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## Nicaragua v. Colombia

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# NICARAGUA V. COLOMBIA

*Christina Stegemoller\**

## I. INTRODUCTION

IN late 2001, the Republic of Nicaragua filed an application with the International Court of Justice (ICJ) to institute proceedings against the Republic of Colombia.<sup>1</sup> Specifically, Nicaragua requested that the ICJ declare Nicaraguan sovereignty over certain islands and keys in the western Caribbean that have been claimed by Colombia, and additionally that the court fix a maritime boundary.<sup>2</sup> Nicaragua also reserved the right to seek compensation from Colombia for unjust enrichment.<sup>3</sup> This application led to the case now known as *Nicaragua v. Colombia*.<sup>4</sup>

Since the filing of the suit, events surrounding the case have begun to unfold. Significantly, in the summer of 2003, Colombia denied that the ICJ had jurisdiction over the dispute.<sup>5</sup> Because the ICJ has not yet issued an opinion, there has been much speculation regarding the impact of this case. Topics of particular importance include the fishing industry, oil exploration and production, and the people of the disputed territories.<sup>6</sup>

## II. THE CASE BROUGHT BY NICARAGUA

The ICJ is the principle judicial organ of the United Nations (U.N.). It replaced the Permanent Court of International Justice in 1946.<sup>7</sup> The ICJ is comprised of fifteen judges elected by the U.N. General Assembly and

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1. Application of the Republic of Nicaragua (Nicar. v. Colom.) (Dec. 6, 2001), available at [http://www.icj-cij.org/icjwww/idocket/inicol/inicolorder/inicol\\_iapplication\\_20011206.html](http://www.icj-cij.org/icjwww/idocket/inicol/inicolorder/inicol_iapplication_20011206.html).

2. *Id.* at 8.

3. *Id.*

4. Press Release, International Court of Justice, Fixing of Time Limits for the Filing of Written Pleadings, (Mar. 1, 2002), available at [http://www.icj-cij.org/icjwww/ipresscom/ipress2002/ipresscom2002-07\\_nicol\\_20020301.htm](http://www.icj-cij.org/icjwww/ipresscom/ipress2002/ipresscom2002-07_nicol_20020301.htm) [hereinafter Press Release of Mar. 1, 2002].

5. Associated Press, *Colombia Denies World Court Jurisdiction*, TIMES LEADER, July 22, 2003, <http://www.timesleader.com/mld/timesleader/news/6359206.htm> (on file with author).

6. James Varney, *Metairie Oil Firm Caught Amid Feud*, INSIDE COSTA RICA, June 10, 2003, [http://insidecostarica.com/specialreports/colombia\\_oil\\_firm\\_san\\_andres.htm](http://insidecostarica.com/specialreports/colombia_oil_firm_san_andres.htm).

7. Ask Yahoo!, *What is the World Court and Where is it Located?*, Mar. 21, 2001, <http://ask.yahoo.com/ask/20010321.html>.

Security Council to serve nine year terms.<sup>8</sup> Of the fifteen judges, no more than one judge can be of any one nationality.<sup>9</sup> One of the ICJ's purposes is to settle legal disputes among the sovereign states.<sup>10</sup>

On December 6, 2001, the Republic of Nicaragua brought suit against the Republic of Colombia before the ICJ in The Hague, The Netherlands.<sup>11</sup> The Embassy of Nicaragua submitted an Application of the Republic of Nicaragua to the Register of the ICJ concerning a dispute "of a group of related legal issues subsisting between the Republic of Nicaragua and the Republic of Colombia concerning title to territory and military delimitation."<sup>12</sup> The Nicaraguan government presented two primary requests to the ICJ: first, it requests that the ICJ declare Nicaraguan sovereignty over certain islands and keys of the western Caribbean and, second, it requests the ICJ to fix a single maritime boundary between the areas of both states' continental shelf.<sup>13</sup> Also, if the ICJ determines that Colombia lacks lawful title and unlawfully interfered with Nicaraguan fishing vessels, Nicaragua reserves the right to seek compensation for Colombia's unjust enrichment resulting from Colombia's possession of the disputed territories and maritime spaces up to the eighty-second meridian.<sup>14</sup>

Specifically, Nicaragua asks the ICJ to adjudge and declare:

*First*, that the Republic of Nicaragua has sovereignty over the islands of Providencia, San Andres, and Santa Catalina, and all the appurtenant islands and keys, and also over the Roncador, Serrana, Serranilla, and Quitasueno keys (in so far as they are capable of appropriation); and

*Second*, in the light of the determinations concerning title requested above, the [IC] is asked further to determine the course of the single maritime boundary between the areas of the continental shelf and exclusive economic zone appertaining respectively to Nicaragua and Colombia, in accordance with equitable principles and relevant circumstances recognized by general international law as applicable to such a delimitation of a single maritime boundary.<sup>15</sup>

The Nicaraguan government first seeks remedies that relate to "questions of title to certain islands in the western Caribbean."<sup>16</sup> Nicaragua claims that it has sovereignty over the islands and surrounding waters of San Andres, Providencia, and Santa Catalina, as well as the Roncador,

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8. *Id.*

9. *Id.*

10. *Id.*

11. Press Release, International Court of Justice, Nicaragua Institutes Proceedings Against Colombia with Regard to "Legal Issues Subsisting" Between the Two States "Concerning Title to Territory and Maritime Delimitation" in the Western Caribbean (Dec. 6, 2001), available at [http://www.icj-cij.org/icjwww/ipresscom/ipress2001/ipresscom2001-34\\_nicol\\_20011206.htm](http://www.icj-cij.org/icjwww/ipresscom/ipress2001/ipresscom2001-34_nicol_20011206.htm).

12. Application of the Republic of Nicaragua, *supra* note 1, at 2.

13. *Id.* at 8.

14. *Id.*

15. *Id.*

16. Application of the Republic of Nicaragua, *supra* note 1, at 2.

Quitasueno, Serrana, and Serranilla keys, and requests that the ICJ declare that it has such sovereignty.<sup>17</sup>

The primary area of dispute consists of the islands and waters of San Andres, Providencia, and San Catalina, which make up the San Andres archipelago.<sup>18</sup> This archipelago lies 400 miles north of Colombia and 120 miles east of Nicaragua.<sup>19</sup> These islands form Colombia's smallest state.<sup>20</sup>

For many years, Colombia has claimed dominion over the islands and keys at issue in this proceeding.<sup>21</sup> Colombia's sovereignty rests upon the Barceñas-Esguerra Treaty (1928 Treaty) signed in Managua, Nicaragua on March 24, 1928.<sup>22</sup> This instrument gives Colombia title over the San Andres archipelago and provides the basis for title over the other disputed territories.<sup>23</sup>

The Nicaraguan government asserts that this treaty is not valid and, therefore, the disputed territory falls under its sovereignty.<sup>24</sup> Nicaragua contends that when it signed away ownership of the islands and certain Caribbean waters surrounding it to Colombia in the 1928 Treaty, it did so under duress.<sup>25</sup> Nicaragua further claims that it was under pressure at the time of the treaty because Nicaragua was ruled by a U.S. puppet government and was occupied by United States Marines hunting the rebel leader Augusto Cesar Sandino.<sup>26</sup>

Nicaragua proclaims that since the treaty is not valid, it cannot provide a basis of Colombian title, and therefore, title to the disputed islands and keys, along with their waters, belongs to the Republic of Nicaragua.<sup>27</sup> This assertion rests upon historical events.<sup>28</sup> The Nicaraguan government claims that when Spain granted the country independence in 1821, the provinces that formerly formed the Captaincy General of Guatemala became the Federation of Central American States (Federation) and "sovereignty over all islands appurtenant to this territory devolved on the newly independent States by virtue of an original title in the Colonial era, confirmed by the principle of *uti possidetis juris* [a phrase used in international law to signify that the parties are to retain possession of what they have acquired by force]."<sup>29</sup> The islands and keys at issue were a part of

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17. *Id.* at 8.

18. *Id.*

19. Varney, *supra* note 6.

20. Javier Baena, *Colombia Threatens Force to Stop Nicaraguan Oil Exploration Near Disputed Islands*, ENVIRONMENTAL NEWS NETWORK, May 14, 2003, [http://enn.com/news/2003-05-14/s\\_4429.asp](http://enn.com/news/2003-05-14/s_4429.asp).

21. Application of the Republic of Nicaragua, *supra* note 1, at 4.

22. *Id.*

23. *Id.*

24. *Id.*

25. Andrew Selsky, *Colombia Outpost wary of Mainland Influence*, MIAMI HERALD, May 11, 2003, <http://www.miami.com/mld/miamiherald/2003/05/11/news/world/americas/5834408.htm> (on file with author).

26. Varney, *supra* note 6.

27. Application of the Republic of Nicaragua, *supra* note 1, at 2.

28. *Id.*

29. *Id.*

the Federation and, Nicaragua insists, came to be a part of the sovereign territory of Nicaragua after the dissolution of the Federation in 1938.<sup>30</sup>

Furthermore, the Nicaraguan government emphasizes the significance of settling the issues of title definitively.<sup>31</sup> Nicaragua recognizes that settlement of such issues is a "condition precedent to the complete and definitive determination of the maritime areas appertaining to Nicaragua."<sup>32</sup> It also alleges that the problem is compounded by Colombia's assertion that its title over the disputed territories also provides for sovereignty over an immense part of the Caribbean Sea pertaining to Nicaragua.<sup>33</sup> The application states that despite how the dispute over the islands and keys is resolved, Colombia claims dominion over 50,000 square kilometers of maritime space that belongs to Nicaragua.<sup>34</sup> Nicaraguan officials stated that when looking at the most recent official Colombian map, which was duly protested by Nicaragua when it was issued in 1995, "one can appreciate the total disproportion and inequity of the self-serving attribution of maritime spaces."<sup>35</sup> As a result, the livelihood of many people living on the Nicaraguan coast is in danger.<sup>36</sup> Nicaragua contends that, even if the 1928 Treaty is considered valid, it is not a treaty of delimitation (a treaty fixing boundary lines) and, therefore, Colombia to does not have a legal basis to claim sovereignty over the waters.<sup>37</sup>

Nicaragua's second request is that the ICJ fix a single maritime boundary between both states' continental shelf, and to establish exclusive economic zones of the sea based on the court's conclusion concerning the disputed islands and keys.<sup>38</sup> Nicaragua recognizes that the overall outcome concerning maritime boundaries will have a great impact upon fishing, oil exploration and production, and the livelihood of its people as this determination establishes who has exclusive, lawful use of certain areas of the Caribbean Sea.<sup>39</sup>

Additionally, Nicaragua reserves the potential right to collect compensation from Colombia for unjust enrichment.<sup>40</sup> This right is contingent upon the ICJ's holdings concerning the two primary issues presented by Nicaragua.<sup>41</sup> Specifically, the Nicaraguan government reserves the right to claim compensation for unjust enrichment caused by Colombia's possession of the islands, keys, and maritime spaces up to the eighty-second meridian in the absence of lawful title, as well as for interference with

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30. *Id.*

31. *Id.*

32. *Id.* at 2-4.

33. Application of the Republic of Nicaragua, *supra* note 1, at 4.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. Application of the Republic of Nicaragua, *supra* note 1.

40. *Id.* at 8.

41. *Id.*

Nicaraguan fishing vessels.<sup>42</sup>

Overall, Nicaragua justifies judicial intervention on the basis that diplomatic negotiations between the two countries have failed.<sup>43</sup> The Nicaraguan government maintains that the last real effort on the part of Colombia occurred at the IX Meeting of Heads of States and Governments of the Group of Rio in Quito, Ecuador on September 6, 1995.<sup>44</sup> The President of Colombia, His Excellency Ernesto Samper, stated that his Minister of Foreign Affairs was to meet with his Nicaraguan counterpart in order to discuss the issues that separated the two countries.<sup>45</sup> In the President's own words, these issues were to include "possible differences that existed on the subject of frontiers."<sup>46</sup> The meeting, however, was cancelled on September 12, 1995, by the Minister of Foreign Affairs who stated that Colombia would not discuss issues of Caribbean sovereignty since "this was a matter that had been totally decided by an international treaty."<sup>47</sup> This declaration was followed by a naval demonstration on the eighty-second meridian at the latitude of parallel twelve and repeated statements reiterating that there was nothing to discuss concerning the territorial dispute.<sup>48</sup>

In November 1996, a new Colombian government was elected and several unsuccessful attempts were made to resolve the issue with Nicaragua.<sup>49</sup> Nicaragua claims that any possibility of solving the dispute through diplomatic negotiations was laid to rest when, on November 30, 1999, Colombia ratified a treaty it had signed with Honduras, a treaty that "had been denounced by Nicaragua since its signature in 1986 as a violation of her territorial sovereignty and rights."<sup>50</sup> Nicaragua believes that this ratification precludes any diplomatic resolution between the two countries.<sup>51</sup>

By an Order of the Court on February 26, 2002, the ICJ fixed time limits for filing written pleadings in the *Nicaragua v. Colombia* case.<sup>52</sup> The deadline for filing of a Memorial by Nicaragua was set for April 28, 2003, and June 28, 2004, for the filing of a Counter-Memorial by Colombia.<sup>53</sup>

### III. COLOMBIA DENIES JURISDICTION

On July 21, 2003, Colombia challenged the proceedings instituted by

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42. *Id.*

43. *Id.* at 6.

44. *Id.*

45. Application of the Republic of Nicaragua, *supra* note 1, at 6.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. Press Release of Mar. 1, 2002, *supra* note 4.

53. *Id.*

Nicaragua.<sup>54</sup> In its preliminary objection, the Colombian government claimed that the ICJ lacks jurisdiction over the dispute between the two nations.<sup>55</sup>

In its December 6, 2001 application, Nicaragua offers what it believes are sufficient foundations for ICJ jurisdiction. Nicaragua first relies upon article XXXI of the American Treaty on Pacific Settlement (the Pact of Bogata) of April 30, 1948, which was ratified by both countries without any pertinent reservation.<sup>56</sup> This article 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.”<sup>57</sup> In addition, Nicaragua relies upon the “Optional Clause” of the ICJ “whereby the two states have accepted the Court’s compulsory jurisdiction.”<sup>58</sup>

As a result of Colombia’s preliminary objection and in accordance with paragraph 5 of article 79 of the Rules of the Court, the ICJ suspended proceedings on the merits.<sup>59</sup> Paragraph 5 provides in relevant part: “[u]pon receipt by the Registry of a preliminary objection, the proceedings on the merits shall be suspended and the Court . . . shall fix the time-limit within which the other party may present a written statement of its observations and submissions. . . .”<sup>60</sup> On September 29, 2003, the ICJ fixed January 26, 2004 as the time-limit for “the filing by Nicaragua of a written statement of its observations and submissions on the preliminary objections to jurisdiction raised by Colombia.”<sup>61</sup>

#### IV. POTENTIAL IMPACTS OF *NICARAGUA V. COLOMBIA*

Although the outcome of the case is not yet clear, current discussion concerns the dispute’s impacts, as well as speculation surrounding the potential impacts of the ICJ’s decision. It is inevitable that both the proceedings and the ICJ’s holding will produce wide-ranging effects upon those parties involved, including Nicaragua, Colombia, and the disputed islands and keys. Particular interest surrounds the ongoing consequences

54. *Colombia Denies World Court Jurisdiction*, *supra* note 5.

55. *Id.*

56. Application of the Republic of Nicaragua, *supra* note 1, at 2. .

57. American Treaty on Pacific Settlement (Pact of Bogata) art. XXXI, Apr. 30, 1948, 30 U.N.T.S. 55, available at <http://www.yale.edu/lawweb/avalon/intdip/interam/intam09.htm>.

58. Pieter H. F. Bekker, *Nicaragua Sues Colombia Before the World Court Over a Dispute Concerning Territorial Questions and Maritime Delimitation in the Western Caribbean*, ASIL INSIGHTS, Dec. 2001, <http://www.asil.org/insights/insigh79.htm>.

59. Press Release, International Court of Justice, Fixing of the Time-Limit for the Filing by Nicaragua of a Written Statement on the Preliminary Objections to Jurisdiction Raised by Colombia (Sep. 29, 2003), available at [http://212.153.43.18/icjwww/ipresscom/ipress2003/ipresscom2003-32\\_nicol\\_20030929.htm](http://212.153.43.18/icjwww/ipresscom/ipress2003/ipresscom2003-32_nicol_20030929.htm) [hereinafter Press Release of Sept. 29, 2003].

60. Rules of Court, 1978 I.C.J. Acts & Docs. art. 79, para. 3, at <http://212.153.43.18/icjwww/basicdocuments/basictext/basicrulesofcourt.html>.

61. Press Release of Sept. 29, 2003, *supra* note 59.

of the proceedings upon fishing, oil production and exploration, and the people of the disputed territories.

#### A. THE FISHING INDUSTRY

The territorial dispute has already had a profound effect on the fishing industry. In fact, this particular industry was affected by tensions between the two countries concerning issues of title before proceedings were instituted, and served as a basis for Nicaragua's complaint.<sup>62</sup> In its application to the ICJ, Nicaragua argues that Colombia claims dominion over more than 50,000 square kilometers of maritime space that belong to Nicaragua based on its alleged sovereignty over the islands and keys involved, irrespective of how the issue of sovereignty is resolved.<sup>63</sup> Relying upon its assertion of ownership over this maritime space, the Colombian navy, a navy far more powerful than that of Nicaragua, patrols this area.<sup>64</sup> In the past, Colombian patrol boats have regularly intercepted and captured Nicaraguan fishing vessels and vessels licensed by Nicaragua "in areas as close as 70 miles off the Nicaraguan coast."<sup>65</sup> As a result of the Colombian navy's presence, few Nicaraguan vessels are willing to venture to the east of the eighty-second meridian, and those that do face a high risk of capture.<sup>66</sup> The Colombian navy has even made incursions to the west of the eighty-second meridian "in pursuit of vessels or simply to intimidate the fishing boats."<sup>67</sup> Nicaragua insists that such action continues to deter Nicaraguan fishermen, thereby limiting its access to the Caribbean Sea's resources, and imperiling the livelihood of the Nicaraguan people, especially those who live on the coast.<sup>68</sup> In an effort to preserve its fishing industry, in December 1999, Nicaragua banned Colombian fishing boats from its waters.<sup>69</sup> But, now Nicaragua requests that the ICJ resolve the matter legally and definitively. Prompted by Nicaragua's December 6, 2001 application to the ICJ, the Colombian military has increased its presence near the San Andres Archipelago.<sup>70</sup> Nicaragua takes the position that if the ICJ refuses to establish its maritime area, the livelihood of its fishing industry, and the people that rely upon, it will be in jeopardy.<sup>71</sup>

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62. Application of the Republic of Nicaragua, *supra* note 1

63. *Id.* at 4.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 6.

68. Application of the Republic of Nicaragua, *supra* note 1, at 4-6.

69. *Nicaragua Bans Honduran, Colombian Fishing Boats as Dispute Worsens*, CNN.COM, Dec. 16, 1999, available at <http://www.latinamericanstudies.org/nicaragua/bans.htm>.

70. Selsky, *supra* note 25.

71. Application of the Republic of Nicaragua, *supra* note 1, at 4-6.

### B. EXPLORATION AND PRODUCTION OF OIL

Exploration and production of oil is another economic aspect substantially impacted by the dispute. According to the Ocean Conservancy, an ocean advocacy group, “[t]he San Andres islands are surrounded by some of the largest and most productive coral reefs in the Western Hemisphere,” therefore, oil and gas present a major concern in this conflict.<sup>72</sup> The right to explore and produce oil and gas rests upon the determination of which country has sovereignty over the disputed territory.<sup>73</sup> Conflicting claims of sovereignty have already affected oil and gas transactions. Most recently, on May 12, 2003, Defence Minister Martha Lucia Ramirez of Colombia warned that if Nicaragua began to explore for oil in the territory at issue, Colombia was prepared to use force to prevent them from doing so.<sup>74</sup> The Colombian navy had ships patrolling the waters around the archipelago and she assured that “[t]he navy has sufficient capacity to defend and guarantee the sovereignty of our waters,” however, she added that Colombia hoped to reach peaceful solutions.<sup>75</sup> This declaration was provoked by Nicaraguan action that granted oil exploration concessions to four small U.S. companies.<sup>76</sup> The Nicaraguan government and one of the oil companies, MKJ Xplorations, Inc., both publicly insisted that all of the potential oil fields lie within Nicaragua’s established exploration zones to the west of the eighty-second meridian and do not spill over into the disputed areas.<sup>77</sup> Colombia reacted nonetheless because the location of the concessions was not immediately clear.<sup>78</sup> Since future exploration and production will depend upon the resolution, the ultimate impact of the dispute cannot be predicted at this point; however, judging from past events, it is clear that the ICJ decision will be of extraordinary significance upon the exploration and production rights of the nations.

### C. PEOPLE OF THE DISPUTED TERRITORIES

Perhaps the greatest impact of all will be that upon the people of the San Andres archipelago, particularly the native islanders. The islanders, who are the descendants of British pirates, African slaves, and Puritan settlers, are caught in the middle of the conflict.<sup>79</sup> However, many feel that they have little in common with either Nicaragua or Colombia.<sup>80</sup> The natives accuse Nicaraguan trawlers of poaching their fish<sup>81</sup> and view Colombia with suspicion and resentment.<sup>82</sup> They blame Colombia for

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72. Baena, *supra* note 20.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. Varney, *supra* note 6.

78. Baena, *supra* note 20.

79. Martin Hodgson, *Trouble in Paradise*, *THE GUARDIAN*, June 11, 2002, available at <http://www.guardian.co.uk/print/0,3858,4431045-103680,00.html>.

80. *Id.*

81. *Id.*

82. Selsky, *supra* note 25.

problems associated with overpopulation (San Andres is currently one of the most densely populated islands in the Caribbean), and they believe that the Colombian government has intentionally flooded San Andres with mainlanders in an attempt to forcibly impose the mainland culture and to secure its stake in the archipelago.<sup>83</sup> As a result, the natives are left without jobs or opportunities and fear losing their customs, culture, and tradition.<sup>84</sup> In the end, however, in terms of the dispute, “[t]here is not one islander who would choose Nicaragua.”<sup>85</sup> And, “[t]here is no doubt that they would prefer to be with Colombia” but would prefer a different relationship.<sup>86</sup> Frustrated by the dispute, native islanders have called for greater autonomy.<sup>87</sup> Recognizing that they rely upon the money that the Colombian government pumps into the islands, they do not seek independence but, instead, desire self-government and a voice in the territorial dispute, which they have lacked up to this point.<sup>88</sup> The natives were particularly outraged by their lack of involvement in Colombia’s reaction to Nicaragua’s possible oil exploration in the area.<sup>89</sup> In response, the natives are now demanding that their desires be met.<sup>90</sup> For example, in May 2003, the Archipelago Movement for Ethic Native Self-Determination (AMEN-SD), a group advocating the rights of the indigenous native people of the Archipelago of St. Andrew, Providence, and Kathleena, produced a declaration seeking greater autonomy and involvement and distributed it amongst international human rights and anti-racism organizations.<sup>91</sup> While the outcome of the natives’ efforts is uncertain, there is no doubt that their future will be heavily dependant upon the eventual resolution of *Nicaragua v. Colombia*.

## V. CONCLUSION

The future of the case is far from certain at this point. It remains to be seen what decision the ICJ will make regarding the issues of title and maritime delimitation—or if it will be determined that the court has the jurisdiction to make such a decision at all. What is clear is that, regardless of the outcome, the case will have serious effects on the fishing and oil industries, as well as the people of the disputed territories. In the end, considering the high stakes of this case, it can be assured that the promise of significant impacts is the only certainty for now.

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83. Hodgson, *supra* note 79.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. Dulph Mitchell, *Indigenous Native Raizal People Extremely Alarmed by Colombian President, Congressmen and Ex-Chancellor's Declarations in Relation to Nicaragua's Possible Oil Exploration in the Area of the Archipelago*, C.A.C. REVIEW (Caribbean Amerindian Centrelink), Aug. 2003, <http://www.kacike.org/cac-ike/August2003.html>.

90. *Id.*

91. *Id.*



# Articles

