

INTERNATIONAL COURT OF JUSTICE

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

(NICARAGUA *v.* COLOMBIA)

**COMMENTS OF THE
REPUBLIC OF COLOMBIA TO
NICARAGUA'S NEW DOCUMENTS**

16 December 2019

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A. Introduction.

1. Concerning the case of the *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)* and in particular to the note sent by the Registrar on 16 October 2019, the Republic of Colombia was informed about the Court's decision to authorize the production of new documents and materials by Nicaragua in forty-four (44) annexes as per its request of 24 September 2019.¹

2. Pursuant to said note and in accordance with Article 56, paragraph 3, of the Rules of Court, the Republic of Colombia provides its Comments on Nicaragua's new documents and produces additional documents in support of these Comments.²

3. As a preliminary note, Colombia should remark that it is still unclear as to the exceptional circumstances which led to the

¹ Out of these 44 annexes, 33 correspond to the event of the Honduran M/V "Observer" and 10 correspond to the Mexican research vessel "Jorge Carranza Fraser". Nicaragua Annex 19 is an interview of the Minister of Foreign Affairs of Colombia, in which, as was noted in Colombia's letter to the Court on Nicaragua's request for the production of new documents (ENLHY-88, p. 3), "[H]e refers, among other matters, to territorial – not maritime – areas. His Statements are unrelated to the two events Nicaragua attempts to document, nor, indeed, to any other 'incidents' alleged by Nicaragua." Hence, this annex will not be addressed in these Comments, as it is immaterial in the context of the current proceedings.

² See Colombian Annexes 1 to 19 attached hereto.

production of these new documents by Nicaragua. Nicaragua gave no reasons as to why those documents were necessary or why they could not be produced at an earlier stage. Nevertheless, Colombia recalls that it has participated in these proceedings in good faith and in compliance with the provisions of the Court's Statute and the Rules of Court concerning the presentation of pleadings and evidence. It is in this spirit that the Republic of Colombia provides its Comments which disprove the allegations raised by Nicaragua in its letter dated 23 September 2019. Due to the wholly misleading nature of the allegations made by Nicaragua based on its new documents, Colombia is constrained to answer these allegations in some detail, and to explain the manner in which Nicaragua has misrepresented the facts.

4. Colombia's Comments will be divided into three main Parts (B, C and D). In Part B, Colombia reiterates its conviction that the Court lacks jurisdiction over the events referred by the new documents. In Part C, Colombia will explain that it did not violate Nicaragua's sovereign rights and maritime spaces with respect to Nicaragua's new allegations. This Part is divided in two Sections, (1) and (2), which address the events regarding the Honduran fishing vessel "Observer" and the Mexican research vessel "Jorge Carranza Fraser", respectively. The first Section, which refers to the M/V "Observer", is divided in five subsections: (a) The "Observer" was not fishing in Nicaraguan waters; (b) Colombia did not harass the Nicaraguan vessel FNN "Tayacán" with a low-flying plane or a fast boat; (c) The

Nicaraguan Naval Force tried to ram the Colombian vessel, (d) Nicaragua deliberately manoeuvred in order to have the “Observer” and the “Antioquia” bump into each other, and (e) The damage to the “Tayacán” depicted by Nicaragua was not caused by the “Antioquia” which never bumped into the Nicaraguan vessel and was caused by the “Tayacán” ramming into the “Observer” to stop it from fleeing. Part D then ends with Colombia’s conclusions regarding the assertions advanced by Nicaragua on the basis of its newly filed documents.

B. The Court lacks jurisdiction over the events referred to in the new documents.

5. The new documents by which Nicaragua seeks to supplement its case allegedly concern two events that occurred in October and December 2018, respectively. They are thus events that were not the subject-matter of any dispute between the Parties at the time when Nicaragua filed its Application on 26 November 2013.

6. As explained in Colombia’s Counter-Memorial and Rejoinder, as of 27 November 2013, Colombia was no longer bound by the American Treaty on Pacific Settlement (Pact of Bogotá). Under Article XXXI of the Pact of Bogotá, Colombia did not consent to the Court’s jurisdiction to rule on any events that took place *after* it ceased to be bound by the Pact.

7. Therefore, even though Nicaragua's new documents have been incorporated into the file of the present case, it does not follow from that that the Court has jurisdiction over the events referred to in these documents. Indeed, Colombia considers that the Court lacks jurisdiction over the events referred to in these new documents, which took place some five years after Colombia ceased to be bound by the Pact of Bogotá.

8. Nevertheless, even if the Court decides it has jurisdiction over the events referred to in Nicaragua's new documents (*quod non*), they do not prove any violation by Colombia of Nicaragua's sovereign rights and maritime spaces. To the contrary, as will be demonstrated, the events, particularly those regarding the M/V "Observer", show an absolute lack of respect for international law and a pattern of aggressive and illegal behaviour by Nicaragua.

C. Colombia did not violate Nicaragua's sovereign rights and maritime spaces.

9. Nicaragua submitted to the Court documents on two events which it claims constitute "*flagrant violations of its rights as conclusively adjudicated by the Court in its 2012*

*Judgment in the Territorial and Maritime Dispute (Nicaragua v. Colombia), and a threat to its rights in dispute in this case”.*³

10. To prove that Colombia has violated its sovereign rights, Nicaragua first has to establish that it has the relevant sovereign rights under customary international law, which is the applicable law in the present case. However, nowhere in its letter dated 23 September 2019 did Nicaragua identify or articulate what specific sovereign rights it possesses that were purportedly violated by Colombia in these events. In fact, the two events primarily concern vessels from third States, not Nicaragua. The “Observer” is a Honduran flagged fishing vessel while the “Jorge Carranza Fraser” is a Mexican flagged research vessel.

11. Apart from these legal deficiencies in Nicaragua’s claim, there are also serious factual and evidentiary problems with Nicaragua’s position. As explained below, the evidence simply does not support Nicaragua’s claim that Colombia violated its sovereign rights and maritime spaces in these two events.

12. Colombia will first comment on the event involving the “Observer”, before addressing the event concerning the “Jorge Carranza Fraser”.

³ Nicaragua Note Ref. HOL-EMB-098-2019, p. 5.

(1) The event concerning the Honduran fishing vessel “Observer”

13. According to Nicaragua, “late in the evening of 10 December 2018, the Nicaraguan navy vessel the ‘Tayacán’ discovered a Honduran flagged vessel, the ‘Observer’”⁴ allegedly “conducting illegal fishing activities in Nicaraguan waters approximately 110 nautical miles northeast of Nicaragua’s Miskito Cays (14°58’00”– 81°00’00”).”⁵ The Nicaraguan Naval Force (“FNN” for its Spanish acronym) then boarded the M/V “Observer”, which had a crew of 13 Honduran nationals and one Colombian.

14. Nicaragua then claims that early in the morning of 11 December 2018, the Colombian vessel ARC-53 “Antioquia”, a low-flying plane and, after that, a fast boat – supposedly dispatched by the “Antioquia” – took hostile actions towards the Nicaraguan vessel, bumping into it twice and bumping into the M/V “Observer” four times.⁶ These hostile actions from the “Antioquia” allegedly “continued for some time”.⁷

15. In support of these assertions, Nicaragua produced documents in 33 annexes. These will be addressed in the following paragraphs. Nevertheless, a close look at these

⁴ Nicaragua Note Ref. HOL-EMB-098-2019, p. 2.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

documents, as well as the materials submitted by Colombia in response in order to correct the record, shows a very different picture from that portrayed by Nicaragua. The facts and evidentiary material submitted by Colombia not only demonstrate that Colombia did not violate Nicaragua's sovereign rights; rather, it was Nicaragua that engaged in a pattern of provocative actions that were in clear violation of international law.

(a) The “Observer” was not fishing in Nicaraguan waters.

(i) *Nicaragua’s Lack of Evidence*

16. The entire premise upon which Nicaragua's case rests for arresting the M/V “Observer” is the allegation that said Honduran vessel was “*conducting illegal fishing activities in Nicaraguan waters*”.⁸ However, Nicaragua has not produced any direct or credible evidence that the “Observer” was, or had been, actually fishing in Nicaraguan waters. Indeed, it was not. As Colombia will presently explain, the “Observer” was simply navigating in transit from Colombian waters around Quitasueño *en route* back to Serranilla when it was illegally stopped and detained by the Nicaraguan Naval Force.

⁸ Nicaragua Note Ref. HOL-EMB-098-2019, p. 2.

17. Nicaragua produced a diplomatic note sent to Colombia on 22 December 2018,⁹ two letters transmitting documents between Nicaraguan authorities,¹⁰ and a map from the Nicaraguan Institute for Fishing and Aquaculture (“INPESCA” for its Spanish acronym) claiming to show where the M/V “Observer” was fishing.¹¹ However, this does not constitute any evidence that the “Observer” was in fact fishing for lobsters in Nicaraguan waters. Rather, they are self-serving documents prepared by Nicaraguan officials for the purpose of this litigation.

18. Nicaragua also produced copies of the fishing permit granted by Colombia to the M/V “Observer” (in Spanish “*Certificado Patente de Pesca*”)¹² dated 1 November 2018 and a set sail (in Spanish “*zarpe*”) dated 10 November 2018.¹³ However, nowhere in these documents does it say that the M/V “Observer” was authorized to fish in Nicaraguan waters, let alone that it was fishing in Nicaraguan waters at the time it was arrested. On the contrary, these documents show that the “Observer” was only authorized to fish in Colombian waters – a fact that in and of itself undermines the assertion that Colombia violated Nicaragua’s sovereign rights or maritime spaces.

⁹ Nicaragua Annex 6. (Colombia has included as Annex 17 some corrections to Nicaragua’s translation of diplomatic correspondence found in Nicaragua’s Annexes 1 to 10).

¹⁰ Nicaragua Annexes 17 and 18.

¹¹ Nicaragua Annex 18(c).

¹² Nicaragua Annex 18(f).

¹³ Nicaragua Annex 18(g).

19. Indeed, Nicaragua’s own authority in matters of fisheries, INPESCA, confirmed that the M/V “Observer” was only authorized to fish in Colombian waters. In its Administrative Decision of First Instance of 8 February 2019 in the case they started against the owner of the Honduran vessel “Observer”, the INPESCA clearly stated:

“That the documentary evidence provided by [the owner of the M/V “Observer”] [...] only prove that the OBSERVER vessel was authorized to conduct fishing activities in waters under the jurisdiction of the Republic of Colombia [...].”¹⁴ (Emphasis added)

20. Nicaragua also submitted a Provisional Certificate of Registry¹⁵ and a Seaworthiness Certificate¹⁶ from the vessel. These documents in no way prove that the M/V “Observer” was fishing in Nicaraguan waters. Nicaragua also produced a document certifying that the Captain of the Vessel, Mr Tito

¹⁴ Colombia Annex 6: Nicaraguan Institute for Fishing and Aquaculture (INPESCA), Administrative Resolution No. 011-2019, Administrative Decision of First Instance regarding the M/V “Observer”, 8 Feb. 2019. In the administrative decision of first instance rendered by INPESCA, the owner of the M/V “Observer” was charged a fine of US\$65.325, with the confiscation of the whole product and the fishing gear on board the vessel and with the detention of the M/V “Observer” in Nicaragua, which has remained to date.

¹⁵ Nicaragua Annex 18(d).

¹⁶ Nicaragua Annex 18(e).

Velásquez Cuevas, is a qualified seafarer.¹⁷ Once again, this does not go any way towards proving that the “Observer” was fishing in Nicaraguan waters.

21. Nicaragua provided two logbooks allegedly from the M/V “Observer”, which apparently record navigation data from the vessel from 22 November 2014 to 2 April 2016,¹⁸ and 23 July 2017 to 4 March 2018.¹⁹ Both of these contain entries logged years prior to the alleged event and do not prove any of Nicaragua’s claims.

22. Nicaragua appended a Certificate of Delivery issued by the Nicaraguan Naval Force²⁰ and an Inspection Certificate by INPESCA,²¹ both dated 15 December 2018. These state that lobster was found in the freezer of the Honduran vessel,²² as well as 2,000 pounds of leather bait alongside other gear proper of lobster fishing.²³ Images of the products found on board the M/V “Observer” were also produced.²⁴ While these show that

¹⁷ Nicaragua Annex 18(h).

¹⁸ Nicaragua Annex 18(k).

¹⁹ Nicaragua Annex 18(j).

²⁰ Nicaragua Annex 18(l).

²¹ Nicaragua Annex 18(b).

²² Once again, it should be noted that Nicaragua is itself unclear as to the information it provides, given that in its diplomatic note on the matter it states that 3,000 pounds of lobster were found on board the M/V “Observer” (Nicaragua Annex 6), while in the Certificate of Delivery it says 5,355.65 pounds (Nicaragua Annex 18(l)), and then in the Inspection Certificate it states that the vessel was detained with 5,357.65 pounds of lobster (Nicaragua Annex 18(b)).

²³ Nicaragua Annexes 18(b) and 18(m).

²⁴ Nicaragua Annex 18(i).

the vessel had indeed fished for lobsters, which is something nobody has ever denied, it does not show *where* the lobsters were caught. As explained above, the vessel only had permit to fish in Colombian waters and was not fishing when boarded by Nicaragua.

23. Similarly, Nicaragua produced a report from INPESCA dated March 2019 concerning the M/V “Observer”, which describes the vessel and its contents, and lists some documents.²⁵ The report was produced three months *after* the alleged event took place and appears to have been produced solely for the purpose of this litigation. Once more, the Court should accord no or little weight to this document. Anyway, the report contains nothing that proves that the “Observer” was fishing in Nicaraguan waters.

24. Likewise, Nicaragua filed four interviews conducted by Nicaraguan military officials with members of the crew of the M/V “Observer”.²⁶ However, these interviews were conducted by interested parties on the seventh and eighth days of the crew being imprisoned²⁷ without having been afforded consular access or access to legal representation. This was in clear

²⁵ Nicaragua Annex 18(a).

²⁶ Nicaragua Annexes 17(f), 17(g), 17(h) and 17(i).

²⁷ The interviews of Messrs Tito Velasquez, Jonathan Velásquez, Nixon Centeno were taken by Nicaraguan military officials on 17 December 2018 while the interview of Mr Samuel de Jesús Hernández was taken on 18 December 2018. Nicaragua itself concedes the Honduran citizens were only granted consular access ten (10) days after their detention on 20 Dec. 2018 (see Nicaragua Annex 11, para. 6).

violation of Article 36 of the 1963 Vienna Convention on Consular Relations,²⁸ to which Colombia and Nicaragua are parties.

25. Further, the interviews were conducted at a time in which the crew was kept in inhumane conditions. As noted by Mr Aaron Humphreys Sjogreen, the sole Colombian crewman aboard the M/V “Observer”:

“[t]he treatment was not very good, I had to withstand a little bit of everything, the food was not very good because that was bread with beans every day [...]

I didn’t have contact with an attorney, that was many days [after, that the] Embassy of Colombia sent, I believe authorized personnel, since I was from San Andres and had my papers.

They made us a paper for entering in their waters they took everyone, Hondurans also, and made [us] sign a paper there, and they came, made questions and we signed. We were captured as well as the vessel for

²⁸ Colombia sent three (3) diplomatic notes on 13, 14 and 19 December 2018 requesting consular access to any Colombian nationals on board the M/V “Observer” and denouncing that denial of consular access constitutes a violation of the Vienna Convention on Consular Relations. (See Nicaragua Annexes 3, 4 and 5.) Colombia reiterated this in its diplomatic note of 24 Sep. 2019 (see Colombia Annex 5: Note Verbale No. S-DVRE-19-042070 from the Ministry of Foreign Affairs of Colombia to the Embassy of Nicaragua in Bogotá, 24 Sep. 2019).

entering the water and like that, successively, each one signed because when you are with them, well it's different, it's not the same, so in order not to have a misunderstanding or mistreatment we had to know how to answer, [you] have to know what to say.

In Bluefields we were like, how to say, some days there, that was in an, that is like an enclosed place, just one door, darkness, no windows, everyone slept there, amongst the Hondurans, and I was there on the floor, each one in a tiny space. [...]

*They didn't beat us physically, but mentally yes.*²⁹

26. As noted above, Mr Aaron Humphreys Sjogreen was only granted consular access ten days after his detention.³⁰ He was interviewed before this access had been granted whilst he was being kept in intimidatingly poor conditions.

27. Accordingly, Colombia submits that the four interviews conducted by Nicaraguan military officials with members of the crew of the M/V “Observer” that were taken by Nicaragua under conditions of duress should not be admitted as evidence

²⁹ Colombia Annex 10: Affidavit by Mr Aaron Humphreys Sjogreen (Crewmember of the M/V “Observer”), 12 Dec. 2019.

³⁰ Nicaragua Annex 8, para. 2; and Nicaragua Annex 9, para. 6. In another document Nicaragua indicates that access was only granted twelve (12) days after being detained, i.e. on 22 Dec. 2018 (see Nicaragua Annex 11, para. 7).

or should be afforded no weight by the Court given the illegal circumstances in which they were taken.³¹

28. In any case, even in the extreme circumstances in which they were taken, none of the statements rendered by the fishermen, including its Captain, indicate that the M/V “Observer” was actually fishing in Nicaraguan waters. In fact, three of them state that the crewmen were sleeping, not fishing, at the time of the boarding by Nicaragua.³²

29. Nicaragua produced affidavits from the two officials on board the FNN “Tayacán”. Interestingly, neither of them state that the M/V “Observer” was fishing, or had fished, in Nicaraguan waters at the time of its arrest and boarding by Nicaragua,³³ which makes it difficult to avoid the impression that both affidavits purposely evaded the issue altogether.

³¹ The questions made by the Nicaraguan officials during the interviews were also leading the witnesses into Nicaragua’s narrative of the alleged events and thus do not carry any probative value. Clearly, what has been testified here has been influenced by those taking the deposition. (See *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, para. 244.)

³² Mr Tito Velásquez stated that at the moment of the boarding by Nicaragua “*I was sleeping*” (Nicaragua Annex 17(f)); Mr Nixon Centeno states that “*I was sleeping and approximately at 22:30 hours the cook woke us up because a coast guard was coming on board*” (Nicaragua Annex 17(h)); and for his part, Mr Samuel de Jesús Hernández asserted that “*at 22:30 hours I was sleeping in my cabin*” (Nicaragua Annex 17(i)).

³³ As explained below, Colombia submits that these two affidavits are materials tailored by Nicaragua for these proceedings and should not be admitted as evidence or given any weight. They were made by State officials interested in the outcome of the proceedings. Nevertheless, given that they

30. In short, the new documents produced by Nicaragua do not prove that the M/V “Observer” was fishing in Nicaraguan waters, let alone that Nicaragua’s sovereign rights or maritime spaces were violated by Colombia. It follows that Nicaragua had no grounds to arrest the “Observer” or to detain the vessel and its crew.

(ii) *Colombia’s Evidence: The M/V “Observer” was illegally arrested, and the conduct of the Nicaraguan Naval Force constituted a violation of international law.*

31. Colombia will now prove that the M/V “Observer” was not fishing and had not fished in Nicaraguan waters and was illegally arrested by Nicaragua when it was merely sailing between the Colombian islands of Quitasueño and Serranilla.

contain statements against interest, the following excerpts are of relevance here. Officer Nery Medaro Monjarrez stated that: “we detected a naval target [...] We asked the Puerto Cabezas Harbor Master whether there were any vessels of the Nicaraguan fishing fleet in that area and he answered that there were none. [...] [We] ordered him [i.e. the captain of the M/V “Observer”] to prepare the ship for boarding. [...] I was ordered to retain the ship and transfer it to port.” (Nicaragua Annex 17(a)). Similarly, Officer Bismarck Isidro Valle stated that: “we detected a naval target [...] We asked the Puerto Cabezas Harbor Master whether there were any vessels of the Nicaraguan fishing fleet in the area and he answered that none were reported in that position. [...] Frigate Lieutenant Nery Monjarrez Padilla, ordered me to go on board the vessel [...]. The Commander of BL 405 [“Tayacan”] ordered me to control the vessel and navigate toward the port.” (Nicaragua Annex 17(b)).

Also, Nicaragua’s arrest of the “Observer” was an illegal interference with the vessel’s freedom of navigation. It should be noted that Colombia raised this fact and alerted Nicaragua to its wrongdoing in its diplomatic correspondence, but to no avail.³⁴ As will be seen, Nicaragua’s claim regarding the M/V “Observer” attempts to mislead the Court by misrepresenting the facts in order to try to improve its precarious position in the present case.

32. The key points of this subsection can be summarized as follows.

- The evidence produced by Colombia herewith reconfirms that the M/V “Observer” was not fishing in Nicaraguan waters when it was illegally arrested and subsequently detained by Nicaragua.
- On 10 December 2018, the Nicaraguan officials of the FNN “Tayacán” boarded the Honduran vessel M/V “Observer” between 22:48 and 23:48 hours,³⁵ under the cover of darkness, surreptitiously and without any regard for international procedures.

³⁴ Nicaragua Annex 8 and Colombia Annex 5.

³⁵ Nicaragua itself is unclear as to the time of the alleged event. In its diplomatic note on the matter (Nicaragua Annex 6), they state that it occurred at 22:30 hours; in the affidavits at Nicaraguan Annexes 17(a) and 17(b) they seem to indicate that the boarding of the M/V “Observer” took place between 22:30 hours and 23:30 hours; while in another Nicaraguan official document they seem to state that it occurred at 23:56 hours (Colombia Annex 6). For its part, Colombian records show that the boarding took place at some point between 22:48,06 hours and 23:55,48 hours (Colombia Annex 16: Vessel Monitoring System (VMS) Track of the “M/V Observer”, Data Sheet, 10 December 2018 (18:48:04) to 11 December 2018 (01:45:18).

- Hours later, on 11 December 2018, still during the night and before the break of dawn, the Colombian naval vessel ARC-53 “Antioquia” arrived to the scene of the event in order to investigate a distress call which had been made by the “Observer” a few hours prior – at 23:55 hours of 10 December. The Nicaraguan officers who at that point were on board and had complete control of the “Observer”, intentionally tried to ram the Colombian vessel, without any regard for the lives of the fishermen and the crew of the ships involved.
- Then, during the early morning (after dawn) of 11 December, at a moment when the “Observer’s” motors had stopped functioning and while the FNN “Tayacán” was towing it, the Nicaraguan officials again engaged in extremely dangerous manoeuvres by trying to cause the “Observer” to bump with the “Antioquia”.
- Finally, in the late morning of 11 December, when the Nicaraguan officials returned to the FNN “Tayacán”, the crewmen of the “Observer” sought this opportunity to try and restart the vessel’s engine. In order to prevent their escape, the “Tayacan” intentionally collided against it on at least four occasions. This was the cause of damage to both vessels. (Those are the damages which Nicaragua, in a rather cynical way, is now trying to present as if caused by the “Antioquia”.)

33. Responsible lobster fishing, like the one authorized by Colombia for the M/V “Observer” to carry out in Colombian waters, is done with artisanal lobster traps (in Spanish “*Nasas*”).³⁶ These traps are placed or “sowed” at depths of no more than 55 metres where lobsters are typically found – whereas, as will be explained below, the “Observer” was illegally detained in a location with depths of over 591 metres. As noted by the Western Central Atlantic Fishery Commission (WECAF) regarding the habitat of the Caribbean spiny lobster: “*This crustacean can reach 40 cm in total length and as adult inhabits coral reefs at depths of 3-55 meters.*”³⁷ This activity is performed during the day, not at night, and over intervals of several days during which the traps are deployed in one location where the fishermen leave them for a given period; then they move to another location to sow some more traps, only to return a few days later to the first location to harvest the trapped lobsters.

³⁶ This in comparison to Nicaragua’s predatory fishing methods which, as has been noted in Colombia’s Counter-Memorial, are contrary to international standards and promote the depletion of species (including lobster) and pose a threat to Caribbean ecosystems and habitats. (See CCM, Chapter 8).

³⁷ Colombia Annex 11: Western Central Atlantic Fishery Commission, *Ninth Session of the Scientific Advisory Group (SAG), MARPLESCA – The Regional Caribbean Spiny Lobster (Panulirus argus) fishery management plan, Document WECAF/SAG/IX/2018/6*, Bridgetown (Barbados), 19-20 November 2018, p. 8. Available at: <<http://www.fao.org/fi/static-media/MeetingDocuments/WECAFC/SAG2018/6e.pdf>> (Last visited: 11 Dec. 2019)

34. Given how lobster fishing is carried out, and considering the evidence submitted by Colombia, it becomes clear that Nicaragua’s case is hopelessly flawed. Colombia did not violate Nicaragua’s sovereign rights; it was Nicaragua who violated the fishing vessel’s freedom of navigation and illegally arrested and detained the crew. This is demonstrated by:

- The hour at which the illegal capture took place.³⁸
- The Vessel Monitoring System (i.e. VMS tracker) of the M/V “Observer” in the hours before and after the illegal capture by Nicaragua.³⁹
- The depth (bathymetry) map of the area where the event took place.⁴⁰

The above-mentioned evidence shows that:

35. *First*, the boarding happened at night, which is not the time for lobster fishing. As explained, lobster fishing is an activity which only takes place during the day.

36. *Second*, the analysis of the VMS tracker⁴¹ of the vessel shows that the M/V “Observer” had been sailing from the

³⁸ Colombia Annex 16.

³⁹ Colombia Annex 16 and Colombia Figure 1: Vessel Monitoring System (VMS) Track of the “M/V Observer”, Course Report (Screenshot).

⁴⁰ Colombia Figure 3: Coordinates of the detention and boarding of the “M/V Observer” by the Nicaraguan Naval Force superimposed over a bathymetry chart.

Colombian island of Serranilla to Quitasueño, then remained in territorial waters of Quitasueño for a few hours, presumably to lay or collect the lobster traps there, and then sailed back to Serranilla – at which point it was boarded by Nicaragua.⁴² The VMS signals are sent automatically every hour, and in this case, contrary to Nicaragua’s assertions, they show, hour by hour, that the “Observer” was sailing towards Serranilla, also Colombian waters, when it was illegally arrested by Nicaragua.

⁴¹ As described by the Food and Agriculture Organization of the United Nations: “*A fishing vessel monitoring system (VMS) is a programme of fisheries surveillance, in which equipment that is installed on fishing vessels provides information about the vessels’ position and activity. This is different from traditional monitoring methods, such as using surface and aerial patrols, on-board observers, logbooks or dockside interviews.*” Fishing Vessel Monitoring Systems. Fishing Vessel Monitoring Systems (VMS). VMS Programme Factsheets. In: *FAO Fisheries and Aquaculture Department* [online]. Rome. Updated. Available at: <<http://www.fao.org/fishery/vms/en>> (Last visited: 11 December 2019)

⁴² Colombia Annex 16 and Colombia Figure 1.

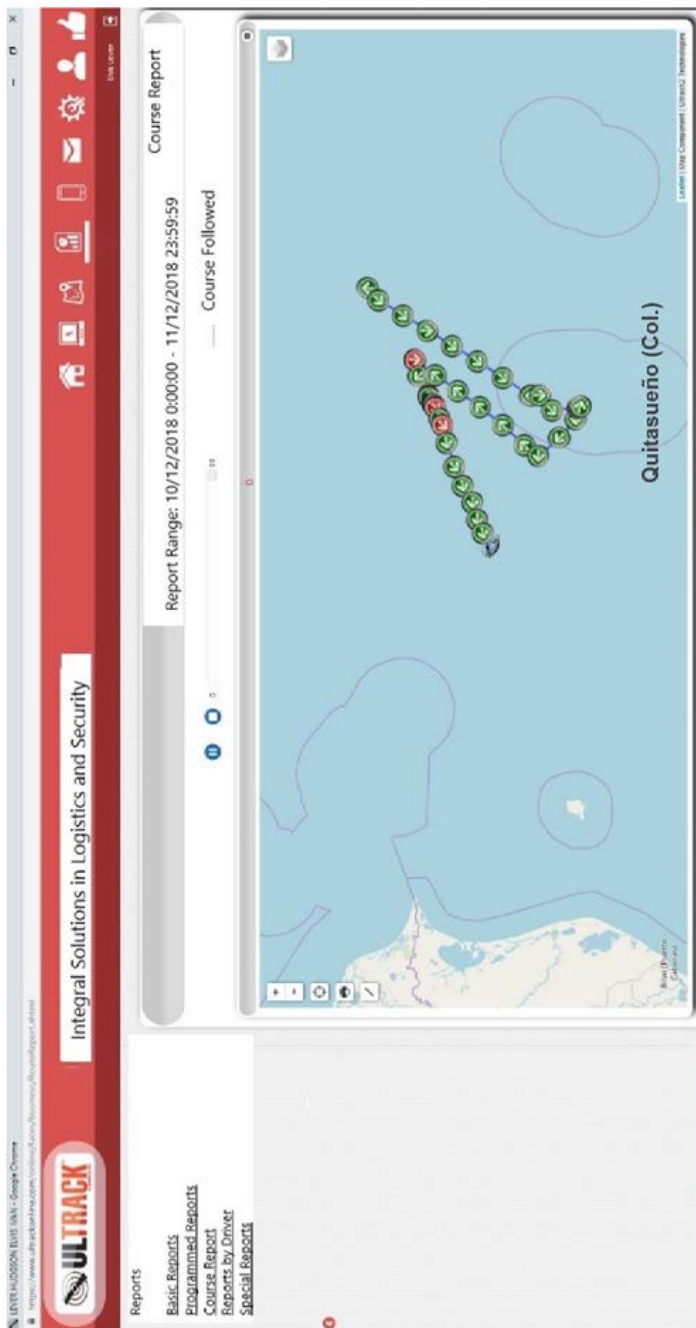


Figure 1: Screenshot of VMS Track system showing M/V “Observer” navigating from the Colombian Island of Serranilla into territorial sea of Quitasueño and then back to Serranilla. Directional arrows show the course of the vessel. Red dots signal locations where distress (panic) calls were made. A change of course southwest bound corresponds to the direction the M/V “Observer” took after being captured by the Nicaraguan Naval Force. (Quitasueño has been referenced for context.)

37. The tracker not only shows where the M/V “Observer” was sailing in the hours previous to the event, but it also shows the exact moment at which the crew of the “Observer” transmitted a panic (distress) signal, sometime after it had been boarded. In response, the Colombian Navy sent a vessel, the “Antioquia”, to investigate.

2018-12-10 23:55:48	Panic	0 Knots	Unidentified driver	True	-80°59'26.0000' 14°59'52.0000'	0.0	Caribbean Sea
2018-12-10 23:48:05	Periodic message	0 Knots	Unidentified driver	True	-80°59'24.0000' 14°59'54.0000'	0.0	Caribbean Sea
2018-12-10 22:48:06	Periodic message	6 Knots	Unidentified driver	True	-81°34.0000' 14°55'18.0000'	0.0	Caribbean Sea
2018-12-10 21:48:05	Periodic message	5 Knots	Unidentified driver	True	-81°6'51.0000' 14°50'13.0000'	0.0	Caribbean Sea
2018-12-10 20:48:05	Periodic message	6 Knots	Unidentified driver	True	-81°10'38.0000' 14°45'6.0000'	0.0	Caribbean Sea

Panic	0 Knots
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Figure 2: Excerpt from data sheet corresponding to the VMS Track showing that in the hours prior to the illegal detention the M/V “Observer” had been travelling at an average speed of 6 knots. At 23:55 hours the panic button was first pressed by its crew. (Excerpt from Colombia Annex 16)

38. Given the fact that the M/V “Observer” was navigating when it was arrested, it could not have been fishing for lobster. As explained before, lobster fishing requires laying traps and picking them up after a few days, all of which are impossible to do when moving. The VMS tracker proves, beyond any doubt, that when the “Observer” was arrested – and before that – it was not fishing for lobsters, but merely navigating and exercising its freedom of navigation sailing between Quitasueño and Serranilla. Needless to say, Nicaragua did not produce any evidence of lobster traps belonging to the “Observer” placed on the seabed of its Exclusive Economic Zone.

39. *Third*, by superimposing the coordinates where the vessel was arrested over a bathymetric chart of the area, it can be seen that the depth of the surrounding waters where the arrest took place is well over 500 metres.⁴³

⁴³ Colombia Figure 3.

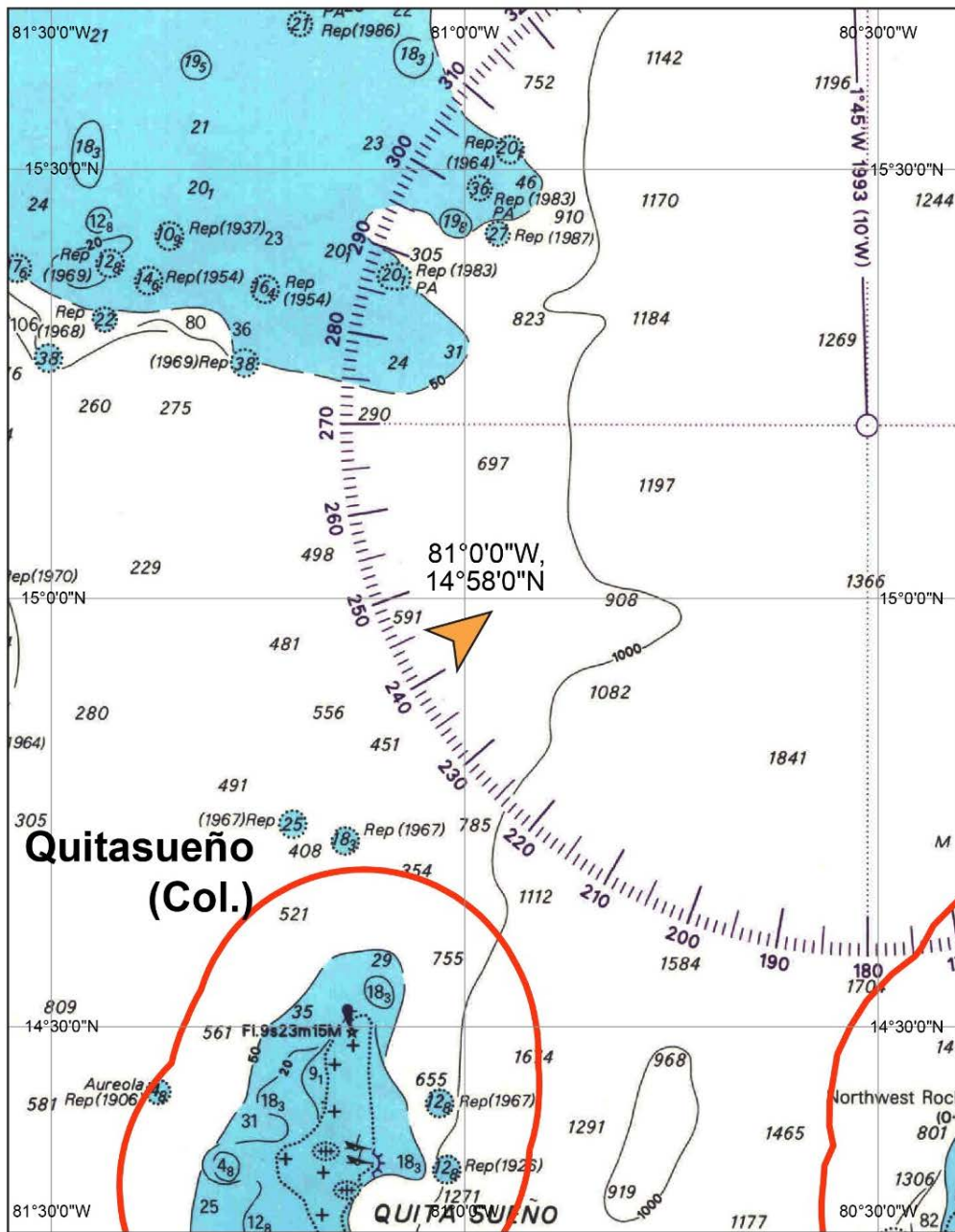


Figure 3: Coordinates where the M/V “Observer” was illegally detained by Nicaraguan Naval Force at 14°58’00” N - 81°00’00” W (depicted in orange arrowhead with course towards Serranilla) superimposed over a bathymetry chart of the area (showing depths of over 591 metres close to the point of detention).

[Source of nautical chart with bathymetry: British Admiralty, *Nautical Chart 1218*, New Ed. 10 Sep. 1993 (rev. 1999)]

40. As explained above, these depths are greater than the depths in which lobster can be caught, a fact which demonstrates beyond any doubt that the M/V “Observer” could not have been fishing when it was detained.

41. In sum, while Nicaragua asserts that the M/V “Observer” was fishing in its waters and that that fact purportedly justified its arrest, the documents it produced do not prove that assertion. To the contrary, the evidence produced by Colombia shows that the “Observer” had been fishing for lobsters in areas of Quitasueño and Serranilla, as it was authorized to do, and after doing so, sailed towards other Colombian waters to continue its activities. It further proves that the “Observer” was boarded at night when it was navigating at a steady speed of around 6 knots on a route where the water depths are over 500 meters, both of which would have made lobster fishing physically impossible. That being the case, there was no basis for Nicaragua to arrest the “Observer” or detain its crew.

(b) Colombia did not harass the Nicaraguan vessel with a low-flying plane or a fast boat.

42. Nicaragua also alleges that Colombia sent a low-flying plane⁴⁴ and a fast boat to harass the Nicaraguan naval vessel

⁴⁴ Nicaragua Note Ref. HOL-EMB-098-2019, p. 2.

“Tayacán”.⁴⁵ However, there is absolutely no evidence to support this assertion.

43. Contrary to what Nicaragua says, there was no low-flying airplane that “harassed” the FNN “Tayacán”. As has been explained previously in Colombia’s Counter-Memorial, the order of operations issued by the Specific Command of San Andrés and Providencia states that “...[i]t is forbidden to fly above any military-type vessel at lower height of 3500 feet, taking into account that these acts may be considered as hostile by the respective vessel...”.⁴⁶ In this specific case, this contention is supported by the evidence produced by Colombia, in the form of a document issued by the Commander of the Air Force certifying that on 11 December there were no flights in that area,⁴⁷ in addition to an affidavit by the Captain of the “Antioquia” stating that there had been no flights in the area.⁴⁸

44. Contrary to Nicaragua’s allegation, there was also no fast boat that “harassed” the FNN “Tayacán”, nor there could have been, for the simple reason that the “Antioquia”, which was the only Colombian vessel present in the area, was not

⁴⁵ Nicaragua Note Ref. HOL-EMB-098-2019, p. 2 and Nicaragua Annex 17(c), Audio Transcript 1.

⁴⁶ CCM, para. 4.33 and CCM, Annex 61.

⁴⁷ Colombia Annex 8: Colombian Air Force, Communication No. 20191600562893-MDN-COGFM- COFAC-JEMFA-COA-CEOPA-SECOC, 23 Oct. 2019.

⁴⁸ Colombia Annex 9: Affidavit by Mr José Cristóbal Méndez Hernández (Captain of the ARC-53 “Antioquia”), 4 Dec. 2019.

carrying a fast boat.⁴⁹ But even if it had been carrying one – which was not the case – that boat could not have been deployed. This is shown by the Travel Report from the Colombian naval vessel which states that the davit (in Spanish “*pescante*”) for deploying the patrol boat was not working at the time.⁵⁰ Both facts are confirmed by the Captain of the Colombian vessel.⁵¹ In other words, it was not possible for the Colombian vessel to deploy any boat, let alone a fast boat, towards the Nicaraguan vessel.

45. It stands to reason that if a fast boat had been deployed, the Nicaraguan vessel would have communicated something to the “Antioquia” or to the alleged patrol boat. It did not. There is no evidence that the FNN “Tayacán” ever said anything with respect to a patrol boat to the Colombian vessel.

46. Moreover, Nicaragua’s own records show⁵² that the communications by the Colombian officials with the Nicaraguan’s were professional at all times.⁵³ If anything, the

⁴⁹ Colombia Annex 9. Support boats carried by vessels such as the “Antioquia” are either Zodiac or rigid-inflatable buoyancy (RIB) boats.

⁵⁰ Colombia Annex 19: National Navy of Colombia, Maritime Travel Report, ARC-53 “Antioquia”, Section 3 “Itinerary” and Section 5 “Novelties in Equipment and/or Machinery”, 10 Jan. 2019.

⁵¹ Colombia Annex 9.

⁵² It should be noted that Nicaragua deliberately omitted from its transcriptions and translations into English at Nicaragua Annex 17(c) key passages of the conversations between Commanders. Colombia has now retrieved in Colombia Annex 18 said passages from the conversation audios found in Nicaragua Annex 17(j).

⁵³ For example: in Nicaragua Annex 17(c) - Audio Transcription 4, the Colombian Commander says that “*I acknowledge that at dawn there was an*

Colombian naval officers invited the Nicaraguan officers to release the Honduran vessel and recalled the agreement between the naval commanders to cooperate so as to avoid any misunderstandings and to maintain the good relations between the Colombian and Nicaraguan naval forces.⁵⁴ This belies any

inspection, but it was aborted.”. In Nicaragua Annex 17(c) - Audio Transcription 5, the Commander of the Colombian Navy says to the Nicaraguan Commander “*we are there to help Admiral Fonseca*”. In Nicaragua Annex 17(c) - Audio Transcription 6 corrected in Colombia Annex 18, the Colombian Commander says “*the information that I have is that the [Colombian] ship is at a distance from where it was as of the offer that was made to provide support if needed.*”. In Nicaragua Annex 17(c) - Audio Transcription 7 corrected in Colombia Annex 18, the Colombian Commander reiterates to the Nicaraguan Commander that: “*No sir, Admiral Fonseca, what they are saying is not so, I have the [Colombian] vessel’s position and the vessel is far away. [...] No that cannot be ... fortunately we have all the records of situations [...] I called you precisely so that this does not transcend to other instances, it was a very respectful request [...] as I say, there are, we have evidence, there is no intention, there is no aggression, there is no instruction in this regard Mr Admiral Fonseca ... you can rest assured that what I am saying is so, we are not going to place ourselves under any risk, of doing it that way, since it is not the intention at all, nor are we going to have [inaudible] specially to a fishing unit, and specially to one of your units.*”. These transcripts are taken from Nicaragua Annex 17(j).

⁵⁴ For example: in Nicaragua Annex 17(c) - Audio Transcription 2, the Commander of the Colombian Navy states “*we had ... been managing an agreement here between the commanders to avoid that this type of event from transcending, Admiral Fonseca [Nicaraguan Commander]*”. In Nicaragua Annex 17(c) - Audio Transcription 3 corrected in Colombia Annex 18, the Commander of the Colombian Navy says to the Nicaraguan Commander: “*right now it [the Honduran vessel] has an emergency [...] the ship is adrift [...] we want to offer you support and take advantage of the situation and the situation to leave things as they are according to the pact that was being sustained with you in which we respect, of course, the commitment and the role of each of the navies, you understand that these things obey to the role of the constitutional mission that you and we also have, which is a political issue and hopefully we can resolve this situation soon so as not to have this type of inconvenience and that of course end up in some way affecting the good relations we want to strengthen with you.*”. These transcripts are taken from Nicaragua Annex 17(j).

contention that the Colombian vessel took hostile actions towards the Nicaraguan vessel.

47. The only “evidence” produced by Nicaragua to support its assertion that Colombia took alleged hostile actions are affidavits from two crew members from the FNN “Tayacán”.⁵⁵ However, these affidavits are not supported by any corroborative evidence and their reliability is highly questionable. They are self-serving and lack credibility. Moreover, the individual who served as notary public for these affidavits is one Walner Abraham Molina who not only is a recently retired member of Nicaragua’s military, but has served as legal counsel for Nicaragua in various cases before the Court – including this one.⁵⁶ The Court itself has noted that caution should be observed, for example when “*witness statements produced in the form of affidavits [...] were made by State officials*”,⁵⁷ even more so when the officials who presented the affidavits, and the official before whom they were presented are interested in the outcome of the proceedings, as occurs in the present case.

⁵⁵ Nicaragua Annexes 17(a) and 17(b).

⁵⁶ Colombia Annex 12: Curriculum Vitae of Mr Walner Abraham Molina. (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*, p. 8).

⁵⁷ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, *Judgment of 8 October 2007*, para. 244.

48. Therefore, contrary to Nicaragua's assertion, the evidence shows that Colombia did not deploy a low-flying plane or a fast boat to harass the Nicaraguan vessel.

49. The fact of the matter is that it was the Nicaraguan Naval Force, and not the Colombian Navy, which throughout the events that occurred late in the evening of 10 December and the early afternoon of 11 December 2018, repeatedly acted in violation of international law by engaging in a pattern of extreme aggressiveness which endangered lives and violated basic rules of behaviour at sea.

(c) The Nicaraguan Naval Force tried to ram the Colombian Vessel

50. At or around 05:00 hours of 11 December, sometime after the Colombian naval vessel "Antioquia" arrived in response to the distress call from the M/V "Observer" and approached the latter vessel in order to assess the situation, the officers of the Nicaraguan Naval Force on board and in control of the "Observer" abruptly – without any notification – changed course directly towards the "Antioquia" and attempted to ram the Colombian ship. This was an illegal, irresponsible and reckless act which endangered the lives of the crews of the "Observer" and the "Antioquia". All this was captured on two videos taken from the Colombian vessel, which show the

abruptness of the “Observer’s” manoeuvre and the extent to which the Colombian Navy had to act to avoid a collision.⁵⁸



Figure 4: Screenshot taken from Colombia Annex 1(a) showing that when the Colombian vessel arrived to the scene of the event on 11 December 2018 (before dawn), the M/V “Observer” was boarded and under control of heavily armed officials from Nicaragua.

51. Of course, Nicaragua does not mention this, in spite of the fact that it was one of the most dangerous moments of the event concerning the M/V “Observer”. The reason for this silence is that the evidence demonstrates that the “Antioquia” was not in any way attempting to do anything other than approaching the area to ascertain the situation of the “Observer” and to communicate with the personnel of the Nicaraguan Naval Force. However, Nicaragua’s response was nothing short of an unwarranted and undisciplined reaction whose dangerous effects were avoided solely on account of the skill of the Colombian

⁵⁸ Colombia Annex 1: Video Material Event M/V “Observer”, 11 Dec. 2018 (before dawn), (a) First Video and (b) Second Video.

Navy. This attempt by the Nicaraguan officials to create a collision between the M/V “Observer” and the Colombian vessel constituted a violation of international regulations concerning the prevention of collision (the COLREGS)⁵⁹ and demonstrate a clear disregard of human lives and safety at sea.

52. From that moment onward, the Nicaraguan Naval Force continued to take still further aggressive actions against the Colombian vessel. Colombia will explain each of those actions in the way they actually occurred.

(d) Nicaraguan officials deliberately manoeuvred the FNN “Tayacán” in order to have the “Observer” and the “Antioquia” bump into each other.

53. At or around 6:30 hours on the morning of 11 December, for reasons which are not clear, the motors and the rudder of the M/V “Observer” stopped working and the vessel could not navigate by itself.⁶⁰ At around 7:00 hours the FNN “Tayacán” started to tow the “Observer” in order to take it to a Nicaraguan port.⁶¹

54. Nicaragua asserts that when the FNN “Tayacán” was towing the “Observer”, the Colombian naval vessel “*took active*

⁵⁹ International Regulations for Preventing Collisions at Sea 1972 (COLREGS).

⁶⁰ Colombia Annex 9.

⁶¹ *Ibid.*

*hostile actions with the aim of impeding the transfer of the ‘Observer’ to port in Nicaragua [...] which culminated in the [Colombian vessel] twice bumping the ‘Tayacán’ and bumping the ‘Observer’ four times”.*⁶² However, as explained below, the evidence provided by Nicaragua as well as the evidence produced by Colombia, show precisely the contrary. It was the Nicaraguan vessel that engaged in dangerous and unprovoked actions.

55. In order to prove its allegations, Nicaragua provided the Court with a video supposedly showing the ARC- 53 “Antioquia” bumping into the M/V “Observer” while being towed by the Nicaraguan vessel FNN “Tayacán”.⁶³ The video produced by Nicaragua fails to show any bumping whatsoever between the Colombian and the Nicaraguan vessels. Rather, the video shows a light touch (not bumping or collision) between the “Antioquia” and the Honduran M/V “Observer” which as will be seen below, was prompted by Nicaragua’s reckless manoeuvring during the towing operation. Moreover, Colombia cannot fail to bring to the Court’s attention that the video produced by Nicaragua⁶⁴ not only does not show what Nicaragua alleges, but it was cropped in at least nine places.⁶⁵

⁶² Nicaragua Note Ref. HOL-EMB-098-2019, p. 2.

⁶³ *Ibid.*, pp. 3-4.

⁶⁴ Nicaragua Annex 17(k).

⁶⁵ Nicaragua Annex 17(k), see minutes: 00:13, 00:18, 00:43, 02:31; 02:42; 04:45; 08:19; 08:57; 09:18.

This undisclosed and unexplained editing of the video raises serious doubts about its veracity.

56. In order to rebut Nicaragua's claim, Colombia is submitting a video of its own which shows a totally different story. Colombia's video was taken from the "Antioquia", and clearly shows that when towing the Honduran vessel, the Nicaraguan vessel deliberately cut across in front of the Colombian vessel in a sinuous fashion in order to cause bumping between the Colombian vessel and the "Observer".⁶⁶ This is illustrated in the figure below.

⁶⁶ Colombia Annex 9 and Colombia Annex 2: Video Material Event M/V "Observer", Colombian perspective of the Nicaraguan towing manoeuvre, 11 December 2018 (early morning after dawn), (a) First Video and (b) Second Video.

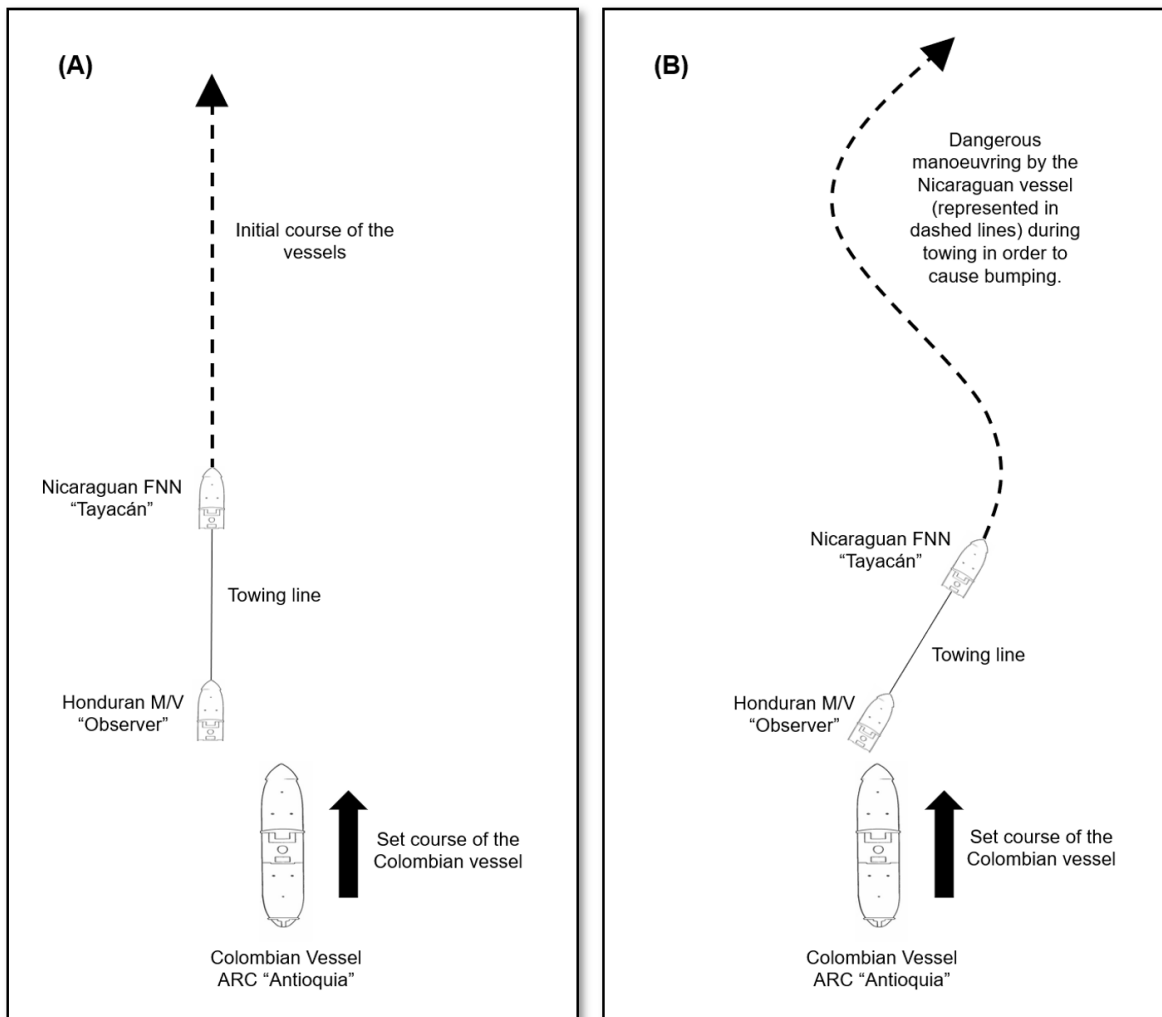


Figure 5: Graphical depiction of Nicaraguan officials' manoeuvres seeking to cause bumping between the ARC-53 "Antioquia" and the M/V "Observer" while being towed by the FNN "Tayacán" on 11 December 2018 (early morning after dawn)

57. Said deliberate manoeuvring by the Nicaraguan Naval Force can be seen in Nicaragua’s own video. It is also shown in Colombia’s videos, where the dangerous manoeuvre is even more visible since it was filmed from the Colombian vessel.⁶⁷ It shows one of the exact moments when the M/V “Observer”, while being towed by the FNN “Tayacán”, crossed the path of the “Antioquia”, demonstrating that there was no bumping between the Colombian naval vessel and the “Observer”. The following screenshots from the Colombian video show different moments of the Nicaraguan manoeuvre:



Figure 6(a): Dangerous manoeuvring by Nicaraguan officials while towing the M/V “Observer” from point of view of ARC-53 “Antioquia” on 11 December 2018 (early morning after dawn) (screenshot taken from Colombia Annex 2(a))

⁶⁷ Colombia Annex 2 (a) and (b).



Figure 6(b): Dangerous manoeuvring by Nicaraguan officials while towing the M/V “Observer” from point of view of ARC-53 “Antioquia” on 11 December 2018 (early morning after dawn) (screenshot taken from Colombia Annex 2(b))



Figure 6(c): Dangerous manoeuvring by Nicaraguan officials while towing the M/V “Observer” from point of view of ARC-53 “Antioquia” on 11 December 2018 (early morning after dawn) (screenshot taken from Colombia Annex 2(b))

58. Thus, it can be seen that, contrary to Nicaragua's assertion, the Colombian vessel was not trying to bump into the M/V "Observer". On the contrary, the videos produced by Colombia and the screenshots shown above prove that the Nicaraguan vessel, which was towing the "Observer", was deliberately trying to cause bumping by towing the Honduran vessel across the path of the Colombian vessel. Fortunately, due to the manoeuvring of the Colombian vessel, an unfortunate situation was averted.

59. The attempt by Nicaragua to create a bumping between the M/V "Observer" and the Colombian vessel constituted, yet again, a clear disregard for human lives and safety at sea. Nicaragua's allegations that the "Antioquia" deliberately bumped with the "Observer" are false and, as explained above, they are nothing more than an attempt to fabricate a case against Colombia in these proceedings.

60. Having addressed Nicaragua's assertion that the Colombian vessel bumped into the "Observer", Colombia now turns to address Nicaragua's assertion that the Colombian vessel also bumped into the Nicaraguan vessel "Tayacán".

- (e) Contrary to Nicaragua’s assertions, the evidence provided by Colombia show that the damage to the FNN “Tayacán”, was caused by the Nicaraguan vessel deliberately ramming into the “Observer” to stop it from fleeing.

61. It should be noted that not a single piece of evidence furnished by Nicaragua proves that the alleged damage to the FNN “Tayacán” was caused by the “Antioquia”. Not even the video submitted by Nicaragua shows “bumping” between the Colombian and the Nicaraguan vessels – as alleged by Nicaragua.

62. In support of its contention that the Colombian vessel bumped into the FNN “Tayacán”, Nicaragua submitted eight photographs showing the damage suffered by the Nicaraguan vessel.⁶⁸ However, as explained below, Colombia is of the view that the damage suffered by Nicaraguan vessel was caused by it ramming into the “Observer” several times while it was trying to flee from the Nicaraguan vessel.

63. In circumstances which are still not clear, after mid-morning of 11 December, the Nicaraguan officials abandoned the M/V “Observer” and went back to the FNN “Tayacán”.⁶⁹ Shortly thereafter, the crew of the “Observer” asked for the assistance of the “Antioquia” informing that the Nicaraguan officials from the FNN “Tayacán” were trying to

⁶⁸ Nicaragua Annex 17(d).

⁶⁹ Colombia Annex 9.

kidnap them,⁷⁰ then sought to reignite the engine of its vessel and tried to flee from its Nicaraguan captors.⁷¹

64. However, as can be seen in the two videos submitted by Colombia, which were taken from a fishing vessel in the vicinity of the events, the Nicaraguan naval vessel pursued the M/V “Observer” and tried to stop it from fleeing by colliding into it on at least four occasions (see screenshots below as well as in the corresponding videos).⁷² Such actions, which clearly violate international law, endangered the lives of the fishermen aboard the “Observer” and damaged both vessels. These collisions would explain the damage on the Nicaraguan vessel for which Nicaragua tries to blame Colombia, and demonstrate that any damage was self-inflicted by Nicaragua and not caused by Colombia.⁷³

⁷⁰ The Captain of the M/V “Observer” says: “[...] *we are just waiting for you [A.R.C. “Antioquia”] to take us out of here! They [the FNN “Tayacán”] want to take it, they want to take it, it’s practically kidnapping! Over.*” Colombia Annex 4(a): Communication No. 1 between the M/V “Observer” and the ARC-53 “Antioquia”, 11 Dec. 2018 (late morning), (i) transcript and (ii) audio.

⁷¹ Colombia Annex 4(b): Communication No. 2 between the M/V “Observer” and the ARC-53 “Antioquia”, 11 Dec. 2018 (late morning), (i) transcript and (ii) audio. See also Colombia Annex 3(b); and Colombia Annex 9.

⁷² Colombia Annex 3: Video Material Event M/V “Observer”, recapture of the M/V “Observer” by the Nicaraguan Naval Force, 11 Dec. 2018 (late morning), (a) full identification of the Nicaraguan FNN “Tayacán” and (b) collisions from the Nicaraguan FNN “Tayacán” to the M/V “Observer” during recapture.

⁷³ Nicaragua submitted three photographs allegedly showing damage suffered by the Honduran vessel on its starboard side (Nicaragua Annex 17(e)) yet it did not provide any pictures of the Honduran vessel on its port side where the collisions between the FNN “Tayacán” and the M/V “Observer” occurred as shown in Colombia Annex 3(b).



Figure 7: Images show the Nicaraguan FNN 405 “Tayacán” fully identified and undamaged on 11 December 2018 (late morning) after the alleged bumping with the Colombian vessel (screenshot taken from Colombia Annex 3(a))



Figure 8(a): FNN “Tayacán” pursuing the M/V “Observer” on 11 December 2018 (late morning) in order to recapture it, colliding with it multiple times (screenshot from Colombia Annex 3(b))



Figure 8(b): FNN “Tayacán” on 11 December 2018 (late morning) colliding against the M/V “Observer” on four different occasions while trying to recapture it (screenshots taken from Colombia Annex 3(b))

65. In sum, Nicaragua has grossly misrepresented the facts. Contrary to Nicaragua's assertion, the evidence does not show that the Colombian vessel took any hostile actions towards the Nicaraguan vessel or the M/V "Observer" at any point in time. To the contrary, it shows that it was Nicaragua who engaged in illegal actions and damaged both the FNN "Tayacán" and the "Observer". Nicaragua's version of this event is simply not true, and constitutes a poorly disguised attempt to mislead the Court into believing that the damage suffered by the "Observer" and the Nicaraguan vessel were caused by Colombia, when in reality, any damage to the Nicaraguan vessel was caused by repeatedly ramming into the "Observer".

66. In the light of the above, the event concerning the M/V "Observer" does not even remotely constitute a violation by Colombia of Nicaragua's sovereign rights and maritime spaces. Rather, this event demonstrates Nicaragua's wrongful actions against a third State by illegally interfering with the "Observer's" right to freedom of navigation, as well as against Colombia by interfering with the exercise of fishing rights in Colombia's waters and its rights under the Vienna Convention on Consular Relations. It also lays bare Nicaragua's illegal behaviour when trying to bump the Colombian and the Honduran vessels, and its willingness to manufacture an "incident" involving Colombia, and to misrepresent the facts in an attempt to improve its case against Colombia.

(2) The event involving the Mexican research vessel “Jorge Carranza Fraser”

67. With respect to the second “new incident” referred to by Nicaragua in its documents, Nicaragua alleges that Colombia twice intercepted the Mexican research vessel, “Jorge Carranza Fraser” in Nicaraguan waters, close to Colombian waters, and ordered it to leave the area, once on 6 October 2018 and again on 8 October 2018.⁷⁴

68. In support of its contentions, Nicaragua produced 10 annexes which it claims demonstrate a violation of its sovereign rights and maritime spaces by Colombia. However, a close look at the new documents produced by Nicaragua, as well as the additional materials submitted by Colombia to the Court herewith, shows that no such violation took place.

69. As a preliminary comment, it must be noted that the “Jorge Carranza Fraser” is a Mexican flagged vessel, affiliated with the Mexican National Institute of Fisheries (“INAPESCA” for its acronym in Spanish). Therefore, even if it was true (*quod non*) that Colombia interfered with the navigation or activities of the vessel, Nicaragua is not the flag State and Colombia has never received a letter from either Mexico or INAPESCA protesting Colombia’s alleged interference with the vessel. Evidently, neither Mexico nor its institution INAPESCA

⁷⁴ Nicaragua Note Ref. HOL-EMB-098-2019, p. 1.

considered any violation to have occurred. How Nicaragua's sovereign rights were violated in such circumstances is thus left unexplained.

70. Nicaragua produced as evidence of its claims a scientific fishing permit by which it authorized the "Jorge Carranza Fraser" to undertake a research project in "*The Caribbean and the Pacific of Nicaragua*".⁷⁵ This document is nothing more than an authorization to undertake certain activities given by Nicaragua to a vessel of a third country. In no way does it demonstrate that Colombia interfered with the navigation or activities of the research vessel.

71. As part of its evidence, Nicaragua also produced two diplomatic notes sent to Colombia. The first, dated 15 November 2018, merely asserts – more than a month later – that an event had happened on 6 October 2018. The second, sent on 18 December 2018, refers to apparently another event that supposedly took place on 8 October 2018.⁷⁶ In this last note Nicaragua was not clear as to the date of this apparently new event because it stated: "[...] on Saturday, 8 October, of the current year, between 03:00 and 12:00 hours [...]".⁷⁷ Noticeably, the eighth day of the month of October 2018 was a Monday, not a Saturday. Nevertheless, it is clear that these diplomatic notes do not constitute any direct evidence of a violation of Nicaragua's sovereign rights by Colombia.

⁷⁵ Nicaragua Annex 16.

⁷⁶ Nicaragua Annex 2.

⁷⁷ Nicaragua Annex 1, para. 2.

72. Nicaragua also produced a copy of a letter from INAPESCA (Mexico),⁷⁸ dated 16 April 2019, which explains the mission of the “Jorge Carranza Fraser” and the results of its investigations in the Southwestern Caribbean Sea, the veracity of which Colombia cannot confirm. As mentioned above, neither INAPESCA nor Mexico ever raised any issue with Colombia concerning the “Jorge Carranza Fraser”.⁷⁹ On the contrary, while the author of the letter stated that the “Jorge Carranza Fraser” did encounter a marine patrol vessel from a third State, it did not mention Colombia, and actually highlights the “*timely development of these joint [research] activities*”.⁸⁰ The letter therefore does not prove that Colombia interfered with the navigation or activities of the vessel.

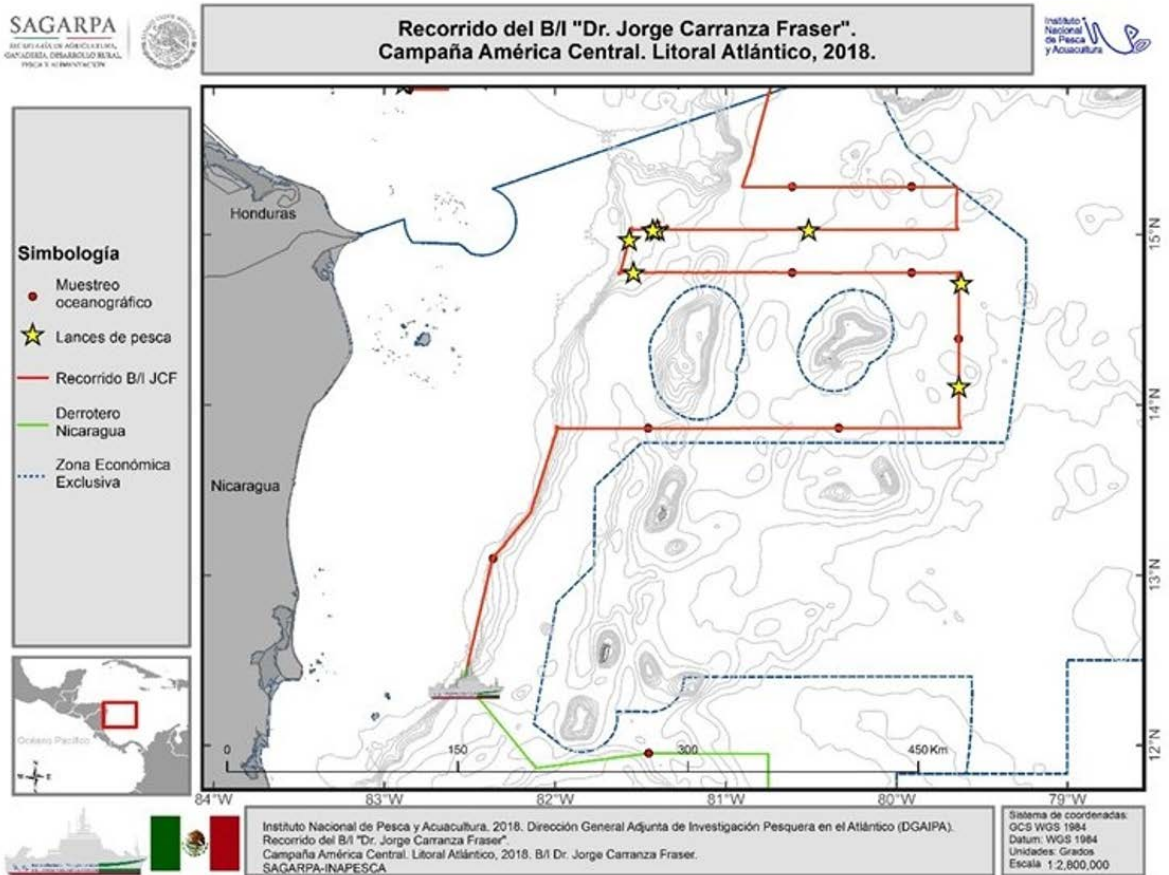
73. Colombia notes that the contents of the letter show several inconsistencies when compared with the official reports published by INAPESCA (Mexico) when the “Jorge Carranza Fraser” was conducting its activities. In a communiqué dated 8 October 2018, INAPESCA stated that on 5 October 2018, which is just one day before the first alleged event, the vessel had already transited through the sector of Quitasueño and was located between Corn Islands (Nicaragua) and Albuquerque

⁷⁸ Nicaragua Annex 12.

⁷⁹ Nicaragua Annex 12, para. 4. It is also striking that Nicaragua took almost seven months to respond to Colombia’s diplomatic note on the matter. (See Nicaragua Annex 7 (9 January 2019) and Nicaragua Annex 10 (2 August 2019)).

⁸⁰ Nicaragua Annex 12, para. 2.

island (Colombia). It follows that the vessel could not have been where Nicaragua claims it was on 6 October 2018.⁸¹



Course and position of the Vessel on 5 October

Figure 9: Excerpt from communiqué from INAPESCA published on 8 October 2018. (Excerpt from Colombia Annex 13).

⁸¹ Colombia Annex 13: National Institute of Fisheries and Aquaculture (INAPESCA), Communiqué regarding the Central America Campaign 2018 of the research vessel "Jorge Carranza Fraser", 8 Oct. 2018. (See also: Nicaragua Annex 7).

74. Noticeably, in said communiqué INAPESCA (Mexico) never mentioned that the vessel’s research activities were interrupted by the Colombian Navy, as Nicaragua now claims. Rather, the communiqué reports that the only difficulties reported by the Mexican vessel relating to its voyage were said to involve “*adverse climatologic conditions*”⁸² and complications due to the “*configuration of the seafloor*”.⁸³ There was no mention of any violation of rights.

75. Moreover, in a second communiqué dated 12 October 2018, which was issued just a few days after the alleged events, again, INAPESCA (Mexico) did not mention that it had experienced any encounters with the Colombian Navy, let alone disruptive ones.⁸⁴ In other words, the contemporaneous documents published by INAPESCA (Mexico) say nothing about an alleged interference by Colombia of the vessel’s activities or route.

76. Nicaragua submitted two documents which allegedly show the original⁸⁵ and modified⁸⁶ navigation course and sampling stations of the “Jorge Carranza Fraser”. These two documents have unknown origins and their reliability is

⁸² Colombia Annex 13, para. 2.

⁸³ *Ibid.*

⁸⁴ Colombia Annex 14: National Institute of Fisheries and Aquaculture (INAPESCA), Communiqué regarding the Central America Campaign 2018 of the research vessel “Jorge Carranza Fraser”, 12 Oct. 2018.

⁸⁵ Nicaragua Annex 15(a).

⁸⁶ Nicaragua Annex 15(b).

therefore open to question. They seem to be partial translations from Spanish, but no original annex was submitted by Nicaragua. In this regard, Article 50 of the Rules of Court states that: “[...] *A copy of the whole document shall be deposited in the Registry, unless it has been published and is readily available.*” Since no such copy was filed by Nicaragua nor is it known that these documents have been published and are readily available, they should either be deemed to be inadmissible or of no probative value.

77. Finally, Nicaragua submitted as evidence of the alleged violation of its rights two affidavits by Nicaraguan representatives allegedly on board the Mexican vessel “Jorge Carranza Fraser” when the alleged incidents took place.⁸⁷ However, as with the other affidavits from two crewmembers from the Nicaraguan vessel “Tayacán,”⁸⁸ described earlier, the veracity of these two affidavits is highly questionable. The individual who served as the notary public in both of them is again Walner Abraham Molina, who is a recently retired member of Nicaragua’s military as well as legal counsel in the current proceedings, and henceforth is clearly interested in the results of this case.⁸⁹

⁸⁷ Nicaragua Annexes 13 and 14.

⁸⁸ Nicaragua Annexes 17(a) and 17(b).

⁸⁹ Colombia Annex 12. (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*, p. 8.)

78. In sum, contrary to Nicaragua's assertions, most of the documents produced by Nicaragua show that the Mexican research vessel "Jorge Carranza Fraser" carried out its work and navigated through the Southwestern Caribbean Sea without interference. The documents of Mexican origin never mention any interference by the Colombian Navy. And even if it had any interaction with Colombian naval assets, it was clearly not serious enough to warrant a response from Mexico or INAPESCA, let alone amount to a violation of Nicaragua's sovereign rights, particularly given that Nicaragua was not even the flag State of the vessel.

D. Conclusions.

79. In conclusion, since the new documents produced by Nicaragua pertain to events that occurred after Colombia was no longer bound by the Pact of Bogotá, the Court lacks jurisdiction to rule on Nicaragua's claim that these events amount to a violation of its sovereign rights and maritime spaces. In any case, as demonstrated, the new documents do not prove any such violation by Colombia. On the contrary, the additional documents and video submitted by Colombia herewith confirm that Colombia committed no such violation and that, particularly with respect to the M/V "Observer" incident, Nicaragua has completely misrepresented the facts.

80. The evidence produced by Nicaragua and Colombia demonstrates:

- (i) that Nicaragua violated international law when its vessel FNN “Tayacán” detained and boarded a Honduran vessel, the M/V “Observer”, which was in transit from Quitasueño to Serranilla, under the false pretext that it was fishing in Nicaraguan waters;
- (ii) that the Honduran vessel “Observer” was neither fishing nor had been fishing in Nicaraguan waters when it was illegally boarded by Nicaragua;
- (iii) that personnel of the Nicaraguan Naval Force, while in command of the M/V “Observer”, through a reckless, irresponsible and illegal manoeuvre, which endangered the lives of the crews’ aboard both ships, tried to collide with the Colombian naval vessel ARC-53 “Antioquia”;
- (iv) that personnel of the Nicaraguan Naval Force during the towing manoeuvre of the M/V “Observer”, through a series of reckless, irresponsible and illegal manoeuvres which endangered the lives of the crews, deliberately

sought to cause bumping between the ARC-53 “Antioquia” and the “Observer”;

- (v) that the Colombian naval vessel ARC-53 “Antioquia” acted according to international law and did not bump or collide with the FNN “Tayacán”;
- (vi) that the Nicaraguan officials of the FNN “Tayacán” in a reckless, irresponsible and illegal manoeuvre which endangered the lives of the crews’ aboard both ships, intentionally collided at least four times with the M/V “Observer” in order to stop it from fleeing the area, causing damage to both vessels;
- (vii) that the “Jorge Carranza Fraser” is a Mexican research vessel which was carrying research activities in the Southwestern Caribbean during the first days of October 2018;
- (viii) that, according to public information published by the INAPESCA (Mexico), the Mexican research ship “Jorge Carranza Fraser” successfully carried out its work in the Southwestern Caribbean on 6 and 8 October 2018;

- (ix) that Mexico did not present any complaint to Colombia with respect to any alleged interference of its activities.

81. These factors all lead to the general conclusion that Colombia did not violate Nicaragua's sovereign rights or maritime spaces, and that Nicaragua's claims are based on allegations that are unsupported and plainly not true. In contrast, the evidence provided not simply by Colombia, but by Nicaragua as well, demonstrates that it was Nicaragua and not Colombia, which acted in a manner incompatible to international law.

82. Moreover, as has been emphasized by Colombia in its written pleadings, what is worrisome is Nicaragua's ongoing misconception of the freedoms of navigation and overflight as it assumes that it has full and unfettered sovereignty over the EEZ.⁹⁰ In its Administrative Decision of First Instance regarding the M/V "Observer" of 8 February 2019, the INPESCA stated:

"This Authority highlights that in accordance with international norms and the domestic laws of our State, the Nicaraguan Naval Force has the right to visit and/or

⁹⁰ This has already been noted by Colombia in its written pleadings. (See CCM, Chapter 3 and CR, Chapter 1).

board any vessel in all the maritime spaces of Nicaragua [...]”.⁹¹ (Emphasis added)

83. It should be stressed, however, that contrary to what Nicaragua alleges and its reiterated attempts to fabricate “incidents” in the context of the present proceedings, the relations between the Nicaraguan Naval Force and the Colombian Navy remain cordial to this day. There is frequent contact and a good working relationship between them. Moreover, Colombia invited Nicaragua to participate in the “Orion” naval multilateral campaigns against drug trafficking. Nicaragua accepted and indeed participated. As noted on 13 August 2019 by Rear-Admiral Ángel Eugenio Fonseca Donaire, Chief of the Nicaraguan Naval Force:

*“We have been participating in the ‘Orión’ Naval Campaigns against Drug Trafficking, organized by Colombia and where several countries participate, respecting each other’s maritime spaces”.*⁹² (Emphasis added)

84. Even as recently as 10 October 2019, after Nicaragua’s request for the production of new documents, the successful completion of the “Orión IV” multilateral campaign in the

⁹¹ Colombia Annex 6.

⁹² Colombia Annex 7: Speeches at the 39th Anniversary of the Nicaraguan Naval Force, 13 Aug. 2019.

Caribbean Sea and the Pacific Ocean was reported, wherein the Colombian Navy and the Nicaraguan Naval Force jointly, cooperatively and successfully participated alongside 20 other States.⁹³

85. In this light, the Republic of Colombia reiterates its concern for the attempts by Nicaragua to fabricate so-called “incidents” with the purpose of artificially improving its case against Colombia. This is a concern which Colombia has raised on several occasions to Nicaragua by diplomatic means.⁹⁴

CARLOS GUSTAVO ARRIETA PADILLA
Agent of the Republic of Colombia

The Hague, 16 December 2019

⁹³ Colombia Annex 15: Colombian Navy, Communiqué regarding the successful completion of new multinational operation against drug trafficking, 10 Oct. 2019

⁹⁴ In this regard see: Nicaragua Annex 7, para. 9; Nicaragua Annex 8, para. 10; Colombia Annex 5, para. 7.

