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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2021

Public sitting

held on Wednesday 29 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 mercredi 29 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,

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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,

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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,

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The Government of Colombia is represented by:

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Le Gouvernement du Nicaragua est représenté par :

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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,

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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,

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comme conseillers.

The PRESIDENT: Please be seated. The sitting is open. The Court meets this afternoon to hear Colombia's second round of oral argument on the claims of Nicaragua and on its own counter-claims.

I note the presence this afternoon of Her Excellency Ms Marta Lucía Ramírez Blanco, Vice-President as well as Minister for Foreign Affairs of Colombia, whom I am pleased to welcome.

I invite Sir Michael Wood to address the Court.

Sir Michael WOOD:

THE APPLICABLE LAW; REMEDIES

1. Madam President, Members of the Court. I shall respond to some applicable law points made by counsel for Nicaragua. And I shall refer briefly to the remedies sought by Nicaragua.

2. I shall be followed by Professor Boisson de Charzounes, Mr. Bundy and Professor Reisman, who will respond to Nicaragua's claims.

3. They will be followed by Mr. Valencia-Ospina and Professor Thouvenin, who will respond to what Nicaragua said about our counter-claims.

4. Finally, the Agent of the Republic of Colombia will make some general observations and read Colombia's submissions.

Subject-matter of the dispute

5. Before turning to the applicable law, I must say a few words about the subject-matter of the dispute. Nicaragua's case concerns alleged violations of its sovereign rights. Nothing else. Nicaragua is the Applicant and, like any applicant, must establish that its rights have been violated in some way. This case is not about determining the international responsibility of the State for political statements made by its officials or former officials. This is not a case about a PowerPoint presentation by former President Santos[1].

[1] E.g. CR 2021/13, p. 45, para. 15 (Reichler); CR 2021/17, p. 24, para. 9 (Reichler); CR 2021/17, p. 11, para. 5 (Pellet).

6. By arguing that "Colombia must establish that the rights that it claims in Nicaragua's EEZ are 'attributed' to it, and not to Nicaragua, by the regime of the EEZ"[2], Nicaragua presents a simplistic view of the EEZ régime, and seeks to reverse the burden of proof.

7. That burden is on the Applicant, who must show such violations and their repercussions. It would not be enough for Nicaragua to establish that Colombia has exceeded its rights in the EEZ. Rather, as the Applicant, Nicaragua has to establish that Colombia's actions violated Nicaragua's rights and to what effect.

8. On Monday, Professor Pellet said he would explain what the case was about and what it was not about[3]. I could agree when he says that the only question is whether Colombia respects Nicaragua's sovereign rights, not whether Colombia respects the 2012 Judgment[4]. They say that, but then they repeatedly accuse Colombia of rejecting the Judgment. Notwithstanding Professor Pellet's rhetoric, there is nothing "exceptional" about this case[5] — save, perhaps, Nicaragua's repeated references to political statements that, whatever their content, are legally speaking irrelevant. On that, the position is perfectly clear and was explained by Colombia's Co-Agent last week[6].

9. The law that is applicable is not an imaginary law regarding political statements and intentions. Even taken at face value, Nicaragua has, at best, cobbled together a handful of alleged events that cannot change the wider reality existing over the last decade: the reality that Nicaragua and its nationals have not been hindered from exercising their rights as part of an alleged continuous pattern of conduct. The Court then is left to deal with the various specific actions alleged by Nicaragua. Nicaragua must prove, for each separate "incident", that its sovereign rights have been violated.

10. The subject-matter of the dispute in the Application consisted of the 13 pre-critical date alleged incidents at sea and Decree 1946. The 13 non-events, as we say, are unconnected to the post-critical date alleged incidents. This much is obvious from the fact that Nicaragua, in its first round, did not even mention any of the pre-critical date alleged incidents. As for Nicaragua's second

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[2] RN, para. 2.10.

[3] CR 2021/17, p. 10, para. 2 (Pellet).

[4] CR 2021/17, p. 11, para. 4 (Pellet).

[5] CR 2021/17, p. 13, para. 10 (Pellet).

[6] CR 2021/14, p. 12, para. 15 (Cepeda Espinosa).

round, Mr. Reichler strained to find a connection between the pre- and post-critical date non-events. This will be further elaborated by Mr. Bundy.

Applicable law

11. Madam President, on Monday Nicaragua once more distorted Colombia's position on the applicable law. I shall not reply to all they said; instead I respectfully refer the Court to the position set out in our written pleadings[7] as well as last week[8].

12. We differ on at least two basic matters: the extent of the rights and duties of all States in the EEZ; and the fact that the rules reflected in Part V are not self-contained, whether as a matter of customary or conventional law.

13. The essence of the applicable régime is that the coastal State has sovereign rights for the purposes of exploring and exploiting, conserving and managing natural resources, and limited jurisdiction concerning specific matters, while all other States enjoy the high seas freedoms of navigation and overflight, and other internationally lawful uses of the sea related to those freedoms. These freedoms are the same as anywhere on the high seas. They apply to all ships and aircraft. They go beyond mere "passage". They include the right to navigate and overfly for any purpose[9].

14. Professor Pellet misstates our position in order to criticize it. He said last week that for Colombia, everything that was not prohibited for third States was permitted, and that for the coastal State everything that was expressly permitted had to be interpreted restrictively[10]. That is not what we said. The simple point we are making is that Nicaragua has the burden of showing, as a matter of law, which of its rights under the specific legal régime Colombia, so it claims, has violated. That it has not done. For our part, we were not suggesting that the customary régime reflected in Part V attributes all rights and jurisdiction within the zone. We would not contest the passage from ~~***the***~~ *M/V Saiga* ***(****No. 2****)*** cited by Professor Pellet[11]. In any event, in relation to the specific "incidents" of

[7] CMC, paras. 3.1-3.76; RC, Chap. 2.

[8] See, in particular, CR 2021/14, pp. 23-28, paras. 5-19 (Wood); CR 2021/14, pp. 43-46, paras. 33-44 (Boisson de Chazournes); CR 2021/15, pp. 26-27, 32-33, paras. 10-16, 44-45 (Reisman).

[9] CR 2021/14, pp. 26-28; paras. 13-18 (Wood).

[10] CR 2021/13, p. 32, para. 20 (Pellet).

[11] CR 2021/13, p. 32, para. 20 (Pellet).

which complaint is made in the present case, the specific legal régime does attribute to all States high seas freedoms in the zone[12] and it applies to the zone virtually all the rules concerning the high seas[13]. Under UNCLOS this is done "subject to the relevant provisions of this Convention" and "in so far as they are not incompatible with [Part V]". Under customary international law that could correspond to something like "subject to the relevant rules of the law of the sea" and "in so far as they are not incompatible with the specific legal regime applicable to the zone".

15. On Friday, Mr. Martin muddied the waters even further. He sought, at some length, to interpret the customary international law on the EEZ by reference to a close textual analysis of a whole series of provisions of UNCLOS and detailed reference to its *travaux préparatoires*[14]. He ignored the fact that the customary international law developed in parallel with the work at the Conference[15]. There was State practice well before the conclusion of UNCLOS in 1982 and its entry into force in 1994. It is not the case, as Nicaragua would have you believe, that customary law excluded all traditional fishing rights. Mr. Martin likewise sought to distinguish, in an obscure and inaccurate way, between the territorial sea and the EEZ by suggesting that the former had a "hybrid" legal régime, being "governed by both UNCLOS and general international law", whereas the EEZ was "a creation of UNCLOS and governed by the provisions of Part V of UNCLOS"[16]. For him, apparently, other rules of international law do not apply within the EEZ. That, with respect, is plainly wrong. Indeed, Part V itself contains many references to other rules, including those concerning the high seas and the protection of the environment.

16. Throughout these oral proceedings, Nicaragua has taken peculiar and contradictory approaches to the identification of customary international law. For one of its counsel, UNCLOS should just be presumed to reflect customary international law[17]. For another, customary international law is clearly not reflected in the Convention[18]. For a third, the existence of customary international

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[12] Cf. UNCLOS, Art. 58.1.

[13] Cf. UNCLOS, Art. 58.2.

[14] CR 2021/16, pp. 20-22, paras. 12 and 20 (Martin).

[15] CR 2021/14, p. 68, paras. 29-30 (Lowe).

[16] CR 2021/16, pp. 22-23, paras. 23-24 (Martin).

[17] CR 2021/13, p. 32, para. 18 (Pellet).

[18] CR 2021/13, p. 66, paras. 19-20 (Lowe); CR 2021/17, p. 42, para. 25 (Lowe).

law must be reflected in State practice and *opinio juris* — but this basic methodology is no longer required if a rule is mentioned in UNCLOS[19].

17. Madam President, last week I described the limited "presence" of Colombia in the area, and the important objectives which it served. I also said that the Colombian activities included observing and informing: that is to say, Colombian vessels and aircraft navigate and overfly the area, among other things, in order to see what is happening. They do so for many reasons and Nicaragua itself has acknowledged the usefulness of this presence both in terms of search and rescue[20] as well as regards transnational criminal activity and anti-drug trafficking operations[21]. Colombia also observes and informs on environmental risk and damage. Its vessels and aircraft inform the vessels concerned, as well as their own headquarters, about illicit activities. Professor Pellet wonders why naval ships are necessary for observing and informing[22]. Navies and coastguards are precisely the people who are best placed routinely to carry out such activities in the high seas. Their actions are all well within the rights of all States where high seas freedoms apply. And they are important both for Colombia's interests as a coastal State in the south-western Caribbean and for the interests of the international community as a whole.

18. Nicaragua continues to treat the specific legal régime of the EEZ as if it were self-contained[23]. Of course, UNCLOS is not applicable between the Parties to this case, and you will decide on the basis of the customary international law of the sea. But that does not mean that other sources of international law can be ignored. Far from it! Account needs to be taken of other rules of customary international law, including those of particular (local) custom; of commitments undertaken in unilateral declarations, such as those of the most senior Nicaraguan officials; and of applicable treaties such as the Cartagena Convention and the Search and Rescue Convention. These particular rules, in turn, assist in a correct understanding of the customary international law of the

[19] CR 2021/16, p. 39, para. 11 (Oude Elferink).

[20] CR 2021/17, p. 28, para. 18 (Reichler).

[21] CR 2021/17, pp. 48-49, paras. 9-12 (Argüello Gómez).

[22] CR 2021/17, p. 11, para. 5 (Pellet).

[23] CR 2021/13, p. 31, para. 15 *et seq.* (Pellet).

sea, as it applies between the Parties. Nicaragua is quite wrong when it urges you to minimize the relevance or even disregard other sources of the law[24].

19. It's good to see that our friends opposite now accept the applicability of the Cartagena Convention[25]. However, Professor Pellet seemed to be suggesting that the Convention did not impose any obligations on the States parties[26]. But that cannot be right. Even if the Convention were to be described as a framework convention, that would not mean it was devoid of legal effect. Obligations under a framework convention are not without legal effect until "implemented" by more detailed provisions. A well-known example is Part XII of UNCLOS itself, often thought of as a framework convention, but which contains fundamental obligations on the protection of the environment, obligations that largely reflect customary international law.

20. Madam President, Professor Lowe too had some curious ways of identifying the applicable law. He said last week that "there is no evidence of States carving out or reserving their position in relation to contiguous zone rights when they delimit maritime boundaries — for example by establishing a contiguous zone straddling the delimited boundary"[27]. But what does that prove? The fact that most maritime boundary agreements delimit the territorial sea, the EEZ and the continental shelf, without mentioning the contiguous zone, tends to confirm that States see no need to delimit contiguous zones; they are not concerned by potential overlaps.

21. Professor Lowe's basic argument was that the contiguous zone and EEZ rights cannot coexist in the same area[28]. His argument here was broad-brush and unconvincing. "The jurisdictional clash is obvious"[29], he asserted. With respect, it is far from obvious. "As was apparent to the ITLOS in the *Saiga* and the *Virginia G* cases", he went on to say. Again, with respect, reading the passages listed in his footnote 212, one finds nothing to support this argument or convey any apparent tension between the contiguous zone and EEZ rights. Professor Lowe is also plain wrong when he asserts

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[24] Churchill and Lowe, *The Law of the Sea* (3rd. ed., 1999), pp. 24-25.

[25] CR 2021/17, pp. 45-46, paras. 45-50 (Lowe).

[26] CR 2021/13, p. 35, para. 26 (Pellet).

[27] CR 2021/13, p. 67, para. 25 (Lowe).

[28] CR 2021/13, pp. 71-73, paras. 47-55 (Lowe).

[29] CR 2021/13, p. 72, para. 49 (Lowe).

that EEZ rights and contiguous zone rights "do not address entirely different matters"[30]. As the book by Churchill and Lowe puts it, with respect to the contiguous zone and the EEZ, "the distinction between the two kinds of zone was put beyond argument"[31].

22. As he did last week, in describing Col*o*mbia's Decree 1946, as amended, Professor Lowe overlooked the fact that the contiguous zone powers in the Decree are, in accordance with international law, expressly limited to powers to prevent and punish infringements of its laws and regulations within its territory and territorial sea. In addition, Article 5 of the Decree, as amended, expressly and unequivocally states, that "[t]he application of this article [Article 5] will be carried out in conformity with international law".

23. Worse still, Professor Lowe gave the impression that Colombia was exercising contiguous zone powers beyond the contiguous zone. At various points, he seemed deliberately to confuse the contiguous zone powers of the coastal State with the rights and freedoms of all States in the EEZ. Indeed, as soon as he turned to the central point about one State's contiguous zone overlapping another State's EEZ[32], he headed off on a long digression about the rights of the coastal State and others in the EEZ[33]. That had nothing to do with contiguous zone rights. He said indeed that the Decree "asserts the right to prevent and control violations of Colombia's environmental laws in Nicaragua's EEZ"[34].

24. Of course, the Decree does no such thing. It is limited, as I have just said, to violations in Colombia's territory and territorial sea. Earlier, Professor Lowe suggested that Colombia had been implementing the Decree in the EEZ: "That is what Mr. Reichler has been talking about"[35], he said. With respect, that was not what Mr. Reichler spoke about. None of the so-called alleged "incidents" Mr. Reichler discussed concern Nicaraguan vessels in Colombia's contiguous zone.

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[30] CR 2021/13, p. 72, para. 50 (Lowe).

[31] Churchill and Lowe, *The Law of the Sea* (3rd. ed, 1999), p. 135.

[32] CR 2021/17, p. 43, para. 29 (Lowe).

[33] CR 2021/17, p. 43, para. 31 *et seq.* (Lowe).

[34] CR 2021/17, p. 44, para. 37 (Lowe).

[35] CR 2021/17, p. 42, para. 27 (Lowe).

25. Professor Lowe asserted on Wednesday that if any of the terms of the Decree were contrary to international law, its mere enactment would violate Nicaragua's EEZ rights[36]. Professor Reisman dealt with this last week[37] and we set out the position at some length in our Rejoinder[38]. Professor Lowe, for his part, merely asserted that "[t]he promulgation of a law . . . can certainly constitute a violation of [a State's international obligations]". Yes, it *can*, but that is the exception rather than the rule. Professor Lowe's reference to Article 4 of the ILC Articles on State does not assist his argument. Article 4 deals with the attribution of the conduct of State organs to a State, not with the content of the international obligation concerned. More relevant is the commentary to Article 12, which we cited in our Rejoinder[39]. Whether the mere enactment of a law violates international law turns on the content of the primary obligation concerned. This has mainly been discussed in the context of human rights obligations, where the jurisprudence is rather clear: it is only when the enactment has a continuous and direct effect on the individual applicant that its mere existence may involve a breach of his or her right to private life[40]. The exceptional circumstances which may give rise to a chilling effect in the human rights context are simply not present in the case of Decree 1946.

26. Professor Lowe cited two advisory opinions in a footnote (again pleading by footnote ~~***as***~~ ***Professor Pellet*** — to use Professor Pellet's expression)[41]. One of the advisory opinions was by this Court; the other by the Inter-American Court of Human Rights. These opinions do not support Nicaragua. This Court's opinion concerned the existence of a dispute, not the merits of the case. The advisory opinion of the Inter-American Court concerned access to the Court by the Inter-American Commission, not the merits of a dispute.

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[36] CR 2021/17, pp. 42-43, para. 28 (Lowe).

[37] CR 2021/15, pp. 35-36, paras. 56-60 (Reisman).

[38] CR, paras. 4.122-4.150.

[39] CR, para. 4.132.

[40] RC, paras. 4.135-4.139, citing *European Court of Human Rights, Case of Dudgeon* v. *The United Kingdom, 22 October 1981, Series A No. 45* and *European Court of Human Rights, Case of Modinos* v. *Cyprus, 22 April 1993, Series A No. 259.*

[41] CR 2021/17, p. 43, para. 28, fn. 125 (Lowe), citing 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.

27. Nor does Professor Lowe's footnote invocation of Lord McNair[42] avail him. The reference appears to be to a short passage from the *North Atlantic Coast Fisheries* case, which deals with good faith in the performance of treaty obligations.

Remedies

28. Madam President, Members of the Court, I now turn to the remedies sought by Nicaragua in connection with its claims[43].

29. Nicaragua has not made out any case for remedies. Even if there were a breach, Nicaragua has not begun to show any material or moral damage, indeed they have not even attempted to do so. So there could be no question of reparation for injury, or any justification for holding a separate procedural phase for that purpose[44]. I refer you to our written pleadings[45].

30. Nicaragua has also deemed it appropriate — if Colombia is found to have violated its rights — to ask the Court to order Colombia to take intrusive actions such as revoking laws, decrees, regulations, permits and licenses. This request is wholly inappropriate in proceedings such as the present one. It contradicts the jurisprudence of the Court, whereby the "choice of means" of compliance with a Judgment of the Court "must be left" to the relevant party[46].

31. On Monday, Professor Pellet invited the Court to insist that Colombia give guarantees of non-repetition. He further invited you to remain seised of the case[47]. Nicaragua's final submissions were changed, at the very last moment, to request "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".

32. Madam President, Members of the Court, the Court's case law is clear: it will only consider assurances of non-repetition if special circumstances so warrant. In the present case, and despite Nicaragua's reliance yet again on statements by high Colombian officials, no such circumstances

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[42] CR 2021/17, p. 43, para. 28, fn. 125 (Lowe), citing Lord McNair, *The Law of Treaties* (1961), p. 550.

[43] MN, Chap. 6.

[44] CR 2021/13, p. 74, para. 62 (Lowe).

[45] CMC, Chap. 6.

[46] *LaGrand (Germany* v. *United States of America), Judgment, I. C.J. Reports 2001*, p. 514, para. 125.

[47] CR 2021/17, pp. 13-14, paras. 8-11 (Pellet).

exist which would justify the Court in demanding cessation and non-repetition[48]. Professor Pellet himself admitted that these requests were very exceptional, and that the request that you remain seised was, in his words, *"une demande inhabituelle"*.

33. Professor Pellet argued there was a precedent in the *Nuclear Tests* case[49]. Madam President, Members of the Court, we are all of course aware of the wholly exceptional paragraph 63 of the Court's Judgment in *Nuclear Tests*, and of New Zealand's 1995 Application.

34. Professor Pellet knows the case well — all too well; he was counsel for France when it argued forcefully that the proceedings did not even amount to a case. The New Zealand Application was, of course, very unusual indeed. There is no comparison between that case, involving nuclear weapons testing, and the circumstances of the present case. In 1975 the Court had declined to exercise jurisdiction on the ground that the matter was moot, having regard to France's unilateral commitments to stop testing. And even in that extreme situation the procedure was highly controversial. We can see no basis whatsoever, in the present case, for the Court to remain seised of the matter. There is no provision for this in the Statute or the Rules, which provide only for the interpretation or revision of a judgment in strictly limited circumstances. No special circumstances exist in the present case to justify such an exceptional measure. By issuing its judgment, the Court will have exercised its jurisdiction to the full.

35. We would therefore strongly urge you, to reject this remarkable suggestion, which would be clearly contrary to the Statute and to the Charter of the United Nations, both of which provide other routes for post-judgment action. As you know well, Article 94 of the United Nations Charter specifically addresses a situation of alleged non-compliance with a judgment of the Court, which is the whole basis for Nicaragua's extraordinary submission.

36. Nicaragua cannot properly use your judgment in the present case to control indefinitely what it claims are violations of the 2012 Judgment. Over the years it has made no effort to use options that were open to it to this end, including Article L of the Pact of Bogotá[50]. As I said earlier, and as

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[48] *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 267, para. 150; see also *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 105, para. 278.

[49] CR 2021/17, p. 13, para. 9 (Pellet).

[50] POC, Vol. II, Ann. 33.

seems to be agreed between the Parties, the present case is not about compliance with the earlier Judgment.

37. Madam President, Members of the Court, that concludes my statement. I thank you for your attention, and I request that you invite Professor Boisson de Chazournes to the podium.

38. I thank you.

The PRESIDENT: I thank Sir Michael, and I now invite the next speaker, Prof. Laurence Boisson de Chazournes ***to take the floor***. You have the floor, Madam.

Mme BOISSON DE CHAZOURNES :

LA DÉFORMATION PAR LE NICARAGUA DES ACTIVITÉS D'OBSERVATION ET D'INFORMATION DE LA COLOMBIE À DES FINS ENVIRONNEMENTALES

1. Madame la présidente, Mesdames et Messieurs les juges, c'est un honneur de me présenter à nouveau devant vous.

2. La Cour l'aura sûrement constaté : le Nicaragua s'est finalement résigné à évoquer l'environnement par la voix autorisée de ses conseils[51] et de son agent[52]. Malheureusement, ces références lui ont tout simplement servi de façade pour donner l'illusion à la Cour que le Nicaragua se préoccuperait également des écosystèmes fragiles de la mer des Caraïbes. Toutefois, de manière obstinée, le Nicaragua continue à nier que l'environnement fait partie intégrante du présent différend. Pour ce faire, le professeur Pellet a ressuscité un subterfuge auquel le Nicaragua n'a pas eu recours lors du premier tour des plaidoiries ; il a affirmé sans ambages que la Cour aurait exclu *ipso facto* et *ipso jure* l'environnement du présent différend en déclarant inadmissibles les demandes reconventionnelles de la Colombie y afférentes[53].

3. En plus d'être infondée, une telle affirmation contredit le soi-disant attachement du Nicaragua au respect des décisions de la Cour de céans. Mes contradicteurs sont trop fins juristes pour ignorer que les décisions de cette dernière, dans les procédures incidentes, ne préjugent pas du

[51] CR 2021/17, p. 11, par. 5, et p. 21, par. 33 (Pellet) ; CR 2021/17, p. 45, par. 45, et p. 46, par. 47 (Lowe).

[52] CR 2021/17, p. 47, par. 4, p. 48, par. 6 (Argüello Gómez).

[53] CR 2021/17, p. 12, par. 7 (Pellet).

fond[54]. La Cour n'a pas dit et n'aurait pu dire, avec l'autorité de la chose jugée, que l'environnement n'a aucune pertinence pour apprécier la licéité du comportement de la Colombie.

4. Alors pourquoi le Nicaragua s'entête-t-il donc à vouloir exclure l'environnement ? Mesdames et Messieurs les juges, la réponse est simple. La stratégie d'évitement du Nicaragua s'explique par le fait que l'environnement, *à lui seul,* révèle le caractère artificiel de la requête du Nicaragua. Il met à nu une évidence : aucune des violations alléguées par le Nicaragua n'est avérée.

5. Le Nicaragua sait que les écosystèmes fragiles de la mer des Caraïbes justifient la présence *licite* de la marine colombienne dans certains espaces du sud-ouest de cette mer. Le Nicaragua sait que les activités d'observation et d'information de la Colombie à des fins environnementales et la manière dont elles sont menées ne violent en aucun cas les droits souverains du Nicaragua. Le Nicaragua sait que la prise en compte des considérations environnementales est vitale pour la protection des habitats fragiles et cruciale pour l'exercice des droits traditionnels de pêche pour les Raizals. Cela explique, Mesdames et Messieurs les juges, pourquoi le Nicaragua s'obstine à présenter l'environnement comme un aspect étranger au différend dont vous avez à connaître**. *I***l le fait en niant les liens intrinsèques entre environnement et santé[55] et la nécessité de protéger l'environnement dans tous les espaces maritimes.

6. Cette déformation stratégique par le Nicaragua de la pertinence de la protection de l'environnement ne vous lie bien évidemment pas. Dans son appréciation de l'objet d'un différend, la Cour se repose sur les arguments et positions des *deux* parties, ainsi que sur des éléments objectifs[56]. Or, il ne fait pas de doute que l'environnement est au cœur du présent différend[57].

7. En tenant dûment compte du droit applicable au présent différend, la Cour constatera que les activités d'observation et d'information de la Colombie à des fins environnementales respectent

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[54] *Activités armées sur le territoire du Congo (République démocratique du Congo c. Ouganda), demandes reconventionnelles, ordonnance du 29 novembre 2001, C.I.J. Recueil 2001,* p. 681, par. 46 ; *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslavie), demandes reconventionnelles, ordonnance du 17 décembre 1997, C.I.J. Recueil 1997,* p. 259, par. 38.

[55] *Projet Gabčíkovo-Nagymaros (Hongrie/Slovaquie), arrêt, C.I.J. Recueil 1997,* p. 41, par. 53 : «l'environnement n'est pas une abstraction, mais bien l'espace où vivent les êtres humains et dont dépendent la qualité de leur vie et leur santé, y compris pour les générations à venir».

[56] *Immunités et procédures pénales (Guinée équatoriale c. France), exceptions préliminaires, arrêt, C.I.J. Recueil 2018 (I),* p. 308, par. 48.

[57] CR 2021/14, p. 16, par. 34 (Cepeda Espinosa) ; CR 2021/14, p. 35, par. 3-4, et p. 36-38, par. 9-14 (Boisson de Chazournes).

les droits souverains du Nicaragua (I) et que ces activités sont conformes aux obligations de prévention de la Colombie (II).

I. Les activités d'observation et d'information à des fins environnementales de la Colombie respectent les droits souverains du Nicaragua

8. Le régime de la zone économique exclusive, comme l'a souligné Sir Michael Wood[58], n'a jamais eu pour objectif d'exclure les droits d'Etats tiers en matière de protection de l'environnement. Il permet bel et bien l'exercice de tels droits. Contrairement à ce que prétend le Nicaragua, ce dernier ne jouit pas de juridiction «exclusive»[59] en matière de protection et de préservation du milieu marin en vertu de l'article 56 de la convention sur le droit de la mer. La juridiction de l'Etat côtier est explicitement liée aux autres «dispositions pertinentes de la convention», qui viennent apporter une «substance» à ladite juridiction[60].

9. Le régime de la zone économique exclusive ne peut, en effet, être lu en isolation clinique des règles pertinentes en matière de protection de l'environnement marin de la partie XII de la convention, laquelle lie le Nicaragua et reflète le droit coutumier. Ces règles, qui sont pleinement applicables à la zone économique exclusive, reconnaissent des obligations mais aussi des droits à tous les Etats — je dis bien à *tous* les Etats, n'en déplaise au professeur Lowe[61] — ~~***et cela***~~ en matière de protection[62] et de préservation de l'environnement marin.

10. En outre, le Nicaragua, si prompt à citer ses «droits souverains», a insisté lourdement sur l'adjectif «souverain», comme pour suggérer une forme d'absolutisme. Il ne peut pourtant nier qu'il est obligé dans sa zone économique exclusive de «tenir dûment compte» des droits et intérêts des Etats tiers en vertu du droit international coutumier et de ses obligations conventionnelles tels que reflétés dans l'article 56 de la convention. Ces droits et intérêts ne sont pas des droits et intérêts à la carte comme l'insinue le Nicaragua. Ce dernier doit, là encore, «tenir *dûment* compte» de *tous* les droits et de *tous* les intérêts. Cette obligation de «tenir *dûment* compte» est inhérente au

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[58] CR 2021/14, p. 25, par. 9 (Wood).

[59] CR 2021/13, p. 35-36, par. 29 (Pellet) ; CR 2021/17, p. 22, par. 35 (Pellet).

[60] Alexander Proelss, "The Law on the Exclusive Economic Zone in Perspective: Legal Status and Resolution of User Conflicts Revisited" (2012) 26 *Ocean Yearbook*, 87-112, p. 103.

[61] CR 2021/17, p. 43-44, par. 35-38 (Lowe).

[62] Article 56 1) *b)* iii) de la convention sur le droit de la mer.

«compromis»[63] que représente la zone économique exclusive dans le droit contemporain de la mer. Elle s'impose d'autant plus au regard de «l'importance» des droits et devoirs de l'Etat tiers concerné comme cela a été reconnu par le tribunal arbitral dans l'affaire de la *Chagos Marine Protected Area*[64].

11. La Colombie a expliqué à la Cour dans ses plaidoiries écrites et orales pourquoi les activités d'observation et d'information à des fins environnementales sont essentielles à la préservation des écosystèmes fragiles de la mer des Caraïbes, ainsi que pour les habitats et les droits des Raizals.

12. Ces activités ne violent pas les droits souverains du Nicaragua. L'observation et l'information ne constituent pas des actes inamicaux visant à empêcher le Nicaragua d'exercer ses droits souverains. Ce dernier peut exercer son droit d'observer et d'informer à des fins environnementales dans sa zone économique exclusive. De même, l'observation et l'information ne constituent pas par eux-mêmes des actes constitutifs de violations des droits souverains du Nicaragua. L'observation vise tout simplement à *évaluer* la situation écologique d'écosystèmes fragiles et nécessaires à la survie des Raizals. L'information, quant à elle, vise tout simplement à *alerter* sur les risques que certaines pratiques de pêche peuvent avoir sur la préservation des écosystèmes, ainsi que mon collègue Rodman Bundy le dira quand il montrera que les soi-disant incidents ne sont en rien étayés juridiquement.

13. Les droits de tout Etat côtier dans sa zone économique exclusive, y compris le Nicaragua, doivent être interprétés raisonnablement[65]. Or, il n'est pas raisonnable de la part du Nicaragua de chercher à empêcher la Colombie de mener des activités d'observation et d'information à des fins environnementales. Il est encore plus déraisonnable de voir dans ces activités des actes hostiles au Nicaragua et de nature à violer ses droits souverains. Qui plus est, ces activités d'observation et d'information bénéficient au Nicaragua, puisque les écosystèmes en cause sont interdépendants et partagés.

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[63] C. Goodman, "Rights, Obligations, Prohibitions: A Practical Guide to Understanding Judicial Decisions on Coastal State Jurisdiction over Living Resources in the Exclusive Economic Zone" (2017) 33 *The International Journal of Marine and Coastal Law*, 1-27, p. 26.

[64] *Chagos Marine Protected Area (Maurice c. Royaume-Uni de Grande-Bretagne et d'Irlande du Nord)*, sentence, affaire CPA n° 2011-3, 18 mars 2015, par. 519.

[65] Affaire de l'*Arctic Sunrise (Royaume des Pays-Bas c. Fédération de Russie)*, sentence sur le fond, affaire CPA n° 2014-02, 14 août 2015, par. 327-328 ; *Affaire concernant le filetage à l'intérieur du golfe du Saint-Laurent*, sentence, 17 juin 1986, *Recueil des sentences arbitrales*, vol. XIX, p. 258-259.

14. L'observation et l'information à des fins environnementales, loin d'être illicites, permettent de garantir la coopération étroite et continue entre les nations dont le destin est de partager des écosystèmes interdépendants et fragiles. Elles permettent, en outre, à la Colombie de se conformer à ses obligations internationales en matière de protection de l'environnement.

II. Les activités d'observation et d'information de la Colombie à des fins environnementales visent à prévenir des dommages aux écosystèmes de la mer des Caraïbes

15. Le Nicaragua, fidèle à sa stratégie, a tenté de passer sous silence les obligations environnementales en cause dans le contexte du présent différend. Pourtant, ce sont ces obligations qui permettent de saisir toute la licéité des activités d'observation et d'information de la Colombie.

16. Parmi ces obligations[66], il y a bien entendu l'obligation de diligence requise en vertu du droit international coutumier de l'environnement. Votre Cour, à travers sa jurisprudence constante, a souligné l'importance de ces obligations[67]. La Cour a notamment insisté sur «la vigilance et la prévention» qui découlent de l'obligation de *due diligence* en raison du «caractère souvent irréversible des dommages causés à l'environnement»[68].

17. Les Etats, y compris le Nicaragua et la Colombie, sont tenus d'exercer vigilance et prévention en matière de protection de l'environnement marin et notamment pour des écosystèmes interdépendants. La vigilance et la prévention ne perdent certainement pas de leur importance lorsque les écosystèmes concernés se trouvent dans une ZEE. Des activités d'information et d'observation contribuent à la vigilance et à la prévention.

18. Le Nicaragua se présente devant vous et prétend et répète sans cesse qu'il a des droits souverains exclusifs en matière de protection de l'environnement dans sa ZEE, et cela en méconnaissant, comme je l'ai dit précédemment, les autres règles et principes applicables dans cet espace. Ce même Etat, qui est assez passif en matière de protection des écosystèmes fragiles, comme l'a reconnu la communauté scientifique et environnementale nicaraguayenne[69], reproche à un autre

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[66] CR 2021/14, p. 43-46, par. 33-44 (Boisson de Chazournes).

[67] Voir, par exemple, *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua)* et *Construction d'une route au Costa Rica le long du fleuve San Juan (Nicaragua c. Costa Rica), arrêt, C.I.J. Recueil 2015 (II)*, p. 706-707, par. 104.

[68] *Projet Gabčíkovo-Nagymaros (Hongrie/Slovaquie), arrêt, C.I.J. Recueil 1997*, p. 78, par. 140.

[69] Voir Commentaires de la Colombie sur les nouveaux documents produits par le Nicaragua, 9 septembre 2021, par. 20.

Etat, en l'occurrence la Colombie, de mener des activités licites d'observation et d'information à des fins environnementales. La logique du Nicaragua consiste, en fait, à favoriser le «*wait and see*» en matière environnementale. Cette logique consiste à demander aux Etats tiers, en vertu de son interprétation erronée du régime de la ZEE, de se soumettre à son bon vouloir unilatéral en matière de protection de l'environnement, et cela malgré les risques avérés qui pèsent sur les écosystèmes fragiles et les habitats des Raizals. Il ne fait guère de doute qu'une telle vision de la protection de l'environnement s'inscrit en porte-à-faux avec la vigilance et la prévention qui sont attendues des Etats en matière environnementale.

19. C'est aussi la vigilance et la prévention dans tous les espaces maritimes, y compris la ZEE, qui sont requises des Etats parties à la convention de Carthagène. Le Nicaragua a maintenant accepté que la convention de Carthagène s'applique et ne tente plus de réduire la portée de cet instrument conventionnel[70]. Il est difficile, en effet, en vertu des canons traditionnels de l'interprétation des traités, de faire abstraction du fait que cette convention contient des obligations positives pour les Etats parties[71]. Les canons du droit des traités rendent en outre sans effet le nouvel argument du Nicaragua selon lequel le protocole relatif aux zones et à la vie sauvage spécialement protégées[72] interdirait les activités d'observation et d'information de la Colombie. Ce protocole, que le Nicaragua a ratifié très récemment pour des raisons vraisemblablement opportunistes, n'est entré en vigueur pour le Nicaragua que le 3 juin 2021[73]. Il ne s'applique donc pas au présent différend. Par ailleurs, ledit protocole, qui a un objet spécifique, n'a pas et n'a jamais eu pour objet de se substituer à la convention de Carthagène. Il s'agit là donc d'une énième tentative douteuse du Nicaragua en vue de rendre illicite ce qui est licite dans le cadre de la convention de Carthagène.

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[70] CR 2021/13, p. 35, par. 27 (Pellet).

[71] Convention de Carthagène, article 4 intitulé «Obligations générales».

[72] 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 dans la région des Caraïbes, 18 janvier 1990.

[73] Ministry of Foreign Affairs of Colombia, SPAW Protocol, list of signatures and ratifications, disponible à l'adresse suivante : https://www.cancilleria.gov.co/sites/default/files/FOTOS2020/protocolo_relativo_a_las_areas_y_flora_y_fauna_silvestres_especialmente_protegidas_del_convenio_para_la_proteccion_y_el_desarrollo_del_medio_marino_de_la_region_del_gran_caribe.pdf (consulté le 28 septembre 2021).

Conclusion

20. Madame la présidente, Mesdames et Messieurs les juges, vous l'aurez compris : la ZEE n'est pas une zone environnementale exclusive comme l'insinue le Nicaragua. Ce dernier, à travers ses écritures et ses deux tours de plaidoiries, vous a présenté une vision tronquée du régime de la ZEE. En outre, cette vision ne tient pas compte du caractère évolutif du droit international et de la nécessité d'interpréter le droit international à la lumière des préoccupations actuelles de la communauté internationale en matière de protection de l'environnement. De plus, elle s'éloigne fondamentalement de la notion de juridiction telle qu'interprétée par la Cour interaméricaine des droits de l'homme.

21. A l'heure où la communauté internationale dans son unanimité a accepté la nécessité de réaliser l'objectif du développement durable n° 14[74] dédié à la conservation des mers et ressources marines, la Cour se doit de déclarer les arguments du Nicaragua comme insoutenables, infondés et les rejeter purement et simplement. La Cour contribuera ainsi, comme elle l'a fait dans le passé, à la clarification de la portée du droit international relatif à la protection de l'environnement. Une telle contribution, qui n'implique pas pour la Cour de «légiférer», comme l'ont soutenu à tort les conseils du Nicaragua[75], serait significative et bienvenue à moins d'un an de la célébration du cinquantenaire de la conférence de Stockholm (Stockholm +50), laquelle a marqué le point de départ des normes et exigences environnementales auxquelles tous les Etats devraient se soumettre.

22. Mesdames et Messieurs les juges, je vous remercie de votre bienveillante attention. Madame la présidente, puis-je vous demander de donner la parole à M. Rodman Bundy ?

The PRESIDENT: I thank Professor Boisson de Chazournes. I now invite the next speaker, Mr. Rodman Bundy, to take the floor.

[74] ODD14 : «Conserver et exploiter de manière durable les océans, les mers et les ressources marines aux fins du développement durable», https://www.un.org/sustainabledevelopment/fr/oceans/ (consulté le 28 septembre 2021).

[75] CR 2021/17, p. 22, par. 36 (Pellet).

Mr. BUNDY:

COLOMBIA DID NOT VIOLATE NICARAGUA'S SOVEREIGN RIGHTS

Introduction

1. Thank you, Madam President, distinguished judges. In this presentation, I shall respond to Nicaragua's contentions concerning alleged violations of sovereign rights by Colombia's naval vessels and aircraft. This is the first strand of Nicaragua's claim. Professor Reisman will follow me with ~~*a*~~ ***the*** second strand; the contiguous zone Decree. My presentation will be in four parts.

2. *First*, I will address Nicaragua's new "composite act" theory of liability that Professor Pellet advanced on Monday. *Second*, I will respond to what counsel had to say about pre-critical date events on Monday. These are the events that Nicaragua studiously avoided discussing in the first round. *Third*, I will turn to the jurisdictional issues in order to show that the arguments we heard two days ago from Professor Pellet do not change the fact that, under Article XXXI of the Pact, Colombia did not consent to the Court's jurisdiction over disputes concerning facts which, if established, would constitute breaches of international obligations after the Pact was no longer in force for Colombia. *Lastly*, I will take up the post-critical date alleged wrongful acts that counsel mentioned on Monday.

1. The alleged "pattern of conduct argument" and "composite act" argument

3. Nicaragua's case is based on a number of discrete alleged acts — 51 such acts over nine years, Mr. Reichler told us on Monday[76]. An average of less than six incidents per year. And even on Nicaragua's version of the facts each of these so-called "incidents" lasted no more than a few minutes. We have shown that the contemporary evidence, such as it is, does not support the proposition that any of these events rose to the level of a violation of Nicaragua's sovereign rights.

4. Recognizing the evidentiary fragility of its case, Nicaragua changed its tune in the Reply. There, Nicaragua claimed that, "[e]ven if Colombia might try to excuse some of these actions, it cannot avoid the conclusion that its behaviour, viewed as a whole, is internationally wrongful"[77].

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[76] CR 2021/17, p. 36, para. 43 (Reichler).

[77] RN, para. 4.90.

5. This attempt to play down the actual facts in favour of a broad-brush "pattern of conduct" approach is misplaced both factually and legally. Not only must Nicaragua demonstrate, based on proven facts and event-by-event, that Colombia violated its rights; it must also overcome the reality, attested to by the statements of its political and military leaders and the significant increase in its own fishing since the 2012 Judgment, that there was no pattern of wrongful conduct on the part of Colombia. Despite the efforts of Nicaragua's counsel, this Nicaragua has not done.

6. In the *Oil Platforms* case, the United States raised a similar argument. It advanced a generic claim to the effect that, as a result of an alleged cumulation of attacks on United States and other vessels in the Persian Gulf, Iran breached its obligation with respect to freedom of commerce and navigation that was the subject-matter of the dispute under Article X of the Treaty of Amity between those two countries. The Court rejected this approach in its 2003 Judgment. The Court stated the following:

> "The Court considers that, in the circumstances of this case, a generic claim of breach of Article X, paragraph 1, of the 1955 Treaty cannot be made out independently of the specific incidents whereby, it is alleged, the actions of Iran made the Persian Gulf unsafe for commerce and navigation, and specifically for commerce and navigation between the territories of the parties. However, [the Court continued] the examination in paragraph 120 above [— that was the paragraph where the Court had addressed each of the individual incidents — the examination in that paragraph] shows that none of them individually involved any interference with the commerce and navigation protected by the 1955 Treaty; accordingly the generic claim of the United States cannot be upheld"[78].

The same holds true in this case.

7. Two days ago, Professor Pellet seized yet another opportunity to change the nature of Nicaragua's case. He asserted that Colombia's acts can also be viewed as a breach consisting of a composite act under Article 15 of the Articles on State Responsibility. Now, this notion of a composite act was entirely new; it was not mentioned in Nicaragua's Application, nor in its Memorial nor in its Reply.

8. While Professor Pellet took you to the Commentary on Article 15, he neglected to mention that paragraph (2) of that Commentary notes that "Composite acts covered by article 15 are limited to breaches of obligations which concern some aggregate of conduct *and not individual acts as such*"

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[78] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, pp. 217-218, para. 123.

(emphasis added). Here, we are dealing precisely with a number of individual acts — "incidents" to use Nicaragua's words — each of which Nicaragua advanced in its written pleadings as a violation of its sovereign rights. That is exactly the opposite of a composite act. Indeed, counsel was unable to say when the last act of this so-called "composite act" occurred although, on Nicaragua's theory of the case, it must have been well after the Pact of Bogotá ceased to be in force for Colombia. Moreover, my learned friend also passed over the Commentary's observation that examples of composite acts include genocide, apartheid, or crimes against humanity, systematic acts of racial discrimination and systematic acts of discrimination prohibited by a trade agreement[79]. Those examples are clearly legally different. They require a series of acts before a wrongful act is committed, and do not even remotely reflect what we are dealing with in the present case.

9. Thus, it is to the individual acts alleged by Nicaragua that we must turn. And Nicaragua's eleventh-hour tactic in advancing a "composite act" theory, which combines pre-critical date and post-critical date events, is no more than a rather transparent effort to overcome the temporal limits to the Court's jurisdiction contained in the Pact's compromissory clause — Article XXXI. As I shall show, this tactic is unavailing.

2. Pre-critical date events

10. I now turn to the pre-critical date events that Mr. Reichler belatedly discussed on Monday. In doing so, it is useful to recall that Nicaragua's Application made no reference, nor attached any annexes, dealing with any specific "incident" that involved interference by Colombia with the exercise by Nicaragua of its sovereign rights.

11. Instead, the documentation furnished by Nicaragua mostly concerned statements made by political or military officials — statements which, in themselves, do not constitute a violation of Nicaragua's sovereign rights. Moreover, we now have, as Sir Michael said, a new Nicaraguan submission in which it requests the Court to remain seised of the case until Colombia recognizes and respects Nicaragua's rights in the Caribbean Sea. But the Applicant forgets that, as the Court itself noted at paragraph 106 of its 2016 Judgment on the preliminary objections, "Nicaragua denies that

[79] Draft Articles on State Responsibility for Internationally Wrongful Acts, Art. 15, para. 2 of the Commentary.

its Application . . . represents an attempt to obtain post-adjudication enforcement measures"[80]. ~~***Now***~~ ***T***hat denial sits badly with Nicaragua's new submission.

12. The first pre-critical date act that Mr. Reichler mentioned on Monday is claimed to have involved a Nicaraguan lobster boat, the *Miss Sofia*. Counsel asserted that the boat was chased away by a Colombian vessel, after which it radioed a Nicaraguan vessel for help, and that two men, whom the Colombian Navy subsequently rescued, had fallen over during this "incident"[81].

13. Now with respect, Madam President, this version of events is a product of Mr. Reichler's rather fertile imagination. The only source counsel cited to support his account was the famous 26 August 2014 letter from Admiral Corrales to Nicaragua's Foreign Ministry, prepared some 18 months after the event is alleged to have taken place, and *one day* before Admiral Corrales himself expressly affirmed that "we have not had any problems with the Colombian Navy"[82].

14. The 26 August 2014 letter contained no contemporaneous evidence to support the allegations. There is also no mention whatsoever that the two crew members on the lobster boat had fallen off during the incident. Regrettably, that again seems to be invention on counsel's part. In contrast, Colombia produced as Annex 53 to its Counter-Memorial a naval report prepared just three days after the event — a contemporaneous report — recounting what had actually happened. The Colombian naval vessel had no contact with the *Miss Sofia*. Rather, it encountered two people set adrift in a canoe who said they were crew members of the *Miss Sofia* lobster boat and the Colombian Navy rescued them. The Colombian vessel then tried to contact the *Miss Sofia*, but the lobster boat failed to respond. So the Colombian vessel then contacted a Nicaraguan patrol boat that could also not reach the *Miss Sofia*, which had mysteriously disappeared abandoning two of its crewmen. Thereafter, the Nicaraguan patrol boat said that it would receive the two crewmen from Colombia, but later changed its mind and indicated that the crewmen could be received by yet a different vessel, which the Colombian Navy did after giving the crewmen food and medical attention. That is a violation of Nicaragua's sovereign rights? I think not.

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[80] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 40, para. 106.

[81] CR 2021/17, p. 25, paras. 11-12 (Reichler).

[82] Preliminary Objections of Colombia, Ann. 43.

15. Mr. Reichler next mentioned an event dated 18 September 2013 reported on Colombian radio as to which he claimed that President Santos was conducting a "'sovereignty exercise' in the waters between San Andrés and the 82nd [degree] meridian"[83]. Regrettably, this too is a distortion. The media report nowhere mentions the 82nd meridian or any exercise of sovereignty up to it. The document in question simply reports President Santos saying: "We are patrolling and exercising sovereignty on Colombian waters."[84] No more, no less. How Mr. Reichler can assert right after quoting this passage that "[e]xercising sovereignty in Nicaragua's EEZ is plainly a violation of Nicaragua's sovereign rights"[85] is not only a *non sequitur*, it is also unsupported by the very report he relies on.

16. Mr. Reichler's last pre-critical date "incident" was described by Nicaragua as having taken place on 19 February 2013 when the Colombian vessel the *Almirante Padilla* was claimed to have prevented a Nicaraguan vessel from inspecting a Colombian fishing vessel in the Luna Verde area[86]. But Colombia produced the navigation logbook of the *Almirante Padilla* showing that, on the day in question, that is, 19 February 2013, the Colombian Naval vessel was berthed at the Cartagena Naval Base which is over 800 kilometres away![87] It could not have done what counsel asserts.

17. ~~***Now T***~~***T***hat is the sum total of the pre-critical date "incidents" that Mr. Reichler chose to discuss, presumably because he felt they represented Nicaragua's best examples. It is a pretty thin soup, Madam President. They amount to nothing, and are an undocumented, unsupported nothing at just that. As I noted last week, there were no Nicaraguan complaints at the time or for well over a year afterwards. To the contrary, the statements of Nicaragua's President, its Head of the Naval Forces and its Chief of the Army in 2013 fundamentally undermine any notion that Nicaragua considered that its sovereign rights had somehow been violated. So much for the pre-critical date events on which the Application was founded.

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[83] CR 2021/17, p. 27, para. 17 (Reichler).

[84] MN, Ann. 5.

[85] CR 2021/17, p. 27, para. 17 (Reichler).

[86] MN, para. 2.39.

[87] CMC, Ann. 31.

3. Lack of jurisdiction over post-critical date events

18. I turn to the post-critical date events now starting with the question of jurisdiction.

19. Last week I noted that, in considering the scope of the Court's jurisdiction *ratione temporis*, Nicaragua's counsel had completely avoided even mentioning Article XXXI of the Pact in their first round. They preferred to rely exclusively on Article LVI. This was rather surprising given that Nicaragua expressly stated in paragraph 16 of its Application: "The jurisdiction of the Court in this case is based on Article XXXI of the American Treaty on Pacific Settlement (Pact of Bogotá) of 30 April 1948."

20. On Monday, Professor Pellet at last addressed Article XXXI, but only to say that it adds nothing to Article LVI[88], and that Article XXXI only concerns the Court's jurisdiction *ratione materiae*[89].

21. To borrow Professor Pellet's words, that is a "bizarre" thesis. First, the two Articles clearly deal with different matters: Article LVI with the denunciation of the Pact and its consequences; Article XXXI with the scope of the Contracting Parties' consent to the Court's jurisdiction. Contrary to my friend's contention, Article XXXI is scarcely limited to jurisdiction *ratione materiae*. It covers jurisdiction *ratione personae* — "the High Contracting Parties declare that they recognize . . . [the Court's jurisdiction]". It deals with jurisdiction *ratione temporis*, "without the necessity of any special agreement so long as the present Treaty is in force". And it deals with jurisdiction *ratione materiae* — sub-paragraphs *(a)* through *(d)* of Article XXXI.

22. Counsel's whole thesis is based on two propositions. The first is based on the second paragraph of Article LVI, that provides ~~***that***~~: "The denunciation shall have no effect with respect to pending procedures initiated prior to the transmission of the particular notification." The second proposition is that the Court can take into consideration facts that are alleged to have taken place after the filing of the application provided they are directly connected with the subject-matter of the Application. Neither of those propositions withstands scrutiny in the light of the actual wording of Article XXXI.

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[88] CR 2021/17, p. 15, para. 16 (Pellet).

[89] CR 2021/17, p. 16, para. 18 (Pellet).

23. Colombia has no problem with Article LVI. Colombia accepts that the Court has jurisdiction over the claims that formed the basis for Nicaragua's Application — namely, alleged wrongful acts of Colombia that existed as of the date of the Application — pre-critical date events. However, the Court's 2016 Judgment on Colombia's preliminary objections —and contrary to counsel for Nicaragua's suggestion — while upholding the Court's jurisdiction over matters that were the subject of Nicaragua's Application, in no way prejudged the question of its jurisdiction over post-treaty facts.

24. On Monday, counsel questioned why Colombia had not advanced the jurisdictional position it takes with respect to post-treaty facts in its preliminary objections[90]. The answer is straightforward. This question depended on how Nicaragua was framing and was to frame its case and the materials it would introduce to support that case. We have seen that Nicaragua's case has consistently evolved from a claim based on a series of discrete acts, to a "continuing violation" theory, to a "pattern of conduct" argument, and finally, just on Monday, to a "composite act" thesis. Moreover, this evolution has been accompanied by the repeated introduction of new documents and new so-called "facts", and in these circumstances, the question of jurisdiction over post-treaty facts was closely connected to the merits of the case and did not have an exclusively preliminary character making it ripe for a preliminary objection.

25. Professor Pellet's Article LVI does not exist in a vacuum. It must be read in conjunction with Article XXXI, which after all is the provision actually providing for the Court's jurisdiction. This is where Nicaragua's case falls down.

26. Notwithstanding the text of Article XXXI, Nicaragua's counsel continued to argue that the Court's jurisprudence stands for the proposition that it has jurisdiction to consider facts and events introduced subsequent to the filing of the Application provided they are connected to facts and events already falling within the Court's jurisdiction and that they do not transform the nature of the dispute. But that is not the key question. Quite simply, none of the cases — *none of the cases* — cited by my opponents to support their argument deal with a compromissory clause drafted in the way that Article XXXI is, and they are not apposite to the situation we have here.

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[90] CR 2021/17, p. 16, para. 17 (Pellet).

27. Take the *Certain Property* case. On that, on Monday, Professor Pellet was economical. He simply stated that that case concerned facts that predated the acceptance of jurisdiction by the two parties and thus the question posed concerned the retroactive exercise of jurisdiction[91]. But what my opponent failed to grapple with was the point I made last week: namely, if the Court had no jurisdiction over facts that were alleged to have occurred before there was a title of jurisdiction between the Parties, why would the situation be different with respect to jurisdiction over facts that are claimed to have transpired after the treaty was no longer in force between the Parties and there was thus no longer any applicable jurisdictional title? No answer from counsel on that point.

28. I will not come back at any length to Professor Pellet's treatment of the other cases I mentioned last week — the *Fisheries Jurisdiction* case and the *Legality of the Use of Force* case. Suffice it to note that my distinguished *contradicteur's* response was equally thin. Once again, he failed to address the critical point, which is that neither of the instruments which the Applicant relied on for jurisdictional purposes in those cases contained a temporal limitation to the Parties' consent to jurisdiction like that in Article XXXI. As the Court observed many years ago in the *Anglo-Iranian Oil Co.* case, and I think it still holds true today, "the jurisdiction of the Court to deal with and decide a case on the merits depends on the will of the Parties"[92]. Here, the will of the Parties with respect to jurisdiction *ratione temporis* was clearly expressed in Article XXXI. That consent only existed with respect to facts or claims that could constitute a breach of an international obligation as long as the Pact remained in force. But after 27 November 2013, the Pact was no longer in force for Colombia.

29. In its written pleadings, Nicaragua relied heavily on what it termed the "*Nottebohm* rule", which the Court recalled in its Order on the admissibility of Colombia's counter-claims in the following way: "Once the Court has established jurisdiction to entertain a case, it has jurisdiction to deal with all its phases; the subsequent lapse of the title cannot deprive the Court of its jurisdiction."[93] Again, Colombia has no problem with that, and while counsel did not return to this case on Monday, it is instructive for purposes of the jurisdictional issue before the Court to have a closer look at that case.

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[91] CR 2021/17, p. 17, para. 20 (Pellet).

[92] *Anglo-Iranian Oil Co. (United Kingdom* v. *Iran), Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 103.

[93] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Counter-Claims, Order of 15 November 2017, I.C.J. Reports 2017*, p. 310, para. 67.

30. Jurisdiction to deal with a dispute over the legal consequences of facts that are in existence during the period when a jurisdictional title exists is not the same thing as ruling on the legal consequences of facts that occur *after* a compromissory clause has lapsed. That is not tantamount to a "phase" of the case, such as a request for provisional measures, or the written or oral phases of the proceedings. Nicaragua is asking the Court to rule on the legality of events that are said to have occurred at a time when the Pact no longer applied as between Nicaragua and Colombia. In *Nottebohm*, the Court was not called upon to decide the legality of any events that transpired after Guatemala's optional clause declaration was no longer operative. Indeed, the Court noted in its Judgment that an Application filed after the expiration of Guatemala's declaration would not have had the effect of legally seising the Court[94].

31. Just as the Court would not have been legally seised if Nicaragua had filed a separate case relating to events occurring after 27 November 2013, so also Nicaragua cannot overcome the temporal limitation to Colombia's consent contained in Article XXXI by attempting to tack such events onto a pre-existing case. That ***~~has~~ is*** a stratagem by which Nicaragua is seeking to evade the basic principle of consent to jurisdiction.

32. Last week, I noted that Nicaragua's counsel had not pointed to a single case where the Court has exercised jurisdiction with respect to the legality of a State's conduct when that conduct occurred at a time when there was no applicable jurisdictional title in force between the parties to the case[95]. On Monday, Nicaragua's counsel were unable to counter that statement.

33. The key point is that, to the extent Nicaragua relies on facts or events that transpired after the Pact ceased to be in force for Colombia, the Court lacks jurisdiction *ratione temporis* to decide whether they constitute a breach of an international obligation.

4. There were no post-critical date breaches in any event

34. So let me last turn to the post-critical date events that Mr. Reichler came back to on Monday, notwithstanding the jurisdictional argument. A good part of Mr. Reichler's presentation consisted in rehashing nine "incidents" that he had discussed last week. But before turning to those

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[94] *Nottebohm (Liechtenstein* v. *Guatemala), Preliminary Objection, Judgment, I.C.J. Reports 1953,* p. 121.

[95] CR 2021/15, p. 18, para. 46 (Bundy).

matters, it is important to recall what counsel was *not* able to show in order to keep Nicaragua's claims in context.

35. The point I would emphasize is that *none* of the events discussed by counsel showed any interference or hostile actions on the part of Colombia's Navy with respect to the activities of Nicaragua's fishermen, who were always able to carry out their activities. Nor did Colombia ever prevent Nicaragua from exercising its sovereign rights with respect to the exploration and exploitation of the resources in maritime areas where it has such rights. Despite the fact that counsel last week stated that he was addressing what he called the "more egregious of these actions of the Colombian Navy"[96], counsel's presentation of individual "incidents" — both last week and again on Monday — failed to demonstrate the contrary. Certainly, none of Mr. Reichler's nine "incidents", or any of the other events he discussed, show any such interference by Colombia on Nicaragua or its fishermen's ability to carry out their activities.

36. Instead — and this is quite striking — the incidents on which Mr. Reichler dwelled all had a common theme. If you flip though the tabs that counsel redirected you to on Monday, you will see that in most of them the Colombian Navy said it was there to protect the historic fishing rights of the Colombian State, provide security for all vessels and combat international crime. In certain others, the statements only refer to the protection of the historic rights of the fishermen.

37. ~~***Now,***~~ Nicaragua takes no issue with the presence of Colombia's vessels for purposes of providing security to all vessels. There is no breach of any sovereign rights there. Nor does Nicaragua contest the right of Colombia's Navy to monitor the situation for international criminal activities, such as the transport of narcotics or arms. On Monday, Nicaragua's distinguished Agent confirmed what Nicaragua had in fact already said in its Reply, that "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"[97].

38. It follows that Nicaragua's case with respect to alleged violations of its rights boils down to only one thing: Colombia's presence in the area to protect the historical fishing rights of Colombia and its nationals, which Mr. Reichler asserted, in itself, constitutes a violation of Nicaragua's

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[96] CR 2021/13, p. 51, para. 29 (Reichler).

[97] CR 2021/17, p. 49, para. 12 (Argüello Gómez).

sovereign rights[98]. But once again on this point, counsel failed to respond to what I had pointed out last week.

39. We have shown that Nicaragua's President, it's Head of State, was on record at the time as stating the following: "I told President Santos, and I have said publicly, that the [Raizales] can continue fishing. That Nicaragua will not affect them in their Rights"[99]. And he also stated that Nicaragua would authorize fishing in the area where Colombian traditionally fished, "both artisanal and industrial fisheries"[100].

40. ~~***Now***~~ Colombia was entitled to rely on the good faith of those statements that were directed at the highest level to Colombia's Head of State from none other than Nicaragua's Head of State. But the problem was that Nicaragua's naval forces did not respect the promises of its own president. They continued to approach Colombian fishermen and harassed them. And in these circumstances, it was entirely reasonable for the Colombian Navy to take President Ortega at his word and to offer protection to the fishermen as needed and when it could do so, without at the same time interfering at all with Nicaragua's own fishing or other activities. And that, in Colombia's submission, does not amount to a violation of Nicaragua's sovereign rights.

41. As for the other "incidents" that Mr. Reichler mentioned on Monday, they too have been presented unfortunately in a misleading manner.

42. For example, Nicaragua alleges that a Colombian vessel ordered a Nicaraguan-licensed fishing vessel, the *Doña Emilia*, to stop fishing. This was one of the events Mr. Reichler returned to on Monday[101]. This event was addressed by us in Appendix 1 to the Rejoinder (pp. 56-57), and the transcript of the audio recording shows that, even though the Nicaraguan fishing boat was carrying out clearly predatory fishing practices, Colombia did no more than to advise the crew to suspend those harmful practices[102]. There was no "order" and no interference with their fishing. In fact, Colombia's officers even informed the fishermen about the need to protect and preserve the species

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[98] CR 2021/17, p. 31, para. 27 (Reichler).

[99] CR 2021/15, p. 19, para. 49 (Bundy).

[100] CR 2021/15, p. 19, para. 49 (Bundy).

[101] CR 2021/13, p. 53, para. 34 (Reichler) and CR 2021/17, p. 31, para. 28 (Reichler).

[102] RN, Ann. 32, p. 405.

for their children. Mere informatory statements like this do not amount to a violation of sovereign rights.

43. Counsel also referred to a matter involving a fishing vessel for Colombia, the *Miss Dolores*, with respect to which a Colombian naval vessel was claimed to have warned off a Nicaraguan patrol boat[103]. But counsel was unable to show that the *Miss Dolores* was even fishing in Nicaragua's waters because the date and the location of the event were unascertainable and have not been evidenced at all by anything Nicaragua has produced. It follows that Nicaragua has simply not sustained any burden of proof that its sovereign rights were infringed in this instance.

44. As for Nicaragua's reliance on the 10 December 2018 matter involving the *Observer*, I explained last week how our opponents' version of events is badly skewed[104]. Mr. Reichler agrees, finally, that, contrary to what he asserted last week, the captain of the *Observer* never admitted he was fishing in areas where Nicaragua has sovereign rights. Mr. Reichler now says it was the owner who admitted as much[105]. But the owner was not even on the *Observer* and he had absolutely no first-hand evidence of what happened. Moreover, to support his argument, counsel referred to a document mentioned in a footnote to his pleading — again pleading by footnote — a document that is not on the record[106], and that Nicaragua has not produced or shown is published or readily available, and for which there is no translation in one of the official languages of the Court. All of this is in complete non-compliance with Practice Direction 9*bis* of the Court, that renders any such reference inadmissible and unreliable, because even if it had been properly produced, Colombia should be given, under Practice Direction 9*bis*, the right to comment; none of that has happened.

45. Mr. Reichler also returned to an episode that is said to have involved a Colombian vessel interfering with a Mexican research ship[107]. But this, again, was a non-event. Colombia's 16 December 2019 letter to the Court, which was in response to new documents filed by Nicaragua and which was not referred to by counsel, explained that the official correspondence from the Mexican authority to which the research vessel was affiliated — an organization called

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[103] CR 2021/17, p. 32, para. 31 (Reichler).

[104] CR 2021/15, pp. 19-20, paras. 52-53 (Bundy).

[105] CR 2021/17, p. 34, para. 37 (Reichler).

[106] CR 2021/13, p. 56, para. 43, and fn. 145 (Reichler).

[107] CR 2021/17, p. 35, para. 42 (Reichler).

INAPESCA — confirmed itself that the vessel carried out its scientific research work without interference. Hence, no Mexican protest.

46. And as for the matter of the claim that Colombia has violated Nicaragua's sovereign rights through the issuances of petroleum contracts, counsel now concedes that no such contracts have been issued[108]. So where is the violation of Nicaragua's sovereign rights?

47. And as for the assertion that Colombia issued a fishing licence for one of its registered boats to fish in the Luna Verde bank — and this my final point, Madam President — counsel had no response to my showing that the document Nicaragua relies on was not a fishing permit: it was only an authorization for the boat to be affiliated with a particular person's fishing fleet. But in any event, Mr. Reichler observed on Monday, "this case does not turn on Colombia's fishing licences"[109]. We agree. So even if the Court had jurisdiction over post-critical events, *quod non*, there were no breaches.

Madam President, distinguished judges, thank you for your attention. That concludes my presentation, and I would be grateful if the floor could be given to Professor Reisman. Thank you very much.

The PRESIDENT: I thank Mr. Bundy. I now invite the next speaker, Professor Michael Reisman, to take the floor.

Mr. REISMAN: Thank you, Madam President.

THE CONTIGUOUS ZONE OF COLOMBIA IN THE SOUTH-WESTERN CARIBBEAN IS LAWFUL

1. Madam President, Members of the Court, it is an honour to appear before you on behalf of the Republic of Colombia. I will focus on Nicaragua's main arguments against the contiguous zone. In brief, contrary to Nicaragua's claims, the overlap is lawful, the simplification is lawful and the powers are lawful. In sum, Nicaragua has failed to prove that Decree 1946 violated any Colombian obligation towards it.

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[108] CR 2021/17, p. 24, para. 9 (Reichler).

[109] CR 2021/17, p. 35, para. 41 (Reichler).

2. The powers exercised by a State in its contiguous zone attach, as of right, to the territorial sea and form part of that régime. These powers encompass *two* functions. Both concern the infringement of the State's protective laws within its territory and territorial sea. First, with respect to outbound activities, a State may punish perpetrators of such violations within its territory and territorial sea. Second, the inbound power concerns preventing perpetrators from executing violations within its territory or territorial sea. These powers do not "control" shipping or apply its laws in the contiguous zone as Nicaragua suggested[110], are entirely unrelated to other States' maritime resource rights and do not produce any adverse effects on any user. That is, of course, except for those who will or have violated Colombia's protective laws and regulations in its territory or territorial sea.

3. In its second pleading, Nicaragua quoted, very selectively, from the Decree's introduction, before — to use Nicaragua's words — turning to "[t]he Decree itself"[111]. Selectivity enables Nicaragua to focus on the vague reference to the contiguous zone as part of Colombia while ignoring the words "in accordance with international law". Even more egregiously, Nicaragua quotes two introductory paragraphs, excluding the bridging paragraph and distorting its meaning.

4. Consider the missing quotation and its effect.

5. Together both paragraphs not only condition the contiguous zone powers to "in accordance with customary international law", but also make clear that the place of those powers is within the territory and the territorial sea and not the zone itself. Nicaragua's repetition that the Decree enforces Colombia's laws in the contiguous zone is incorrect[112].

6. "The Decree itself" provides in Article 5: "Prevent and control infractions of the laws and regulations . . . which take place in its insular territories or in their territorial sea". Like any other contiguous zone, there is no "control" of "foreign shipping", or regulation of the EEZ's environment, as Nicaragua suggests[113].

7. Three points must be emphasized. First, contiguous zone powers are not exclusive and require neither delimitation, delineation nor even proclamation. Second, the simplification of the

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[110] CR 2021/17, pp. 40-41, para. 17, p. 42, para. 27, and pp. 44-45, paras. 37 and 43 (Lowe).

[111] CR 2021/17, p. 39, para. 8 (Lowe).

[112] See e.g. CR 2021/17, pp. 44-45, paras. 37, 41, 42 and 43 (Lowe).

[113] CR 2021/17, pp. 40-41, para. 17 (Lowe).

contiguous zone is lawful and causes no injury to Nicaragua — by contrast with its straight baselines which Professor Thouvenin will deal with. Third, the powers in the Decree directed at preventing and punishing the infringement of the security, environment and cultural heritage within Colombia's territory or territorial sea are not "additions" to the terms in UNCLOS Article 33, but simply their elaboration.

8. Madam President, from the *Anglo-Norwegian Fisheries* case on, the Court has adjusted the Law of the Sea to maintain a balance between inclusive and exclusive uses. Both EEZ rights and contiguous zone rights are permissible uses. Contiguous zone powers are inclusive, as they may be exercised by various States in the same location, without interfering with the rights of the other users — whether exclusive or not. The EEZ does not "outrank" the contiguous zone. Both concern distinct and different rights having the *same normative force*. When occurring in the same space, they do not cancel each other out.

A. Inclusive contiguous zone powers may lawfully co-exist with exclusive EEZ rights

9. Nicaragua portrays the contiguous zone as a zone which trumps or excludes all the rights of other users because it has a spatial extent. Indeed, a contiguous zone does have a spatial extent, but it is inherently different from exclusive jurisdictions, such as the EEZ régime.

10. When a State's territorial sea abuts the EEZ of another State, its contiguous zone perforce extends into the EEZ of the latter. There is no conflict because the EEZ State's resource rights are substantially different from the contiguous zone State's "prevent and punish" powers. Keep in mind that the contiguous zone is a set of rights and not a conveyance of space. In its second round, Nicaragua artfully argued that "[w]hat 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". Left unsaid is that the "boundary" for the purposes of contiguous zone powers is the outer limit of another State's territorial sea, as confirmed by the proclamation of the United States I quoted last week[114]. So Nicaragua, arguing circularly, in effect

[114] CR 2021/15, pp. 27-28, para. 17 (Reisman).

has no reasoned argument to support its denial of a contiguous zone for Colombia's islands' fronting Nicaragua's EEZ.

11. Nicaragua asserted that Colombia only offered a single authority to support the proposition of a permissible overlap between a contiguous zone and an EEZ[115]. Nicaragua errs. This passage, from a contemporary 1984 report by the Commonwealth Group of Experts, was offered as the explanation for the removal of the delimitation provision by the authoritative Virginia Commentary[116]. But Nicaragua misreads the Commentary, overlooking paragraph 33.8 *(c)*, which explains that: "There is nothing in article 33 corresponding to article 16, and there is no specific requirement for notice to be given of the establishment of a contiguous zone for the purposes indicated in article 33". No specific requirement for notice.

12. UNCLOS and the Commentary recognized that contiguous zone powers are not exclusive, do not affect the protected rights of others, and require no delimitation, delineation or even publication. For a coastal State's exclusive jurisdictions which affect the rights of others, UNCLOS requires publishing detailed charts depicting their spatial extent.

13. For example, Article 16 mandates that the coastal State publish charts or geographical coordinates for the territorial sea and baselines, "of a scale or scales adequate for ascertaining their position". They must be made public and deposited with the United Nations.

14. Articles 47, 75, and 84 on archipelagic baselines, the EEZ, the continental shelf and the outer continental shelf, which are in tab 6 of your folder, are to the same effects.

15. The reasons for such requirements are clear. These exclusive jurisdictions perforce affect the rights of other users, who must know their precise locations if they are to respect them. But there is no need for comparable notice for contiguous zone powers, which concern violations of laws *within* the territorial sea or territory of the contiguous zone State.

16. Given the nature of contiguous zone powers, the effects of their exercise on another State or user are minimal, if not non-existent. As I explained last week, the freedom of navigation does not include violating Colombia's protective laws in its territorial sea. As evident from Article 111 on ***a***

[115] CR 2021/17, p. 45, para. 44 (Lowe).

[116] Myron H. Nordquist, Satya N. Nandan and Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea, 1982: A Commentary*, pp. 273-274, para. 33.8 (hereinafter Virginia Commentary).

hot pursuit, where a State defines the extent of its contiguous zone, it is primarily to direct the activities of its law enforcement officers when they are called on to prevent and punish such violations.

17. It is therefore clear that contiguous zone powers, which require no delineation, no publication and no delimitation, may lawfully co-exist with exclusive EEZ rights of an adjacent State. The focus of these powers is the State's own territory and territorial sea. In any event, the Court should approve the overlap in the unique circumstances of this case, given the location of the islands and their fragile marine environment.

B. The simplification of the contiguous zone is lawful

18. Nicaragua accepts that simplifications may be lawful, but ~~***also***~~ objects to Colombia's simplification because it extends beyond 24 nautical miles[117].

19. Simplifications of the extent of these inclusive powers should be allowed when three conditions are met. First, when they promise efficient management by the contiguous zone State. Second, when they impose no deprivations on other users. And third, when they are modest and not excessive. The simplification provided by Colombia's Decree 1946, as amended, meets these conditions and should be allowed.

20. As Colombia explained, the simplification ensures that Colombian authorities may effectively prevent and punish violations of its protective laws in its territory or territorial sea. As a question of fact~~***s***~~[118], the practical application problems generated by the tangle of interconnected arcs generated by these islands has been confirmed by this Court[119]. Second, the simplification of the contiguous zone, most of which falls in Colombia's EEZ, imposes no limits on the rights of others. Thus, Nicaraguan vessels may conduct their activities within the simplified contiguous zone and encounter no interference, indeed, be oblivious to the Decree.

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[117] CR 2021/17, p. 40, para. 14 (Lowe).

[118] CR 2021/17, pp. 40-41, paras. 16-17 (Lowe).

[119] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II),* p. 710, para. 235.

21. If contiguous zone powers impacted the rights of others, as Nicaragua asserts[120], there would have been a requirement to give notice or to publicize their spatial extent. Yet none exists[121]. This shows why the contiguous zone powers have a limited effect, if any, on the rights of other States. Given that the simplification of the Archipelago's contiguous zone portends no effect on others, or specifically, on Nicaragua, it should enjoy a wider margin of discretion than that of baselines, which is ~~*a*~~ ***the*** question of law[122].

22. One last point on simplification. In its first and second pleading, as well as its written submissions, Nicaragua relied upon a sketch of Colombia's contiguous zone presented as an illustration in a televised press conference by former President Santos and on a purported map Nicaragua produced by itself[123]. But none is accurate since Colombia did not finalize the localization of its baselines. The only relevant map, for illustrative purposes, is the one produced by Colombia and is tab 7 of your folders. But as international law does not require the publication of a detailed map or even notice of a contiguous zone establishment, a televised map cannot be dispositive.

C. The powers in Decree 1946, as amended, are lawful

23. Nicaragua only disputes the Decree's powers of security~~***, and***~~ environment ~~***and cultural heritage***~~[124]. I will focus on ***them*** ~~***security and environment***~~. But I must note that Colombia's contiguous zone obligation within Nicaragua's EEZ is to have "due regard" to the EEZ rights and jurisdictions when applying the Decree.

24. Nicaragua has failed to produce proof that the Decree has ever been applied against it, or that it has suffered any injury. Nicaragua's examples, whatever their value, do not, except one, even relate to events in the contiguous zone. Without regard to the absence of incidents, Nicaragua's claims that the mere promulgation of Decree 1946 *ipso facto* violated its rights because it may have a chilling effect on its claimed EEZ rights is wrong[125].

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[120] CR 2021/17, p. 42, para. 27 (Lowe).

[121] UNCLOS, Art. 16; Virginia Commentary, p. 274.

[122] CR 2021/17, p. 40, para. 16 (Lowe).

[123] CR 2021/13, judges' folder, tab 7 (Reichler-5 and Reichler-6) (Reichler); CR 2021/13, judges' folder, tab 35 (VL1-4), tab 36 (VL1-5) and tab 39 (VL1-8) (Lowe); CR 2021/17, judges' folder, tab VL-2 (VL2-7) (Lowe).

[124] CR 2021/13, p. 71, para. 52 (Lowe).

[125] CR 2021/17, pp. 42, para. 27 (Lowe).

25. But just what is chilled? In the area in which it claims EEZ rights, Nicaragua enjoys no preferential freedoms of navigation beyond those availing other users. In the remote case of a conflict between activities implementing Decree 1946 and Nicaragua's EEZ rights, which are unrelated, those would be solved by the "due regard" obligation, as EEZ rights and contiguous zone rights are equal in normative force.

26. Nicaragua's proposition that there could be a theoretical chilling effect on its fishing activities due to the mere promulgation of contiguous zone powers may be quickly disposed of. First, Decree 1946, as amended, does not address fishing. Second, Nicaragua assumes the Decree would be misapplied by Colombia. Yet every State is entitled to the presumption that it will abide by its international obligations and apply the Decree in conformity with international law, as the Decree prescribes. Third, a theoretical chilling effect in a particular instance does not automatically justify denying Colombia the right to effectively protect its islands and territorial sea.

27. Nicaragua seems to accept that the terms in Article 33, dating back over seventy years to the ILC's 1956 draft, are generic and their interpretation may evolve[126]. But it muddles the rules for identifying custom and those for interpretation[127]. Evolutionary interpretation concerns the rules of interpretation as a recent ILC report made clear[128], not practice and *opinio juris*.

28. The terms mentioned in Article 33 were not defined in 1956, nor in 1958, nor the 1982 Convention. So determining their contemporary scope, one has to take account of the development of international law. Viewed in these terms, Decree 1946, as amended, does not add to the powers in UNCLOS Article 33, but simply provides an elaboration of these powers originating more than half a century ago.

29. In the Namibia Advisory Opinion, you explained that "the Court must take into consideration the changes which have occurred in the supervening half-century" and that

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[126] CR 2021/17, p. 41, para. 19 (Lowe).

[127] CR 2021/17, p. 41, para. 19 (Lowe).

[128] ILC, *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries*, 2018, UN doc. A/73/10, available at https://legal.un.org/ilc/texts/instruments/english/commentaries/1_11_2018.pdf.

"an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation"[129].

The PRESIDENT: Mr. Reisman, may I kindly interrupt you before you continue, as it appears that it would be a good time to adjourn for a coffee break of 10 minutes.

Mr. REISMAN: Thank you, Madam President, I will recess.

The PRESIDENT: The sitting is adjourned.

The Court adjourned from 4.35 p.m. to 4.50 p.m.

The PRESIDENT: Please be seated. I now give the floor back to Professor Reisman to continue his presentation.

Mr. REISMAN:

30. Thank you, Madam President. Recently, the International Law Commission adopted its draft conclusions on "subsequent agreements and subsequent practice in relation to the interpretation of treaties"[130]. Four of the ILC conclusions are on point.

31. First, in conclusion 5, the ILC states that, under the Vienna Convention, subsequent practice consists of "*any* conduct of a party in the application of a treaty, whether in the exercise of its executive, legislative, judicial or other functions". Second, in conclusion 7, the ILC observed that "[t]his may result in narrowing, widening, or otherwise determining the range of possible interpretations, including any scope for the exercise of discretion which the treaty accords to the parties". Third, this subsequent practice, as conclusion 8 explains, may "assist in determining whether or not the presumed intentions of the parties upon the conclusion of the treaty was to give a term used a meaning which is capable of evolving over time". And fourth, conclusion 10 of the ILC

[129] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 31, para. 53.

[130] ILC, *Subsequent agreements and subsequent practice in relation to interpretation of treaties*, available at https://legal.un.org/ilc/guide/1_11.shtml.

states that "[s]ilence on the part of one or more parties may constitute acceptance of the subsequent practice when the circumstances call for some reaction"[131].

32. Colombia submits that a contemporary interpretation of the generic terms in Article 33 now includes the powers specified in Decree 1946, as amended. Contiguous zone laws of other States provide some elaboration of the generic terms in Article 33. Jamaica, for example, includes "safety"[132], China and India "security"[133], Malta "pollution"[134], Saudi Arabia and Sierra Leone "environmental"[135]. But rather than "additions" to Article 33 or "violations", these are more in the way of elaborations on its generic terms, reflecting modern realities and understandings of the perils confronting coastal States[136] and the contemporary practice of other States.

33. Nicaragua's objection to the environmental power ~~***now***~~ ignores the now widely appreciated link between environmental protection and the health of the population. Colombia submits that contiguous zone powers include powers to prevent or punish violations of a State's environmental protection laws *in its territory or territorial sea*. This is consistent with the practice of other States and is a contemporary interpretation of the term "sanitary". It is both inspired by and consistent with foundational instruments of contemporary international law.

34. Nicaragua suggested that UNCLOS Article 210 on dumping provides an example for a theoretical conflict between the power to protect the island's environment and its own EEZ right to regulate dumping. Colombia would assume of course that, as a State claiming to value environmental protection, Nicaragua would not authorize activities adversely affecting the Archipelago's fragile environment. But if it were to, the Decree can only be applied "in conformity with international

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[131] ILC, *Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties*, 2018, UN doc. A/73/10, para. 51, available at https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_11_2018.pdf.

[132] Maritime Areas Act of 1996, Art. 28, available at https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/JAM_1996_Act.pdf.

[133] Law on the Territorial Sea and the Contiguous Zone of 25 February 1992, Art. 13, available at https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1992_Law.pdf; http://www.mod.gov.cn/big5/regulatory/2021-01/23/content_4877678.htm; The Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976, Act No. 80, 28 May 1976, Art. 5, available at https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/IND_1976_Act.pdf.

[134] Territorial Waters and Contiguous Zone, Art. 4, available at http://extwprlegs1.fao.org/docs/pdf/mlt1897.pdf.

[135] Translation of Royal Decree No. 6, dated 18/1/1433H, available at https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/SAU_2011_Decree.pdf; The Maritime Zones (Establishment) Decree, 1996, Art. 7, available at https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/SLE_1996_Decree.pdf.

[136] See Alexander Proelβ, *The United Nations Convention on the Law of the Sea: A Commentary* (2017), p. 267.

law"[137]. So if such a theoretical conflict were to occur, in addition to the "due regard" obligation, the Colombian authorities would be required to respect Nicaragua's right to regulate dumping. This one, theoretical and remote, conflict cannot reasonably be used to deny Colombia the power to protect and punish infringements of its environmental laws in its territory or territorial sea.

35. Madam President, Colombia assumes that security risks, primarily those stemming from drug trafficking and piracy, pose a grave risk to the health and well-being of its population, not to speak of the fact that they violate its customs law. To support its proposition that such "security" powers in the contiguous zone are not reflective of an emerging custom or a modern interpretation of the treaty terms, Nicaragua claims that "[s]ecurity claims have been protested by roughly as many States as have made them"[138]. But, for the inclusion of security in contiguous zone powers, the 2021 study on which Nicaragua bases its claim relied on objections filed by one non-party State, and an uncorroborated note by a single author, as the Court can appreciate in tab 10 of the folder[139]. This study identifies 16 States that have proclaimed contiguous zone powers to prevent and punish violations of their security laws. Of these, 11 are UNCLOS States parties, among them: China, India, Sri Lanka and Saudi Arabia. Does Nicaragua assume that the practice of these *parties* to UNCLOS may not serve to interpret the generic terms in Article 33? Does it ignore the apparent silence of the other State parties?

36. If such practices, per the ILC conclusions, may "result in narrowing, widening, or otherwise determining the range of possible interpretations", such practice necessarily affects the interpretation of generic terms. Colombia thus submits that the power to punish or prevent security threats is an elaboration of the generic terms in Article 33, as reflected in customary international law and consistent with State practice, specifically that of UNCLOS parties.

37. I may note, Madam President, that in addition to the Roach study on which Nicaragua relies, two additional States include in their contiguous zone the punishment or prevention of acts violating the protective security laws in their territory or territorial sea. First, Colombia claims such a power in Decree 1946. Second, Nicaragua's unlimited claim to punish or prevent the violation of

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[137] CMC, Ann. 7, Decree 1946, as amended, Art. 3.

[138] CR 2021/17, p. 41, para. 20 (Lowe); CR 2021/13, p. 69, para. 34 (Lowe).

[139] J. Ashley Roach, *Excessive Maritime Claims* (4th ed., 2021), pp. 146-149, fns. 14 and 16.

its entire portfolio of criminal laws necessarily includes such power. If Nicaragua criminalizes acts which undermine its security, environment, or even its political interests, such as its widely discussed law criminalizing activities on social media[140], then is it not claiming powers in the contiguous zone to prevent and punish such activities?

38. To conclude, Madam President, Colombia submits that the powers in Decree 1946 concerning its protective laws on security and the environment are lawful.

39. Madam President, Members of the Court, thank you for your attention. May I ask you to call on my colleague Eduardo Valencia-Ospina.

The PRESIDENT: I thank Professor Reisman, and I now give the floor to Mr. Eduardo Valencia-Ospina. You have the floor.

Mr. VALENCIA-OSPINA:

COUNTER-CLAIM: NICARAGUA'S INFRINGEMENT OF THE TRADITIONAL FISHING RIGHTS OF THE INHABITANTS OF THE SAN ANDRÉS ARCHIPELAGO

I. Introduction

1. Madam President, distinguished judges, Nicaragua's position on the traditional fishing rights counter-claim is based on three negative propositions: no recognition of the traditional fishing rights, no such rights in the EEZ, and no evidence of their existence and violation.

2. Colombia has advanced two *alternative* and *independently* decisive propositions.

3. The first Colombian proposition is that traditional rights run with the land *as well as with the sea*[141]. The creation and expansion of maritime areas, the transfer of territory and maritime delimitation have no bearing on their existence. There is no exception for the EEZ, and recognition of traditional rights is not a requirement for establishing their existence, though it would bear *decisive* value from the evidentiary standpoint. The second alternative Colombian proposition is that, assuming traditional rights were prohibited in the EEZ *(quod non)*, no one could deny that such

[140] Human Rights Watch, Nicaragua Events of 2021, available at https://www.hrw.org/world-report/2021/country-chapters/nicaragua#.

[141] CR 2021/15, pp. 44-45, para. 27 and fn. 81 (Valencia-Ospina); CMC, paras. 3.98-3.99, 3.106, and 9.12-9.13; RC, para. 5.12.

prohibition would fall under *jus dispositivum* and, thus, that States could set aside such notional ban, recognizing between themselves that certain practices amount to rights that survived the EEZ[142].

4. In this presentation I will first address the recognition of the traditional fishing rights while touching upon the evidence. I will then show that, should recognition not be established *(quod non)*, the traditional fishing rights would still be protected as a matter of principle, including in the EEZ. Finally, I will deal with the infringement of these vested rights.

II. The recognition and existence of the traditional fishing rights

5. Colombia must emphasize that we are not confronted with an expression of the will that is difficult to establish. Colombia does *not* rely on absence of reaction and does *not* infer recognition from a *tacit* expression of the will. Colombia simply gives meaning to the words of Nicaragua's President. Did he not speak of "historical rights"[143]? Did he not declare that the Raizales can "fish freely" and that "they already have a permanent permit"[144]? This leads me to a straightforward point. This case is about *express* recognition, but Nicaragua's first strategy is to portray a quasi-apocalyptic background[145], in the hope that the Court will forgive the words of its President.

6. Nicaragua does *not* deny that the Presidents of Nicaragua and Colombia can commit to internationally binding obligations, including through unilateral declarations[146], oral agreements[147] and approval that certain local practices are accepted as law[148]. Notwithstanding its depiction of the supposedly "critical diplomatic context"[149], Nicaragua does *not* argue that the will of its President was expressed in the absence of freedom, or that coercion rendered the act of recognition null and

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[142] CR 2021/15, p. 49, para. 40 (Valencia-Ospina); RC, paras. 5.25-5.26.

[143] RC, Ann. 6.

[144] *Ibid*.

[145] CR 2021/16, p. 24, paras. 28-29 (Martin); RN, paras. 6.64-6.66; APN, paras. 2.29-2.30 and 2.36.

[146] See for example ILC, *Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations*, 2006; *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, pp. 267 *et seq.*, paras. 42 *et seq.*; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, pp. 472 *et seq.*, paras. 45 *et seq.*

[147] See for example Vienna Convention on the Law of Treaties, concluded at Vienna on 23 May 1969, *UNTS*, No. 18232, Vol. 1115, p. 331, Article 3 *(a)*.

[148] See for example ILC, *Conclusions on Identification of customary international law, Conclusion 16, annexed to General Assembly resolution 73/203 of 20 December 2018; Asylum (Colombian/Peruvian), Judgment, I.C.J. Reports 1950*, pp. 276-278; *Right of Passage over Indian Territory (Portugal* v. *India), Merits, Judgment, I.C.J. Reports 1960*, pp. 40-43; *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, pp. 265-266, para. 141; see also, CMC, paras. 3.87-3.92.

[149] RN, para. 6.67.

void. Nicaragua *only* suggests that, when evaluating its President's statements, account should be taken of the supposedly "furious" and "hostile" behaviour of Colombia[150]. For Nicaragua, context — together with a psychological inquiry into the real will of its President — reveal a different intention from the one expressed in his statements discussed last week. Unfortunately for Nicaragua, what matters is the *expressed* will, the *exteriorized* will of States. Context alone cannot change the fact that Nicaragua's President declared that the Raizales "can *continue* fishing", that "they are in *their* waters" and "in *their* natural habitat"[151].

7. Nicaragua thus overstated its contextual argument. More importantly, it is the context *as such* that Nicaragua overstated. When the Presidents of Nicaragua and Colombia spoke in Mexico, they disproved Nicaragua's depiction of a "particularly delicate context"[152]. Interestingly, Nicaragua's President stressed that "there is permanent communication between the different authorities"[153], adding that "this meeting . . . offer[ed] a message of peace and tranquillity to the brother country of Colombia and to the people of Nicaragua"[154]. This is the real context within which Nicaragua's President declared "[b]e sure that we will respect the historical rights that they (the Raizales) have had over those territories"[155].

8. This brings me to the second Nicaraguan strategy. As explained by Colombia, Nicaragua persists in its attempt to blur the *recognition* of the traditional rights with the creation of mechanisms aimed at *ensuring* these rights[156]. According to Nicaragua, "the artisanal fishing 'rights' do not exist independently of 'mechanisms' to be approved by Nicaragua"[157]. However, the conclusion of technical arrangements "should not be confused with *the existence* ~~***[or the]***~~ ***and*** *recognition of the existence* of the traditional fishing rights"[158]. If these rights do not exist as of today, how is it that

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[150] RN, paras. 6.64-6.65; APN, para. 2.30; CR 2021/16, p. 24, para. 28 (Martin).

[151] RC, Ann. 6.

[152] RN, para. 6.64.

[153] CMC, Ann. 74.

[154] *Ibid.*

[155] *Ibid*.

[156] RC, paras. 5.2 and 5.30.

[157] RN, para. 6.70. Cf. also APN, paras. 2.33-2.41; CR 2021/16, p. 25, para. 32 (Martin).

[158] CR 2021/15, p. 38, para. 5 (Valencia-Ospina)

Nicaragua's President *consistently* speaks of "*historical rights*"?[159] If recognition is contingent on the creation of mechanisms, how is it that Nicaragua's President said that "they *already* have a permanent permit" and that they "can *continue* fishing"?[160]

9. Last week, Colombia went through the Nicaraguan presidential statements to show that recognition had *already* occurred, that it was subject to *no* condition, and that the aim of the foreseen "mechanisms"[161] would be *to ensure* the traditional fishing rights, not to establish their existence anew. But from what Nicaragua argued since then it would appear that, with regard to traditional fishing by the Raizales, *everything* has yet to be decided and *everything* will eventually depend on its "willingness"[162]. For the time being, though, Nicaragua shows *no* discomfort in declaring that it remains "ready to accommodate Colombia's concerns about the Raizales' artisanal fishing interests"[163]. Nicaragua's judicial strategy has left it no other choice since it cannot deny that its President paid a great deal of consideration to the "Raizal brethren"[164]. Nicaragua cannot disregard the fact that its President took pride in proclaiming Nicaragua's respect for the "Principle of the Native Peoples"[165]. What Nicaragua does, instead, is to build a narrative according to which these statements only stand for the proposition that fishing will have to be the subject of an agreement[166].

10. Nicaragua makes it look as though *everything* has yet to be defined, but in reality the *scope* of these vested rights has already been delineated. We know that traditional fishing rights relate to *artisanal* practices. For Nicaragua's President, revealingly, it is "industrial fishing", not artisanal fishing, that requires "permission from INPESCA"[167]. We likewise know that the artisanal practices at stake are those of individuals and of small companies. "If the Raizales have a company", says

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[159] RC, Ann. 6.

[160] *Ibid*.

[161] CMC, Anns. 73-74.

[162] CR 2021/16, p. 25, para. 32 (Martin).

[163] APN, para. 2.41.

[164] MN, Ann. 27.

[165] *Ibid*.

[166] CR 2021/16, p. 25 para. 32 (Martin); RN, para. 6.73.

[167] RC, Ann. 6.

Nicaragua's President, "this company that belongs to the Raizales can fish *freely* as well, because these are their *original* areas as *original* people."[168]

11. The statements of Nicaragua's President are consistent with Colombia's evidence. Already in November 2012, he acknowledged that the Raizales are the "Native Peoples" that have "historically" fished and navigated the maritime areas discussed last week[169]. In perfect conformity with that evidence, he stressed the permanent connection between the Raizales and those he described as "their relatives in Bluefields [and] Pearl Lagoon"[170]. When later in February he explained that the artisanal companies can also "fish freely"[171], his words were once more consistent with the evidence that suggests that artisanal fishing is a *commercial* and *social* activity that implicates co-operatives and associations based in San Andrés and Providencia[172].

12. In spite of its distorted reading by Nicaragua, Colombia's evidence indeed shows that the artisanal fishermen and their ancestors have long navigated and fished in the shallow banks of Cape Bank and Luna Verde, as well as the deep-sea banks located east of La Esquina and in between the Northern Islands referred to in Colombia's first round tabs 41 to 43. These traditional banks are located no farther, and sometimes much closer, than some of the Northern Islands, which Nicaragua accepts are traditional grounds[173]. In this connection, I refer you to tab 11: San Andrés is located closer to Cape Bank and La Esquina compared to Roncador, Serrana and Quitasueño. As for Providencia, roughly the same distance separates it from Luna Verde, Roncador and Serrana. Providencia is in fact located significantly closer to La Esquina and the Northern banks situated between Providencia and Quitasueño. If the artisanal fishermen reach Serrana, Roncador and Quitasueño, they are per force able to reach Luna Verde and La Esquina.

13. Last week Nicaragua collected censuses and declared that the San Andrés Archipelago was not always as densely populated as today[174]. Yet traditional rights do not require high volume of

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[168] RC, Ann. 6.

[169] MN, Ann. 27.

[170] *Ibid.*

[171] RC, Ann. 6

[172] Cf. in particular CMC, paras. 2.70-2.71, Anns. 62, 65, 68 and 71; RC, para. 5.8.

[173] Cf. for example, CR 2021/16, p. 29, para. 47 (Martin).

[174] CR 2021/16, pp. 11-12, paras. 11-12 and pp. 12-13, paras. 15-17 (Argüello).

fishing to come into being[175]. In addition, Nicaragua pointed out that, even though the artisanal fishermen often refer to the aforementioned banks, they do not always *expressly* say that they are traditional ones[176]. In a similar vein, Nicaragua stressed that common references to fishing do not suffice if these references are not *systematically* preceded by the term "traditional"[177]. These verbal tricks are certainly — to quote Nicaragua — "not the stuff of which serious international cases are made"[178]. The affidavits, some excerpts of which you will find in tab 12, are clear and compelling. The artisanal fishermen and their ancestors have for generations fished in these banks. This is a fact that is established in the affidavits, as well as in other documents adduced by Colombia[179]. This is a fact, which is fully *corroborated* by the statements of Nicaragua's President, all of which were made well before the affidavits now being looked at with suspicion by Nicaragua.

14. There is one last Nicaraguan strategy, addressed by Colombia in its Rejoinder[180], according to which a Section of the Colombian Ministry of Labour made a statement against interest in proceedings brought by Raizales before the ILO Committee of Experts[181]. What Colombia already showed when annexing all relevant documents is that that Section did not provide any evidence to maintain that the traditional banks had not been impacted by the 2012 Judgment[182]. This *unsupported* statement cannot undo the recognition by both the then President and Foreign Minister of Colombia[183]. This three-line assertion cannot be reconciled with the Colombian investments to support the artisanal fishermen in the aftermath of that Judgment[184]. What the proceedings before the Committee reveal is that the Raizales are consistent, regardless of whether their claims are supported

[175] *Award of the Arbitral Tribunal in the Second Stage of the Proceedings between Eritrea and Yemen (Maritime Delimitation), Decision of 17 December 1999, RIAA*, Vol. XXII, p. 358, para. 95.

[176] CR 2021/16, p. 31, para. 57 (Martin).

[177] *Ibid*., p. 30, para. 51 (Martin).

[178] *Ibid*., p. 34, para. 70 (Martin).

[179] Cf. CMC, Anns. 62-72, 85, 91 and 93.

[180] RC, paras. 5.55-5.61 and Anns. 24 and 67.

[181] CR 2021/16, pp. 27–28, paras. 40-43 (Martin).

[182] RC, para. 5.56 and Ann. 24.

[183] RC, para. 5.55; CMC Ann. 20; POC, Anns. 10 and 38.

[184] RC, paras. 5.57-5.60.

by Colombia or brought against Colombia[185]. This tells a lot about the integrity of the artisanal fishermen.

15. To conclude with recognition, Nicaragua need look no further than its own President if it wishes to discuss speeches against interest. Following the meeting in Mexico, the Nicaraguan President remarked: "I told President Santos, and I have said publicly, that the Raizal Community can continue fishing . . . Nicaragua will not affect them in their Rights as Original People"[186]. To quote *Libya/Chad*, his recognition entailed "first and foremost accepting", thus "respecting . . . and refraining from contesting . . . in the future"[187].

III. Traditional fishing rights are not qualified by the maritime areas or territories in which they took shape

16. I turn to the second part of my presentation. Although judicial economy militates against considering the EEZ argument of extinction, I will review it nonetheless since Nicaragua remains in denial with regard to recognition.

17. Let me begin by stressing the Colombian points that Nicaragua does not challenge.

— First, States may recognize traditional rights in the EEZ. Should recognition be established, the extinction theory would be of no avail.

— Secondly, traditional rights are compatible with the rights of States within their territories, territorial seas, archipelagic waters and internal waters. Revealingly, in all of these areas, *exclusive* sovereign rights are exercised over natural resources.

— Lastly, the *legal rationale* of traditional rights is the understanding that border communities may acquire vested rights after years of practice carried out in keeping with the tradition of their forebears. This *rationale* applies in an equally rational manner regardless of where the practices took place. Are traditional grazing rights of border communities that depend on their livestock[188] more important than traditional fishing rights of border communities that depend on their fishing

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[185] RC, para. 5.61 and Anns. 67 and 68.

[186] RC, Ann. 6.

[187] *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 22, para. 42.

[188] *Award in the Arbitration regarding the delimitation of the Abyei Area between the Government of Sudan and the Sudan People's Liberation Movement/Army, Award of 22 July 2009, Reports of International Arbitral Awards (RIAA)*, Vol. XXX, p. 412, para. 766.

activities? Does the rationale suddenly become irrational if the fishing activities occur at 13 rather than 12 nautical miles from the nearest shore?

18. The whole strategy of Nicaragua is premised on *exceptionalism*, the proposition that traditional fishing rights must cease to exist in *one area and one alone*, the EEZ. This is precisely the area of interest to the Raizales, where you find the shallow and deep-sea banks already discussed[189]. Last week, we heard again the "legal monopoly" plea[190]. As Nicaragua puts it so peremptorily, the rights over the living resources of the *exclusive* economic zone cannot be but "*exclusive*", exactly as the name of this maritime area would suggest[191]. Yet, no matter the name, exclusivity of rights over natural resources is *not* specific to the EEZ. Traditional rights have been found to exist on land and at sea, in all areas where States possess *exclusive* rights over natural resources. It is, therefore, remarkable to hear from Nicaragua that exclusivity "is the *foundation* of [their] case"[192]. For if it is the foundation, it is a feeble one to say the least; one that would reveal that the entire jurisprudence on vested rights[193] is premised on a legal blunder, the failure to note that traditional rights are *always*, to quote Nicaragua, "inconsistent"[194] since they *always* relate to areas in which States possess exclusive rights over natural resources.

19. Nicaragua acknowledges that its extinction theory, premised on exceptionalism, finds no explicit support in UNCLOS, a treaty to which in any event, it bears repeating, Colombia is not a party. This is why Nicaragua came forth with the argument that what matters is that its Part V and customary international law contain no express carve-out preserving traditional rights in the EEZ[195].

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[189] CR 2021/15, pp. 41-44, paras. 16-24 (Valencia-Ospina).

[190] CR 2021/16, pp. 18-19, paras. 7-8 (Martin); cf. also, APN, paras. 2.13, 2.22 and 2.26.

[191] CR 2021/16, pp. 18-19, paras. 3 and 7; p. 20, para. 13; p. 21, para. 17; and p. 23, para. 24 (Martin). See also, RN, para. 6.9; APN, para. 2.5.

[192] CR 2021/16, p. 20, para. 13 (Martin); emphasis added.

[193] *Award in the Arbitration regarding the delimitation of the Abyei Area between the Government of Sudan and the Sudan People's Liberation Movement/Army, Award of 22 July 2009, RIAA*, Vol. XXX, p. 408, para. 753; *Award of the Arbitral Tribunal in the First Stage of the Proceedings between Eritrea and Yemen (Territorial Sovereignty and Scope of the Dispute), Decision of 9 October 1998, RIAA*, Vol. XXII, p. 244, para. 126; *Award of the Arbitral Tribunal in the Second Stage of the Proceedings between Eritrea and Yemen (Maritime Delimitation), Decision of 17 December 1999, RIAA*, Vol. XXII, p. 361, paras. 110-111; *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the Delimitation of the Exclusive Economic Zone and the Continental Shelf between Them, RIAA*, Vol. XXVII, p. 227, para. 292; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, pp. 400-401, para. 66; *German Settlers in Poland, Advisory Opinion, 1923, P.C.I.J., Series B, No. 6*, p. 36.

[194] CR 2021/16, pp. 18-19, para. 7 (Martin).

[195] CR 2021/16, p. 21, para. 15 (Martin); cf. RN, para. 6.13. Cf. also, RC, para. 5.13.

The downside of the carve-out theory is that there is *no* such carve-out for the territory and territorial sea of States[196]. The jurisprudence goes precisely in the opposite direction. The principle applied in *El Salvador/Honduras*[197], *Abyei Area* and *Eritrea/Yemen*[198], is that vested rights are protected as a matter of principle, not as a matter of exception. The *Eritrea/Yemen* Tribunal, the only tribunal ever *formally* tasked with addressing traditional rights in the EEZ specifically, put it best: "traditional fishing . . . is not limited to . . . territorial waters" and "is not qualified by the maritime zones specified under . . . [UNCLOS]"[199]. The Tribunal did not rely on exceptionalism, but instead followed the usual presumption that, unless there is an "*explicit* prohibition to the contrary", traditional rights are not to be construed as being extinguished[200].

20. This is indeed the specificity of non-exclusive traditional rights compared to other *more intrusive* historic rights. Traditional rights vested in border communities, *unlike* historic rights that presuppose assertions of sovereignty or *exclusive* sovereign rights, do not entail at the outset violations of international law. Because traditional fishing first took place in conformity with the freedoms of the high seas, it is *free* from the original sin that characterizes *other* historic rights. This specificity of traditional rights clarifies why the jurisprudence *never* rests their existence upon consent or acquiescence. This specificity clarifies why Nicaragua's carve-out theory is unfounded.

21. This point was also developed by Sir Gerald Fitzmaurice[201] in the excerpt to be found in your folders at tab 13. Admittedly, Sir Gerald was not writing about the EEZ. But what mattered to the view he supported is that traditional fishing took shape *in the high seas*, not that the high seas later became part of broader territorial seas, or newly invented archipelagic waters or EEZ. Whether

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[196] RC, para. 5.19.

[197] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening), Judgment, I.C.J. Reports 1992,* pp. 400-401, para. 66.

[198] *Award in the Arbitration regarding the delimitation of the Abyei Area between the Government of Sudan and the Sudan People's Liberation Movement/Army, Award of 22 July 2009, RIAA*, Vol. XXX, p. 408, para. 753; *Award of the Arbitral Tribunal in the Second Stage of the Proceedings between Eritrea and Yemen (Maritime Delimitation), Decision of 17 December 1999, RIAA*, Vol. XXII, p. 361, paras. 110-111.

[199] *Award of the Arbitral Tribunal in the Second Stage of the Proceedings between Eritrea and Yemen (Maritime Delimitation), Decision of 17 December 1999, RIAA*, Vol. XXII, p. 361, para. 109.

[200] *Award in the Arbitration regarding the delimitation of the Abyei Area between the Government of Sudan and the Sudan People's Liberation Movement/Army, Award of 22 July 2009, RIAA*, Vol. XXX, p. 408, para. 753.

[201] G. Fitzmaurice, "The Law and Procedure of ICJ, 1951-54: General Principles and Sources of Law", *British Yearbook of International Law*, 1953, Vol. 30, p. 31. See also RC, paras. 5.16-5.17. See also United Nations, Juridical régime of historic waters including historic bays — Study prepared by the Secretariat, UN doc. A/CN.4/143, pp. 7–11, paras. 42–61.

the coastal State is exercising *full-fledged exclusive sovereignty*, as is the case in the territorial sea, or *functional exclusive sovereign rights*, as is the case in the EEZ, has no bearing on the *rationale* supporting the jurisprudence on vested rights.

22. Nicaragua reads too much into *Gulf of Maine*[202], a case that Colombia addressed last week[203]. The short answer is that *Gulf of Maine* was *not* about traditional fishing rights. This case stands for the proposition, already discussed, according to which private practice has no impact on delimitation[204]. It says nothing, conversely, on the impact of delimitation on vested rights. To postulate a fundamental incompatibility between the EEZ and traditional rights on account of exclusivity alone is to fall again into contradiction, since the jurisprudence on vested rights always relates to areas in which there is monopoly over natural resources.

23. Colombia has explained that it is wrong to insinuate, as Nicaragua did[205], that the *Eritrea/Yemen* Tribunal applied other factors, such as Islamic law or a bilateral agreement[206] to depart from what would have otherwise been the black letter of international law[207]. On the contrary, the Tribunal said, in *unequivocal* terms that "traditional fishing . . . is not qualified by the maritime zones specified under . . . [UNCLOS]"[208].

24. Nicaragua's extinction theory rests on unconvincing *implications* to be apparently drawn from two UNCLOS provisions, the first pertaining to archipelagic waters, the second to the EEZ. Thus, as to the former, Nicaragua believes that Article 51, paragraph 1, with its reference to traditional fishing rights, supports the carve-out theory[209]. A more reasonable interpretation, which takes into account the *travaux* and *rationale* of acquired rights, indicates that this reference was made, not because of an *entrenched* belief that a carve-out was necessary, but because an example was

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[202] CR 2021/16, pp. 19-20, paras. 8-11 (Martin).

[203] CR 2021/15, p. 49, para. 38 (Valencia-Ospina).

[204] CR 2021/15, pp. 44-45, para. 27 (Valencia-Ospina); see also CMC, paras. 3.98-3.111.

[205] RN, paras. 6.24-6.29.

[206] CR 2021/16, p. 23, para. 25 (Martin).

[207] RC, paras. 5.21-5.22.

[208] *Award of the Arbitral Tribunal in the Second Stage of the Proceedings between Eritrea and Yemen (Maritime Delimitation), Decision of 17 December 1999*, *RIAA*, Vol. XXII, p. 361, para. 109.

[209] CR 2021/16, p. 21, para. 15 (Martin); see also RN, para. 6.14; APN, fn. 38.

discussed and a few delegations felt reassured by its addition[210]. To suggest that, absent this reference, traditional rights would have been extinguished in archipelagic waters is speculation. There is indeed no similar provision in UNCLOS Part II, which concerns the territorial sea.

25. According to the second provision, Article 62, paragraph 3, when granting access to the surplus of the allowable catch, coastal States shall take into account "the need to minimize economic dislocation in States whose nationals have habitually fished in the zone"[211]. But *habitual* fishing is not the same as *traditional* fishing, the term of art used elsewhere in the Convention and the jurisprudence[212]. Unlike what happened with regard to archipelagic waters, and contrary to what Nicaragua would have you believe[213], the Conference did not consider the acquired rights of border communities and indigenous peoples in the EEZ. Instead, it considered habitual fishing, and what some *equivocally* labelled traditional fishing. These expressions were used by the major fishing powers with long-range fleets operating in many parts of the high seas[214]. In other words, unlike traditional fishing, habitual fishing need not be artisanal, need not occur in the adjacent waters of neighbouring States, and need not to have taken place for more than, say, a decade. The fact that these habitual fishing activities are deserving of consideration when granting access to surpluses neither suggests, nor hints, that traditional rights vested in border communities were extinguished by the EEZ. What this provision does is clarify that traditional rights, unlike habitual fishing activities, are not made dependent on the harvesting capacity and discretionary conduct of coastal States.

26. To sum up, the EEZ did not extinguish traditional fishing rights. Instead, these rank among those "other ~~***[pertinent]***~~ rules of international law"[215] which, according to general international law and UNCLOS, are compatible with the EEZ. Simply put, and as stated in the preamble of UNCLOS, these are "matters not regulated by this Convention" and which "continue to be governed by the rules and principles of general international law"[216]. Yet, I would be remiss if I were not to end this part

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[210] Summary Records of Meetings of the Second Committee, 36th meeting, A/CONF.62/C.2/SR.36, paras. 1-8 (Indonesia); A/CONF.62/C.2/SR.37, paras. 26-29 (Singapore).

[211] UNCLOS, Article 62 (3).

[212] RC, para. 5.18.

[213] CR 2021/16, pp. 21-22, paras. 18-20 (Martin).

[214] See for example A/CONF.62/C.2/SR.27, para. 34 (Turkey); A/CONF.62/C.2/SR.22, para. 92 (Barbados).

[215] UNCLOS, Article 58 (3).

[216] UNCLOS, preamble.

of my presentation with the reminder that an *obiter dictum* from an arbitration which Nicaragua has not invoked, stressed that extinction, of course, would be no bar to "recognition", which, "would, in most instances, be commendable"[217].

IV. The infringement of the traditional fishing rights

27. Last week, Nicaragua contested the probative value of Colombia's evidence, bringing nothing new to the table. The Nicaraguan position is that *all* the evidence amounts to hearsay[218]. There are good reasons, not requiring much elaboration, that explain why Colombia cannot rely on first-hand accounts *only*. To these reasons, well reflected in the reports of international and non-governmental organizations, one may add that the associations and co-operatives, with whom the artisanal fishermen interact, neither have records, nor protocols in case of incidents at sea.

28. However, the affidavits, press-reports and observations of the ILO attest to the fact that the Nicaraguan Naval Force has inflicted fines and seized products, gears and vessels[219]. One might think that boarding a vessel to request food, cigarettes or coffee reveals just lack of professionalism. But if one were to put himself or herself in the shoes of the artisanal fishermen, it would become altogether clear that these encounters are far from benign. How to deal with them is one of the issues that Nicaragua and Colombia will have to resolve when discussing the means to ensure the traditional fishing rights.

29. Madam President, distinguished judges, this brings me to the end of my presentation. I thank you for your attention and request that you invite Professor Thouvenin to the podium.

The PRESIDENT: I thank Mr. Valencia-Ospina. I now invite the next speaker, Professor Jean-Marc Thouvenin, to take the floor.

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[217] *The South China Sea Arbitration between the Republic of the Philippines and the People's Republic of China, Award of 12 July 2016, RIAA*, Vol. XXXIII, p. 469, para. 804 *(b)*.

[218] See for example CR 2021/16, pp. 33-34, paras. 65-70 (Martin); RN, para. 6.79; APN, para. 2.60.

[219] See in particular RC, paras. 5.62-5.73; CMC, Anns. 64, 65, 67, 69, 70, 71 and 72; MN, Ann. 12; RN, Ann. 20; ILO, Committee of Experts on the Application of Conventions and Recommendations, "Observations (CEACR) — adopted 2014, published 104rd ILC session (2015)", Indigenous and Tribal Peoples Convention, 1989, No. 169, Colombia, (Ratification: 1991); "San Andrés: entre la corrupción y el riesgo sanitario", press report by RCN, 16 Nov. 2019, available at https://www.noticiasrcn.com/nacional/san-andres-entre-la-corrupcion-y-el-riesgo-sanitario-349613 (accessed 22 Sept. 2021); "El fallo de la Haya se acató y se aplicó", press report by Caracol, 9 Oct. 2019, available at https://caracol.com.co/programa/2019/10/09/6am_hoy_por_hoy/1570633564_762159.html (accessed 22 Sept. 2021).

M. THOUVENIN : Merci beaucoup, Madame la présidente.

DEMANDE RECONVENTIONNELLE : ILLÉGALITÉ DU DÉCRET Nº 33-2013

1. Madame la présidente, Mesdames et Messieurs les juges, je reviens aujourd'hui sur la deuxième demande reconventionnelle.

La Colombie maintient que le décret établissant les lignes de base droites du Nicaragua n'est pas conforme au droit international :

— Le sud de la côte nicaraguayenne n'est pas bardé de profondes échancrures[220]. Ses légères concavités ne sont même pas *bien marquées*[221] : si tel était le cas, le croquis que vous voyez ici, comme tous les autres disponibles, en attesterait. Aucun ne le fait ! Et même si tel était le cas, cela n'autoriserait pas à tirer une ligne droite entre un point de la côte (le point 9) et une île du large (le point 8).

— Il n'y a pas davantage de chapelet d'îles le long et à proximité immédiate de la côte[222]. Le Nicaragua n'essaie même pas de le démontrer par la géographie. Mon contradicteur préfère s'appuyer sur la longueur des lignes de base droites[223] que le Nicaragua s'estime en droit de tirer pour tenter de justifier que Ned Thomas Cay et Man of War Cay contribuent substantiellement, sur le plan géographique, à constituer un chapelet d'îles le long de la côte. Soixante-quinze milles marins séparent ces deux insignifiantes formations maritimes. C'est plus que la distance Rotterdam-Bruxelles. Puis de vous montrer l'archipel de la Recherche, en Australie, composé lui, indubitablement, d'un chapelet d'îles à l'effet masquant, abondamment réparties le long et à proximité très immédiate de la côte, et de suggérer que la géographie nicaraguayenne serait comparable[224], alors qu'elle ne l'est manifestement pas.

— Il est inutile, je pense, de marteler que les lignes de base contestées ne suivent en rien la direction générale de la côte : cela saute aux yeux[225]. Quant à la connexité des nouvelles eaux intérieures

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[220] Voir notamment, CR 2021/15, p. 54-55, par. 17 (Thouvenin) ; voir également Colombie, dossier des juges du mercredi 22 septembre 2021, onglet nº 50.

[221] CR 2021/15, p. 55, par. 18 (Thouvenin).

[222] Voir notamment CR 2021/15, p. 57-60, par. 27-47 (Thouvenin).

[223] CR 2021/16, p. 40, par. 13 (Oude Elferink).

[224] CR 2021/16, p. 43, par. 22-23 (Oude Elferink)

[225] CR 2021/15, p. 61-62, par. 51-55 (Thouvenin) ; voir également Colombie, dossier des juges du mercredi 22 septembre 2021, onglet nº 56.

avec la côte, nous verrons tout à l'heure que le Nicaragua n'a jamais été capable de prouver l'existence même des formations maritimes qu'il prétend maintenant tellement «connectées» avec ses terres.

2. Ceci posé, quatre controverses nécessitent d'y consacrer quelques minutes. Elles concernent :

— l'objet du différend ;

— les effets du décret ;

— la question de la preuve de la multitude d'îles dont le Nicaragua se prévaut ; et, last but not least,

— la question des prétendues îles situées à Edinburgh Cay.

A. L'objet du différend relatif aux lignes de base droites

3. Madame la présidente, Mesdames et Messieurs les juges, quoi qu'en dise la Partie adverse, le différend n'a jamais porté, ne porte pas, et ne peut pas porter sur les lignes de bases *colombiennes*[226]. La seule question est de savoir si les lignes de base droites nicaraguayennes sont conformes au droit international.

4. Le différend ne porte pas non plus sur les nouvelles allégations nicaraguayennes relatives à de prétendues lignes de base normales soudainement apparues sur de prétendus hauts-fonds découvrants, à partir desquels serait mesurée la largeur de la ZEE et du plateau continental.

5. La question est réglée par l'article premier du décret n° 33-2013 qui énonce sans ambiguïté que les lignes de base droites sont celles : «à partir desquelles sera mesurée la largeur … *de sa zone économique exclusive et de son plateau continental dans la mer des Caraïbes*»[227].

6. J'ajoute que ce décret a été signé par le président Ortega le 19 août 2013, deux mois après que le Nicaragua a saisi la Commission des limites du plateau continental d'une demande dont le résumé public fait apparaître un croquis contenant deux mystérieux points surajoutés au feutre rouge[228]. Quelle qu'ait été l'intention de l'auteur de cet ajout, le décret précise de manière limpide à

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[226] CR 2021/15, p. 51, par. 5.

[227] CMC, annexe 13, article premier (les italiques sont de nous).

[228] République du Nicaragua, «Submission to the Commission on the Limites of the Continental Shelf, Part I: Executive Summary», juin 2013, p. 4 (disponible à l'adresse suivante : www.un.org/depts/los/clcs_new/submissions_files/nic66_13/Executive%20Summary.pdf).

son article 5 que : «Toutes les dispositions légales et réglementaires qui contreviennent au présent décret sont abrogées.»[229]

7. En somme, le décret nº 33-2013 est l'objet précis, circonscrit, et unique de la demande reconventionnelle.

8. Au demeurant, le différend sur les lignes tracées par ce décret est le seul sur lequel la Cour peut exercer sa compétence. La Partie adverse reconnaît que : «Colombia's counter-claim indeed did not impugn the validity of Nicaragua's baseline along its low-water line.»[230] Evidemment, puisque c'est le décret qui fixe les lignes de base à partir desquelles se mesure la distance des zones, comme on vient de le voir. Mais mon contradicteur ajoute aussitôt : «But that is not the point.»[231] Mais si, that is *precisely* the point car, comme la Cour en a décidé, c'est à propos de la légalité de ce seul décret qu'un différend concernant les lignes de base droites nicaraguayennes est né avant la date d'effet de la dénonciation du pacte de Bogotá. L'extrait pertinent de votre ordonnance est reproduit à l'onglet nº 16 du dossier des juges[232].

B. Les effets du décret nº 33-2013

9. J'en viens à mon deuxième point, Madame la présidente, relatif aux effets du décret contesté.

10. Il ne fait à l'évidence aucun doute que les droits des Etats tiers, y compris de la Colombie, en sont affectés. Indubitablement, de larges portions de ZEE et de mer territoriale deviennent eaux intérieures, et de larges portions de ZEE deviennent mer territoriale. Mes contradicteurs suggèrent que tout ceci n'aurait pas grande importance puisque le droit de passage inoffensif serait maintenu dans les nouvelles eaux intérieures nicaraguayennes[233].

11. Mais, Madame la présidente, le Nicaragua ne conteste pas que de vastes espaces de ZEE tomberaient alors sous ce régime, là où devraient prévaloir non seulement la liberté de navigation — ce qui inclut, n'en déplaise au professeur Pellet[234], la liberté d'observer et d'informer sur les

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[229] CMC, annexe 13, art. 5.

[230] CR 2021/16, p. 37, par. 8 (Oude Elferink)

[231] *Ibid.*

[232] *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. 312, par. 73 ~~***(les italiques sont de nous)***~~.

[233] CR 2021/16, p. 36, par. 4 (Oude Elferink), et p. 16, par. 29 (Argüello).

[234] CR 2021/17, p. 10, par. 1 (Pellet).

méfaits de certaines pratiques sur l'environnement[235] —, mais également les autres droits coutumiers reflétés dans le texte de l'article 58 de la convention de 1982[236].

12. Tout cela est inhérent au tracé des lignes de base droites, vous a-t-on dit vendredi[237]. Mais c'est précisément à cause de cet effet «inhérent», par définition dommageable aux autres Etats, que le droit international n'autorise à recourir à cette méthode que de manière exceptionnelle. Mais il est vrai que l'avocat de la Partie adverse ignore totalement la mise en garde de la Cour dans *Qatar c. Bahreïn* selon laquelle la méthode des lignes de base droites «doit être appliquée de façon restrictive»[238].

13. En outre, la Partie adverse s'est bien gardée de préciser que, dans ces mêmes espaces, le Nicaragua s'absout, par le seul jeu du décret contesté, des obligations applicables dans la ZEE au titre du régime international de conservation des ressources biologiques, notamment halieutiques, établi par la convention de 1982. Dans les eaux annexées par le décret, le Nicaragua n'a plus l'obligation de prendre «des mesures appropriées de conservation et de gestion pour éviter que le maintien des ressources biologiques de sa zone économique exclusive soit compromis par une surexploitation»[239]. Même chose s'agissant de ses obligations au titre des articles 62, 63, etc., de la convention à laquelle il est partie. Toutes obligations dont la portée *erga omnes* ne saurait faire de doute, car on ne protège pas l'environnement marin *inter partes* ; on le protège au bénéfice de tous.

14. Ces dernières remarques conduisent d'ailleurs à la parenthèse ouverte par l'agent du Nicaragua vendredi révélant que l'une des raisons de l'adoption des lignes de base droites : «is because it considered it appropriate in view of the rights of the population to fish and exploit those areas within 25 nautical miles of the adjacent islands and keys»[240].

15. Tout expert du droit de la mer saurait que les nouvelles lignes de base droites nicaraguayennes n'ont strictement aucun emport, du point de vue du droit international, sur les droits des populations nicaraguayennes de pêcher ou de conduire d'autres activités au large de la côte

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[235] CPA, *The Arctic Sunrise Arbitration (Netherlands* v. *Russia)*, Award on the merits, 14 août 2015, par. 227.

[236] CNUDM, art. 58.

[237] CR 2021/16, p. 36, par. 4 (Oude Elferink).

[238] *Délimitation maritime et questions territoriales entre Qatar et Bahreïn (Qatar c. Bahreïn), fond, arrêt, C.I.J. Recueil 2001*, p. 103, par. 212.

[239] CNUDM, art. 61, par. 2.

[240] CR 2021/16, p. 14, par. 22 (Argüello).

nicaraguayenne. Ils le pouvaient avant, ***~~et~~ ils*** le peuvent après~~,~~ les lignes de base droites. La seule différence, mais elle est de taille, est que, désormais, leurs activités ne sont plus encadrées par le droit international qui protège contre la surexploitation.

16. Le Nicaragua fait d'ailleurs d'une pierre deux coups, puisqu'il s'absout aussi, dans ses immenses eaux intérieures conquises par décret, des obligations spécifiques de protection du milieu marin des Caraïbes auxquelles il s'est engagé en ratifiant la convention de Carthagène, dont le premier article précise qu'elle ne s'applique pas, sauf exception, aux eaux intérieures[241]. Grâce au décret, *exit*, l'obligation posée par cette convention de combattre la pollution et de gérer rationnellement l'environnement[242]. *Idem*, de l'obligation de protéger et préserver les écosystèmes rares ou fragiles ainsi que l'habitat des espèces en régression, menacées ou en voie d'extinction[243].

17. Le Nicaragua ne découvre évidemment pas aujourd'hui que son décret emporte l'effet majeur de le dégager, dans les eaux concernées, de ses obligations internationales les plus importantes de la période contemporaine, en particulier pour ses voisins caribéens.

18. Madame la présidente, Mesdames et Messieurs les juges, pas plus sur ce terrain que sur les autres, le Nicaragua ne peut sérieusement prétendre que le décret contesté n'a que peu d'effets sur les droits des tiers, y compris de la Colombie.

C. La question de la preuve de l'existence des îles

19. Je passerai dans un instant à Edinburgh Cay. Permettez-moi auparavant un mot sur la multitude d'îles dont le Nicaragua se prévaut. Dans ses diverses plaidoiries, le Nicaragua a balayé la question de leur preuve d'un revers de main en avançant deux arguments erronés.

20. Premièrement, il suffirait de regarder les cartes pour voir que les 95 îles listées en annexe 31 à la plaidoirie additionnelle sont bien là[244]. J'ai déjà mentionné quelques déficiences de cette liste. Il y en a d'autres : sur la carte qui vous a été montrée par le Nicaragua, la semaine dernière, comme preuve de l'existence d'îles sur Edinburgh Cay ou Edinburgh Reef, «The Witties», qui est dans la liste des prétendues îles, n'est qu'un haut-fond découvrant. Il en va de même pour

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[241] CMC, annexe 17, article premier.

[242] ***Ibid., article 4 (1).***

[243] ***Ibid., article 10.***

[244] PAN, p. 56, par. 3.38 ; voir également, CR 2021/17, p. 40, par. 16 (Oude Elferink).

Ned Thomas Cay, sur lequel le Nicaragua pose un de ses points de base, mais aussi des trois prétendues îles de Lamarka Reef, et de Dennis Prong. Quant à Dry Rock et Sand Cay, je ne les ai pas trouvées.

21. Qu'en déduire ? Que les cartes de la zone, comme preuves de la géographie locale, ne sont pas fiables. Surtout quand on leur fait dire ce qu'elles ne disent pas. Ainsi du montage projeté par le professeur Oude Elferink, qui est à l'onglet n° 13 du dossier des juges de vendredi, surchargeant la carte extraite du site Internet de la convention Ramsar que j'avais montrée mercredi, dans sa version «bio» — c'est-à-dire sans aucune surcharge artificielle — et que voici à nouveau sur vos écrans. Cette carte dit simplement que les zones humides protégées au niveau de Miskito Cay et de la bande côtière ne sont pas connectées.

22. La Partie adverse a jugé bon de triturer cette même carte pour, apparemment, vous convaincre qu'un tapis d'îles connecterait la côte à Miskito Cay[245].

23. Ce que vous voyez à l'écran maintenant n'est rien d'autre que le montage du professeur Oude Elferink, mais en retirant tout ce qui n'est pas une île, en respectant fidèlement pour ce faire la légende de la carte qu'il a utilisée. La carte bio disait vrai. Il n'y a pas de connexion. Et on ne voit certainement ni un tapis ni un chapelet d'îles le long et à proximité de la côte.

24. Deuxièmement, pour prouver l'existence de ses îles, le Nicaragua croit avoir trouvé le Graal en renvoyant à la figure 9.2 annexée au contre-mémoire de la Colombie dans l'affaire clôturée en 2012[246].

25. Le Nicaragua se garde bien de rappeler que cette figure a été composée avec beaucoup de difficultés par la Colombie pour les seuls besoins du litige d'alors, sur la base, concernant la zone nicaraguayenne, d'informations cartographiques qui étaient à la fois imprécises et non vérifiées.

26. La Partie adverse veut en particulier oublier que, dans son contre-mémoire d'alors, la Colombie mettait en garde :

> «[L]a Colombie identifiera les points de base du Nicaragua en fonction des renseignements dont elle dispose. Comme la Colombie l'a noté, l'un des nombreux défauts du mémoire du Nicaragua tient au fait que ce pays n'a fourni aucun renseignement utile concernant les détails de sa géographie. En conséquence,

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[245] CR 2021/16, p. 45, par. 28 (Oude Elferink).

[246] CR 2021/16, p. 40, par. 16 (Oude Elferink) ; voir également, Nicaragua, dossier des juges du vendredi 24 septembre 2021, onglet n° 14.

> l'identification des points de base du côté nicaraguayen de la ligne médiane a été basée sur les cartes disponibles de ces zones.»[247]

27. Et la Colombie de préciser on ne peut plus nettement que «les cartes … ont été établies à des échelles différentes et ne sont plus d'actualité à certains égards»[248].

28. Le Nicaragua n'entreprit rien de nature à clarifier la situation, se complaisant dans une connaissance très approximative des abords de sa côte. Pourquoi se donnerait-il du mal quand sa désinvolture paye ?

D. La question d'Edinburgh Cay

29. Cette désinvolture du Nicaragua à propos de sa propre géographie nous conduit au cas emblématique d'Edinburgh Cay.

30. La Cour a entendu parler pour la première fois de cette formation maritime dans *Nicaragua c. Honduras*[249].

31. S'interrogeant dans sa réplique sur le point de savoir si certaines formations — comme Edinburgh Cay et Edinburgh Reef — sont dotées d'une mer territoriale, le Honduras manifestait de sérieux doutes[250]. Le Nicaragua reconnaissait pour sa part, à propos des petites formations côtières dont il était avéré que certaines disparaissent au cours du temps : «the instability of these islets … indicates that they should in no case provide the basis for the delimitation of a maritime boundary»[251].

32. Le Nicaragua confirmait lors des plaidoiries qu'il

> «ignore le nombre d'îles et de formations qui sont en cause et leur emplacement étant donné que les principaux relevés se rapportant à cette zone remontent à la première moitié du XIX^{e} siècle et qu'il s'agit d'une zone où ces formations ont nettement tendance à émerger et disparaître»[252].

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[247] *Différend territorial et maritime (Nicaragua c. Colombie)*, contre-mémoire de la Colombie, 11 novembre 2008, par. 9.20.

[248] *Ibid.*, par. 9.19.

[249] *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras)*.

[250] *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras)*, duplique du Honduras, p. 114, par. 6.27 et p. 115, par. 6.29.

[251] *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras)*, réplique du Nicaragua, p. 32, par. 3.17.

[252] *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras)*, CR 2007/11, p. 27, par. 70 (Argüello) *[traduction du Greffe]*.

33. Le Nicaragua évoquait ici ce qui se trouve à quelques milles au nord du 15e parallèle, mais sa remarque valait évidemment tout autant pour la zone d'Edinburgh Cay et d'Edinburgh Reef, qui se trouvent à quelques encablures au sud du 15e parallèle.

34. Le professeur Oude Elferink l'avait d'ailleurs confirmé dans sa plaidoirie du 19 mars 2007. Alors que le conseil du Honduras remarquait que «le Nicaragua n'a[vait] rien fait pour éclairer la Cour au sujet de ces formations, et le Honduras ne dispos[ait] d'aucun élément de preuve indépendant quant à leurs caractéristiques», et se plaignait du fait que le Honduras en était réduit à leur donner ce qu'il appelait «le bénéfice du doute»[253], le professeur Oude Elferink répondait :

> «*Que se passerait-il si l'on découvrait qu'Edinburgh Cay et les cayes situées sur Edinburgh Reef n'existaient pas ?* Cela ne serait en rien pertinent aux fins de déterminer la situation qui prévalait en 1821. Que peut-on prouver à propos des cayes à cette date ? La carte 2425 du service hydrographique du Royaume-Uni, initialement établie à partir de levés réalisés entre 1830 et 1843, montre six cayes sur Edinburgh Reef.»[254]

35. Bref, le Nicaragua reconnaissait qu'il était incapable de confirmer si les îles en question existaient encore. D'ailleurs, un rapport établi à sa demande dans cette affaire confirmait le peu de fiabilité actuelle des cartes marines de la zone : «The fact that features thought no longer to exist remain clearly marked on a current UKHO chart is not at all surprising.»[255]

36. C'est sur cette base qu'Edinburgh Cay a été prise en compte par la Cour dans sa décision. De guerre lasse, au bénéfice du doute.

37. En août 2013, date d'adoption du décret contesté devant vous, le Nicaragua n'avait toujours rien vérifié. Aujourd'hui encore, le doute demeure intact. Au bénéfice du Nicaragua qui n'a aucun intérêt à vérifier qu'Edinburgh Cay n'est plus aujourd'hui qu'une chimère insulaire. D'ailleurs, vous avez pu constater que, pour prouver l'existence d'Edinburgh Cay en tant qu'île, le professeur Oude Elferink s'est borné à vous renvoyer à la carte qu'il avait produite dans l'affaire *Nicaragua c. Honduras*[256].

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[253] CR 2007/11, p. 57, par. 17 (Oude Elferink) *[traduction du Greffe]*.

[254] CR 2007/11, p. 57, par. 19 (Oude Elferink) (les italiques sont de nous) *[traduction du Greffe]*.

[255] *Ibid.*, réponse écrite de la République du Nicaragua à la question posée par M. le juge *ad hoc* Gaja lors de l'audience publique tenue le 16 mars 2007, 5 avril 2007.

[256] CR 2021/16, p. 41, par. 17 (Oude Elferink).

38. Je ne méconnais pas, bien sûr, que mon contradicteur a fait valoir non seulement qu'Edinburgh Cay est une île, mais encore qu'il y a d'autres îles, à Edinburgh Reef[257]. La carte que j'ai montrée la semaine dernière tend à attester qu'Edinburgh Cay n'est pas une île[258]. Il n'en existe pas davantage à Edinburgh Reef.

39. J'invite à cet égard la Cour à bien vouloir se référer aux instructions nautiques établies par les services hydrographiques des Etats-Unis. Ces instructions entendent décrire les formations marines rencontrées par les navigateurs, et ce, de manière précise en fonction des connaissances concrètes disponibles. Lorsque l'information n'est pas certaine, l'instruction le mentionne. Lorsque le doute n'est pas permis, l'information est sans réserve. Ainsi, alors qu'au début du XX^{e} siècle, Edinburgh Reef était décrit comme «apparently awash»[259] — «apparemment submergée» en français —, les relevés ultérieurs ont permis à la National Geospatial-Intelligence Agency de lever ce doute, et d'affirmer, de manière constante depuis les années 1950, que : «Edinburgh Reef, about 4 miles long, *lies awash* about 8 ¼ miles northward of the northern limits of the Cayos Miskitos group»[260].

40. Ce témoignage récent, d'une partie tierce qui n'a aucun intérêt dans la présente espèce, est déterminant. La Cour sera également intéressée de savoir que, quelques années plus tard, le naturaliste Peter Matthiesen, que l'on ne saurait davantage soupçonner de partialité, faisait rapport sur sa propre visite de la zone de la manière suivante : «At Edinburgh Reef, no land was visible — only irregular patterns of white surf.»[261] Il notait aussi les similitudes entre Edinburgh Reef et «Cape Bank» — aujourd'hui Banco del Cabo Falso au Honduras : «Like Edinburgh, this reef is barely below the surface…»[262].

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[257] CR 2021/16, p. 41, par. 17 (Oude Elferink).

[258] Colombie, dossier des juges du mercredi 22 septembre 2021, onglet n^{o} 51.

[259] *Central America and Mexico Pilot*, H.O. No. 130, Government Printing Office, 2nd ed., 1920 (disponible à l'adresse suivante : books.google.nl/books?id=uEAPAQAAMAAJ).

[260] *Sailing Directions for the East Coasts of Central America and Mexico*, Pub. 20, Defense Mapping Agency, Hydrographic Center, 5^{e} éd., 1952. (disponible à l'adresse suivante : books.google.nl/books?id=ibEnMMtvivAC — les italiques sont de nous) ; voir également, *Sailing Directions (enroute) for the Caribbean Sea*, Pub. 144, Defense Mapping Agency, Hydrographic/Topographic Center, 1re éd., 1976 (disponible à l'adresse suivante : books.google.nl/books?id=sOPgS6jBpsIC), *Sailing Directions (enroute) for the Caribbean Sea*, Numero 148, vol. 2, Defense Mapping Agency, Hydrographic/Topographic Center, 4^{e} éd., 1993 (disponible à l'adresse suivante : books.google.nl/books?id=O_KrJAWvqw4C), *ibid.*, 6^{e} éd., 1998 (disponible à l'adresse suivante : books.google.nl/books?id=TFaDH-1zPsoC) & *ibid.*, 17^{e} éd., 2017 (disponible à l'adresse suivante : msi.nga.mil/Publications/SDEnroute).

[261] P. Matthiessen, «A Reporter at large to the Miskito Bank», *The New Yorker*, 28 octobre 1967, p. 154.

[262] *Ibid.*, p. 158.

41. Madame la présidente, Mesdames et Messieurs les juges, j'en viens à ma conclusion. Premièrement, la géographie ne permet manifestement pas au Nicaragua de tracer des lignes de base droites au long de sa côte ; deuxièmement, même si tel était le cas, les lignes qu'il trace ne respectent en rien les règles s'appliquant à cette méthode ; enfin, et en tout état de cause, ces lignes s'appuient sur une géographie et de prétendus points de base qui ne pourraient exister qu'au bénéfice du doute.

Madame la présidente, ceci conclut ma plaidoirie. Mesdames et Messieurs les juges, je vous remercie de votre patiente attention. Madame la présidente, je vous prie de bien vouloir appeler à la barre M. l'agent de la Colombie.

The PRESIDENT: I thank Professor Thouvenin. I shall now give the floor to the Agent of Colombia, H.E. Mr. Carlos Gustavo Arrieta Padilla. You have the floor, Your Excellency.

Mr. ARRIETA PADILLA:

1. Madam President, distinguished judges, it is an honour to stand before you, once again, as the Agent of the Republic of Colombia.

2. Throughout these hearings, Nicaragua has tried to present a case that does not correspond to reality. It has tried to make this a case of non-compliance of the 2012 ruling, which it is not. The scope of this case was clearly defined by the Court in its 2016 decision on preliminary objections, which clearly stated that this is a case concerning alleged violations by Colombia of Nicaragua's sovereign rights, and nothing else.

3. Nicaragua's desire to change the scope of the case has led it to present a false narrative of Colombia's position and of the actual situation in the south-western Caribbean, based on misrepresented statements by Colombian presidents and a distorted presentation of some alleged events. Nicaragua has done this in order to be able to say that Colombia has had a systematic policy of disregarding the 2012 Judgment and Nicaragua's sovereign rights.

4. However, as a consequence of its desire to misrepresent the facts, Nicaragua has forgotten to pay attention to everything the presidential statements — on which they so heavily rely — did *not* say: Colombia never said that it will not respect its international obligations; Colombia never said that Nicaragua could not fish in its waters; and the Colombian Navy never received an order to stop Nicaraguan vessels. On the contrary, in line with our constitutional court's 2014 decision, as was

explained by the Co-Agent, our country has always tried to act in compliance with its international obligations.

5. Madam President, distinguished judges, Nicaragua is trying to make, as we say in Colombia, a storm in a teacup. It has intentionally forgotten to mention the reality in the area throughout the past nine years. That is, from the day after your ruling of 2012, Nicaraguan fishing boats have been able to fish freely east of the 82nd meridian, and Colombia has never opposed it. Based on a sporadic list of alleged incidents, Nicaragua has tried to ignore that overwhelming reality: since November 2012, vessels from that country have carried out no less than 10,000 fishing operations in these waters, and since November 2012 their fishing income has multiplied exponentially. All of this was demonstrated by Colombia in their pleadings.

6. If we look at this in terms of numbers, and even assuming that all the alleged incidents were true, which they are not of course, as Mr. Bundy explained, events have only occurred in 0.4 per cent of Nicaragua's fishing operations. This implies, *contrario senso*, that there have been no problems at all in at least 99.6 per cent of the fishing tasks carried out on Nicaraguan boats since 2012. That is, out of 10,000 fishing sorties made in the area by Nicaraguan fishing boats in 2012, 9,960 have had no problem at all. If we add the fact that in none of the cases alleged by Nicaragua our Navy has ever prevented Nicaraguan fishing vessels from continuing their fishing activities, it is easy to conclude that Colombia has never had a policy of systematic violations of Nicaragua's rights. On the contrary, these numbers show the opposite, that is that Colombia has always had a policy of respect for the sovereign rights of Nicaragua.

7. Even though this is a minor issue, Colombia wants to clarify a statement made by Nicaragua's counsel: we do not have a fleet in the area. The Colombian Navy has only one coast guard in the area, and occasionally two, which only coincide when one is replacing the other. In these conditions, that is, with just one coast guard in an area, as Nicaragua's Agent calls it, the size of the Adriatic Sea, one can hardly say that Colombia is trying to systematically impede Nicaragua from exercising their rights.

8. Colombia understands that lawyers sometimes get excited about their cases and exaggerate their positions. But in this case, they cannot hide the fact that during the past nine years more than 99.9 per cent of their fishing sorties have not had any problem at all, and that their fishing has increased monumentally.

9. Nicaragua has also tried to convey a false image of Colombia before the Court: it has said, not once but several times, that Colombia's actions and positions have intentionally disrespected the Court and its 2012 ruling, and has asked the Court to react by sanctioning my country. Madam President and distinguished judges, what Nicaragua has said is simply not true. Nicaragua seems to forget that this is a case of Nicaragua against Colombia, and not, as they try to portray it, a case of Colombia against the Court.

10. Colombia has been very clear from the beginning of the case. We have explained with total transparency our country's reaction after the 2012 Judgment; and throughout our written pleadings we have explained how our legal régime works, what our constitutional limitations are, and how we have tried to handle them. Colombia could not act otherwise: we are a country with a tradition of respect for judges, for national and international courts, and for their decisions. That has been one of the constants in the republican history of our country, which is the oldest in South America, that we will never change. I wish other countries could say the same.

11. Madam President, distinguished judges, Colombia has not had and will not have a policy of disregard of the Court or of Nicaragua's rights. What we have is a constitutional limitation. As the Co-Agent explained in his initial intervention, Colombia is a dualist country, whose political constitution provides that State boundaries can only be modified by a treaty. The second part of Article 101 of the Colombian Constitution has a very specific mandate, which Professor Pellet, by the way, chose to ignore in his presentation. It says that the existing boundaries, in 1991, "can only be modified by virtue of a treaty". Colombia cannot ignore that reality, nor the rule of law, nor the rule of the separation of powers.

12. Madam President, distinguished judges, the image of Colombia that Nicaragua wants to present is ill-intentioned, and completely removed from what Colombia is. We strongly reject that message, and also the fact that Nicaragua resorts to such attempts at manipulation to defend its indefensible positions.

13. It is worth repeating, as the Co-Agent said in his initial speech, that Colombia has been willing to open paths for dialogue with Nicaragua. It tried in 1977, in 1995, in 2001 and in 2015. Unfortunately, Nicaragua did not accept. In spite of this attitude, Colombia has left the door open since 2015.

14. Madam President, distinguished judges, Colombia has appeared in these proceedings to defend the rights conferred upon us by international law and to reject the unfounded accusations of Nicaragua. Colombia is convinced: (i) that it has the right to have a contiguous zone of the islands of the Archipelago of San Andrés, and to exercise in it the functions conferred by international law, as Professor Reisman explained; (ii) that it has the right to have a presence in the south-western Caribbean, to exercise its freedom of navigation and overflight, and to observe and report illegal activities that may occur, as allowed by international law, as my colleague explained; and (iii) that it has the duty to protect the natural habitat of the Raizal communities and to protect the maritime environment around the Archipelago from the predatory activities of Nicaragua and other countries that threaten the stability of the Archipelago and of the habitat of the Raizales, on which the survival of the islands depends.

15. I would finally refer – make a brief comment on Colombia's counter-claims:

16. First, the Raizal community of the islands of the San Andrés Archipelago has fished in the waters of south-western Caribbean for hundreds of years; members of that community settled the Mosquitia coast and were the origin of the Raizal groups in that area. The Raizales of San Andrés Archipelago discovered and named almost all the fishing grounds between the islands and the coast of Nicaragua. As Kent Francis James said last Wednesday, the sea is the Raizales' life and raison d'être. It is their gift from God. They have travelled and fished without impediment or limitation, but they did so until 2012, when Nicaragua impeded them to continue all this, in spite of their rights, and recognition made by Nicaragua's own President. Unfortunately, today, they face the possibility of not being able to continue fishing in their traditional banks, and they suffer the fear of moving freely between the islands of the Archipelago.

17. Far from what Nicaragua's Agent said, this would directly or indirectly affect not a small number of Raizales, but the entire community that inhabits the Colombian islands. This situation is inacceptable from any legal or social perspective, as it would affect a cultural and ethnical minority,

who just happen to be the original inhabitants of the islands. If they are so few fishermen, as Nicaragua contends, why does Nicaragua insist on denying them access to their traditional fishing grounds? Colombia considers that international law cannot support or be the cause of this situation. International law exists, among many other reasons, to correct such situations.

18. Madam President, distinguished judges, Colombia thanks the Court for having held these hearings and for having been heard. We thank you, Madam President, and your Colleagues. We also thank the Registrar and all his staff, who have made these hearings possible under extraordinary circumstances. And a special word of appreciation is due to the interpreters and the technicians who have made these hybrid proceedings possible.

19. Madam President, I know I will exceed a couple of minutes our allotted time, but please, I shall now read Colombia's concluding submissions, written copies of which will be made available in accordance with the Rules of the Court:

FINAL SUBMISSIONS

I. For the reasons stated in its written and oral pleadings, the Republic of Colombia respectfully requests the Court to reject each of the Submissions of the Republic of Nicaragua, and to adjudge and declare that

1. Colombia has not in any manner violated Nicaragua's sovereign rights or maritime spaces in the Southwestern Caribbean Sea.
2. Colombia's Decree No. 1946 of 9 September 2013 (as amended by Decree No. 1119 of 17 June 2014) has not given rise to any violation of Nicaragua's sovereign rights or maritime spaces.
   (a) There is nothing in international law that precludes the contiguous zone of one State from overlapping with the exclusive economic zone of another State;
   (b) The geodetic lines established in the Decree connecting the outermost points of Colombia's contiguous zones do not violate international law;
   (c) The specific powers concerning the contiguous zone enumerated in the Decree do not violate international law;

(d) No Colombian action in the contiguous zone has given rise to any violation of Nicaragua's sovereign rights or maritime spaces.

II. Further, the Republic of Colombia respectfully requests the Court to adjudge and declare that

3. The inhabitants of the San Andrés Archipelago, in particular the Raizales, enjoy artisanal fishing rights in the traditional fishing grounds located beyond the territorial sea of the islands of the San Andrés Archipelago.

4. Nicaragua has violated the traditional fishing rights of the inhabitants of the San Andrés Archipelago.

5. Nicaragua's straight baselines established in Decree No. 33-2013 of 19 August 2013 are contrary to international law and violate Colombia's rights and maritime spaces.

III. The Court is further requested to order Nicaragua

6. With regard to submissions 3 and 4, to ensure that the inhabitants of the San Andrés Archipelago engaged in traditional fishing enjoy unfettered access to:

(a) Their traditional fishing banks located in the maritime areas beyond the territorial sea of the islands of San Andrés Archipelago; and,

(b) The banks located in Colombian maritime areas when access to them requires navigating outside the territorial sea of the islands of the San Andrés Archipelago.

7. To compensate Colombia for all damages caused, including loss of profits, resulting from Nicaragua's violation of its international obligations.

8. To give Colombia appropriate guarantees of non-repetition.

Madam President, distinguished judges, thank you very much for your attention. This concludes Col***o***mbia's presentation.

The PRESIDENT: I thank the Agent of Colombia. The Court takes note of the final submissions which you have now read on behalf of Colombia.

Your statement brings to an end Colombia's second round of oral arguments on the claims of Nicaragua and on Colombia's counter-claims. I recall that on Friday 1 October 2021, between 3 p.m.

and 4 p.m., Nicaragua will present its second round of oral argument on Colombia's counter-claims.

The sitting is adjourned.

The Court rose at 6.10 p.m.

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