribbean Crisis: Can Nicaragua Navigate Waters It Won From Colombia? Pulitzer Center on Crisis Reporting!'. [Online] 28th November. Available at: <http://world.time.com/2012/11/28/caribbean-crisis-can-nicaragua-navigate-waters-it-won-from-colombia/>. [Accessed: 10 November 2014].

¹⁵ See UNESCO, MAB Programme, International Coordinating Council, Twenty-sixth session, SC-14/CONF.226/14, [Online] 17th April 2014. Available at: http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/SC/pdf/SC-14-CONF-226-14Information_on_Seaflower-eng-rev.pdf [Accessed: 15 November 2014]. See also: YouTube, UNESCO reconoce que Reserva de Biósfera Sea Flower pertenece a Nicaragua, José Miguel Fonseca con la información, [Online]. Available at: <https://www.youtube.com/watch?v=IflymY590ps>. [Accessed: 15 November 2014].



Source: El Tiempo, 14 december 2014.

the Presidential elections in November 2013 and the establishment of the new Bachelet government in March 2014, however, a more cautious line has been privileged and all evidence suggests that Chile has frozen its withdrawal²⁴. Nevertheless, at the current state of affairs, a further change of hearth appears still possible²⁵.

LASEGUNDAOnline (2014), Heraldo Muñoz se abre a debatir retiro de Chile de Pacto de Bogotá: 'Es una discusión legítima', [Online]. Available at: <http://www.lasegunda.com/Noticias/Politica/2014/01/910324/munoz-se-abre-a-debatir-retiro-de-chile-de-pacto-de-bogota-es-una-discusion-legitima> [Accessed 10 November 2014]; LASEGUNDAOnline (2014), Presidente Pidió Informe de Pros y Contras Ante Retiro de Pacto de Bogotá, [Online]. Available at: <http://www.lasegunda.com/Noticias/Politica/2014/02/913578/presidente-pidio-informe-de-pros-y-contras-ante-retiro-de-pacto-de-bogota> [Accessed: 10 November 2014].

²⁴ Bachelet stated that currently she is not considering a withdrawal from the Pact, but she also added that the issue should be debated with seriousness and accuracy in the future. See: SoyChile (2014), "Hoy día no tengo considerado salirme del Pacto de Bogotá", dijo Michelle Bachelet, [Online]. Available at: <http://www.soychile.cl/Santiago/Politica/2014/03/12/236064/Bachelet-ni-tiene-contemplado-salirse-del-Pacto-de-Bogota.aspx> [Accessed: 15 November 2014].

²⁵ After the delivery of the ICJ judgment on *Maritime dispute case*, new contentions between Chile and Peru have emerged. These contentions mainly regard territorial borders and, specifically, the so-called 'Triangulo Terrestre' (Land Triangle). See: BBCMundo (2014), Que es el triangulo terrestre que vuelve a enfrentar a Peru y Chile, [Online]. Available at: http://www.bbc.co.uk/mundo/noticias/2014/08/140821_mapa_triangu_lo_terrestre_polemica_ac [Accessed: 15 November 2014]. In addition,

Accordingly, it is worth pointing out that the divergent practice started by Colombia might still affect the positive trend that ICJ was experiencing in Latin America. In other words, Latin American countries could progressively lose their trust in the ICJ and reduce their resort to judicial means of dispute settlement, undermining the resolution of persisting and long-standing controversies in the region. A progressive decrease in tension and a definitive resolution of the dispute between Colombia and Nicaragua appears the main path to follow in order to oppose this eventual harmful domino effect. How could a way-out from the current impasse be found? To date, with two new pending cases, the ICJ still appears to be the main international actor involved in the contention. However, it would be rather incorrect to charge the ICJ with the responsibility of dealing with cases of non-compliance, given that the UN Security Council (UNSC) has been asked to carry out this task under the UN framework. According to Article 94(2) of the Charter of the United Nations, the UNSC 'may...make recommendations or decide upon measures to be taken to give effect to the judgment'. Nevertheless, the UNSC never adopted these kinds of measures, mainly because its own enormous discretionary power

Chile is still involved in a further case pending before the ICJ, after that Bolivia instituted proceedings against Chile in April 2013, claiming for an access to the Pacific Ocean. See: Application Instituting Proceedings, *Obligate to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, 24 April 2013, [Online]. Available at: <http://www.icj-cij.org/docket/files/153/17338.pdf> [Accessed: 15 November 2014].

and very political nature prevent it from taking action in such a sensitive field²⁶. Moreover, the UNSC does not even appear the appropriate body to deal with this specific case, as Nicaragua is well conscious that a direct UNSC involvement would have significantly increased tension and erased any possibility of reaching an agreement with Colombia. Rather than the UNSC, the Organization of American States (OAS), with its elaborate structure, might be the suitable regional body to deal with this dispute. However, bearing in mind that the OAS legal framework for the settlement of disputes eventually lays on the Pact of Bogotá, the definitive withdrawal of Colombia prevented this regional body from playing any effective role in this controversy.

In the end, diplomatic means of dispute settlement stand as the most suitable path to follow. Although Colombia has repeatedly stated that the stipulation of an agreement with Nicaragua would be the only conceivable means to solve the dispute, it has persistently avoided direct bilateral negotiations with Nicaragua. For this reason, a diplomatic intervention of a third party might be the proper key to persuade Colombia and Nicaragua to talk and unlock the impasse. Up to this point, neither neighbouring countries nor other more powerful and influential states have stepped forward to mediate in the dispute. Thus, we just have to wait for who will make the needed breakthrough.

Concluding Observations

Cases of non-compliance give rise to a wide variety of problems on the international scenario. Every case of non-compliance has profound implications not only for the bilateral relations of the parties to the dispute, but also for the international community as a whole. The reliability of judicial mechanisms of dispute resolution is undoubtedly betrayed; the international system comes out inherently weakened. This is something that the international community must avoid by increasing the effectiveness of its tools. As a matter of fact, there is still a long way to go.

²⁶ See: LLAMZON A., (2008), Jurisdiction and Compliance in Recent Decisions of the International Court of Justice, *EJIL*, 18(5), pp. 815-852.

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