PONTIFICIA UNIVERSIDAD CATÓLICA DEL PERÚ

FACULTAD DE DERECHO

Informe sobre la sentencia de fondo de la Corte Internacional de Justicia del 21 de abril de 2022 en el caso de Presuntas Violaciones a Derechos Soberanos y Espacios Marítimos en el Mar Caribe (Nicaragua c. Colombia)

Trabajo de Suficiencia Profesional para optar el Título de Abogada que presenta:

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Lima, 2023

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RESUMEN

El tema principal del caso está relacionado con la determinación de si Colombia vulneró o no los derechos de soberanía y jurisdicción de Nicaragua en los espacios marítimos que le fueron reconocidos a través de la Sentencia de fondo de la Corte Internacional de Justicia (CIJ), emitida el 19 de noviembre de 2012.

Los hechos se desarrollaron entre los años 2013 a 2018, y comprendieron múltiples actuaciones de parte de Colombia en espacios marítimos nicaragüenses, como son: intervenciones a embarcaciones de bandera o licencia nicaragüense, concesión de autorizaciones o permisos de pesca, la oferta y adjudicación de lotes petroleros y constitución de una zona contigua integral a su territorio insular. Considerando que Colombia no era parte de la Convención de las Naciones Unidas sobre el Derecho del Mar (CONVEMAR), el análisis completo se realiza a partir del Derecho internacional consuetudinario. Para estos efectos, la Corte determina si algunos artículos de la CONVEMAR reflejan costumbre. Asimismo, se aplican conceptos clave sobre la Responsabilidad Internacional de los Estados para determinar si se configuraron Hechos Ilícitos Internacionales que comprometieran la responsabilidad internacional de Colombia. Tras el análisis de la sentencia, se determinó que Colombia vulneró los derechos de soberanía y jurisdicción de Nicaragua en su Zona Económica Exclusiva.

Palabras clave

Responsabilidad Internacional, Derecho del Mar, Derecho Internacional Consuetudinario, Tratados, Espacios Marítimos

ABSTRACT

The main topic of the case involves determining whether or not Colombia violated Nicaragua's sovereign rights and jurisdiction in the maritime spaces that were recognized in the Judgment of the International Court of Justice (ICJ) issued on November 19, 2012. The events took place between 2013-2018, and include multiple actions by Colombia in Nicaragua's maritime spaces, such as: interventions on Nicaraguan flagged or licensed vessels, granting of authorizations or fishing permits, the offer and award of oil drilling rights and constitution of an integral contiguous zone to its insular territory. Considering that Colombia was not part of the United Nations Convention on the Law of the Sea (UNCLOS), all the analysis is made from Customary International Law. For this, the Court determines if some articles of UNCLOS are customary. Also, key concepts of States International Responsibility are applied to determine if Internationally Wrongful Acts were committed, involving Colombia's international responsibility. From the judgement analysis, it's determined that Colombia indeed trespassed Nicaragua's sovereignty and jurisdiction in its Exclusive Economic Zone.

Keywords

International responsibility, Law of the Sea, Customary International Law, Treaties, Maritime Spaces.

ÍNDICE

PRINCIPALES DATOS DEL CASO

N° Expediente / Nombre del caso	**155. Presuntas Violaciones a Derechos Soberanos y Espacios Marítimos en el Mar Caribe (Nicaragua c. Colombia)**
Área(s) del derecho sobre las cuales versa el contenido del presente caso	Derecho Internacional Público: Derecho de los Tratados, Derecho Internacional Procesal; Derecho del Mar; Responsabilidad Internacional.
Identificación de las sentencias	- 155. Presuntas Violaciones a Derechos Soberanos y Espacios Marítimos en el Mar Caribe (Nicaragua c. Colombia), Sentencia de fondo de la CIJ del 21 de abril de 2022.
Sentencias vinculadas	- 124. Controversia Territorial y Marítima (Nicaragua c. Colombia), Sentencia de excepciones preliminares de la CIJ del 13 de diciembre de 2007, I.C.J. Reports 2007, p. 832. - 124. Controversia Territorial y Marítima (Nicaragua c. Colombia), Sentencia de fondo de la CIJ del 19 de noviembre de 2012, I.C.J. Reports 2012, p. 624. - 155. Presuntas Violaciones a Derechos Soberanos y Espacios Marítimos en el Mar Caribe (Nicaragua c. Colombia), Sentencia de excepciones preliminares de la CIJ del 17 de marzo de 2016, I.C.J. Reports 2016, p. 3.
Demandante / Denunciante	República de Nicaragua
Demandado / Denunciado	República de Colombia
Instancia administrativa o jurisdiccional	Corte Internacional de Justicia
Otros	Existe una relación estrecha con el caso de la Controversia Territorial y Marítima, resuelta en el año 2012, toda vez que los espacios en los que se desarrollan los hechos del caso materia de este informe, son los determinados para cada una de las partes en el proceso del 2012.

I. INTRODUCCIÓN

I.1. Justificación de la elección de la resolución

Escogí la resolución bajo análisis pues es un caso actual y geográficamente cercano, respecto del cumplimiento de una sentencia de delimitación marítima de la Corte Internacional de Justicia (CIJ). Esto guarda especial importancia en la medida en que el acceso y la explotación de los recursos marítimos en el Mar Caribe es una de las principales fuentes de recursos económicos para los Estados de esa región.

Además, este caso constituye un antecedente importante sobre la vinculatoriedad y fuerza de las decisiones de la CIJ, en particular, en asuntos limítrofes como el del caso bajo análisis. De este modo, la solidez argumentativa de la sentencia contribuirá a desincentivar el incumplimiento de decisiones previas y futuras, o por contrario, de presentar algunas falencias, será una herramienta que justifique la discrecionalidad de los Estados en el cumplimiento de las sentencias de la CIJ.

Otra de las razones por las que escogí la sentencia es porque en ella la Corte analizó a detalle dos espacios marítimos importantes, la Zona Económica Exclusiva (en adelante, ZEE) y la Zona Contigua (en adelante, ZC), así como los derechos y deberes que en ellas ejecutan tanto el Estado ribereño, como terceros Estados. En particular, me interesó estudiar la contribución que hace la Corte al Derecho internacional consuetudinario, al determinar si algunos artículos de la Convención de las Naciones Unidas sobre el Derecho del Mar (en adelante, CONVEMAR), alegados por las partes en el caso, reflejan una costumbre internacional del mar.

Finalmente, el caso es especialmente complejo, dado que para entenderlo y analizarlo es preciso revisar tres sentencias previas de la CIJ: Las sentencias de excepciones preliminares (2007) y de fondo (2012) en el caso de la

Controversia Territorial y Marítima entre Nicaragua y Colombia, y la sentencia de excepciones preliminares (2016) en el caso de las Presuntas Violaciones a Derechos Soberanos y Espacios Marítimos en el Mar Caribe.

I.2. Presentación del caso y análisis

En este caso se analiza el comportamiento de la República de Colombia (en adelante, Colombia) con posterioridad al fallo de la CIJ del 19 de noviembre de 2012, que estableció su frontera marítima con la República de Nicaragua (en adelante, Nicaragua) en el Mar Caribe, para determinar si existe o no un incumplimiento de lo ordenado en esa sentencia.

A estos efectos, el problema principal era determinar si Colombia vulneró o no los derechos de soberanía y jurisdicción de Nicaragua en los espacios marítimos que le fueron reconocidos a través de la Sentencia de fondo de la CIJ, emitida el 19 de noviembre de 2012, respecto de la Controversia Territorial y Marítima por la cual se definió la frontera marítima entre ambos Estados en el Mar Caribe. Se identificaron también, cuatro problemas secundarios, relacionados a las acciones de Colombia.

Luego de analizar los hechos, la CIJ determinó que Colombia incumplió el Derecho internacional consuetudinario al interferir con los derechos soberanos de Nicaragua en la ZEE delimitada por la Corte en su sentencia del 2012, y ordena cesar esos hechos internacionalmente ilícitos, lo que considera como una medida de reparación suficiente.

II. IDENTIFICACIÓN DE LOS HECHOS RELEVANTES

II.1. Antecedentes

El caso se desarrolla en el marco de la ejecución de una sentencia previa de la CIJ, emitida el 19 de noviembre de 2012, respecto de la Controversia Territorial y Marítima entre Nicaragua y Colombia, en el Mar Caribe.

En el mencionado proceso, la Corte confirmó la soberanía de Colombia sobre las islas de San Andrés, Providencia y Santa Catalina en virtud del Tratado sobre cuestiones territoriales entre Colombia y Nicaragua celebrado en Managua el 24 de marzo de 1928 (también conocido como el Tratado de 1928 o Tratado Esguerra-Bárcenas), y determinó la misma los Cayos de Alburquerque, los Cayos del Este-Sudeste, Roncador, Quitasueño, Serrana, Serranilla y Bajo Nuevo. Además, definió una línea de frontera marítima única que delimitó las plataformas continentales y las zonas económicas exclusivas de las partes, de acuerdo con los principios de delimitación marítima recogidos en la CONVEMAR y que forman parte del Derecho internacional consuetudinario.

La zona marítima en la que ocurren los hechos del presente caso se ubica en el suroeste del Mar Caribe. Nicaragua se encuentra al oeste del Mar Caribe. Al norte de Nicaragua se encuentra Honduras; al sur, Costa Rica y Panamá; al noreste, Jamaica; y al este, la costa continental de Colombia. Por su parte, Colombia se ubica al sur del Mar Caribe y, con relación al ámbito caribeño, al oeste limita con Panamá y al este con Venezuela.

Es pertinente señalar que el Derecho aplicable entre las partes, en lo concerniente al Derecho del Mar, es el Derecho internacional consuetudinario, pues si bien Nicaragua es un Estado parte de la Convención de las Naciones Unidas sobre el Derecho del Mar (CONVEMAR), Colombia no lo es; por lo cual, este Tratado no es aplicable.

II.2. Hechos relevantes del caso

En esta sección se presentan los principales hechos que explican la controversia entre Nicaragua y Colombia. Para estos efectos he dividido los hechos de la siguiente manera:

a) En primer lugar, se presentan los hechos principales del caso de la Controversia Territorial y Marítima entre las partes en el Mar Caribe, resuelto por la CIJ en el 2012. Esta inclusión se sustenta en el hecho de que los espacios en los que se desarrollan los hechos del caso materia de este informe, son los determinados para cada una de las partes en el proceso del 2012.

b) En segundo lugar, se detallan los principales hechos de carácter procesal del presente caso, dado que se trató de un proceso complejo que duró casi ocho años y medio, y en el que la defensa presentó tanto excepciones preliminares como reconvenciones.

En el caso objeto del presente informe existe una controversia de hecho y de derecho sobre los diversos incidentes ocurridos entre las partes durante los años 2013 a 2018. Por esa razón, los hechos de este caso serán desarrollados en el «punto 4.1 Problemas principal y secundarios» de la «sección IV. Identificación y análisis de los problemas jurídicos del caso». He organizado el informe de esta manera siendo que en algunos incidentes las partes discuten sobre la forma en que ocurrieron los hechos e, incluso, sobre su existencia, por lo que es pertinente revisarlos considerando, en conjunto, las versiones de cada parte, las evidencias presentadas y la decisión de la Corte.

II.2.1. Caso de la Controversia Territorial y Marítima (Nicaragua c. Colombia)

1. El 06 de diciembre de 2001 Nicaragua presentó una solicitud ante la CIJ para el inicio de procedimientos en contra de Colombia respecto a una controversia sobre la titularidad de territorio y la delimitación marítima en

el Mar Caribe. Nicaragua solicitó que la Corte juzgue y declare lo siguiente:

> *"Primero, que la República de Nicaragua tiene soberanía sobre las islas de Providencia, San Andrés y Santa Catalina, y todas las islas y cayos anexos, así como sobre los cayos de Roncador, Serrana, Serranilla y Quitasueño (en la medida en que sean pasibles de apropiación).*
>
> *Segundo, que, en virtud de la titularidad determinada en el punto anterior, la Corte determine una frontera marítima única entre las plataformas continentales y las zonas económicas exclusivas pertenecientes a Nicaragua y Colombia, respectivamente, de acuerdo con los principios equitativos y circunstancias pertinentes, reconocidos por el Derecho Internacional General como aplicables a la delimitación de una frontera marítima única"* [1].

2. Nicaragua sustentó la jurisdicción de la Corte en dos instrumentos:

   i) El artículo XXXI del Tratado Americano de Soluciones Pacíficas (en adelante, Pacto de Bogotá), celebrado el 30 de abril de 1948.

   ii) Las declaraciones facultativas formuladas por las partes en virtud del artículo 36 del Estatuto de la Corte Permanente de Justicia Internacional, a través de las cuales se reconoce la jurisdicción obligatoria de la Corte para resolver controversias internacionales[2].

3. El 21 de julio de 2003 Colombia presentó una solicitud de excepciones preliminares a la competencia de la Corte. En ella señaló que la CIJ carecía de la competencia para conocer la controversia, dado que en aplicación de los artículos VI y XXXIV del Pacto de Bogotá, a la fecha de

[1] Solicitud de inicio de procedimiento de Nicaragua en el caso de la Controversia Territorial y Marítima (Nicaragua c. Colombia), del 06 de diciembre de 2001, p. 8, párrafo 8.
[2] Recuérdese que el artículo 36.5 del Estatuto de la CIJ establece que las declaraciones que hubieren hecho los Estados al amparo del artículo 36 del Estatuto de la Corte Permanente de Justicia Internacional, para aceptar la jurisdicción de esta última, se entenderán como realizados con respecto a la CIJ.

su celebración, las cuestiones planteadas por Nicaragua habían sido resueltas por dos tratados vigentes: el Tratado sobre cuestiones territoriales entre Colombia y Nicaragua celebrado en Managua el 24 de marzo de 1928 (también conocido como el Tratado de 1928 o Tratado Esguerra-Bárcenas) y el Protocolo de Intercambio de Ratificaciones, celebrado en Managua el 05 de mayo de 1930 (también conocido como el Protocolo de 1930)[3].

4. El 13 de diciembre de 2007 la CIJ emitió su Sentencia sobre las excepciones preliminares, en la que determinó que:

i) No existe controversia sobre la soberanía respecto de las islas de San Andrés, Providencia y Santa Catalina, toda vez que ello fue resuelto con el Tratado de 1928 celebrado entre Nicaragua y Colombia, por el cual, el primero reconoció la soberanía de este último sobre las islas en mención, y este, la de Nicaragua respecto de la Costa de Mosquitos y las islas Mangle Grande (Great Corn) y Mangle Chico (Little Corn)[4].

ii) En aplicación del artículo XXXI del Pacto de Bogotá, tiene competencia para pronunciarse sobre la soberanía de los Estados respecto de las otras formaciones marítimas (Cayos de Albuquerque, Este-Sudeste, Roncador, Quitasueño, Serrana, Serranilla, y Bajo Nuevo), dado que el Tratado de 1928 no definió cuáles de estas formaciones eran parte del Archipiélago de San Andrés, sobre el cual Colombia tiene soberanía[5]. Asimismo, tiene competencia para pronunciarse sobre la delimitación de los espacios marítimos entre Nicaragua y Colombia, toda vez que el Tratado de 1928 y el Protocolo de 1930 no definieron un límite marítimo entre ambos Estados[6].

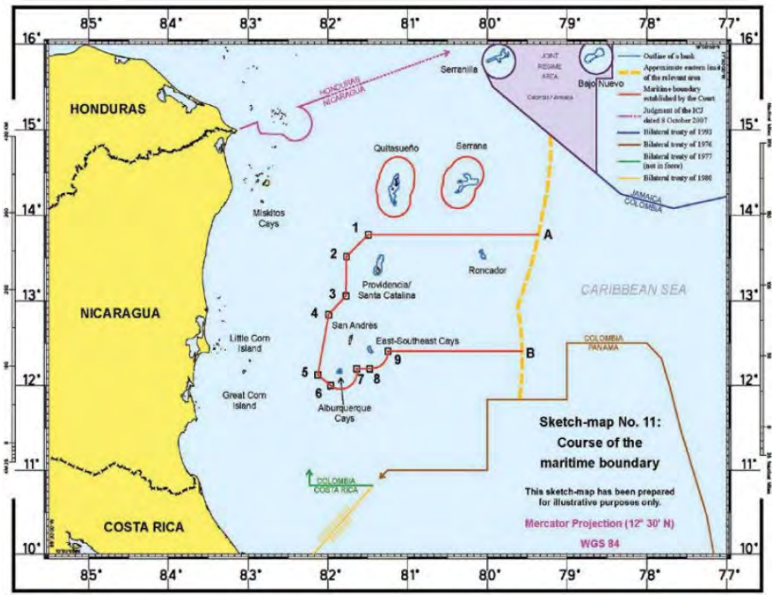
[3] Cfr. CIJ. Caso de la Controversia Territorial y Marítima (Nicaragua c. Colombia), Sentencia de excepciones preliminares del 13 de diciembre de 2007, p. 849, párrafo 43.
[4] Cfr. Ibid., p. 861, párrafo 90.
[5] Cfr. Ibid., p. 867, párrafo 97 y p.865, párrafo 104.
[6] Cfr. CIJ. **Caso de la Controversia Territorial y Marítima (Nicaragua c. Colombia)**, Sentencia de fondo de la CIJ del 19 de noviembre de 2012, p. 869, párrafo 120.

5. El 19 de noviembre de 2012 la CIJ emitió su fallo en el caso de la Controversia Territorial y Marítima, en el que:

i) Reconoció que Colombia tiene soberanía sobre las islas y cayos de Albuquerque, Este-Sudeste, Roncador, Quitasueño, Serrana, Serranilla, y Bajo Nuevo, dado que su comportamiento pone de manifiesto la autoridad de dicho Estado en estas formaciones marítimas (*effectivités*), con un ejercicio de soberanía, continuo y consistente, de naturaleza pública; que no fue reclamado antes por Nicaragua[7].

ii) Definió una línea de frontera marítima única que delimita la plataforma continental y las zonas económicas exclusivas de Nicaragua y Colombia según se detalla en el mapa que está a continuación; reconociendo en favor del primero la zona marítima al oriente del meridiano 82, hasta las 200 millas marinas desde las líneas de base a partir de las que se mide el ancho del mar territorial nicaragüense[8].

Mapa Nº 1



Fuente: Sentencia de fondo de la CIJ en el caso de la Controversia Territorial y Marítima (Nicaragua c. Colombia) (Mapa 11, p. 714)

[7] Cfr. Ibid., p. 662, párrafo 103.
[8] Cfr. Ibid., p. 719, párrafo 251.

II.2.2. Aspectos procesales en el caso de Presuntas Violaciones a Derechos Soberanos y Espacios Marítimos en el Mar Caribe (Nicaragua c. Colombia)

1. El 26 de noviembre de 2013 Nicaragua presentó a la CIJ una demanda de inicio de proceso contra Colombia, relativa a la violación de sus derechos soberanos y espacios marítimos reconocidos en la Sentencia del 2012. En su petitorio Nicaragua solicitó que la Corte declare que Colombia incumplió sus obligaciones de[9]:

   i) Abstenerse del uso o amenaza del uso de la fuerza conforme al artículo 2.4 de la Carta de las Naciones Unidas (en adelante, Carta de la ONU) y al Derecho internacional consuetudinario.

   ii) Respetar los espacios marítimos, derechos de soberanía y la jurisdicción de Nicaragua determinados en la Sentencia de la CIJ del 19 de noviembre de 2012.

   iii) Respetar los derechos de Nicaragua en función al Derecho internacional consuetudinario, reflejado en la CONVEMAR (Partes V y VI).

   En ese sentido, solicitó a la CIJ ordenar a Colombia el cumplimiento de la Sentencia del 2012, la supresión de las consecuencias de sus Hechos Internacionalmente Ilícitos (en adelante, HII) y el otorgamiento de una reparación por los daños causados.

2. Nicaragua alegó la jurisdicción de la Corte en aplicación del artículo XXXI del Pacto de Bogotá, suscrito el 30 de abril de 1948.

3. Por orden de fecha 03 de febrero de 2014, la CIJ fijó como fechas para la presentación de la memoria y la contramemoria, el 03 de octubre de 2014 y 03 de junio de 2015, respectivamente.

[9] Cfr. CIJ. **Caso de las Presuntas Violaciones a Derechos Soberanos y Espacios Marítimos en el Mar Caribe (Nicaragua c. Colombia)**, Sentencia de fondo de la CIJ del 21 de abril de 2022, p. 13, párrafo 22.

4. El 03 de octubre de 2014 Nicaragua presentó su memoria.

5. El 19 de diciembre de 2014 Colombia presentó una solicitud de excepciones preliminares a la competencia de la CIJ.

6. Por Orden de fecha 19 de diciembre de 2014, la CIJ suspendió los procedimientos sobre el fondo y solicitó a Nicaragua presentar una declaración escrita sobre las excepciones preliminares planteadas por Colombia.

7. El 20 de abril de 2015 Nicaragua presentó su declaración escrita sobre las excepciones preliminares interpuestas por Colombia.

8. Del 28 de septiembre al 02 de octubre de 2015 se llevaron a cabo las audiencias públicas sobre las excepciones preliminares presentadas por Colombia.

9. El 17 de marzo de 2016 la CIJ emitió su sentencia de excepciones preliminares. En ella determinó que tenía competencia para conocer el caso en virtud del artículo XXXI del Pacto de Bogotá[10]. Asimismo, acogió una de las excepciones preliminares planteadas por Colombia respecto a la existencia de una controversia sobre el incumplimiento de Colombia de su obligación de abstenerse del uso o amenaza del uso de la fuerza[11].

10. En atención a la sentencia emitida, el proceso de fondo continuó y, por Orden de fecha 17 de marzo de 2016, la Corte fijó como nueva fecha para la presentación de la contramemoria, el 17 de noviembre de 2016.

11. El 17 de noviembre de 2016 Colombia presentó su contramemoria, en la que incluyó cuatro contrademandas.

[10] Cfr. CIJ. **Caso de las Presuntas Violaciones a Derechos Soberanos y Espacios Marítimos en el Mar Caribe (Nicaragua c. Colombia)**, Sentencia de excepciones preliminares de la CIJ del 17 de marzo de 2016, pp. 26-27, párrafo 48.
[11] Cfr. Ibid., pp. 34-35, párrafos 75-79

12. Mediante Carta de fecha 20 de enero de 2017, la Corte fijó el 20 de abril y 20 de julio de 2017 como fechas para la presentación de las observaciones escritas de Nicaragua y Colombia, respectivamente, sobre la admisibilidad de las contrademandas.

13. El 20 de abril de 2017 Nicaragua presentó sus observaciones escritas sobre la admisibilidad de las contrademandas.

14. El 28 de junio de 2017 Colombia presentó sus observaciones escritas sobre la admisibilidad de sus contrademandas

15. Por Orden de fecha 15 de noviembre de 2017, la Corte admitió a trámite dos de las cuatro contrademandas de Colombia, que se analizaron en la sentencia de fondo, y se agregan al presente informe en la sección 4.2, problemas complementarios. Asimismo, fijó el 15 de mayo y el 15 de noviembre de 2018, para la presentación de la réplica y dúplica por parte de Nicaragua y Colombia, respectivamente.

16. El 15 de mayo de 2018 Nicaragua presentó su réplica.

17. El 15 de noviembre de 2018 Colombia presentó su dúplica.

18. Adicionalmente, mediante Orden del 4 de diciembre de 2018, la CIJ autorizó a Nicaragua a presentar un alegato adicional sobre las contrademandas de Colombia, el que fue presentado el 04 de marzo de 2019.

19. El 20, 22, 24, 27 y 29 de septiembre y el 01 de octubre de 2021 se llevaron a cabo las audiencias públicas sobre el fondo del caso, en las cuales ambas partes expusieron sus argumentos ante la Corte.

20. El 21 de abril de 2022 la CIJ emitió su sentencia de fondo.

III. DETERMINACIÓN DE LA COMPETENCIA DE LA CIJ EN EL PROCESO DE EXCEPCIONES PRELIMINARES

Previo a la determinación y análisis de los problemas jurídicos encontrados en el caso, es importante referirnos a la excepción preliminar planteada por Colombia, toda vez que, en ella, la Corte hizo un análisis sobre su competencia *ratione temporis*.

Como mencioné en la sección anterior, Nicaragua presentó su demanda de inicio del proceso en fecha **26 de noviembre de 2013**. En dicho documento, alegó la jurisdicción de la Corte en aplicación del artículo XXXI del Pacto de Bogotá, que disponía lo siguiente:

> *"Las Altas Partes Contratantes declaran que reconocen respecto a cualquier otro Estado Americano como obligatoria ipso facto, sin necesidad de ningún convenio especial* ***mientras esté vigente el presente Tratado****, la jurisdicción de la expresada Corte (…)"* [12]

Con fecha **27 de noviembre de 2012**, Colombia había dado aviso de su denuncia del Pacto de Bogotá. En ese sentido, en su solicitud de excepciones preliminares argumentó que dicho Tribunal carecía de competencia *ratione temporis* para conocer un proceso iniciado con posterioridad al aviso de denuncia del Pacto de Bogotá. Colombia sustentó su posición en lo establecido en el párrafo 2 del artículo LVI el Pacto de Bogotá.

El artículo LVI del Pacto de Bogotá, referido a la denuncia, establecía lo siguiente:

> *"El presente Tratado regirá indefinidamente, pero podrá ser denunciado mediante aviso anticipado de un año, transcurrido el cual cesará en sus efectos para el denunciante (…).*

[12] Artículo XXXI del Pacto de Bogotá. Énfasis agregado.

La denuncia no tendrá efecto alguno sobre los procedimientos pendientes iniciados antes de transmitido el aviso respectivo."[13]

Por su parte, Nicaragua sostuvo que se tenía que leer el artículo LVI en su integridad. En ese sentido, el párrafo 1 señalaba que las denuncias del Pacto de Bogotá surtían efecto un año después de su notificación. Dicho año se cumplía el **27 de noviembre de 2013**. De este modo, considerando que el proceso ante la CIJ fue iniciado de manera previa al cumplimiento del año (un día antes), la Corte tenía competencia para conocerlo.

La Corte le dio la razón a Nicaragua, y sostuvo que al estar vigente el Pacto de Bogotá al momento de la presentación de la demanda, su competencia quedaba confirmada. Asimismo, sostuvo que dicha competencia no se vería afectada por el hecho de que el Pacto de Bogotá perdiera su vigencia entre las partes al día siguiente, dado que lo ocurrido después de determinada la competencia, no tenía efectos retroactivos.

Entre los párrafos 33-47 de la sentencia de fondo, se discuten los alcances de la competencia *ratione temporis* determinada por la Corte en la sentencia de excepciones preliminares, siendo que en el caso, Nicaragua alegó **hechos anteriores y posteriores al 27 de noviembre de 2013** (fecha que la Corte calificó como «fecha crítica», pues a partir de ese momento el Pacto de Bogotá deja de estar vigente entre las partes). Según Colombia, la Corte solo tenía competencia para evaluar los hechos ocurridos antes de la fecha crítica.

La Corte concluyó, con base en su jurisprudencia, que la terminación del Pacto de Bogotá, no hacía que su competencia *ratione temporis* se limitara a los hechos ocurridos con anterioridad a la fecha crítica. En ese sentido, determinó que los hechos ocurridos después de la fecha crítica sí entraban bajo el ámbito de su competencia, pues cumplían con los siguientes requisitos[14]:

[13] Artículo LVI del Pacto de Bogotá.

[14] Cfr. CIJ. **Caso de las Presuntas Violaciones a Derechos Soberanos y Espacios Marítimos en el Mar Caribe (Nicaragua c. Colombia)**, Sentencia de fondo de la CIJ del 21 de abril de 2022, pp. 28-29, párrafos 44-47.

i) Se trataba de hechos relacionados directamente al objeto de la demanda.
ii) Su inclusión no transformaba la controversia planteada en la demanda.

Para llegar a esta conclusión, la Corte realizó una analogía con la evaluación aplicable a la admisibilidad de peticiones posteriores a la presentación de la demanda, dado que no se había planteado un caso similar al de Colombia en algún proceso anterior[15].

Esta decisión de la Corte fue discutida, aprobándose por diez votos contra cinco. Los jueces Abraham, Bennouna, Yusuf, Nolte y McRae consideraron que no era correcto realizar tal analogía, dado que en los casos de admisibilidad de peticiones posteriores a la demanda, no había un hecho determinante que cuestionara la competencia *ratione temporis* de la Corte; lo que sí ocurría en el presente caso. Para los jueces mencionados, la Corte debió limitarse a analizar los hechos ocurridos antes del **27 de noviembre de 2013**.

De la revisión realizada, me encuentro de acuerdo con los jueces que votaron en contra de la extensión de la competencia *ratione temporis* de la Corte a hechos ocurridos después de la fecha crítica. Sin perjuicio de esto, a continuación realizaré el análisis de todo el caso.

IV. IDENTIFICACIÓN Y ANÁLISIS DE LOS PROBLEMAS JURÍDICOS DEL CASO

IV.1. Problemas principal y secundarios

El principal problema de este caso gira en torno a la **determinación de si Colombia vulneró o no los derechos de soberanía y jurisdicción de Nicaragua en los espacios marítimos que le fueron reconocidos a través de la Sentencia de fondo de la CIJ, emitida el 19 de noviembre de 2012,** respecto de la Controversia Territorial y Marítima por la cual se definió la frontera marítima entre ambos Estados en el Mar Caribe.

[15] Cfr. Ibid., p. 28, párrafo 43.

Para resolver esa interrogante, es necesario analizar los siguientes cuatro problemas secundarios, relacionados a las acciones de Colombia:

a. Determinar si las intervenciones en el Mar Caribe por parte de las fragatas de la Armada Nacional de la República de Colombia (ARC) a embarcaciones de bandera nicaragüense o autorizadas por Nicaragua reflejan un incumplimiento de los derechos de soberanía de este en los espacios marítimos que le fueron reconocidos en la Sentencia del 2012.

b. Determinar si la emisión por parte de las autoridades colombianas de licencias o autorizaciones para pescar o conducir investigaciones científicas marítimas refleja un incumplimiento de los derechos de soberanía de Nicaragua en los espacios marítimos que le fueron reconocidos en la Sentencia del 2012.

c. Determinar si la oferta y adjudicación de licencias de exploración petrolera por parte de las autoridades colombianas refleja un incumplimiento de los derechos de soberanía de Nicaragua en los espacios marítimos que le fueron reconocidos en la Sentencia del 2012.

d. Determinar si la constitución de una "zona contigua integral" (ZCI) correspondiente a los territorios insulares colombianos en el Mar Caribe occidental, a través del Decreto Presidencial 1946 de Colombia, refleja un incumplimiento de los derechos de soberanía de Nicaragua en los espacios marítimos que le fueron reconocidos en la Sentencia del 2012.

En esa línea, a continuación analizaré los problemas secundarios, con miras a plantear mis conclusiones en torno al el problema principal de este caso en la sección final. El estudio de los problemas secundarios y del problema principal partirá de los hechos que se presentarán para cada situación, tomará en consideración la posición de cada una de las partes y describirá la posición de la CIJ. Todo esto para poder, finalmente, realizar un análisis crítico basado en la doctrina, que me lleve a establecer mi posición personal.

IV.1.1. ¿Las intervenciones en el Mar Caribe de las fragatas de la ARC a embarcaciones de bandera nicaragüense o autorizadas por Nicaragua reflejan un incumplimiento de los derechos de soberanía de Nicaragua en los espacios marítimos que le fueron reconocidos en la Sentencia del 2012?

IV.1.1.1. Intervenciones ocurridas

En la sentencia se mencionó que Nicaragua alegó más de cincuenta supuestos incidentes ocurridos en el Mar Caribe, sobre los que buscó sustentar su petitorio[16]. La Corte desestimó al menos cuarenta de ellos, argumentando que las pruebas ofrecidas por el demandante eran insuficientes o defectuosas (audios no claros, informes sin fuente de corroboración, entre otros)[17]. Los incidentes desestimados no se mencionan en la sentencia, por lo que no será posible considerarlos en la presente sección.

Por otro lado, entre los párrafos 71-90 de la sentencia, la CIJ presentó los supuestos incidentes que sí pudieron ser analizados en función a las pruebas ofrecidas por las partes. Para su mejor comprensión, he numerado los incidentes y los he clasificado en tres categorías:

i) intervenciones a actividades pesqueras (Tabla 1: incidentes 1, 2, 3, 4, 5, 6, 7 y 8)
ii) intervenciones a investigaciones científicas marinas (Tabla 1: incidente 9),
iii) intervenciones a buques de la armada o guardacostas nicaragüenses (Tabla 1: incidentes 3, 7 y 10).

En la siguiente tabla he resumido las intervenciones que aparecen en la sentencia, en orden cronológico, e identificando a las embarcaciones involucradas. Dado que hay una controversia de hecho con relación a la existencia o alcance de estas intervenciones, se presentan también las versiones de las partes:

[16] Cfr. Ibid., p. 34, párrafo 65.
[17] Cfr. Ibid., p. 35, párrafo 69.

Tabla Nº 1: Relación de Incidentes del primer problema secundario

N°	Fecha	Embarcaciones involucradas por Estado		Suceso ocurrido según la versión de Nicaragua	Suceso ocurrido según la versión de Colombia
1	17 NOV 2013	COL:	ARC Almirante Padilla (fragata)	El *ARC Almirante Padilla* ordenó al *Miss Sofía*, ubicado en las coordenadas 14° 50' 00'' N y 81° 45' y 00'' W, moverse, dado que se encontraba en "aguas colombianas". Al negarse, el ARC envió una lancha a motor para ahuyentarlo. En la tarde, el *Rio Escondido* se encontró con el *ARC Almirante Padilla,* y le informó que se encontraba en un espacio marítimo nicaragüense. Este último se negó a moverse, argumentando que el Gobierno Colombiano no reconocía la sentencia del 2012.	El *ARC Almirante Padilla* y el *Miss Sofía* se encontraron en la zona de Luna Verde (nombre del área de las coordenadas referidas por Nicaragua). No obstante, el primero intentó contactar al segundo, para devolverle a dos pescadores que, aparentemente, habían sido abandonados por el barco nicaragüense. Dado que no tuvo éxito, luego contactó a la embarcación de guardacostas *Rio Escondido*.
		NIC:	Miss Sofia (barco langostero) Rio Escondido (embarcación guardacostas)		
2	27 ENE 2014	COL:	ARC Independiente (fragata)	El *ARC Independiente* informó al *Caribbean Star*, ubicado en las coordenadas 14° 47' 00'' N y 81° 52' 00'' W, que estaba pescando ilegalmente en la Reserva de la Biósfera de Seaflower. De acuerdo con un audio presentado por Nicaragua, la *ARC Independiente dijo*: *"el Estado colombiano ha determinado que la Sentencia de la Corte Internacional de Justicia no es aplicable, por lo que las unidades de la [Armada de Colombia] seguirán ejerciendo soberanía y control sobre estas aguas".* El mismo día, el *ARC Independiente* intervino al *Al John* que tenía autorización de pesca nicaragüense y se ubicaba en 14° 44 00'' N y 81° 47' 00'' W.	Niega que haya existido un encuentro entre el *ARC Independiente* y el *Caribbean Star* ese día, con base en la bitácora de viaje del primero. No obstante, confirma el encuentro con el *Al John* en la ZEE de Nicaragua, en cuya interacción la fragata colombiana solo le manifestó que la pesca que estaba llevando a cabo en el área de la Biósfera Seaflower era ilegal. La tripulación del *Al John* continuó con la pesca luego.
		NIC:	Caribbean Star (barco langostero) Al John (barco langostero)		
3	05 FEB 2014	COL:	ARC 20 de Julio (fragata)	El *ARC 20 de Julio* informó al *Tayacán* y a los 12 barcos pesqueros, ubicados en las coordenadas 14° 44' 01'' N y 81° 39' 08'' W, que se retiren de la zona continua y mar territorial colombianos. Según la grabación, la fragata colombiana informó lo siguiente: *"(…) se encuentran en aguas jurisdiccionales de Colombia – el Estado colombiano ha determinado que la sentencia de La Haya no es aplicable; por tanto, las unidades de la [Armada] de la República de Colombia continuarán ejerciendo la soberanía sobre estas aguas".* Igualmente, el *ARC 20 de Julio* instó al *Nica Fish* a retirarse de las "aguas colombianas", siendo que	El *ARC 20 de Julio* interactuó con el *Tayacán* en las coordenadas señaladas. Ahora bien, defiende que la lectura de la declaración contenida en el audio presentado por Nicaragua no implica una violación a los derechos de soberanía de Nicaragua, ni representa una violación del Derecho Internacional. Con relación al *Nica Fish*, señala que el *ARC 20 de Julio*, lo identificó, pero no interactuó con él.

N°	Fecha	Embarcaciones involucradas por Estado		Suceso ocurrido según la versión de Nicaragua	Suceso ocurrido según la versión de Colombia
		NIC:	Tayacán (embarcación de la armada) 12 barcos pesqueros Nica Fish (barco pesquero)	se ubicaba en las coordenadas 14° 44' 00'' N y 81° 39' y 00'' W.	
4	12 y 13 MAR 2014	COL:	ARC 20 de Julio (fragata)	El 12.03.14 el *ARC 20 de Julio* interceptó de manera hostil al *Al John*, ubicado en las coordenadas 14° 44' 00'' N y 81° 50' 00'' W, y le ordenó que se retire de la zona. Asimismo, envió una lancha a motor para ahuyentarlo. El 13.03.14 interceptó al *Marco Polo*, instándolo a salir del área de pesca (coordinadas 14° 43' 00'' N y 81° 45' 00'' W).	El *ARC 20 de Julio* interactuó con los barcos nicaragüenses en las fechas establecidas. No obstante, solo les informó que se encontraban pescando en una zona protegida por la UNESCO, por lo que las invitó a suspender su pesca depredadora y emplear métodos compatibles con el medio ambiente. Niega que haya existido hostigamiento o vulneración a los derechos de soberanía de Nicaragua, toda vez que ambas embarcaciones siguieron pescando.
		NIC:	Al John (barco langostero) Marco Polo (barco pesquero)		
5	03 ABR 2014	COL:	ARC San Andrés (fragata)	La fragata *ARC San Andrés* instó al *Mister Jim* a dejar de pescar langosta y retirarse del área (coordinadas 14° 44'' 00'' N y 82° 00' 00' W).	El *ARC San Andrés* y el *Mister Jim* interactuaron en la fecha y coordenadas establecidas. La fragata colombiana leyó lo siguiente: *"invito al Mister Jim a suspender sus prácticas de pesca predatoria, dañinas para el medio marino, y cambiar sus métodos a los autorizados"*
		NIC:	Mister Jim (barco pesquero)		
6	28 JUL 2014	COL:	ARC 7 de Agosto (fragata)	El 28.07.14 el *Doña Emilia* informó a un buque de la armada nicaragüense que el 22.07.14, el *ARC 7 de Agosto* lo interceptó, argumentando que no podía pescar en dicha zona, ubicada en las coordinadas 14° 29' 00'' N y 81° 53' 00'' W.	El *ARC 7 de Agosto* interactuó con el *Doña Emilia* en la fecha indicada, y le informó que estaba pescando con métodos depredadores en una zona protegida por la UNESCO, por lo que debía suspender la misma y emplear métodos autorizados. Alegó que no se afectaron los derechos de soberanía de Nicaragua, pues el barco continuó sus actividades.
		NIC:	Doña Emilia (barco pesquero)		
7	26 MAR 2015	COL:	ARC 11 de Noviembre (fragata)	El *ARC 11 de Noviembre* dijo al guardacostas *GC-401 José Santos Zelaya*, ubicado en las coordenadas 14° 50' 00'' N y 81° 41' 00'' W, que *"según el gobierno colombiano, la sentencia de La Haya [era] inaplicable, razón por lo que [estaba] en el Archipiélago colombiano de San Andrés [y] Providencia"*. Posteriormente, en las coordenadas 14° 50' 2.98" N y 81° 47' 3.62" W el *ARC 11 de Noviembre* se encontró con el *Doña Emilia*, que estaba realizando pesca predatoria. Lo instruyó a suspender esta actividad al encontrarse prohibida, independientemente de la autorización que ostente.	Colombia no confirma ni niega el encuentro entre su fragata y la embarcación guardacostas nicaragüense. Sin embargo, defiende que la declaración realizada no vulnera los derechos de soberanía de Nicaragua. Alega que Nicaragua le está negando sus derechos en el Mar Caribe. Por otro lado, negó tener constancia sobre el encuentro con el *Doña Emilia*, y manifestó que, de ser verídica la grabación, el oficial colombiano debe haber manifestado que se trata de un área protegida por la UNESCO, donde no es posible realizar una pesca depredadora, invitándoles a cambiar sus métodos. En ese sentido indicó
		NIC:	GC-401 José Santos Zelaya (embarcación guardacostas) Doña Emilia (barco pesquero)		

N°	Fecha	Embarcaciones involucradas por Estado		Suceso ocurrido según la versión de Nicaragua	Suceso ocurrido según la versión de Colombia
					que no constituye una violación de los derechos de Nicaragua.
8	21 AGO 2016	COL:	ARC Almirante Padilla (fragata)	El *ARC Almirante Padilla* interceptó al *Marco Polo* informándole que sus actividades de pesca eran ilegales, por lo que emitió un sonido agudo en el agua que impidió la pesca de langostas.	El *ARC Almirante Padilla* se encontró con el *Marco Polo* en la fecha señalada, pero solo leyó una proclama dirigida a barcos nicaragüenses que empleaban pesca depredadora. No obstante, el *Marco Polo* no hizo caso a las indicaciones y continuó su actividad.
		NIC:	Marco Polo (barco pesquero)		
9	06 y 08 OCT 2018	COL:	ARC Almirante Padilla (fragata)	El 06.10.18, el *ARC Almirante Padilla* intervino al *Dr. Jorge Carranza Fraser* que realizaba investigación científica marina al sur de Cayo Albuquerque, en las coordenadas 13° 51' 50.79'' N y 81° 27' 18.066'' W, ordenándole cesar sus actividades pues se encontraba en "aguas colombianas". El 08.10.18 la fragata colombiana vuelve a intervenir a la embarcación mexicana ordenándole retirarse.	El suceso no se llevó a cabo, siendo que el 05.10.18 la nave mexicana ya había transitado por la zona en cuestión, con base en una comunicación del Instituto Nacional de Pesca y Acuicultura de México (INAPESCA). En otra comunicación INAPESCA dice que la embarcación mexicana se encontró con una nave marina de un tercer Estado, pero no señala que sea colombiana.
		NIC:	Dr. Jorge Carranza Fraser (embarcación de investigación científica marina mexicana autorizada por Nicaragua)		
10	11 DIC 2018	COL:	ARC Antioquia (fragata) Observer (barco pesquero de Honduras)	El *Tayacán* interceptó al *Observer*, que pescaba langostas ilegalmente en las coordenadas 14° 58' 00'' N y 81° 00' 00'' W. Mientras lo conducía a puerto, los interceptó el *ARC Antioquia*, que solicitó la liberación del *Observer*. El *Tayacán* fue hostigado por aire y mar durante horas, teniendo incluso que cambiar de rumbo. En la persecución, el *ARC Antioquía* chocó con el *Tayacán* y el *Observer* en varias oportunidades. Incluso, la tripulación del ARC Antioquia apuntó con armas a los navales nicaragüenses a bordo del *Observer*, buscando que se rindieran.	El *Observer* estaba transitando entre las islas colombianas, no pescando en la ZEE de Nicaragua. El *ARC Antioquia* acudió ante el llamado de emergencia del *Observer*. No se hostigó a la embarcación nicaragüense (ni por aire, ni por mar). Al contrario, el *Tayacán* intentó que la fragata colombiana y el barco pesquero hondureño chocaran.
		NIC:	Tayacán (embarcación de la armada)		

Fuente: Elaboración propia

IV.1.1.2. Posición de Nicaragua

Para Nicaragua, las acciones realizadas por Colombia en su ZEE vulneraron sus derechos de soberanía y su jurisdicción en el espacio marítimo que le fue reconocido por la Corte en su Sentencia de 2012. En particular, argumentó que, a través de dichas actuaciones, Colombia había instaurado un régimen de vigilancia y monitoreo de la zona, como si aún se tratara de un espacio marítimo colombiano.

Nicaragua reconoció que los terceros Estados tienen libertades de navegación, sobrevuelo y otros usos legítimos del mar vinculados a ambas libertades, como se establece en la CONVEMAR[18]. No obstante, alegó que para su interpretación se debía recurrir al sentido corriente de los términos, según el cual, la palabra «navegación» *"se limita al paso de buques o al movimiento de buques sobre el agua y no incluye actos sistemáticos de «monitoreo» y «seguimiento»"* [19].

Finalmente, señaló que de acuerdo con la CONVEMAR, la jurisdicción para garantizar el cumplimiento de normas ambientales es del Estado ribereño, por lo que Colombia no tenía el derecho de interferir en este ámbito.

IV.1.1.3. Posición de Colombia

Colombia alegó que las intervenciones de sus fragatas estaban permitidas por el Derecho Internacional en tanto que se enmarcaron en el ejercicio de sus libertades de navegación y sobrevuelo u otros usos permisibles del mar, reconocidos a terceros Estados en la ZEE de un Estado ribereño. Además, en el marco de dichas libertades, sostuvo que actuó conforme a los siguientes derechos y deberes, también derivados del Derecho Internacional[20]:

i) Deber de proteger y preservar el medio ambiente marino del Mar Caribe.
ii) Deber de debida diligencia.
iii) Derecho y deber de proteger el hábitat de la población Raizal[21] y los demás habitantes del Archipiélago de San Andrés.

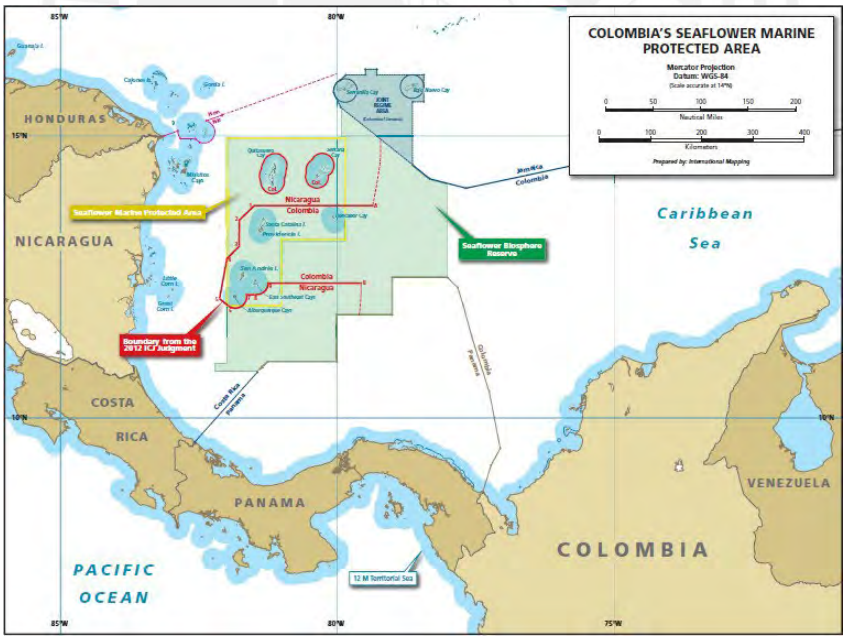
Para Colombia, las libertades antes descritas permitían que todas sus embarcaciones y aeronaves, incluso las de carácter militar, naveguen o sobrevuelen la ZEE de Nicaragua, para el ejercicio de sus derechos y deberes mencionados. En particular, los que se derivan de los Tratados celebrados para proteger la zona, como son el Convenio para la Protección y el Desarrollo del

[18] Artículo 58.1 de la CONVEMAR.
[19] CIJ. **Caso de las Presuntas Violaciones a Derechos Soberanos y Espacios Marítimos en el Mar Caribe (Nicaragua c. Colombia)**, Sentencia de fondo de la CIJ del 21 de abril de 2022, p. 30, párrafo 51. Traducción propia.
[20] Cfr. Ibid., p. 31, párrafo 54.
[21] Los Raizales son la población nativa del Archipiélago de San Andrés, Providencia y Santa Catalina.

Medio Marino de la Región del Gran Caribe, suscrito en Cartagena de Indias el 24 de marzo de 1983 (en adelante, el Convenio de Cartagena) y su Protocolo relativo a las Áreas y Flora y Fauna Silvestres Especialmente Protegidas, celebrado en Kingston el 18 de enero de 1990 (en adelante, el Protocolo SPAW por sus siglas en inglés). En conjunto, el Convenio y sus Protocolos se conocen como el Régimen de Cartagena.

A lo anterior, agregó que tiene el deber de proteger a la población Raizal y a los demás habitantes del Archipiélago de San Andrés, Providencia y Santa Catalina, territorio sobre el que sí se le reconoció soberanía en la Sentencia de 2012. En esa línea, para cumplir con dichas obligaciones, Colombia creó dos reservas protegidas: la Reserva de la Biósfera de Seaflower y el Área Marina Protegida de Seaflower, establecidas en los años 2000 y 2005, respectivamente.

Mapa Nº 2



Fuente: Contramemoria de Colombia (Figura 2.3, p. 51)

Sobre la base de lo anterior, argumentó que gozaba del derecho a monitorear cualquier práctica que atentara contra su obligación medioambiental y, por ende, podía instar a su cese[22]. Incluso sostuvo que *"las preocupaciones sobre*

[22] Cfr. Colombia. **Contramemoria de Colombia** en el caso de las Presuntas Violaciones a Derechos Soberanos y Espacios Marítimos en el Mar Caribe (Nicaragua c. Colombia), del 17 de noviembre de 2016, p. 112, párrafo 3.31. Traducción propia.

temas ambientales en el Mar Caribe Suroccidental deben ser tomadas en cuenta plenamente, independientemente de las consideraciones de soberanía o derechos de soberanía" [23]*.*

Finalmente, como parte de su defensa, Colombia argumentó que para demostrar la ilegalidad de alguna acción que no esté expresamente listada entre las libertades señaladas, sería necesario probar que le impidió a Nicaragua el ejercicio de sus derechos de soberanía, o que esto le generó un perjuicio[24]. Según señaló esto no puede demostrarse en el caso, dado que las embarcaciones de bandera o con licencia nicaragüense continuaron sus actividades, pese a los reclamos de las fragatas colombianas.

IV.1.1.4. Decisión de la CIJ

En primer lugar, la Corte señaló que el Derecho aplicable al caso sería el Derecho internacional consuetudinario, toda vez que solo uno de los Estados en litigio era parte de la CONVEMAR (Nicaragua). En ese sentido, en distintas secciones de su sentencia, la CIJ analizó si los artículos de la CONVEMAR reflejaban o no una costumbre internacional, y si pueden, por lo tanto, aplicarse al caso concreto.

Dado que la controversia entre las partes se refiere a los derechos y deberes que tienen los Estados (tanto el Estado ribereño como los otros Estados) en la ZEE, entre los párrafos 56 a 63 de la sentencia, la Corte determinó y analizó los artículos de la CONVEMAR aplicables al caso concreto. De este modo, señaló que la institución de la ZEE "*ya había recibido una amplia aceptación por los Estados*" [25] al momento en que se celebró la CONVEMAR, por lo que desde su sentencia de fondo en el caso de la Plataforma Continental (Libia c. Malta) reconoció que esta se había *"convertido en parte del Derecho*

[23] Cfr. Ibid., p. 111, párrafo 3.29. Traducción propia.
[24] Cfr. CIJ. **Caso de las Presuntas Violaciones a Derechos Soberanos y Espacios Marítimos en el Mar Caribe (Nicaragua c. Colombia)**, Sentencia de fondo de la CIJ del 21 de abril de 2022, p. 31, párrafo 55.
[25] Ibid., p. 32, párrafo 56. Traducción propia.

consuetudinario" [26]. En adición, la CIJ precisó que los artículos 56, 58, 61, 62 y 73 de la CONVEMAR también reflejan costumbres internacionales.

Como se señaló anteriormente, en el caso se identificó una controversia de hecho y derecho. En ese sentido, las partes tenían versiones distintas sobre los hechos ocurridos en el Mar Caribe, los que resumí y numeré en la Tabla 1 del presente informe. La Corte no realizó un análisis a detalle de cada incidente, limitándose a verificar lo siguiente[27]:

- Las pruebas respaldaron que en los incidentes 1, 2, 4, 5, 6, 8 y 9, se produjo un encuentro entre las fragatas colombianas y las embarcaciones nicaragüenses alrededor de Luna Verde (conocida zona de pesca al este del meridiano 82°, que a partir de la Sentencia del 2012, se encuentra dentro de la ZEE de Nicaragua).

- Queda demostrado que en los incidentes 2, 4, 5, 6, 7 y 8, las fragatas colombianas *"pretendieron ejercer jurisdicción en la zona económica exclusiva de Nicaragua"* [28]. Esto se verificó a través de las grabaciones en las que se escucha a los oficiales colombianos leer mensajes de rechazo a la Sentencia del 2012, asegurando que Colombia seguiría ejerciendo soberanía sobre los espacios marítimos en que se producían los encuentros, y por ende podía exhortar a las embarcaciones pesqueras a suspender sus actividades.

Habiendo determinado lo anterior, la Corte procedió con el análisis de fondo en función a los dos aspectos principales de la defensa de Colombia: 1) Alcances de las libertades de navegación y sobrevuelo, y otros usos permisibles del mar atribuibles a los terceros Estados en la ZEE de un Estado ribereño y 2) Titularidad de la obligación de conservar y proteger el medioambiente marino en la ZEE.

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[26] CIJ. **Caso de la Plataforma Continental (Jamahiriya Árabe Libia c. Malta)**, Sentencia de fondo del 03 de junio de 1985, p. 33, párrafo 34. Traducción propia.
[27] Cfr. CIJ. **Caso de las Presuntas Violaciones a Derechos Soberanos y Espacios Marítimos en el Mar Caribe (Nicaragua c. Colombia)**, Sentencia de fondo del 21 de abril de 2022, p. 42, párrafo 92.
[28] **Loc. Cit.**

Con respecto al primer punto, la Corte afirmó que el Derecho internacional consuetudinario reconoce que los terceros Estados tienen libertades de navegación y sobrevuelo en la ZEE, lo que se refleja en el artículo 58 de la CONVEMAR. No obstante, señaló claramente que las libertades antes referidas:

> "*no incluyen los derechos relacionados con la exploración, explotación, conservación y administración de los recursos naturales de esta zona marítima, ni tampoco (…) otorgan (…) la jurisdicción para hacer cumplir medidas de conservación en la zona económica exclusiva del Estado ribereño. Dichos derechos y jurisdicción están específicamente reservados para el Estado ribereño en aplicación del Derecho internacional consuetudinario, reflejado en los artículos 56 y 73 de la CONVEMAR*" [29].

Sobre el segundo punto, si bien la Corte reconoció que todos los Estados tienen la obligación de proteger el medio ambiente, concluyó que, en la ZEE, esta se encuentra a cargo del Estado ribereño (supuesto iii) del literal b) del artículo 56.1 de la CONVEMAR); quien incluso puede emitir las normas necesarias para hacer efectiva dicha protección (artículos 61 y 62 de la CONVEMAR). Según señaló la Corte, en este espacio marítimo, un tercer Estado tendría la obligación de cumplir las normas emitidas por el Estado ribereño, así como asegurar su cumplimiento por las embarcaciones de su pabellón.

Adicionalmente, la Corte reforzó su argumento haciendo referencia a las propias normas del Régimen de Cartagena (artículo 10 del Convenio de Cartagena y artículo 3 del Protocolo SPAW), según las cuales, el cumplimiento de las obligaciones establecidas en dichos tratados por los Estados parte, no puede afectar la soberanía, los derechos soberanos o la jurisdicción de otros Estados.

[29] Ibid., p. 43, párrafo 94. Traducción propia.

Un tema importante sobre las obligaciones medioambientales de Colombia es el referido a la protección de las reservas marinas creadas con anterioridad a la delimitación marítima realizada por la CIJ en el 2012. Al respecto, la Corte concluyó que, en los espacios en que las reservas se superpongan con la ZEE de Nicaragua, Colombia está obligada a respetar los derechos de soberanía y jurisdicción de este último[30].

En ese sentido, la Corte declaró que Colombia incumplió su obligación internacional de respetar los derechos de soberanía y jurisdicción de Nicaragua en su ZEE, reflejada en los artículos 56, 58 y 73 al realizar las siguientes actuaciones: 1) interferir con las actividades pesqueras y de investigación científica realizadas por las embarcaciones de bandera o licencia nicaragüense, 2) interferir con las operaciones de los barcos de la armada nicaragüense, y 3) pretender hacer cumplir medidas de conservación ambiental en el espacio marítimo en cuestión[31].

IV.1.1.5. Posición personal

Comparto totalmente lo decidido por la CIJ con respecto al primer problema secundario, aunque considero que omitió referirse a algunos temas que pudieron complementar su argumentación.

La controversia en este primer problema estuvo referida a la determinación de los derechos y deberes que corresponden al Estado ribereño en su ZEE; así como al alcance de las actividades comprendidas en las libertades de navegación y sobrevuelo y otros usos legítimos del mar, que podría realizar otro Estado sobre el referido espacio marítimo. Es sobre estos dos temas que versan los incidentes narrados en la Tabla 1 del presente informe.

Una primera dificultad que enfrentó la Corte al analizar este aspecto es la existencia de una controversia de hecho sobre los diversos y abundantes incidentes alegados por Nicaragua. Para simplificar el análisis, la CIJ descartó

[30] Cfr. Ibid., p. 44, párrafo 98.
[31] Ibid., p. 46, párrafo 101.

al menos cuarenta de los incidentes alegados por el demandante, con base en la debilidad de las pruebas de sustento. En consecuencia, solo listó aquellos que contaban con pruebas que sí podría valorar. Esta es la primera omisión que identifique, dado que los incidentes descartados no son si quiera mencionados en el fallo.

Sobre los diez incidentes restantes, que sí aparecen listados en el fallo, la Corte adoptó, nuevamente, una salida pragmática, y constató dos aspectos mediante la valoración de las pruebas, sin entrar a un análisis detallado de cada incidente[32]:

i) Las fragatas colombianas y los barcos pesqueros o de investigación científica de bandera o licencia nicaragüense coincidieron en sus coordenadas de ubicación en momentos determinados, lo que fue prueba de un encuentro.

ii) En las intervenciones realizadas, los oficiales de las fragatas colombianas leyeron mensajes que reflejaban una política de rechazo a la Sentencia del 2012, a través de los cuales se reafirmaba la idea de que Colombia mantenía el control sobre el espacio marítimo que había sido reconocido a Nicaragua.

En mi opinión, el análisis simplificado que hizo la Corte sirvió a efectos de determinar si Colombia había incumplido o no con su obligación internacional de respetar los derechos de soberanía y jurisdicción de Nicaragua. Sin embargo, el no mencionar los hechos o el no analizarlos de manera independiente, podría tener impacto en la determinación de una eventual reparación.

En relación con el fondo, la sentencia es valiosa pues identifica a los artículos de la CONVEMAR que reflejan una costumbre internacional respecto de la ZEE

[32] Al realizar el análisis simplificado, la Corte omitió incluir a los incidentes 3 (05 de febrero de 2014) y 10 (11 de diciembre de 2018), los que presumo no tuvieron un problema en relación las pruebas de soporte, de lo contrario habrían sido descartados junto con los cuarenta presuntos incidentes no mencionados en la sentencia.

(artículos 56, 58, 61, 62 y 73), y que, por lo tanto, pueden ser empleados para analizar el caso, habida cuenta de que una de las partes en litigio no es parte de dicho Tratado.

Al respecto, considero que la Corte realizó una correcta interpretación del literal b) del artículo 56.1 de la CONVEMAR, en el sentido corriente de los términos, al señalar que el Estado ribereño (Nicaragua) es quien tiene la jurisdicción para la protección y preservación del medio ambiente marino en su ZEE. Lo que, además, reforzó con una interpretación en función al contexto, al incluir a los artículos 61, 62 y 73 de la CONVEMAR, a través de los cuales se detallan las medidas de conservación y utilización de recursos vivos que podría adoptar el Estado ribereño, quien además está facultado a adoptar las medidas necesarias para garantizar el cumplimiento de sus normas.

Sobre este punto, es importante recordar que el artículo 31 de la Convención de Viena sobre el Derecho de los Tratados de 1969, establece la regla general de interpretación de Tratados, que considera entre los principios de interpretación al «sentido ordinario y natural de los términos del tratado» y al «contexto de estos»[33].

Lo concluido por la Corte en los párrafos anteriores, no niega la existencia de una obligación general[34] de proteger y preservar el medio ambiente a cargo de todos los Estados; no obstante, precisa que en un espacio definido como es la ZEE, quien tiene esa obligación especial es el Estado ribereño. En ese sentido, la mención que hizo la CIJ a los artículos 10 y 3 del Convenio de Cartagena y del Protocolo SPAW, respectivamente, fue transcendental, pues pese a tratarse de Convenios específicos para la protección del medio marino en la Región del Gran Caribe, en ellos mismos se disponía que el cumplimiento de las medidas

[33] De La Guardia, E. y Delpech, M. (1970). El Derecho de los Tratados y la Convención de Viena. La Ley, pp. 315-316.

[34] En su Opinión Consultiva sobre la legalidad de la amenaza o uso de armas nucleares la CIJ dijo que:

> *"Reconoce que el medio ambiente no es una abstracción, sino que representa un espacio vital, la calidad de vida y la salud de los seres humanos, incluyendo a las generaciones venideras. La existencia de una obligación general de los Estados de asegurar que las actividades dentro de su jurisdicción y control respeten el medio ambiente o de áreas más allá del control nacional es ahora parte del corpus de Derecho Internacional relativo al medio ambiente".* (Opinión Consultiva de la CIJ del 8 de julio de 1996, pp. 241-242, párrafo 29. Traducción propia).

acordadas debía respetar la soberanía, derechos soberanos, o jurisdicción de los Estados.

Sobre este punto, y en referencia al Protocolo SPAW, considero que la Corte omitió citar los artículos 4 (establecimiento de áreas protegidas), 5 (medidas de protección) y 6 (régimen de planificación y manejo para áreas protegidas), de aplicación pertinente al caso y que también disponían, expresamente, que la actuación de los Estados parte debía limitarse a los espacios marítimos sobre los cuales ejercieran soberanía, derechos soberanos o jurisdicción.

Por lo tanto, habiendo quedado claro que la protección y preservación del medioambiente marino corresponde al Estado ribereño, sería contradictorio admitir que esta puede ser una de las actividades comprendidas en las libertades de navegación y sobrevuelo y otros usos permisibles del mar de las que gozan terceros Estados (artículo 58 de la CONVEMAR). En ese sentido, no se trata de libertades irrestrictas, sino que tienen un contrapeso plasmado en el mismo artículo 58, referido al respeto de los derechos y deberes del Estado ribereño, así como al cumplimiento de la normativa emitida por este[35]. En consecuencia, el principal argumento de Colombia para justificar sus múltiples intervenciones a los barcos de bandera o con licencia nicaragüense en la ZEE de Nicaragua, se desvanece.

Hecho el análisis, y en respuesta a lo señalado por Colombia, considero que si bien las preocupaciones medioambientales son temas importantes que demandan una acción conjunta y concertada de los Estados, no son excusa para menoscabar la soberanía ni los derechos de soberanía de sus pares. Al respecto, es importante recordar que la «soberanía» de un Estado no se limita a su espacio terrestre, sino que se extiende a su espacio marítimo (aguas interiores y mar territorial), y a su espacio aéreo suprayacente a los mismos, en la medida en que en conjunto comprenden su territorio[36]. Por su parte, un

[35] Abugattas, G. (2023). La Convención de las Naciones Unidas sobre el Derecho del Mar de 1982: estructura y principales características. En: Roncagliolo, N. y Vidarte, O. (Eds.). El Perú y la Convención del Mar: Balance y Perspectivas (pp. 55-94). Fundación Academia Diplomática del Perú, p.71.

[36] Remiro Brotóns, A. y otros (2007). Derecho Internacional. Tirant lo Blanch, p. 98; SALMÓN, E. (2014). Curso de Derecho Internacional Público. Fondo Editorial de la Pontificia Universidad Católica del Perú, p. 104; CIJ. Caso relativo a las actividades militares y paramilitares en y contra Nicaragua (Nicaragua c. Estado Unidos de América), Sentencia de fondo de la CIJ del 27 de junio de 1986, p. 111, párrafo 212.

Estado tiene derechos de soberanía sobre su ZEE para fines económicos, como la exploración, explotación, conservación y administración de recursos naturales[37].

Por otro lado, desde el esquema de responsabilidad internacional de los Estados, podemos afirmar que se cumplieron los elementos del Hecho Ilícito Internacional (en adelante, HII) descritos en el artículo 2 del Proyecto de Artículos de la CDI sobre Responsabilidad del Estado por Hechos Internacionalmente Ilícitos adoptado el 12 de diciembre de 2001 (en adelante, el Proyecto de la CDI). Novak y García Corrochano explican estos elementos como sigue[38]:

i) **Elemento objetivo:** que se produzca el incumplimiento de una obligación internacional, por la disconformidad parcial o total entre la conducta ocurrida y la ordenada.

ii) **Elemento subjetivo:** que la referida violación sea atribuible al Estado.

Al respecto, como hemos visto, Colombia tenía la obligación de respetar los derechos de soberanía y la jurisdicción de Nicaragua en la ZEE de este último, delimitada por la CIJ en el 2012. Como sostuvo la Corte, esa obligación estaba plasmada en el Derecho internacional consuetudinario reflejado en los artículos 56, 58 y 73 de la CONVEMAR, existente al momento de la ocurrencia de los incidentes.

El comportamiento de Colombia manifestado a través de las intervenciones a embarcaciones pesqueras y de investigación científica de bandera o licencia nicaragüense, la obstaculización de las operaciones de los barcos de la armada nicaragüense, y al hacer cumplir medidas de conservación medioambiental en la ZEE de Nicaragua, evidenció una incompatibilidad total entre la conducta ordenada y la acontecida. En ese sentido, la Corte

[37] Novak, F. y García-Corrochano, L. (2005). Derecho Internacional Público. Tomo II: Sujetos de Derecho Internacional (Vol. 1). Fondo Editorial de la Pontificia Universidad Católica del Perú, pp. 231-232.
[38] Novak, F. y García-Corrochano, L. (2016). Derecho Internacional Público. Tomo II: Sujetos de Derecho Internacional (2ª ed., Vol. 1). Thomson & Reuters, pp. 398-401.

acertadamente concluyó que Colombia había incumplido su obligación internacional.

Con relación al elemento subjetivo, es claro que estamos ante una conducta atribuible al Estado colombiano, en los términos del artículo 4.1 del Proyecto de la CDI, habida cuenta de que en cada uno de los incidentes participaron las fragatas de la Armada de la República de Colombia (ARC). De este modo, se trató de actuaciones de personas *"que gozan de representación del Estado, por mandato del derecho interno de este"* [39], denominadas «agentes del Estado», actuando en el ejercicio de sus funciones. Si bien la Corte no menciona esto expresamente en el fallo, dado lo obvio del asunto, sí llega a esta conclusión puesto que en todo momento se refiere a la «conducta de Colombia».

Considerando lo anterior, y tomando en cuenta el primer principio rector de la responsabilidad internacional, contenido en el artículo 1 del Proyecto de la CDI, **Colombia es responsable internacionalmente por la comisión del HII en perjuicio de Nicaragua**. Por lo tanto, debiera quedar obligada a reparar los perjuicios ocasionados.

En el párrafo 144 de su fallo, la Corte llegó a esta conclusión sobre la responsabilidad de Colombia en el marco Derecho Internacional, y párrafos más abajo, le ordenó la cesación del a conducta ilícita[40]. Pese a la conclusión alcanzada, sorprende la decisión de la CIJ de no conceder a Nicaragua la reparación solicitada, pues como señaló:

> *"Considerando la naturaleza de los hechos internacionalmente ilícitos de Colombia, la Corte considera que las medidas de reparación señaladas anteriormente [cesación de la conducta ilícita] son suficientes para reparar el daño que los hechos internacionalmente ilícitos de Colombia infligieron en Nicaragua"* [41].

[39] Ibid., p. 412.
[40] Cfr. CIJ. **Caso de las Presuntas Violaciones a Derechos Soberanos y Espacios Marítimos en el Mar Caribe (Nicaragua c. Colombia)**, Sentencia de fondo del 21 de abril de 2022, p. 68, párrafo 195.
[41] Ibid., p. 69, párrafo 197. Traducción propia.

Sobre este punto, en el párrafo 24 del fallo, veremos que Nicaragua solicitó dos de las tres modalidades de reparación contenidas en el artículo 34 del Proyecto de la CDI:

i) **Satisfacción:** a través del reconocimiento público, en la sentencia de la CIJ, de que Colombia incumplió con su obligación internacional de respetar los espacios marítimos de Nicaragua delimitados en la Sentencia de 2012, así como sus derechos de soberanía y jurisdicción.

ii) **Indemnización:** reparación pecuniaria por el lucro cesante de las embarcaciones pesqueras de bandera o licencia nicaragüense que fueron indebidamente intervenidas por las fragatas de la ARC en la ZEE de Nicaragua.

En adición, Nicaragua solicitó el cumplimiento de las siguientes obligaciones complementarias dispuestas en los artículos 29 y 30 del Proyecto de la CDI:

i) **Continuar el cumplimiento de la obligación internacional:** a través de la adopción de medidas para el respeto de los derechos de soberanía y jurisdicción de Nicaragua en su ZEE.

ii) **Cesación del HII:** mediante el cese inmediato de la vulneración de sus derechos de soberanía y jurisdicción en su ZEE.

iii) **Garantías de no repetición:** a través del reconocimiento de que, en adelante se respetará la frontera marítima delimitada por la CIJ en la Sentencia de 2012.

De la comparación entre lo solicitado por Nicaragua y lo otorgado por la Corte, puedo llegar a cuatro conclusiones:

1) Aunque la sentencia no hace referencia expresa a una «satisfacción», sí la otorga, pues en sus párrafos 100, 101, 195 y 2 de la parte dispositiva declaró que Colombia incumplió su obligación internacional de respetar

los derechos de soberanía y la jurisdicción de Nicaragua, reflejados el Derecho internacional consuetudinario.

2) Respecto de las obligaciones complementarias, la Corte reafirmó que Colombia debía continuar el cumplimiento de su obligación internacional, dado que en varias secciones de la sentencia mencionó que dicho Estado tiene el deber de respetar los derechos de soberanía y jurisdicción de Nicaragua en su ZEE[42]. Del mismo modo, en los párrafos 195 de la sentencia y 4 de la parte dispositiva, le ordena a Colombia cesar el HII, que se había manifestado a través de los múltiples incidentes.

3) La Corte rechazó el pedido de indemnización realizado por Nicaragua debido a la ausencia de pruebas de los daños materiales sufridos por sus embarcaciones pesqueras. Para arribar a esta decisión se basó en el criterio fijado en su jurisprudencia, según el cual no es posible aceptar una pretensión de este tipo, ante la ausencia de evidencia capaz de demostrar que se ha sufrido un perjuicio económicamente evaluable[43].

   Sobre este punto, es lamentable que no se tuvieran las pruebas necesarias para conceder una indemnización, pues aún cuando las intervenciones colombianas a las embarcaciones de bandera o licencia nicaragüense no impidieron del todo la pesca, sí la dificultaron, como puede verse de la narración de los incidentes. En ese sentido, Nicaragua debió documentar mejor las pérdidas sufridas en los espacios de interrupción que tuvieron sus embarcaciones.

4) La Corte omitió pronunciarse sobre el pedido de garantías de no repetición de Nicaragua. A mi criterio, la CIJ pudo aprovechar este pedido, para ordenarle a Colombia adoptar las medidas necesarias, a fin de que los miembros de sus Armada dejen de realizar pronunciamientos que abiertamente desconozcan la Sentencia de 2012 o que reafirmen la soberanía o derechos soberanos de Colombia sobre la ZEE de

[42] Cfr. Ibid., p. 44, párrafo 98.
[43] Cfr. **Caso de la Controversia relativa a los derechos de navegación y conexos (Costa Rica c. Nicaragua)**, Sentencia de fondo del 13 de julio de 2009, p. 267, párrafo 149.

Nicaragua. Es sabido que la Corte se guía por una regla general por la cual *"no hay una razón para suponer que un Estado cuya conducta ha sido declarada como ilícita por la Corte, la repita en el futuro, debiendo presumirse su buena fe"* [44].

No obstante, en el caso concreto se trató de una violación manifiesta, probada a través de grabaciones a oficiales navales colombianos, que la propia Corte calificó como parte de una política estatal para "[mantener el control de] *las actividades pesqueras y la conservación de recursos en la ZEE de Nicaragua*" [45]. Si a esto se suman las actuaciones ilícitas de Colombia en los demás problemas que se analizarán líneas abajo, considero que se requería la adopción de una decisión más enfática por parte de la CIJ, que desincentivara el incumplimiento de sus decisiones y de otras obligaciones internacionales.

Finalmente, para no dejar de lado las preocupaciones medioambientales, que, como dije, son muy importantes, conviene revisar lo dispuesto en el artículo 9 del Protocolo SPAW respecto del establecimiento de áreas protegidas contiguas a fronteras internacionales.

Como se ha visto, en el espacio marítimo en el que ocurre la controversia existen dos reservas naturales para la protección del medio ambiente marino: la Reserva de la Biósfera de Seaflower y el Área Marina Protegida de Seaflower. Ambas fueron establecidas por Colombia en los años 2000 y 2005, respectivamente, pero desde el 2012 se superponen en parte con la ZEE de Nicaragua. Al respecto, la Corte señaló que, al ejercer sus derechos y cumplir sus obligaciones en estas reservas, Colombia debía respetar los derechos de soberanía y jurisdicción de Nicaragua, lo que sin duda es correcto; sin embargo, considero que pudo ser más propositiva.

[44] Cfr. Ibid., p. 267, párrafo 150.
[45] **CIJ. Caso de las Presuntas Violaciones a Derechos Soberanos y Espacios Marítimos en el Mar Caribe (Nicaragua c. Colombia)**, Sentencia de fondo del 21 de abril de 2022, p. 42, párrafo 92. Traducción propia.

Tanto Colombia como Nicaragua son Estados parte del Protocolo SPAW, por ende, sus disposiciones son obligatorias para ambos. En el artículo 9 del referido Protocolo, se contempla el supuesto del establecimiento de un área protegida por uno de los Estados Parte, que se encuentre muy próxima a la frontera o límites de jurisdicción con otro Estado Parte. En este caso el Protocolo dispone que se deben llevar a cabo consultas entre ambos Estados, para alcanzar un acuerdo sobre las medidas a adoptar, tales como el establecimiento de otra área protegida en el espacio de jurisdicción del otro Estado, o la creación de programas de manejo en cooperación. Si bien en este caso no se trata de la creación de una nueva área protegida, pues estas ya existen, y es más bien la superposición de estas con la frontera marítima entre Nicaragua y Colombia el hecho que sobreviene, el artículo 9 podría plantear una alternativa interesante.

Como primera opción, se podría recomendar a Colombia reducir el ámbito espacial de las reservas mencionadas, y motivar a Nicaragua a establecer otra reserva en su ZEE, para asegurar la protección de las especies amenazadas de fauna y flora silvestres de la región. Recomendando además la cooperación entre ambos Estados, para el cumplimiento del objeto y fin del Protocolo. Una segunda alternativa sería recomendar a las partes la creación de un programa de manejo conjunto de las áreas protegidas ya existentes, en el que cada Estado cooperaría en su espacio de jurisdicción

Es cierto que puede ser complejo para los Estados adecuar su comportamiento a una delimitación marítima nueva, que afecta el ejercicio de sus derechos y obligaciones. No obstante, como pude verse, existen algunas alternativas que pueden adoptarse que no impliquen afectar los derechos de soberanía y la jurisdicción de otro Estado.

IV.1.2. ¿La emisión por parte de las autoridades colombianas de licencias o autorizaciones para pescar o conducir investigaciones científicas marítimas, refleja el incumplimiento de los derechos de soberanía de Nicaragua en los espacios marítimos que le fueron reconocidos en la Sentencia del 2012?

IV.1.2.1. Incidentes ocurridos

En este segundo problema secundario también existe una controversia sobre los hechos planteados por las partes. Los incidentes se formularon en torno a tres temas:

- Resoluciones emitidas por la Dirección General Marítima (DIMAR) del Ministerio de Defensa Nacional de Colombia.
- Resoluciones emitidas por la Gobernación del Archipiélago de San Andrés, Providencia y Santa Catalina (en adelante, la Gobernación), perteneciente a Colombia
- Incidentes respecto de las autorizaciones emitidas por las autoridades colombianas.

Al respecto, Nicaragua presentó cinco resoluciones emitidas por la DIMAR entre los años 2013-2017, alegando que a través de estas se otorgaron permisos de pesca, con incentivos económicos, tanto a embarcaciones colombianas como de terceros Estados, para operar en su ZEE. Asimismo, presentó cinco resoluciones de la Gobernación por las que se declaró la aplicabilidad de los permisos de pesca, para los años 2013, 2014, 2015 y 2016, en el área de Luna Verde, ubicada dentro de su ZEE. Las resoluciones son las siguientes:

Tabla Nº 2: Resoluciones emitidas por autoridades colombianas

DIMAR[46]	Gobernación del Archipiélago de San Andrés[47]
- Resolución N° 0311 (26.06.13) - Resolución N° 0305 (25.06.14) - Resolución N° 0437 (27.07.15) - Resolución N° 0459 (27.07.16)	- Resolución N° 5081 (22.10.13) - Resolución N° 4997 (10.11.14) - Resolución N° 4356 (01.09.15) - Resolución N° 4780 (24.09.15)

[46] Cfr. Ibid., p. 46, párrafo 103.
[47] Cfr. Ibid., pp. 47 y 49, párrafos 104 y 117. Las Resoluciones N° 4997 y 4356 son agregadas por Nicaragua en su réplica.

DIMAR[46]	Gobernación del Archipiélago de San Andrés[47]
- Resolución N° 0550 (15.08.17)	- Resolución N° 2465 (30.06.16)

Fuente: Elaboración propia

En respuesta, Colombia alegó que la DIMAR no tenía competencias para emitir licencias de pesca. Asimismo, negó haber promovido o autorizado la pesca industrial en la ZEE de Nicaragua, señalando que ninguna de las resoluciones hacía referencia a este espacio marítimo[48]. Por el contrario, se refirieron a espacios colombianos (Roncador, Serrana, Quitasueño, Serranilla, Bajo Alicia y Bajo Nuevo).

Finalmente, entre los párrafos 120 y 130 de la sentencia se presentaron los cinco supuestos incidentes que he numerado y resumido en la siguiente Tabla, organizándolos en orden cronológico, e identificando a las embarcaciones involucradas en los sucesos. Además, al existir una controversia de hecho en torno a la existencia o alcance de estos, se presentan las versiones de Nicaragua y Colombia:

Tabla Nº 3: Relación de Incidentes del segundo problema secundario

N°	Fecha	Embarcaciones involucradas por Estado		Suceso ocurrido según la versión de Nicaragua	Suceso ocurrido según la versión de Colombia
1	13 y 14 FEB 2014	COL:	ARC Almirante Padilla (fragata) Blue Sky (barco pesquero de Honduras)	El 13.02.14, el *Tayacán* vio al personal del *ARC Almirante Padilla* abordar el *Blue Sky* en las coordenadas 14° 48' 00'' N y 81° 36' 00'' W. El 14.02.14, el *Tayacán* contactó al *Blue Sky* (en las coordenadas 14° 56' 00'' N y 81° 35' 00'' W), que en respuesta informó que contaba con autorización colombiana.	El abordaje de la tripulación del *ARC Almirante Padilla* al *Blue Sky* no afectó a Nicaragua, pues la embarcación no es de su pabellón, ni fue licenciada por ella. Alegó además que los supuestos permisos de pesca emitidos por Colombia no se refirieron a la ZEE de Nicaragua.
		NIC:	Tayacán (embarcación de la armada)		
2	23 MAR 2015	COL:	ARC Independiente (fragata) Lucky Lady (barco pesquero de Honduras)	El guardacostas nicaragüense le preguntó al *Lucky Lady* (ubicado en las coordenadas 14° 40' 00'' N y 81° 45' 00'' W) bajo qué autoridad pescaba, a lo que el *ARC Independiente* respondió que dicho barco estaba protegido por el gobierno colombiano, quien no acata la Sentencia de la CIJ del 2012.	Las pruebas no pueden confirmar la fecha y lugar del presunto incidente. Además, destacó que no otorgó autorización al *Lucky Lady* para pescar en el ZEE de Nicaragua, sino para dirigirse a las Islas del Norte.
		NIC:	S/N (embarcación guardacostas)		

[48] Cfr. Ibid., p. 47, párrafo 106-107.

N°	Fecha	Embarcaciones involucradas por Estado		Suceso ocurrido según la versión de Nicaragua	Suceso ocurrido según la versión de Colombia
3	12 SET 2015	COL:	ARC S/N (fragata) Miss Dolores (barco pesquero de Tanzania)	El *Tayacán* se encontró con el *Miss Dolores* en las coordenadas 14° 54' 00'' N y 81° 28' 00'' W. Una fragata colombiana los interceptó y solicitó al *Tayacán* alejarse pues no contaba con autorización para visitar a dicho barco, autorizado por el gobierno colombiano.	Las pruebas no permiten determinar la fecha, lugar y circunstancia del encuentro. Si fueran auténticas probarían que Nicaragua pretendió reclamar soberanía en vez de derechos soberanos.
		NIC:	Tayacán (embarcación de la armada)		
4	12 y 13 ENE 2016	COL:	ARC S/N (fragata) Observer (barco pesquero de Honduras)	El 12.01.16 el guardacostas nicaragüense interceptó al *Observer* en las coordenadas 14° 41' 00'' N y 81° 41' 00'' y le ordenó dejar de pescar. El *Observer*, manifestó que contaba con autorización de las autoridades colombianas. Una fragata de la ARC acudió a proteger al *Observer,* manifestando que este contaba con autorización colombiana. El 13.01.16 recibió una respuesta similar en coordenadas cercanas.	Niega el hecho, pues observó al guardacostas nicaragüense un par de días antes, no en las fechas alegadas por Nicaragua. Señaló que si las pruebas fueran auténticas demostrarían que Nicaragua pretendió reclamar soberanía en vez de derechos soberanos.
		NIC:	S/N (embarcación guardacostas)		
5	06 ENE 2017	COL:	ARC S/N (fragata) Capitán Geovanie, Observer, Amex (barcos pesqueros de Honduras)	El *Tayacán* se encontró con el *Capitán Geovanie* y le ordenó abandonar su ZEE. Lo intervino una fragata de la ARC que señaló que se encontraba garantizando la seguridad de las embarcaciones en el Archipiélago de San Andrés. Le ordenó al *Capitán Geovanie* continuar pescando en las *"aguas históricamente colombianas"*, y le pidió al Tayacán que no interfiriera, pues el primero tenía autorización colombiana. La fragata de la ARC también protegió al *Observer y al Amex.*	Las pruebas no pueden confirmar la fecha ni lugar donde ocurrió el encuentro. Colombia otorgó una licencia al *Capitán Geovanie* para pescar en las Islas del Norte, no en la ZEE de Nicaragua. Colombia veló por la seguridad de las otras embarcaciones en ejercicio de sus libertades.
		NIC:	Tayacán (embarcación de la armada)		

Fuente: Elaboración propia

IV.1.2.2. Posición de Nicaragua

Nicaragua sostuvo que Colombia incumplió con su obligación de respetar sus derechos de soberanía y jurisdicción en su ZEE, a través de la emisión de autorizaciones de pesca e investigación científica, así como por su participación en los incidentes ocurridos en el Mar Caribe.

Para Nicaragua, las resoluciones de la DIMAR y de la Gobernación otorgaron permisos de pesca industrial, en espacios ubicados al interior de su ZEE. Asimismo, alegó que los incidentes descritos en la sección 4.1.2.1 confirmaron

el otorgamiento de los permisos por Colombia, quién además protegió el desarrollo de la actividad pesquera a través de su Armada naval.

En suma, señaló que estas actuaciones demostraron la intención de Colombia de ejercer control y jurisdicción sobre el espacio marítimo en cuestión.

IV.1.2.3. Posición de Colombia

Como se señaló anteriormente, Colombia afirmó que la DIMAR no tenía competencia para otorgar licencias de pesca. Asimismo, respecto de las resoluciones emitidas por la Gobernación, expresó que los permisos se limitaron a los espacios bajo soberanía colombiana, reconocidos en la Sentencia del 2012, y no a Luna Verde ni a otra parte de la ZEE nicaragüense[49].

Respecto de los incidentes en el mar, Colombia sostuvo que las pruebas de Nicaragua eran insuficientes para demostrar los hechos. Ahora bien, en los casos en que sus fragatas sí estuvieron presentes en las coordenadas alegadas, afirmó que lo hicieron en ejercicio de su libertad de navegación y sobrevuelo, así como otros usos permitidos del mar.

IV.1.2.4. Decisión de la CIJ

La CIJ analizó, primero, lo referido a las resoluciones de la DIMAR y la Gobernación y, en segundo lugar, los incidentes discutidos por las partes.

Respecto de las resoluciones de la DIMAR, constató que entre sus propios considerandos se establecía que es función de esta *"autorizar la operación de las naves y artefactos navales en aguas colombianas"* [50]. Visto lo anterior, la Corte señaló que aún cuando dichos permisos estaban sujetos a una autorización posterior por parte de la Gobernación, ello no significaba que el otorgamiento de autorizaciones no fuera una función de dicha entidad[51].

[49] Cfr. Ibid., p. 47, párrafo 106-107.
[50] Cuarto considerando de las Resoluciones N° 0311, 0305, 437, 459 y 550 de la DIMAR.
[51] CIJ. **Caso de las Presuntas Violaciones a Derechos Soberanos y Espacios Marítimos en el Mar Caribe (Nicaragua c. Colombia)**, Sentencia de fondo del 21 de abril de 2022, p. 48, párrafo 111.

En lo relativo al ámbito de aplicación de las autorizaciones, la Corte señaló que las resoluciones no fijaban un alcance geográfico claro pues todas establecían que: *"[sus] disposiciones (…) serán aplicables exclusivamente a las (…) naves dedicadas a la pesca industrial en jurisdicción de las Capitanías de Puerto de San Andrés y de Providencia"* [52]. En ese sentido, no pudo determinar si se extendían hasta la ZEE de Nicaragua.

Por otro lado, en lo referente a la Gobernación, la Corte analizó cinco resoluciones. Al respecto, señaló que si bien en las resoluciones de los años 2014 (4997), 2015 (4356) y 2016 (2465) se hizo referencia exclusiva a espacios bajo jurisdicción de Colombia; en las resoluciones del 2013 (5081) y 2016 (4780) sí se agregó una referencia expresa a la zona de Luna Verde, como si estuviera comprendida dentro el territorio insular colombiano. En consecuencia, concluyó que:

> *"La inclusión expresa de «La Esquina o Luna Verde» en la zona de pesca descrita en las resoluciones emitidas por el Gobernador del Archipiélago de San Andrés después de la Sentencia del 2012 sugiere que Colombia continúa atribuyéndose el derecho de autorizar las actividades de pesca en parte de la zona económica exclusiva de Nicaragua"* [53].

Finalmente, en el análisis de los supuestos incidentes, la CIJ señaló que las pruebas presentadas por las partes confirmaron que[54]:

i) Las embarcaciones de bandera extranjera realizaron actividades de pesca en la ZEE de Nicaragua. Es más, en las resoluciones de la DIMAR y la Gobernación figuran los nombres de las seis embarcaciones extranjeras que realizaron dichas actividades y que están listadas en la Tabla 3.

[52] Artículo 2 de las Resoluciones N° 0311, 0305, 437, 459 y 550 de la DIMAR. Énfasis añadido.
[53] **Caso de las Presuntas Violaciones a Derechos Soberanos y Espacios Marítimos en el Mar Caribe (Nicaragua c. Colombia)**, Sentencia de fondo de la CIJ del 21 de abril de 2022, p. 50, párrafo 119. Traducción propia.
[54] Cfr. Ibid., p. 53, párrafo 131.

ii) En algunos casos las fragatas de la Armada de la República de Colombia (ARC) protegieron las actividades de pesca realizadas por las embarcaciones extranjeras en la ZEE de Nicaragua.
iii) Colombia sabía que la ZEE de Nicaragua incluye el área de Luna Verde.

De lo anterior, la Corte concluyó que *"la conducta de las fragatas colombianas, que es atribuible a Colombia, confirma que las autorizaciones de pesca colombianas se extendieron al área marítima que ahora pertenece a Nicaragua"* [55]. Por lo tanto, Colombia incumplió sus obligaciones internacionales, al vulnerar los derechos de soberanía y jurisdicción de Nicaragua en este espacio marítimo.

La CIJ no pudo concluir algo en relación con los permisos de investigación científica que Nicaragua alegó que se otorgaron en su ZEE, dado que no se presentaron pruebas suficientes.

IV.1.2.5. Posición personal

Con respecto al segundo problema secundario, comparto totalmente la decisión de la CIJ.

Para determinar si Colombia tenía responsabilidad internacional, la Corte debía **constatar si los permisos de pesca emitidos por las autoridades colombianas se extendieron a la ZEE de Nicaragua**, determinada a partir de la Sentencia del 2012. A estos efectos, se revisaron, por un lado, el ámbito de aplicación geográfica de las autorizaciones concedidas entre los años 2013-2017, y por el otro, los cinco incidentes ocurridos entre las partes en el Mar Caribe occidental.

La respuesta a esta interrogante es fundamental, dado que, como he mencionado en la sección 4.1.1, los derechos de soberanía para la exploración, explotación, conservación y administración de los recursos naturales en la ZEE son exclusivos del Estado ribereño (artículo 56.1.a de la CONVEMAR). En ese

[55] Ibid., p. 53, párrafo 132. Traducción propia.

sentido, es Nicaragua, y no Colombia, quien tiene el derecho a conceder permisos de pesca y a reglamentar cómo se llevará a cabo dicha actividad, lo que ha sido desarrollado en los artículos 61 y 62 de la CONVEMAR, que, como ha dicho la Corte, reflejan costumbre internacional. De este modo, si se demuestra que Colombia emitió permisos de pesca para algún espacio ubicado al interior de la ZEE de Nicaragua, habría vulnerado su obligación internacional de respetar los derechos de soberanía y jurisdicción de esta última.

Considero que la Corte actuó manera acertada al basarse en las dos resoluciones que tenían una descripción precisa del espacio geográfico en el que se aplicaban los permisos (Resoluciones 5081 y 4780 de la Gobernación). Como se ha repetido varias veces en el fallo, a partir de la delimitación marítima realizada por la Corte en el 2012, el área de Luna Verde quedó comprendida en la ZEE de Nicaragua. En ese sentido, concuerdo con la Corte respecto a que la referencia expresa a esta área en los permisos otorgados por la Gobernación en los años 2013 y 2015, sugería que Colombia mantenía el control sobre este espacio.

Dado que Colombia negó haber otorgado permisos de pesca que abarcaran los espacios marítimos de Nicaragua, fue necesario realizar un contraste entre dichos permisos y lo manifestado por las tripulaciones de las embarcaciones autorizadas y de las fragatas colombianas que participaron en los incidentes. Dicho análisis le permitió a la CIJ confirmar que los permisos se extendieron a la ZEE de Nicaragua, siendo incluso que las fragatas de la ARC brindaron protección a las embarcaciones extranjeras autorizadas durante la actividad extractiva.

Considerando lo anterior, y en función al esquema de responsabilidad de los Estados, puedo concluir que estamos ante un HII que comprometió la responsabilidad internacional de Colombia. Al emitir autorizaciones de pesca que se extendieron a una parte de la ZEE de Nicaragua, el comportamiento de Colombia es incompatible con lo ordenado por la norma consuetudinaria vista líneas arriba (elemento objetivo). Igualmente, en vista a que las actuaciones son llevadas a cabo por los órganos del Estado (la Gobernación al emitir los

permisos y la ARC al interferir con las labores de control de la armada y guardacostas nicaragüense), estas serían atribuibles a Colombia (elemento subjetivo).

Sobre la atribución de la conducta, es preciso mencionar que la disposición del artículo 4 del Proyecto de la CDI esta fundamentada en el «principio de unidad del Estado», habida cuenta de que las actuaciones (positivas y negativas) todos los órganos del Estado, independientemente del poder al que se vinculen (ejecutivo, legislativo o judicial) o el nivel que tengan en la organización estatal (nacional o subnacional), serán atribuibles al Estado.[56]

Habiendo determinado la responsabilidad internacional de Colombia, corresponde analizar las medidas de reparación otorgadas. Con relación a este punto, Nicaragua solicitó las tres modalidades de reparación dispuestas en el artículo 34 del Proyecto de la CDI:

i) **Satisfacción**: a través del reconocimiento público, en la Sentencia de la CIJ, que declare el incumplimiento de Colombia de su obligación de respetar los derechos soberanos y jurisdicción de Nicaragua en su ZEE.

ii) **Restitución:** mediante la revocación de los permisos de pesca concedidos.

iii) **Indemnización**: por el lucro cesante producto de las autorizaciones ilegales que Colombia concedió sobre su ZEE; y,

Además, solicitó el cumplimiento de las obligaciones complementarias de los artículos 29 y 30 del Proyecto de la CDI: i) Continuar el cumplimiento de la obligación internacional, ii) Cesación del HII y iii) Garantías de no repetición, en los términos descritos en la sección 4.1.1.5.

[56] **CREUTZ, K.** (2020). The Evolution of State Responsibility. In State Responsibility in the International Legal Order: A Critical Appraisal. Cambridge University Press, pp. 87-88.

Al realizar el contraste entre lo pedido por Nicaragua y lo decido por la Corte, observo lo siguiente:

1) Al igual que con respecto al problema anterior, considero que, a través de su fallo, la Corte ha concedido la «satisfacción» solicitada por Nicaragua, pues en los párrafos 134, 195 y 3 de la parte dispositiva declaró que Colombia incumplió su obligación internacional de respetar los derechos de soberanía y la jurisdicción de Nicaragua, reflejados el Derecho internacional consuetudinario.

2) La CIJ no se pronunció sobre la revocación de los permisos de pesca emitidos por la DIMAR y la Gobernación. A mi criterio esto se justifica en la temporalidad de las autorizaciones, pues al ser anuales, al momento de la emisión de la sentencia, los permisos ya habían caducado. Si este no fuera el caso, y los permisos duraran por un tiempo prolongado (por ejemplo, diez años), la CIJ solo podría ordenar la revocación de aquellos que establecieran un ámbito geográfico que comprendiera, de manera indubitable, alguna parte de la ZEE de Nicaragua. Por ejemplo, aquellos que hicieran referencia a la zona de Luna Verde o a coordenadas geográficas que permitieran la identificación exacta del espacio de pesca autorizado.

3) La Corte rechazó nuevamente el pedido de indemnización de Nicaragua, alegando que no presentó las pruebas necesarias[57]. Es lamentable que Nicaragua no haya brindado la información suficiente para que la CIJ efectúe una evaluación financiera del lucro cesante, producto de la pesca industrial no autorizada en su ZEE, pues claramente había ganancias dejadas de percibir. No obstante, concuerdo con la decisión de la Corte, pues necesita información cuantitativa par el cálculo de una indemnización.

[57] Cfr. **Caso de las Presuntas Violaciones a Derechos Soberanos y Espacios Marítimos en el Mar Caribe (Nicaragua c. Colombia)**, Sentencia de fondo de la CIJ del 21 de abril de 2022, p. 69, párrafo 198.

4) En lo referente a las obligaciones complementarias, la Corte ordenó a Colombia la cesación inmediata del HII, y, el cumplimiento de su obligación internacional de respetar los derechos de soberanía y jurisdicción de Nicaragua en su ZEE. Si bien estoy de acuerdo con ambas medidas, creo que debió complementarlas con el otorgamiento de garantías de no repetición. Al igual que en la sección 4.1.1, puede observarse que en los incidentes resumidos en la Tabla 3, los oficiales de la ARC expresaron, nuevamente, el rechazo del gobierno colombiano a la Sentencia del 2012. Asimismo, manifestaron que los encuentros ocurrieron en «aguas históricamente colombianas» y que sus autoridades eran quienes debían emitir las autorizaciones. Considero que estas manifestaciones, sumadas al comportamiento activo de proteger a los barcos con autorizaciones ilegales, demuestra la mala fe de Colombia, y su intención de seguir incumpliendo la sentencia de la CIJ y la costumbre internacional del mar. De este modo, se requiere la adopción de medidas concretas que desincentiven este tipo de prácticas violatorias.

IV.1.3. ¿La oferta y adjudicación de licencias de exploración petrolera por parte de las autoridades colombianas, refleja el incumplimiento de los derechos de soberanía de Nicaragua en los espacios marítimos que le fueron reconocidos en la Sentencia del 2012?

IV.1.3.1. Intervenciones ocurridas

En el 2010, la Agencia Nacional de Hidrocarburos de Colombia (en adelante, ANH) ofreció once bloques petroleros (3050, 3051, 3052, 3053, 3054, 3055, 3056, 3057, 3059, 3060 y 3061). De estos, dos (3050 y 3059) fueron adjudicados en el mismo año a un consorcio en el que participaban las empresas colombiana Ecopetrol, española Repsol y argentina YPF; no obstante, no se suscribió el contrato[58].

Los demás bloques se continuaron mostrando como «disponibles» en el mapa de bloques de hidrocarburos de la ANH del año 2017.

[58] Cfr. Ibid., p. 54, párrafo 135.

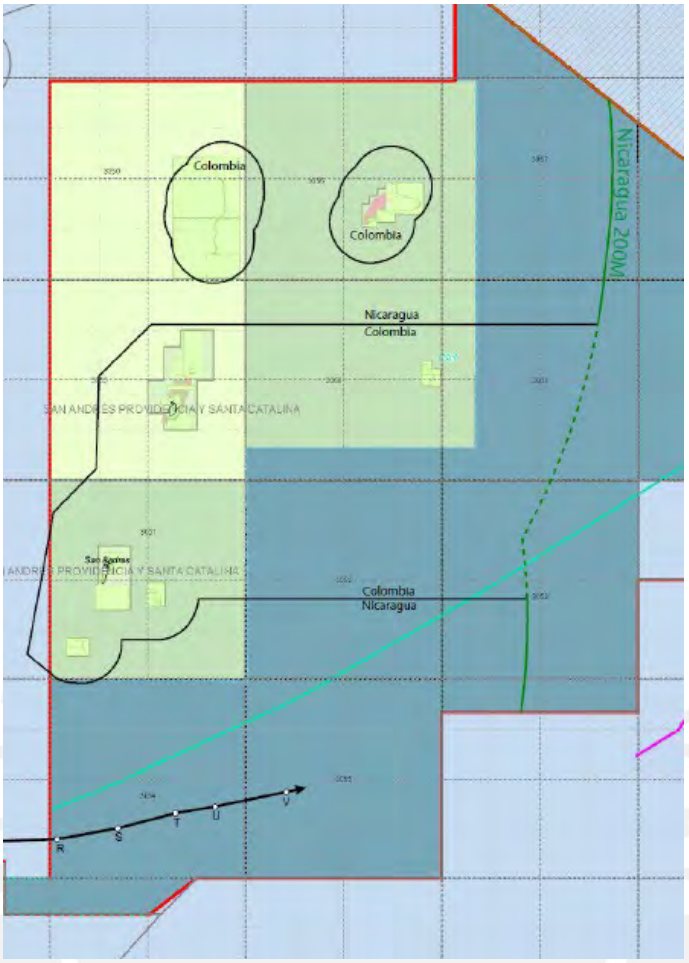
IV.1.3.2. Posición de Nicaragua

El incidente en cuestión fue alegado por Nicaragua en su réplica, presentada el 15 de mayo de 2018. Al respecto, enfatizó que no se trataba de una petición adicional, sino de una vinculada al petitorio presentado desde el inicio del proceso.

Según Nicaragua, a través de la ANH, Colombia estaba ofreciendo y adjudicando bloques petroleros en zonas que comprendían su ZEE, lo que abiertamente vulneraba sus derechos soberanos sobre este espacio marítimo, y significaba una contravención de la Sentencia de la CIJ del 2012[59]. Asimismo, señaló que, en un mapa de bloques de hidrocarburos del 2017, publicado en el portal de la ANH, se seguía mostrando como «disponibles» para concesión los nueve bloques no adjudicados.

[59] Cfr. Nicaragua. **Replica de Nicaragua** en el caso de las Presuntas Violaciones a Derechos Soberanos y Espacios Marítimos en el Mar Caribe (Nicaragua c. Colombia), del 15 de mayo de 2018, pp. 111-114, párrafos 4.126–4.130.

Mapa Nº 3



Fuente: Réplica de Nicaragua (Figura 4.3, p. 113)

IV.1.3.3. Posición de Colombia

La argumentación de Colombia sobre este asunto se dividió en dos aspectos: primero, respecto de su admisibilidad, considerando que Nicaragua lo alegó tardíamente en su réplica y, segundo, en la falta de mérito.

Respecto de la admisibilidad, Colombia sostuvo que esta nueva pretensión no se identificó como parte de la controversia al momento de presentación de la demanda, ni tampoco en la memoria de Nicaragua. Asimismo, argumentó que esta no se relacionaba con la pretensión original, pues no estuvo implícita en la misma, ni surgía de su objeto, por lo que debía ser declarada inadmisible[60].

[60] Cfr. Colombia. **Dúplica de Colombia** en el caso de las Presuntas Violaciones a Derechos Soberanos y Espacios Marítimos en el Mar Caribe (Nicaragua c. Colombia), del 15 de noviembre de 2018, pp. 128-132, párrafos 3.93–3.99.

Sin perjuicio de lo anterior, y en caso se admitiera lo argumentado por Nicaragua, Colombia sostuvo que el asunto carecía de mérito. De este modo, argumentó que, aun cuando los bloques petroleros fueron adjudicados, en primer lugar, ello ocurrió antes de la Sentencia de la CIJ del 2012 y, en segundo lugar, esa adjudicación se suspendió y por ende no se suscribió el contrato respectivo. Alegó que esta suspensión se debió a una decisión política del entonces presidente Juan Manuel Santos, y a la sentencia del Tribunal Administrativo de San Andrés y el Consejo de Estado emitida el 04 de junio de 2012[61].

Finalmente, sobre la aparición de los demás bloques como «disponibles» en el Mapa de 2017, argumentó que esto no vulneraba los derechos de soberanía de Nicaragua en su ZEE, en la medida en que no se habían adjudicado.

IV.1.3.4. Decisión de la CIJ

En primer lugar, la Corte declaró admisible lo alegado por Nicaragua, basándose en que la pretensión, pese a referirse una actividad diferente (oferta y adjudicación de licencias de exploración petrolera) a las listadas en la demanda, no transformaba el objeto de la controversia, y tenía un vínculo directo con ella[62].

Con relación al fondo, la CIJ constató que, si bien hubo una adjudicación de dos bloques petroleros en el espacio marítimo en cuestión, ello ocurrió antes de la delimitación marítima que se realizó en la Sentencia del 2012. Asimismo, confirmó que el contrato sobre los bloques adjudicados no llegó a suscribirse. Por otro lado, con respecto a si hubo o no un ofrecimiento de los bloques que aparecían como «disponibles» en el Mapa de 2017, la CIJ estableció que Nicaragua no pudo probar que la ANH mantuviera la intención de ofrecerlos y adjudicarlos.

[61] Cfr. Ibid., pp. 132-133, párrafos 3.102–3.103.
[62] Cfr. **Caso de las Presuntas Violaciones a Derechos Soberanos y Espacios Marítimos en el Mar Caribe (Nicaragua c. Colombia)**, Sentencia de fondo de la CIJ del 21 de abril de 2022, p. 55, párrafo 140.

Con base en lo anterior, la Corte rechazó el pedido de Nicaragua.

IV.1.3.5. Posición personal

Con relación al tercer problema secundario identificado en el fallo, comparto parcialmente la decisión de la CIJ.

Por un lado, concuerdo con la Corte respecto a la admisibilidad de lo alegado por Nicaragua para ser analizado en la sentencia de fondo, así como en lo relacionado a su conclusión sobre la inexistencia de una obligación internacional por parte de Colombia al ofertar y adjudicar bloques petroleros en el año 2010. Sin embargo, considero que se pudo haber determinado la responsabilidad de Colombia por la publicación en el portal institucional de la ANH de un Mapa con la identificación de bloques petroleros «disponibles» en espacios marítimos reconocidos a Nicaragua, luego de la delimitación realizada por la CIJ en la Sentencia del 2012.

Sobre el primer punto, considero que los hechos alegados por Nicaragua en su Réplica cumplieron con los criterios establecidos en la jurisprudencia de la Corte, para ser admitidos, pese a que se plantearon con posterioridad a la presentación de la demanda. Los criterios son:

iii) Que se trate de hechos o eventos implícitos o que se derivan directamente del objeto de la demanda.
iv) Que su consideración no transforme la controversia planteada en la demanda.

La Corte acertadamente concluyó que la controversia del caso versaba sobre los derechos que correspondían a las partes en los espacios marítimos delimitados por la Sentencia del 2012. En ese contexto, determinar si el ofrecimiento o concesión de licencias para la exploración de bloques petroleros constituía una vulneración de los derechos de soberanía de Nicaragua, era un tema que directamente se desprendía del objeto de la demanda, sin transformar la controversia.

Con relación a la oferta y adjudicación de bloques petroleros realizada por la ANH en el 2010, es clara la conclusión a la que llegó la Corte al decir que no hay violación de obligación internacional alguna, dado que la delimitación marítima recién se produjo en el 2012. A partir de un análisis en función al esquema de responsabilidad internacional de los Estados, podría decirse que, en aplicación del artículo 13 del Proyecto de la CDI, al momento de la comisión del hecho, Colombia no se encontraba obligada a respetar los derechos de soberanía y jurisdicción de Nicaragua en este espacio, siendo que el mismo aún no se había atribuido a este último. En ese sentido, se podría decir que no existía una obligación internacional.

Ahora bien, es importante destacar que, en el 2010, Colombia ya sabía que la frontera marítima que, de acuerdo con ella, había sido fijada en el meridiano 82 a través del Protocolo de 1930, había sido rechazada por la Corte en su sentencia de excepciones preliminares del 13 de diciembre de 2007[63]. En se sentido, considero que el comportamiento de Colombia al ofrecer y adjudicar bloques petroleros en un espacio sobre el que su jurisdicción o derechos de soberanía eran inciertos, podría denotar cierta mala fe.

Al respecto, podría discutirse la necesidad de plantear medidas provisionales en los casos en que la Corte constate la ausencia de un límite preexiste, y proceda a realizar una delimitación fronteriza en el curso del proceso, a efectos de que la controversia entre las partes no se agrave o que no se preste a un enriquecimiento injusto por ninguna de ellas. Ahora bien, esto requeriría sopesar los costos y beneficios de una medida de este tipo, y hacer un análisis particular en función a las actividades que las partes pretendan realizar en los espacios en litigio, lo que escapa a los alcances del presente informe.

En el caso bajo análisis este problema no se concretó, pues como señaló Colombia, no se suscribieron los contratos sobre los bloques adjudicados, en cumplimiento de la decisión tomada por uno de sus tribunales internos. En el

[63] Cfr. CIJ. **Caso de la Controversia Territorial y Marítima (Nicaragua c. Colombia),** Sentencia de excepciones preliminares del 13 de diciembre de 2007, p. 867, párrafo 115.

marco de un litigio entre la Corporación para el Desarrollo Sostenible del Archipiélago de San Andrés, Providencia y Santa Catalina (CORALINA) y la ANH, el Tribunal Administrativo de San Andrés ordenó a esta última suspender el proceso de exploración y explotación de los bloques petroleros adjudicados en esta área, para salvaguardar el derecho a un medio ambiente saludable.

Por otro lado, discrepo de lo dicho por la Corte con respecto al Mapa publicado en el portal web de la ANH el 17 de febrero de 2017, en el que se mostraban los bloques no adjudicados como «disponibles», pese a que se superponían en parte con la ZEE de Nicaragua. A mi criterio, sí se pudo determinar la responsabilidad de Colombia por esta acción.

A partir del 19 de noviembre de 2012, fecha de emisión de la sentencia de fondo en el caso de la Controversia Territorial y Marítima, ya existía una frontera marítima delimitada entre Nicaragua y Colombia. Por lo tanto, los espacios marítimos, así como los derechos que sobre estos ejercían las partes y las obligaciones que debían cumplirse, estaban definidos en función al Derecho internacional consuetudinario.

Para determinar si se ha configurado el HII, en los términos del artículo 2 del Proyecto de la CDI, corresponde revisar si se han cumplido sus dos elementos, objetivo y subjetivo.

Respecto al primer elemento, la Corte pudo constatar que los bloques petroleros que se identificaban como «disponibles» en el Mapa de 2017 de la ANH, se encontraban parcialmente superpuestos con la ZEE de Nicaragua. En virtud de la costumbre internacional reflejada en el artículo 56.1 de la CONVEMAR, quien tenía los derechos de soberanía para explorar y explotar los recursos que se ubicaran en este espacio era Nicaragua; mientras que, Colombia tenía la obligación internacional de respetar tales derechos. Pese a esto, Colombia se comportó de manera incompatible con su obligación al irrogarse la facultad de calificar la disponibilidad de estos bloques, y materializarla en un Mapa publicado cinco años después de la delimitación efectuada por la CIJ. Esa discrepancia entre la conducta ordenada por la

costumbre internacional y el comportamiento de Colombia constituye el incumplimiento de una obligación internacional.

Por su parte, el elemento subjetivo se cumplió al ser la ANH quien publicó el mapa en su portal institucional, en ejercicio de su función de "[administración de] *las áreas hidrocarburíferas de la Nación y asignarlas para su exploración y explotación"* [64]. La ANH es una Unidad Administrativa Especial adscrita al Ministerio de Minas y Energía de Colombia[65]. En ese sentido, con su actuación se cumple el supuesto del artículo 4.1 del Proyecto de la CDI, según el cual *"Se considerará hecho del Estado (…) el comportamiento de todo órgano del Estado ya sea que ejerza funciones legislativas, ejecutivas, judiciales o de otra índole (…)"*. Por lo tanto, la violación de la obligación internacional señalada en el párrafo anterior es atribuible al Estado colombiano.

En conclusión, a mi criterio la publicación del referido Mapa de 2017 por la ANH constituyó un HII, que comprometía la responsabilidad internacional de Colombia. La Corte pudo declararlo así y ordenarle a Colombia, retirar del portal de la ANH, cualquier mapa o documento que erróneamente sugiriera que tiene derechos de soberanía o jurisdicción sobre el espacio marítimo reconocido a Nicaragua a partir de la Sentencia del 2012.

IV.1.4. ¿La constitución de una "zona contigua integral" (ZCI) correspondiente a los territorios insulares colombianos en el Mar Caribe occidental, a través del Decreto Presidencial 1946 de Colombia, refleja un incumplimiento de los derechos de soberanía de Nicaragua en los espacios marítimos que le fueron reconocidos en la Sentencia del 2012?

IV.1.4.1. La Zona Contigua Integral fijada por Colombia

Con fecha 09 de septiembre de 2013, Colombia emitió el Decreto Presidencial 1946[66], cuyo artículo 5 establecía una Zona Contigua Integral (ZCI) alrededor

[64] Artículo 5.1 del Decreto 1760 de 2003 de la República de Colombia
[65] Artículo 2 del Decreto 1760 de 2003 de la República de Colombia.
[66] El texto completo del Decreto Presidencial 1946 y su modificatoria se encuentran disponibles en el Sistema Único de Información Normativa (SUIN) del Estado colombiano, al que se puede acceder a través del siguiente enlace: https://www.suin-juriscol.gov.co/viewDocument.asp?id=1374866. Consultado por última vez el 03 de julio de 2023.

de sus territorios insulares y listaba las facultades que podían ejercitarse en ella. Posteriormente, fue modificado con el Decreto Presidencial 1119, emitido el 14 de junio de 2014, que incluyó algunas precisiones al artículo 5.

En el artículo 5.2 del referido Decreto, se dispuso el trazado de una Zona Contigua Integral del Departamento del Archipiélago de San Andrés, Providencia y Santa Catalina, a través de la unión de los límites exteriores de las ZC de las islas que lo conformaban, mediante líneas geodésicas. La configuración de la ZCI se sustentó en la superposición de las ZC de las islas que integraban el territorio insular colombiano en el Mar Caribe, y en la necesidad de graficar un contorno regular que permitiera la *"debida administración y el manejo de todo el archipiélago de San Andrés, Providencia y Santa Catalina, de sus islas, cayos, y demás formaciones y de sus áreas marítimas y recursos"* [67].

Por su parte, en el artículo 5.3 se listaron las facultades de implementación y control que las autoridades colombianas podían ejecutar en la ZCI, para la protección de su territorio y mar territorial. Estas facultades permitían la prevención, control y sanción de las infracciones de las leyes y reglamentos referidos a los siguientes ámbitos:

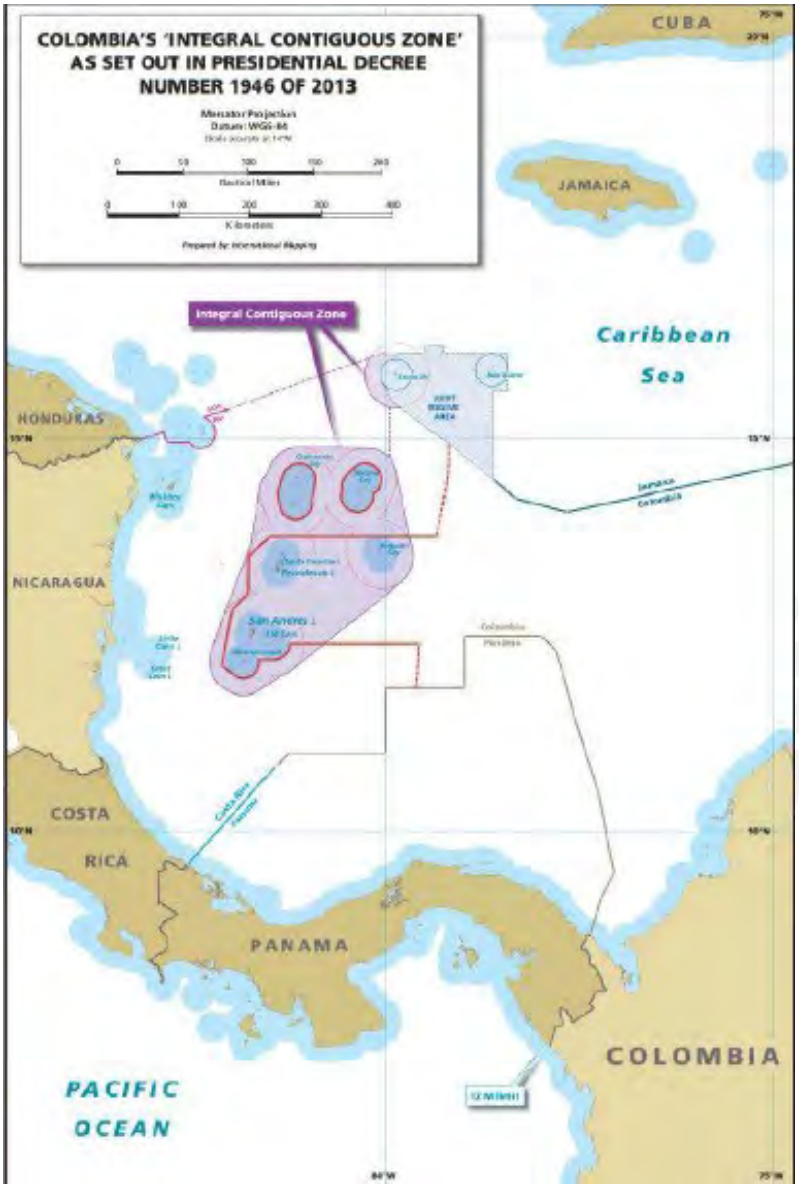
- Seguridad integral del Estado, incluyendo la piratería y el tráfico de estupefacientes y sustancias psicotrópicas.
- Seguridad en el mar e intereses marítimos nacionales.
- Asuntos aduaneros, fiscales, de inmigración y sanitarios.
- Preservación del medio ambiente.
- Patrimonio cultural.

Como parte de las modificaciones realizadas a través del Decreto Presidencial 1119, se incorporó un párrafo final al artículo 5 que dispuso expresamente que la implementación de la ZCI se haría conforme al Derecho Internacional y sin afectar o limitar los derechos de otros Estados.

[67] Artículo 5.2 del Decreto Presidencial 1946 de Colombia.

La Zona Contigua Integral establecida por Colombia a través de los citados Decretos fue graficada por dicho Estado de la siguiente manera:

Mapa Nº 4



Fuente: Contramemoria de Colombia (Figura 5.1, p. 204)

IV.1.4.2. Posición de Nicaragua

Para Nicaragua, el establecimiento de una ZCI a través del Decreto Presidencial 1946 de Colombia vulneró sus derechos de soberanía y

jurisdicción en la ZEE que le fue reconocida a través de la Sentencia del 2012[68].

De acuerdo con Nicaragua, dicha vulneración se fundamenta en dos aspectos:

i) La ZCI planteada por Colombia tenía una extensión superior a las veinticuatro millas náuticas contadas desde las líneas de base a partir de las cuales se mide la anchura del mar territorial, reconocidas por el Derecho internacional consuetudinario y reflejadas en el artículo 33.2 de la CONVEMAR.

ii) Las facultades que se pueden ejercer en la ZCI listadas en el literal a) del artículo 5.3 del Decreto Presidencial 1946, exceden el alcance material determinado por la costumbre internacional, reflejada en el artículo 33.1 de la CONVEMAR.

Para Nicaragua el artículo 33 de la CONVEMAR reflejaba una costumbre contemporánea en lo referido a la ZC, tanto con respecto a su amplitud máxima de veinticuatro millas náuticas, como con respecto al ámbito material de las facultades de control del Estado ribereño, para la prevención y sanción de *"las infracciones de sus leyes y reglamentos aduaneros, fiscales, de inmigración o sanitarios que se cometan en su territorio o su mar territorial"* [69].

Según Nicaragua, Colombia no pudo demostrar que la circunstancia geográfica especial del Archipiélago justificara el empleo de líneas geodésicas para la configuración de una ZCI, que en algunas secciones se extendiera más allá del límite permitido[70]. Ni tampoco que la costumbre haya evolucionado para incluir otros asuntos dentro del ámbito material de las facultades de control del Estado ribereño, como seguridad, intereses marítimos, conservación medioambiental y patrimonio cultural[71].

[68] Cfr. CIJ. **Caso de las Presuntas Violaciones a Derechos Soberanos y Espacios Marítimos en el Mar Caribe (Nicaragua c. Colombia)**, Sentencia de fondo del 21 de abril de 2022, p. 56, párrafo 145.
[69] Literal a) del artículo 33.1 de la CONVEMAR. Énfasis añadido.
[70] Cfr. CIJ. **Caso de las Presuntas Violaciones a Derechos Soberanos y Espacios Marítimos en el Mar Caribe (Nicaragua c. Colombia)**, Sentencia de fondo del 21 de abril de 2022, p. 60, párrafo 165.
[71] Cfr. Ibid., p. 60, párrafo 166.

En particular, Nicaragua sostuvo que Colombia no podía incluir en las facultades del control del artículo 33.1 de la CONVEMAR, a la fiscalización de la remoción y el tráfico de objetos de carácter arqueológico e histórico hallados en la ZC (a los que se refiere el artículo 303.2), dado que esa potestad de fiscalizar corresponde a los Estados parte de la CONVEMAR. Por lo tanto, al no ser un Estado parte de dicho Tratado, ni haber demostrado que esa potestad de fiscalización estuviera reflejada en una costumbre internacional, Colombia no podía alegarla.

Finalmente, Nicaragua alegó que la delimitación que la Corte hizo de su ZEE en el fallo del 2012 incluyó la delimitación de la ZC. En relación con la misma, y habida cuenta de que la ZC de Colombia y la ZEE de Nicaragua se superponen, sostuvo que los derechos del primero se limitaban a los reconocidos en el artículo 58 de la CONVEMAR, que como ya se dijo, forman parte del derecho consuetudinario.

IV.1.4.3. Posición de Colombia

Colombia defendió que tenía el derecho de fijar una ZC alrededor de las islas y cayos sobre los que se le reconoció soberanía en la Sentencia del 2012. Alegó que si bien en algunas partes ello implicaba una superposición entre su ZC y la ZEE de Nicaragua, esto era posible dado que las facultades o derechos ejecutados en ambos espacios eran compatibles[72].

Por otro lado, argumentó que la ZCI establecida a través del Decreto Presidencial 1946 se ajustaba al Derecho internacional consuetudinario, en la medida en que este había evolucionado con respecto a lo establecido en el artículo 33 de la CONVEMAR. De acuerdo con Colombia:

> *"*[En] *el Derecho internacional consuetudinario existente, un Estado ribereño podría establecer zonas contiguas a su mar territorial de una*

[72] Cfr. Colombia. **Contramemoria** en el caso de las Presuntas Violaciones a Derechos Soberanos y Espacios Marítimos en el Mar Caribe (Nicaragua c. Colombia), del 17 de noviembre de 2016, p. 201, párrafo 5.24.

anchura variable y para múltiples propósitos, que van incluso más allá de los expresamente dispuestos en el artículo 33 de la CONVEMAR" [73].

Sobre el ancho, señaló que el establecimiento de la ZCI respondía a la geografía particular del Archipiélago, pues dada la proximidad entre las islas y cayos, la superposición entre las ZC formaba un contorno irregular, que haría compleja la administración de este espacio. De este modo, si la Corte concluía que la anchura de 24 millas náuticas era la costumbre vigente, Colombia aún podía ampararse en lo que denominó una «excepción consuetudinaria» a esta regla, para realizar una delimitación simplificada, uniendo los arcos de las ZC a través de líneas geodésicas, a efectos de definir un espacio funcional, que en algunas secciones superaba el límite establecido por el artículo 33.2 de la CONVEMAR[74].

En lo que respecta al ámbito material de las facultades que pueden ejercitarse en la ZC, que en virtud del literal a) del artículo 5.3 del Decreto Presidencial 1946 abarcó temas de «seguridad integral del Estado» (que incluye piratería y narcotráfico), «seguridad o intereses marítimos», «preservación del medio ambiente» y «patrimonio cultural»; justificó que la ampliación de las materias se hacía en virtud de la evolución de la costumbre, siendo que la finalidad de las facultades de control reconocidas por la CONVEMAR en la ZC se articulan con las necesidades de prevención actuales que tienen los Estados para la protección de su territorio o su mar territorial.

Colombia sustentó su argumento, señalado en el párrafo anterior, en una lista de dispositivos legales internos referidos a la ZC emitidos por algunos Estados, a través de las cuales se amplió el ámbito material de las facultades de control del Estado ribereño en el referido espacio marítimo[75].

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[73] Colombia. **Dúplica** en el caso de las Presuntas Violaciones a Derechos Soberanos y Espacios Marítimos en el Mar Caribe (Nicaragua c. Colombia), del 15 de noviembre de 2018, p. 175, párrafo 4.49. Traducción propia

[74] Cfr. **Caso de las Presuntas Violaciones a Derechos Soberanos y Espacios Marítimos en el Mar Caribe (Nicaragua c. Colombia)**, Sentencia de fondo de la CIJ del 21 de abril de 2022, p. 61, párrafo 168.

[75] Cfr. Colombia. **Contramemoria** en el caso de las Presuntas Violaciones a Derechos Soberanos y Espacios Marítimos en el Mar Caribe (Nicaragua c. Colombia), del 17 de noviembre de 2016, p. 217, párrafo 5.48.

Finalmente, Colombia sostuvo que las facultades del Estado ribereño sobre el patrimonio cultural en la ZC estaban expresamente establecidas en el artículo 303.2 de la CONVEMAR, al que ya se ha hecho mención en la sección anterior.

IV.1.4.4. Decisión de la CIJ

En primer lugar, al existir una controversia entre las partes respecto a si el artículo 33 de la CONVEMAR reflejaba el Derecho Internacional consuetudinario vigente, la Corte dedicó los párrafos 151 a 155 de su fallo a analizar este aspecto.

El análisis tomó en consideración los comentarios de la Comisión de Derecho Internacional (CDI) respecto del proyecto de artículos sobre el Derecho del Mar, las discusiones de la Primera Conferencia de las Naciones Unidas sobre el Derecho del Mar de 1958, así como las prácticas de los Estados que se listan a continuación[76]:

- El establecimiento de una ZC de una distancia máxima de veinticuatro millas náuticas por parte de los Estados.
- La reducción de la anchura de sus ZC, para ajustarse al límite de veinticuatro millas náuticas, efectuada por algunos Estados.
- La aceptación general por los Estados de las materias contempladas en el artículo 33.1 de la CONVEMAR al referirse a las facultades de control que tiene el Estado ribereño en su ZC.
- La objeción de los Estados frente a la ampliación de las facultades de control en la ZC que realice algún Estado ribereño, a través de su normativa interna, para incluir temas de seguridad.

Hecho el análisis, la Corte concluyó que el citado artículo 33 sí refleja una costumbre internacional vigente respecto de la ZC, tanto en lo concerniente a

[76] Cfr. CIJ. **Caso de las Presuntas Violaciones a Derechos Soberanos y Espacios Marítimos en el Mar Caribe (Nicaragua c. Colombia)**, Sentencia de fondo del 21 de abril de 2022, pp. 57-58, párrafos 151 y 154.

su amplitud máxima hasta la milla náutica veinticuatro como en lo referido a las facultades que el Estado ribereño podía ejecutar en este espacio[77].

Por otro lado, la Corte confirmó lo dicho por Colombia respecto de que la ZEE de un Estado (Nicaragua) podía superponerse con la ZC de otro Estado (Colombia), habida cuenta de que se trata de regímenes diferenciados, en los que se pueden ejecutar facultades y/o derechos que no son incompatibles entre sí. En ese sentido, confirmó que, Colombia podía fijar una ZC alrededor del Archipiélago[78].

Al analizar la ZCI establecida con el Decreto 1946, la Corte determinó que esta no se encontraba acorde al Derecho internacional consuetudinario; tanto en lo referido a su extensión, pues en algunos espacios el trazo de la ZCI superaba el límite de las veinticuatro millas náuticas establecido en el artículo 33.2 de la CONVEMAR, como en lo relacionado a las facultades que el artículo 5.3 del Decreto le atribuía a Colombia, pues excedía el ámbito material permitido en el artículo 33.1 de la CONVEMAR.

Con respecto al primer punto, la Corte señaló que si bien la simplificación es una práctica usada para la delimitación marítima, esta se ha alcanzado a través acuerdos (tratados) o por un mecanismo de solución de controversias por tercero, no de manera unilateral por uno de los Estados. Considerando ello, si Colombia decidía simplificar la delimitación de las ZC de sus islas a través de una ZCI, ello no la eximía de respetar el límite de las 24 millas náuticas; así, sería posible que la delimitación se haga, pero reduciendo el ancho de la ZCI, para no superar en ningún punto las 24 millas náuticas y, así, no afectar a Nicaragua[79].

Sobre las facultades de control ejecutadas en la ZCI, la CIJ descartó los materiales basados en la legislación interna de diferentes Estados presentados por Colombia, y concluyó que la costumbre no ha evolucionado en relación con

[77] Cfr. Ibid., p. 58, párrafo 155.
[78] Cfr. Ibid., p. 60, párrafo 163.
[79] Cfr. Ibid., p. 64, párrafo 174.

los términos listados en el literal a) del artículo 33.1 de la CONVEMAR[80]. Señaló que una interpretación amplia de las facultades que se pueden realizar en esa zona llevaría a un conflicto con los derechos reservados a los Estados ribereños en sus ZEE.

Sin perjuicio de lo anterior, la CIJ admitió que el artículo 303.2 de la CONVEMAR, referido a la facultad del Estado ribereño de controlar el tráfico y remoción de objetos de carácter arqueológico e histórico encontrados en su ZC, refleja una costumbre internacional. Para alcanzar esta conclusión la Corte se basó en los siguientes elementos[81]:

- Trabajos preparatorios de la CONVEMAR.
- Comentarios de la CDI respecto del proyecto de artículos sobre el Derecho del Mar.
- Discusiones de la Tercera Conferencia de las Naciones Unidas sobre el Derecho del Mar.
- Incremento de Estados que consideran dentro de su legislación interna la facultad del Estado ribereño de prevenir la remoción de objetos arqueológicos o históricos (patrimonio cultural) de su ZC.
- Suscripción de Tratados multilaterales sobre la protección del patrimonio cultural subacuático[82].

En ese sentido, en la medida que la referencia al patrimonio cultural del artículo 5.3 del Decreto Presidencial 1946 se entendiera hecha a los objetos arqueológicos e históricos encontrados en la ZC, Colombia no habría incumplido el Derecho internacional consuetudinario en este aspecto.

Finalmente, la Corte analizó si el solo establecimiento de la ZCI por el Decreto Presidencial 1946 constituía una violación de las obligaciones de Colombia con Nicaragua. En el caso particular, sostuvo que con relación a las zonas de

[80] Cfr. Ibid., pp. 58 y 64, párrafos 154 y 177.
[81] Cfr. Ibid., p. 66, párrafos 184-185.
[82] Un ejemplo sería la Convención de la UNESCO sobre la Protección del Patrimonio Cultural Subacuático adoptada en París el 02 de noviembre de 2001, cuyo artículo 9 hace referencia a la facultad de los Estados Parte para reglamentar y autorizar las actividades dirigidas al patrimonio cultural subacuático en su ZC.

superposición entre la ZCI de Colombia y la ZEE de Nicaragua, el primero era responsable por la vulneración de los derechos de soberanía del segundo, dado que el Decreto había sido declarado contrario al Derecho internacional consuetudinario. En ese sentido, le ordenó a Colombia adecuar el mencionado Decreto de conformidad con el Derecho internacional y la Sentencia del 2012.

IV.1.4.5. Posición personal

El análisis realizado por la CIJ sobre a la Zona Contigua Integral (ZCI) establecida por Colombia a través del Decreto Presidencial 1946, es relevante desde múltiples aspectos. En particular se revisaron, los siguientes temas: la posibilidad de superposición entre la ZEE y la ZC de Estados ribereños diferentes, la formación y evolución de la costumbre internacional referida a los artículos 33 y 303.2 de la CONVEMAR, la incompatibilidad de la ZCI de Colombia con el Derecho Internacional y, la responsabilidad internacional de Colombia por la comisión de un HII. Abordaré los temas y presentaré mi posición personal sobre la decisión de la CIJ, siguiendo este orden.

a) La posibilidad de superposición entre la ZEE y la ZC de Estados ribereños diferentes

En primer lugar, las partes discrepan sobre si Colombia tenía o no el derecho a establecer una ZC alrededor del Archipiélago de San Andrés, habida cuenta de que no quedó definida en la Sentencia del 2012, y toda vez que la configuración de esta implicaba, necesariamente, que existieran algunos espacios de superposición con la ZEE de Nicaragua.

Para la CIJ, la delimitación realizada no privaba a Colombia del derecho a establecer tal ZC, argumentando, además, que la superposición de esta con la ZEE de Nicaragua, era posible en la medida en que se trata de regímenes distintos que no son incompatibles entre sí.

En la doctrina, cuando se estudian los derechos que se pueden ejercer en la ZEE y la ZC de un Estado ribereño, se suele hacer referencia a que "*los regímenes jurídicos de ambas zonas son complementarios y no contradictorios*" [83]. El caso bajo análisis, por otro lado, presenta una situación particular, pues en él se superponen la ZC y la ZEE de Estados ribereños diferentes. Ahora bien, de lo dicho por la Corte en su sentencia, vemos que no habría impedimento para que esta superposición se produzca incluso en dicho supuesto.

Comparto la posición de la Corte sobre este aspecto. A diferencia de la ZEE, vista en la sección 4.1.1. del presente informe, la ZC es un espacio funcional, en el que, de acuerdo con la CONVEMAR (y con la costumbre internacional) los Estados ribereños tienen facultades de control para prevenir y sancionar el incumplimiento de su normativa en materia aduanera, fiscal, de inmigración o sanitaria que ocurran en su territorio o mar territorial[84]. Sobre este espacio, el Estado ribereño no tiene soberanía[85], ni tampoco derechos de soberanía[86]. Partiendo de esta presunción, la ZC de un Estado podría superponerse con la ZEE de otro Estado.

Un punto importante para cerrar lo referido a la superposición entre ambos espacios marítimos, está relacionado a los derechos, deberes y facultades que tendría cada Estado en la zona de intersección. La Corte aclaró este tema en el párrafo 162 del fallo[87], al señalar que, en el espacio de superposición, Colombia podría ejercer las facultades de control sobre la ZC reflejadas en el artículo 33.1 de la CONVEMAR, en adición a los derechos y deberes del artículo 58 del mismo Tratado. Por su parte, Nicaragua, tendría los derechos de soberanía y jurisdicción sobre su ZEE, de conformidad con los artículos 56 y 73 de la CONVEMAR. Asimismo, aunque no lo precisó la Corte, considero que Nicaragua también tendría la obligación de respetar las libertades de

[83] Abugattas, G. (2023). Op. Cit., p. 68.
[84] Artículo 33 de la CONVEMAR.
[85] Roach, J.A. (2021). Excessive Maritime Claims (4th ed.). Brill Nijhoff, p. 143.
[86] Novak, F. y García-Corrochano, L. (2005). Derecho Internacional Público. Tomo II: Sujetos de Derecho Internacional (Vol. 1). Fondo Editorial de la Pontificia Universidad Católica del Perú, p.230.
[87] CIJ. **Caso de las Presuntas Violaciones a Derechos Soberanos y Espacios Marítimos en el Mar Caribe (Nicaragua c. Colombia)**, Sentencia de fondo del 21 de abril de 2022, p. 59, párrafo 162.

navegación y sobrevuelo, y otros usos permisibles del mar, contemplados en el artículo 58.

b) la formación y evolución de la costumbre internacional referida a los artículos 33 y 303.2 de la CONVEMAR

Con relación al tema de la costumbre internacional, la CIJ respondió a las siguientes interrogantes, que vale la pena desarrollar:

i) ¿El artículo 33 de la CONVEMAR refleja la costumbre internacional vigente sobre la ZC?
ii) ¿El artículo 303.2 de la CONVEMAR refleja una costumbre internacional?

De acuerdo con la doctrina, la costumbre es una práctica reiterada en el tiempo (elemento objetivo) cuya ejecución responde a una consciencia de obligatoriedad u *opinio iuris* (elemento subjetivo)[88]. La conjunción de ambos elementos da lugar a una costumbre internacional.

Ahora bien, de su sola descripción, se puede concluir que el proceso de formación, y, por ende, de identificación de una costumbre, es complejo[89], siendo que no existen estándares exactos para determinar cuándo o desde cuándo nos encontramos frente ella. En ese sentido, los criterios tomados en cuenta por la Corte para determinar si los artículos 33 y 303.2 de la CONVEMAR reflejaban o no una costumbre internacional, son de vital importancia. Por tal razón, en la sección 4.1.4.4. del presente informe listé aquellos criterios expresados en la sentencia.

Sobre este punto, Tanaka señala que la CIJ no siempre realiza un análisis estricto de ambos elementos para determinar la existencia de una costumbre[90]. A continuación, revisaré si en la evaluación realizada por la Corte para responder a las interrogantes mencionadas, se identifican alguno de estos supuestos.

[88] **Tanaka, Y**. (2023). The International Law of the Sea (4th ed.). Cambridge University Press, p. 13.
[89] **CDI** (2018). Draft conclusions on identification of customary international law, with commentaries. p.123
[90] Tanaka, Y. (2023). The International Law of the Sea (4th ed.). Cambridge University Press, p. 15.

Para determinar si Colombia era responsable internacionalmente por la emisión del Decreto Presidencial 1946 que estableció una ZCI alrededor de su territorio insular, la CIJ debía determinar, en primer lugar, si dicha ZCI se ajustaba o no al Derecho internacional. Siendo que Colombia no es parte de la CONVEMAR, este análisis tenía que realizarse en función al Derecho consuetudinario.

A estos efectos, el primer paso fue resolver la controversia entre las partes sobre si el artículo 33 de la CONVEMAR reflejaba la costumbre contemporánea en torno a la ZC, o si esta había evolucionado en cuanto a su anchura máxima y al ámbito material de las facultades de control que corresponden al Estado ribereño.

Como resumí en la sección 4.1.4.4., la Corte tomó en cuenta múltiples aspectos para concluir que el artículo 33 de la CONVEMAR reflejaba una costumbre internacional contemporánea. En mi opinión, la CIJ se esmeró en detallar aquellas actuaciones de los Estados que evidenciaban la práctica estatal, sin hacer referencia expresa a si alguno de esos criterios sustentaba también la *opinio iuris*. Pese a ello, considero que la Corte constató indirectamente la presencia del elemento subjetivo al mencionar las siguientes dos prácticas:

- La reducción de la anchura de la ZC, para ajustarse al límite de veinticuatro millas náuticas.
- La objeción de los Estados frente a la ampliación de las facultades de control en la ZC, de otros Estados, para incluir temas de seguridad.

Sobre la primera, creo que el tener una ZC establecida previamente, y luego reducir su anchura para ajustarse al límite de las 24 millas náuticas denota cierta consciencia de parte de los Estados sobre la existencia de una obligación que afecta su comportamiento. En ese sentido, parecería que lo que antes era lícito (tener una ZC cuya distancia supere las veinticuatro millas náuticas) ha dejado de serlo para el Estado, y al tomar consciencia de ello, se ve compelido a reducir su anchura.

En el segundo caso, hay un Estado cuyo comportamiento (emisión de una normativa interna que amplía las facultades de control del Estado ribereño en su ZC) excede lo que otros Estados creen que sería la obligación existente (ejecutar facultades de control en la ZC para la prevención y sanción de infracciones en las materias del artículo 33.1.a) de la CONVEMAR); en mérito a lo cual se oponen a dicho comportamiento y le exigen al Estado adecuar su conducta conforme a dicha obligación. Aquí, la consciencia de obligatoriedad estaría en aquellos Estados que exigen el comportamiento al primer Estado.

En mi opinión, en ambos casos las prácticas estatales se refieren, indirectamente, a la formación de *opinio iuris*. En ese sentido, considero que sí evaluó ambos elementos (objetivo y subjetivo) al concluir que el artículo 33 reflejaba la costumbre internacional vigente.

La segunda interrogante que resuelve la Corte relacionada a la costumbre internacional gira en torno al artículo 303.2 de la CONVEMAR, referido a la facultad del Estado ribereño de controlar el tráfico y la remoción de objetos de carácter arqueológico e histórico encontrados en su ZC. La CIJ concluyó que este artículo también refleja costumbre internacional. Aquí también considero que la Corte hace una evaluación de ambos elementos de la costumbre, aunque no lo señale expresamente, pues se refiere por ejemplo al incremento de Estados que, a partir de la celebración de la CONVEMAR, empiezan a contemplar en su legislación interna el supuesto regulado en el artículo 303.2, bajo la consciencia de que es obligatorio.

c) La incompatibilidad de la ZCI de Colombia con el Derecho Internacional

Habiendo concluido que el artículo 33 de la CONVEMAR refleja el Derecho internacional consuetudinario contemporáneo, la Corte determinó que la ZCI establecida por Colombia no se ajustaba al Derecho Internacional.

Comparto lo resuelto por la Corte en este punto, pues la superposición de las ZC de las islas colombianas y la necesidad de simplificar el trazo con un borde regular, no eximen a Colombia de su obligación de respetar el límite de las 24 millas náuticas. Igualmente, la ampliación del ámbito material de las facultades de control del Estado ribereño en la ZC, para incluir temas de seguridad, protección medio ambiental e intereses marítimos, contradice la costumbre reflejada en el artículo 33 de la CONVEMAR, y esconde la intención de Colombia de mantener el control sobre este espacio marítimo, en detrimento de la delimitación efectuada por la CIJ en el 2012.

Además, considero que el aceptar la extensión material que pretendía el demandado, haría que la superposición entre la ZEE de Nicaragua y la ZC de Colombia, sea imposible, pues existiría una incompatibilidad entre los regímenes jurídicos de ambos espacios producto de la desnaturalización de la ZC. Algo que la Corte no menciona en su fallo, pero que quisiera hacer notar para sustentar mi argumento de que Colombia intentó desnaturalizar la figura de la ZC, es lo que dice el propio artículo 5.2 del Decreto Presidencial 1946, para justificar el establecimiento de la ZCI:

> "Con el objeto de *asegurar la debida administración y el manejo de todo el archipiélago de San Andrés, Providencia y Santa Catalina, de sus islas, cayos, y demás formaciones y de sus áreas marítimas y recursos"* [91].

Como señalé anteriormente, la ZC es un espacio funcional, que se emplea para la *"prevención y sanción de infracciones cometidas en los espacios bajo su soberanía"* [92], en las materias ya mencionadas. En ese sentido, no se trata de un espacio en el cual el Estado ribereño tenga derechos de «administración y manejo» de islas u otras formaciones marítimas, ni de recursos naturales. Pareciera entonces, que lo que Colombia quiso fijar a través del Decreto Presidencial 1946, era una ZC con derechos propios de una ZEE, desnaturalizando la figura de la primera.

[91] Artículo 5.2 del Decreto Presidencial 19446.
[92] **Novak, F. y García-Corrochano, L.** (2005)**.** Derecho Internacional Público. Tomo II: Sujetos de Derecho Internacional (Vol. 1). Fondo Editorial de la Pontificia Universidad Católica del Perú, p. 230.

Sin perjuicio de lo dicho hasta aquí, me parece interesante que la Corte haya avalado el empleo de trazos simplificados para la configuración de una zona contigua integral (ZCI). En el caso, la Corte no discutió la constitución *per se* de una ZCI, sino solo el establecimiento de una que sea contraria al Derecho internacional. Esto me indica que puede tratarse de un tema a estudiar y desarrollar más a fondo, en especial siendo que no he encontrado doctrina al respecto.

d) La responsabilidad internacional de los Estados en el caso

Finalmente, corresponde analizar la responsabilidad internacional de Colombia y sus efectos por la constitución de una ZCI contraria al Derecho internacional consuetudinario. Como en los casos anteriores, se requiere analizar los elementos objetivo y subjetivo dispuestos en el artículo 2 del Proyecto de la CDI.

En lo que respecta al elemento objetivo, ya ha quedado establecido que, al trazar su ZC Colombia estaba obligada a hacerlo conforme al Derecho internacional consuetudinario reflejado en el artículo 33 de la CONVEMAR. Sin embargo, actuó de manera incompatible a lo establecido en la norma, al constituir una ZCI que superaba la anchura máxima permitida y que atribuía a sus autoridades facultades de control sobre asuntos no contemplados en la costumbre. Esto, además, implicó una vulneración de los derechos soberanía y jurisdicción de Nicaragua en los espacios de superposición entre su ZEE y la ZCI.

Entre los párrafos 189-194 de la sentencia, la CIJ analizó si la sola configuración de la ZCI, a través del Decreto Presidencial 1946 podía considerarse un incumplimiento por parte Colombia de su obligación internacional. Coincido con la Corte en que sí, aunque creo que pudo explicar más a detalle las razones que la llevaron a esta conclusión.

El Decreto Presidencial 1946 tenía una naturaleza eminentemente práctica, habida cuenta de que no requería un desarrollo posterior (se trataba de la reglamentación de una Ley) y podía aplicarse de inmediato (entró en vigor a la sola expedición del Decreto[93]). Asimismo, al trazar el espacio que configuraría su ZCI, estaba facultando a sus autoridades competentes a actuar en espacios que superaban del límite de las veinticuatro millas náuticas; y en materias no permitidas por la costumbre internacional. En ese sentido, sí hay un incumplimiento de una obligación internacional.

Por otro lado, el elemento subjetivo también se cumplió al tratarse de un Decreto emitido por el Presidente de la República de Colombia en ejercicio de la función dispuesta en el numeral 11 del artículo 189 de la Constitución de 1991. Por lo tanto, sin duda se trata del acto de una persona que actuó en representación del Estado, en ejercicio de sus funciones, conforme a lo establecido por el artículo 4 del Proyecto de la CDI. En consecuencia, la violación de la obligación internacional es atribuible a Colombia.

Al cumplirse ambos elementos, en el caso hay un HII que compromete la responsabilidad internacional de Colombia, lo que es declarado por la CIJ en los párrafos 194 y 196.

La principal modalidad de reparación solicitada por Nicaragua fue la restitución, a través de la supresión de las disposiciones del Decreto 1946 que afectaban sus derechos de soberanía y jurisdicción en la ZEE que le fue reconocida en el 2012. La CIJ concedió este pedido, señalando lo siguiente:

> *"Colombia tiene la obligación, por los medios de su propia elección, de ajustar las disposiciones del Decreto Presidencial 1946 de acuerdo con el Derecho internacional consuetudinario en lo que respecta a las áreas marítimas que fueron reconocidas a Nicaragua en la Sentencia del 2012 de la Corte"* [94].

[93] Cfr. Artículo 8 del Decreto Presidencial 1946.
[94] CIJ. **Caso de las Presuntas Violaciones a Derechos Soberanos y Espacios Marítimos en el Mar Caribe (Nicaragua c. Colombia)**, Sentencia de fondo del 21 de abril de 2022, p. 70, párrafo 202.

De la lectura de este texto, que se repite en el párrafo 6 de la parte dispositiva, pareciera que la Corte solo le ordenara Colombia ajustar la extensión de su ZCI, dado que tiene secciones que superan la anchura máxima permitida, y, solo en lo que respecta a los espacios que se superponen con la ZEE de Nicaragua. Al respecto, discrepo de lo decidido por la Corte, pues si en el análisis se concluyó que la ZCI era contraria al Derecho internacional consuetudinario respecto de dos aspectos, su anchura máxima y el ámbito material extendido de las facultades de control reconocidas el Estado ribereño, debió ordenarse el ajuste del Decreto respecto de ambas inconsistencias y en toda la ZCI.

IV.2. Problemas complementarios

El caso presenta dos problemas complementarios referidos a las contrademandas planteadas por Colombia, que fueron admitidas a trámite por la Corte para su análisis en la sentencia de fondo. A continuación, presento cada uno de estos problemas, que resumen de las posiciones de las partes, lo decidido por la Corte, y mi opinión personal.

IV.2.1. ¿Tienen los habitantes del Archipiélago de San Andrés derechos de pesca tradicionales en los espacios marítimos que le fueron reconocidos a Nicaragua en la Sentencia del 2012? Primera Contrademanda de Colombia

Colombia afirmó que, a consecuencia de la delimitación marítima realizada por la Corte en la Sentencia del 2012, los bancos de pesca tradicionales de los habitantes del Archipiélago de San Andrés quedaron ubicados al interior de la ZEE de Nicaragua, o en espacios marítimos colombianos, que requerían el acceso a través de esta.

Frente a este problema, sostuvo que los habitantes del Archipiélago tenían derechos de pesca tradicionales con base en dos argumentos:

i) Existencia de una costumbre local entre Nicaragua y Colombia, sustentada siglos de ejercicio del derecho.

ii) Compromiso unilateral vinculante, producto de las declaraciones del presidente de Nicaragua, después de emitida la Sentencia del 2012, a través de las cuales se reconoció la existencia de los derechos de pesca, comprometiéndose a respetarlos.

En respuesta, Nicaragua negó la existencia de derechos de pesca tradicionales en su ZEE, pues sostuvo que en este espacio era ella quien tenía los derechos de soberanía para la explotación de los recursos vivos. Además, señaló que Colombia no pudo probar la existencia de una costumbre, y que las declaraciones del Presidente nicaragüense no implicaron un reconocimiento o aceptación de los derechos reclamados. Sin perjuicio de lo anterior, Nicaragua manifestó su buena voluntad a alcanzar un acuerdo con Colombia sobre esta materia.

La CIJ analizó, primero, lo referido a la práctica histórica de los derechos de pesca tradicional alegados por Colombia y, en segundo lugar, lo relativo a las declaraciones formuladas por el Presidente de Nicaragua.

Sobre el primer punto, concluyó que las pruebas presentadas por Colombia (11 declaraciones de pescadores) no demostraron que los habitantes del Archipiélago tuvieran una práctica de consistente, ni de larga data en la ZEE de Nicaragua[95]. Por el contrario, en muchos casos confirmaron que las actividades de pesca se realizaban en espacios marítimos colombianos. Asimismo, la Corte dio un peso importante a las declaraciones realizadas en otros foros internacionales por el propio gobierno colombiano, en los manifestó que la delimitación del 2012 no afectaba los derechos de pesca tradicional[96].

Por otro lado, de la revisión de las declaraciones, la Corte constató que, en varias ocasiones el Presidente nicaragüense se refirió a la importancia de facilitar los derechos de pesca de los habitantes del Archipiélago para no afectarlos producto de la delimitación marítima (por ejemplo, a través del otorgamiento de permisos, la creación de comisiones, la firma de convenios,

[95] Ibid., p. 75, párrafo 220.
[96] Ibid., p. 76, párrafo 222.

entre otros). En ese sentido, concluyó que no podía desprenderse de las mismas el reconocimiento o la aceptación del derecho de los habitantes de San Andrés a pescar en la ZEE de Nicaragua sin autorización[97].

Sin perjuicio de lo anterior, analizó también si las declaraciones del Presidente dieron lugar a una la obligación nueva de respetar los derechos de pesca de los habitantes del Archipiélago. Al respecto, siguiendo los criterios de su jurisprudencia, concluyó que de las declaraciones no se podía identificar la intención del gobierno nicaragüense de contraer un compromiso vinculante de respetar los derechos de pesca de los habitantes del Archipiélago[98]. En mérito a todo lo anterior, la Corte desestimó la contrademanda.

Considero que la Corte hizo un análisis correcto de los dos argumentos planteados por Colombia, que la llevaron a desestimar la contrademanda.

En relación con el argumento basado en la costumbre, en efecto no se pudo demostrar que existía una práctica constante y ancestral de ejercicio de derechos de pesca, ni que esta se realizara normalmente en los espacios que fueron reconocidos a Nicaragua, a partir de la Sentencia de 2012. Igualmente, me parece importante que, al efectuar su análisis, la Corte haya considerado las manifestaciones de otros representantes del gobierno colombiano efectuadas en otras instancias internacionales, puesto se trata de un mismo Estado representado.

Sobre las declaraciones del presidente de Nicaragua, coincido con la Corte en que no reflejaron la intencionalidad del Estado de crear una obligación (de tener efectos jurídicos). Siendo este uno de los elementos constitutivos de un acto unilateral[99], considero que no estaríamos frente a un acto unilateral propiamente, sino frente a una declaración de una intención.

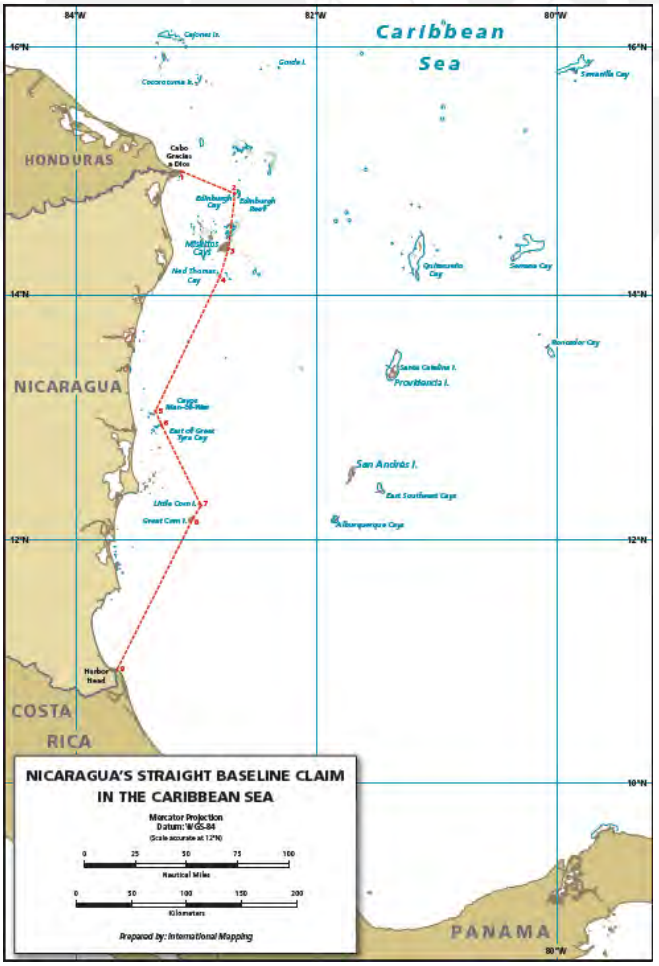
[97] Ibid., p. 78, párrafo 227.
[98] Ibid., p. 80, párrafo 230.
[99] Novak, F. y García-Corrochano**, L.** (2003)**.** Derecho Internacional Público. Tomo I: Introducción y fuentes. Fondo Editorial de la Pontificia Universidad Católica del Perú, p. 467-468.

En consideración a lo anterior, se puede concluir que los habitantes del Archipiélago de San Andrés no tenían derechos de pesca tradicionales sobre los espacios marítimos reconocidos a Nicaragua en la Sentencia del 2012. Por ende, Nicaragua no tenía obligación alguna.

IV.2.2. ¿Las líneas de base rectas aprobadas con el Decreto 33 de Nicaragua se ajustan al Derecho internacional consuetudinario, reflejado en el artículo 7 de la CONVEMAR? Segunda Contrademanda de Colombia

Con fecha 27 de agosto de 2013, Nicaragua emitió el Decreto 33, a través del cual aprobó un sistema de líneas de base rectas (LBR) frente a sus costas en el Mar Caribe. En dicho documento se señalan nueve puntos de base (dos en la costa continental y siete en las islas), a partir de los cuales se dibujan ocho secciones de líneas de base, como puede observarse en el siguiente mapa:

Mapa Nº 5



Fuente: Contramemoria de Colombia (Figura 10.1, p. 314)

En su contrademanda, Colombia sostuvo que Nicaragua no podía emplear LBR, pues no cumplía con los criterios geográficos dispuestos en el artículo 7 de la CONVEMAR, esto es: "*profundas aberturas y escotaduras o franja de islas a lo largo de la costa situada en su proximidad inmediata*"[100]. Nicaragua por su parte alegó que las líneas de base identificadas en su Decreto 33, se ajustaban al Derecho internacional consuetudinario reflejado en la CONVEMAR, pues cumplía con los dos criterios geográficos dispuesto en el artículo 7 del referido Tratado.

La Corte partió por aclarar que el empleo de LBR está condicionado al cumplimiento de los criterios geográficos establecidos en el artículo 7 de la CONVEMAR, que refleja el derecho consuetudinario existente. Igualmente, realizó una precisión importante, respecto a que no se trataba de condiciones acumulativas, sino alternativas, por lo que, para justificar el empleo de LBR, bastaba que solo una de ellas se cumpliera[101].

Ahora bien, en el caso la CIJ revisó el cumplimiento de ambas condiciones geográficas, puesto que Nicaragua las había empleado de manera separada para justificar el empleo de LBR en distintos segmentos (alegó tener una franja de islas entre los puntos de base 1 al 8, y una abertura profunda de las costas entre los puntos 8 y 9).

En primer lugar, la Corte evaluó el segmento 8-9 para determinar si la estructura geográfica de la costa nicaragüense en ese espacio podía considerarse una abertura profunda. Del análisis realizado, determinó que la curvatura en la costa sur de Nicaragua no era lo suficientemente pronunciada, para sustentar el establecimiento de una LBR, considerando sobre todo que su empleo es excepcional y restrictivo.

[100] Artículo 7.1 de la CONVEMAR.
[101] CIJ. **Caso de las Presuntas Violaciones a Derechos Soberanos y Espacios Marítimos en el Mar Caribe (Nicaragua c. Colombia)**, Sentencia de fondo del 21 de abril de 2022, p. 84, párrafo 244.

Con relación al segmento 1-8, el análisis requería que se confirmara que las formaciones usadas sean islas (en los términos del artículo 121.1 de la CONVEMAR), que los puntos de base se hubieran colocado sobre islas, que estas conformaran un sistema o franja, que estuvieran a lo largo de la costa, y que tuvieran una proximidad al territorio continental. De acuerdo con la Corte, Nicaragua tenía la carga de la prueba para el cumplimiento de las condiciones mencionadas, pues es ella quien alegó el criterio geográfico[102].

La Corte observó que en el caso no había certeza sobre si las formaciones marítimas que Nicaragua empleó para justificar el trazo de LBR eran propiamente islas, ni tampoco se aportaron las pruebas suficientes para evaluarlo. Asimismo, la Corte señaló que Nicaragua no la pudo convencer a de que se cumplieran los demás criterios.

Considerando lo anterior, la Corte concluyó que no se pudo probar el cumplimiento de los criterios geográficos necesarios para el empleo de LBR. Por lo tanto, declaró que las LBR empleadas por Nicaragua no se ajustaron al Derecho internacional consuetudinario, reflejado en el artículo 7.1 de la CONVEMAR[103].

En mi opinión, la Corte realizó un análisis exhaustivo del cumplimiento de los criterios necesarios para justificar el trazado de LBR que pretendía Nicaragua. Este análisis a detalle se sustenta en que el empleo de LBR se encuentra condicionado, por lo que requiere un criterio de análisis restrictivo, como señaló la Corte. Esto justifica también que la carga de la prueba para demostrar el cumplimiento de las condiciones exigidas recaiga en el Estado que la alega.

Los filtros mencionados son necesario para evitar que los Estados *"*[amplíen] *el espacio sobre el que ejercen control en el mar adyacente a sus costas"* [104], lo que directamente afecta los derechos de los demás Estados. La Corte pone como ejemplo de esto, que ampliar el mar territorial a través del empleo de

[102] Ibid., p. 85, párrafo 249.
[103] Ibid., p. 88, párrafo 259.
[104] Abugattas, G. (2023). Op. Cit., p. 61

LBR, implicaría un recorte en el espacio sobre el que otro Estado tendría libertades de navegación y sobrevuelo en la ZEE, de conformidad con el artículo 58 de la CONVEMAR.

V. CONCLUSIONES

Del análisis de la sentencia, se puede concluir como respuesta al problema principal que **Colombia sí vulneró los derechos de soberanía y jurisdicción de Nicaragua en los espacios marítimos** que le fueron reconocidos a este último a través de la Sentencia de la CIJ del 2012. Dicha vulneración se produjo en torno a tres grupos de actuaciones atribuibles a Colombia:

Intervenciones de las fragatas de la Armada de la República de Colombia (ARC) a las embarcaciones de bandera o licencia nicaragüense (pesqueras, de investigación científica y navales) en la Zona Económica Exclusiva (ZEE) de Nicaragua.

- De conformidad con el Derecho internacional consuetudinario, reflejado en el artículo 56 de la CONVEMAR, es Nicaragua, como Estado ribereño, quien tenía los derechos de soberanía para la exploración, explotación, conservación y administración de los recursos naturales en su ZEE; así como la jurisdicción para la protección y preservación del medio ambiente marino. En ejercicio de dichos derechos, autorizó válidamente a sus embarcaciones a realizar actividades de pesca y de investigación científica en su ZEE.

- De conformidad con el Derecho internacional consuetudinario, reflejado en el artículo 58 de la CONVEMAR, Colombia tenía libertades de navegación y sobrevuelo en la ZEE de Nicaragua; sin embargo, estaba obligada a respetar los derechos de soberanía y jurisdicción de este último.

- En ejercicio de sus libertades de navegación y sobrevuelo en la ZEE de Nicaragua, Colombia no podía interferir con las actividades de pesca ni de investigación científica de las embarcaciones de bandera o licencia nicaragüense; ni con las operaciones de los barcos de la armada o guardacostas nicaragüense; sin embargo, lo hizo en los incidentes 1,2,4,5,6,7,8 y 9 de la Tabla N° 1. Dichas intervenciones no podían justificarse en el deber de Colombia de proteger el medio ambiente, toda vez que quien tenía jurisdicción para ello era Nicaragua.

- En consecuencia, Colombia **sí vulneró los derechos de soberanía y jurisdicción de Nicaragua**, al intervenir a las embarcaciones de bandera o licencia nicaragüense que realizaban actividades de pesca e investigación científica en la ZEE de esta última, así como al interferir con las operaciones de los buques de la armada nicaragüense.

Emisión de autorizaciones de pesca por parte de las autoridades colombianas que se aplicaron en la ZEE de Nicaragua

- Del análisis de los hechos quedó comprobado que la Gobernación del Archipiélago de San Andrés, Providencia y Santa Catalina, perteneciente a Colombia, otorgó permisos a embarcaciones de bandera extranjera para pescar en Luna Verde, conocido banco de pesca, ubicado al interior de la ZEE de Nicaragua. Asimismo, las fragatas de la ARC protegieron a las embarcaciones autorizadas en cinco incidentes ocurridos en Luna Verde.

- Dado que la explotación de los recursos naturales en la ZEE es un derecho soberano del Estado ribereño, Colombia **sí vulneró los derechos de soberanía y jurisdicción de Nicaragua,** al otorgar permisos de pesca para espacios comprendidos en la ZEE este último.

Constitución de una "Zona Contigua Integral" (ZCI) correspondiente a los territorios insulares colombianos en el Mar Caribe occidental, a través del Decreto Presidencial 1946

- Colombia tenía el derecho de trazar una zona contigua (ZC) alrededor de las islas sobre las que la CIJ le había reconocido soberanía en la Sentencia del 2012. Dicha dicha ZC se podía superponer con la ZEE de Nicaragua, pues los regímenes jurídicos de ambos espacios no son incompatibles entre sí.

- Colombia podía simplificar el trazado de la ZC de sus territorios insulares a través de una ZCI, a fin de lograr un borde regular.

- La ZCI constituida por Colombia a través del Decreto Presidencial 1946 no se ajustó al Derecho internacional consuetudinario reflejado en el artículo 33 de la CONVEMAR, toda vez que superaba la anchura máxima permitida de veinticuatro millas náuticas y excedía el ámbito material de las facultades de control para la prevención y sanción de infracciones en el territorio y mar territorial, al haber incluido temas de seguridad, intereses marítimos y protección medioambiental.

- Colombia no pudo probar que la costumbre internacional reflejada en el artículo 33 de la CONVEMAR hubiera evolucionado respecto de la anchura máxima ni en relación al ámbito material de las facultades de control.

- En los espacios en que la ZCI de Colombia se superponía con la ZEE de Nicaragua, Colombia **sí** v**ulneró los derechos de soberanía y jurisdicción de Nicaragua,** pues excedió la anchura máxima permitida y en el ámbito material de las facultades de control que se irrogó.

Adicionalmente, la Corte pudo haber determinado la responsabilidad internacional de Colombia por la publicación en el portal institucional de su Agencia Nacional de Hidrocarburos (ANH) de un Mapa con la identificación de bloques petroleros «disponibles» en la ZEE de Nicaragua, como sustenté en el punto 4.1.3.5 del informe.

Las obligaciones complementarias asignadas por la Corte a Colombia tras la determinación de su responsabilidad internacional son insuficientes. Considero

que en los problemas secundarios 1 y 2 la Corte pudo haber dispuesto garantías de no repetición, toda vez que el comportamiento de Colombia demostró la existencia de una Política de Estado de rechazo al cumplimiento de la Sentencia de 2012, que trazó la delimitación marítima entre Nicaragua y Colombia.

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21 APRIL 2022

JUDGMENT

ALLEGED VIOLATIONS OF SOVEREIGN RIGHTS AND MARITIME SPACES IN THE CARIBBEAN SEA

(NICARAGUA *v.* COLOMBIA)

_____

VIOLATIONS ALLÉGUÉES DE DROITS SOUVERAINS ET D'ESPACES MARITIMES DANS LA MER DES CARAÏBES

(NICARAGUA c. COLOMBIE)

21 AVRIL 2022

ARRÊT

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ALLEGED VIOLATIONS OF SOVEREIGN RIGHTS AND MARITIME SPACES IN THE CARIBBEAN SEA

(NICARAGUA *v.* COLOMBIA)

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*

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* *

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Alleged authorization by Colombia of fishing activities and marine scientific research in Nicaragua's exclusive economic zone — Resolutions of General Maritime Directorate of Ministry of National Defence of Colombia related to industrial fishing in the San Andrés Archipelago — Not possible to determine geographical scope of these resolutions — Two resolutions by Governor of San Andrés Archipelago define fishing zone as including areas within Nicaragua's exclusive economic zone — Colombia continues to assert right to authorize fishing activities in Nicaragua's exclusive economic zone — Examination of alleged incidents at sea — Fishing vessels allegedly authorized by Colombia engaged in fishing activities in Nicaragua's exclusive economic zone — Fishing activities conducted under protection of Colombian frigates — Insufficient evidence that Colombia authorized marine scientific research in Nicaragua's exclusive economic zone — Finding that Colombia has violated Nicaragua's sovereign rights and jurisdiction in its exclusive economic zone by authorizing fishing activities in that zone.

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*

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"Integral contiguous zone" established by Colombia's Presidential Decree 1946 not in conformity with customary international law with respect to its breadth and powers asserted therein — In maritime areas where it overlaps with Nicaragua's exclusive economic zone, "integral contiguous zone" infringes upon Nicaragua's sovereign rights and jurisdiction in exclusive economic zone — Colombia under obligation, by means of its own choosing, to bring provisions of Presidential Decree 1946 into conformity with customary international law in so far as they relate to Nicaragua's maritime areas.

Nicaragua's request to order Colombia to pay compensation rejected.

No legal basis to grant Nicaragua's request that the Court remain seised of the case.

* *

Counter-claims made by Colombia.

Alleged infringement by Nicaragua of artisanal fishing rights of inhabitants of San Andrés Archipelago, in particular the Raizales — Applicable law is customary international law as reflected in relevant provisions of Part V of UNCLOS — Question whether inhabitants of San Andrés Archipelago have historically enjoyed artisanal fishing rights in areas now falling within Nicaragua's exclusive economic zone — Affidavits from fishermen from San Andrés Archipelago — Indications that some fishing activities have taken place in areas that now fall within Nicaragua's exclusive economic zone — Period during which such activities took place and whether there was a constant practice not established with certainty — Colombia's claim regarding long-standing practice of artisanal fishing not sufficiently established — Previous positions adopted by or on behalf of Colombia undermine Colombia's claim — Statements of President of Nicaragua do not establish acceptance or recognition by Nicaragua that artisanal fishermen of San Andrés Archipelago have right to fish in Nicaragua's maritime zones without prior authorization.

Colombia has failed to establish that inhabitants of the San Andrés Archipelago enjoy artisanal fishing rights in waters now located in Nicaragua's exclusive economic zone — Counter-claim dismissed.

*

Alleged violation of Colombia's sovereign rights and maritime spaces by Nicaragua's use of straight baselines — Nicaragua's Decree No. 33-2013 establishing a system of straight baselines along Caribbean coast — Article 7 of UNCLOS reflects customary international law — Establishment of straight baselines by coastal State falls to be assessed by international rules, to be applied restrictively.

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JUDGMENT

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.

In the case concerning alleged violations of sovereign rights and maritime spaces in the Caribbean Sea,

between

the Republic of Nicaragua,

represented by

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

as Agent and Counsel;

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

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

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

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

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

as Counsel and Advocates;

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

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

as Assistant Counsel;

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

as Scientific and Technical Adviser;

Ms Sherly Noguera de Argüello, MBA,

as Administrator,

and

the Republic of Colombia,

represented by

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

as Agent;

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

as Co-Agent;

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

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

as National Authorities;

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

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

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

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

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

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

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

Mr. Sebastián Correa Cruz, Third Secretary, Embassy of Colombia in the Netherlands,

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

as representatives of the 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,

as representatives of the Navy of Colombia;

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

Ms Victoria Taylor, Cartographer, International Mapping,

as Technical Advisers;

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

as Legal Assistant;

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

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

as Advisers,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 26 November 2013, the Government of the Republic of Nicaragua (hereinafter "Nicaragua") filed in the Registry of the Court an Application instituting proceedings against the Republic of Colombia (hereinafter "Colombia") concerning a dispute in relation to "the violations of Nicaragua's sovereign rights and maritime zones declared by the Court's Judgment of 19 November 2012 [in the case concerning *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*] and the threat of the use of force by Colombia in order to implement these violations".

2. In its Application, Nicaragua sought to found the jurisdiction of the Court on Article XXXI of the American Treaty on Pacific Settlement signed on 30 April 1948, officially designated, according to Article LX thereof, as the "Pact of Bogotá" (hereinafter referred to as such).

3. The Registrar immediately communicated the Application to the Colombian Government, in accordance with Article 40, paragraph 2, of the Statute of the Court. He also notified the Secretary-General of the United Nations of the filing of the Application by Nicaragua.

4. Pursuant to Article 40, paragraph 3, of the Statute of the Court, the Registrar subsequently notified the Members of the United Nations, through the Secretary-General, of the filing of the Application, by transmission of the printed bilingual text.

5. Since the Court included upon the Bench no judge of the nationality of either Party, each Party proceeded to exercise the right conferred upon it by Article 31, paragraph 3, of the Statute of the Court to choose a judge *ad hoc* to sit in the case. Nicaragua first chose Mr. Gilbert Guillaume, who resigned on 8 September 2015, and subsequently Mr. Yves Daudet. Colombia first chose Mr. David Caron and subsequently, following the death of Mr. Caron, Mr. Donald McRae.

6. By an Order of 3 February 2014, the Court fixed 3 October 2014 and 3 June 2015 as the respective time-limits for the filing of a Memorial by Nicaragua and a Counter-Memorial by Colombia. Nicaragua filed its Memorial within the time-limit thus fixed.

7. On 19 December 2014, within the time-limit prescribed by Article 79, paragraph 1, of the Rules of Court of 14 April 1978 as amended on 1 February 2001, Colombia raised preliminary objections to the jurisdiction of the Court. Consequently, by an Order of 19 December 2014, the President noted that, by virtue of Article 79, paragraph 5, of the Rules of Court of 14 April 1978 as amended on 1 February 2001, the proceedings on the merits were suspended and, taking account of Practice Direction V, fixed 20 April 2015 as the time-limit for the presentation by Nicaragua of a written statement of its observations and submissions on the preliminary objections raised by Colombia. Nicaragua filed its statement within the prescribed time-limit.

8. Pursuant to the instructions of the Court under Article 43, paragraph 1, of the Rules of Court, the Registrar addressed to States parties to the Pact of Bogotá the notification provided for in Article 63, paragraph 1, of the Statute of the Court. In accordance with the provisions of Article 69, paragraph 3, of the Rules of Court, the Registrar also addressed to the Organization of American States (hereinafter the "OAS") the notification provided for in Article 34, paragraph 3, of the Statute of the Court and, as provided for in Article 69, paragraph 3, of the Rules of Court, asked that Organization whether or not it intended to furnish observations in writing. The Registrar further stated that, in view of the fact that the current phase of the proceedings related solely to the question of jurisdiction, any written observations should be limited to that question. By letter dated 16 June 2015, the Secretary-General of the OAS indicated that the Organization did not intend to submit any such observations.

9. Referring to Article 53, paragraph 1, of the Rules of Court, the Government of the Republic of Chile (hereinafter "Chile") asked to be furnished with copies of the pleadings and documents annexed in the case. Having ascertained the views of the Parties in accordance with that same provision, the President of the Court decided to grant that request. The Registrar duly communicated that decision to the Government of Chile and to the Parties. Copies of Nicaragua's Application and Memorial and of Colombia's preliminary objections were therefore communicated to Chile. A copy of Nicaragua's written statement of its observations and submissions on the said preliminary objections was also subsequently transmitted to Chile.

10. Pursuant to the same provision of the Rules, the Government of the Republic of Panama (hereinafter "Panama") also asked to be furnished with copies of the pleadings and documents annexed in the case. Taking into account the views of the Parties, the Court decided that copies of the preliminary objections raised by Colombia and of Nicaragua's written statement of its observations and submissions on those objections would be made available to the Government of Panama. The Court decided, however, that it would not be appropriate to furnish Panama with a copy of Nicaragua's Memorial. The Registrar duly communicated that decision to the Government of Panama and to the Parties.

11. Public hearings on the preliminary objections raised by Colombia were held from 28 September to 2 October 2015. In its Judgment of 17 March 2016 (hereinafter the "2016 Judgment"), the Court found that it had jurisdiction, on the basis of Article XXXI of the Pact of Bogotá, to entertain the dispute between Nicaragua and Colombia regarding the alleged violations by Colombia of Nicaragua's rights in the maritime zones which, according to Nicaragua, the Court declared in its aforementioned Judgment of 19 November 2012 appertain to Nicaragua. The Court upheld a preliminary objection raised by Colombia in so far as it concerned the existence of a dispute regarding alleged violations by Colombia of its obligation not to use force or threaten to use force.

12. By an Order of 17 March 2016, the Court fixed 17 November 2016 as the new time-limit for the filing of the Counter-Memorial of Colombia; that pleading was filed within the time-limit thus prescribed. In Part III of its Counter-Memorial, Colombia, making reference to Article 80 of the Rules of Court, submitted four counter-claims.

13. Referring to Article 53, paragraph 1, of the Rules of Court, the Government of Panama asked to be furnished with copies of the pleadings and documents annexed in the case on the merits. Having ascertained the views of the Parties in accordance with the same provision, the President of the Court granted that request. However, further to a specific request received from the Agent of

Colombia, the President decided that the copies of the Counter-Memorial being furnished would not include Annexes 28 to 61, which Colombia claimed were "classified as reserved for reasons of national security" under its domestic legislation. The Registrar duly communicated these decisions to the Government of Panama and to the Parties. A copy of Colombia's Counter-Memorial, not including Annexes 28 to 61, was also made available to the Government of Chile (see paragraph 9 above).

14. At a meeting held by the President of the Court with the representatives of the Parties on 19 January 2017, Nicaragua indicated that it considered the counter-claims contained in the Counter-Memorial of Colombia to be inadmissible. By letters dated 20 January 2017, the Registrar informed the Parties that the Court had decided that the Government of Nicaragua should specify in writing, by 20 April 2017 at the latest, the legal grounds on which it relied in maintaining that the Respondent's counter-claims were inadmissible, and that the Government of Colombia should present its own views on the question in writing, by 20 July 2017 at the latest. Nicaragua and Colombia submitted their written observations on the admissibility of Colombia's counter-claims within the time-limits thus fixed.

15. In its Order of 15 November 2017, the Court found that the first two counter-claims submitted by Colombia were inadmissible as such and did not form part of the current proceedings, and that the third and fourth counter-claims submitted by Colombia were admissible as such and did form part of the current proceedings. In its third counter-claim, Colombia asserts that Nicaragua has "failed to respect the traditional and historic fishing rights of the inhabitants of the San Andrés Archipelago, including the indigenous Raizal people, in the waters to which they are entitled to said rights". The fourth counter-claim relates to the adoption by Nicaragua of Decree No. 33-2013 of 19 August 2013 (hereinafter "Decree 33"), which, according to Colombia, established straight baselines that are contrary to international law and violate Colombia's maritime rights and spaces. By the same Order, the Court directed Nicaragua to submit a Reply and Colombia to submit a Rejoinder relating to the claims of both Parties in the current proceedings, and fixed 15 May and 15 November 2018 as the respective time-limits for the filing of those pleadings. The Reply of Nicaragua and the Rejoinder of Colombia were filed within the time-limits thus fixed.

16. By an Order dated 4 December 2018, the Court authorized the submission by Nicaragua of an additional pleading relating solely to the counter-claims submitted by Colombia and fixed 4 March 2019 as the time-limit for the filing of that written pleading. The additional pleading was filed by Nicaragua within the prescribed time-limit.

17. By letter (with 19 annexes) dated 23 September 2019, the Agent of Nicaragua, alleging various "incidents involving the Colombian navy that took place in Nicaraguan waters", requested, on behalf of his Government, the authorization of the Court, pursuant to Article 56 of its Rules, for the annexed documentation to "be included in the formal record of the case". In accordance with Article 56, paragraph 1, of the Rules of Court, copies of the above-mentioned documents were communicated to the other Party, which was requested to inform the Court of any observations that it might wish to make with regard to the production of those documents. By letter dated 3 October 2019, the Agent of Colombia informed the Court that his Government "d[id] not consent to the request by Nicaragua" to produce 19 new documents, and provided the reasons why his Government considered that the request did not meet the requirements under either Article 56 of the Rules of Court or Practice Direction IX, paragraph 3. On 15 October 2019, the Court authorized the

production of the above-mentioned documents by Nicaragua and gave Colombia the opportunity to comment, by 16 December 2019, on the documents thus produced by Nicaragua and to submit documents in support of its comments. Colombia transmitted to the Court its comments on the new documents produced by Nicaragua, as well as documents and audio-visual material in support of those comments, within the time-limit thus fixed.

18. By letter (with four annexes) dated 30 July 2021, the Agent of Nicaragua requested, on behalf of his Government, the authorization of the Court, pursuant to Article 56 of its Rules, for the annexed documentation to "be added to the formal record of the case". In accordance with Article 56, paragraph 1, of the Rules of Court, copies of the above-mentioned documents were communicated to the other Party, which was requested to inform the Court of any observations that it might wish to make with regard to the production of those documents. By letter dated 16 August 2021, the Co-Agent of Colombia stated that his Government "object[ed] to their production and request[ed] the Court to deny Nicaragua's request", and provided the reasons why his Government considered that the request did not meet the requirements under either Article 56 of the Rules of Court or Practice Direction IX, paragraphs 1, 2 and 3. By a letter dated 17 August 2021, the Agent of Nicaragua submitted comments of his Government on Colombia's observations. By letter dated 18 August 2021, the Co-Agent of Colombia provided further observations of his Government on Nicaragua's request. On 1 September 2021, the Court authorized the production of two of the four new documents and gave Colombia the opportunity to comment, by 9 September 2021, on the documents thus produced by Nicaragua and to submit documents in support of its comments. Colombia transmitted to the Court its comments on the new documents produced by Nicaragua, as well as documents in support of those comments, within the time-limit thus fixed.

19. Pursuant to Article 53, paragraph 2, of its Rules, the Court, after ascertaining the views of the Parties, decided that copies of the written pleadings and documents annexed would be made accessible to the public, with the exception of certain annexes to, and figures included in, Colombia's written pleadings. In particular, the Court acceded to Colombia's request that these materials not be made accessible to the public on the basis that, under Colombian legislation, they are classified as secret or reserved for reasons of national security. The Parties were informed that, while, during the hearings, they were free to refer to the titles of these confidential documents as they appeared in the list of annexes, they were not to read out quotations from them nor display slides showing all or part of them. With the exception of the above-mentioned confidential materials, and in accordance with the Court's practice, all pleadings and documents annexed were placed on the Court's website.

20. Public hearings were held on 20, 22, 24, 27 and 29 September and on 1 October 2021. The oral proceedings were conducted in a hybrid format, in accordance with Article 59, paragraph 2, of the Rules of Court and on the basis of the Court's Guidelines for the parties on the organization of hearings by video link, adopted on 13 July 2020 and communicated to the Parties on 21 July 2021. During the oral proceedings, a number of judges were present in the Great Hall of Justice, while others joined the proceedings via video link, allowing them to view and hear the speaker and see any demonstrative exhibits displayed. Each Party was permitted to have up to four representatives present in the Great Hall of Justice and up to five other representatives in an additional room in the Peace Palace equipped with the necessary facilities to follow the proceedings remotely. The remaining members of each Party's delegation were given the opportunity to participate via video link from other locations of their choice.

21. During the above-mentioned hearings, the Court heard the oral arguments and replies of:

For Nicaragua: H.E. Mr. Carlos José Argüello Gómez,
Mr. Alain Pellet,
Mr. Paul Reichler,
Mr. Vaughan Lowe,
Mr. Lawrence Martin,
Mr. Alex Oude Elferink.

For Colombia: H.E. Mr. Manuel José Cepeda Espinosa,
H.E. Mr. Kent Francis James,
Sir Michael Wood,
Ms Laurence Boisson de Chazournes,
Mr. Rodman Bundy,
Mr. Michael Reisman,
Mr. Eduardo Valencia-Ospina,
Mr. Jean-Marc Thouvenin,
H.E. Mr. Carlos Gustavo Arrieta Padilla.

*

22. In the Application, the following claims were made by Nicaragua:

"On the basis of the foregoing statement of facts and law, Nicaragua, while reserving the right to supplement, amend or modify this Application, requests the Court to adjudge and declare that Colombia is in breach of:

— its obligation not to use or threaten to use force under Article 2 (4) of the UN Charter and international customary law;

— its obligation not to violate Nicaragua's maritime zones as delimited in paragraph 251 of the ICJ Judgment of 19 November 2012 as well as Nicaragua's sovereign rights and jurisdiction in these zones;

— its obligation not to violate Nicaragua's rights under customary international law as reflected in Parts V and VI of UNCLOS;

— and that, consequently, Colombia is bound to comply with the Judgment of 19 November 2012, wipe out the legal and material consequences of its internationally wrongful acts, and make full reparation for the harm caused by those acts."

23. In the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Nicaragua,

in the Memorial:

"1. For the reasons given in the present Memorial, the Republic of Nicaragua requests the Court to adjudge and declare that, by its conduct, the Republic of Colombia has breached:

(a) its obligation not to violate Nicaragua's maritime zones as delimited in paragraph 251 of the Court Judgment of 19 November 2012 as well as Nicaragua's sovereign rights and jurisdiction in these zones;

(b) its obligation not to use or threaten to use force under Article 2 (4) of the UN Charter and international customary law;

(c) and that, consequently, Colombia has the obligation to wipe out the legal and material consequences of its internationally wrongful acts, and make full reparation for the harm caused by those acts.

2. Nicaragua also requests the Court to adjudge and declare that Colombia must:

(a) Cease all its continuing internationally wrongful acts that affect or are likely to affect the rights of Nicaragua.

(b) Inasmuch as possible, restore the situation to the *status quo ante*, in

(i) revoking laws and regulations enacted by Colombia, which are incompatible with the Court's Judgment of 19 November 2012 including the provisions in the Decrees 1946 of 9 September 2013 and 1119 of 17 June 2014 to maritime areas which have been recognized as being under the jurisdiction or sovereign rights of Nicaragua;

(ii) revoking permits granted to fishing vessels operating in Nicaraguan waters; and

(iii) ensuring that the decision of the Constitutional Court of Colombia of 2 May 2014 or of any other National Authority will not bar compliance with the 19 November 2012 Judgment of the Court.

(c) Compensate for all damages caused insofar as they are not made good by restitution, including loss of profits resulting from the loss of investment caused by the threatening statements of Colombia's highest authorities, including the threat or use of force by the Colombian Navy against Nicaraguan fishing boats [or ships exploring and exploiting the soil and subsoil of Nicaragua's continental shelf] and third state fishing boats licensed by Nicaragua as well as from the exploitation of Nicaraguan waters by fishing vessels unlawfully 'authorized' by Colombia, with the amount of the compensation to be determined in a subsequent phase of the case.

(d) Give appropriate guarantees of non-repetition of its internationally wrongful acts."

in the Reply:

"1. For the reasons given in Chapters II to V of the present Reply, the Republic of Nicaragua requests the Court to adjudge and declare that:

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

(b) Colombia must immediately cease its internationally wrongful conduct in Nicaragua's maritime zones, as delimited by the Court in its Judgment of 19 November 2012, including its violations of Nicaragua's sovereign rights and jurisdiction in those maritime zones;

(c) Colombia must revoke, by means of its choice, all laws and regulations which are incompatible with the Court's Judgment of 19 November 2012, including the provisions in Decrees 1946 of 9 September 2013 and 1119 of 17 June 2014 on maritime areas which have been recognized as under the jurisdiction or sovereign rights of Nicaragua;

(d) Colombia must revoke permits granted to fishing vessels operating in Nicaragua's exclusive economic zone, as delimited in the Court's Judgment of 19 November 2012;

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

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

(g) Colombia must give appropriate guarantees of non-repetition of its internationally wrongful acts.

2. For the reasons given in Chapters VI and VII of this Reply, the Republic of Nicaragua requests the Court to adjudge and declare that the Counter-Claims of Colombia are rejected."

On behalf of the Government of Colombia,

in the Counter-Memorial:

"I. For the reasons stated in this Counter-Memorial, the Republic of Colombia respectfully requests the Court to reject the submissions of the Republic of Nicaragua in its Memorial of 3 October 2014 and to adjudge and declare that

1. Nicaragua has failed to prove that any Colombian naval or coast guard vessel has violated Nicaragua's sovereign rights and maritime spaces in the Caribbean Sea;

2. Colombia has not, otherwise, violated Nicaragua's sovereign rights and maritime spaces in the Caribbean Sea;

3. Colombia's Decree 1946 of 9 September 2013 establishing an Integral Contiguous Zone is lawful under international law and does not constitute a violation of any of Nicaragua's sovereign rights and maritime spaces, considering that:

   (a) The Integral Contiguous Zone produced by the naturally overlapping concentric circles forming the contiguous zones of the islands of San Andrés, Providencia, Santa Catalina, Alburquerque Cays, East-Southeast Cays, Roncador, Serrana, Quitasueño and Serranilla and joined by geodetic lines connecting the outermost points of the overlapping concentric circles is, in the circumstances, lawful under international law;

   (b) The powers enumerated in the Decree are consistent with international law; and

4. No Colombian action in its Integral Contiguous Zone of which Nicaragua complains is a violation of international law or of Nicaragua's sovereign rights and maritime spaces.

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

5. Nicaragua has infringed Colombia's sovereign rights and maritime spaces in the Caribbean Sea by failing to prevent its flag or licensed vessels from fishing in Colombia's waters;

6. Nicaragua has infringed Colombia's sovereign rights and maritime spaces in the Caribbean Sea by failing to prevent its flag or licensed vessels from engaging in predatory and unlawful fishing methods in violation of its international obligations;

7. Nicaragua has infringed Colombia's sovereign rights and maritime spaces by failing to fulfil its international legal obligations with respect to the environment in areas of the Caribbean Sea to which said obligations apply;

8. Nicaragua has failed to respect the traditional and historic fishing rights of the inhabitants of the San Andrés Archipelago, including the indigenous Raizal people, in the waters to which they are entitled to said rights; and

9. Nicaragua's Decree No. 33-2013 of 19 August 2013 establishing straight baselines violates international law and Colombia's maritime rights and spaces.

III. The Court is further requested to order Nicaragua

10. With regard to submissions 5 to 8:

(a) To desist promptly from its violations of international law;

(b) To compensate Colombia for all damages caused, including loss of profits, resulting from Nicaragua's violations of its international obligations, with the amount and form of compensation to be determined at a subsequent phase of the proceedings; and

(c) To give Colombia appropriate guarantees of non-repetition.

11. With regard to submission 8, in particular, to ensure that the inhabitants of the San Andrés Archipelago enjoy unfettered access to the waters to which their traditional and historic fishing rights pertain; and

12. With regard to submission 9, to adjust its Decree No. 33-2013 of 19 August 2013 in order that it complies with the rules of international law concerning the drawing of the baselines from which the breadth of the territorial sea is measured.

IV. Colombia reserves its right to supplement or amend these submissions."

in the Rejoinder:

"I. For the reasons stated in its Counter-Memorial and Rejoinder, 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 zone 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 traditional fishing rights in maritime areas adjudicated to appertain to Nicaragua.

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 sovereign 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 adjudicated to appertain to Nicaragua;

   (b) The banks located in Colombian maritime areas, access to which requires navigating through the maritime areas adjudicated to appertain to Nicaragua.

7. To compensate Colombia for all damages caused, including loss of profits, resulting from Nicaragua's violations of its international obligations, with the amount and form of compensation to be determined at a subsequent phase of the proceedings.

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

24. At the oral proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Nicaragua,

at the hearing of 27 September 2021, on the claims of Nicaragua:

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

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

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

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

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

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

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

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

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

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

at the hearing of 1 October 2021, on the counter-claims of Colombia:

"In the case concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)*, for the reasons explained in the

Written and Oral phase, Nicaragua respectfully requests the Court to adjudge and declare that the counter-claims of the Republic of Colombia are rejected with all legal consequences."

On behalf of the Government of Colombia,

at the hearing of 29 September 2021, on the claims of Nicaragua and the counter-claims of Colombia:

"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 zone 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 the 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 violations of its international obligations.

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

*

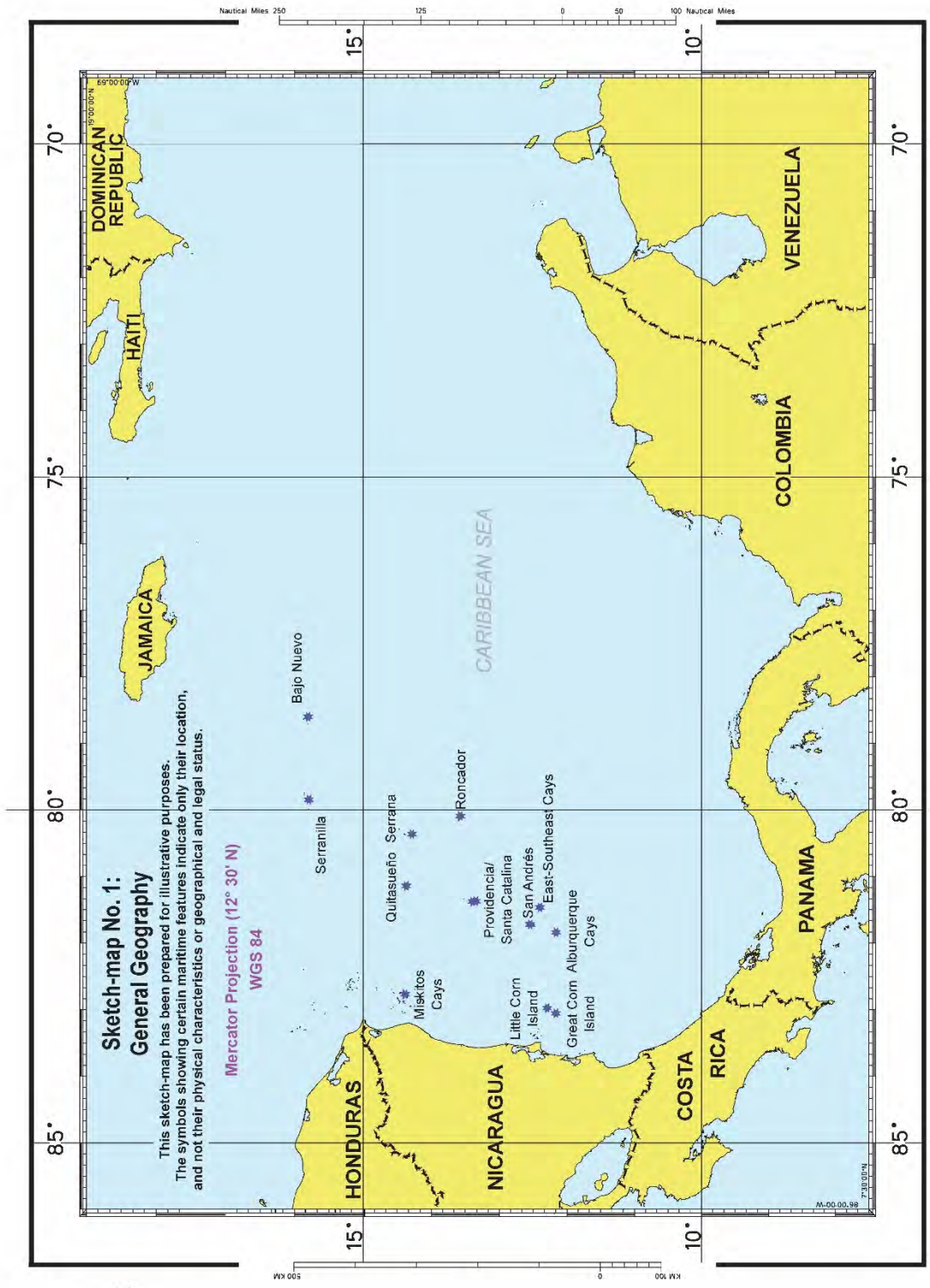
* *

I. GENERAL BACKGROUND

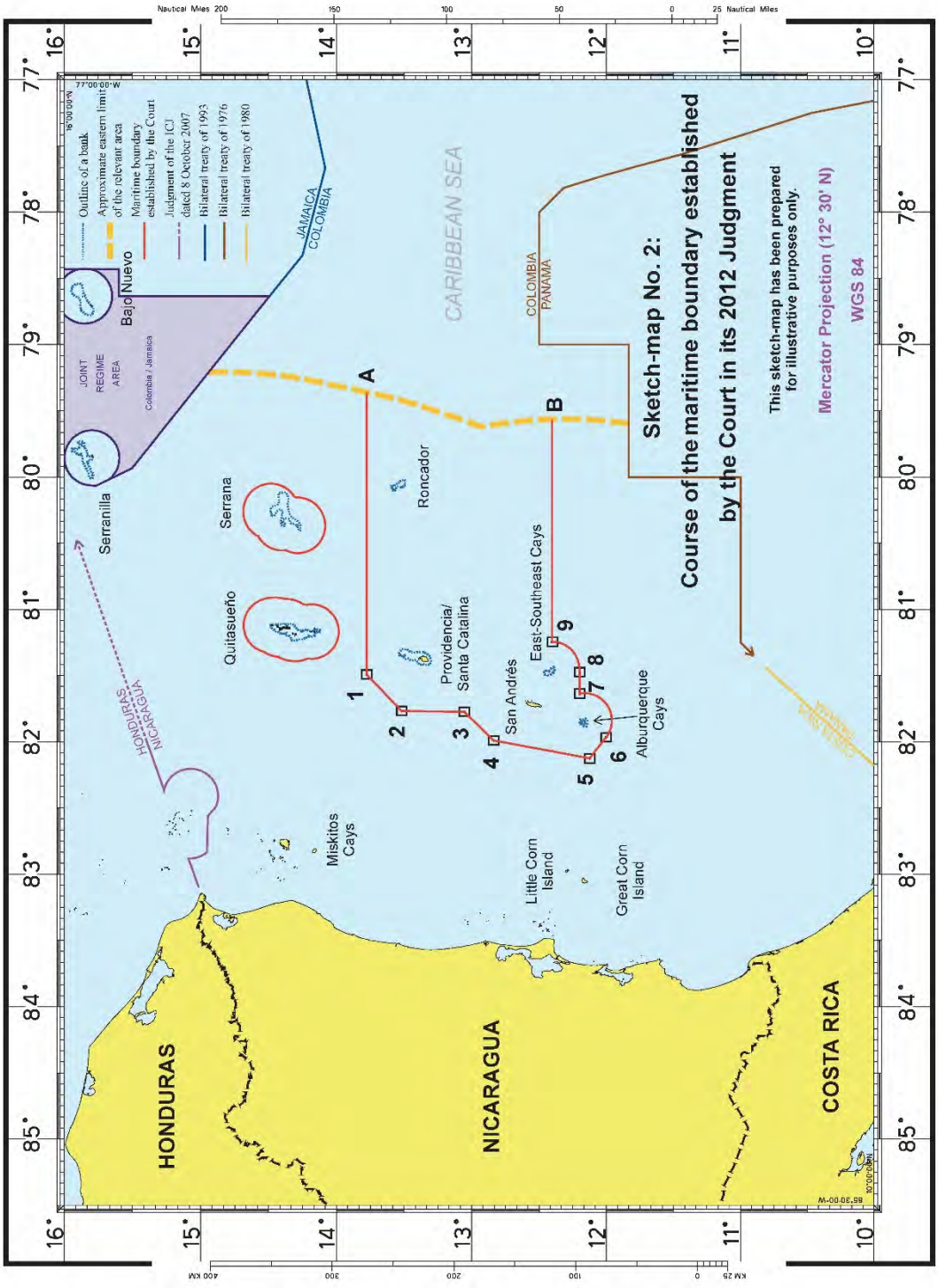
25. The maritime areas with which the present proceedings are concerned are located in the Caribbean Sea, an arm of the Atlantic Ocean partially enclosed to the north and east by a number of islands, and bounded to the south and west by South and Central America. Nicaragua's eastern coast faces the south-western part of the Caribbean Sea. To the north of Nicaragua lies Honduras and to the south lie Costa Rica and Panama. To the north-east, Nicaragua faces Jamaica, and to the east, it faces the mainland coast of Colombia. Colombia is situated to the south of the Caribbean Sea. In terms of its Caribbean front, Colombia is bordered to the west by Panama and to the east by Venezuela. The Colombian islands of San Andrés, Providencia and Santa Catalina lie in the south-west of the Caribbean Sea, approximately 100 to 150 nautical miles to the east of the Nicaraguan coast. (For the general geography of the area, see sketch-map No. 1.)

26. In the Judgment rendered by the Court on 19 November 2012 in the case concerning *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)* (hereinafter the "2012 Judgment"), the Court decided that Colombia had sovereignty over the islands at Alburquerque, Bajo Nuevo, East-Southeast Cays, Quitasueño, Roncador, Serrana and Serranilla (*I.C.J. Reports 2012 (II)*, p. 718, para. 251, subpara. (1)). The Court also established a single maritime boundary delimiting the continental shelf and the exclusive economic zones of Nicaragua and Colombia up to the 200-nautical-mile limit from the baselines from which the territorial sea of Nicaragua is measured (*ibid.*, pp. 719-720, para. 251, subpara. (4)). The Court, however, noted in its reasoning that, since Nicaragua had not yet notified the Secretary-General of the United Nations of the location of those baselines under Article 16, paragraph 2, of the 1982 United Nations Convention on the Law of the Sea (hereinafter "UNCLOS" or the "Convention"), the precise location of the eastern endpoints of the maritime boundary could not be determined and was therefore depicted on the sketch-map only approximately (*ibid.*, p. 713, para. 237). (For the course of the maritime boundary established by the Court in its 2012 Judgment, see sketch-map No. 2.)

SKETCH-MAP NO. 1: GENERAL GEOGRAPHY



SKETCH-MAP NO. 2 : COURSE OF THE MARITIME BOUNDARY ESTABLISHED BY THE COURT IN ITS 2012 JUDGMENT



27. The Court notes that, in the present case, the Parties refer to the "San Andrés Archipelago". In this regard, the Court recalls that it addressed the question of the composition of the Archipelago in its 2012 Judgment but left open the question whether certain features are part of the Archipelago, a matter on which the Parties disagreed. In particular, the Court observed that the Treaty concerning Territorial Questions at Issue between Colombia and Nicaragua, signed at Managua on 24 March 1928 (hereinafter the "1928 Treaty"), had not specified the composition of the San Andrés Archipelago and noted that the question about the composition of the Archipelago could not be definitively answered solely on the basis of the geographical location of the maritime features in dispute or of historical records. However, the Court acknowledged that the 1928 Treaty could be understood as including at least the maritime features closest to San Andrés, Providencia and Santa Catalina. The Court held that "[a]ccordingly, the Alburquerque Cays and East-Southeast Cays, given their geographical location (lying 20 and 16 nautical miles, respectively, from San Andrés island) could be seen as forming part of the Archipelago". By contrast, in view of considerations of distance, the Court considered that it was less likely that Serranilla and Bajo Nuevo could form part of the Archipelago. The Court further stated that it did not consider that "the express exclusion of Roncador, Quitasueño and Serrana from the scope of the 1928 Treaty [was] in itself sufficient to determine whether these features were considered by Nicaragua and Colombia to be part of the San Andrés Archipelago" (see *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), I.C.J. Reports 2012 (II)*, pp. 648-649, paras. 52-56).

28. In the present case, Nicaragua alleges that Colombia has violated Nicaragua's sovereign rights and jurisdiction in Nicaragua's exclusive economic zone in various ways. First, it contends that Colombia has interfered with Nicaraguan-flagged or Nicaraguan-licensed fishing and marine scientific research vessels in this maritime zone in a series of incidents involving Colombian naval vessels and aircraft. Nicaragua also claims that Colombia repeatedly directed its naval frigates and military aircraft to obstruct the Nicaraguan Navy in the exercise of its mission in Nicaraguan waters. Secondly, Nicaragua states that Colombia has granted permits for fishing and authorizations for marine scientific research in Nicaragua's exclusive economic zone to Colombians and nationals of third States. Thirdly, Nicaragua alleges that Colombia has violated its exclusive sovereign right to explore and exploit natural resources by offering and awarding hydrocarbon blocks encompassing parts of Nicaragua's exclusive economic zone.

29. Nicaragua further objects to Presidential Decree No. 1946 of 9 September 2013, as amended by Decree No. 1119 of 17 June 2014 (hereinafter "Presidential Decree 1946"), whereby Colombia established an "integral contiguous zone", which "ostensibly unified the maritime 'contiguous zones' of all of Colombia's islands, keys and other maritime features in the area". Nicaragua claims that the "integral contiguous zone" overlaps with waters attributed by the Court to Nicaragua as its exclusive economic zone and therefore "substantially transgresses areas subject to Nicaragua's exclusive sovereign rights and jurisdiction". Nicaragua further claims that the Decree violates customary international law and that its mere enactment engages Colombia's international responsibility.

30. In its counter-claims, Colombia first asserts that the inhabitants of the San Andrés Archipelago, in particular the Raizales, enjoy artisanal fishing rights in the traditional fishing banks located beyond the territorial sea of the islands of the San Andrés Archipelago. It contends that Nicaragua has infringed the traditional fishing rights of the inhabitants of the San Andrés Archipelago to access their traditional fishing banks located in the maritime areas beyond the territorial sea of the islands of the San Andrés Archipelago and those banks located in the Colombian maritime areas, access to which requires navigating outside the territorial sea of the islands of the San Andrés Archipelago.

31. Secondly, Colombia challenges the lawfulness of Nicaragua's straight baselines established by Decree 33 (see paragraph 15 above). More specifically, Colombia contends that the straight baselines, which connect a series of maritime features appertaining to Nicaragua east of its continental coast in the Caribbean Sea, have the effect of pushing the external limit of its territorial sea far east of the 12-nautical-mile limit permitted by international law, expanding Nicaragua's internal waters, territorial sea, exclusive economic zone and continental shelf. According to Colombia, Nicaragua's straight baselines thus directly impede the rights and jurisdiction to which Colombia is entitled in the Caribbean Sea.

32. Before examining Nicaragua's claims and Colombia's counter-claims, the Court will address the scope of its jurisdiction *ratione temporis*, an issue raised by Colombia in its Counter-Memorial.

II. SCOPE OF THE JURISDICTION *RATIONE TEMPORIS* OF THE COURT

33. In its 2016 Judgment, the Court concluded that it had jurisdiction, on the basis of Article XXXI of the Pact of Bogotá, to entertain the dispute concerning the alleged violations by Colombia of Nicaragua's rights in the maritime zones which, according to Nicaragua, the Court declared in its 2012 Judgment appertain to Nicaragua (*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. 43, para. 111 (2)).

34. Colombia, while accepting that the Court otherwise has jurisdiction in the case, contends that "the Court lacks jurisdiction *ratione temporis* to consider any claims that are based on events that are alleged to have transpired after Colombia ceased to be bound by the provisions of the Pact". It argues that, by virtue of Article XXXI of the Pact of Bogotá, the Parties recognized as compulsory the jurisdiction of the Court in all disputes of a juridical nature that arise among them concerning "[a]ny question of international law" (Article XXXI, subparagraph *(b)*) or "[t]he existence of any fact which, if established, would constitute the breach of an international obligation" (Article XXXI, subparagraph *(c)*), but only "so long as the present Treaty is in force".

35. Colombia maintains that this view is reinforced by the 2016 Judgment, in which, according to Colombia, the Court stated that the dispute was limited to those events which allegedly occurred before the critical date. Colombia is of the view that, for the Court to have jurisdiction to consider whether facts alleged by a party in support of its claim constitute a breach of an international obligation by the other party, "those facts must have occurred during a period when a jurisdictional basis exists between the parties". In this regard, it argues that "[j]urisdiction 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" (emphasis in the original).

36. Moreover, Colombia argues that the alleged events in the present case do not amount to a continuing pattern of illegal conduct on the part of Colombia and that they do not constitute a "composite act" within the meaning of Article 15 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (hereinafter the "ILC Articles on State Responsibility"). It considers that the Court should adopt an "event-by-event" analysis rather than

the "pattern of conduct" approach advanced by Nicaragua. Colombia argues that Nicaragua's contentions, if upheld, would lead to a "perverse effect" and would run counter to the Court's jurisprudence.

*

37. Nicaragua, for its part, claims that Colombia's interpretation of Article XXXI of the Pact of Bogotá is incompatible with the text and context of that provision. Nicaragua maintains, moreover, that the effect of Colombia's denunciation of the Pact of Bogotá under Article LVI is to prevent the Court from pronouncing on acts occurring after the termination of the treaty that would form the subject of a new dispute, distinct from the present one before the Court in respect of which it has found that it has jurisdiction.

38. Nicaragua maintains that "[t]he appropriate test for determining the existence of jurisdiction over facts occurring after the filing of an application is . . . whether the facts 'aris[e] directly out of the question which is the subject-matter of [the] Application'". Nicaragua argues that the events which occurred after 27 November 2013, like those which occurred before that date, arose directly out of the question which is the subject-matter of the Application. According to Nicaragua, those subsequent events, which are both composite and continuing in character, do not form a new dispute, but are manifestations of the same dispute that is presently before the Court. Moreover, Nicaragua contends that Colombia itself refers to events that occurred after the institution of the proceedings in order to support its counter-claims.

* *

39. The Court recalls that, at the preliminary objection stage, Colombia's first preliminary objection was that the Court lacked jurisdiction because Colombia had given its notice of denunciation of the Pact of Bogotá on 27 November 2012, before Nicaragua filed its Application in the present case. The Court rejected Colombia's objection on the ground that, by virtue of Article LVI, paragraph 1, of the Pact, Article XXXI thereof, which conferred jurisdiction on the Court, remained in force between the Parties on the date that the Application in the present case was filed. The subsequent termination of the Pact of Bogotá as between Nicaragua and Colombia did not affect the jurisdiction which existed on the date when the proceedings were instituted.

The question raised by Colombia in the present context concerns the interpretation of Articles XXXI and LVI of the Pact of Bogotá, which was addressed by the Court at length in the 2016 Judgment.

Article XXXI states:

> "In conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice, the High Contracting Parties declare that they recognize in relation to any other American State, the jurisdiction of the Court as compulsory *ipso facto*, without the necessity of any special agreement so long as the present Treaty is in force, in all disputes of a juridical nature that arise among them concerning:

> *a)* The interpretation of a treaty; *b)* Any question of international law; *c)* The existence of any fact which, if established, would constitute the breach of an international obligation; *d)* The nature or extent of the reparation to be made for the breach of an international obligation."

According to Colombia, the phrase "so long as the present Treaty is in force" in Article XXXI provides a temporal limitation to Colombia's consent to the Court's jurisdiction over disputes as described in subparagraphs *(b)* and *(c)*. It argues that the Court does not have jurisdiction over the claims based on the events that allegedly occurred after the Pact of Bogotá ceased to be in force for Colombia.

40. The Court does not consider that Colombia's argument correctly reflects the meaning of Article XXXI. Subparagraphs *(b)* and *(c)* of that Article refer to the subject-matter of a dispute over which the Court may exercise jurisdiction (see *Border and Transborder Armed Actions (Nicaragu*a v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 84, para. 34). The phrase "so long as the present Treaty is in force" limits the period within which such a dispute must have arisen. Since the Court has already decided in its 2016 Judgment that there existed a dispute between the Parties that fell within the scope of Article XXXI at the time Nicaragua filed its Application, the question of consent under Article XXXI with regard to that dispute does not arise at the present stage of the proceedings. The question now before the Court is whether its jurisdiction over that dispute extends to facts or events that allegedly occurred after the lapse of the title of jurisdiction.

41. Colombia maintains that its view on the Court's jurisdiction *ratione temporis* is reinforced by the 2016 Judgment, in which, according to Colombia, the Court stated that the dispute was limited to the facts that occurred before the filing of the Application. However, Colombia mischaracterizes the 2016 Judgment, in which the Court, applying its settled jurisprudence, recalled that the date at which its jurisdiction has to be established is the date on which the application is filed with the Court (*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. 18, para. 33, citing *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, pp. 437-438, paras. 79-80, and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 613, para. 26). In order to determine whether the Court has jurisdiction in a particular case, it has to ascertain whether there existed a dispute between the parties on the date on which the application was filed. For that purpose, the Court's decision must be based on the acts which allegedly occurred before that date. Contrary to what Colombia claims, the 2016 Judgment does not preclude the Court from entertaining those incidents that allegedly occurred after the filing of the application.

42. With regard to the lapse of the jurisdictional title, the Court has stated in a number of cases that, "according to its established jurisprudence, if a title of jurisdiction is shown to have existed at the date of the institution of proceedings, any subsequent lapse or withdrawal of the jurisdictional instrument is without effect on the jurisdiction of the Court" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 445, para. 95; see also *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. 18, para. 33; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 28,

para. 36; *Nottebohm (Liechtenstein* v. *Guatemala), Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 123). There is nothing in the Court's jurisprudence to suggest that the lapse of the jurisdictional title after the institution of proceedings has the effect of limiting the Court's jurisdiction *ratione temporis* to facts which allegedly occurred before that lapse.

43. Although the question posed by Colombia has not previously been presented to the Court, considerations that have been brought to bear on the adjudication of a claim or submission made after the filing of an application can be instructive in the present case. In the view of the Court, the criteria that it has considered relevant in its jurisprudence to determine the limits *ratione temporis* of its jurisdiction with respect to such a claim or submission, or the admissibility thereof, should apply to the Court's examination of the scope of its jurisdiction *ratione temporis* in the present case.

44. In cases involving the adjudication of a claim or submission made after the filing of the application, the question has in some cases been addressed as one of jurisdiction and, in others, as one of admissibility. The Court has in such instances considered whether such a claim or submission arose directly out of the question which is the subject-matter of the application or whether entertaining such a claim or submission would transform the subject of the dispute originally submitted to the Court (see *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 203, para. 72; *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 484, para. 45; *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 266-267, paras. 67 and 69-70; and *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 16, para. 36). With regard to facts or events subsequent to the filing of the application, in *Certain Questions of Mutual Assistance in Criminal Matters*, the Court referred to the above jurisprudence and stated the following:

> "When the Court has examined its jurisdiction over facts or events subsequent to the filing of the application, it has emphasized the need to determine whether those facts or events were connected to the facts or events already falling within the Court's jurisdiction and whether consideration of those later facts or events would transform the 'nature of the dispute'" (*Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, pp. 211-212, para. 87).

Although the Court did not find the above criteria applicable to that case, since the matter before it concerned jurisdiction *ratione materiae* and not jurisdiction *ratione temporis*, it affirmed the relevance of criteria relating to "continuity" and "connexity" for "determining limits *ratione temporis* to its jurisdiction" (*ibid.*, p. 212, para. 88).

45. In the 2016 Judgment, the Court did not address the question of jurisdiction *ratione temporis* with regard to those alleged incidents that occurred after the denunciation of the Pact of Bogotá came into effect. However, its Judgment implies that the Court has jurisdiction to examine every aspect of the dispute that the Court found to have existed at the time of the filing of the Application. As the Court has pointed out,

> "it has become an established practice for States submitting an application to the Court to reserve the right to present additional facts and legal considerations. The limit of the freedom to present such facts and considerations is 'that the result is not to transform

> the dispute brought before the Court by the application into another dispute which is different in character' (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 427, para. 80)" (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 318-319, para. 99). See also *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, pp. 213-214, paras. 116-118).

It follows that the task of the Court is to decide whether the incidents alleged to have occurred after the lapse of the jurisdictional title meet the aforementioned criteria drawn from the Court's jurisprudence.

46. The incidents said to have occurred after 27 November 2013 generally concern Colombian naval vessels and aircraft allegedly interfering with Nicaraguan fishing activities and marine scientific research in Nicaragua's maritime zones, Colombia's alleged policing operations and interference with Nicaragua's naval vessels in Nicaragua's maritime waters and Colombia's alleged authorization of fishing activities and marine scientific research in Nicaragua's exclusive economic zone. These alleged incidents are of the same nature as those that allegedly occurred before 26 November 2013. They all give rise to the question whether Colombia has breached its international obligations under customary international law to respect Nicaragua's rights in the latter's exclusive economic zone, a question which concerns precisely the dispute over which the Court found it had jurisdiction in the 2016 Judgment.

47. In light of the foregoing considerations, the Court concludes that the claims and submissions made by Nicaragua in relation to incidents that allegedly occurred after 27 November 2013 arose directly out of the question which is the subject-matter of the Application, that those alleged incidents are connected to the alleged incidents that have already been found to fall within the Court's jurisdiction, and that consideration of those alleged incidents does not transform the nature of the dispute between the Parties in the present case. The Court therefore has jurisdiction *ratione temporis* over Nicaragua's claims relating to those alleged incidents.

III. ALLEGED VIOLATIONS BY COLOMBIA OF NICARAGUA'S RIGHTS IN ITS MARITIME ZONES

48. The dispute between the Parties in the present case raises questions concerning the rights and duties of the coastal State and the rights and duties of other States in the exclusive economic zone. The Applicant and the Respondent agree that the applicable law between them is customary international law. Nicaragua is a party to UNCLOS and Colombia is not; consequently, UNCLOS is not applicable between them. The Court notes that both Parties acknowledge that a number of the provisions of UNCLOS that they refer to reflect customary international law. They disagree, however, about whether that is true of other provisions that are at issue in the present case. The Court will consider whether the particular provisions of the Convention relevant to the present case reflect customary international law when addressing Nicaragua's claims and Colombia's counter-claims.

A. Colombia's contested activities in Nicaragua's maritime zones

1. Incidents alleged by Nicaragua in the south-western Caribbean Sea

49. In its submissions, Nicaragua requests the Court to adjudge and declare that, by its conduct, Colombia has breached its international obligation to respect Nicaragua's maritime zones as delimited by the Court in its 2012 Judgment. Nicaragua claims that, after the Court delivered its Judgment on maritime delimitation, Colombia engaged in a series of acts that violated Nicaragua's sovereign rights and jurisdiction in Nicaragua's exclusive economic zone. Nicaragua maintains that Colombia attempted to enforce its own jurisdiction in Nicaragua's maritime zones, including by obstructing, through both naval and aerial means, Nicaragua's exercise of its own jurisdiction; by harassing and intimidating Nicaraguan-flagged and Nicaraguan-licensed fishing vessels; and by authorizing Colombians and nationals of third States to operate in those zones. Nicaragua also refers to instances in which it alleges that Colombia asserted its sovereignty over Nicaragua's exclusive economic zone or otherwise rejected the 2012 Judgment.

50. Nicaragua contends that Colombia must establish that the rights it claims in Nicaragua's exclusive economic zone are "attributed" to it, and not to Nicaragua, under customary international law. According to Nicaragua, the set of sovereign rights of the coastal State for the purpose of exploring and exploiting, conserving and managing natural resources in the exclusive economic zone "contains no exception or qualification that would give or preserve traditional fishing rights of artisanal fishermen".

51. The Applicant recognizes that the Respondent enjoys, in Nicaragua's exclusive economic zone, freedoms of navigation and overflight and other internationally lawful uses of the sea related to these freedoms. It does not question Colombia's right to take action against Colombian-flagged vessels or against a vessel suspected of drug-trafficking that a Colombian naval vessel may happen to encounter in Nicaragua's exclusive economic zone. The Applicant argues, however, that in light of the ordinary meaning of the word "navigation", the scope of the Respondent's freedom of navigation is limited to the passage of ships or the movement of ships on water and does not include systematic acts of "monitoring" and "tracking".

52. The Applicant complains that the Respondent has erected and implemented a régime of surveillance and enforcement that treats Nicaragua's exclusive economic zone as if it were Colombian "national waters". Nicaragua further argues that Colombia has no right to enforce or police environmental standards in Nicaragua's exclusive economic zone, because UNCLOS is clear in allocating jurisdiction to coastal and flag States in relation to the protection and preservation of the marine environment.

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53. For its part, Colombia contends that in the exclusive economic zone, States other than the coastal State enjoy freedoms of navigation and overflight as well as other internationally lawful uses of the sea. According to Colombia, in assessing the lawfulness of a State's conduct in another State's exclusive economic zone, regard needs to be had to the customary international law of the sea, which may be identified by reference to both the text of UNCLOS and to State practice; to other rules of customary international law, including local custom; to commitments undertaken in unilateral declarations; and to rules reflected in other applicable treaties. It is not the case, in the Respondent's view, that a right not specifically attributed to third States necessarily vests with the coastal State.

54. In support of the legality of its actions, the Respondent claims that it has acted in accordance with three types of rights and duties recognized by international law: (i) the right and duty to protect and preserve the environment of the south-western Caribbean Sea; (ii) the due diligence duty within the relevant maritime area; and (iii) the right and duty to protect the habitat of the Raizales and other local communities inhabiting the Archipelago. Colombia asserts that, in view of the fragility of the Caribbean ecosystem resulting from threats such as marine-based pollution, overfishing and other predatory practices, it has adopted a series of protective measures and become a party to bilateral and regional agreements to protect and preserve the area, among which the most important are the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, done at Cartagena de Indias on 24 March 1983 (hereinafter the "Cartagena Convention") and the Protocol Concerning Specially Protected Areas and Wildlife to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, done at Kingston on 18 January 1990 (hereinafter the "SPAW Protocol"). In addition, Colombia established two special reserve areas for marine environmental protection in 2000 and 2005, the Seaflower Biosphere Reserve and the Seaflower Marine Protected Area, with the respective aims of protecting the marine environment in the south-western Caribbean Sea and the habitat of the Raizales community.

55. The Respondent claims that it therefore has the right and duty to protect and preserve the environment of the south-western Caribbean Sea and the duty to exercise due diligence within the relevant marine area. It states that "[e]nvironmental concerns within the Southwestern Caribbean Sea need to be fully taken into account regardless of considerations of sovereignty or sovereign rights". According to Colombia, it has the right to monitor and track any practices that endanger the marine environment and urge them to cease. The Respondent maintains that to find unlawful under customary international law an activity of Colombia that is not specifically recognized as encompassed by its freedoms of navigation and overflight, or other permissible uses of the sea, it must be proved that "Colombia's actions impeded, or materially prejudiced, Nicaragua's ability to exercise its sovereign rights".

* *

56. The Court recalls that the applicable law between the Parties is customary international law. The Court notes that, by the time UNCLOS was concluded, the concept of the exclusive economic zone had already received widespread acceptance by States. In 1985, the Court found it incontestable that the institution of the exclusive economic zone had become a part of customary law (*Continental Shelf (Libya Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 33, para. 34). To date, around 130 States, including both parties and non-parties to the Convention, have adopted national legislation or administrative decrees declaring an exclusive economic zone.

57. Customary rules on the rights and duties in the exclusive economic zone of coastal States and other States are reflected in several articles of UNCLOS, including Articles 56, 58, 61, 62 and 73. Article 56 reads as follows:

"Article 56

Rights, jurisdiction and duties of the coastal State in the exclusive economic zone

1. In the exclusive economic zone, the coastal State has:

(a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;

(b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:

(i) the establishment and use of artificial islands, installations and structures;

(ii) marine scientific research;

(iii) the protection and preservation of the marine environment;

(c) other rights and duties provided for in this Convention.

2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.

3. The rights set out in this article with respect to the sea-bed and subsoil shall be exercised in accordance with Part VI."

58. Articles 61 and 62 address the conservation and utilization of the living resources in the exclusive economic zone. Under Article 61, the coastal State has the responsibility to conserve the living resources in that maritime zone. For that purpose, it shall determine the allowable catch of the living resources in the exclusive economic zone and ensure, through proper conservation and management measures, taking into account the best scientific evidence available to it, that the living resources in that zone are not endangered by over-exploitation. The coastal State shall take measures

to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the economic needs of the coastal fishing communities and the special requirements of developing States. Article 62 provides that in order to achieve an optimum utilization of the living resources in the exclusive economic zone, the coastal State shall determine its capacity to harvest the living resources of the zone, and, where it does not have the capacity to harvest the entire allowable catch, it shall, through agreements or other arrangements, give other States access to the surplus of the allowable catch, with particular attention paid to the rights of landlocked States and geographically disadvantaged States. Article 62 also provides that nationals of other States fishing in a coastal State's exclusive economic zone shall comply with the conservation measures established in the laws and regulations adopted by the coastal State in conformity with the Convention.

59. Moreover, under Article 73 of UNCLOS, the coastal State, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, has the power to take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations it has adopted in conformity with UNCLOS.

60. In exercising its sovereign rights and jurisdiction in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall observe its other obligations under the law of the sea.

61. Customary international law also attributes rights and duties to other States in the exclusive economic zone, as reflected in Article 58 of UNCLOS, which states:

> "Article 58
>
> *Rights and duties of other States in the exclusive economic zone*
>
> 1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.
>
> 2. Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.
>
> 3. In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part."

62. Thus, under customary international law, all States enjoy the freedoms of navigation and overflight, as well as other internationally lawful uses related to such freedoms, in another State's exclusive economic zone. Moreover, the customary rules as reflected in Articles 88 to 115 of UNCLOS and other pertinent rules of international law are applicable to the exclusive economic zone in so far as they are not incompatible with the régime of that zone.

63. In exercising their rights and performing their duties in the exclusive economic zone, other States shall have due regard to the sovereign rights and jurisdiction of the coastal State in that zone.

*

64. In considering whether the evidence establishes the violations of customary international law alleged by Nicaragua, the Court will be guided by its jurisprudence on questions of proof. The Court recalls that, "as a general rule, it is for the party which alleges a particular fact in support of its claims to prove the existence of that fact" (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Compensation, Judgment, I.C.J. Reports 2018 (I)*, p. 26, para. 33; see also *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, p. 660, para. 54). The Court will treat with caution evidentiary materials prepared for the purposes of a case, as well as evidence from secondary sources (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 731, para. 244; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, pp. 201, 204 and 225, paras. 61, 68 and 159; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 41, para. 65). It will consider evidence that comes from contemporaneous and direct sources to be more probative and credible. The Court will also "give particular attention to reliable evidence acknowledging facts or conduct unfavourable to the State represented by the person making them" (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 201, para. 61, citing *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 41, para. 64). Finally, while press articles and documentary evidence of a similar secondary nature are not capable of proving facts, they can corroborate, in some circumstances, the existence of facts established by other evidence (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Merits, Judgment, I.C.J. Reports 2015 (I)*, p. 87, para. 239, citing *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 40, para. 62).

65. In the present case, Nicaragua refers to over 50 alleged incidents at sea. The Court observes that, for most of these events, Nicaragua mainly relies on the following materials as evidence: a letter from the Nicaraguan Naval Force to the Ministry of Foreign Affairs of Nicaragua dated 26 August 2014, which contains a report of alleged incidents produced pursuant to a request for information from the Ministry of Foreign Affairs and which is accompanied by daily reports from the Navy and, in respect of some of the alleged incidents, audio recordings of exchanges between the vessels

involved. According to Nicaragua, these daily reports in map format were prepared contemporaneously with the incidents and maintained in the logs of the Nicaraguan armed forces. The above-mentioned report listing alleged incidents was also annexed to a diplomatic Note sent by Nicaragua to Colombia, dated 13 September 2014. Moreover, Nicaragua adduces three letters from the President of the Nicaraguan Chamber of Fisheries to the Executive Director of the Nicaraguan Institute of Fisheries and Aquaculture (hereinafter "INPESCA"), dated, respectively, 6 January 2014, 1 July 2014, and 24 July 2014, each of which refers to certain incidents allegedly reported by captains or crewmembers of fishing vessels to their vessel owners. For alleged incidents between 2015 and 2017, Nicaragua also produces daily reports from its Navy, some with audio recordings attached. In addition to these letters and materials, Nicaragua refers to diplomatic Notes, affidavits, photographic and audio-visual materials, and media reports.

66. In considering the evidentiary weight of the reports from the Nicaraguan Navy, some of which are accompanied by audio recordings, the Court takes into account Nicaragua's assertion that these reports were prepared contemporaneously with alleged events, while also bearing in mind that they appear to have been prepared for the purposes of the current proceedings and that, in many instances, they do not contain first-hand evidence. The Court approaches with some caution the letters from the President of the Nicaraguan Chamber of Fisheries to the Executive Director of INPESCA, which do not contain first-hand accounts of events and at least some of which appear to have been specially prepared for the purposes of the case.

67. In response, Colombia presents, for certain incidents, its naval maritime travel reports and navigation logs to prove that its naval frigates did not have encounters with Nicaraguan vessels at the times and the places alleged by Nicaragua, or that the naval frigates concerned were recorded docking at the port or elsewhere at the relevant time. In respect of some incidents, Colombia also provides communications from officers of the Colombian Navy, audio recordings, photographic evidence, and video footage of its own, as well as affidavits. In addition, in respect of incidents which allegedly occurred before 18 March 2014, Colombia refers to the statement made on that date by the Chief of Nicaragua's Army that there had been "no incidents" involving Colombia or its Navy.

68. With regard to Colombia's evidence, the Court considers that the Colombian Navy's maritime travel reports and navigation logs have probative value, as they mostly provide information from contemporaneous and direct sources. The Court will attach particular significance to reliable evidence that admits or establishes facts unfavourable to Colombia. In the same way as with the evidence adduced by Nicaragua, the Court will treat with caution reports and affidavits adduced by Colombia which appear to have been prepared specially for the purposes of the case.

69. Upon examination of the evidence submitted by Nicaragua, the Court finds that for many alleged incidents, Nicaragua seeks to establish that Colombian naval vessels violated Nicaragua's rights in its maritime zones; yet its evidence does not prove, to the satisfaction of the Court, that Colombia's conduct in Nicaragua's exclusive economic zone went beyond what is permitted under customary international law as reflected in Article 58 of UNCLOS. In relation to a number of other alleged incidents, Nicaragua's evidence is primarily based on what fishermen reported to the owners

of their vessels, on materials that were apparently prepared for the purposes of the present case without other corroborating evidence, on audio recordings that are not sufficiently clear, or on media reports that either do not indicate the source of their information or are otherwise uncorroborated. The Court does not consider that such evidence suffices to establish Nicaragua's allegations against Colombia.

The Court considers that, with regard to the alleged incidents referred to above, Nicaragua has failed to discharge its burden of proof to establish a breach by Colombia of its international obligations. The Court will therefore dismiss those allegations for lack of proof.

70. With regard to the rest of the alleged incidents, the Court will examine in detail the evidence adduced by Nicaragua, together with Colombia's responses to each of the alleged incidents.

* *

The alleged incidents of 17 November 2013

71. Nicaragua claims that in the morning of 17 November 2013 the ARC *Almirante Padilla*, a Colombian frigate, ordered the *Miss Sofia*, a Nicaraguan lobster ship, to move from its position at 14° 50' 00" N and 81° 45' 00" W because the lobster ship was in "Colombian waters". According to Nicaragua, when the *Miss Sofia* refused to leave, the Colombian frigate sent a speedboat to chase the lobster ship away. Nicaragua bases these allegations on the report of incidents attached to the letter from the Nicaraguan Naval Force to the Ministry of Foreign Affairs of Nicaragua, dated 26 August 2014 and the letter from the President of the Nicaraguan Chamber of Fisheries to the Executive Director of INPESCA, dated 6 January 2014. On the basis of the same evidence, Nicaragua claims that, later that day at around 3 p.m., after one of its coast guard vessels, the *Río Escondido*, informed the ARC *Almirante Padilla* that it was in Nicaraguan waters, the Colombian frigate refused to leave, stating that the Government of Colombia did not recognize the 2012 Judgment. Nicaragua argues that the different narrative of the alleged incident provided by Colombia (see paragraph 72 below) is not inconsistent with its own allegations, as the two accounts pertain to events that occurred at different times of the day.

72. With regard to these events, Colombia acknowledges that the ARC *Almirante Padilla* and the *Miss Sofia* were in the Luna Verde area on 17 November 2013. Colombia claims, however, that on that day the ARC *Almirante Padilla* unsuccessfully tried to contact the *Miss Sofia* in order to return two fishermen whom it had rescued in the late afternoon and who appeared to have been abandoned by the *Miss Sofia*. Colombia asserts that, due to its inability to establish contact with the fishing vessel, its frigate contacted the Nicaraguan patrol boat. Colombia claims that it acted in accordance with its obligation under customary international law to assist any person found at sea in the exclusive economic zone in danger of being lost. In relation to these events, Colombia refers to signed declarations by two fishermen, dated 17 November 2013, attesting to their good treatment by the crew of the Colombian frigate, to audio-visual material, and to a communication from the Commander of the ARC *Almirante Padilla* to the Commander of the Specific Command of San Andrés and Providencia dated 20 November 2013. Colombia did not provide any information or evidence concerning the location and activities of the ARC *Almirante Padilla* before 5.10 p.m. that day.

The alleged incidents of 27 January 2014

73. Nicaragua claims that, on 27 January 2014, the Colombian frigate ARC *Independiente* informed the *Caribbean Star*, a Nicaraguan lobster ship, located at 14° 47' 00" N and 81° 52' 00" W, that it was fishing illegally in the Seaflower Biosphere Reserve. In support of this claim, Nicaragua relies on an audio recording, the letter from the President of the Nicaraguan Chamber of Fisheries to the Executive Director of INPESCA dated 1 July 2014, and the report of incidents attached to the letter from the Nicaraguan Naval Force to the Ministry of Foreign Affairs dated 26 August 2014. According to the audio recording submitted by Nicaragua, the Colombian frigate stated "the Colombian [S]tate has determined that the judgment of the International Court of Justice is not applicable, therefore the units of the [Colombian Navy] will continue exercising sovereignty and control over these waters". Also on the basis of the report attached to the letter dated 26 August 2014, Nicaragua alleges that, on the same day, the ARC *Independiente* harassed the *Al John*, another lobster ship, operating with a Nicaraguan fishing licence at 14° 44' 00" N and 81° 47' 00" W.

74. For its part, Colombia states that it cannot confirm the authenticity of the audio recording. It denies, by reference to the maritime travel report of the ARC *Independiente* for 27 January 2014, that the *Independiente* encountered the *Caribbean Star* on that day, but concedes that the ARC *Independiente* was in Nicaragua's exclusive economic zone and that it interacted with the *Al John*. Colombia refers to a communication from the Commander of the Colombian Naval Force of the Caribbean, dated 28 January 2014, in support of its claim that the ARC *Independiente* did not harass the *Al John* as Nicaragua asserts but rather informed it that its practices in the Seaflower Biosphere Reserve were illegal. According to the communication on which Colombia relies, the captain of the *Al John* asked the Colombian frigate to allow his crew to continue to work "in these Nicaraguan waters". Colombia claims that this was the end of the communication, indicating that the fishermen were neither intimidated nor prevented from carrying out their activities.

The alleged incidents of 5 February 2014

75. According to Nicaragua, on 5 February 2014, the ARC *20 de Julio*, a Colombian frigate, informed the Nicaraguan Navy vessel *Tayacán* and 12 Nicaraguan fishing boats operating in the vicinity of 14° 44' 01" N and 81° 39' 08" W to withdraw from Colombia's contiguous zone and territorial sea. Nicaragua relies, in this regard, on the report of incidents and an audio recording attached to the letter dated 26 August 2014. In the audio recording submitted by Nicaragua, the speaker identifies himself as representing the "[Navy] of the Republic of Colombia, ARC '20 de Julio'" and informs "Nicaraguan units" that "you are in Colombia jurisdictional waters — the Colombian State has determined that the ruling by The Hague is not applicable; therefore, the units of the [Navy] of the Republic of Colombia will continue to exercise sovereignty over these waters". The speaker also notes the specific co-ordinates at which the Nicaraguan units are located as 14° 44' 02" N and 81° 39' 06" W. By reference to the letter from the President of the Nicaraguan Chamber of Fisheries to the Executive Director of INPESCA dated 1 July 2014, as well as the above-mentioned report, Nicaragua also claims that, later that day, the ARC *20 de Julio* intercepted the *Nica Fish*, a Nicaraguan fishing boat, located at 14° 44' 00" N and 81° 39' 00" W, and urged it to withdraw from "Colombian waters".

76. Colombia does not challenge the authenticity of the audio recording submitted by Nicaragua, nor does it deny that its vessel interacted with the *Tayacán*, which the ARC *20 de Julio* identified as being located at 14° 44' N and 81° 36' W. Colombia, however, asserts that the mere reading of a statement concerning the 2012 Judgment, without any evidence of interference with Nicaragua's sovereign rights, does not amount to a violation of international law. Colombia also refers to the maritime travel report of the ARC *20 de Julio*, which it argues supports its claim that on 5 February 2014 the frigate identified only one fishing vessel, the *Nica Fish*, with which it did not interact.

The alleged incidents of 12 and 13 March 2014

77. Nicaragua claims that on 12 March 2014 the Colombian frigate ARC *20 de Julio* harassed the Nicaraguan lobster ship *Al John*, which was located at approximately 14° 44' 00" N and 81° 50' 00" W, by ordering it to withdraw from the area in which it was fishing and by sending a speedboat to chase it away. Nicaragua also alleges that the Colombian frigate and speedboat had a "hostile attitude". In respect of this alleged incident, Nicaragua relies on the letter from the President of the Nicaraguan Chamber of Fisheries to the Executive Director of INPESCA dated 1 July 2014 and the report attached to the letter from the Nicaraguan Naval Force to the Ministry of Foreign Affairs of Nicaragua dated 26 August 2014. Moreover, Nicaragua claims, on the basis of the same evidence, that, the following day, the same Colombian frigate ordered the *Marco Polo*, a Nicaraguan fishing boat in the vicinity of 14° 43' 00" N and 81° 45' 00" W, to leave the area in which it was fishing.

78. In response, Colombia accepts that the ARC *20 de Julio* interacted with the *Al John* and the *Marco Polo* on 12 and 13 March 2014, respectively. Colombia claims that its frigate simply informed each of the fishing vessels that they were operating "in a UNESCO specially-protected area" and invited them to suspend their environmentally harmful practices and to change them for other methods. The Respondent submits a communication from the Commander of the ARC *20 de Julio* to the Colombian Navy's Specific Command of San Andrés and Providencia dated 13 March 2014 to which photographic evidence and the transcription of communications with the two fishing vessels were attached, which indicates that the ARC *20 de Julio*, reading from a proclamation, informed the *Al John* and the *Marco Polo* that they were engaged in predatory fishing practices in a protected area. Colombia notes that, according to its transcription of those communications, the captain of the *Al John* said that it would move when it was "done fishing" and the *Marco Polo* replied that it would continue "exercising legal fishing". Colombia claims that these responses support its contention that there was no harassment or violation of Nicaragua's sovereign rights.

The alleged incident of 3 April 2014

79. Nicaragua alleges that on 3 April 2014 a Colombian Navy ocean patrol ship, the ARC *San Andrés*, harassed the *Mister Jim*, a Nicaraguan fishing boat, located at 14° 44' 00" N and 82° 00' 00" W, and advised it by radio that it should not continue to fish for lobster and should withdraw from the area. In relation to this allegation, Nicaragua relies on the report attached to the letter from the Nicaraguan Naval Force to the Ministry of Foreign Affairs of Nicaragua dated 26 August 2014 and the letter from the President of the Nicaraguan Chamber of Fisheries to the Executive Director of INPESCA dated 1 July 2014.

80. While conceding that an interaction did occur between the ARC *San Andrés* and the *Mister Jim*, Colombia claims that the ARC *San Andrés* invited the *Mister Jim* to suspend its environmentally harmful fishing practices and to make use of authorized fishing methods instead. The communication from the Commander of the Specific Command of San Andrés and Providencia to the Commander of the Naval Force of the Caribbean dated 7 April 2014 and submitted by Colombia with respect to this incident confirms that the interaction indeed took place. Colombia introduces evidence that indicates that, as part of the exchange, the ARC *San Andrés*, reading from a proclamation, "invited the *Mister Jim* to suspend its predatory fishing practices, which are harmful to the marine environment, and change its methods to authorized ones".

The alleged incident of 28 July 2014

81. Nicaragua alleges that on 28 July 2014 the captain of the Nicaraguan-flagged fishing vessel *Doña Emilia* informed a Nicaraguan Navy vessel that "a few days earlier", while at 14° 29' 00" N and 81° 53' 00" W, a Colombian Navy vessel advised the *Doña Emilia* that it could not operate in that area. Nicaragua supports this allegation by reference to the report and an audio recording attached to the letter from the Nicaraguan Naval Force to the Ministry of Foreign Affairs, dated 26 August 2014.

82. Colombia accepts that one of its naval vessels, the ARC *7 de Agosto*, interacted with the *Doña Emilia* on 22 July 2014. It presents a communication from the Commander of the Specific Command of San Andrés and Providencia to the Commander of Colombia's Naval Force of the Caribbean dated 22 July 2014. According to this communication, the ARC *7 de Agosto* informed the *Doña Emilia* that it had been found carrying out predatory fishing in a UNESCO protected environmentally sensitive area, and invited it "to suspend such harmful practice for the marine environment and change it for authorized methods". In support of its assertion that Nicaragua was not impeded from exercising its sovereign rights in the area, Colombia also refers to the transcript of the audio recording provided by Nicaragua, according to which the captain of the *Doña Emilia* stated that the fishing vessel ignored the Colombian naval vessel and continued with its fishing activities.

The alleged incidents of 26 March 2015

83. Nicaragua claims that on 26 March 2015 the ARC *11 de Noviembre*, located at 14° 50' 00" N and 81° 41' 00" W, stated to Nicaraguan coast guard vessel GC-401 *José Santos Zelaya* that, "according to the Colombian government, the ruling of The Hague [was] inapplicable, which is why [it was] in the Colombian Archipelago of San Andrés [and] Providencia". According to Nicaragua, later that day, the ARC *11 de Noviembre* informed the Nicaraguan-flagged fishing vessel *Doña Emilia* that it was engaging in predatory fishing at co-ordinates 14° 50' 2.98" N and 81° 47' 3.62" W and asked it to suspend this practice. In respect of these alleged events, Nicaragua relies on daily reports of its Navy and audio recordings. According to Nicaragua's transcript of one of these recordings, the captain of the ARC *11 de Noviembre* told the *Doña Emilia* that its fishing technique was "totally prohibited anywhere . . . regardless of the fishing license that a boat has" and asked the fishing vessel whether the "instructions" were clear.

84. For its part, Colombia claims that, even if true, Nicaragua's audio recording relating to GC-401 *José Santos Zelaya* shows no violation of Nicaragua's sovereign rights, and that Nicaragua is seeking to negate Colombia's rights in the south-western Caribbean Sea. As for the alleged interaction between the ARC *11 de Noviembre* and the *Doña Emilia*, Colombia claims to have no record of this encounter. It further claims that, if Nicaragua's audio recording is authentic, Nicaragua has distorted the alleged interaction. Colombia asserts that, in the recording, the Colombian officer informed the fishing vessel that "it was in a UNESCO specially-protected area, where predatory fishing was not permitted" and the officer "merely invited the vessel to suspend this harmful fishing practice and change it for authorized methods". According to Colombia, this alleged incident does not constitute a violation of Nicaragua's sovereign rights.

The alleged incident of 21 August 2016

85. Nicaragua further claims that on 21 August 2016 the captain of the *Marco Polo* reported that, while fishing at 14° 51' 00" N and 81° 41' 00" W, the Colombian frigate ARC *Almirante Padilla* informed the vessel that its fishing activities were illegal and "proceeded to emit an acute sound in the water, which obstructed the *Marco Polo*'s fishing for lobster, thereby forcing it to leave the area". In respect of this incident, Nicaragua relies on the letter from the Navy to the Commander in Chief of the Army, dated 20 August 2016, accompanied by a signed complaint from the captain of the Nicaraguan fishing vessel *Marco Polo*, as well as a daily report of its Navy.

86. Regarding the encounter with the *Marco Polo*, Colombia accepts that the ARC *Almirante Padilla* had an encounter with the Nicaraguan fishing vessel in question, but argues that the Colombian frigate, after finding the *Marco Polo* to be undertaking predatory fishing, merely read a proclamation used to address Nicaraguan fishing vessels engaging in what Colombia regarded as predatory practices and invited the crew to suspend its environmentally harmful fishing practices. Colombia relies on the maritime travel report of the ARC *Almirante Padilla* in claiming that the fishing vessel ignored this invitation, which, in Colombia's view, implies that the *Marco Polo* did not leave the area and was not precluded from carrying out its fishing activities.

The alleged incidents of 6 and 8 October 2018

87. Nicaragua alleges that, on 6 October 2018, the ARC *Almirante Padilla*, a Colombian naval vessel, intercepted the *Dr Jorge Carranza Fraser*, a Mexican-flagged vessel conducting marine scientific research activities with Nicaragua's authorization in waters south of Alburquerque Cay. Nicaragua claims that the Mexican-flagged vessel was located at 13° 51' 50.79" N and 81° 27' 18.066" W when the Colombian vessel "ordered it to stop its activities and prevented it from continuing [its marine scientific research activities], claiming that it was operating in Colombian waters". Nicaragua further alleges that, two days later, the ARC *Almirante Padilla* again intercepted the Mexican-flagged vessel while operating at 11° 51' 39.798" N and 80° 58' 9.998" W and ordered it to leave. Nicaragua bases its claim on evidence that includes diplomatic Notes, a letter from the Mexican National Institute of Fisheries and Aquaculture (hereinafter "INAPESCA"), dated 16 April 2019, and affidavits provided by two Mexican crew members accompanied by contemporaneous radar screen photographs. In respect of its allegations concerning the Mexican-flagged vessel, Nicaragua also refers to the original and modified navigation course and sampling stations of that vessel.

88. Colombia argues that the alleged incident "was a non-event". By reference to a communiqué by INAPESCA dated 8 October 2018, which indicates that on 5 October 2018 the Mexican-flagged vessel had already transited the area in which the alleged incident took place, Colombia claims that the Mexican-flagged vessel "could not have been where Nicaragua claims it was on 6 October 2018". Colombia further states that contemporaneous materials emanating from INAPESCA do not mention the alleged interference by Colombia and that neither Mexico nor INAPESCA protested the alleged event. While Colombia accepts that the INAPESCA letter dated 16 April 2019 refers to an encounter the Mexican-flagged vessel had with a marine patrol vessel from a third State, it notes that the letter "did not mention Colombia". Additionally, Colombia questions the veracity of the affidavits submitted by Nicaragua on the grounds that "[t]he individual who served as the notary public in both of them is . . . a recently retired member of Nicaragua's military as well as legal counsel in the current proceedings".

The alleged incident of 11 December 2018

89. Nicaragua claims that in the late evening of 10 December 2018 the Nicaraguan Navy vessel *Tayacán* boarded the *Observer*, a Honduran-flagged fishing boat, and found it to be conducting illegal fishing for lobster at 14° 58' 00" N and 81° 00' 00" W. According to Nicaragua, while escorting the *Observer* to a Nicaraguan port early in the morning of 11 December 2018, its naval vessel detected the presence of the ARC *Antioquia*, a Colombian Navy frigate, which established communication, demanding that the Nicaraguan Navy release the *Observer*. Nicaragua alleges that its naval vessel was harassed first by a low-flying plane and then by a fast boat dispatched by the ARC *Antioquia*, forcing the *Tayacán* to change course. According to Nicaragua, the ARC *Antioquia* followed the *Tayacán* for hours and then took hostile actions with the aim of impeding the transfer of the *Observer*, culminating in the *Antioquia* bumping several times into both the *Observer* and the *Tayacán.* Nicaragua further alleges that the crew of the *Antioquia* pointed guns at Nicaraguan naval personnel aboard the *Observer*, demanding that they surrender. In respect of these allegations, Nicaragua relies on, among other things, an affidavit from the Commander and Second Commander of the *Tayacán*; signed and notarized interviews with the captain, second captain, and two crew members of the *Observer*; audio-visual material; photographs; and audio recordings.

90. With respect to the alleged events of 10-11 December 2018, Colombia argues that the *Observer* was not fishing in Nicaragua's exclusive economic zone but was in transit between Colombia's islands. In this regard, Colombia refers to, among other things, how lobster fishing is carried out, the timing of the alleged events, and data from the vessel monitoring system of the *Observer*. Colombia also relies on these data in support of its claim that the ARC *Antioquia* was in the area in response to a distress call from the *Observer*. Colombia denies that it deployed either a low-flying plane or a fast boat to harass the Nicaraguan vessel and refers, in support of its position, to a communication from the Commander of Colombia's Air Force dated 23 October 2019, which states that on 11 December 2018 there were no flights by the Colombian Air Force in the area, as well as to an affidavit by the captain of the ARC *Antioquia* and the maritime travel report of the ARC *Antioquia*. Moreover, relying on audio-visual material, audio recordings, and the affidavit from the captain of the ARC *Antioquia*, Colombia claims that Nicaraguan officials tried to ram the ARC *Antioquia* and deliberately manoeuvred the *Tayacán* in order to have the *Observer* and the ARC *Antioquia* bump into each other. Colombia also questions the credibility of the affidavits produced

by Nicaragua, since the notary public for those affidavits is a recently retired member of Nicaragua's military who has served as legal counsel for Nicaragua in the present case. Referring to an affidavit from a crew member of the *Observer*, Colombia considers, moreover, that the interviews on which Nicaragua relies were taken under duress and that the Court should thus not take them into consideration.

* *

91. The Court considers that, based upon the above-mentioned evidentiary material, a number of facts on which Nicaragua's claim rests are established. First of all, as to many of the alleged incidents, the evidence supports Nicaragua's allegations regarding the location of Colombian frigates (see the alleged incidents of 17 November 2013; 27 January 2014; 12 and 13 March 2014; 3 April 2014; 28 July 2014; 21 August 2016; 6 and 8 October 2018). Colombia's own naval reports and navigation logs, as contemporaneous documents, also corroborate the specific geographic co-ordinates presented by Nicaragua, which lie within the area east of the 82° meridian, often in the fishing ground at or around Luna Verde, located within the maritime area that was declared by the Court to appertain to Nicaragua.

92. Moreover, the Colombian naval vessels purported to exercise enforcement jurisdiction in Nicaragua's exclusive economic zone (see the alleged incidents of 27 January 2014; 13 March 2014; 3 April 2014; 28 July 2014; 26 March 2015; 21 August 2016). In communications with Nicaraguan naval vessels and fishing vessels operating in Nicaragua's exclusive economic zone, Colombian naval officers, at times reading from a government proclamation, requested Nicaraguan fishing vessels to discontinue their fishing activities, alleging that those activities were environmentally harmful and were illegal or not authorized. These officials also stated to the Nicaraguan vessels that the maritime spaces concerned were "Colombian jurisdictional waters" over which Colombia would "continue to exercise sovereignty" on the basis of the determination by the Colombian Government that the 2012 Judgment "is not applicable". The evidence sufficiently proves that the conduct of Colombian naval vessels was carried out to give effect to a policy whereby Colombia sought to continue to control fishing activities and the conservation of resources in the area that lies within Nicaragua's exclusive economic zone.

93. Colombia relies on two legal grounds to justify its conduct at sea. First, Colombia claims that its actions, even if proved, are permitted as an exercise of its freedoms of navigation and overflight. Secondly, Colombia asserts that it has an international obligation to protect and preserve the marine environment of the south-western Caribbean Sea and the habitat of the Raizales and other inhabitants of the Archipelago. It argues that environmental concerns need to be fully taken into account regardless of considerations of sovereignty or sovereign rights.

94. With regard to the Respondent's first assertion, the Court considers that, in accordance with the customary rules on the exclusive economic zone, freedoms of navigation and overflight enjoyed by other States in the exclusive economic zone of the coastal State, as reflected in Article 58 of UNCLOS, do not include rights relating to the exploration, exploitation, conservation and management of the natural resources of the maritime zone, nor do they give other States jurisdiction to enforce conservation measures in the exclusive economic zone of the coastal State. Such rights and jurisdiction are specifically reserved for the coastal State under customary international law, as reflected in Articles 56 and 73 of UNCLOS.

95. With regard to Colombia's assertion relating to its international obligation to preserve the marine environment of the south-western Caribbean Sea, it is not contested between the Parties that all States have the obligation under customary international law to protect and preserve the marine environment. In the exclusive economic zone, however, it is the coastal State that has jurisdiction to discharge that obligation. As stated by the International Tribunal for the Law of the Sea (hereinafter "ITLOS"), "the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment" (*Southern Bluefin Tuna Cases (New Zealand* v. *Japan; Australia* v. *Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999*, p. 295, para. 70). In this respect, the coastal State bears the responsibility within its exclusive economic zone to take legislative, administrative and enforcement measures in accordance with customary international law, as reflected in the relevant provisions of UNCLOS, for the purpose of conserving the living resources and protecting and preserving the marine environment. A third State, in the capacity of a flag State, also has "an obligation to ensure compliance by vessels flying its flag with relevant conservation measures concerning living resources enacted by the coastal State for its exclusive economic zone" (*Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015*, p. 37, para. 120). However, a third State has no jurisdiction to enforce conservation standards on fishing vessels of other States in the exclusive economic zone.

96. The Court observes that great emphasis has been placed by the Respondent on its obligations to protect the marine environment of the south-western Caribbean Sea and the habitat of the Raizales and other inhabitants of the Archipelago under the Cartagena Convention and the SPAW Protocol (hereinafter referred to as the "Cartagena régime"). The Cartagena Convention was concluded with the objective of enhancing international co-operation to prevent, reduce and control pollution from various sources in the wider Caribbean region and to ensure sound environmental management. The SPAW Protocol is one of the three protocols to the Cartagena Convention, under which the States parties undertake to establish protected areas and take measures for the preservation of endangered species and marine areas. Colombia became a party to the Cartagena Convention on 2 April 1988 and Nicaragua became a party on 24 September 2005. Both Colombia and Nicaragua are parties to the SPAW Protocol, which entered into force on 17 June 2000. Colombia deposited its instrument of ratification on 5 January 1998; Nicaragua deposited its instrument of ratification on 4 May 2021.

97. In implementing the Cartagena régime, Colombia established the Seaflower Biosphere Reserve and the Seaflower Marine Protected Area. The Court observes that Colombia's two marine natural reserves were established in the south-western Caribbean Sea at the time when there were overlapping maritime claims between Colombia and Nicaragua in the area. As a result of the

maritime delimitation in the 2012 Judgment, these two marine natural reserves now partly overlap with Nicaragua's exclusive economic zone (see the map "Colombia's Seaflower Marine Protected Area", figure 2.3, Colombia's Counter-Memorial, p. 51). The question in the present case concerns the extent to which Colombia may exercise its rights and discharge its obligations under the Cartagena régime in an area that presently falls within the exclusive economic zone of Nicaragua. In Colombia's view, should Nicaragua fail to control and police predatory or other illegal fishing activities carried out by Nicaraguan nationals or by nationals of third States in that area, Colombia has the right and duty under the Cartagena régime to exercise due diligence to control such activities.

98. The maritime delimitation between the Parties directly affects the rights and duties of Colombia in the parts of the Seaflower Marine Protected Area and the Seaflower Biosphere Reserve that overlap with Nicaragua's exclusive economic zone. Colombia is under an international obligation to respect Nicaragua's sovereign rights and jurisdiction in those areas, not only on the basis of customary international law on the exclusive economic zone, but also on the basis of the Cartagena Convention and the SPAW Protocol. Article 10 of the Cartagena Convention states:

> "The Contracting Parties shall, individually or jointly, take all appropriate measures to protect and preserve rare or fragile ecosystems, as well as the habitat of depleted, threatened or endangered species in the Convention area. To this end, the Contracting Parties shall endeavour to establish protected areas. The establishment of such areas shall not affect the rights of other Contracting Parties and third States. In addition, the Contracting Parties shall exchange information concerning the administration and management of such areas."

The provision stating that "[t]he establishment of such areas shall not affect the rights of other Contracting Parties and third States" means that in discharging its obligations under the Cartagena Convention, Colombia must respect the sovereign rights and jurisdiction of Nicaragua in its exclusive economic zone. It may not, therefore, enforce conservation standards and protection measures in the area that is within Nicaragua's exclusive economic zone.

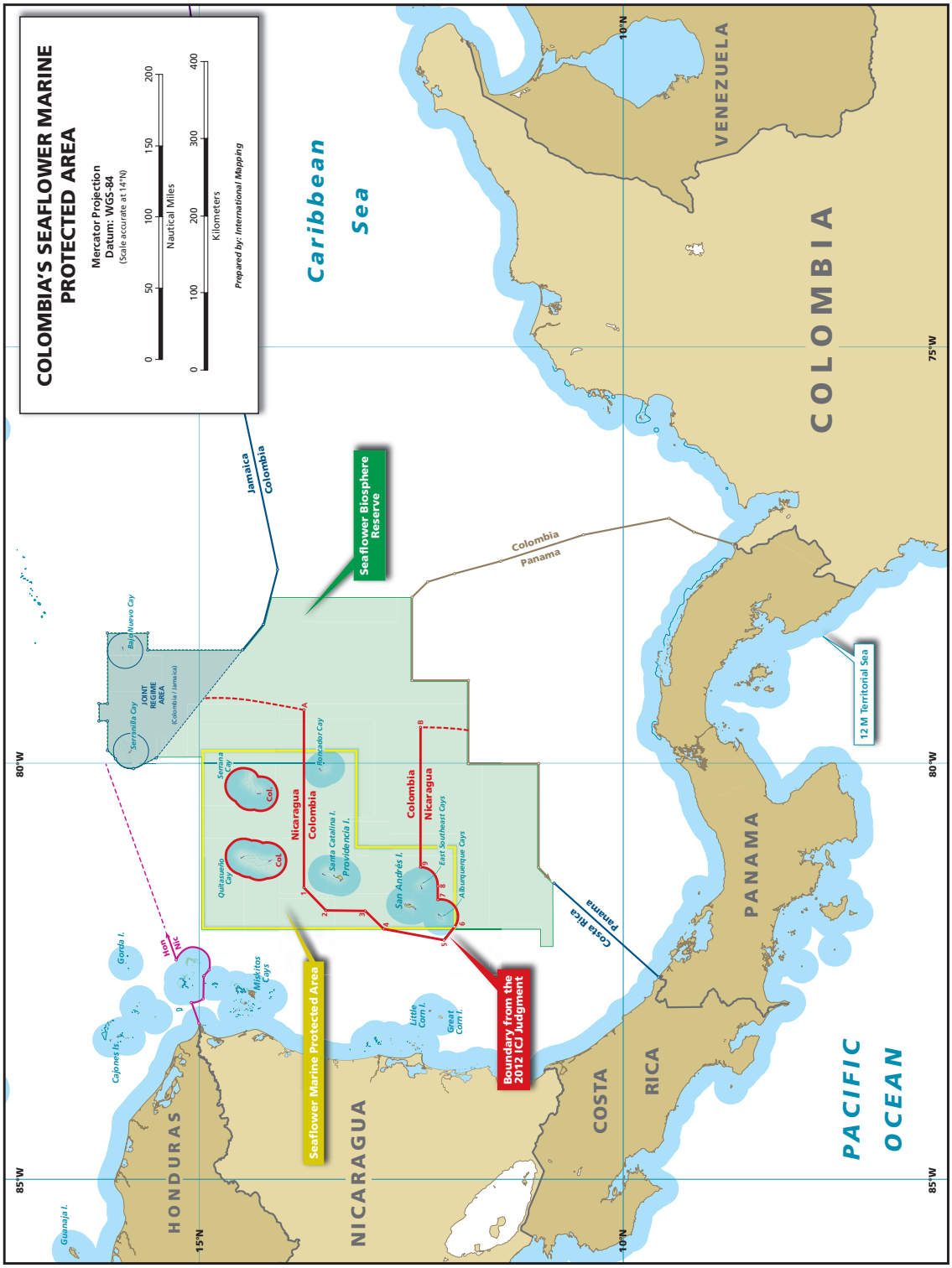
99. A similar provision is contained in the SPAW Protocol. Article 3, paragraph 1, of the Protocol states that each party "shall . . . take the necessary measures to protect, preserve and manage [certain areas and species of flora and fauna] in a sustainable way, within areas of the Wider Caribbean Region in which it exercises sovereignty, or sovereign rights or jurisdiction". Paragraph 2 of Article 3 further states that

> "[e]ach Party shall endeavour to co-operate in the enforcement of these measures, without prejudice to the sovereignty, or sovereign rights or jurisdiction of other Parties. Any measures taken by such Party to enforce or to attempt to enforce the measures agreed pursuant to this Protocol shall be limited to those within the competence of such Party and shall be in accordance with international law".

Contrary to Colombia's claim, therefore, under the SPAW Protocol the power of the States parties to adopt and enforce conservation measures is limited to the maritime areas in which they exercise sovereignty, or sovereign rights or jurisdiction. The fragility of the ecological environment of a protected area established by a State party does not provide a legal basis for it to take measures in areas that are subject to the sovereignty, sovereign rights or jurisdiction of another State party.

MAP SHOWING THE SEAFLOWER MARINE PROTECTED AREA AND THE SEAFLOWER BIOSPHERE RESERVE ACCORDING TO COLOMBIA

(*Source:* Colombia's Counter-Memorial, Figure 2.3, p. 51)



100. According to customary international law on the exclusive economic zone, Nicaragua, as the coastal State, enjoys sovereign rights to manage fishing activities and jurisdiction to take measures to protect and preserve the maritime environment in its exclusive economic zone. The evidence before the Court shows that the conduct of Colombian naval frigates in Nicaraguan maritime zones was not limited to "observing" predatory or illegal fishing activities or "informing" fishing vessels of such activities, as claimed by Colombia. This conduct often amounted to exercising control over fishing activities in Nicaragua's exclusive economic zone, implementing conservation measures on Nicaraguan-flagged or Nicaraguan-licensed ships, and hindering the operations of Nicaragua's naval vessels (see paragraph 92 above). The Court considers that Colombia's legal arguments do not justify its conduct within Nicaragua's exclusive economic zone. Colombia's conduct is in contravention of customary rules of international law as reflected in Articles 56, 58 and 73 of UNCLOS.

101. In light of the foregoing considerations, the Court finds that Colombia has violated its international obligation to respect Nicaragua's sovereign rights and jurisdiction in the latter's exclusive economic zone by interfering with fishing activities and marine scientific research by Nicaraguan-flagged or Nicaraguan-licensed vessels and with the operations of Nicaragua's naval vessels, and by purporting to enforce conservation measures in that zone.

2. Colombia's alleged authorization of fishing activities and marine scientific research in Nicaragua's exclusive economic zone

102. Nicaragua also claims that Colombia authorized fishing activities and marine scientific research in Nicaragua's exclusive economic zone. In support of these contentions, it refers to legal measures adopted by Colombia, as well as alleged incidents at sea. Nicaragua argues that, by these actions, Colombia violated its sovereign rights and jurisdiction in its exclusive economic zone.

103. According to Nicaragua, Colombia issued permits to Colombians and nationals of third States to fish in Nicaragua's exclusive economic zone. In this regard, Nicaragua refers to resolutions issued annually by the General Maritime Directorate of the Ministry of National Defence of Colombia (hereinafter "DIMAR"), starting with a resolution dated 26 June 2013 (Resolution No. 0311 of 26 June 2013; Resolution No. 305 of 25 June 2014; Resolution No. 0437 of 27 July 2015; Resolution No. 0459 of 27 July 2016; and Resolution No. 550 of 15 August 2017), each of which lists anywhere from six to nineteen foreign-flagged industrial fishing vessels which "shall automatically be granted a permit to stay and operate in the jurisdiction of the San Andrés and Providencia Harbour Master's Offices for the term of one year". In Nicaragua's view, the jurisdiction defined in these resolutions extends to maritime areas within Nicaragua's exclusive economic zone. Additionally, Nicaragua alleges that these resolutions encourage such fishing through financial incentives.

104. Nicaragua claims, moreover, that the Governor of the Department of the Archipelago of San Andrés, Providencia and Santa Catalina (hereinafter the "Governor of the San Andrés Archipelago") issued resolutions concerning the applicability of Colombian fishing permits to Nicaragua's exclusive economic zone. In this regard, Nicaragua specifies that Resolution No. 5081 of 22 October 2013 authorized the use by the Honduran-flagged vessel *Captain KD* of an existing industrial and commercial fishing permit to fish in "[a]ll banks (Roncador, Serrana and Quitasueño, Serranilla) and Shallows (Alicia and Nuevo), and the area known as *La Esquina* or *Luna Verde*", this latter area being "plainly under the jurisdiction of Nicaragua". Nicaragua also refers to Resolution No. 4780 of 2015 as recognizing the applicability of an "Industrial Commercial Fishing Permit" in "the area known as . . . '*La Esquina*' or '*Luna Verde*'". In addition, Nicaragua claims that Resolution No. 2465 of 2016 grants "'Traditional Commercial Fisherm[e]n' the right to engage in traditional fishing 'within the maritime jurisdiction of the Department of the Archipelago of San Andrés, Providencia and Santa Catalina', which includes maritime areas within Nicaragua's EEZ".

105. Further, Nicaragua refers to alleged incidents at sea in support of its claim that Colombia authorized and protected fishing and marine scientific research activities in Nicaragua's exclusive economic zone. Nicaragua emphasizes that the alleged fishing-related incidents all occurred "in or near the *Luna Verde* area".

*

106. Colombia contends that Nicaragua's allegation that it authorized Colombians and nationals of other States to fish and conduct marine scientific research activities in Nicaraguan waters is without merit. Regarding the resolutions issued by DIMAR, Colombia claims that the entity concerned does not possess the competence to grant fishing licences and that the resolutions do not grant economic incentives to promote fishing in Nicaragua's exclusive economic zone. In Colombia's view, the financial exemptions it granted comprise only financial relief without authorizing or encouraging industrial fishing and make no reference to Nicaragua's maritime zones.

107. Moreover, Colombia claims that the resolutions issued by the Governor of the San Andrés Archipelago do not authorize fishing activities in Nicaragua's exclusive economic zone; they expressly indicate that the only areas where fishing activities are authorized are Roncador, Serrana, Quitasueño, Serranilla, Bajo Alicia and Bajo Nuevo, areas which, according to Colombia, the Court has recognized as lying within Colombia's territorial sea and exclusive economic zone. The resolutions do not, in Colombia's view, authorize fishing activities in the Luna Verde bank or in other maritime spaces situated within Nicaragua's exclusive economic zone. As regards Nicaragua's reliance on Resolution No. 4780, Colombia contends that this resolution is not a fishing permit, that it does not concern the vessel to which Nicaragua refers, and that the reference in its preamble to Luna Verde does not purport to grant a licence to fish there. Colombia further claims that Resolution No. 2465 of 2016 is completely irrelevant, since it has "nothing to do with the granting of fishing permits or any Nicaraguan maritime spaces".

108. In respect of Nicaragua's claim concerning the *Captain KD*, Colombia argues that the authorization for an "integrated commercial industrial fishing permit" was granted in September 2012, before the maritime boundary was delimited by the Court, and that Resolution No. 5081 of 22 October 2013 referred to by Nicaragua does not grant authorization to fish at the Luna Verde bank.

109. As regards the incidents alleged by Nicaragua to demonstrate that Colombia authorized fishing and marine scientific research in Nicaragua's exclusive economic zone, Colombia claims that Nicaragua offers no direct evidence, or at least no direct evidence whose authenticity Colombia can confirm. It claims that Colombian vessels that were present at the location and time that some of the incidents alleged by Nicaragua occurred were there in exercise of Colombia's freedoms of navigation and overflight, or other internationally lawful uses of the sea.

* *

110. Before turning to the evidence relating to the incidents at sea alleged by Nicaragua, the Court will first consider the resolutions under which Nicaragua claims Colombia authorized fishing by Colombian-flagged and foreign vessels in Nicaragua's exclusive economic zone.

111. The resolutions in question were issued by two Colombian governmental authorities: DIMAR and the Governor of the San Andrés Archipelago. According to its resolutions, DIMAR has been conferred the "function of authorizing the operation of ships and naval craft in Colombian waters". While the permits granted by DIMAR to foreign vessels to stay and operate in the San Andrés Archipelago are subject to the authorization of the Governor of the San Andrés Archipelago, they nonetheless constitute an exercise of DIMAR's function of authorizing the operation of fishing vessels. The Court cannot dismiss Nicaragua's allegation simply on the basis of Colombia's statement that DIMAR is not the competent authority to grant such permits without further examining the evidence before it.

112. The case file shows that since the Court delivered its 2012 Judgment, DIMAR has annually issued resolutions relating to industrial fishing in the San Andrés Archipelago. Nicaragua refers to five resolutions: Resolution No. 0311 of 2013, Resolution No. 305 of 2014, Resolution No. 0437 of 2015, Resolution No. 0459 of 2016 and Resolution No. 550 of 2017.

113. The preamble of the first resolution states that, given the "negative economic and social effects" caused by the 2012 Judgment, "it was deemed necessary to implement special transitory measures applicable to national and foreign ships that have been engaged in industrial fishing in said area of the national territory". On its scope of application, Article 2 of the resolution states: "The provisions of this resolution shall be applicable exclusively to the following ships dedicated to industrial fishing in the jurisdiction of the San Andrés and Providencia Harbour Master's Offices".

On the granting of fishing permits for foreign ships, the resolution provides:

> "Article 4. *Stay-and-operation permit for foreign ships*. The foreign-flag motor ships listed in Section 2 of Article 2 of this resolution shall automatically be granted a permit to stay and operate in the jurisdiction of the San Andrés and Providencia Harbour Master's Offices for the term of one year from the entry into force of this resolution, upon authorization of the office of Secretary of Agriculture and Fishing of the Government of San Andrés, Providencia and Santa Ca[ta]lina."

114. Among the "special transitory measures" provided for by the resolution are payment exemptions granted to the national and foreign ships listed therein (Article 3). The content of Article 2 and Article 4 of Resolution No. 0311 of 2013, and an exemption from payment of certain fees, were consistently reaffirmed in subsequent resolutions.

115. With regard to the financial exemptions, the Court considers that, for the purposes of the present case, it is unnecessary to determine whether such measures granted by the Colombian Government "authorize" or "encourage" industrial fishing, as alleged by Nicaragua, or whether they comprise only financial relief to serve the objectives of the resolution, as claimed by Colombia. Insomuch as the jurisdiction of the San Andrés and Providencia Harbour Master's Offices accords with the maritime boundary between the Parties, measures taken under the resolution are matters that rest within the jurisdiction of Colombia. The critical issue for the Court to determine is the geographical scope of the fishing authorizations granted by the Colombian Government.

116. The Court observes that neither of the above-mentioned articles nor any other provisions contained in the DIMAR resolutions specify the extent of "the jurisdiction of the San Andrés and Providencia Harbour Master's Offices", a crucial issue for the purposes of the present case. On the basis of the resolutions themselves, the Court cannot determine whether the geographical scope of the area in which the listed fishing vessels were authorized to operate extends into Nicaragua's maritime area. Therefore, the Court must examine other evidence before it, including the resolutions issued by the Governor of the San Andrés Archipelago.

117. The documents submitted by Nicaragua include five resolutions issued by the Governor of the San Andrés Archipelago: Resolution No. 5081 of 22 October 2013, Resolution No. 4997 of 10 November 2014, Resolution No. 4356 of 1 September 2015, Resolution No. 4780 of 24 September 2015, and Resolution No. 2465 of 30 June 2016, each of which specifies the fishing zones for the fishing operations. In Resolution No. 4356 of 2015, the relevant fishing zone is described as comprising "all of the banks (Roncador, Serrana and Quitasueño, and Serranilla) and Shoals (Alicia and Nuevo), and the zone where fishing is permitted by the laws, which includes our [Colombia's] island territory and authorized fishing zones". Resolution No. 4997 of 2014 provides the same, with the addition of "zones where [activities for extraction of Fishery Resources are] permitted by . . . fishing regulations, and system *[sic]* of Protected Marine Areas that apply in the Department for Industrial Fishing". The fishing zone in Resolution No. 2465 of 2016 is described as "the territory that is within the jurisdiction of the Department of the Archipelago of San Andrés, Providencia and Santa Catalina". The scope of jurisdiction is not defined more clearly in these three resolutions than it is in the aforementioned DIMAR resolutions. In Resolution No. 5081 of 22 October 2013 and Resolution No. 4780 of 24 September 2015, however, the fishing zone is described more precisely.

118. In Resolution No. 5081 of 22 October 2013, the fishing zone is defined as follows:

> "All banks (Roncador, Serrana y Quitasue[ñ]o, Serranilla) and Shallows (Alicia and Nuevo), and the area known as *La Esquina* or *Luna Verde*, which encompasses our insular territory and fishing zones; nonetheless, protected areas and fisheries regulations of the department and fisheries legislation must be respected."

The fishing zone in Resolution No. 4780 contains the same reference to "the area known as . . . *La Esquina* or *Luna Verde*, which includes our [Colombia's] island territory and fishing zones".

119. As previously noted, the fishing ground at La Esquina or Luna Verde is located in Nicaragua's exclusive economic zone as delimited by the 2012 Judgment. The express inclusion of "*La Esquina* or *Luna Verde*" in the fishing zone described in resolutions issued by the Governor of the San Andrés Archipelago after the 2012 Judgment suggests that Colombia continues to assert the right to authorize fishing activities in parts of Nicaragua's exclusive economic zone.

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120. In light of the above consideration of Colombia's relevant resolutions, the Court will now examine the alleged incidents at sea to determine whether Colombia authorized fishing activities and marine scientific research in Nicaragua's exclusive economic zone.

The alleged incident of 13-14 February 2014

121. Nicaragua claims that, on 13 February 2014, the Nicaraguan vessel *Tayacán*, while on patrol at 14° 48' 00" N and 81° 36' 00" W, saw personnel from the Colombian frigate ARC *Almirante Padilla* board the *Blu Sky*, a Honduran-flagged fishing vessel. According to Nicaragua, when the *Tayacán* communicated with the *Blu Sky* on the next day in the vicinity of 14° 56' 00" N and 81° 35' 00" W, the captain of the *Blu Sky* informed the *Tayacán* that he had received authorization by Colombia to fish there. In respect of these allegations, Nicaragua relies on the report attached to the letter from the Nicaraguan Naval Force to the Ministry of Foreign Affairs dated 26 August 2014.

122. In response, Colombia asserts that Nicaragua was unaffected by the boarding of the fishing vessel, since Nicaragua is not the flag State of the vessel and since Nicaragua did not license it. By reference to two resolutions issued by the Governor of the San Andrés Archipelago, the Respondent claims that the alleged "fishing permits granted by Colombia" do not in fact grant fishing rights in Luna Verde or in any other area of Nicaragua's exclusive economic zone and that, therefore, the contention that Colombia authorized the *Blu Sky* to fish in that zone is false.

The alleged incident of 23 March 2015

123. Nicaragua claims that, on 23 March 2015, when one of its coast guard vessels, located at 14° 40' 00" N and 81° 45' 00" W, observed the Honduran-flagged fishing vessel *Lucky Lady* and asked it under whose authority it was fishing, the Colombian frigate ARC *Independiente* intervened, stating that "[the] *Lucky Lady* is under the protection of the government of Colombia" and that Colombia does not abide by the Court's 2012 Judgment. In relation to this alleged incident, Nicaragua relies on an audio recording and the daily reports of its Navy.

124. For its part, Colombia claims that the timing and location of this alleged incident cannot be established from Nicaragua's audio recording. Moreover, in denying that it granted any official authorization to fish in Nicaragua's exclusive economic zone, Colombia refers to a sailing record in which it granted the *Lucky Lady*, destined for the Northern Islands, permission to leave a Colombian port.

The alleged incident of 12 September 2015

125. Referring to audio recordings and the daily reports of its Navy, Nicaragua further claims that, on 12 September 2015, when Nicaragua's Navy vessel the *Tayacán* encountered the Tanzanian-flagged industrial fishing vessel *Miss Dolores* at 14° 54' 00" N and 81° 28' 00" W, a nearby Colombian frigate asked the *Tayacán* to stay away from the *Miss Dolores*, stating that the *Tayacán* had not been authorized by Colombia "to exercise visitation rights on the *Miss Dolores* flagship of Tanzania, which is fishing for the Colombian government".

126. Regarding this alleged incident, Colombia asserts that its circumstances, date and location cannot be ascertained from Nicaragua's audio recordings. Colombia also claims that, even if the audio recordings submitted by Nicaragua were authentic, they would confirm Nicaragua's attempt to claim sovereignty over maritime spaces in which international law only grants it limited sovereign rights, since they suggest that a Nicaraguan officer claimed to be "exercising sovereignty" in the waters in question.

The alleged incidents of 12 and 13 January 2016

127. Relying on audio recordings and the daily reports of its Navy, Nicaragua makes allegations concerning incidents involving the Honduran-flagged fishing vessel the *Observer* on 12 and 13 January 2016. More specifically, Nicaragua claims that, on 12 January 2016, the commander of one of its coast guard vessels, located at 14° 41' 00" N and 81° 41' 00" W, ordered the *Observer* to stop fishing there, to which the *Observer* replied that the Colombian authorities allowed it to fish in that area and indeed "ordered [it] to come and work here". Nicaragua claims that, later that day, its coast guard vessel attempted to hail the *Observer* after seeing it fish in the same area with the protection of a Colombian frigate, and that the Colombian frigate intervened, stating that the *Observer* was authorized by the Colombian maritime authority to fish in the area. Nicaragua alleges that the Colombian frigate gave a similar response the next day, when the Nicaraguan vessel informed the frigate that the *Observer*, located at 14° 42' 27" N and 81° 42' 39" W, had to leave the area.

128. With respect to these alleged events, Colombia claims, on the basis of a Note Verbale from the Ministry of Foreign Affairs of Colombia to the Ministry of Foreign Affairs of Nicaragua dated 1 February 2016, that Nicaraguan patrol boats were observed "on 11 and 12 January 2016 — . . . not on 12 and 13 January" and that "communications between the vessels were conducted in an amicable and professional manner". Colombia refers also to the fact that, if authentic, the audio recordings would confirm Nicaragua's attempt to claim sovereignty over maritime spaces in which international law only grants it limited sovereign rights, given the latter's reported reference to "Nicaraguan territorial waters", among other similar statements.

The alleged incidents of 6 January 2017

129. On the basis of an audio recording and the daily reports of its Navy, Nicaragua claims that, on 6 January 2017, the Honduran-flagged fishing vessel *Capitán Geovanie* refused to follow an order by the Nicaraguan Navy vessel *Tayacán* to leave Nicaragua's exclusive economic zone and that a Colombian frigate then announced that it was in the Archipelago of San Andrés and Providencia to guarantee the security of all vessels present in the area, before asking the *Capitán Geovanie* whether the *Tayacán* was interfering with its work and telling the *Capitán Geovanie* to continue its fishing in "historically Colombian waters". Nicaragua further alleges that the Colombian frigate told the Nicaraguan vessel not to attempt to board or prevent the fishing activities of the *Capitán Geovanie*, adding that the fishing vessel "is authorized by the Colombian maritime authority". Nicaragua claims, also on the basis of an audio recording and the daily reports of its Navy, that the Colombian frigate informed two other Honduran-flagged and Colombian-authorized fishing vessels, the *Observer* and the *Amex*, located at 14° 43' 00" N and 81° 45' 00" W and 14° 48' 00" N and 81° 42' 00" W respectively, that it would remain in the area for their safety.

130. In response, Colombia claims that some of the audio recordings submitted by Nicaragua contain no indication as to when or where the alleged incidents occurred. Moreover, Colombia claims that the audio recordings do not support Nicaragua's allegation that Colombia authorized those fishing vessels to fish in Nicaragua's exclusive economic zone. As regards the *Capitán Geovanie*, Colombia refers to the audio recording submitted by Nicaragua in support of its claim that the *Capitán Geovanie* left San Andrés with a specific sailing record, which, according to Colombia, indicates that authorization was given for fishing only in the Northern Islands, not in Nicaragua's exclusive economic zone. As regards Nicaragua's allegations concerning the other two vessels, Colombia claims that the alleged Colombian officer merely stated that they were watching over the safety of the vessels and that, in exercising its internationally lawful uses of the sea, Colombia "provides security to vessels of *all* nationalities" (emphasis in the original). Colombia further contends that Nicaragua's assertions concerning the alleged incidents on that day are implausible. Colombia states that given the meteorological conditions at the time it is difficult to believe that there were several vessels fishing so far from land.

* *

131. The evidence presented by the Parties is largely based on the same type of materials as described above (paragraphs 65-68). The Court considers that the evidence reveals at least three facts. First, the fishing vessels allegedly authorized by Colombia did engage in fishing activities in Nicaragua's exclusive economic zone during the relevant time. In this regard, the Court notes that the six foreign fishing vessels involved in the alleged incidents summarized above were identified by name in some of the resolutions of DIMAR and of the Governor of the San Andrés Archipelago. Secondly, such fishing activities were often conducted under the protection of Colombian frigates, a fact that Colombia does not deny. Thirdly, Colombia recognizes that the Luna Verde area is in Nicaragua's exclusive economic zone.

132. The Court considers that Colombia's responses to Nicaragua's allegations are not entirely convincing. Colombia's response that Nicaragua attempted to claim sovereignty over maritime spaces does not provide a legal basis for Colombia to claim a right to authorize fishing in Nicaragua's exclusive economic zone (see Colombia's responses to the alleged incidents of 12 September 2015 and of 12 and 13 January 2016). Nicaragua's efforts to prevent and stop fishing activities authorized by Colombia in Nicaragua's exclusive economic zone are a legitimate exercise of its sovereign rights and jurisdiction, to which it is entitled under customary international law. Moreover, the evidence demonstrates that Colombian frigates not only explicitly stated that the fishing vessels were authorized by the Colombian maritime authority to fish in the area but they also, in unequivocal terms, informed Nicaraguan naval vessels that those fishing ships were "under the protection of the government of Colombia". Colombia, in its responses to Nicaragua's allegations, denies that it authorized fishing activities in Nicaragua's exclusive economic zone. It does not, however, explain why its naval frigates constantly asserted their authority to protect those fishing activities purportedly unauthorized in Nicaragua's exclusive economic zone when Nicaraguan naval vessels intervened as to such fishing activities on the basis that they were not authorized by Nicaragua. The conduct of Colombian naval frigates, which is attributable to Colombia, confirms that Colombian authorization of fishing activities extended to the maritime area that now appertains to Nicaragua.

133. As regards Colombia's alleged authorization of marine scientific research in Nicaragua's exclusive economic zone, the Court cannot find in the resolutions before it any express reference to authorization of marine scientific research operations. Without other credible evidence to corroborate Nicaragua's claim in this regard, the Court cannot draw a conclusion from the available evidence that Colombia also authorized marine scientific research in Nicaragua's exclusive economic zone.

134. On the basis of the above considerations, the Court concludes that Colombia has violated Nicaragua's sovereign rights and jurisdiction in its exclusive economic zone by authorizing vessels to conduct fishing activities in Nicaragua's exclusive economic zone.

3. Colombia's alleged oil exploration licensing

135. In its Reply, Nicaragua claims that Colombia, through its National Hydrocarbon Agency (hereinafter the "ANH"), offered and awarded "hydrocarbon blocks encompassing parts of Nicaragua's [exclusive economic zone]", thereby violating Nicaragua's sovereign rights. Nicaragua asserts in particular that, according to an ANH list and a map of hydrocarbon blocks, in 2010 the ANH offered 11 blocks in areas that at least in part encroach on Nicaragua's exclusive economic zone (blocks Nos. 3050 to 3057 and 3059 to 3061, named CAYOS 1, 2, 3, 5, 6, 7, 10, 11, 12, 13, and 14), and awarded two blocks (Nos. 3050 and 3059) to a consortium made up of Ecopetrol (Colombia), Repsol (Spain) and YPF (Argentina), although the relevant contracts have yet to be signed. As for the remaining nine blocks, Nicaragua contends that the ANH's list and its map of hydrocarbon blocks in 2017 continue to indicate that those blocks are "available" for licensing.

136. Nicaragua admits that an additional submission modifying substantially the requests in the Application would be inadmissible, but maintains that facts and legal considerations on the petroleum blocks are used to give detail to Nicaragua's initial requests. In its view, they constitute an "argument" rather than a "new claim".

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137. With regard to Nicaragua's claim relating to oil exploration licensing, Colombia first raises the question of admissibility. It maintains that, as Nicaragua has submitted the issue concerning petroleum blocks for the first time in the Reply, this claim is inadmissible. According to Colombia, the claim is neither implicit in Nicaragua's Application or Memorial, nor does it "arise directly out of the question that is the subject-matter of the Application". Colombia also contends that the claim was submitted "at a time when the Respondent is no longer able to assert preliminary objections".

138. Colombia argues that even if the claim were admissible, it has no merit. Colombia asserts that in 2011 it suspended all offshore petroleum blocks that were licensed before the Court's 2012 Judgment and has not signed or pursued any new contracts. According to Colombia, its courts have prohibited all petroleum activities within the Seaflower Biosphere Reserve. With regard to the remaining blocks referred to by Nicaragua based on a map from the ANH dated 17 February 2017, Colombia argues that the evidence is inadmissible, because it concerns a subject-matter different from the claims contained in the Application and falls outside the temporal jurisdiction of the Court. Colombia contends that even if the Court were to take account of the map in question, it does not show any violation of Nicaragua's sovereign rights. Colombia asserts that none of those blocks have been the object of any implementation process, and that, accordingly, there is no existing contract or proposal for the blocks in question, nor could there be. Colombia also alleges that Nicaragua itself has admitted that no such contracts have been issued.

* *

139. The Court will first address the admissibility of Nicaragua's claim concerning Colombia's alleged oil exploration licensing.

140. The Court has discussed its jurisprudence on a claim made after the filing of the application in paragraph 44 above. Nicaragua's allegation regarding Colombia's oil exploration licensing concerns the question whether Colombia has violated Nicaragua's sovereign rights in the exclusive economic zone. Although a different kind of activity is involved, Nicaragua's claim does not transform the subject-matter of the dispute as stated in the Application, since the dispute between the Parties involves the rights of the Parties in all maritime zones as delimited by the 2012 Judgment. Nicaragua's claim arises directly out of the question which is the subject-matter of the Application. The Court is therefore of the view that Nicaragua's claim is admissible.

141. Regarding the merits of the claim, the evidence shows, including by Nicaragua's own account, that Colombia offered 11 oil concession blocks for licensing and awarded two blocks in 2011, at a time when the maritime boundary between the Parties had not yet been delimited. The documents before the Court also demonstrate that signature of the contracts for the said petroleum blocks was first suspended by the parties concerned in 2011 and later by a decision of the administrative tribunal of San Andrés, Providencia and Santa Catalina in 2012. Nicaragua also concedes that, to date, the contracts in question have not been signed.

142. As regards the facts since then, Nicaragua has only produced as evidence a "Map of Lands" taken from the ANH's website dated 17 February 2017, which shows a number of "available" blocks in the areas that partially overlap with Nicaragua's exclusive economic zone. The map is not corroborated by any other credible evidence that the ANH still intends to offer and award those blocks. The Court notes in this regard that Nicaragua did not pursue its claim during the oral proceedings and that it acknowledged Colombia's statement that no concessions had been awarded in the areas concerned. Colombia, for its part, reiterated that the blocks in question "[had] not been implemented and [would] not be pursued, and [would] not be offered".

143. In light of the foregoing, the Court finds that Nicaragua has failed to prove that Colombia continues to offer petroleum blocks situated in Nicaragua's exclusive economic zone. The allegation that Colombia violated Nicaragua's sovereign rights by issuing oil exploration licences must therefore be rejected.

4. Conclusions

144. In light of the foregoing considerations, the Court finds that Colombia has breached its international obligation to respect Nicaragua's sovereign rights and jurisdiction in its exclusive economic zone (i) by interfering with fishing and marine scientific research activities of Nicaraguan-flagged or Nicaraguan-licensed vessels and with the operations of Nicaraguan naval vessels in Nicaragua's exclusive economic zone; (ii) by purporting to enforce conservation measures in Nicaragua's exclusive economic zone; and (iii) by authorizing fishing activities in Nicaragua's exclusive economic zone. Colombia's wrongful conduct engages its responsibility under international law.

B. Colombia's "integral contiguous zone"

145. Among its allegations of Colombia's violations of Nicaragua's rights in its maritime zones, Nicaragua refers to Colombia's Presidential Decree 1946, which establishes an "integral contiguous zone" around Colombian islands in the western Caribbean Sea. Nicaragua does not deny Colombia's entitlement to a contiguous zone, but it maintains that both the geographical extent of the "integral contiguous zone" and the material scope of the powers which Colombia claims it may exercise therein exceed the limits permitted under customary international rules on the contiguous zone. In Nicaragua's view, by establishing the "integral contiguous zone", Colombia violated Nicaragua's rights in the latter's exclusive economic zone.

146. The Parties disagree as to whether Article 33 of UNCLOS on the contiguous zone reflects customary international law. Before examining Presidential Decree 1946, the Court will first consider the customary rules applicable to the contiguous zone.

1. The applicable rules on the contiguous zone

147. Nicaragua claims that the provisions of Article 33 of UNCLOS reflect customary international law and that the 24-nautical-mile limit prescribed therein is supported by "practically unanimous" State practice. With regard to the powers that the coastal State may exercise in the contiguous zone, Nicaragua maintains that Article 33, paragraph 1, reflects customary international law. It further contends that Colombia has not been able to establish that State practice points to an evolution in customary international law such that it now authorizes States to exercise control in their contiguous zone over matters other than those listed in Article 33 of UNCLOS.

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148. For its part, Colombia takes the view that Article 33 of UNCLOS "does not reflect present-day customary international law on the contiguous zone". It maintains that "under existing customary international law, a coastal State is permitted to establish zones contiguous to its territorial sea, of varying breadth and for a range of purposes, going in some respects beyond those expressly envisaged in Article 33 of UNCLOS". In this regard, according to Colombia, "the coastal State may exercise the control necessary to protect and safeguard its essential interests, including but not limited to those relating to customs, fiscal, immigration or sanitary laws and regulations enacted to protect its interests in its territory and territorial sea". In Colombia's view, this right enables the coastal State to safeguard essential interests in matters such as security, drug trafficking, pollution, and cultural heritage within its contiguous zone.

* *

149. As demonstrated by the general practice of States and as accepted by both Parties, the concept of the contiguous zone is well established in international law. The establishment by States of contiguous zones preceded the adoption in 1958 of the Convention on the Territorial Sea and the Contiguous Zone (hereinafter the "1958 Convention") and of UNCLOS. To date, about 100 States, including States that are not parties to UNCLOS, have established contiguous zones.

150. The Parties hold divergent views as to whether Article 33 of UNCLOS reflects the contemporary customary rules on the contiguous zone. Article 33 reads as follows:

> "1. In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to:
>
> *(a)* prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;
>
> *(b)* punish infringement of the above laws and regulations committed within its territory or territorial sea.
>
> 2. The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured."

151. With regard to the régime governing the contiguous zone, the Court first notes that under the law of the sea the contiguous zone is distinct from other maritime zones in the sense that the establishment of a contiguous zone does not confer upon the coastal State sovereignty or sovereign rights over this zone or its resources. The drafting history of Article 24 of the 1958 Convention and that of Article 33 of UNCLOS demonstrate that States have generally accepted that the powers in the contiguous zone are confined to customs, fiscal, immigration and sanitary matters as stated in Article 33, paragraph 1. With regard to the breadth of the contiguous zone, most States that have established such zones have set the breadth thereof within a 24-nautical-mile limit consistent with Article 33, paragraph 2, of UNCLOS. Some States have even reduced the breadth of previously established contiguous zones to conform to that limit.

152. In the development of the contiguous zone régime, the question whether the coastal State may include "security" in the list of matters over which it may exercise control in the contiguous zone was extensively considered by States. For its part, the International Law Commission (hereinafter the "ILC") in its Commentary on Article 66 of the draft Articles concerning the law of the sea, which subsequently became Article 24 of the 1958 Convention, gave the following reason for not including security among the matters in respect of which the coastal State may exercise control in its contiguous zone:

> "The Commission did not recognize special security rights in the contiguous zone. It considered that the extreme vagueness of the term 'security' would open the way for abuses and that the granting of such rights was not necessary. The enforcement of customs and sanitary regulations will be sufficient in most cases to safeguard the security of the State. In so far as measures of self-defence against an imminent and direct threat to the security of the State are concerned, the Commission refers to the general principles of international law and the Charter of the United Nations." (Commentary to the articles concerning the law of the sea, *Yearbook of the International Law Commission*, 1956, Vol. II, p. 295, Article 66, Comment (4)).

153. At the First United Nations Conference on the Law of the Sea in 1958, a Polish proposal to add "security" to the list of matters under the contiguous zone régime was adopted by a narrow majority in the First Committee, but it did not obtain the required majority for adoption by the plenary (Official Records of the First United Nations Conference on the Law of the Sea (1958), Vol. II, doc. A/CONF.13/38, p. 40, para. 63). Instead, the Conference accepted, by an overwhelming majority, a proposal submitted by the United States which incorporated Ceylon's proposal to add "immigration" to the article (*ibid.*, para. 64). During the negotiations at the Third United Nations Conference on the Law of the Sea, the wording of Article 24, paragraph 1, of the 1958 Convention was adopted in Article 33, paragraph 1, of UNCLOS without any change as regards the matters in respect of which the coastal State may exercise control.

154. Although there are a few States that maintain in their national laws the power to exercise control with respect to security in the contiguous zone, their practice has been opposed by other States. The materials adduced by Colombia with regard to national legislation on the contiguous zone do not support Colombia's claim that the customary rules on the contiguous zone have evolved since the adoption of UNCLOS such that they allow a coastal State to extend the maximum breadth of the contiguous zone beyond 24 nautical miles or expand the powers it may exercise therein.

155. In conclusion, the Court considers that Article 33 of UNCLOS reflects contemporary customary international law on the contiguous zone, both in respect of the powers that a coastal State may exercise there and the limitation of the breadth of the contiguous zone to 24 nautical miles (hereinafter "the 24-nautical-mile rule").

2. Effect of the 2012 Judgment and Colombia's right to establish a contiguous zone

156. Nicaragua maintains that the Parties' entitlements should be limited by the maritime boundary established by the Court in its 2012 Judgment. In Nicaragua's view, the rights of Colombia as a third State in Nicaragua's exclusive economic zone are governed by Article 58 of UNCLOS, which reflects customary international law and which does not encompass contiguous zone rights. The delimitation of the exclusive economic zone includes the delimitation of the contiguous zone, "if only implicitly". Nicaragua argues that the fact that the 2012 Judgment makes no express mention of the contiguous zone is not decisive.

157. Colombia argues that it is entitled under international law to establish a contiguous zone around the San Andrés Archipelago and that the 2012 Judgment does not provide a legal basis to deny such a right. It claims that the exercise of "contingent powers" by a coastal State with respect to "specified categories of events" within its contiguous zone neither negates nor otherwise infringes a neighbouring State's exercise of its sovereign rights within its overlapping exclusive economic zone. The right of the coastal State to establish a contiguous zone is independent of, and not incompatible with, any resource-oriented exclusive economic zone rights of another State in the same space.

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158. The Court notes that in the proceedings leading to the 2012 Judgment, the Parties discussed the contiguous zone but did not request the Court to delimit it in drawing a single maritime boundary, nor did the Court address the contiguous zone, as the issue did not arise during the delimitation. In this regard, the Court recalls that, in the operative paragraph of that Judgment, it found that Colombia "has sovereignty over the islands at Alburquerque, Bajo Nuevo, East-Southeast Cays, Quitasueño, Roncador, Serrana and Serranilla" and that it decided on both "the single maritime boundary delimiting the continental shelf and the exclusive economic zones" of the two Parties and "the single maritime boundary around Quitasueño and Serrana" (*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, pp. 718-720, para. 251, subparas. (1), (4) and (5)). The Court considers that, in the absence of any reference to the contiguous zone, the 2012 Judgment cannot be taken to imply that the delimitation of the exclusive economic zone includes the delimitation of the contiguous zone, as claimed by Nicaragua. The 2012 Judgment does not delimit, expressly or otherwise, the contiguous zone of either Party.

159. With regard to maritime areas in which Colombia's "integral contiguous zone" overlaps with Nicaragua's exclusive economic zone, the Court observes that Nicaragua contends that Colombia is not entitled to establish a contiguous zone that overlaps with Nicaragua's exclusive economic zone following the maritime delimitation between them. Nicaragua further maintains that the rights of Colombia in Nicaragua's exclusive economic zone are limited to the rights set forth in Article 58 of UNCLOS, which does not encompass contiguous zone rights.

160. In the first place, the Court notes that the contiguous zone and the exclusive economic zone are governed by two distinct régimes. It considers that the establishment by one State of a contiguous zone in a specific area is not, as a general matter, incompatible with the existence of the exclusive economic zone of another State in the same area. In principle, the maritime delimitation between Nicaragua and Colombia does not abrogate Colombia's right to establish a contiguous zone around the San Andrés Archipelago.

161. Under the law of the sea, the powers that a State may exercise in the contiguous zone are different from the rights and duties that a coastal State has in the exclusive economic zone. The two zones may overlap, but the powers that may be exercised therein and the geographical extent are not the same. The contiguous zone is based on an extension of control by the coastal State for the purposes of prevention and punishment of certain conduct that is illegal under its national laws and regulations, while the exclusive economic zone, on the other hand, is established to safeguard the coastal State's sovereign rights over natural resources and jurisdiction with regard to the protection of the marine environment. This distinction between the two régimes was recognized during the negotiations of UNCLOS (Official Records of the Third United Nations Conference on the Law of the Sea, Vol. II, Summary records of the 31st Meeting of the Second Committee, 7 August 1974, UN doc. A/CONF.62/C.2/SR.31, pp. 233-234). In exercising the rights and duties under either régime, each State must have due regard to the rights and duties of the other State.

162. The Court does not accept Nicaragua's assertion that Article 58 of UNCLOS encompasses all the rights that Colombia has within its contiguous zone. In the parts of the "integral contiguous zone" which overlap with Nicaragua's exclusive economic zone, Colombia may exercise its powers of control in accordance with customary rules on the contiguous zone as reflected in Article 33, paragraph 1, of UNCLOS and it has the rights and duties under customary law as reflected

in Article 58 of UNCLOS. In the Court's view, in exercising its powers in the parts of its "integral contiguous zone" which overlap with Nicaragua's exclusive economic zone, Colombia is under an obligation to have due regard to the sovereign rights and jurisdiction which Nicaragua enjoys in its exclusive economic zone under customary law as reflected in Articles 56 and 73 of UNCLOS.

163. Given the above considerations, the Court concludes that Colombia has the right to establish a contiguous zone around the San Andrés Archipelago in accordance with customary international law.

3. The compatibility of Colombia's "integral contiguous zone" with customary international law

164. Having concluded that the provisions of Article 33 of UNCLOS reflect customary international law and that a coastal State is entitled to a contiguous zone which may overlap with the exclusive economic zone of another State, the Court will next consider the compatibility of Colombia's "integral contiguous zone" established under Presidential Decree 1946 with customary international law and Nicaragua's claims in that regard.

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165. Regarding Presidential Decree 1946, Nicaragua claims that, according to the maps issued by Colombia, parts of the "integral contiguous zone" reach into Nicaragua's exclusive economic zone and extend beyond 24 nautical miles from the baselines from which Colombia's territorial sea is measured. In its view, Colombia's justification for using geodetic lines to draw the "integral contiguous zone" by reference to the special geographical situation of the San Andrés Archipelago has no legal basis in international law.

166. As for the powers to be exercised in the "integral contiguous zone" under Article 5 (2) and Article 5 (3) of Colombia's Presidential Decree 1946, Nicaragua contends that some of the powers contained therein, including those concerning the protection of security, national maritime interests and cultural heritage, are not listed in Article 33, paragraph 1, of UNCLOS and are unsupported by general State practice. It argues that Colombia has not been able to establish that State practice has evolved into a rule of customary international law authorizing States to exercise control in their contiguous zone over matters other than those listed in Article 33 of UNCLOS. Nicaragua claims that the powers claimed by Colombia conflict with Nicaragua's powers in its exclusive economic zone. According to Nicaragua, Colombia wrongfully stretches the phrase "sanitary laws and regulations" in Article 33, paragraph 1, of UNCLOS to encompass laws and regulations relating to environmental protection.

167. With respect to cultural heritage in the contiguous zone, Nicaragua maintains that only a State party to UNCLOS may claim the right referred to in Article 303 and that Colombia has not demonstrated that that provision reflects customary international law. Nicaragua further complains

that the power to protect cultural heritage in the "integral contiguous zone" is contradictory to Colombia's own domestic law, which reserves to Colombia itself the sole control over cultural heritage in its exclusive economic zone.

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168. In response to Nicaragua's arguments against the establishment of the "integral contiguous zone", Colombia denies that it acted wrongfully under international law. Colombia argues that the spatial construction of the "integral contiguous zone" is dictated by the natural and special configuration of the San Andrés Archipelago and that its use of geodetic lines is consistent with the established jurisprudence in this regard and serves solely to define a "functional" area within which Colombia may execute the powers granted by international law. It argues that even if the Court were to find that the 24-nautical-mile limit of the contiguous zone reflects customary international law, the geographical configuration of the "integral contiguous zone" is justified by a "customary exemption" to this rule. In its view, "in unique geographical circumstances, the techniques according to which the external limit of a maritime zone is determined, if reasonable in context, may depart from the general rules in order to create a viable contiguous zone that enables the achievement of its purposes" where "the application of the general rule would create an impracticable contiguous zone".

169. Colombia argues that the powers prescribed under Presidential Decree 1946 are based on "context, function and policy considerations", which are permitted under customary international law. According to Colombia, even if the Court were to proclaim that Article 33, paragraph 1, reflects customary law, the powers to be exercised in the "integral contiguous zone" still fall within the scope of that provision. In particular, Colombia argues that protection of the marine environment is consistent with a contemporary interpretation of the term "sanitary", and protection of security and national maritime interests can also fall into the "customs", "fiscal", "immigration" and "sanitary" generic categories. With respect to the power to preserve cultural heritage, Colombia argues that it is explicitly permitted by Article 303 of UNCLOS.

* *

170. The Parties are divided over the conformity with customary international law of the provisions of Article 5 of Presidential Decree 1946, which set out the geographical extent of the "integral contiguous zone" and the material scope of the powers that may be exercised therein. Article 5 reads as follows:

> "Contiguous zone of the island territories
> in the western Caribbean Sea
>
> 1. Without prejudice to the terms of Section 2 of this Article, the Contiguous Zone of the island territories of Colombia in the Western Caribbean Sea extends up to a distance of 24 nautical miles measured from the baselines referred to in Article 3 above.

2. The Contiguous Zones adjacent to the territorial sea of the islands which form the island territories of Colombia in the Western Caribbean Sea, except for the islands Serranilla and Bajo Nuevo, where they intersect, generate a continuous and uninterrupted Contiguous Zone, across the whole of the Department of the Archipelago of San Andrés, Providencia and Santa Catalina, over which the competent national authorities will exercise the powers recognized by international law and Colombian laws mentioned in Section 3 of this Article.

In order to secure the proper administration and orderly management of the entire Archipelago of San Andrés, Providencia and Santa Catalina, and of their islands, cays and other formations and their maritime areas and resources, and in order to avoid the existence of irregular figures or contours which would make practical application difficult, the lines indicated for the outer limits of the contiguous zones will be joined to each other through geodetic lines. In the same fashion, these will be linked to the contiguous zone of the island of Serranilla by geodetic lines which maintain the direction of parallel 14° 59' 08" N, and to Meridian 79° 56' 00" W, and thence to the North, thus forming an Integral Contiguous Zone of the Department Archipelago of San Andrés, Providencia and Santa Catalina.

3. **Modified by Decree 1119 of 2014, Art. 2.** In developing what has been provided for in the previous numeral, with the purpose of protecting the sovereignty in its territory and territorial sea, in the Integral contiguous zone established in this Article Colombia exercises the faculties of enforcement and control necessary to:

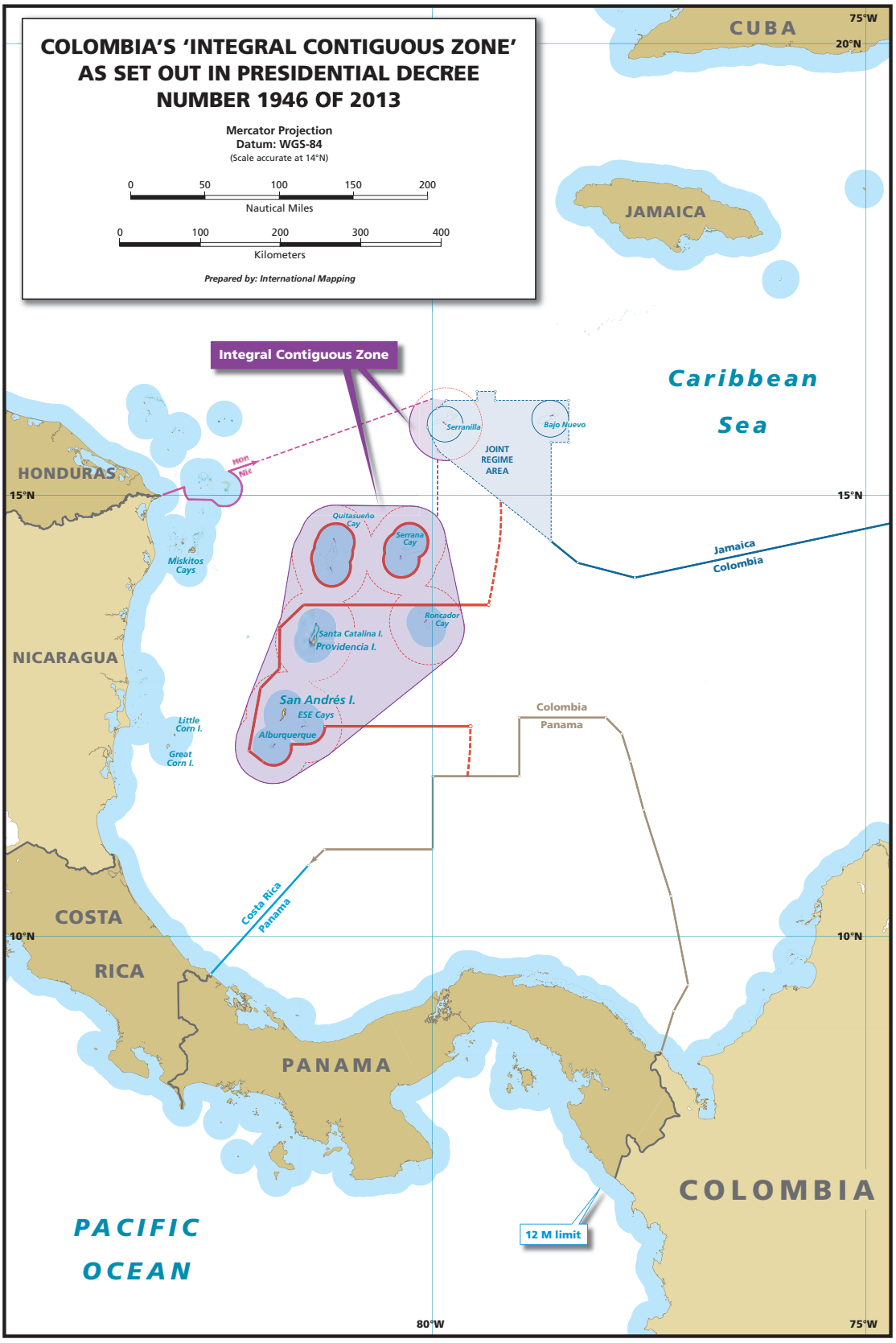
(a) **Modified by Decree 1119 of 2014, Art. 2.** Prevent and control the infractions of the laws and regulations related with the integral security of the State, including piracy and trafficking of drugs and psychotropic substances, as well as conduct contrary to security in the sea and the national maritime interests, the customs, fiscal, migration and sanitary matters which take place in its insular territories or in their territorial sea. In the same manner, violations against the laws and regulations related with the preservation of the environment and the cultural heritage will be prevented and controlled.

(b) Punish violations of laws and regulations related to the matters indicated in section a) above, committed in its island territories or in their territorial sea.

PARAGRAPH ***Added by Decree 1119 of 2014, Art. 3.*** The application of this article will be carried out in conformity with international law and Article 7 of the Present Decree."

171. Colombia produces an illustrative map depicting the "integral contiguous zone", which it claims is an accurate depiction of how the Decree should apply in practice. Nicaragua also produces a map that it claims was presented by the Colombian President on the day Presidential Decree 1946 was issued. The two maps do not coincide in their depiction of the "integral contiguous zone", but both of them show that some parts of the "integral contiguous zone" extend more than 24 nautical miles from Colombia's baselines and overlap with Nicaragua's exclusive economic zone. (For illustrative purposes, the Court includes the map produced by Colombia in its Counter-Memorial.)

MAP SHOWING COLOMBIA'S "INTEGRAL CONTIGUOUS ZONE" ACCORDING TO COLOMBIA
(*Source:* Colombia's Counter-Memorial, Figure 5.1, p. 204)



172. Colombia does not deny that the "integral contiguous zone", in various parts, extends beyond 24 nautical miles, but claims its position to be justified on the basis of customary international law. According to Colombia, a coastal State is permitted under customary international law to establish contiguous zones "of varying breadth", going beyond those expressly envisaged in Article 33 of UNCLOS.

173. As is stated above, the 24-nautical-mile rule provided for in Article 33, paragraph 2, is an established customary rule. The coastal State does not have the right to extend the breadth of its contiguous zone as it sees fit. The Court notes that the simplification of boundary lines is not uncommon in maritime delimitation between two States, but in such cases a simplified boundary is achieved by mutual agreement or through a third-party settlement. By contrast, in the present case, the establishment of the outer limit of the "integral contiguous zone" is a unilateral act of Colombia that directly affects the rights and interests of Nicaragua.

174. Colombia refers to the *Fisheries* case between the United Kingdom and Norway and the 2012 Judgment as a jurisprudential basis for the simplified configuration of the "integral contiguous zone". Neither of the Judgments invoked by Colombia, however, is applicable to the present case. Any consideration of the geographical circumstances by Colombia must respect the 24-nautical-mile rule, as required by customary international law reflected in Article 33, paragraph 2, of UNCLOS. Colombia may choose to reduce the breadth of the "integral contiguous zone" if it wishes to simplify the configuration of the zone, but it has no right to expand it beyond the 24-nautical-mile limit to the detriment of the exercise by Nicaragua of its sovereign rights and jurisdiction in its exclusive economic zone.

175. In sum, Colombia is under an international obligation to observe the 24-nautical-mile rule. The geographical extent of the "integral contiguous zone" is not in conformity with customary international law, as reflected in Article 33, paragraph 2, of UNCLOS.

176. With regard to the material scope of Colombia's powers within the "integral contiguous zone", Article 5 (3) *(a)* of Presidential Decree 1946 provides that Colombia shall exercise powers in the "integral contiguous zone" to prevent and control infringements of laws and regulations regarding

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

Under this provision, the scope of the powers under which the Colombian authorities may exercise control in the contiguous zone is much broader than the material scope of the powers enumerated in Article 33, paragraph 1, of UNCLOS (see paragraph 150 above).

177. The Court notes that, in terms of security, Article 5 (3) refers to the "integral security of the State", which, according to Colombia, includes suppressing piracy and drug-trafficking, as well as conduct contrary to security at sea. As the Court has previously found, security was not a matter that States agreed to include in the list of matters over which a coastal State may exercise control in

the contiguous zone; nor has there been any evolution of customary international law in this regard since the adoption of UNCLOS (see paragraph 154 above). The inclusion of security in the material scope of Colombia's powers within the "integral contiguous zone" is therefore not in conformity with the relevant customary rule.

178. In respect of the power to protect "national maritime interests", Article 5 (3) of Presidential Decree 1946, through its broad wording alone, appears to encroach on the sovereign rights and jurisdiction of Nicaragua as set forth in Article 56, paragraph 1, of UNCLOS. This is also true with regard to violations of "laws and regulations related with the preservation of the environment". As the "laws and regulations" are adopted by Colombia, the power thus conferred on the Colombian authorities to ensure their implementation in part of Nicaragua's exclusive economic zone is contrary to Article 56, paragraph 1 *(b)* (iii), of UNCLOS, which grants the coastal State, Nicaragua in the present case, jurisdiction in its exclusive economic zone over the "protection and preservation of the marine environment".

179. Although under UNCLOS, as stated above, all States parties have an obligation to preserve the marine environment in the exclusive economic zone, other States must observe the laws and regulations adopted by the coastal State for the conservation of the living resources and for the preservation of the marine environment. A flag State may enforce such conservation measures adopted by the coastal State with regard to its national vessels operating in the exclusive economic zone (see *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015*, p. 37, para. 120). This is not the situation in the present case with regard to the powers authorized under Presidential Decree 1946. Article 5 (3) confers on the Colombian authorities powers that, if exercised in the area overlapping with Nicaragua's exclusive economic zone, would encroach on the sovereign rights and jurisdiction of Nicaragua.

180. With regard to Colombia's argument that the word "sanitary" can now be taken to include the protection of the marine environment, the Court is not convinced that the meaning of that word, as used in Article 33, paragraph 1, of UNCLOS, has evolved to extend to the protection of the marine environment, a matter that is separately governed by customary international law on the environment. The term "sanitary" was originally included in the provisions on the contiguous zone because of its connection with customs regulations (Commentary to the articles concerning the law of the sea, *Yearbook of the International Law Commission*, 1956, Vol. II, p. 295, Article 66, Comment (3)). There is no basis, either in law or in State practice, to give this term the expansive interpretation proposed by Colombia.

181. Article 5 (3) *(a)* of Presidential Decree 1946 also refers to cultural heritage. In support of its position, Colombia invokes Article 303, paragraph 2, of UNCLOS. Nicaragua challenges Colombia's claim on the basis that Colombia, as a non-party to UNCLOS, may not claim the right set out in Article 303 and that Colombia has not demonstrated that Article 303, paragraph 2, reflects customary international law.

182. The Court recalls that paragraphs 1 and 2 of Article 303, entitled "Archaeological and historical objects found at sea", provide as follows:

> "1. States have the duty to protect objects of an archaeological and historical nature found at sea and shall co-operate for this purpose.

> 2. In order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the sea-bed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article."

183. The Court notes that in Article 5 (3) *(a)*, of Presidential Decree 1946, the phrase "cultural heritage" is used. Since Colombia relies on Article 303, paragraph 2, the Court takes it that Colombia uses this phrase to mean objects of an archaeological and historical nature.

184. Article 303 is included in the general provisions of Part XVI of UNCLOS. The *travaux préparatoires* and the ILC's Commentary to the articles concerning the law of the sea indicate that the negotiating States did not wish to include objects of cultural heritage found on the sea-bed as part of the natural resources of the continental shelf and, therefore, did not include cultural heritage in the continental shelf régime (*Yearbook of the International Law Commission*, 1956, Vol. II, p. 298). During the negotiations at the Third United Nations Conference on the Law of the Sea, the negotiating States agreed to give the coastal State the power to exercise control over objects of an archaeological and historical nature found in its contiguous zone and that the removal of such objects can be regarded as an infringement of its laws and regulations on customs, fiscal, immigration or sanitary matters. Such extended power is strictly confined to the limit of 24 nautical miles under Article 303, paragraph 2, which was accepted by the plenary of the Third United Nations Conference on the Law of the Sea (UN doc. A.CONF.62/L.58, para. 15).

185. Following the conclusion of UNCLOS, a growing number of States have extended the application of their cultural heritage legislation over the contiguous zone, and multilateral treaties have been concluded to protect underwater cultural heritage.

186. Taking into account State practice and other legal developments in this field, the Court is of the view that Article 303, paragraph 2, of UNCLOS reflects customary international law. It follows that Article 5 (3) of Presidential Decree 1946, in so far as it includes the power of control with respect to archaeological and historical objects found within the contiguous zone, does not violate customary international law.

4. Conclusion

187. In light of the foregoing, the Court finds that the "integral contiguous zone" established by Colombia's Presidential Decree 1946 is not in conformity with customary international law in two respects. First, the geographical extent of the "integral contiguous zone" contravenes the 24-nautical-mile rule for the establishment of the contiguous zone. Secondly, Article 5 (3) of Presidential Decree 1946 confers certain powers on Colombia to exercise control over infringements of its laws and regulations in the "integral contiguous zone" that extend to matters that are not permitted by customary rules as reflected in Article 33, paragraph 1, of UNCLOS.

188. Having reached this conclusion, the Court will consider the question whether the establishment of the "integral contiguous zone" by enactment of Presidential Decree 1946 constitutes, in and of itself, a breach by Colombia of its international obligations owed to Nicaragua, which engages its international responsibility.

* *

189. Nicaragua claims that Colombia's enactment of Presidential Decree 1946, even if not implemented, is sufficient to constitute an internationally wrongful act engaging Colombia's responsibility. Nicaragua adds that, in any event, the incidents at sea have shown that, in implementing Presidential Decree 1946, Colombia infringed and continues to infringe Nicaragua's sovereign rights and jurisdiction in its exclusive economic zone.

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190. In rejecting Nicaragua's claim, Colombia maintains, even assuming — "*quod non*" — that the "integral contiguous zone" established in Presidential Decree 1946 were found to be inconsistent with customary international law, the enactment of the Decree would not *ipso facto* constitute an internationally wrongful act. It argues that the lawfulness of Presidential Decree 1946 must be evaluated on the basis of whether its "application" has failed to comply with the "due regard" obligation owed to Nicaragua. It argues that Nicaragua has failed to show a single instance where Colombia impeded Nicaragua from exercising its exclusive economic zone rights within the "integral contiguous zone".

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191. The Court recalls the ILC's observation that there is no general rule applicable to the question whether a State engages its international responsibility by the enactment of national legislation. The question depends on the specific terms of the obligation concerned and the circumstances of the case. The ILC's Commentary explains:

> "The question often arises whether an obligation is breached by the enactment of legislation by a State, in cases where the content of the legislation *prima facie* conflicts with what is required by the international obligation, or whether the legislation has to be implemented in the given case before the breach can be said to have occurred. Again, no general rule can be laid down applicable to all cases. Certain obligations may be breached by the mere passage of incompatible legislation. Where this is so, the passage of the legislation without more entails the international responsibility of the enacting State, the legislature itself being an organ of the State for the purposes of the attribution of responsibility. In other circumstances, the enactment of legislation may not in and of

> itself amount to a breach, especially if it is open to the State concerned to give effect to the legislation in a way which would not violate the international obligation in question. In such cases, whether there is a breach will depend on whether and how the legislation is given effect." (Commentary to Article 12 of the ILC Articles on State Responsibility, *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, p. 57, para. 12.)

192. The Court will decide the question for the purposes of the present case in light of the obligations of which Colombia is allegedly in breach and the specific context of the case.

193. Colombia's Presidential Decree 1946 was initially issued not long after the delivery of the 2012 Judgment. Coupled with the official statements made at the highest level of the Colombian Government with regard to the 2012 Judgment and the events at sea, the enactment of Presidential Decree 1946 contributed to the dispute between the Parties, which eventually led to the institution of the present proceedings by Nicaragua. As the Court has found that Colombia's "integral contiguous zone" established under Presidential Decree 1946 is, in two respects, incompatible with the rules of customary international law on the contiguous zone and infringes upon Nicaragua's rights in its exclusive economic zone (see paragraph 187 above), the Court must address the request made by Nicaragua in its final submissions with regard to Presidential Decree 1946. The Court is mindful that Colombia amended Presidential Decree 1946 in 2014 to provide that the Decree will be applied in compliance with international law. Given the finding of the Court and the circumstances of the case, however, the Court does not consider that this additional provision is sufficient to address the concern raised by Nicaragua with respect to Presidential Decree 1946. Colombia is under an international obligation to remedy the situation.

194. On the basis of the above considerations, the Court concludes that, in respect of the maritime areas in which Colombia's "integral contiguous zone" overlaps with Nicaragua's exclusive economic zone, Colombia's "integral contiguous zone", which the Court has found to be incompatible with customary international law as reflected in Article 33 of UNCLOS, infringes upon Nicaragua's sovereign rights and jurisdiction in the exclusive economic zone. Colombia's responsibility is thereby engaged. Colombia has the obligation, by means of its own choosing, to bring the provisions of Presidential Decree 1946 into conformity with customary international law in so far as they relate to maritime areas declared by the Court in its 2012 Judgment to appertain to Nicaragua.

C. Conclusions and remedies

195. The Court has concluded (see paragraph 144 above) that Colombia breached its international obligation to respect Nicaragua's sovereign rights and jurisdiction in its exclusive economic zone (i) by interfering with fishing activities and marine scientific research activities of Nicaraguan-flagged or Nicaraguan-licensed vessels and with the operations of Nicaraguan naval vessels in Nicaragua's exclusive economic zone; (ii) by purporting to enforce conservation measures in Nicaragua's exclusive economic zone; and (iii) by authorizing fishing activities in Nicaragua's exclusive economic zone. This wrongful conduct engages Colombia's responsibility under international law. Colombia must therefore immediately cease its wrongful conduct.

196. The Court has also found (see paragraphs 187 and 194 above) that the "integral contiguous zone" established by Colombia's Presidential Decree 1946 is not in conformity with customary international law, both because its breadth exceeds 24 nautical miles from the baselines from which Colombia's territorial sea is measured and because the powers that Colombia asserts within the "integral contiguous zone" exceed those that are permitted under customary international law. In the maritime areas where the "integral contiguous zone" overlaps with Nicaragua's exclusive economic zone, the "integral contiguous zone" infringes upon Nicaragua's sovereign rights and jurisdiction in the exclusive economic zone. Colombia's responsibility is thereby engaged. Colombia has the obligation, by means of its own choosing, to bring the provisions of Presidential Decree 1946 into conformity with customary international law in so far as they relate to maritime areas declared by the Court in its 2012 Judgment to appertain to Nicaragua.

197. In its final submissions, Nicaragua made a number of requests for additional remedies (see paragraph 24 above). Considering the nature of Colombia's internationally wrongful acts, the Court considers that the remedies stated above suffice to redress the injury that Colombia's internationally wrongful acts have inflicted on Nicaragua.

198. As regards the request by Nicaragua to order Colombia to pay compensation, the Court considers that in the course of the proceedings Nicaragua did not offer evidence demonstrating that Nicaraguan-flagged or Nicaraguan-licensed vessels or their fishermen suffered material damage or were effectively prevented from fishing as a result of Colombia's acts of interference by its naval frigates in Nicaragua's exclusive economic zone. Nicaragua's claim that fishing activities authorized by Colombia, in Nicaragua's exclusive economic zone, have caused "a substantial loss of profits for Nicaragua and its licensed fishermen" is not substantiated. In the absence of "any evidence capable of demonstrating . . . financially assessable injury", the Court will not uphold a claim for compensation (*Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 267, para. 149). Therefore, Nicaragua's request for compensation must be rejected. Accordingly, there is no basis for the Court to defer the question of compensation to a further stage.

199. Finally, Nicaragua requests that the Court remain seised of the case until Colombia recognizes and respects Nicaragua's rights in the Caribbean Sea as attributed by the 2012 Judgment. The Court considers that there is no legal basis for the Court to accept such a request. Nicaragua's request must therefore be rejected.

IV. COUNTER-CLAIMS MADE BY COLOMBIA

200. The Court recalls, as outlined in paragraph 15 of the present Judgment, that in its Order dated 15 November 2017 it ruled pursuant to Article 80 of the Rules of Court that "there is no direct connection, either in fact or in law, between Colombia's first and second counter-claims and Nicaragua's principal claims", and that those counter-claims are inadmissible as such and do not form part of the present proceedings (*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. 314, para. 82 (A) (1) and (2)). The Court found, however, that there is a direct connection between Colombia's third and fourth counter-claims and Nicaragua's principal claims and that therefore those counter-claims are admissible and do form part of the present proceedings (*ibid.*, p. 314, para. 82 (A) (3) and (4)). The Court will next examine the merits of Colombia's third and fourth counter-claims in turn.

A. Nicaragua's alleged infringement of the artisanal fishing rights of the inhabitants of the San Andrés Archipelago to access and exploit the traditional banks

201. In its third counter-claim Colombia asserts that the ancestral inhabitants of the San Andrés Archipelago, including the Raizales, have for more than three centuries engaged in navigating, fishing and turtling throughout the south-western Caribbean Sea in the maritime areas adjudged in the 2012 Judgment to appertain to Nicaragua, as well as in Colombian waters, access to which requires navigating through a part of Nicaragua's exclusive economic zone. It contends that the Raizales have traditionally fished between the Mosquito Coast and the San Andrés Archipelago, including in "[t]he shallow grounds of Cape Bank and, in particular, along La Esquina, that is to say on both sides of the 82° West Meridian, and the area known as Luna Verde"; and "[t]he deep-sea banks situated North of Quitasueño, East of the 82° West Meridian and West and North-West of Providencia, and between, respectively, Providencia and Quitasueño, Quitasueño and Serrana and Serrana and Roncador". Colombia further contends that while long fishing expeditions to Cape Bank and the Northern Banks have always taken place, artisanal fishermen started sailing to these banks much more frequently in the second half of the twentieth century, due to the decrease in production around San Andrés and Providencia. Colombia asserts that, as a result of the 2012 Judgment, many traditional fishing banks of the inhabitants of the Archipelago are now located in the maritime zones under the jurisdiction of Nicaragua, while certain other fishing grounds located in Colombia's maritime areas can only be accessed by navigating through Nicaragua's exclusive economic zone.

202. In support of its third counter-claim, Colombia asserts, first, that the traditional fishing rights of the Raizales arise out of an uncontested local customary norm or practice spanning centuries, as evidenced through various historical documents and affidavits annexed to the Counter-Memorial. It describes those fishing rights as "limited . . . customary rights of access and exploitation" whose exercise does not negate the exclusive character of the sovereign rights of Nicaragua as the coastal State. Secondly, Colombia argues that, "in the immediate aftermath of the 2012 Judgment, Colombia and Nicaragua recognized, both tacitly and explicitly, that such a . . . long-established practice [of artisanal fishing] had taken the shape of a local customary norm that survived the maritime delimitation". Thirdly, Colombia asserts that Nicaragua has, through the statements of its Head of State, accepted that the artisanal fishermen of the Archipelago have a right to fish in Nicaragua's own maritime zones without the need for bilateral fishing agreements or other mechanisms to preserve these rights and without the fishermen having to request authorization from INPESCA. Colombia argues, in the alternative, that these statements must be viewed as constituting a binding unilateral undertaking by Nicaragua to respect the traditional fishing rights of the Raizales. Finally, Colombia asserts that,

> "[i]t matters little whether the formal source is a local customary norm, a tacit agreement, an act of acquiescence, a unilateral understanding or even a rule of international law on the treatment of vested rights of foreign nationals. The result is the same. The inhabitants of the Archipelago and, in particular, the Raizales have the right to fish in the banks located in the maritime zones found to appertain to Nicaragua . . . without having to request an authorization."

203. In this regard, Colombia refers, *inter alia*, to the following statements by Nicaragua's Head of State:

(i) a statement of 26 November 2012 in which President Ortega allegedly stressed Nicaragua's respect for the rights of the inhabitants of the Archipelago "to fish and navigate in those waters, which they ha[d] historically navigated", while also stating that "artisanal fishermen would require an authorization from the relevant Nicaraguan authorities";

(ii) a statement of 1 December 2012 in which President Ortega allegedly declared that "Nicaragua will respect the ancestral rights of the Raizales" and that "mechanisms for dialogue" would have to be established in order to "ensure the right of the Raizal people to fish";

(iii) a statement of 21 February 2013 in which President Ortega allegedly stated that "the Raizal community, living in San Andrés can continue fishing in the Caribbean waters now belonging to Nicaragua and that their rights as native people will not be affected" but that it was "necessary to work on an agreement between Colombia and Nicaragua to regulate this situation, because right now there is no way to know how many vessels belong to the Raizal community and which are related by industrial fishing";

(iv) a statement of 18 November 2014 in which President Ortega asserted that, while the President of Colombia was prepared to work on an agreement or treaty with Nicaragua to implement the 2012 Judgment, the Parties "agreed that it was necessary to work on reaching an Agreement where the [r]ights of the Raizal Community [would] be guaranteed"; and

(v) a statement by President Ortega, of 5 November 2015 which contains a reference to "engagements . . . with the Raizales Brothers regarding their [f]ishing [r]ights, which will have to be arranged later".

204. Colombia claims that in the aftermath of the 2012 Judgment and, notwithstanding President Ortega's support of the rights of the inhabitants of the San Andrés Archipelago, Nicaragua's Naval Force has followed an active strategy of intimidation, including through threats and pillaging, thereby "preventing on a recurring basis, or at the very least, seriously discouraging the artisanal fishermen of the Archipelago from reaching their traditional banks located in the maritime zones adjudicated to appertain to Nicaragua and the Northern Banks of Quitasueño, Serrana, Serranilla and Bajo Nuevo", as evidenced in 11 affidavits annexed to the Counter-Memorial. Colombia further asserts that the Nicaraguan industrial fishermen operating in the relevant areas are involved in "predatory practices as well as acts of piracy" and that, by the Nicaraguan Naval Force "tolerating these predatory fishing practices and criminal activities", Nicaragua is in further violation of the customary right of the artisanal fishermen in the Archipelago to access and exploit the traditional banks.

205. Colombia considers that Nicaragua "is under an obligation to cease and desist from preventing Colombian artisanal fishermen from accessing their traditional fishing grounds, and to fully respect the traditional, historic fishing rights of the Raizales and other fishermen of the Archipelago to such grounds". Colombia is also of the view that Nicaragua should pay compensation for damage caused, including loss of profits resulting from Nicaragua's alleged violations, and give appropriate guarantees of non-repetition.

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206. In response to Colombia's third counter-claim, Nicaragua argues that "there are absolutely no legal rights, residual or otherwise, of the Raizal population of the small islands of San Andrés, Providencia and Santa Catalina to any purported fishing in the Nicaraguan [exclusive economic zone]" and that the claimed rights are incompatible with the régime of the exclusive economic zone. In Nicaragua's view, "the text and context of the relevant provisions of UNCLOS, the preparatory works, and the jurisprudence all make clear that historic fishing rights, including artisanal fishing rights, did not survive the creation of the [exclusive economic zone] régime". Furthermore, Nicaragua asserts that, in any event, Colombia has failed to establish that the artisanal fishermen of the San Andrés Archipelago have such rights or that Nicaragua has infringed them.

207. First, Nicaragua argues that, in accordance with the Court's jurisprudence, "the régime [of the exclusive economic zone], as codified in Part V of UNCLOS is fully applicable between the Parties as customary international law". For Nicaragua, an examination of the text, context and preparatory work of Part V of the Convention clearly indicates that the exploitation of the living resources of the exclusive economic zone is reserved for the coastal State. The Applicant relies on the text of Article 56, paragraph 1 *(a)*, which provides for the coastal State's "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil". Nicaragua also notes that Article 61, paragraph 1, of the Convention gives to the coastal State the exclusive right to establish allowable catch limits in its exclusive economic zone; while Article 62, paragraph 2, empowers the same State to establish its own harvesting capacity, with the possibility, under Article 62, paragraph 3, of giving access to other States to the surplus stocks, taking into account, *inter alia*, "the need to minimize economic dislocation in States whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks". Nicaragua argues that some provisions of UNCLOS concerning other maritime areas, such as Article 51 on archipelagic waters, "contain express carve-outs for traditional fishing rights or the application of other rules of international law". Thus, according to Nicaragua, the absence of a provision in Part V of UNCLOS preserving traditional fishing rights in the exclusive economic zone indicates the intention of the drafters of the Convention to relegate these rights to a "relevant factor" in the allocation of the surplus resources.

208. Nicaragua further asserts that during the negotiation of UNCLOS at the Third United Nations Conference on the Law of the Sea, proposals concerning the protection of historic fishing practices in the exclusive economic zone were discussed and rejected and that a large number of States objected to this protection in the waters adjacent to their coasts, a fact which supports the recognition of exclusive sovereign rights and jurisdiction of the coastal State over the natural resources of the exclusive economic zone. Finally, Nicaragua argues that the jurisprudence, as evidenced by the Court's ruling in the case concerning *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* (*Judgment, I.C.J. Reports 1984*, p. 246), also supports its argument that, under customary international law, traditional fishing rights have been extinguished by the establishment of the exclusive economic zone, and that coastal States now enjoy a "legal monopoly" over the living resources of the exclusive economic zone.

209. In the alternative, Nicaragua contends that, should the Court find that traditional fishing rights have survived the establishment of the exclusive economic zone, Colombia has, in any event, not discharged its burden of proving either that its fishermen actually had such rights or that

Nicaragua has infringed them. Nicaragua argues further that Colombia's claim of traditional fishing rights is inconsistent with the latter's own prior admissions during the proceedings before the Court in the case concerning *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, where Colombia did not make any reference to the existence of ancestral fishing rights of the Raizales. Nicaragua also refers to a passage of Colombia's Counter-Memorial submitted in the above-mentioned case, where the Respondent indicated that the population of the Archipelago has relied for subsistence on the fisheries and other resources located in "Roncador, Quitasueño, Serrana, Serranilla and Bajo Nuevo", features which are not located in the area the Court declared in its 2012 Judgment to appertain to Nicaragua's exclusive economic zone. Nicaragua also invites the Court to take into account Colombia's statement to the International Labour Organization's Committee of Experts on the Application of Conventions and Recommendations that the fishing areas used by the inhabitants of San Andrés "were not affected by the ICJ ruling, as they consisted of territorial waters awarded to Colombia". Finally, Nicaragua argues that, through official acts, such as Colombia's DIMAR Resolution No. 0121 of 28 April 2004, Colombia itself placed tight limits on the areas where artisanal fishermen were allowed to fish, restricting their area of operation to a distance of 12 nautical miles from the islands of San Andrés and Providencia.

210. Nicaragua also submits that Colombia's own evidence, in the form of the 11 affidavits from artisanal fishermen referenced above, disproves Colombia's claim and demonstrates that fishing did not historically occur in the area the Court declared in its 2012 Judgment to constitute Nicaragua's exclusive economic zone. Nicaragua, moreover, questions the probative value of this type of evidence, arguing that the affidavits were sworn by private persons interested in the outcome of the proceedings, and prepared less than a month before the filing of Colombia's Counter-Memorial, for the purposes of litigation. Nicaragua asserts that, in any event, the affidavits prove that "historic fishing took place largely in the vicinity of Colombia's islands, and not in waters that the Court determined to be part of Nicaragua's [exclusive economic zone]".

211. Nicaragua further asserts that none of the statements in which President Ortega expressed his openness to address Colombia's concerns about the fishing practices of the Raizales, amount to an explicit recognition or acceptance of the alleged traditional fishing rights. In Nicaragua's view, those statements, which must be understood in the particularly delicate context in which they were made, were intended to be conciliatory and to diffuse the political tension created by Colombia's rejection of the Court's 2012 Judgment. Nicaragua emphasizes that, in the statements, President Ortega expressly called for the establishment of appropriate mechanisms to accommodate the activities of the artisanal fishermen, including a bilateral agreement with Colombia. Nicaragua also makes it clear that, while it denies that the inhabitants of the San Andrés Archipelago have a

> "vested 'right' to conduct artisanal fishing in Nicaragua's exclusive economic zone as a matter of law, it remains open, in the spirit of brotherhood and good neighbourly relations, to work with Colombia to reach a bilateral agreement that takes account of . . . the fishing needs of the Raizales".

212. Nicaragua further argues that Colombia has failed to produce any contemporaneous evidence of the alleged incidents of interference by the Nicaraguan Navy. Nicaragua states that the declaration of President Santos of 18 February 2013 and the affidavits on which Colombia relies do not provide any details of the incidents of harassment or pillaging that is alleged to have occurred.

* *

213. The Court observes that Colombia's third counter-claim is premised on two main contentions: first, Colombia asserts that the inhabitants of the San Andrés Archipelago, in particular the Raizales, have for centuries practised traditional or artisanal fishing in locations now falling in Nicaragua's exclusive economic zone. The alleged long-standing practices amongst those communities are said to have given rise to an uncontested "local customary norm" between the Parties or to customary rights of access and exploitation that survived the establishment of Nicaragua's exclusive economic zone. Additionally, Colombia points to statements of President Ortega, the Head of State of Nicaragua, which it characterizes both as accepting or recognizing the existence of those rights and as unilateral statements that are capable of producing "legal effects" in the sense that they amounted to "granting rights to the artisanal fishermen". The Court will examine the merits of each of those arguments before determining whether Colombia has proven Nicaragua's alleged violations.

214. As to Colombia's first main contention, the onus is on Colombia to prove that the inhabitants of the San Andrés Archipelago, in particular the Raizales, have historically practised artisanal fishing in areas that now fall within Nicaragua's exclusive economic zone, giving rise (according to Colombia) to an "uncontested local customary norm" or to "customary rights of access and exploitation" that survived the establishment of Nicaragua's exclusive economic zone.

215. The Court begins by recalling that the Parties' relations in respect of the exclusive economic zone are governed by customary international law (see paragraph 48 above). Accordingly, in order to determine the rights and obligations of the Parties specifically in Nicaragua's exclusive economic zone, the Court will apply the relevant rules of customary international law, as reflected in the relevant provisions of Part V including Article 56 and Article 58 of UNCLOS (see paragraphs 57 and 61 above).

216. Under customary international law, as reflected in Article 56 of UNCLOS, Nicaragua, as the coastal State, enjoys sovereign rights in its exclusive economic zone including "for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil". Furthermore, customary international law as reflected in Articles 61 and 62 of UNCLOS grants to Nicaragua, as the coastal State, the right to "determine the allowable catch of the living resources in its exclusive economic zone" (Article 61, paragraph 1); to determine its capacity to harvest the living resources of the exclusive economic zone and where it does not have the capacity to harvest the entire allowable catch, give access to the surplus of the allowable catch to other States, through agreements or other

arrangements, and pursuant to its terms, conditions and laws (Article 62, paragraph 2). Furthermore, customary international law requires that, in giving access to other States to its exclusive economic zone for the purpose of accessing the surplus of Nicaragua's allowable catch, Nicaragua

> "shall take into account all relevant factors, including, *inter alia*, . . . the requirements of developing States in the subregion or region in harvesting part of the surplus and the need to minimize economic dislocation in States whose nationals have habitually fished in the zone" (Article 62, paragraph 3).

217. Under customary international law, as reflected in Article 58 of UNCLOS, other States, including Colombia, enjoy in Nicaragua's exclusive economic zone, high seas freedoms of navigation and overflight and other internationally lawful uses of the sea related to these freedoms which must, however, be exercised with due regard to Nicaragua's rights as the coastal State.

218. The Court now turns to the question whether Colombia has proved that the inhabitants of the San Andrés Archipelago, in particular the Raizales, have historically enjoyed "artisanal fishing rights" in areas that now fall within Nicaragua's exclusive economic zone and that those "rights" survived the establishment of Nicaragua's exclusive economic zone. Colombia relies on 11 affidavits annexed to its Counter-Memorial to prove the existence of a long-standing practice of artisanal fishing by the inhabitants of the San Andrés Archipelago, in particular the Raizales. The Court recalls that it must exercise caution in giving weight to affidavit evidence especially prepared by a party for the purposes of a case:

> "[W]itness statements produced in the form of affidavits should be treated with caution. In assessing such affidavits the Court must take into account a number of factors. These would include whether they were made by State officials or by private persons not interested in the outcome of the proceedings and whether a particular affidavit attests to the existence of facts or represents only an opinion as regards certain events." (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 731, para. 244.)

219. In the present case, the 11 affidavits annexed to Colombia's Counter-Memorial appear to have been sworn specifically for the purposes of this case and are signed by fishermen who may be considered as particularly interested in the outcome of these proceedings, factors that have a bearing on the weight and probative value of that evidence. The Court must nonetheless analyse the affidavits "for the utility of what is said" and to determine whether they support Colombia's contention (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 731, para. 244).

220. Having reviewed the affidavits on which Colombia relies, the Court observes that they contain indications that some fishing activities have in the past taken place in certain areas that had once been part of the high seas but now fall within Nicaragua's exclusive economic zone. However, the Court also notes that the affidavits do not establish with certainty the periods during which such

activities took place, or whether there was in fact a constant practice of artisanal fishing spanning many decades or centuries, as claimed by Colombia. Some affiants refer to fishing expeditions beyond the Colombian islands being limited to "a few times a year", while others claim to have carried out fishing in those areas since the 1980s and 1990s, a time span which the Court does not consider, in the circumstances of the present case, long enough to qualify such fishing as "a long-standing practice" or to support Colombia's claim concerning the existence of a local custom or of "a local customary right to artisanal fishing". The Court also notes in this regard that most of the affiants speak of having conducted their activities in waters surrounding the Colombian features or in fishing grounds located within Colombia's territorial sea, rather than Nicaraguan maritime areas. The evidence also suggests that the fishing expeditions within the areas now falling within Nicaragua's exclusive economic zone increased in frequency in recent decades as a result of technological developments enabling artisanal fishermen to venture further out to sea, and as a result of the depletion of fish stocks around the Colombian islands, a fact that Colombia itself concedes in its written pleadings and oral arguments. Finally, the Court observes that certain affidavits do not address the alleged historical nature of the fishing conducted in waters now falling in Nicaragua's exclusive economic zone, so that a conclusion in that regard cannot be derived from their reading.

221. The Court is mindful that traditional fishing practices alleged to have taken place over many decades may not have been documented in any formal or official record (cf. *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, pp. 265-266, para. 141), which calls for some flexibility in considering the probative value of the affidavits submitted by Colombia. Nonetheless, the Court is of the view that the 11 affidavits submitted by Colombia do not sufficiently establish its claim that the inhabitants of the San Andrés Archipelago, in particular the Raizales, have been engaged in a long-standing practice of artisanal fishing in "traditional fishing banks" located in waters now falling within Nicaragua's exclusive economic zone.

222. The Court also considers that the positions adopted by Colombia, *inter alia*, its statement before the International Labour Organization's Committee of Experts on the Application of Conventions and Recommendations, and Resolution No. 0121 of Colombia's General Maritime Directorate of 28 April 2004 (see paragraph 209 above), are inconsistent with Colombia's assertion concerning the existence of such a traditional practice of artisanal fishing in Nicaragua's exclusive economic zone. For example, on two occasions (August 2013 and February-March 2014), the Colombian General Confederation of Labour (hereinafter the "CGT") submitted information on behalf of the Raizal Small-Scale Fishers' Associations and Groups of the Department Archipelago of San Andrés, Providencia and Santa Catalina to the International Labour Organization's Committee of Experts on the Application of Conventions and Recommendations concerning the application by Colombia of the International Labour Organization's Indigenous and Tribal Peoples Convention of 1989. In these communications, the CGT asserted that the 2012 Judgment had negative implications for traditional fishing, as "Raizal fishers have no longer been able to fish with the tranquillity that they did ancestrally" and that "[they] have to cross Nicaraguan maritime territory, which is reported to give rise to difficulties and the payment of fines". The Committee summarized the responses sent by the Government of Colombia refuting the submissions of the CGT as follows:

> "[T]he Government explains that traditional fishing sites are precisely located in the vicinity of areas not affected by the ICJ judgment since it is a question of territorial sea and in this respect the ICJ ruled in favour of Colombia. The Government states that fishers from the islands of San Andrés, Providencia and Santa Catalina can continue fishing in the traditional way." (International Labour Organization, Committee of Experts on the Application of Conventions and Recommendations, Observation (CEACR) — adopted 2013, published 103rd ILC session (2014).)

> "The Government adds that the waters in which the small-scale fishers of the Raizal community traditionally fished continue to belong to Colombia and the fishers can continue their work as they did before the ruling of the ICJ of November 2012. With regard to the right of the inhabitants of San Andrés to have access to traditional fishing areas, the Government specifies that such fishing areas are located precisely around the keys and that these areas were not affected by the ICJ ruling, as they consisted of territorial waters awarded to Colombia, together with the sovereignty of the islands and the seven keys." (International Labour Organization, Committee of Experts on the Application of Conventions and Recommendations, Observation (CEACR) — adopted 2014, published 104th ILC session (2015).)

223. Colombia responds to the above observation by claiming that the Colombian Ministry of Labour "cavalierly concluded . . . that the artisanal fishermen of the San Andrés Archipelago could not have been impacted by the 2012 line" while "fail[ing] to provide even a shred of evidence to support its assertion that the traditional fishing sites were precisely located in the vicinity of areas not affected by the decision". It further points to the plan established by the Colombian Government to alleviate the adverse effects of the 2012 Judgment on the artisanal fishermen and considers that the communications from the fishermen prove its claim in the present proceedings. However, the Court has previously held that "statements emanating from high-ranking official[s] . . . are of particular probative value when they acknowledge facts or conduct unfavourable to the State represented by the person who made them" (*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 206, para. 78. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 41, para. 64). The Court has further observed in the past that

> "persons representing a State in specific fields may be authorized by that State to bind it by their statements in respect of matters falling within their purview. This may be true, for example, of holders of technical ministerial portfolios exercising powers in their field of competence in the area of foreign relations, and even of certain officials." (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 27, para. 47.)

The Court must consider therefore that the statements noted above, emanating from the Head of the Office of Co-operation and International Relations of Colombia's Ministry of Labour, further undermine Colombia's assertion of the existence of such a traditional practice of artisanal fishing in Nicaragua's exclusive economic zone.

224. The Court also takes note of a report issued by the Comptroller General's Office of the Department Archipelago of San Andrés, Providencia and Santa Catalina. In his 2013 Report on the "Status of Natural Resources and the Environment", the Comptroller of the Archipelago presented the new maritime boundary determined by the Court and the effects of the 2012 Judgment, asserting that the ruling of the Court translated into a substantial reduction of the marine territory of the Archipelago. With regard to the impact of the 2012 Judgment on fisheries, the Comptroller's report alludes to the reduction of fisheries activities, and links it to the concerns expressed by fishermen over "conflicts arising from [the ruling of the Court]". However, the Court observes that, in presenting "a detailed description of each impact on fisheries [of the 2012 Judgment]", the report only refers to the effects of the 2012 Judgment on industrial fishing without any specific mention of detrimental impacts in respect of artisanal fishermen. In addition, the report lists the "Traditional Fishing Location[s]" as follows:

> "San Andrés Island artisanal fishermen distribute themselves throughout the entire shelf, using points of reference for fishing grounds such as: Outside Bank (Northern San Andrés Island), Under the Lee (Western side of San Andres Island), Southend Bank (Southern San Andrés Island), Alburquerque Cays (50 km to the SSW of San Andrés Island), and Meridian 82 on the boundary with Nicaragua.
>
> In Providencia and Santa Catalina, fishing takes place in the interior and the exterior of the barrier reef, close to the reef terrace, respecting the park area and the protected marine area . . . [T]he specific work areas are El Faro, Taylor Reef, Morning Star, Northeast Bank, South Banks, and North Banks."

The report also seems to confirm that the artisanal fishermen usually remained close to the Colombian islands and found themselves in Nicaragua's exclusive economic zone only infrequently, a fact supported by the aforesaid affidavits. In view of the foregoing, the Court concludes that previous positions adopted by or on behalf of Colombia further undermine Colombia's assertion concerning the existence of a traditional practice of artisanal fishing in Nicaragua's exclusive economic zone.

225. The Court turns to several statements of Nicaragua's Head of State, which, according to Colombia, either illustrate Nicaragua's acceptance or recognition that the artisanal fishermen of the Archipelago have the right to fish in Nicaragua's maritime zones without having to request prior authorization or alternatively create a legal obligation on the part of Nicaragua to respect those fishing rights.

226. First, the Court observes that, in certain statements, President Ortega refers to the need to "respect the ancestral rights of the Raizales over those waters now fully belonging to [his] country" or to "respect the historical rights of the Raizal people . . . over the region". In other instances, the President affirms that "the [R]aizal community, living in San Andrés can continue fishing in the Caribbean waters now belonging to Nicaragua and that their rights as native people will not be affected".

227. Bearing in mind these observations, the Court begins by considering whether a recognition by Nicaragua of the alleged artisanal fishing rights may be inferred from the above statements. In this context, the Court will examine carefully the words used in those statements in order to ascertain whether such a recognition emerges therefrom. The Court observes that, in several

of President Ortega's statements, reference is made to the need for the Raizal community or the inhabitants of the Archipelago to obtain fishing permits or authorizations from Nicaragua to carry on artisanal or industrial fishing. In addition, President Ortega made references to mechanisms that needed to be established between Nicaragua and Colombia before the artisanal fishermen could operate in waters falling in Nicaragua's exclusive economic zone by virtue of the 2012 Judgment. In this regard, President Ortega proposed, *inter alia*, the creation of a commission "to work [to delimit] where the Raizal people can fish in [the] exercise of their historic rights"; the elaboration of "an agreement between Colombia and Nicaragua to regulate [the] situation"; or the establishment of "a Nicaraguan consular section" on the San Andrés island "to solve the issue of the fishing permits for the [R]aizal community". In the Court's view, the statements by President Ortega do not establish that Nicaragua has recognized that the inhabitants of the San Andrés Archipelago, in particular the Raizales, have the right to fish in Nicaragua's maritime zones without having to request prior authorization. It follows that the Court cannot uphold Colombia's contention that Nicaragua, through the statements of its Head of State, accepted or recognized the rights of the Raizales to fish in Nicaragua's exclusive economic zone without requiring authorization from Nicaragua.

228. The Court will now consider whether the statements of President Ortega constitute a legal undertaking "granting rights to the artisanal fishermen". In determining whether a unilateral declaration by a State official entails the creation of legal obligations, the Court has stated:

> "It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding.
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> . . . . . .
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> With regard to the question of form, it should be observed that this is not a domain in which international law imposes any special or strict requirements. Whether a statement is made orally or in writing makes no essential difference, for such statements made in particular circumstances may create commitments in international law, which does not require that they should be couched in written form. Thus the question of form is not decisive." (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, pp. 267-268, paras. 43 and 45; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, pp. 472-473, paras. 46 and 48.)

229. The Court has also emphasized the need to consider the factual circumstances in which the unilateral statement was made and the need to consider carefully whether the State issuing the declaration intended to be bound by it (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment. I.C.J. Reports 1986*, p. 43, para. 71; *Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 573, para. 39; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Judgment, I.C.J. Reports 2018 (II)*, p. 555, para. 146). In this regard, the Court is mindful that certain

declarations may express a State's willingness to adopt a particular course of conduct, without being expressed in terms of undertaking a legal obligation (*Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Judgment, I.C.J. Reports 2018 (II)*, p. 555, para. 147). The Court has also held that "[w]hen States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for" (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 267, para. 44; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 473, para. 47). It also falls to the Court to "form its own view of the meaning and scope intended by the author of a unilateral declaration which may create a legal obligation" (*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 573, para. 39, citing *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 269, para. 48; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 474, para. 50).

230. In the Court's view, the statements of Nicaragua's Head of State indicate that the Nicaraguan authorities were aware of the issues that arose in respect of the fishing activities of the inhabitants of the Archipelago and the challenges that Colombia faced in implementing the 2012 Judgment. In that regard, it appears that Nicaragua expressed an openness to concluding an agreement with Colombia regarding appropriate mechanisms and solutions to overcome those challenges. The Court notes that, in some statements adduced by the Respondent, the Nicaraguan Head of State expressed concerns regarding the rejection by Colombia of the delimitation effected by the Court and affirmed the need to work with Colombia on reaching an agreement to ensure compliance with the 2012 Judgment. President Ortega further alluded to the need to understand the inner workings of domestic politics and to give due time to Colombia to bring its national legislation into compliance with the Court's Judgment. The Court further observes that both Parties agree that the statements were made in the context of political protests in the aftermath of the 2012 Judgment and against the backdrop of the ongoing negotiations with Colombia with the view of achieving an agreement on the implementation of the 2012 Judgment. Bearing in mind the above context and adopting a restrictive interpretation (*Nuclear Tests (Australia* v. *France), I.C.J. Reports 1974*, p. 267, para. 44; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 473, para. 47), the Court cannot accept Colombia's alternative argument that the statements of President Ortega, referred to above, constitute a legal undertaking on the part of Nicaragua to respect the rights of the artisanal fishermen of the San Andrés Archipelago to fish in Nicaragua's maritime zones without requiring prior authorization from Nicaragua.

231. For these reasons, the Court concludes that Colombia has failed to establish that the inhabitants of the San Andrés Archipelago, in particular the Raizales, enjoy artisanal fishing rights in waters now located in Nicaragua's exclusive economic zone, or that Nicaragua has, through the unilateral statements of its Head of State, accepted or recognized their traditional fishing rights, or legally undertaken to respect them. In view of this conclusion, the Court need not examine the Parties' arguments in respect of whether or in which circumstances the traditional fishing rights of a particular community can survive the establishment of the exclusive economic zone of another State, or Colombia's contentions concerning Nicaragua's alleged infringement of said rights through the conduct of its Naval Force. In light of all the above considerations, the Court dismisses Colombia's third counter-claim.

232. Notwithstanding the above conclusion, the Court takes note of Nicaragua's willingness, as expressed through statements of its Head of State, to negotiate with Colombia an agreement regarding access by members of the Raizales community to fisheries located within Nicaragua's exclusive economic zone. The Court considers that the most appropriate solution to address the concerns expressed by Colombia and its nationals in respect of access to fisheries located within Nicaragua's exclusive economic zone would be the negotiation of a bilateral agreement between the Parties.

233. The Court also emphasizes that, under customary international law applicable to the exclusive economic zone, as reflected in Article 58 of UNCLOS, third States possess freedom of navigation in this area. It follows that the inhabitants of the Archipelago, including the Raizales, may freely navigate within Nicaragua's exclusive economic zone, including in the course of their travel between the inhabited islands and the fishing areas located on Colombia's side of the maritime boundary.

B. Alleged violation of Colombia's sovereign rights and maritime spaces by Nicaragua's use of straight baselines

234. The Court now turns to Colombia's fourth counter-claim. On 27 August 2013, Nicaragua enacted Decree 33 through which it established a system of straight baselines along its Caribbean coast, from which the breadth of its territorial sea is measured. In the preamble to the Decree, Nicaragua purports to have acted in accordance with the provisions of UNCLOS in establishing those baselines. The Decree identifies nine base points — two are located on the low-water line along Nicaragua's mainland coast and the remaining seven are located on the low-water line along islands seaward of Nicaragua's mainland coast — and eight straight baseline segments. (In the 2018 amendment to Decree 33, Nicaragua made a small adjustment to the location of base point 9, located on its southern coast, to take into account the Court's Judgment of 2 February 2018 in the cases concerning *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v. *Nicaragua)* and *Land Boundary in the Northern Part of Isla Portillos (Costa Rica* v. *Nicaragua)*, a change that neither Party considers material to the present case.)

235. In its fourth counter-claim, Colombia raises three objections to Nicaragua's use of straight baselines. First, the Respondent argues that Nicaragua has not met the necessary geographical preconditions required under Article 7 of UNCLOS, which reflects the customary international law on the use of straight baselines, in that there is no "fringe of islands along the Nicaraguan coast in its immediate vicinity", and the coastline is not "deeply indented and cut into". Colombia also advocates for a strictly frontal projection in determining the extent to which the coast is masked or guarded by the islands and finds that the concerned features "mask no more than 5 to 6 percent of the coast". Secondly, Colombia argues that even if those geographical preconditions were met, the manner in which Nicaragua drew those baselines contravenes the provisions of Article 7, paragraph 3, since the baselines depart significantly from the general direction of Nicaragua's coast and enclose sea areas that are not sufficiently closely linked to the land domain to be subject to the régime of internal waters. Thirdly, Colombia argues that by employing straight baselines, Nicaragua is attempting to misappropriate significant maritime areas as its internal waters and is artificially expanding its territorial sea, exclusive economic zone and continental shelf, in a manner that not only infringes upon Colombia's rights and maritime spaces, but also limits the rights of third States in the Caribbean Sea. Colombia accordingly maintains that Nicaragua's straight baselines established in Decree 33, as amended, are contrary to international law and violate Colombia's rights and maritime spaces.

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236. For its part, Nicaragua asserts that its straight baselines were drawn in accordance with customary international law and the relevant provisions of UNCLOS, and that the Applicant is therefore entitled to determine the status of the waters landward and seaward of those baselines in accordance with international law. Nicaragua also disagrees with Colombia's contention that Decree 33 produces an artificial overlap of Nicaragua's exclusive economic zone with Colombia's entitlement to its own exclusive economic zone and continental shelf. According to Nicaragua, the outer limit of its exclusive economic zone is unaltered by the use of straight baselines, because the outer limit of that zone is controlled by basepoints on the low-water line along its coast that are seaward of the straight baselines.

237. Nicaragua maintains that the geographical configuration of its coast permits the use of straight baselines, in that the coastline is deeply indented and cut into and there is a fringe of islands along the coast in its immediate vicinity, as required by Article 7, paragraph 1, of UNCLOS. Nicaragua further argues that the Court's 2012 Judgment in two instances refers respectively to the "Nicaraguan fringing islands" and the "islands fringing the Nicaraguan coast". Moreover, base points on Nicaragua's fringing islands were used in the construction of a provisional median line. In its view, these islands form a fringe in the immediate vicinity of the coast of Nicaragua. It also disputes Colombia's assertion that the islands do not form a unity with the mainland given the distance between the main features — the Miskitos Cays and the Corn Islands — and the Nicaraguan coast. Nicaragua observes in this respect that Colombia's claim does not take account of the fact that these main features are located in an area in which there are numerous other islands. Nicaragua argues that the Court should be informed by its own approach to determining the seaward projection of relevant coasts in connection with the delimitation of maritime boundaries. In light of the Court's jurisprudence, Nicaragua submits, it would be reasonable to look at a projection of all relevant islands and features between a perpendicular to the general direction of the mainland coast and an angle of 20 degrees to that perpendicular, an approach which allegedly yields a masking effect of 46 per cent.

238. Nicaragua further contends that the course of its baselines does "not depart to any appreciable extent from the general direction of the coast", in accordance with Article 7, paragraph 3, of the Convention. It considers that, as indicated by the Court, in applying the principle of the general direction of the coast, the focus should be on the overall direction of the coast under consideration, not that of specific localities. Second, it asserts that "the sea areas lying within the lines [are] sufficiently closely linked to the land domain to be subject to the régime of internal waters", in accordance with the same provision.

239. Finally, Nicaragua argues that Colombia's rights have not been infringed by Nicaragua's straight baselines. It states that its straight baselines are in conformity with Article 7 of the Convention and, as a consequence, Nicaragua is entitled to apply the régime for internal waters, as defined by the Convention and customary international law, landward of these straight baselines. It adds that the outer limit of Nicaragua's exclusive economic zone has not shifted seaward following the establishment of its straight baselines through Decree 33, since the outer limit of Nicaragua's exclusive economic zone is determined from base points located on the low-water line along Nee Reef and London Reef (low-tide elevations that are located within 12 nautical miles of the Miskitos Cays), Blowing Rock and Little Corn Island, all of which are seaward of those straight baselines.

* *

240. The Court recalls that when it delimited the maritime boundary between the Parties in the 2012 Judgment, the location of Nicaragua's baselines was unsettled, given that "Nicaragua ha[d] not yet notified the Secretary-General [of the United Nations] of the location of those baselines under Article 16, paragraph 2, of UNCLOS". Accordingly, the location of the eastern endpoints of the maritime boundary was determined only on an approximate basis (*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 683, para. 159, and p. 713, para. 237).

241. The Parties agree on the principles governing the determination of appropriate baselines. They consider that Article 5 of UNCLOS sets out the criteria that govern the establishment of normal baselines, namely "the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State". The Parties also agree that customary international law permits a deviation from normal baselines where "the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity". They accept that Article 7 of UNCLOS reflects customary international law on the drawing of straight baselines.

242. The Court recalls that in its Judgment in the *Fisheries* case, it recognized the employment of straight baselines as the "application of general international law to a specific case" given the geographic characteristics of Norway's coast (*Fisheries (United Kingdom* v. *Norway), Judgment, I.C.J. Reports 1951*, p. 131). In assessing the validity of Norway's baselines under international law, the Court indeed identified certain criteria which were codified in Article 4 of the 1958 Convention. This provision corresponds, almost verbatim, to Article 7 of UNCLOS on "Straight baselines", paragraphs 1, 3 and 4 of which provide that:

> "1. In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.
>
> . . . . . .
>
> 3. The drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters.
>
> 4. Straight baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them or except in instances where the drawing of baselines to and from such elevations has received general international recognition."

The Court considers that Article 7 of UNCLOS reflects customary international law.

243. The Court recalls that it is for the coastal State to determine its baselines for the purposes of measuring the breadth of its maritime zones, in conformity with international law. However, as the Court has stated in the past, the determination of baselines is "an exercise which has always an international aspect" and falls to be assessed by reference to international rules (*Maritime*

Delimitation in the Black Sea (Romania v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 108, para. 137; see also *Fisheries (United Kingdom* v. *Norway), Judgment, I.C.J. Reports 1951*, p. 132). Moreover, the Court would recall, in relation to the use of straight baselines and the applicable rules, that

> "the method of straight baselines, which is an exception to the normal rules for the determination of baselines, may only be applied if a number of conditions are met. This method must be applied restrictively." (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001*, p. 103, para. 212.)

244. Customary international law as reflected in Article 7, paragraph 1, of UNCLOS provides for two geographical preconditions for the establishment of straight baselines. The preconditions are alternative and not cumulative. With respect to the straight baselines drawn from Cabo Gracias a Dios on the mainland to Great Corn Island along the coast (points 1-8), Nicaragua asserts that there is "a fringe of islands along the coast in its immediate vicinity" that entitles it to use straight rather than normal baselines. As to the southernmost part of its mainland coast, Nicaragua claims instead that the indentation of the coast from Monkey Point to the land boundary terminus with Costa Rica justifies Nicaragua's straight baselines drawn from point 8 (Great Corn Island) to point 9 (Barra Indio Maíz).

245. The Court notes that there appears to be no single test for identifying a coastline that is "deeply indented and cut into". Since Nicaragua concedes that it is only the southernmost portion of its Caribbean coast between Monkey Point and Barra Indio Maíz that falls to be considered under the second geographic option, the Court must determine whether the straight baseline segment between base points 8 and 9 defined by Decree 33, as amended, is justified on the basis that the corresponding coast is "deeply indented and cut into". An examination of the relevant maps reveals that Nicaragua's southernmost coast does, in fact, curve inward. Under the conditions reflected in Article 7, paragraph 1, of UNCLOS, however, it is not sufficient for the coast to have slight indentations and concavities; the coast must be "deeply indented and cut into". From the Isla del Venado (facing the bay of Bluefields) to Monkey Point, Nicaragua's mainland coast has a smooth configuration. A broad concavity is observable from Punta Grindston Bay to Isla Portillos, at the land boundary terminus with Costa Rica. The indentations along the relevant portion of Nicaragua's coast do not penetrate sufficiently inland or present characteristics sufficient for the Court to consider the said portion as "deeply indented and cut into". The relevant portion is not "of a very distinctive configuration", nor "broken along its whole length" or "constantly open[ing] out into indentations often penetrating for great distances inland" (*Fisheries (United Kingdom* v. *Norway), Judgment, I.C.J. Reports 1951*, p. 127). Thus, recalling that the straight baselines method "must be applied restrictively", the Court finds that the straight baseline segment between base points 8 and 9 defined by Decree 33, as amended, does not conform with customary international law on the drawing of straight baselines as reflected in Article 7, paragraph 1, of UNCLOS.

246. The Court now turns to the remainder of Nicaragua's straight baselines running from point 1 to point 8, where some base points are located on features such as Edinburgh Cay, the Miskitos Cays, Ned Thomas Cay, the Man of War Cays and the Corn Islands. It recalls that base points used to construct straight baselines may be placed on islands, but may not be placed on features that are below water at high tide (low-tide elevations) except in certain situations which are not

present in this case. Article 121, paragraph 1, of UNCLOS, defines an "island" as "a naturally formed area of land, surrounded by water, which is above water at high tide". In the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, the Court viewed the legal definition of an island embodied in Article 121, paragraph 1, as part of customary international law (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain, (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001*, p. 91, para. 167, and p. 99, para. 195) and it reaffirmed the same in its 2012 Judgment (*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 674, para. 139).

247. In this regard, the Court notes that the Parties are divided on the question whether Nicaragua's offshore islands constitute a "fringe of islands along the coast in its immediate vicinity" within the meaning of Article 7, paragraph 1, of UNCLOS. First, the Parties disagree as to whether certain features are islands and whether there is a sufficient number of islands for drawing straight baselines. They also disagree on whether the islands in question "form a unity with the mainland" or have a "masking effect" on Nicaragua's coastline. Lastly, the Parties disagree about the size of the islands and whether their distance from each other and from the mainland justifies the drawing of straight baselines.

248. The Court must begin by ascertaining whether Nicaragua has demonstrated the presence of "islands" and, if so, whether those islands amount to "a fringe . . . along the coast in its immediate vicinity" as required by customary international law. Nicaragua asserts that there are 95 "islands" along its coast and provides a list of these as an annex to its written pleadings. Colombia adopts the view that Nicaragua has failed to prove the existence of the "islands", noting that Nicaragua does not adduce evidence concerning the insular nature or characteristics of these features. Colombia further considers that the feature called Edinburgh Cay, on which Nicaragua has placed a base point, is not an "island" for the purposes of Article 7, paragraph 1, and is shown as a simple "low-tide elevation" on Nautical Chart 28130.

249. As noted by the Parties, the 2012 Judgment contains references to "islands fringing the Nicaraguan coast" and to "the Nicaraguan mainland and fringing islands". While the Parties reach different conclusions on the legal significance of such references by the Court, they agree that the Court did not qualify the said islands as "a fringe of islands" within the meaning of Article 7, paragraph 1, of UNCLOS, nor that the Court was dealing with Nicaragua's claim to straight baselines. Furthermore, the Court clearly indicated that Nicaragua was yet to notify its baselines from which the breadth of its territorial sea would be measured, in accordance with Article 16, paragraph 2, of UNCLOS (*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 683, para. 159). Notwithstanding these clarifications, the Court is satisfied, in general terms, on the basis of the above references and noting its findings in its 2012 Judgment according to which "[t]here are a number of Nicaraguan islands located off the mainland coast of Nicaragua" (*ibid.*, p. 638, para. 21), that some of the 95 features listed by Nicaragua are islands, as opposed to low-tide elevations. The Court must emphasize, nonetheless, that it does not automatically follow that all the features listed by Nicaragua are "islands" or that they constitute "a fringe" within the meaning of Article 7, paragraph 1, of UNCLOS. It remains for Nicaragua to prove that there is indeed "a fringe of islands along the coast in its immediate vicinity" within the meaning of that provision.

250. The Parties are divided concerning the insular nature of "Edinburgh Cay" and about whether this feature may be considered an island for the purpose of drawing straight baselines under Article 7 of UNCLOS. The Court notes that, in plotting a provisional equidistance line, the 2012 Judgment refers to "Edinburgh Reef" as part of the islands located off the coast of Nicaragua (*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 638, para. 21) and that the Court placed a base point on this feature for the construction of the provisional equidistance line (*ibid.*, pp. 698-700, paras. 201 and 204). However, the Court did not at that time consider the appropriateness of this feature for the purpose of drawing straight baselines, nor did the Court qualify it as an "island" within the meaning of Article 7, paragraph 1, of UNCLOS. The Court has underlined in the past that

> "the issue of determining the baseline for the purpose of measuring the breadth of the continental shelf and the exclusive economic zone and the issue of identifying base points for drawing an equidistance/median line for the purpose of delimiting the continental shelf and the exclusive economic zone between adjacent/opposite States are two different issues" (*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 108, para. 137).

251. The Court notes the contradictory data put forward by the Applicant concerning the nature of Edinburgh Cay. Nautical Chart NGA 28130, annexed to the Applicant's written pleadings, indicates that Edinburgh Cay, based on charted data, is not an island. Nicaragua explains that a different chart (British Admiralty Chart 1218), which was part of Nicaragua's pleadings in the case concerning *Territorial and Maritime Dispute*, shows the presence of "several islands on Edinburgh Cay or Reef". In these circumstances, the Court considers that there are serious reasons to question the nature of Edinburgh Cay as an island for the purpose of Article 7, paragraph 1, of UNCLOS. Thus, significant questions arise as to its appropriateness as the location for a base point for the drawing of straight baselines under the same provision. The Court adopts the view that Nicaragua has not demonstrated the insular nature of this feature.

252. In respect of the existence of a fringe of islands, the Court notes that there are no specific rules regarding the minimum number of islands, although the phrase "fringe of islands" implies that there should not be too small a number of such islands relative to the length of the coast (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001*, p. 103, para. 214). Given the uncertainty about which of the 95 features are islands, the Court is not satisfied, on the basis of the maps and figures submitted by the Parties, that the number of Nicaragua's islands relative to the length of the coast is sufficient to constitute "a fringe of islands" along Nicaragua's coast.

253. The maritime features shown on the maps may be divided into two groups on the basis of their geographic proximity: one group, located off the northernmost part of Nicaragua's mainland coast, extends from Edinburgh Cay to Ned Thomas Cay, including the Miskitos Cays; the second group, located off the central part of Nicaragua's mainland coast, extends from Man of War Cays to the Corn Islands, including the Tyra Cays and Pearl Point (Punta de Perlas).

254. The Parties have alluded in their pleadings to several factors they consider as relevant to determine whether a given group of islands amounts to "a fringe". The Court has equated in the past the term "fringe of islands" to a "cluster of islands" or an "island system" (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001*, p. 103, para. 214). The arbitral tribunal in the proceedings between Eritrea and Yemen referred to "[a] tightly knit group of islands and islets, or 'carpet' of islands and islets" or to "an intricate system of islands, islets and reefs which guard this part of the coast" (*Second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation), Award, 17 December 1999, Reports of International Arbitral Awards (RIAA)*, Vol. XXII, p. 369, para. 151). Also, it emerges from these considerations that a certain continuity must be observed in respect of the islands in question for them to form a "fringe of islands" within the meaning of Article 7, paragraph 1, of UNCLOS. This conclusion is reinforced by the ordinary meaning of the words "fringe of islands" in other authentic languages of UNCLOS, such as in French, which refers to "un chapelet d'îles", a term which implies a certain succession or continuity. In the Court's view, a "fringe" must enclose a set, or a cluster of islands which present an interconnected system with some consistency or continuity. In certain instances, a fringe of islands "guard[ing] [a] part of the coast" may have a masking effect on a large proportion of the coast from the sea, a criterion which has been used and discussed by the Parties in the present proceedings to demonstrate or refute the existence of a fringe of islands along the Nicaraguan coastline (*Second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation), Award, 17 December 1999, RIAA*, Vol. XXII (2001), p. 369, para. 151).

255. In determining whether the features identified by the Applicant can be considered a "fringe of islands", the Court observes that customary international law, as reflected in Article 7, paragraph 1, of UNCLOS, requires this fringe to be located "along the coast" and in its "immediate vicinity". Read together with the additional requirements of Article 7, paragraph 3, according to which the drawing of straight baselines "must not depart to any appreciable extent from the general direction of the coast" and "the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters", the specific requirements of Article 7, paragraph 1, indicate that a "fringe of islands" must be sufficiently close to the mainland so as to warrant its consideration as the outer edge or extremity of that coast (*Fisheries (United Kingdom* v. *Norway), Judgment, I.C.J. Reports 1951*, p. 128). It is not sufficient that the concerned maritime features be part, in general terms, of the overall geographical configuration of the State. They need to be an integral part of its coastal configuration (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001*, p. 103, para. 214; *Second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation), Award, 17 December 1999, RIAA*, Vol. XXII (2001), p. 338, para. 14).

256. Bearing in mind these considerations, the Court is of the opinion that the Nicaraguan "islands" are not sufficiently close to each other to form a coherent "cluster" or a "chapelet" along the coast and are not sufficiently linked to the land domain to be considered as the outer edge of the coast. Nicaragua asserts that "there are numerous small cays between the mainland and the Corn Islands and that as a consequence the territorial seas of the two merge and overlap" in order to illustrate the relationship between the "islands" and the mainland. However, the Court notes that Nicaragua's straight baselines enclose large maritime areas where no maritime feature entitled to a territorial sea has been shown to exist. These areas are between Ned Thomas Cay and the Man of War Cays, between East of Great Tyra Cay and the Corn Islands, and from Corn Islands to the land boundary terminus with Costa Rica. The Court further notes that the features and islands located towards the south of Nicaragua's mainland coast — the Man of War and East of Great Tyra Cay and

the Little Corn and Great Corn Islands — appear to be significantly detached from the islands grouped in the north. Furthermore, a notable break in continuity of over 75 nautical miles can be observed between Ned Thomas Cay, on which Nicaragua has plotted base point 4, and Man of War Cays where base point 5 is located. Nicaragua concedes that the groups of islands along its coast are "separate".

257. Furthermore, the Court is not convinced that Nicaragua's islands "guard . . . part of the coast" in such a way that they have a masking effect on a large portion of the mainland coast (*Second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation), Award, 17 December 1999, RIAA*, Vol. XXII (2001), p. 369, para. 151). The segments of Nicaragua's mainland coast facing the areas lying between Ned Thomas Cay and the Man of War Cays and south of the Corn Islands do not seem to be masked by islands. The Court notes that the Parties disagree about the approach to be adopted to assess the extent of the masking effect of the islands and propose different methods by way of different projections. Without adopting a view concerning the relevance of the projections suggested by the Parties in assessing the masking effect of islands for the purpose of Article 7, paragraph 1, of UNCLOS, the Court considers that, even if it were to accept Nicaragua's approach, the masking effect of the maritime features that the Applicant identifies as "islands" is not significant enough for them to be considered as masking a large proportion of the coast from the sea.

258. In light of the above findings, the Court cannot accept Nicaragua's contention that there exists a continuous fringe or an "intricate system of islands, islets and reefs which guard this part of the coast" of Nicaragua (*Second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation), Award, 17 December 1999, RIAA*, Vol. XXII (2001), p. 369, para. 151). It follows that Nicaragua's straight baselines do not meet the requirements of customary international law reflected in Article 7, paragraph 1, of UNCLOS. Having reached this conclusion, the Court need not consider whether the Applicant's straight baselines meet the additional requirements reflected in Article 7, paragraph 3, of UNCLOS.

259. Nicaragua's own evidence establishes that the straight baselines convert into internal waters certain areas which otherwise would have been part of Nicaragua's territorial sea or exclusive economic zone and convert into territorial sea certain areas which would have been part of Nicaragua's exclusive economic zone. The establishment of Nicaragua's straight baselines limits the rights that Colombian vessels would have had in those areas. The availability of the right of innocent passage in areas landward of straight baselines, consistent with Article 8, paragraph 2, of UNCLOS, does not fully address the implications for Colombia of Nicaragua's straight baselines. The Court notes in particular that by converting certain areas of its exclusive economic zone into internal waters or into territorial sea, Nicaragua's straight baselines deny to Colombia the rights to which it is entitled in the exclusive economic zone, including the freedoms of navigation and overflight and of the laying of submarine cables and pipelines, as provided under customary international law as reflected in Article 58, paragraph 1, of UNCLOS.

260. For the reasons set out above, the Court concludes that the straight baselines established by Decree 33, as amended, do not conform with customary international law. The Court considers that a declaratory judgment to that effect is an appropriate remedy.

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261. For these reasons,

THE COURT,

(1) By ten votes to five,

Finds that its jurisdiction, based on Article XXXI of the Pact of Bogotá, to adjudicate upon the dispute regarding the alleged violations by the Republic of Colombia of the Republic of Nicaragua's rights in the maritime zones which the Court declared in its 2012 Judgment to appertain to the Republic of Nicaragua, covers the claims based on those events referred to by the Republic of Nicaragua that occurred after 27 November 2013, the date on which the Pact of Bogotá ceased to be in force for the Republic of Colombia;

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa; *Judge* ad hoc Daudet;

AGAINST: *Judges* Abraham, Bennouna, Yusuf, Nolte; *Judge* ad hoc McRae;

(2) By ten votes to five,

Finds that, by interfering with fishing and marine scientific research activities of Nicaraguan-flagged or Nicaraguan-licensed vessels and with the operations of Nicaraguan naval vessels in the Republic of Nicaragua's exclusive economic zone and by purporting to enforce conservation measures in that zone, the Republic of Colombia has violated the Republic of Nicaragua's sovereign rights and jurisdiction in this maritime zone;

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa; *Judge* ad hoc Daudet;

AGAINST: *Judges* Abraham, Bennouna, Yusuf, Nolte; *Judge* ad hoc McRae;

(3) By nine votes to six,

Finds that, by authorizing fishing activities in the Republic of Nicaragua's exclusive economic zone, the Republic of Colombia has violated the Republic of Nicaragua's sovereign rights and jurisdiction in this maritime zone;

IN FAVOUR: *President* Donoghue; *Judges* Tomka, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa; *Judge* ad hoc Daudet;

AGAINST: *Vice-President* Gevorgian; *Judges* Abraham, Bennouna, Yusuf, Nolte; *Judge* ad hoc McRae;

(4) By nine votes to six,

Finds that the Republic of Colombia must immediately cease the conduct referred to in points (2) and (3) above;

IN FAVOUR: *President* Donoghue; *Judges* Tomka, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa; *Judge* ad hoc Daudet;

AGAINST: *Vice-President* Gevorgian; *Judges* Abraham, Bennouna, Yusuf, Nolte; *Judge* ad hoc McRae;

(5) By thirteen votes to two,

Finds that the "integral contiguous zone" established by the Republic of Colombia by Presidential Decree 1946 of 9 September 2013, as amended by Decree 1119 of 17 June 2014, is not in conformity with customary international law, as set out in paragraphs 170 to 187 above;

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte; *Judge* ad hoc Daudet;

AGAINST: *Judge* Abraham; *Judge* ad hoc McRae;

(6) By twelve votes to three,

Finds that the Republic of Colombia must, by means of its own choosing, bring into conformity with customary international law the provisions of Presidential Decree 1946 of 9 September 2013, as amended by Decree 1119 of 17 June 2014, in so far as they relate to maritime areas declared by the Court in its 2012 Judgment to appertain to the Republic of Nicaragua;

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Bennouna, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte; *Judge* ad hoc Daudet;

AGAINST: *Judges* Abraham, Yusuf; *Judge* ad hoc McRae;

(7) By twelve votes to three,

Finds that the Republic of Nicaragua's straight baselines established by Decree No. 33-2013 of 19 August 2013, as amended by Decree No. 17-2018 of 10 October 2018, are not in conformity with customary international law;

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Abraham, Yusuf, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte; *Judge* ad hoc Daudet;

AGAINST: *Judges* Bennouna, Xue; *Judge* ad hoc McRae;

(8) By fourteen votes to one,

Rejects all other submissions made by the Parties.

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte; *Judge* ad hoc Daudet;

AGAINST: *Judge* ad hoc McRae.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-first day of April, two thousand and twenty-two, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Nicaragua and the Government of the Republic of Colombia, respectively.

(Signed) Joan E. DONOGHUE,
President.

(Signed) Philippe GAUTIER,
Registrar.

Vice-President GEVORGIAN appends a declaration to the Judgment of the Court; Judge TOMKA appends a separate opinion to the Judgment of the Court; Judge ABRAHAM appends a dissenting opinion to the Judgment of the Court; Judge BENNOUNA appends a declaration to the Judgment of the Court; Judge YUSUF appends a separate opinion to the Judgment of the Court; Judge XUE appends a declaration to the Judgment of the Court; Judge ROBINSON appends a separate opinion to the Judgment of the Court; Judge IWASAWA appends a declaration to the Judgment of the Court; Judge NOLTE appends a dissenting opinion to the Judgment of the Court; Judge *ad hoc* MCRAE appends a dissenting opinion to the Judgment of the Court.

(Initialled) J.E.D.

(Initialled) Ph.G.