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CR 2021/17

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2021

Public sitting

held on Monday 27 September 2021, at 3 p.m., at the Peace Palace,

President Donoghue presiding,

***in the case concerning* Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua *v.* Colombia)**

VERBATIM RECORD

ANNÉE 2021

Audience publique

tenue le lundi 27 septembre 2021, à 15 heures, au Palais de la Paix,

sous la présidence de Mme Donoghue, présidente,

***en l'affaire relative à des* Violations alléguées de droits souverains et d'espaces maritimes dans la mer des Caraïbes (Nicaragua c. Colombie)**

COMPTE RENDU

Present:	President	Donoghue
	Vice-President	Gevorgian
	Judges	Tomka
		Abraham
		Bennouna
		Yusuf
		Xue
		Sebutinde
		Bhandari
		Robinson
		Salam
		Iwasawa
		Nolte
	Judges *ad hoc*	Daudet
		McRae
	Registrar	Gautier

Présents : Mme Donoghue, présidente
M. Gevorgian, vice-président
MM. Tomka
Abraham
Bennouna
Yusuf
Mmes Xue
Sebutinde
MM. Bhandari
Robinson
Salam
Iwasawa
Nolte, juges
MM. Daudet
McRae, juges *ad hoc*

M. Gautier, greffier

The Government of Nicaragua is represented by:

H.E. Mr. Carlos José Argüello Gómez, Ambassador of the Republic of Nicaragua to the Kingdom of the Netherlands,

as Agent and Counsel;

Mr. Alex Oude Elferink, Director, Netherlands Institute for the Law of the Sea, Professor of International Law of the Sea at Utrecht University,

Mr. Vaughan Lowe, QC, Emeritus Chichele Professor of Public International Law, University of Oxford, member of the Institut de droit international, member of the Bar of England and Wales,

Mr. Lawrence H. Martin, Attorney at Law, Foley Hoag LLP, member of the Bars of the United States Supreme Court, the District of Columbia and the Commonwealth of Massachusetts,

Mr. Alain Pellet, Emeritus Professor of the University Paris Nanterre, former Chairman of the International Law Commission, President of the Institut de droit international,

Mr. Paul Reichler, Attorney at Law, Foley Hoag LLP, member of the Bars of the United States Supreme Court and the District of Columbia,

as Counsel and Advocates;

Ms Claudia Loza Obregon, Legal Adviser, Ministry of Foreign Affairs of Nicaragua,

Ms Tessa Barsac, Consultant in International Law, Master (University Paris Nanterre), LLM (Leiden University),

as Assistant Counsel;

Mr. Robin Cleverly, MA, DPhil, CGeol, FGS, Law of the Sea Consultant, Marbdy Consulting Ltd,

as Scientific and Technical Adviser;

Ms Sherly Noguera de Argüello, MBA,

as Administrator.

The Government of Colombia is represented by:

H.E. Mr. Carlos Gustavo Arrieta Padilla, former Judge of the Council of State of Colombia, former Attorney General of Colombia and former Ambassador of Colombia to the Netherlands,

as Agent;

H.E. Mr. Manuel José Cepeda Espinosa, former President of the Constitutional Court of Colombia, former Permanent Delegate of Colombia to UNESCO and former Ambassador of Colombia to the Swiss Confederation,

as Co-Agent;

Le Gouvernement du Nicaragua est représenté par :

S. Exc. M. Carlos José Argüello Gómez, ambassadeur de la République du Nicaragua auprès du Royaume des Pays-Bas,

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M. Alex Oude Elferink, directeur de l'Institut néerlandais du droit de la mer, professeur de droit international de la mer à l'Université d'Utrecht,

M. Vaughan Lowe, QC, professeur émérite de droit international public à l'Université d'Oxford, titulaire de la chaire Chichele, membre de l'Institut de droit international, membre du barreau d'Angleterre et du pays de Galles,

M. Lawrence H. Martin, avocat au cabinet Foley Hoag LLP, membre des barreaux de la Cour suprême des Etats-Unis d'Amérique, du district de Colombia et du Commonwealth du Massachusetts,

M. Alain Pellet, professeur émérite de l'Université Paris Nanterre, ancien président de la Commission du droit international, président de l'Institut de droit international,

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comme agent ;

S. Exc. M. Manuel José Cepeda Espinosa, ancien président de la Cour constitutionnelle de Colombie, ancien représentant permanent de la Colombie auprès de l'UNESCO et ancien ambassadeur de Colombie auprès de la Confédération suisse,

comme coagent ;

H.E. Ms Marta Lucía Ramírez Blanco, Vice-President and Minister for Foreign Affairs of the Republic of Colombia,

H.E. Mr. Everth Hawkins Sjogreen, Governor of San Andrés, Providencia and Santa Catalina, Colombia,

as National Authorities;

Mr. W. Michael Reisman, McDougal Professor of International Law at Yale University, member of the Institut de droit international,

Mr. Rodman R. Bundy, former *avocat à la Cour d'appel de Paris*, member of the Bar of the State of New York, partner at Squire Patton Boggs LLP, Singapore,

Sir Michael Wood, KCMG, member of the International Law Commission, member of the Bar of England and Wales,

Mr. Eduardo Valencia-Ospina, former Registrar and Deputy-Registrar of the International Court of Justice, member and former Special Rapporteur and Chair of the International Law Commission, former Chair of the Latin American Society of International Law,

Mr. Jean-Marc Thouvenin, Professor at the University Paris Nanterre, Secretary-General of the Hague Academy of International Law, associate member of the Institut de droit international, member of the Paris Bar, Sygna Partners,

Ms Laurence Boisson de Chazournes, Professor of International Law and International Organization at the University of Geneva, member of the Institut de droit international,

H.E. Mr. Kent Francis James, former Ambassador of Colombia to Belize, former Ambassador of Colombia to Jamaica,

as Counsel and Advocates;

Mr. Andrés Villegas Jaramillo, LLM, Co-ordinator, Group of Affairs before the International Court of Justice at the Ministry of Foreign Affairs of Colombia, member of the Legal Sub-Commission of the Caribbean Sea Commission, Association of Caribbean States,

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S. Exc. M. Everth Hawkins Sjogreen, gouverneur de San Andrés, Providencia et Santa Catalina, Colombie,

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S. Exc. M. Kent Francis James, ancien ambassadeur de Colombie au Belize et ancien ambassadeur de Colombie en Jamaïque,

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H.E. Mr. Juan José Quintana Aranguren, Head of Multilateral Affairs, former Ambassador of Colombia to the Netherlands,

H.E. Mr. Fernando Antonio Grillo Rubiano, Ambassador of the Republic of Colombia to the Kingdom of the Netherlands and Permanent Representative of Colombia to the Organisation for the Prohibition of Chemical Weapons,

Ms Jenny Sharyne Bowie Wilches, Second Secretary, Embassy of Colombia in the Netherlands,

Ms Viviana Andrea Medina Cruz, Second Secretary, Embassy of Colombia in the Netherlands,

Mr. Sebastián Correa Cruz, Third Secretary,

Mr. Raúl Alfonso Simancas Gómez, Third Secretary, Group of Affairs before the International Court of Justice,

Ministry of Foreign Affairs of Colombia;

Rear Admiral Ernesto Segovia Forero, Chief of Naval Operations,

CN Hermann León, Delegate of Colombia to the International Maritime Organization,

CN William Pedroza, National Navy of Colombia, Director of Maritime and Fluvial Interests Office,

Navy of the Republic of Colombia;

Mr. Scott Edmonds, Cartographer, Director of International Mapping,

Ms Victoria Taylor, Cartographer, International Mapping,

as Technical Advisers;

Mr. Gershon Hasin, LLM, JSD, Yale Law School,

as Legal Assistant;

Mr. Mark Taylor Archbold, Consultant for the National Unit of Disaster Risk Management,

Mr. Joseph Richard Jessie Martinez, Consultant for the National Unit of Disaster Risk Management,

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S. Exc. M. Juan José Quintana Aranguren, chef des affaires multilatérales, ancien ambassadeur de Colombie aux Pays-Bas,

S. Exc. M. Fernando Antonio Grillo Rubiano, ambassadeur de la République de Colombie auprès du Royaume des Pays-Bas et représentant permanent de la Colombie auprès de l'Organisation pour l'interdiction des armes chimiques,

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Mme Viviana Andrea Medina Cruz, deuxième secrétaire, ambassade de Colombie aux Pays-Bas,

M. Sebastián Correa Cruz, troisième secrétaire,

M. Raúl Alfonso Simancas Gómez, troisième secrétaire, groupe chargé des affaires portées devant la Cour internationale de Justice,

ministère des affaires étrangères de la République de Colombie ;

Le contre-amiral Ernesto Segovia Forero, chef des opérations navales,

Le capitaine de vaisseau Hermann León, représentant de la Colombie auprès de l'Organisation maritime internationale,

Le capitaine de vaisseau William Pedroza, marine nationale de Colombie, chef de la direction chargée des intérêts maritimes et fluviaux,

marine de la République de Colombie ;

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Mme Victoria Taylor, cartographe, International Mapping,

comme conseillers techniques ;

M. Gershon Hasin, LLM, JSD, faculté de droit de l'Université de Yale,

comme assistant juridique ;

M. Mark Taylor Archbold, consultant auprès de l'unité nationale de gestion des risques de catastrophe,

M. Joseph Richard Jessie Martinez, consultant auprès de l'unité nationale de gestion des risques de catastrophe,

comme conseillers.

The PRESIDENT: Please be seated. The sitting is open. I would like to note that, today, the following judges are present with me in the Great Hall of Justice: Vice-President Gevorgian and Judges Tomka, Bennouna, Sebutinde and Nolte; while Judges Abraham, Yusuf, Xue, Bhandari, Robinson, Salam and Iwasawa, and Judges *ad hoc* Daudet and McRae are participating by video link.

The Court meets this afternoon to hear Nicaragua's second round of oral argument on its own claims.

I shall now give the floor to Professor Alain Pellet. You have the floor, Sir.

M. PELLET :

LES BIZARRERIES JURIDIQUES DES THÈSES COLOMBIENNES

1. Madame la présidente, Mesdames et Messieurs les juges, la semaine dernière, la Colombie a plaidé une affaire dans laquelle nous avons du mal à reconnaître celle que le Nicaragua vous a soumise par sa requête du 26 novembre 2013. Comme l'ambassadeur James s'agissant des Raizals, Laurence Boisson de Chazournes a beaucoup fait vibrer la corde sensible en mettant en accusation la politique environnementale nicaraguayenne qui serait «au cœur du présent différend»[1] — tandis que, pour Jean-Marc Thouvenin, «ce qui est en jeu dans cette affaire, c'est la liberté de navigation»[2].

2. Dans un premier temps, je m'emploierai donc à nouveau à remettre l'affaire sur ses rails en rappelant de quoi il s'agit et… de quoi il ne s'agit pas. Cela me conduira à revenir sur l'étendue de la compétence de la Cour et la prétendue irrecevabilité de l'invocation par le Nicaragua de certains faits survenus postérieurement à l'introduction de la requête. Je dirai ensuite quelques mots, plus largement, des vains efforts de la Colombie pour manipuler le droit applicable.

I. L'objet de l'affaire

3. Madame la présidente, l'objet de l'affaire qui nous réunit est décrit, de manière claire et suffisante, par le premier membre de phrase du paragraphe 2 de la requête : «Le différend porte sur des violations des droits souverains et des espaces maritimes du Nicaragua qui lui ont été reconnus par la Cour dans son arrêt du 19 novembre 2012...» Le même paragraphe ajoutait : «ainsi que sur la

[1] CR 2021/14, p. 35, par. 3 (Boisson de Chazournes).

[2] CR 2021/15, p. 50, par. 2 (Thouvenin) ; voir aussi, par exemple, CR 2021/14, p. 14, par. 27 (Cepeda Espinosa).

menace de la Colombie de recourir à la force pour commettre ces violations». Mais, dans votre sagesse, vous avez retenu, par votre arrêt du 17 mars 2016, l'exception préliminaire soulevée à l'encontre de cette seconde demande — elle ne fait donc pas l'objet du présent différend : contrairement à l'Etat défendeur, le Nicaragua se plie, lui, aux décisions de la Cour.

4. La seule question est donc de savoir si la Colombie respecte, non pas votre arrêt de 2012 en tant que tel, mais les droits en résultant en ce qui concerne aussi bien leur extension spatiale que leur intégrité — intégrité : cela veut dire, les droits *souverains* appartenant au Nicaragua dans sa zone économique *exclusive*. Il est clair que la Partie colombienne ne s'y résigne pas — ni dans les faits, ni dans les discours de ses dirigeants, ni même dans les plaidoiries de ses représentants devant la Cour de céans. Toutes leurs contorsions verbales ne peuvent nier l'évidence : la Colombie entend, pour reprendre la formule de son ancien président, «continuer à exercer un plein contrôle et une pleine juridiction» dans sa «zone contiguë intégrale réunissant les zones contiguës de toutes les îles et cayes [qu'elle possède] dans la partie occidentale de la mer des Caraïbes»[3] ; ou bien, selon le titulaire actuel de cette haute fonction, «conserver tous les outils qui nous permettent d'assurer l'intégrité du territoire colombien»[4], et cela au détriment des zones maritimes relevant du Nicaragua.

5. Dans sa nouvelle présentation de l'affaire, la Colombie s'emploie essentiellement à minimiser ses activités dans la ZEE du Nicaragua. Elle se fait la représentante des intérêts de la communauté internationale dans son ensemble et la gardienne de la préservation de l'environnement sans égard pour les droits souverains du Nicaragua. Elle ne contrôle point ; elle ne contraint pas, elle «observe et informe» — l'expression constitue la clé de voûte de toute la plaidoirie de la professeure Boisson de Chazournes, dans laquelle elle n'apparaît pas moins de treize fois[5]. Cela n'est évidemment pas tenable, ne serait-ce que parce que ce n'est pas avec des navires de guerre que l'on procède à l'observation et à l'information relatives à la protection de l'environnement. M[e] Reichler

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[3] Déclaration du président Juan Manuel Santos concernant la stratégie globale de la Colombie face à l'arrêt de la Cour internationale de Justice, 9 septembre 2013 (MN, annexe 4) ou https://www.radionacional.co/actualidad/colombia-va-defender-sus-intereses-sobre-litigio-con-nicaragua.

[4] «Presidente Duque ve con buenos ojos propuesta de Uribe sobre «consulta popular» para confirmar límite con Nicaragua», *Semana*, 23 septembre 2021, https://www.semana.com/nacion/articulo/presidente-duque-ve-con-buenos-ojos-propuesta-de-uribe-sobre-consulta-popular-para-confirmar-limite-con-nicaragua/202112/ (espagnol original : «seguir manteniendo vivas todas las herramientas que nos permitan tener la integralidad del territorio colombiano»).

[5] CR 2021/14, p. 36, par. 7 et 8, p. 37, par. 11, p. 41, par. 25, p. 43, par. 30, p. 45-46, par. 40-42, 46 et sect. I et II (Boisson de Chazournes). Voir aussi : p. 18, par. 43 (Cepeda Espinosa) ; p. 29, par. 22 et p. 33, par. 41 (Wood) ; CR 2021/15, p. 19, par. 50 (Bundy).

y reviendra plus longuement ; et le professeur Lowe, pour sa part, montrera que la conception qu'a l'Etat défendeur des droits lui revenant dans la zone contiguë «intégrale» qu'il prétend instaurer est totalement incompatible avec les règles coutumières applicables à la zone économique exclusive et à la zone contiguë.

6. En transformant leur défense des intérêts de la Colombie en une attaque, vaine, mal fondée, hors de cause, dirigée contre la politique nicaraguayenne de protection de l'environnement, nos contradicteurs confirment une nouvelle fois que l'Etat défendeur fait fi des décisions de votre haute juridiction.

7. Il se soucie comme d'une guigne de votre ordonnance du 15 novembre 2017 relative à ses demandes reconventionnelles. Il se comporte comme si vous n'aviez pas rejeté les deux premières exceptions se rapportant, l'une comme l'autre, selon le résumé que vous en avez fait, «aux prétendues violations, par le Nicaragua, de l'obligation qui lui incombe de protéger et de préserver l'environnement marin»[6]. Constatant «l'absence de connexité directe, tant en fait qu'en droit, entre [ces] demandes reconventionnelles de la Colombie et les demandes principales du Nicaragua»[7], vous avez jugé ces demandes «irrecevable[s] comme telle[s]» et, dès lors, comme *ne faisant «pas partie de l'instance en cours»*[8]. Elles n'en font pas partie, et la Colombie ne peut pas aujourd'hui réintroduire par la fenêtre, à l'occasion de ses plaidoiries sur le fond, ce que vous aviez exclu par la grande porte, à la majorité de 15 voix contre une. A cette occasion, la Colombie avait déjà fait valoir, selon le résumé qu'en a donné la Cour au paragraphe 29 de son ordonnance, que le Nicaragua aurait manqué aux obligations lui incombant «en matière de préservation et de protection de l'environnement marin et [dans] l'exercice de la diligence requise à cet égard...»[9]. La Colombie avait précisé que ces manquements se seraient produits dans «la zone couvrant certaines parties de la réserve de biosphère Seaflower et l'aire marine protégée du même nom, dont l'espace maritime entourant le banc de Luna Verde, … ainsi que la zone contiguë qu'elle a proclamée»[10]. Il est assez

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[6] *Violations alléguées de droits souverains et d'espaces maritimes dans la mer des Caraïbes (Nicaragua c. Colombie), demandes reconventionnelles, ordonnance du 15 novembre 2017, C.I.J. Recueil 2017*, p. 300, par. 35.

[7] *Ibid.*, p. 302, par. 39.

[8] *Ibid.*, p. 314, par. 82.A(1) et (2) (les italiques sont de nous).

[9] *Ibid.*, p. 298, par. 29.

[10] *Ibid.*

plaisant (et en même temps choquant) de constater que toute la plaidoirie de Laurence Boisson de Chazournes a consisté en fait à reprendre et développer très exactement ces mêmes arguments.

8. Madame la présidente, nous ne suivrons pas cet exemple — ce mauvais exemple — et les conclusions que notre agent va lire tout à l'heure s'en tiendront strictement aux limites que la Cour a définies dans son arrêt sur les exceptions préliminaires. Je souhaite cependant ajouter une remarque : on peut avoir des doutes sur certaines conclusions demandant à la Cour d'ordonner à l'Etat défendeur d'offrir des garanties de non-répétition. Mais s'il y a un cas dans lequel cette forme de réparation s'impose, c'est assurément celui, très exceptionnel, dans lequel un Etat mauvais perdant se refuse à mettre en œuvre les droits résultant de l'un de vos arrêts. Nous maintenons donc cette conclusion visant à ce que la Colombie reconnaisse («acknowledge» en anglais), formellement et définitivement, la frontière maritime délimitée par la Cour dans son arrêt du 19 novembre 2012 et qu'il la respectera[11].

9. Mais nous croyons aussi que, compte tenu des circonstances particulières de cette affaire, au cours de laquelle la Colombie a montré le peu de cas qu'elle fait des décisions de l'organe judiciaire principal des Nations Unies, il serait approprié à tous points de vue que la Cour elle-même s'associe à cette garantie et déclare qu'elle restera saisie de l'affaire jusqu'à ce que la Colombie reconnaisse (toujours «acknowledge») et respecte les droits du Nicaragua que votre arrêt du 19 novembre 2012 lui a attribués dans la mer des Caraïbes.

10. Nous sommes bien conscients qu'il s'agit d'une demande inhabituelle ; elle est à la mesure du caractère exceptionnel de l'affaire. Et d'ailleurs, elle n'est pas sans précédent. Ainsi, dans les affaires des *Essais nucléaires*, la Cour a spontanément fait observer que : «si le fondement du présent arrêt [de 1974] était remis en cause, le requérant pourrait demander un examen de la situation conformément aux dispositions du Statut». Et vous avez ajouté que la dénonciation par la France du fondement «de la compétence de la Cour en l'espèce … ne saurait en soi faire obstacle à la présentation d'une telle demande»[12].

11. Vous avez dit ceci alors même que vous aviez précisé qu'il n'entre pas dans votre fonction d'envisager qu'«un Etat [qui] a pris un engagement quant à son comportement futur ... ne le respecte

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[11] Voir MN, par. 4.66-4.73, conclusion 2 *d)*, et RN, conclusion 1 *g)*.

[12] *Essais nucléaires (Nouvelle-Zélande c. France), arrêt, C.I.J. Recueil 1974*, p. 477, par. 63.

pas»[13]. Dans notre affaire, l'inenvisageable s'est produit : l'Etat défendeur se refuse délibérément à respecter les droits découlant de votre arrêt ; c'est au moins aussi inacceptable et illicite que le non-respect d'un engagement unilatéral. La Cour a confirmé, dans son ordonnance du 22 septembre 1995, qu'une telle «procédure spéciale pouvait être envisagée lorsque les circonstances l'exigent»[14]. Nous espérons vivement qu'elles ne l'exigeront pas ; on ne peut toutefois pas totalement l'exclure au vu du comportement de la Colombie au cours des années écoulées.

II. L'étendue de la compétence de la Cour

12. Mesdames et Messieurs les juges, la plaidoirie de M[e] Bundy était censée établir que la Colombie n'a commis aucune violation des droits du Nicaragua dans la ZEE que lui a reconnue votre arrêt de 2012. Mon contradicteur, et néanmoins ami, n'en a pas moins consacré la plus grande partie de son intervention à tenter de neutraliser un très grand nombre des faits sur lesquels le Nicaragua s'appuie en invoquant la prétendue incompétence de la Cour pour en connaître. La raison en serait que «the Court lacks jurisdiction *ratione temporis* under the Pact of Bogotá to consider any events claimed to have occurred after 27 November 2013»[15], date à laquelle le pacte a cessé d'être en vigueur à l'égard de la Colombie, suite à sa dénonciation, survenue un an plus tôt.

13. Je ne discuterai pas la consistance et la portée de ces nombreux faits illicites, qui mettent la Colombie si mal à l'aise ; Paul Reichler s'en chargera avec son talent habituel. Il m'incombe seulement de rappeler[16] que, contrairement aux affirmations de Rodman Bundy, tous ces faits relèvent du différend que le Nicaragua a soumis à la Cour par sa requête du 26 novembre 2013.

14. Pour le montrer, je m'étais principalement appuyé lundi dernier sur l'interprétation généralement admise de l'article LVI du pacte de Bogotá. Elle semble l'être aussi par mon contradicteur puisque celui-ci ne nous reproche pas d'avoir mal interprété cette disposition. Mais il nous critique pour avoir négligé l'article XXXI. «Yet», he argued, «it is Article XXXI that not only contains the Contracting Parties' consent to the Court's jurisdiction, but equally importantly, the

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[13] *Ibid.*

[14] *Demande d'examen de la situation au titre du paragraphe 63 de l'arrêt rendu par la Cour le 20 décembre 1974 dans l'affaire des* Essais nucléaires (Nouvelle-Zélande c. France) *(Nouvelle-Zélande c. France), ordonnance du 22 septembre 1995, C.I.J. Recueil 1995*, p. 303-304, par. 52-54.

[15] CR 2021/14, p. 48, par. 4 (Bundy).

[16] Voir CR 2021/13, p. 37-39 (Pellet).

limits of that consent, including consent to the Court's jurisdiction *ratione temporis* to decide disputes referred to in that Article»[17].

15. Avec votre permission, Madame la présidente, revoyons donc ce que dit l'article XXXI (dans sa partie utile pour nous aujourd'hui) — le texte complet se trouve à l'onglet AP-1 du dossier des juges :

> «Conformément au paragraphe 2 de l'article 36 du Statut de la Cour internationale de Justice, les Hautes Parties Contractantes en ce qui concerne tout autre Etat américain déclarent reconnaître comme obligatoire de plein droit, et sans convention spéciale tant que le présent Traité restera en vigueur, la juridiction de la Cour sur tous les différends d'ordre juridique surgissant entre elles».

16. L'expression «tant que le présent Traité restera en vigueur» serait la clé de la question puisque cette disposition contient, comme l'a dit Rodman Bundy, «a clear temporal limitation to Colombia's consent to the Court's jurisdiction over a dispute concerning the existence of any fact which, if established, could constitute the breach of an international obligation»[18]. Nous en sommes bien conscients ; mais cette «limitation temporelle» n'ajoute rien à ce que dit l'article LVI. Comme la Cour l'a constaté dans son arrêt de 2016, après une analyse soigneuse des relations entre les articles XXXI et LVI du pacte et l'article 36, paragraphe 2, du Statut : «L'extinction ultérieure du pacte entre le Nicaragua et la Colombie n'a pas d'incidence sur la compétence qui existait à la date à laquelle l'instance a été introduite.»[19] Aucune nouvelle instance ne peut être introduite mais la limitation temporelle contenue dans l'article XXXI ne concerne que *le différend* soumis à la Cour, étant entendu qu'il l'est *dans son ensemble*, sans pouvoir être divisé, saucissonné, entre plusieurs litiges. Celui qui vous a été soumis par le Nicaragua est né avant la dénonciation du pacte par la Colombie ; il concerne «des violations des droits souverains et des espaces maritimes du Nicaragua qui lui ont été reconnus par la Cour dans son arrêt du 19 novembre 2012»[20]. Ces violations, qui trouvent leur origine commune dans le refus continu de la Colombie de respecter les droits que le Nicaragua tient de votre arrêt, forment un tout.

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[17] CR 2021/15, p. 15, par. 35 (Bundy).

[18] Voir CR 2021/15, p. 15, par. 37 (Bundy).

[19] *Violations alléguées de droits souverains et d'espaces maritimes dans la mer des Caraïbes (Nicaragua c. Colombie), exceptions préliminaires, arrêt, C.I.J. Recueil 2016 (I)*, p. 26, par. 48.

[20] Requête, par. 2.

17. En réalité, M^e^ Bundy invente une limitation temporelle de la compétence de la Cour en vertu de ~~***laquelle***~~ l'article XXXI totalement incompatible avec le texte et le contexte de cette disposition. Je relève que la Colombie — qui a soulevé quatre exceptions préliminaires pour tenter de s'opposer, en tout ou en partie, à la compétence de la Cour dans notre affaire — n'avait pas élevé cette objection. On le comprend : elle brille davantage par son originalité que par sa solidité et consiste à transformer sans raison une exception de compétence *ratione materiae* en une exception *ratione temporis*.

18. Nous convenons, bien entendu, que la compétence de la Cour s'étend exclusivement aux différends de nature juridique survenus pendant que le pacte était en vigueur pour les deux Parties. La Cour a déjà décidé, dans son arrêt de 2016, qu'un tel différend, né avant la dénonciation du pacte par la Colombie, a effectivement surgi en l'espèce, et qu'elle a compétence pour en connaître. Mais M. Bundy va plus loin, et prétend trouver une limitation supplémentaire à la compétence *temporelle* de la Cour dans les alinéas *a)* à *d)* de l'article XXXI, en particulier l'alinéa *c)*[21]. Vous ne sauriez l'admettre : ces alinéas — qui reprennent le texte de ceux figurant à l'article 36, paragraphe 2, du Statut de la Cour — concernent sa compétence matérielle, *ratione materiae*, et non sa compétence temporelle, *ratione temporis*. Il n'est donc nécessaire, ni selon l'article XXXI, ni selon l'article 36, paragraphe 2, que *les faits* constituant des violations du droit international se produisent tous avant que la base de juridiction ait pris fin. Il suffit que *le différend* ait pris naissance alors que ces instruments de consentement étaient en vigueur et que les faits survenus ultérieurement fassent partie de ce même différend. En l'espèce, les faits dont se prévaut le Nicaragua font, indépendamment de leur date, partie intégrante du différend — objet de sa requête. M^e^ Reichler y reviendra.

19. Dès lors, n'en déplaise à notre contradicteur, le problème se pose exactement dans les mêmes termes que cela était le cas dans les affaires qu'il s'efforce en vain de distinguer, relatives à la légalité de l'usage de la force ou à la *Compétence en matière de pêcheries* :

— dans le premier cas, selon les propres termes de Rodman Bundy, la question posée à la Cour était de savoir «si le *différend* — le mot «différend» *(dispute)* est souligné dans le compte rendu —

[21] CR 2021/15, p. 15-16, par. 36, 39 (Bundy).

était né avant ou après la déclaration facultative de la Yougoslavie» («whether the *dispute* arose before or after Yugoslavia's optional clause declaration»)[22], et,

— dans le second cas (dans l'affaire des *Pêcheries* entre l'Allemagne et l'Islande), il s'agissait de savoir — toujours selon notre contradicteur — si «one of Germany's submissions that was based on facts subsequent to the filing of the Application but arising directly out of the question which was the subject-matter of the Application»[23].

De la même manière, dans l'affaire qui nous occupe, qu'ils soient antérieurs à la requête ou postérieurs, *tous* les faits attribuables à la Colombie et invoqués par le Nicaragua établissent la réalité de la violation continue des droits du Nicaragua, qui est l'objet même (le subject matter) du différend.

20. La Colombie ne peut davantage se fonder sur l'affaire relative à *Certains biens*[24] : dans celle-ci, le différend portait exclusivement sur des faits pré-datant l'acceptation de la juridiction de la Cour par les deux parties et la question qui se posait était celle de la rétroactivité de l'exercice de la compétence.

21. Ce qui est fondamental dans l'affaire présente, c'est que le refus obstiné, persistant, continu, de la Colombie de reconnaître et respecter la juridiction et les droits souverains et exclusifs appartenant au Nicaragua dans sa ZEE ne résulte pas d'un fait isolé. Il s'agit d'un fait illicite composite au sens de l'article 15 des Articles de la CDI sur la responsabilité de l'Etat de 2001 — dont le texte avec les commentaires est reproduit à l'onglet AP-2 du dossier des juges. Il consiste en «une série d'actions … ou d'omissions, définie dans son ensemble comme illicite».

> «Dans un tel cas», comme le précise la Commission, «la violation s'étend sur toute la période débutant avec la première des actions ou omissions de la série et dure aussi longtemps que ces actions ou omissions se répètent et restent non conformes à ladite obligation internationale.»

22. Comme l'indique le commentaire de ce projet d'article : «le fait illicite est réputé s'étendre tout au long de la période commençant avec la commission de la première action ou omission»[25] ; au surplus, «cela n'exclut pas pour autant la possibilité que chacun des faits qui constituent la série soit

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[22] *Ibid.*, p. 17, par. 41, se référant, sans citer à *Licéité de l'emploi de la force (Yougoslavie c. Belgique), mesures conservatoires, ordonnance du 2 juin 1999, C.I.J. Recueil 1999 (I)*, p. 134, par. 28.

[23] CR 2021/15, p. 17-18, par. 45 (Bundy) ; voir *Compétence en matière de pêcheries (République fédérale d'Allemagne c. Islande), fond, arrêt, C.I.J. Recueil 1974*, p. 203, par. 72.

[24] CR 2021/15, p. 16, par. 39 (Bundy).

[25] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, p. 158, par. 10.

lui-même illicite…»[26]. Dans notre affaire, le fait déclencheur du fait composite illicite a été le refus de mettre en œuvre l'arrêt de 2012 dont est résultée une série d'actions, elles-mêmes illicites, violant la juridiction et les droits souverains du Nicaragua dans sa zone économique exclusive.

23. J'ajoute pour surplus de droit que même si, par impossible, la Cour estimait ne pas avoir compétence pour se prononcer sur l'illicéité, en tant que telle, de faits postérieurs à la dénonciation du pacte, il n'en résulterait nullement qu'elle devrait faire abstraction de ces faits pour apprécier celle des comportements de la Colombie antérieurs au 27 novembre 2013 — d'autant moins qu'ils sont dans la continuité des activités passées de la Colombie et confirment qu'elle n'a nullement l'intention de respecter les droits souverains et la juridiction du Nicaragua dans la ZEE que l'arrêt de 2012 lui a reconnus.

III. Le droit applicable

24. Mesdames et Messieurs de la Cour, je voudrais, pour terminer, relever certaines bizarreries persistantes dans l'argumentation colombienne en ce qui concerne maintenant le droit applicable.

25. La première, et non la moindre, concerne les explications embrouillées qu'a données le coagent de la Colombie au sujet des relations entre le droit interne de son pays et le droit international et, plus précisément, l'application de votre arrêt de 2012. Pour autant que je les ai comprises, il semble en résulter que cet arrêt serait applicable dans l'ordre international mais pas dans l'ordre interne, aussi longtemps en tout cas qu'un traité (international donc…) lui donnant effet n'aura pas été conclu[27]… Ceci résulterait de la sentence de la Cour constitutionnelle de 2014 (dont, curieusement, il n'a d'ailleurs plus du tout été question dans la suite des plaidoiries après la présentation du coagent). Selon cette décision, «the rulings of the International Court of Justice ha[ve] binding international effects and … Colombia ha[s] a "duty to comply [with it] in good faith", until a treaty [i]s concluded» — this is good news. And the Co-Agent added : «The Constitutional Court went on to say that Colombia "recognizes the binding character of the decisions adopted by an international court in the performance of treaties previously entered into, approved and ratified by Colombia".»[28]

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[26] *Ibid.*, par. 9.

[27] Voir CR 2021/14, notamment p. 13, par. 19 (Cepeda Espinosa).

[28] *Ibid.*, p. 12, par. 14.

26. C'est que, nous a-t-on expliqué : «La Colombie est un pays dualiste pour ce qui est des frontières territoriales et maritimes.» («Colombia is a dualist country in matters of territorial and maritime boundaries»)[29]. Le dualisme a bon dos, Madame la présidente ***!*** D'abord, il s'agit d'un dualisme «à la carte», car je peine à voir dans les articles 150 et 224 de la Constitution de la Colombie une adhésion de ce pays à la doctrine dualiste. (Les articles pertinents figurent à l'onglet AP-3 du dossier des juges.) De toute manière, il ne s'agit pas *d'incorporation* d'un éventuel traité dans le droit interne mais *de sa conclusion*, qui serait nécessaire pour donner effet à votre arrêt (sans considération pour l'article 94, paragraphe 1, de la Charte des Nations Unies ni pour l'article 60 de votre Statut). Je note également que l'article 101 de la Constitution, sur lequel s'appuie principalement la Cour constitutionnelle, dispose :

> «Les frontières de la Colombie sont celles établies dans les traités internationaux approuvés par le Congrès et dûment ratifiés par le président de la République, *et celles définies dans les sentences arbitrales auxquelles la nation est partie*.»

Il semble assez évident que ce qui vaut pour les sentences arbitrales vaut, au moins tout autant, pour les arrêts de la Cour mondiale.

27. Au demeurant, l'arrêt de la Cour de céans a été rendu en application de son Statut et du pacte de Bogotá, c'est-à-dire de traités dûment ratifiés par la Colombie. Malheureusement, ce ne sont apparemment pas de ces traités-là qu'il s'agit mais d'un futur traité, éventuel, à conclure avec le Nicaragua, qui aurait pour objet de donner effet à l'arrêt de 2012. Le Nicaragua, par la voix de son président[30], s'est d'ailleurs déclaré disposé à conclure un tel traité ; mais il n'en a plus été question par la suite et le coagent de la Colombie s'est bien gardé de prendre un engagement quelconque à cette fin pour l'avenir. Je constate d'ailleurs que, neuf ans après que la Cour a rendu son ***arrêt***, aucune initiative n'a été prise par la Colombie en ce sens. Je comprends que ses conseils aient jugé plus prudent de laisser l'ambassadeur Cepeda Espinosa se débrouiller de cet imbroglio.

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[29] *Ibid.*, par. 15.

[30] Voir «Daniel : 40 ans après le martyre d'Allende, la paix doit prévaloir», *El 19 Digital*, 11 septembre 2013, MN, annexe 39. Voir aussi «L'Assemblée nicaraguayenne favorable au dialogue avec la Colombie», *El Universal*, 12 septembre 2013 (MN, annexe 40) ; «Le Nicaragua propose à la Colombie de collaborer en vue de la mise en œuvre de l'arrêt de La Haye», *AFP*, 9 mai 2014, MN, annexe 46 (http://www.noticiasrcn.com/internacional-america/nicaragua-propone-coordinar-fallo-haya-colombia).

28. A défaut de respecter la Charte des Nations Unies et le Statut de la Cour, la Colombie s'appuie en revanche sur plusieurs traités qu'elle interprète à sa façon — qui n'est pas toujours orthodoxe, et est même souvent franchement imaginative.

29. En ce qui concerne le droit coutumier, Sir Michael Wood, qui en est spécialiste, a essayé de vous convaincre que la Colombie en avait identifié les règles avec grand soin. Mais en dehors d'une forte affirmation en ce sens au paragraphe 7 de sa plaidoirie de mercredi dernier[31], ni lui ni ses collègues n'ont tenté, comme il s'en targue, d'identifier sérieusement, sur la base de la pratique et de l'*opinio juris*, les règles coutumières qui s'éloigneraient de celles consacrées dans la convention de Vienne. Et, au fond, ils ont accepté, dans la quasi-totalité des cas, que les dispositions de la convention de Montego Bay les reflètent — surtout lorsqu'il s'agit de les opposer au Nicaragua[32].

30. En ce qui concerne la ZEE, Sir Michael a reconnu que l'essence même de son régime juridique est que «l'Etat côtier a «des droits souverains *aux fins d'exploration et d'exploitation, de conservation et de gestion des ressources naturelles*, biologiques ou non biologiques, des eaux surjacentes aux fonds marins, des fonds marins et de leur sous-sol»»[33] — ce faisant, il cite le texte de l'article 56, auquel il reconnaît donc une valeur coutumière. Il y ajoute, dans une note de bas de page[34], une mention de l'article 193 de la convention qui mérite que l'on s'y arrête un instant (il figure sous l'onglet AP-4 de vos dossiers) :

> «Les Etats ont le droit souverain d'exploiter *leurs* ressources naturelles selon *leur* politique en matière d'environnement et conformément à leur obligation de protéger et de préserver le milieu marin.»

— *leurs* ressources naturelles, selon *leur* politique en matière d'environnement…

31. Cette disposition suit l'article 192 aux termes duquel : «Les Etats ont l'obligation de protéger et de préserver le milieu marin.» Cette «obligation d'ordre général» (c'est le titre de l'article 192) est qualifiée par la règle spéciale énoncée à l'article suivant ; elle s'applique sous réserve du droit souverain qu'ont les Etats d'exploiter et de gérer les ressources naturelles des zones marines sur lesquelles ils ont juridiction, notamment dans leur zone économique *exclusive*. Dans

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[31] CR 2021/14, p. 24, par. 7 (Wood).

[32] Voir notamment *ibid*., p. 24-25, par. 8, p. 27, par. 17, p. 31, par. 31, p. 33, par. 40 (Wood) ; p. 44, par. 35 (Boisson de Chazournes).

[33] CR 2021/14, p. 24-25, par. 8, citant l'article 56.1 *a)* de la CNUDM (les italiques sont dans l'original).

[34] *Ibid*., p. 25, note 25.

celle-ci, c'est l'article 56 qui s'applique (ou plutôt, dans notre espèce, son équivalent coutumier). Quoi qu'en ait dit Sir Michael, le Nicaragua ne demande rien de plus et il ne s'oppose nullement à l'exercice par d'autres Etats, y compris, bien sûr, la Colombie, des droits qui leur appartiennent dans les domaines non couverts par l'article 56 — domaines qui sont d'ailleurs énumérés à l'article 58 et ont également valeur coutumière (ce que Sir Michael semble reconnaître implicitement).

32. Au fond, qu'il s'agisse de l'affaire principale ou de ses demandes reconventionnelles, tout le raisonnement de la Colombie et de ses conseils consiste à nier l'existence même d'une zone économique *exclusive* caractérisée par les droits, limitativement énumérés certes, mais *souverains*, et la juridiction dont bénéficie l'Etat côtier.

33. Oui, Madame la présidente, tous les Etats ont des droits et des obligations en matière de préservation de l'environnement ou de lutte contre le trafic de drogues. Mais ils doivent les exercer dans le cadre des règles applicables propres aux différentes zones maritimes concernées.

34. Juste un exemple : bien sûr que la Colombie, comme le Nicaragua, doit respecter les dispositions de la convention de Carthagène, à laquelle ils sont tous deux parties et dont la professeure Boisson de Chazournes (qui a une petite tendance à plaider un peu trop par l'intermédiaire de notes de bas de page[35]) fait grand cas[36]. Mais il faut relever que l'article 3, paragraphe 2, de cette convention précise que : «La présente Convention et ses protocoles doivent s'interpréter *conformément au droit international applicable en la matière.*»[37]

35. L'article 3, paragraphe 1, du protocole de 1990 à la convention, dont la Colombie a souligné, dans son contre-mémoire, l'importance aux fins de la présente affaire[38], mais que ma contradictrice a opportunément omis de citer, ***~~cet article 3, paragraphe 1, du protocole~~*** explicite ce principe plus clairement encore :

> «Chaque Partie au présent Protocole, conformément [à] sa législation et réglementation et aux termes du Protocole, prend les mesures nécessaires pour protéger,

[35] Voir notamment les notes 87, 91, 102 reproduites dans le CR 2021/14.

[36] *Ibid.*, p. 35-36, par. 5-8, p. 38, par. 16, p. 41, par. 24-25, section III, et p. 46, par. 47-48.

[37] Convention pour la protection et la mise en valeur du milieu marin dans la région des Caraïbes, 24 mars 1983, CMC, annexe 17.

[38] CMC, p. 38-39, par. 2.38.

> préserver et gérer de manière durable, *dans les zones de la région des Caraïbes dans laquelle s'exerce sa souveraineté, ses droits souverains ou sa juridiction*».[39]

Le texte complet du protocole figure à l'onglet AP-5 de votre dossier ; il contient d'autres dispositions confirmant cette limitation spatiale dans lesquelles s'exercent les droits et obligations imposés aux Parties par la convention et ses protocoles — sur lesquels le professeur Lowe reviendra tout à l'heure. La Colombie n'exerce pas sa souveraineté et n'a ni droits souverains ni juridiction dans la ZEE du Nicaragua. Celui-ci en a ! C'est à lui, et à lui seul, qu'il revient de gérer les ressources naturelles de cette zone et d'y exercer sa juridiction (exclusive) en ce qui concerne «la protection et la préservation du milieu marin».

36. Décidément, Mesdames et Messieurs les juges, la Colombie se prévaut de droits totalement «imaginaires»[40]. Or, pour le dire comme le professeur Reisman : «la Cour ne se préoccupe pas de questions théoriques»[41]. Le Nicaragua ne doute pas que, conformément à votre mission et à votre jurisprudence constante, vous direz le droit existant et ne céderez pas à la tentation de légiférer[42] comme la Colombie vous y invite avec insistance.

37. Je vous remercie pour votre attention. Et je voudrais en profiter pour remercier aussi Tessa Barsac et Sébastien Le Drean pour leur assistance dans ces plaidoiries à distance. Je vous prie, Madame la présidente, de bien vouloir donner la parole à M[e] Reichler.

The PRESIDENT: I thank Professor Pellet. I now invite the next speaker, Mr. Reichler, to take the floor.

Mr. REICHLER: Madam President, Members of the Court, good afternoon.

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[39] Protocole relatif aux zones et à la vie sauvage spécialement protégées à la Convention pour la protection et la mise en valeur du milieu marin de la région des Caraïbes, 18 janvier 1990, CMC, annexe 18 (les italiques sont de nous). Voir aussi l'article II 2) du protocole 3 (de 1999).

[40] Voir CR 2021/14, p. 46, par. 45 (Boisson de Chazournes).

[41] CR 2021/15, p. 25, par. 3 (Reisman).

[42] Voir *Licéité de la menace ou de l'emploi d'armes nucléaires, avis consultatif, C.I.J. Recueil 1996 (I)*, p. 237, par. 18. Voir aussi *Compétence en matière de pêcheries (Royaume-Uni c. Islande) (République fédérale d'Allemagne c. Islande), fond, arrêt, C.I.J. Recueil 1974*, p. 23-24, par. 53, et p. 192, par. 45 ; ou *Activités armées sur le territoire du Congo (République démocratique du Congo c. Ouganda), arrêt, C.I.J. Recueil 2005*, p. 190, par. 26.

THE EVIDENCE OF COLOMBIA'S VIOLATIONS OF NICARAGUA'S RIGHTS UNDER THE JUDGMENT OF 19 NOVEMBER 2012

1. Last Wednesday, Colombia claimed to be "astonished" that Nicaragua, in its first round, set out the evidence of eleven incidents in which the Colombian Navy violated Nicaragua's sovereign rights under the Court's 2012 Judgment, all of which occurred after the "critical date" of 27 November 2013.

2. There were good reasons for this. First, as Professor Pellet has just demonstrated, the Court has jurisdiction over these post-critical-date violations, just as it has over the violations that preceded it, because all these violations are part of the same dispute, over which the Court found that it has jurisdiction in its Judgment of March 2016.

3. Second, as we said last Monday, we focused on these eleven violations because they are emblematic of those that Colombia has committed, on an ongoing basis since 2013, and because we have irrefutable proof that Colombia committed them, in the form of audio recordings, some of which we played for the Court, and others that we displayed in transcription.

4. What is most revealing about Colombia's response, and quite "astonishing" in its own right, is that it had absolutely nothing to say about nine of these violations — precisely the nine for which we played audio recordings or displayed transcriptions before the Court. Their silence about these nine incidents last week speaks loudly. It confirms that they have no credible defence for these blatant violations of Nicaragua's sovereign rights, as I will discuss further in the course of my presentation.

5. But first: what other compelling evidence of Colombia's violations of Nicaragua's sovereign rights, in its EEZ, as determined by the Court, did we present that Colombia kept absolutely quiet about?

6. How about the official statements by the President of Colombia that Colombia regards the 2012 Judgment as inapplicable?[43] Colombia made no attempt to explain or justify them, only accusing Nicaragua of quoting them "out of context"[44].

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[43] See "Declaration of President Juan Manuel Santos on the judgment of the International Court of Justice, Bogotá,19 November 2012", Spanish original available at https://www.cancilleria.gov.co/newsroom/news/alocucion-presidente-juan-manuel-santos-fallo-corte-internacional-justicia, MN, Ann. 1; "Colombia denounces the Pact of Bogotá after Judgement of the ICJ", *DW*, 28 Nov. 2012, Spanish original available at https://www.dw.com/es/colombia-denuncia-pacto-de-bogot%C3%A1-tras-fallo-de-la-cij/a-16414772, MN, Ann. 2; "Declaration of President Juan Manuel Santos on the integral strategy of Colombia on the Judgment of the International Court of Justice", 9 Sept. 2013, Spanish original available at https://www.cancilleria.gov.co/newsroom/news/colombia-presenta-su-estrategia-integral-frente-fallo-haya, MN, Ann. 4.

[44] CR 2021/14, p. 14, para. 25 (Cepeda Espinosa).

7. What about the official statements by the President of Colombia, including its current President, earlier this month[45], that the boundary with Nicaragua is the 82nd meridian, notwithstanding the Court's Judgment rejecting that claim[46]. On these statements, not a word was heard from Colombia last week.

8. Then there were the statements by commanders of the Colombian Navy, and other senior naval officers, that Colombia does not regard the Court's 2012 Judgment as applicable; that the boundary with Nicaragua is the 82nd meridian; and that the Navy exercises and protects Colombia's sovereignty all along that meridian and in all the maritime space lying east of it[47]. Not a peep from the other side about any of this, either.

9. Colombia also had nothing to say about the three maps published by the Colombian Navy showing the boundary with Nicaragua as the 82nd meridian and indicating, specifically, that the Navy's responsibility included exercising and protecting the sovereignty and sovereign rights that Colombia claims for itself, despite the Court's Judgment, in all areas east of that meridian[48]. Absolutely nothing from Colombia about these. Instead, its counsel chose to ignore them, and to spend his time on a map produced by the National Hydrocarbon Agency, making a grand show of the fact that, although it depicts petroleum blocks available for licence up to the 82nd meridian, in Nicaragua's EEZ, Colombia has not actually licensed any exploration there[49]. But we had already said that to the Court on Monday[50]. Our purpose in displaying that map was simply to show that the Navy is not the only Colombian State organ publishing official maps showing that the boundary with Nicaragua is the 82nd meridian, exactly as Colombia's presidents have been declaring from 2012 through 2021.

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[45] "Presidente Duque ve con buenos ojos propuesta de Uribe sobre 'consulta popular' para confirmar límite con Nicaragua", *Semana*, 1 Sept. 2021.

[46] "Declaration of President Juan Manuel Santos on the integral strategy of Colombia on the Judgment of the International Court of Justice", 9 Sept. 20, MN, Ann. 4.

[47] See "Santos orders defense of the continental shelf with cloak and sword", *El Espectador*, 19 Sept. 2013, Spanish original available at https://www.elespectador.com/politica/santos-ordena-defender-plataforma-continental-a-capa-y-espada-article-447445/, MN, Ann. 41; "*There are no vetoed zones for the fishermen in San Andrés: National Navy*," *El País*, 3 Dec. 2015, RN, Ann. 26; "La Armada continúa patrullando el meridiano 82" *El Nuevo Siglo*, 7 Dec. 2019, Spanish original available at https://www.elnuevosiglo.com.co/articulos/12-2019-la-armada-continua-patrullando-el-meridiano-82.

[48] Admiral Hernando Wills Vélez, *Proyectando el Futuro, Poder Marítimo Colombiano*, pp. 5-7 ("Areas of Responsibility of the National Army").

[49] CR 2021/15, p. 21, para. 59 (Bundy).

[50] CR 2021/13, p. 48, para. 23 (Reichler).

10. Colombia attempts to portray all the post-November 2013 incidents as disconnected from the dispute that arose prior thereto, and thus, beyond the scope of the dispute over which the Court confirmed its jurisdiction, when it rejected Colombia's second preliminary objection in March 2016. This is an untenable argument, as Professor Pellet has explained.

11. Let me illustrate further the impeccable logic of Professor Pellet's analysis. As we showed you last Monday, in November 2012, President Santos declared that Colombia "emphatically rejects" the boundary established by the Court[51] and, in September 2013, he emphasized that "[t]he [J]udgment of the International Court of Justice is NOT APPLICABLE"[52]. On 17 November 2013, in an incident that occurred prior to the critical date, which I did not discuss last week, the Colombian naval frigate ARC *Almirante Padilla* ordered a Nicaraguan fishing vessel, the *Miss Sofía*, to leave what it said were Colombian waters — in the location now shown on your screens, which is plainly within Nicaragua's EEZ[53]. This is at tab PR-1 of our folder for today.

12. The *Miss Sofía* radioed a Nicaraguan coast guard vessel, the CG-205, calling for help[54]. The CG-205 advised the Colombian Navy by radio that it was in Nicaraguan waters, pursuant to the Judgment of the International Court of Justice[55]. The Colombian vessel responded, according to the official report sent by the CG-205 to Nicaragua's naval command, that "*ellos no reconocían la sentencia y que por lo tanto se mantendrían en el lugar"*[56]. In English, the message from Colombia was that "they did not recognize the Judgment and therefore would maintain their position"[57]. This was a clear reflection of President Santos' declaration, just a short while earlier, that, for Colombia, the Court's Judgment was "inapplicable". And it is the same message that Colombian naval vessels communicated to Nicaragua's Coast Guard repeatedly during the incidents after 27 November 2013, as you heard during our presentation last week.

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[51] "Declaration of President Juan Manuel Santos on the integral strategy of Colombia on the Judgment of the International Court of Justice", 9 Sept. 2013, MN, Ann. 4.

[52] *Ibid.*

[53] MN, 3 Oct. 2014, Ann. 23-A, p. 297.

[54] MN, 3 Oct. 2014, Ann. 23-A, p. 297.

[55] *Ibid.*

[56] *Ibid.*, p. 281.

[57] *Ibid.*, p. 297.

13. The same Colombian policy expressed in various declarations by President Santos in 2012 and 2013 — that the Court's 2012 Judgment is inapplicable, that Colombia does not recognize it, and that Colombia is therefore free to prevent Nicaragua from exercising sovereign rights in its own EEZ — is reflected in all the incidents that occurred after November 2013, in which Colombia's naval vessels repeatedly invoked the same policy, in virtually the same language reflected in the President of Colombia's earlier pronouncements.

14. To recall briefly, in the incident of 18 March 2015, Colombia's ARC *Independiente* radioed Nicaragua's CG-401 that "[t]he Colombian state has established that the ruling of The Hague is not applicable; therefore, the units of the Navy of the Republic of Colombia will continue to exercise sovereignty in these waters"[58]. Likewise, in the incident occurring on 23 March 2015, Colombia's Navy radioed to the Nicaraguan Coast Guard: "I inform you that the Colombian government has not abided by the ruling in The Hague."[59] On 26 March 2015, Colombia's *ARC 11 de Noviembre* insisted to Nicaragua's CG-401: "According to the Colombian government, the ruling of The Hague is inapplicable"[60].

15. In light of this evidence, it is simply untenable for Colombia to argue that the incidents after 27 November 2013 — all to the very same effect and purpose, and all repeating, almost word for word, the declarations of Colombia's President which gave rise to them — are not part of the same dispute, that is, the dispute over Nicaragua's allegations that Colombia has violated its sovereign rights under the Court's 2012 Judgment. All of these incidents are plainly part of the same, indivisible and ongoing dispute over Colombia's violations of Nicaragua's sovereign rights in its EEZ. Colombia cannot artificially divide them into separate disputes, in order to escape responsibility for its violations after November 2013.

16. The first documented incident in this series occurred in February 2013, well before the critical date. It also involved the ARC *Almirante Padilla*, which, at that time, prevented a Nicaraguan naval vessel from inspecting a Colombian-flagged fishing boat operating in the Luna Verde area, which is well within Nicaragua's EEZ. A Colombian media report directly quoted a Colombian naval

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[58] RN, Ann. 32, audio transcription of 18.03.2015.

[59] *Ibid.*, audio transcription of 23.03.2015.

[60] RN, Ann. 32, audio transcription of 26.03.2015 *(a)*.

commander, Roberto Garcia Marquez, as confirming that this incident occurred[61]. Colombia disputes it on the ground that the *Almirante Padilla* was in its home port on the date the media report was published. But that media report was published several days after the incident[62]. Colombia has not accounted, in its written pleadings, for the whereabouts of the *Almirante Padilla* on the date of the incident or produced evidence that it was in another location on that date. Nor has it discredited the statement of its naval commander. My friend Mr. Bundy, reading from an older Nicaragua case, reminded the Court that it "takes the view that statements of this kind . . . are of particular probative value when they acknowledge facts or conduct unfavourable to the State represented by the person who made them"[63].

17. There was another incident on 18 September 2013, also before the critical date, and just prior to President Santos' issuance of Decree 1946 establishing Colombia's Integral Contiguous Zone[64]. On that date, the President, along with the Minister of Defence and the commanders of Colombia's armed forces, conducted what they themselves called a "sovereignty exercise" in the waters between San Andrés and the 82nd meridian[65]. During the exercise, inside Nicaragua's EEZ, President Santos said: "We find ourselves patrolling and exercising sovereignty over Colombian waters"[66]. Exercising sovereignty in Nicaragua's EEZ is plainly a violation of Nicaragua's sovereign rights under the 2012 Judgment. In its written pleadings, Colombia's first response was that this was nothing more than an exercise of Colombia's freedom of navigation[67], but that conflicted with President Santos' own description of it as a "sovereignty exercise". Then they gave another equally untenable explanation, that this was all about protection of Colombia's biosphere reserve[68]. But, of course, the biosphere reserve in Nicaragua's EEZ and continental shelf is Nicaraguan, not Colombian.

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[61] "Colombia avoided boundary frictions with the Army of Nicaragua", *Caracol*, 19 Feb. 2013, MN, Ann. 34.

[62] See *ibid*.; RN, 15 May 2018, para. 4.53.

[63] CR 2021/15, p. 11, para. 22 (Bundy), citing to *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 41, para. 64.

[64] "Declaration of President Juan Manuel Santos during the Sovereignty Exercises Performed in the Caribbean Sea", 18 Sept. 2013, MN, Ann. 5.

[65] *Ibid*.

[66] *Ibid*.

[67] CMC, Vol. 1, para. 4.24.

[68] *Ibid*. para. 4.25.

18. I have already mentioned the incident involving the *Almirante Padilla*, the *Miss Sofía* and Nicaraguan coast guard vessel CG-205 on 17 November 2013, also prior to the critical date. Colombia does not deny that the incident occurred, but claims that the *Almirante Padilla* performed a humanitarian service, rescuing two of the *Miss Sofía's* crew, who had fallen overboard during the incident[69]. But this is not inconsistent with the evidence submitted by Nicaragua. Nicaragua has not accused Colombia of acting inhumanely to its nationals, or violating human rights, but of violating its sovereign rights, including its right to control fishing activities in its own EEZ, as determined by the Court. Colombia's answer, in its written pleadings, does not refute Nicaragua's evidence.

19. All three of these incidents, which occurred prior to 27 November 2013, elicited from Colombia an attempt to brush them off, based on public statements by Nicaraguan officials during this period that there was no conflict with the Colombian Navy, and no incidents of which to complain. We have already accounted for Nicaragua's reluctance to speak out at that time. My good friend Mr. Bundy scoffed at our explanation and redoubled his emphasis on Nicaragua's statements. But what he failed to mention was that the last such statement was made in March 2014[70]. Thereafter, as Colombia's violations of Nicaragua's sovereign rights continued, Nicaragua not only began to protest them, it began to record the radio communications exchanged during these incidents. Nicaragua has submitted audio recordings and accompanying transcriptions of many of these exchanges, beginning in early 2014, as part of Annexes 23A and B of its Memorial and Annex 2 of its Reply.

20. Here is a transcription of one of those early recordings, from 8 May 2014, which is in today's folder at tab PR-2. The incident occurred in the location depicted on the map, well within Nicaragua's EEZ. What may be of particular interest to the Court is this part of the message from Colombia's ARC *20 de Julio* to Nicaragua's CG-201: "I remind you that this is a unit of the Coast Guard of the *Armada* [that is, the Navy] of the Republic of Colombia, which is protecting the historical fishing rights of the Colombian State . . . This communication is being recorded for legal purposes."

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[69] *Ibid*., paras. 4.40, 4.45.

[70] "Nicaragua denies intimidation of Colombia in San Andrés", *El Economista*, 18 Mar. 2014, POC, Ann. 26, p. 367.

21. Madam President, Nicaragua was not the only Party recording these exchanges. Colombia was, as well. Yet Colombia has submitted no recordings and no transcriptions of any of them to the Court. Surely, if their recordings contradicted what is on those submitted by Nicaragua, Colombia would have included them with its written pleadings. We can only presume, from Colombia's withholding of its own audio recordings, that they confirm, or at least do not contradict, what is on Nicaragua's.

22. I turn next to the nine incidents after 27 November 2013 for which we played recordings, or displayed transcriptions, last week. Colombia's silence in the face of this evidence may reflect more than the absence of a credible defence. It may also indicate a deliberate litigation strategy of saving their arguments for the second round and denying us an opportunity to respond to them. In consequence, we urge the Court to approach with caution anything that may be said for the first time on Wednesday. In the meantime, we will respond to what Colombia has already said about these incidents in its written pleadings, especially in Appendix 1 of its Rejoinder, which is where Mr. Bundy, in his only comment on these incidents, said Colombia's response could be found[71].

23. We begin with the incident that occurred on 18 March 2015, as depicted at tab 17 of our folder from last Monday. Colombia responds to Nicaragua's evidence as follows: "The authenticity of that audio cannot be confirmed by Colombia. Moreover, the circumstances of where and when the alleged interaction took place cannot be established from the said recording, since neither the date nor the position of the vessels are stated in the dialogue."[72] That is their entire defence, even at this late stage of the proceedings.

24. To which Nicaragua responds: first, Colombia only states that it cannot confirm the authenticity of the audio, which is not the same thing as claiming, let alone offering evidence, that the audio is inauthentic[73]. And Nicaragua has vouched for its authenticity, having been recorded contemporaneously at the time radio communications between the two vessels were exchanged, and having been furnished to the Nicaraguan naval command pursuant to standard procedures, and in turn to the Foreign Ministry, from which counsel for Nicaragua obtained it. Colombia did not argue

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[71] CR 2021/15, p. 48, para. 7 (Bundy).

[72] RC, Vol. II, App. 1, p. 52, para. 2.

[73] *Ibid.*

that its naval officials did not make the statements that are reflected in the recording. Presumably, that is because its own recording is to the same effect.

25. In regard to the location of the incident, Colombia is correct that this is not stated in the radio communications. The source of that information is the official daily report by the Nicaraguan coast guard vessel, and the official log of such reports maintained by the naval command, which was submitted to the Court as part of Annex 2 to Nicaragua's Reply[74]. Notably, Colombia does not argue that the incident did not occur, or that it did not occur on the date or in the location shown in Nicaragua's evidence. This is significant because Colombia praises itself, repeatedly, about "the Colombian Navy's thoroughness in keeping record of its activities"[75]. Accordingly, if Colombia's records showed that the ARC *Independiente* was in another location on the date of the incident, Colombia would not have failed to mention that in its written pleadings.

26. I turn to the second of the nine incidents that we discussed last week, which occurred on 23 March 2015, as depicted at tab 18 of last week's folder. Here again, Colombia's defence is that it cannot confirm the authenticity of Nicaragua's audio recording, and that the date and location of the incident are not in it[76]. Nicaragua's response is the same as for the incident of 18 March 2015: the authenticity of the recording and the date and location of the incident are confirmed by Nicaragua's evidence, submitted with its Reply. Colombia also contends that the Honduran-flagged *Lucky Lady* was not authorized by Colombia to fish at Luna Verde, but only in Colombian waters[77]. But it does not dispute that the incident occurred in the location depicted on this map when Nicaragua's coast guard vessel encountered it, or that Colombia's ARC *Independiente* intervened to prevent Nicaragua from approaching that fishing vessel, claiming that it was in Colombian waters.

27. The third incident that we discussed last week occurred on 26 March 2015, as depicted at tab 19 of last week's folder. Again, Colombia's main defence is that it cannot confirm the authenticity of the audio recording[78]. Beyond this, Colombia claims that the ARC *11 de Noviembre*'s conduct

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[74] RN, Ann. 2, p. 210.

[75] RC, Vol. II, App. 1, p. 62, para. 3.

[76] RC, Vol. II, App. 1, p. 53, para. 2.

[77] *Ibid*., para. 3.

[78] *Ibid*., p. 54, para. 2.

was "far from hostile"[79]. But that is beside the point. The indisputable fact is it was in Nicaragua's EEZ, as defined by the Court, where it was claiming to protect "the historic fishing rights of the Colombian State" in those waters. This, in itself, was a violation of Nicaragua's sovereign rights.

28. The fourth incident also occurred on 26 March 2015, depicted at tab 20 of our first-round folder. This is also evidenced by an audio recording, and by the official daily report of Nicaragua's BL-405 and the logs of the naval command[80]. Colombia argues that "no evidence of the *[Doña Emilia*'s*]* flag has been produced by Nicaragua"[81]. Yet, two paragraphs later in the Appendix to its Rejoinder, Colombia quotes one of its own naval officers as having radioed to the *Doña Emilia* that "your country has a restriction . . . which forbids snail and lobster fishing"[82]. Colombia thus admits that it knew that the *Doña Emilia* was flagged by Nicaragua. Colombia then accuses Nicaragua of having "manipulated" the recording, because "the only audible parts of the audio are the statements by the alleged Colombian officer; the responses by the crew of the *Doña Emilia* are not on record"[83]. Nicaragua emphatically rejects Colombia's unfounded accusation, and it denies any manipulation of the recording. Significantly, Colombia admits that the statements by its naval officer are indeed "audible", and does not deny that these were made, as transcribed by Nicaragua.

29. In regard to the fifth incident, on 5 April 2015, depicted at tab 21 of the first-round folder, Colombia's only defence is the now familiar refrain that it cannot confirm the authenticity of the recording, and that the recording itself does not identify the date or location of the incident[84]. As with previous incantations of these mantras, Nicaragua has furnished uncontradicted evidence of the authenticity of its recordings and the date and location of the incident, in Annex 2 of its Reply[85].

30. I turn next to the sixth incident, on 7 April 2015, depicted at tab 22 of last week's folder. Here, Colombia claims that the recording is "incomplete and inaudible in several parts"[86]. But the part that we displayed last Monday is complete and perfectly clear. Colombia further argues that

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[79] *Ibid*., para. 3.

[80] RN, Ann. 2, p. 213; RN, Ann. 32, audio transcription 26.03.2015 *(b)*.

[81] RC, Vol. II, App. 1, p. 56, para. 1.

[82] RN, Ann. 32, audio transcription 26.03.2015 *(b)*.

[83] RC, 15 Dec. 2018, Vol. II, App. 1, p. 56, para. 2.

[84] *Ibid*., p. 59, para. 2.

[85] RN, Ann. 2, p. 215.

[86] RC, Vol. II, App. 1, p. 61, para. 2.

"[i]n the Maritime Travel Report of the A.R.C. 'San Andrés' there are no records of the said interactions as claimed by Nicaragua"[87]. Regardless, the audio recording plainly establishes that the ARC *San Andrés* was in radio communication with Nicaragua's BL-405, in close proximity to it[88]. And there is no doubt that this was the ARC *San Andrés*, whatever Colombia's maritime travel report fails to say, because the vessel identified itself as such. Maybe Colombia's maritime travel reports are not as thorough or as accurate as Colombia claims.

31. The seventh incident we discussed last week is the one that took place on 12 September 2015, depicted at tab 23 of the first-round folder, in which the Colombian naval vessel instructed Nicaragua's BL-405 to stay away from the Tanzanian-flagged fishing vessel, *Miss Dolores*, which, it said, was fishing "for the Colombian government". Here again, Colombia's only defence is that it cannot confirm the authenticity of the recording, and that the recording itself does not identify the date or location of the incident[89]. They have not denied, though, that the incident occurred as described by Nicaragua, at least not in their written pleadings.

32. We come next to the eighth incident, which occurred on 12 January 2016, as depicted at tab 25 of our earlier folder. Here, Colombia once again states that the "authenticity of the said audios cannot be confirmed"[90], but it does not contest that an incident occurred on 12 January 2016, nor does it contest the location, within Nicaragua's EEZ, as depicted by Nicaragua in this chart. Nor does it challenge Nicaragua's version of events, as evidenced by the recording, which we played aloud for you last week and showed you in transcription. Colombia's main argument is that Nicaragua's CG-403 claimed that it was "in Nicaraguan territorial waters", when, in fact, "according to the coordinates where it claims the interaction to have occurred, it was clearly in its EEZ, not territorial sea"[91]. Nicaragua will gladly stipulate to this: that is, that the incident took place in Nicaragua's EEZ, and not its territorial sea. As such, Colombia has plainly acknowledged violating Nicaragua's sovereign rights when it admitted to CG-403, on tape, that "the motorboat Observer is authorized to

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[87] *Ibid*., p. 62, para. 3.

[88] Audio transcription 7.04.2015 *(a)*: mins. 2:20-2:25; 3:26-3:35.

[89] RC, Vol. II, App. 1, p. 66, para. 2.

[90] *Ibid*., p. 69, para. 2.

[91] *Ibid*., p. 70, para. 5.

fish in this area by the Colombian maritime authority, according to the historic fishing rights of the State of Colombia"[92].

33. The ninth incident that we discussed last Monday occurred on 6 January 2017, as depicted at tab 26 of that folder. This is the incident in which the Colombian Navy instructed Nicaragua's CG-405 "to abort any attempt to board and any attempt to abort the fishing of the *Capitán Geovanie* motorboat", on the ground that the "*Capitán Geovanie* is authorized by the Colombian maritime authority, fishing in historically Colombian waters"[93]. Colombia's first defence is that its naval ship was "in the area watching over the safety of the vessels" and "exercising its freedom of navigation"[94]. But that explanation is directly contradicted by the message delivered by the Colombian naval vessel to CG-405. Colombia further argues that the *Capitán Geovanie* "was authorized to fish, not in Nicaragua's EEZ, but rather in the 'Northern Islands', i.e., in Colombian waters"[95]. But the audio recording contradicts that assertion, too. It shows that the Colombian naval vessel prevented Nicaragua's Coast Guard from enforcing Nicaragua's fisheries jurisdiction, in Nicaragua's EEZ, on the ground that the "*Capitán Geovanie* is authorized by the Colombian maritime authority, fishing in historically Colombian waters"[96].

34. In sum, the arguments and evidence that Colombia offered in its written pleadings, in respect of the nine incidents it studiously ignored at the oral hearings last week, come nowhere close to refuting Nicaragua's evidence, including its audio recordings, or justifying Colombia's interference with Nicaragua's exercise of its sovereign rights in relation to any of these incidents.

35. In contrast to its silence last week on these nine recorded incidents, Columbia did attempt to respond to our contentions regarding two other incidents.

36. The first of these was the incident of 10 December 2018, where Nicaragua's BL-405 *Tayacán* encountered, again, the Honduran-flagged *Observer*, in Nicaragua's EEZ, as depicted at tab 27 of last week's folder. Colombia argued last week that the *Observer* was in transit between

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[92] RN, Ann. 32, audio transcription of 12.01.2016.

[93] *Ibid.*, audio transcription of 06.01.2017.

[94] RC, Vol. II, App. 1, p. 73, para. 3.

[95] RC, Vol. II, App. 1, p. 74, para. 4.1.

[96] RN, Ann. 32, audio transcription of 06.01.2017.

Quitasueño and Serrana[97]. Nicaragua does not dispute that. Wherever it might have been headed, it was plainly in Nicaragua's EEZ at the time it was intercepted by Nicaragua's coast guard vessel, boarded, and towed toward the Nicaraguan mainland.

37. The incident with Colombia occurred the following day. Colombia's ARC *Antioquía* approached and ordered Nicaragua's coast guard vessel to release the *Observer*. The Nicaraguan vessel refused, successfully manoeuvred to escape the Colombian vessel, and hauled the *Observer* to Nicaragua. Although Colombia failed in its attempt to prevent Nicaragua from doing so, the attempt itself is another example of Colombia's violation of Nicaragua's sovereign right to control and regulate fishing in its EEZ, and to exercise its law enforcement jurisdiction over unlicensed fishing in its waters.

38. On Monday, we said that the captain of the *Observer* admitted that it had been fishing in Nicaragua's EEZ without a Nicaraguan licence at the time of its arrest[98]. Counsel for Colombia insisted that this was not correct[99]. He was right. It was the owner of the *Observer*, not the captain, who admitted that his vessel was fishing illegally in Nicaragua's waters[100]. The real question is this: what right does Colombia have to challenge Nicaragua's enforcement of its fisheries jurisdiction, in its own EEZ, against a vessel flagged by a third State that is unlicensed by Nicaragua and that it believes to be fishing illegally in its waters? Colombia has given no answer to this question.

39. Instead, it argues that the manoeuvres by the BL-405 *Tayacán* threatened the safety of the *Observer*, which was bumped in the process[101]. This, of course, is irrelevant to these proceedings, which do not involve Nicaragua's compliance with international rules of navigation. Whether or not the Nicaraguan vessel's manoeuvres violated such rules, which is denied, they were undertaken to escape and avoid Colombia's naval vessel, which had no right to interfere with Nicaragua's exercise of its law enforcement rights in regard to fishing in its EEZ.

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[97] CR 2021/15, p. 20, para. 53 (Bundy).

[98] CR 2021/13, p. 56, para. 43 (Reichler).

[99] CR 2021/15, p. 20, para. 53 (Bundy).

[100] Judgment of Nicaragua's Supreme Court of Justice No. 086, 26 October 2020, p. 10. Spanish original available at https://www.poderjudicial.gob.ni/pjupload/sconten2012/pdf/certificacion_caso_observer.pdf.

[101] CR 2021/15, p. 20, para. 53 (Bundy).

40. Colombia has challenged our assertion that it licensed and encouraged Colombian and foreign-flagged vessels, including industrial-commercial vessels, to fish in waters that the Court determined to fall within Nicaragua's EEZ, and it has disputed our reading of a Colombian-issued industrial commercial fishing permit that expressly refers to fishing in the areas known as Luna Verde and La Esquina, which are indisputably located in Nicaragua's EEZ[102].

41. We stand by our reading of that permit, which is at tab 29 of our folder from last week. But this case does not turn on Colombia's fishing licences. It turns on the actions by Colombia's Navy, in Nicaragua's EEZ, including the physical protection given by the Colombian Navy to Colombian and foreign-flag fishing vessels at Luna Verde and La Esquina, and, according to Mr. Valencia Ospina, various other locations in Nicaragua's EEZ[103]; and, it includes especially, the Colombian Navy's prevention of Nicaragua's enforcement of its own fishing laws and regulations in regard to these vessels, which have not been authorized by Nicaragua to fish in these areas. My friend Mr. Bundy appears to have conceded this. As he said last week, correctly: "in most of the exchanges, the Colombian vessels indicated that they were protecting Colombia's historical fishing rights"[104]. Protecting them from whom? From Nicaragua, of course. And that is exactly why their actions violated Nicaragua's sovereign rights over fishing in its own EEZ.

42. The only other incident, of the eleven that we discussed last Monday, with which Colombia chose to engage, is the one in which Colombia's *Almirante Padilla* intervened to prevent a Mexican scientific research vessel, licensed by Nicaragua, from carrying out its research activities in Nicaragua's EEZ[105]. What was Colombia's defence? There was none. Mr. Bundy cavalierly dismissed the incident as a "non-event", on the ground that Mexico did not complain to Colombia about it[106]. That is all they said on Wednesday. They did not dispute that the Mexican vessel was conducting marine scientific research under a Nicaraguan license, that it was in Nicaragua's EEZ, or that Colombia prevented it from carrying out its mission. In other words, they were unable to defend

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[102] CR 2021/15, p. 20, para. 55 (Bundy).

[103] CR 2021/15, pp. 42-43, para. 21 (Valencia Ospina).

[104] CR 2021/15, p. 18, para. 48 (Bundy).

[105] Letter of the Agent of Nicaragua to the International Court of Justice, REF: HOL-EMB-098-2019, 23 Sept. 2019, p. 1, Anns. 1, 2 (p. 2), 7, 10.

[106] CR 2021/15, p. 21, para. 56 (Bundy).

Colombia's clear violation of Nicaragua's right to authorize marine scientific research in its own EEZ.

43. Madam President, as in most situations, context is relevant. All 11 of these incidents, plus the 3 incidents prior to 27 November 2013 that I discussed earlier, and the 37 others described in our written pleadings, occurred within a context that was framed by the repeated declarations of Colombia's presidents and senior naval commanders that the Judgment of the Court is inapplicable, that the boundary with Nicaragua is the 82nd meridian, that Colombia alone has sovereignty or exclusive sovereign rights in all the waters east of that meridian, and that the Colombian Navy would actively exercise Colombia's sovereignty or sovereign rights in those waters and, specifically, that it would protect what they called Colombia's historic fishing rights east of the meridian. The actions by Colombia's Navy that we have described in all of these incidents are entirely consistent with these presidential and naval declarations; indeed, they follow directly from them, and are linked to each other by them. They are the inevitable result of the policies expressed, and directions given, in the official statements by Colombia's presidents and naval commanders, commencing in November 2012 and continuing through to the present.

44. Most of these statements can be found on Colombian government websites[107]. Three of the naval commanders' statements were published by online news sources[108]. Consistent with the Court's treatment of media reports, Nicaragua has not relied on them as proof of the events that the reports themselves narrate. We have only relied on them as evidence of the public statements by Colombian naval authorities directly quoted therein. As Mr. Bundy helpfully reminded us, such statements, against the interests of the State these high officials represent, "are of particular probative value".

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[107] "Declaration of President Juan Manuel Santos on the judgment of the International Court of Justice", Spanish original available at https://www.cancilleria.gov.co/newsroom/news/alocucion-presidente-juan-manuel-santos-fallo-corte-internacional-justicia 19 November 2012, MN, Ann. 1; "Colombia denounces the Pact of Bogota after Judgement of the ICJ", *DW*, 28 Nov. 2012, Spanish original available at https://www.dw.com/es/colombia-denuncia-pacto-de-bogot%C3%A1-tras-fallo-de-la-cij/a- 16414772, MN, Ann. 2; Declaration of President Juan Manuel Santos on the integral strategy of Colombia on the Judgment of the International Court of Justice", 9 Sept. 2013, Spanish original available at https://www.cancilleria.gov.co/newsroom/news/colombia-presenta-su-estrategia-integral-frente-fallo-haya, MN, Ann. 4.

[108] See "Santos orders defense of the continental shelf with cloak and sword", *El Espectador*, 19 Sept. 2013, Spanish original available at https://www.elespectador.com/politica/santos-ordena-defender-plataforma-continental-a-capa-y-espada-article-447445/, MN, Ann. 41; "*There are no vetoed zones for the fishermen in San Andrés: National Navy*," *El País*, 3 December 2015, RN, Ann. 26; "La Armada continúa patrullando el meridiano 82" *El Nuevo Siglo*, 7 Dec. 2019, Spanish original available at https://www.elnuevosiglo.com.co/articulos/12-2019-la-armada-continua-patrullando-el-meridiano-82.

45. As you have seen, Nicaragua has also relied on audio recordings made contemporaneously, and transcribed faithfully, as well as on official daily reports of its naval and coast guard vessels, routinely submitted in the regular course of operations to the naval command. To be sure, the reports concerning events after Nicaragua's Application was filed were prepared while this case was in progress. Mr. Bundy attempts to demean them as "prepared for purposes of litigation"[109]. But it is unavoidable that evidence of this nature would be produced during litigation in any case where the alleged violations are ongoing. In this case, the Nicaraguan naval and coast guard officers who recorded and reported on the incidents did so in the regular performance of their official duties. There is no reason to doubt the credibility of the recordings or the reports, especially after Colombia has had every opportunity to discredit them in its written pleadings, and it failed to do so, or to submit its own audio recordings of the incidents. Nicaragua trusts the Court will give this evidence its proper weight.

46. Colombia's primary response to all the evidence of its repeated and ongoing violations of Nicaragua's sovereign rights, as defined by the Court in its November 2012 Judgment, is to place its bet on a long-shot jurisdictional argument, pursuant to which, it hopes, the Court will ignore most of the violations, including those that are recorded. But, as Professor Pellet has explained, Colombia has got the law wrong, especially its strained and implausible interpretation of Article XXXI of the Pact of Bogotá. And the facts show, beyond reasonable argument, that Colombia's violations of Nicaragua's rights after the critical date are inextricably part of the same dispute that arose in November 2012, when Colombia first denounced, rejected and declared inapplicable the Judgment of the Court, and vowed that its Navy would disregard it.

47. In closing, Nicaragua reaffirms what it said last week: Colombia cannot escape international responsibility for violating Nicaragua's sovereign rights either on jurisdictional grounds, or on the merits.

48. Madam President, Members of the Court, it has been an honour for me to appear before you in these proceedings, and I thank you for your kind courtesy and patient attention, and ask that you call my colleague, Professor Lowe, to speak next.

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[109] CR 2021/14, p. 51, para. 15 (Bundy).

The PRESIDENT: I thank Mr. Reichler. I will now give the floor to Professor Lowe. You have the floor, Sir.

Mr. LOWE:

COLOMBIA'S INTEGRAL CONTIGUOUS ZONE IS INCONSISTENT WITH INTERNATIONAL LAW

1. Madam President, Members of the Court: last Wednesday, Colombia addressed four arguments concerning the contiguous zone that it attributed to Nicaragua[110].

2. I shall respond to those arguments, but first let me address a preliminary point. Colombia said that we were referring to an "obsolete" version of Decree 1946. It is true that the Decree was amended by Decree 1119 of 17 June 2014; and this is apparently regarded as an exception to Colombia's principle that you should look at the position as at the date of the Application in this case, which was filed in 2013.

3. You have the amended Decree, Annex 7 from Colombia's Counter-Memorial, in your folders as tab VL-1. You will see in paragraph 2 of its preamble that it says that "the contiguous zone . . . [is] also *part of Colombia*".

4. In paragraph 7, it says that "the Government will proceed to indicate . . . the lines from which the various maritime spaces in which the Colombian nation exercises sovereignty are measured, including sovereign rights and jurisdiction in accordance with customary international law".

5. In paragraph 10, it says:

> "In accordance with customary international law, in the contiguous zone States exercise *sovereign rights and jurisdiction and control* in matters of *security*, control of the trafficking in drugs and illicit substances, the *protection of the environment*, fiscal and customs matters, immigration, health, *and other matters*."

6. In paragraph 11, it says that "[t]he extent of the contiguous zone of the island territories forming the Western Caribbean needs to be determined . . . *in order to secure the protection of the environment and resources, and the maintenance of comprehensive security and public order*".

[110] CR 2021/15, pp. 25-26. para. 7 (Reisman).

7. I pause to ask if this is the language of a measure intended to record that Colombia is doing no more than "observing" those in its contiguous zone and "informing" them of their legal position[111], rather like a schoolteacher gently "advising" her sometimes mischievous infant pupils on their behaviour.

8. The Decree itself, as amended, says in Article 1 that

> "Colombia exercises full sovereignty over its insular territories and territorial sea; *jurisdiction and sovereign rights over the rest of the maritime spaces* generated by its insular territories in the terms prescribed by international law, the Political Constitution, Law [No.] 10 of 1978, and by the present Decree, in what corresponds to each of them".

9. Article 2 reaffirms that "the contiguous zone . . . [is] *part of Colombia*".

10. And then comes Article 5. It is too long to read out in full, but it is central to this case. It establishes, in Section 2, "a continuous and uninterrupted Contiguous Zone, across the whole of the Department of the Archipelago of San Andrés, Providencia and Santa Catalina". That Department's website lists Serranilla, and also Bajo Nuevo, as part of the Department[112], though Bajo Nuevo is apparently left outside the Integral Contiguous Zone.

11. Article 5, Section 3 *(a)* says that in this contiguous zone

> "Colombia exercises the faculties of enforcement and control necessary to:
>
> *(a)* Prevent and control the infractions of the laws and regulations *related with the integral security of the State*, including piracy and trafficking of drugs and psychotropic substances, as well as *conduct contrary to the security in the sea* and *the national maritime interests*, the customs, fiscal, migration and sanitary matters which take place in its insular territories or in their territorial sea. In the same manner, violations against the laws and regulations related with *the preservation of the marine environment and the cultural heritage* will be prevented and controlled."

12. It is not clear how Colombia thinks the 2014 amendments to Decree 1946 affect Nicaragua's case. I have shown you the law. Last Wednesday, Colombia stated that "the map it produced in the record is its most accurate illustration of the contiguous zone", and that it "will publish official charts depicting its contiguous zone when ready"[113]. That map is now on the screen.

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[111] CR 2021/14, p. 29, para. 22, p. 33, para. 41 (Wood); CR 2021/14, p. 36, paras. 7-8, p. 41, para. 25, p. 43, para. 30, p. 45, paras. 40-42, p. 46, para. 46 (Boisson de Chazournes); etc.

[112] Available at https://sanandres.gov.co/index.php/archipielago/informacion-general/geografia (accessed 24 Sept. 2021).

[113] CR 2021/15, p. 25. para. 4 (Reisman). The reference is to the map in RC, p. 212, Figure CR 4.3.

There is no key to the map, but you can see the "simplified" zone in the south and the zone around Serranilla, and the joint régime area in the north connected to it by the purple dotted line.

13. Having established that we are on the same page as our Colombian friends as far as the text of the Decree is concerned, let me turn to the four matters addressed by Colombia. Three of them can be dealt with briefly; and I begin with their second assertion, that Nicaragua "contends that a State may not resort to *any* reasonable geodetic lines to simplify the jagged and indented contours of its contiguous zone"[114].

14. That is not true. Colombia can draw a smooth contiguous zone boundary if it wishes. Nicaragua says only that it may not extend more than 24 nautical miles from the territorial sea baselines and may not extend beyond the Court's 2012 boundary; and that the suggestion of Colombia that its ICZ has jagged and indented contours comparable to the Norwegian coast is not credible.

15. Colombia made no attempt to establish that international law permits a contiguous zone in excess of 24 nautical miles — all of the red areas on the figure now on the screen — or that it permits the contiguous zone to be drawn from anything other than the baselines from which the breadth of territorial sea is measured. Its only point is that this is a "modest use of geodetic lines to smooth out and simplify the otherwise impractical outer limits of the contiguous zone . . . dictated by geography"[115]. I referred you to the State practice on the point[116], and it offers no support for Colombia's claim to exceed 24 nautical miles.

16. It is for you to decide whether, as Colombia claims, "without simplification, the contiguous zone of Colombia would be a tangle of interconnected arcs, representing difficulties in its practical implication" — a question of fact — and, if that were so, whether Colombia has any legal right to make the "simplification" that it claims — a question of law.

17. I add only that when Colombia says that "smoothing the [contiguous zone contours] has no adverse effects on the rights or interests of other States"[117], we disagree. Subjecting foreign

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[114] CR 2021/15, p. 25. para. 7 (Reisman).

[115] CR 2021/15, p. 26. para. 8 (Reisman).

[116] CR 2021/13, pp. 70-71, paras. 41-46 (Lowe).

[117] CR 2021/15, pp. 30-31, para. 35 (Reisman).

shipping to Colombian control beyond the limits permitted by international law self-evidently has an adverse effect on the rights and interests of other States: that is what the whole history of debates over the freedom of the seas has been about.

18. Next, Colombia alleges that we say that customary international law confines contiguous zone powers to those enumerated in UNCLOS Article 33 — "customs, fiscal, immigration [and] sanitary" — and that they cannot evolve to adjust to new circumstances[118]. Colombia says that those terms have a "generic meaning"[119] and must be given an "evolutionary interpretation"[120].

19. Evolution is one thing: but Colombia's contiguous zone claim is more like a metamorphosis. Maybe "customs, fiscal, immigration [and] sanitary" can evolve to include some other matters, given the normal requirements of State practice and *opinio juris*. But where is the proof that it *has* done so?

20. I took you to the 2020 Roach study of 103 States claiming contiguous zones and said that the evidence of State practice was that most claims to jurisdiction over matters other than those listed had been related to security and to the underwater cultural heritage. Security claims have been protested by roughly as many States as have made them; and cultural heritage is covered by UNCLOS Article 303, which is binding on Nicaragua. So what does that prove about the content of customary international law?

21. What has Colombia produced? Annex B to its Counter-Memorial paraphrases extracts from the laws of under half that number of States — 40, taking account of the fact that one State appears in the list twice, as "Burma" and as "Myanmar".

22. Some do claim jurisdiction over "other matters" apart from the four accepted purposes. Jamaica and Palau, for example, assert jurisdiction over living resources: but they have that jurisdiction anyway because the contiguous zone is part of the EEZ, in which jurisdiction over living resources is uncontroversial.

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[118] CR 2021/15, pp. 25-26. para. 7 (Reisman).

[119] CR 2021/15, p. 31, paras. 38. (Reisman).

[120] CR 2021/15, pp. 31-32, paras. 38-40 (Reisman).

23. Some entries are outdated. Cameroon is listed by Colombia as claiming a fifty-nautical-mile territorial sea: but 20 years ago it told the Court in the *Cameroon* v. *Nigeria* case that that provision was no longer in effect[121].

24. Only Albania appears to claim anything like the range of purposes within the Colombian contiguous zone claim; and its inclusion seems to be the result of a misapprehension. Neither DOALOS nor the Roach study list Albania as a contiguous zone claimant; and the Albanian law cited by Colombia appears to do no more than list the entire range of "tasks" that the Albanian coastguard may be called upon to discharge in Albania's maritime zones in general[122].

25. Where is the proof of a "general practice accepted as law" that establishes the rights that Colombia claims under customary international law?

26. I shall return to this point in a moment in order to focus on one of the most egregious of Colombia's claims — the claim to control environmental matters; but let me first address the last of the three brief points — Colombia's argument that the mere enactment of the Decree does not violate Nicaragua's rights: only its implementation could do so[123].

27. There are two common-sense answers. One: Colombia *has been implementing it*. That is what Mr. Reichler has been talking about. Two, in any event, telling Nicaraguan and other ships in Nicaragua's EEZ that they are subject to Colombian control is intended to affect their behaviour, and it cannot fail to do so. If a policeman, in uniform and on duty, acting under the authority of Decree 1946 tells you that he is "observing" your activities and "informing [you] of the consequences of [your] actions"[124] in Colombia's contiguous zone, that is very different from a cheerful wave from a passing fellow seafarer. Colombia asserts the right to *prevent and control infractions of Colombian laws and regulations* in Nicaragua's EEZ.

28. There is also a legal answer. The promulgation of a law that is manifestly incompatible with the international obligations assumed by a State can certainly constitute a violation of those

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[121] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening)*, Reply of the Republic of Cameroon, 4 Apr. 2000, pp. 387-388, paras. 9.02–9.05.

[122] See Law No 8875, 4 Apr. 2002, Article 5, available at http://extwprlegs1.fao.org/docs/pdf/alb60863E.pdf.

[123] CR 2021/15, p. 25, para. 7. (Reisman).

[124] CR 2021/14, p. 29, para. 22 (Wood).

obligations[125]. That is why the ILC Articles restate the well-established rule of international law that the acts of the legislature are imputable to the State for the purposes of State responsibility[126].

29. Let me then turn to Colombia's first assertion: that Nicaragua "contends that, as a general rule, customary international law denies a State a protective contiguous zone if its territorial sea abuts another State's EEZ"[127].

30. What Nicaragua actually says is that a State's contiguous zone may not extend for more than 24 nautical miles from the baseline, and that in any event it must stop at the State's international maritime boundary.

31. Let me illustrate the point. One of Colombia's most egregious claims is the assertion of the right to exercise "the faculties of enforcement and control necessary to: . . . [p]revent and control . . . violations against the laws and regulations related with the preservation of the marine environment", in the words of Article 5 of Decree 1946.

32. Colombia asks which of Nicaragua's "enumerated environmental jurisdictions in [UNCLOS] Part XII the Colombian Decree violates"[128] — accepting that the UNCLOS provisions reflect customary international law for this purpose.

33. Our first point is that it is really for Colombia to establish what right it has to exercise those powers in the EEZ of another State. But let me respond directly to the question.

34. Nicaragua's case is based on UNCLOS Part V, which embodies the customary rules defining the rights and jurisdictions of the coastal State in the EEZ[129]. Article 56 asserts that "the coastal State has: . . . jurisdiction as provided for in the relevant provisions of this Convention with regard to: . . . the protection and preservation of the marine environment".

35. The relevant provisions are set out in UNCLOS Part XII. Articles 192-206 address general principles and international co-operation; Articles 207–212 address jurisdiction to prescribe rules to

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[125] Inter-American Court of Human Rights, *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention, Advisory Opinion OC-14/94*, *International Law Reports*, 1994, Vol. 116, p. 320, paras. 31-50. Cf. *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988*, pp. 29-30, para. 42. Lord McNair, *The Law of Treaties* (1961), p. 550.

[126] *YILC*, 2001, Articles on State Responsibility, Art. 4.

[127] CR 2021/15, p. 25, para. 7. (Reisman).

[128] CR 2021/15, p. 33, para. 47 (Reisman).

[129] UNCLOS, Art. 55.

prevent, reduce and control pollution of the marine environment[130]; and Articles 213-233 address the enforcement of those rules.

36. For example, Article 210 concerns dumping at sea and provides in paragraph 5 that dumping within the territorial sea and EEZ "shall not be carried out without the express prior approval *of the coastal State*, which has *the right to permit, regulate and control such dumping* after due consideration of the matter with other States which . . . may be adversely affected thereby".

37. Colombia's Decree asserts the right to prevent and control violations of *Colombia's* environmental laws in Nicaragua's EEZ, in flat contradiction of Article 210.

38. You will note that despite Colombia's rather odd assertion that "none of the provisions in Part XII or anywhere else in the UNCLOS grant an EEZ State the jurisdiction to protect the environment of another State's territorial sea and land territory"[131], Article 210 establishes not only the right but the *duty* to take account of the interests of other States that may be affected — as, indeed, do other provisions in Part XII, such as Articles 194, 198 and 204[132]. The duty on coastal States under Part XII is to prevent, reduce and control pollution, not simply to prevent, reduce and control pollution of their own waters[133].

39. Article 211 goes on to address vessel source pollution and sets out coastal States' rights to adopt laws and regulations on that matter, and so on.

40. Then comes Section 6 of Part XII, on "enforcement". It refers to enforcement by flag States[134], port States[135] and coastal States[136]. No others. The only right of any other State acknowledged in Part XII is the right to intervene in the event of a maritime casualty which may reasonably be expected to result in major harmful consequences. That is the preservation in UNCLOS of the pre-existing right of intervention established after the *Torrey Canyon* incident in 1967 and set

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[130] The *chapeau* of Part XII, Sec. 5.

[131] CR 2021/15, p. 33, para. 48 (Reisman).

[132] See UNCLOS, Arts. 193-195, 197-199, 204 (2) and 206.

[133] See e.g. Arts. 192 and 208 (1) and (2).

[134] UNCLOS, Art. 217.

[135] UNCLOS, Art. 218.

[136] UNCLOS, Art. 220.

out in the 1969 International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties[137], as amended[138].

41. That exceptional right to intervene in respect of major casualties has nothing to do with the routine "observing and informing" of ships or the "prevention and control" of Colombian laws, in the Nicaraguan EEZ; and it provides no support for Colombia's claimed contiguous zone powers. Nor does anything else in Part XII.

42. So if Colombia attempts to prevent dumping in the Nicaraguan EEZ authorized by Nicaragua, there is an obvious conflict of rights. So, too, if Colombia tries to enforce some other Colombian environmental laws and to prevent conduct lawful under Nicaraguan law.

43. We are not dealing with an exercise of high seas freedoms by Colombia. Colombia is establishing and implementing a zone in which it will prevent and control activities subject to Colombian law; and it is doing so in Nicaragua's EEZ, and in matters that directly overlap with Nicaragua's rights. And it is hard to believe that Colombia is not doing so precisely so as to make its point that the Court was wrong to draw the maritime boundary where it did. We cannot find *any* other example of a State unilaterally establishing a maritime zone in the waters of another State.

44. In passing, I should note that the one publication that Colombia cites as expressing the view that contiguous zone claims of neighbouring States may overlap is now included in your judges' folder as tab VL-6[139]. We leave it to the Court to decide how much weight to attach to it — a single, unsupported sentence on page 39 of a booklet on ocean management in the Pacific published almost forty years ago. It is what statisticians would call an "outlier".

45. Important as these — very obvious — points are, they must not obscure the larger picture. Colombia has made impassioned pleas concerning the environment of the western Caribbean, as if to give the impression that this is its main concern.

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[137] United Nations, *Treaty Series (UNTS)*, Vol. 970, p. 211.

[138] Protocol relating to Intervention on the High Seas in Cases of Pollution by Substances other than Oil (Intervention Protocol 1973), *UNTS*, Vol. 1313, p. 4.

[139] Commonwealth Group of Experts, *Ocean Management: A Regional Perspective — The Prospects for Commonwealth Maritime Co-operation in Asia and the Pacific* (1984), Commonwealth Secretariat, p. 39, para. 2.35.

46. But both Nicaragua and Colombia are among the more than two dozen parties to the 1983 Cartagena Convention for the Protection and Development of the Marine Environment in the Wider Caribbean Region[140].

47. The Cartagena Convention provides a comprehensive framework for international action in the Caribbean to protect the environment. Article 4 of the Convention obliges States parties to "take all appropriate measures . . . to prevent, reduce and control pollution of the Convention area", and Article 11 obliges them to co-operate in taking necessary measures to respond to pollution emergencies.

48. Protocols such as the 1983 Protocol concerning Co-operation in Combatting Oil Spills amplify the provisions for the co-ordination of national efforts and mutual assistance[141].

49. But nowhere in that Convention is there any indication that one State has the right unilaterally to exercise powers of prevention and control in the waters of another. The whole Cartagena scheme is based on the principle that each State party will act in areas in which it exercises sovereignty, or sovereign rights, or jurisdiction, as Professor Pellet has shown you[142].

50. Perhaps the clearest example of this point is in Article 9 of the Cartagena Protocol concerning Specially Protected Areas, in today's folders as tab AP-5. This makes provision for "protected areas and buffer zones contiguous to international boundaries". Much as you might expect, it requires the two neighbouring States to "consult each other with a view to reaching agreement on the measures to be taken".

51. There is no suggestion that State A may declare an overlapping zone in which it can exercise powers to control activities in State B's EEZ. When States wish to take action regarding problems that straddle jurisdictional boundaries, they *have to agree* on how to do so. And for all Colombia's protests about its vital need to establish contiguous zone to safeguard the environment, the whole legal framework for safeguarding the Caribbean has been there — under the Cartagena Convention — for decades.

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[140] Available at https://www.unep.org/cep/who-we-are/cartagena-convention.

[141] Available at https://www.unep.org/cep/who-we-are/cartagena-convention.

[142] See e.g. Arts. 3 (1), 5 (1), 6 (1), 7 (1) and 8 of the Protocol concerning Specially Protected Areas and Wildlife, available at https://www.unep.org/cep/who-we-are/cartagena-convention.

52. And if Colombia thinks that its partners in the Cartagena Convention are failing in their duties, then the dispute settlement procedures of Cartagena Article 23, including arbitration, are open to it, and it should use them.

53. When States wish to exercise their jurisdiction at sea beyond their national limits, they do so by agreement, not by denying the validity of those limits or by unilaterally establishing maritime zones in other States' waters. Colombia should do likewise.

54. Madam President, Members of the Court, that brings to an end my submissions on behalf of Nicaragua in this case. I thank you for your attention, and unless I can assist you further, I would ask you now to invite Nicaragua's Agent to the podium to present Nicaragua's final submissions.

The PRESIDENT: I thank Professor Lowe. I shall now give the floor to the Agent of Nicaragua, H.E. Mr. Carlos José Argüello Gómez. You have the floor, Your Excellency.

Mr. ARGÜELLO GÓMEZ:

1. Madam President, Members of the Court, good afternoon. Before proceeding to deliver Nicaragua's submissions on its case against Colombia, allow me to address very briefly a couple of issues that Colombia has directly or indirectly argued about the legal questions that are properly before the Court.

2. One of these questions is that of the environment. It should be recalled that Colombia filed four counter-claims. Two of these were related to questions of the environment and the Court did not admit them.

3. Madam President, in spite of Colombia's insistence on the topic, environmental issues are not part of the subject-matter of the present case, as has been clearly pointed out by Professor Pellet. Nevertheless, allow me a few additional remarks.

4. Since 2007, Nicaragua has increased its attention to the environment and has taken concrete steps that go well beyond its international commitments. For example, Nicaragua is one of the few countries in the world to have included in its Constitution, since 2014, a recognition of Mother Earth's rights[143].

[143] Nicaraguan Constitution, Article 60, available at https://www.asamblea.gob.ni/assets/constitucion.pdf (accessed 26 Sept. 2021).

5. In a country that has a continental territory of just over 130,000 sq km, it has declared 73 protected areas including 4 biosphere reserves adding up to 7,261,860 hectares of protected areas; that is, 72,000 sq km of protected areas[144].

6. The protection of the environment is an ongoing process for Nicaragua. Just this past January, Nicaragua established a biosphere reserve of 44,157 sq km in its Caribbean area that extends roughly from the Miskito archipelago out to the EEZ attributed by the Court to Nicaragua. Colombia promptly protested that it was located in its Seaflower Biosphere Reserve, which it is not[145]. The Nicaraguan biosphere is entirely in Nicaraguan territory and waters, and the law clearly and in so many words, spells out that it does not include or affect the Colombian keys of Quitasueño and Serrana or any of the areas attributed by the Court to Colombia. The text of the law with a map of the area and the co-ordinates were published in the *Official Gazette* on 2 February 2021, which is a readily available publication[146]. The Colombian protest note and Nicaragua's response are part of the record of this case, despite Colombia's opposition[147].

7. Madam President, it is ironic that Colombian counsel should state that Nicaragua treats the environment with disdain — "mépris"[148] — whilst Colombian authorities are trying to hinder Nicaragua's attempts to enhance this protection.

8. In conclusion, Colombia's attempt to portray Nicaragua as a country that does not care for the environment is no more than a bid to divert the attention of the public, and this Court, to matters that are not part of the case. In any event, it also fails on the merits.

9. Another point that has been the object of comments by the Co-Agent and by Colombian counsel is the right of Colombian vessels to fight crime they encounter in the Nicaraguan EEZ. Mr. Cepeda, the Co-Agent, notes that 38 States take part in joint operations (Operation Orion) against

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[144] Ministry of the Environment, available at http://www.marena.gob.ni/ (accessed 26 Sept. 2021).

[145] Nicaragua's letter to the Court of 30 July 2021 (Ref.: HOL-EMB-384-2021); see also Registrar's letter to the Agent of Nicaragua, Ref.: 155258, 1 Sept. 2021.

[146] La Gaceta, Diario Oficial, No. 22, 22 Feb. 2021 available at https://www.lagaceta.gob.ni/2021/02/022/ (accessed 26 Sept. 2021).

[147] Nicaragua's letter to the Court of 30 July 2021 (Ref.: HOL-EMB-384-2021); see also Registrar's letter to the Agent of Nicaragua, Ref.: 155223, 16 Aug. 2021, and Ref.: 155258, 1 Sept. 2021.

[148] CR 2021/14, p. 34, para. 2 (Boisson de Chazournes).

drug trafficking "including Nicaragua", and then states that "[i]t is unclear, to say the least, why Nicaragua maintains that all these countries can be present in the area, but Colombia cannot"[149].

10. For my part, it is unclear for me, to say the least, how Nicaragua can be participating in an operation of which Colombia is an important part and at the same time the distinguished Co-Agent should allege that Nicaragua opposes this. Nicaragua has never opposed in any way, openly or tacitly, Colombia's participation in multinational operations against the scourge of drug traffic.

11. Sir Michael Wood also continues with this strange argument that Nicaragua is opposed to Colombia combatting drug traffic in the Caribbean and in the same breath he states: "The Chief of the Nicaraguan Army applauded the 'high level of cooperation' with the Colombian Navy against drug trafficking, through participation in Operation Orion."[150]

12. Madam President, let me state it very clearly: Nicaragua does not object that Colombia should take measures for the control of the criminal activities that might occur in the Caribbean, particularly drug trafficking. After all, it is only logical that Colombia do so since most of this criminal activity has its origin in Colombia. But Colombian naval forces are also protecting illegal fishing in Nicaraguan waters, harrying Nicaraguan fishermen in Nicaraguan waters and, in general, carrying out activities in the Nicaraguan EEZ which are plain usurpations of Nicaragua's sovereign rights and jurisdiction there. If Colombia wishes to act beyond its jurisdictional limits as set by international law, it must do so by agreement, not by unilaterally asserting its control over the waters of neighbouring States.

13. Madam President, in compliance with Article 60 of the Rules of Court, I will now proceed to read into the record Nicaragua's final submissions. A copy of the written text of these submissions, duly signed, is being communicated to the Court and transmitted to the other Party.

FINAL SUBMISSIONS

1. In the case concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)*, for the reasons explained in the Written and Oral phase, Nicaragua respectfully requests the Court to adjudge and declare that:

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[149] CR 2021/14, p. 16, para. 36 (Cepeda).

[150] CR 2021/14, p. 31, para. 30 (Wood).

(a) By its conduct, the Republic of Colombia has breached its international obligation to respect Nicaragua's maritime zones as delimited in paragraph 251 of the Court Judgment of 19 November 2012, as well as Nicaragua's sovereign rights and jurisdiction in these zones; and that, in consequence

(b) Colombia must immediately cease its internationally wrongful conduct in Nicaragua's maritime zones, as delimited by the Court in its Judgment of 19 November 2012, including its violations of Nicaragua's sovereign rights and jurisdiction in those maritime zones and take all necessary measures effectively to respect Nicaragua's sovereign rights and jurisdiction; these measures include but are not limited to revoking, by means of its choice:

(i) all laws and regulations, permits, licences, and other legal instruments which are incompatible with the Court's Judgment of 19 November 2012, including those related to marine protected areas;

(ii) the provisions of Decrees 1946 of 9 September 2013 and 1119 of 17 June 2014 in so far as they relate to maritime areas which have been recognized as under the jurisdiction or sovereign rights of Nicaragua; and

(iii) permits granted to fishing vessels to operate in Nicaragua's exclusive economic zone, as delimited in the Court's Judgment of 19 November 2012;

(c) Colombia must ensure that the decision of the Constitutional Court of Colombia of 2 May 2014 or of any other National Authority will not bar compliance with the 19 November 2012 Judgment of the Court;

(d) Colombia must compensate Nicaragua for all damage caused by its violations of its international legal obligations, including but not limited to damages caused by the exploitation of the living resources of the Nicaraguan exclusive economic zone by fishing vessels unlawfully "authorized" by Colombia to operate in that zone, and the loss of revenue caused by Colombia's refusal to allow, or by its deterrence of, fishing by Nicaraguan vessels or third State vessels authorized by Nicaragua and, generally, for the damages caused by its actions and declarations to the proper exploitation of the resources in Nicaragua's exclusive economic zone, with the amount of the compensation to be determined in a subsequent phase of the case; and

(e) Colombia must give appropriate guarantees of non-repetition of its internationally wrongful acts, including by formally acknowledging that the boundary as delimited by the Court in its Judgment of 19 November 2012 will be respected as the international maritime boundary between Colombia and Nicaragua.

(f) Nicaragua also requests that the Court adjudge and declare that it will remain seised of the case until Colombia recognizes and respects Nicaragua's rights in the Caribbean Sea as attributed by the Judgment of the Court of 19 November 2012.

This is the end of Nicaragua's submissions, Madam President, and with this I end the pleading of Nicaragua. I wish to thank you, Madam President, Members of the Court, for your kind attention.

The PRESIDENT: I thank the Agent of Nicaragua. The Court takes note of the final submissions which you have just read on behalf of Nicaragua in relation to its own claims.

Your statement brings to an end Nicaragua's second round of oral argument on its own claims. I recall that on Wednesday 29 September 2021, between 3 p.m. and 6 p.m., Colombia will present its second round of oral argument on the claims of Nicaragua and on its own counter-claims, and on Friday 1 October 2021, between 3 p.m. and 4 p.m., Nicaragua will present its second round of oral argument on the counter-claims of Colombia.

The sitting is adjourned.

The Court rose at 5 p.m.

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