

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

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

(NICARAGUA *c.* COLOMBIE)

DEMANDES RECONVENTIONNELLES

ORDONNANCE DU 15 NOVEMBRE 2017

2017

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

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

(NICARAGUA *v.* COLOMBIA)

COUNTER-CLAIMS

ORDER OF 15 NOVEMBER 2017

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INTERNATIONAL COURT OF JUSTICE

YEAR 2017

15 November 20172017
15 November
General List
No. 155**ALLEGED VIOLATIONS
OF SOVEREIGN RIGHTS AND MARITIME SPACES
IN THE CARIBBEAN SEA****(NICARAGUA v. COLOMBIA)****COUNTER-CLAIMS****ORDER**

Present: President ABRAHAM; Vice-President YUSUF; Judges OWADA, TOMKA, BENNOUNA, CAÑADO TRINDADE, GREENWOOD, XUE, DONOGHUE, GAJA, SEBUTINDE, BHANDARI, ROBINSON, GEVORGIAN; Judges ad hoc DAUDET, CARON; Registrar COUVREUR.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Article 48 of the Statute of the Court and to Article 80 of the Rules of Court,

Makes the following Order:

Whereas:

1. By an Application filed in the Registry of the Court on 26 November 2013, the Government of the Republic of Nicaragua (hereinafter “Nicaragua”) instituted proceedings against the Republic of Colombia (hereinafter “Colombia”) concerning a dispute in relation to “the viola-

tions 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 invoked as a basis of the jurisdiction of the Court Article XXXI of the American Treaty on Pacific Settlement signed at Bogotá on 30 April 1948 (hereinafter the "Pact of Bogotá"). In the alternative, Nicaragua stated that the jurisdiction of the Court "lies in its inherent power to pronounce on the actions required by its Judgments".

3. By an Order of 3 February 2014, the Court fixed 3 October 2014 as the time-limit for the filing of the Memorial of Nicaragua and 3 June 2015 for the filing of the Counter-Memorial of Colombia. Nicaragua filed its Memorial within the time-limit so prescribed.

4. On 19 December 2014, within the time-limit set by Article 79, paragraph 1, of the Rules of Court, Colombia raised preliminary objections to the jurisdiction of the Court. Consequently, by an Order of 19 December 2014, the President, noting that, by virtue of Article 79, paragraph 5, of the Rules of Court, 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.

5. The Court held public hearings on the preliminary objections raised by Colombia from 28 September to 2 October 2015. By a Judgment dated 17 March 2016, the Court found that it had jurisdiction, on the basis of Article XXXI of the Pact of Bogotá, to adjudicate upon 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 appertain to Nicaragua in its above-mentioned Judgment of 19 November 2012.

6. 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. The Counter-Memorial was filed within the time-limit thus fixed. In Part III of its Counter-Memorial, Colombia, making reference to Article 80 of the Rules of Court, submitted four counter-claims.

7. Referring to Article 53, paragraph 1, of the Rules of Court, the Government of the Republic of Chile and the Government of the Republic of Panama 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 the same provision, the Court decided to grant each of these requests. However, further to a specific request received from the Agent of Colombia, the Court decided that the copies of the Counter-Memorial being furnished would not include Annexes 28 to 61 "for reasons of national security". The Registrar duly communicated these decisions to the said Governments and to the Parties.

8. 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, and proposed that Nicaragua and Colombia each be given three months, successively, to file written observations on the admissibility of Colombia's counter-claims. At the same meeting, Colombia stated that it considered three months to be an excessively long period of time, but that in any case it wished to benefit from the same amount of time as that accorded to Nicaragua for the preparation of its written observations.

9. 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.

10. Having received full and detailed written observations from each of the Parties, the Court considered that it was sufficiently well informed of their respective positions as to the admissibility of Colombia's counter-claims, and did not consider it necessary to hear the Parties further on the subject.

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11. In the Application, the following claims were presented 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.”

12. In the Memorial, the following submissions were presented by Nicaragua:

“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."

13. With regard to the above-mentioned submission 1 (b) in Nicaragua's Memorial (quoted in the preceding paragraph), the Court recalls that in its Judgment on preliminary objections of 17 March 2016, it found that there was no dispute between the Parties regarding alleged violations by Colombia of its obligation not to use force or threaten to use force.

14. In the Counter-Memorial, the following submissions were presented by Colombia:

"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."

15. With regard to the admissibility of the counter-claims presented by Colombia, Nicaragua, at the end of its written observations, requested the Court to adjudge and declare that: “Colombia’s first, second, third and fourth counter-claims as presented in its 17 November 2016 Counter-Memorial are inadmissible”.

16. For its part, at the end of its written observations on the admissibility of its counter-claims, Colombia requested the Court to adjudge and declare that “the counter-claims made in the Counter-Memorial fulfil the requirements of Article 80 of the Rules of Court and are admissible”.

I. GENERAL FRAMEWORK

17. Article 80 of the Rules of Court provides as follows:

“1. The Court may entertain a counter-claim only if it comes within the jurisdiction of the Court and is directly connected with the subject-matter of the claim of the other party.

2. A counter-claim shall be made in the Counter-Memorial and shall appear as part of the submissions contained therein. The right of the other party to present its views in writing on the counter-claim, in an additional pleading, shall be preserved, irrespective of any decision of the Court, in accordance with Article 45, paragraph 2, of these Rules, concerning the filing of further written pleadings.

3. Where an objection is raised concerning the application of paragraph 1 or whenever the Court deems necessary, the Court shall take its decision thereon after hearing the parties.”

18. Counter-claims are autonomous legal acts the object of which is to submit new claims to the Court which are, at the same time, linked to the principal claims, in so far as they are formulated as “counter” claims that react to those principal claims (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997, p. 256, para. 27; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Counter-Claims, Order of 18 April 2013, I.C.J. Reports 2013, pp. 207-208, para. 19).

19. Under Article 80, paragraph 1, of the Rules of Court, two requirements must be met for the Court to be able to entertain a counter-claim, namely, that the counter-claim “comes within the jurisdiction of the Court” and, that it “is directly connected with the subject-matter of the claim of the other party”. In earlier pronouncements, the Court has characterized these requirements as relating to the “admissibility of a

counter-claim as such” (*Oil Platforms (Islamic Republic of Iran v. United States of America)*, Counter-Claim, Order of 10 March 1998, *I.C.J. Reports 1998*, p. 203, para. 33; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Counter-Claims, Order of 29 November 2001, *I.C.J. Reports 2001*, p. 678, para. 35; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Counter-Claims, Order of 18 April 2013, *I.C.J. Reports 2013*, p. 208, para. 20). In this context, the Court has accepted that the term “admissibility” must be understood to encompass both the jurisdictional requirement and the direct-connection requirement for a claim to be presented as a counter-claim (*Jurisdictional Immunities of the State (Germany v. Italy)*, Counter-Claim, Order of 6 July 2010, *I.C.J. Reports 2010 (I)*, p. 316, para. 14; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Counter-Claims, Order of 18 April 2013, *I.C.J. Reports 2013*, p. 208, para. 20).

20. The requirements of admissibility under Article 80 of the Rules of Court are cumulative; each requirement must be satisfied for a counter-claim to be found admissible. In examining those requirements, the Court, however, is not bound by the sequence set out in that Article (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Counter-Claims, Order of 18 April 2013, *I.C.J. Reports 2013*, p. 210, para. 27).

21. In the present case, the Court deems it appropriate to begin with the question whether Colombia’s counter-claims are directly connected with the subject-matter of Nicaragua’s principal claims.

II. DIRECT CONNECTION

22. It is for the Court to assess “whether the counter-claim is sufficiently connected to the principal claim, taking account of the particular aspects of each case” (see *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Counter-Claims, Order of 18 April 2013, *I.C.J. Reports 2013*, pp. 211-212, para. 32).

23. In previous decisions relating to the admissibility of counter-claims as such, the Court has taken into consideration a range of factors that could establish a direct connection in fact and in law between a counter-claim and the claims of the other party for the purposes of Article 80.

24. With respect to the connection in fact, the Court has considered whether the facts relied upon by each party relate to the same factual complex, including the same geographical area or the same time period (see *Certain Activities Carried Out by Nicaragua in the Border Area* (*Costa Rica v. Nicaragua*) and *Construction of a Road in Costa Rica along the San Juan River* (*Nicaragua v. Costa Rica*), *Counter-Claims, Order of 18 April 2013*, *I.C.J. Reports 2013*, p. 213, para. 34; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Yugoslavia*), *Counter-Claims, Order of 17 December 1997*, *I.C.J. Reports 1997*, p. 258, para. 34; *Oil Platforms* (*Islamic Republic of Iran v. United States of America*), *Counter-Claim, Order of 10 March 1998*, *I.C.J. Reports 1998*, p. 205, para. 38). It has also considered whether the facts relied upon by each party are of the same nature, in that they allege similar types of conduct (see *Certain Activities Carried Out by Nicaragua in the Border Area* (*Costa Rica v. Nicaragua*) and *Construction of a Road in Costa Rica along the San Juan River* (*Nicaragua v. Costa Rica*), *Counter-Claims, Order of 18 April 2013*, *I.C.J. Reports 2013*, pp. 212-213, para. 33; *Armed Activities on the Territory of the Congo* (*Democratic Republic of Congo v. Uganda*), *Counter-Claims, Order of 29 November 2001*, *I.C.J. Reports 2001*, p. 679, para. 38).

25. With respect to the connection in law, the Court has examined whether there is a direct connection between the counter-claim and the principal claim in terms of the legal principles or instruments relied upon, as well as whether the applicant and the respondent were considered as pursuing the same legal aim by their respective claims (see *Certain Activities Carried Out by Nicaragua in the Border Area* (*Costa Rica v. Nicaragua*) and *Construction of a Road in Costa Rica along the San Juan River* (*Nicaragua v. Costa Rica*), *Counter-Claims, Order of 18 April 2013*, *I.C.J. Reports 2013*, p. 213, para. 35; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Yugoslavia*), *Counter-Claims, Order of 17 December 1997*, *I.C.J. Reports 1997*, p. 258, para. 35; *Oil Platforms* (*Islamic Republic of Iran v. United States of America*), *Counter-Claim, Order of 10 March 1998*, *I.C.J. Reports 1998*, p. 205, para. 38; *Land and Maritime Boundary between Cameroon and Nigeria* (*Cameroon v. Nigeria*), *Order of 30 June 1999*, *I.C.J. Reports 1999 (II)*, pp. 985-986; *Armed Activities on the Territory of the Congo* (*Democratic Republic of Congo v. Uganda*), *Counter-Claims, Order of 29 November 2001*, *I.C.J. Reports 2001*, p. 679, paras. 38 and 40).

A. First and Second Counter-Claims

26. In the body of the Counter-Memorial and in its written observations, Colombia explains that its first counter-claim is based on “Nicaragua’s violation of its duty of due diligence to protect and preserve the marine environment of the Southwestern Caribbean Sea”, and that its

second counter-claim, which “is a logical consequence of the first one”, deals with “Nicaragua’s violation of its duty of due diligence to protect the right of the inhabitants of the San Andrés Archipelago, in particular the Raizales, to benefit from a healthy, sound and sustainable environment”.

27. These two counter-claims are formulated differently in the submissions contained at the end of Colombia’s Counter-Memorial, which read as follows:

“II. . . [T]he 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.”

28. According to Colombia, there are a number of elements which show that the first and second counter-claims “are directly connected with the subject-matter of Nicaragua’s claims and pursue the same legal aims, and are thus admissible” under Article 80, paragraph 1, of the Rules of Court.

29. In particular, Colombia asserts that these two counter-claims arise out of the same factual complex as Nicaragua’s principal claims. First, according to Colombia, these counter-claims and Nicaragua’s principal claims refer to the same geographical area, that is the area comprising parts of the Seaflower Biosphere Reserve and the Seaflower Marine Protected Area, including the maritime area around the Luna Verde Bank, “which is where most of the ‘incidents’ mentioned by Nicaragua are said to have taken place”, as well as within Colombia’s declared contiguous zone. Secondly, Colombia explains, these counter-claims and the principal claims are based on facts of the same nature because they address the conduct of the Parties with respect to the preservation and protection of the marine environment and the exercise of due diligence within the relevant maritime area. Thirdly, Colombia maintains that they concern events that occurred within the same period of time.

30. Colombia further contends that its first and second counter-claims have a direct legal connection with Nicaragua’s principal claims. Colombia asserts that they are based on the same corpus of law, namely the

customary international law of the sea which addresses the sovereign rights of coastal States in connection with those States' international obligations, as well as the rights and duties of other States, including environmental rules. Moreover, Colombia, in its counter-claims, and Nicaragua, in its principal claims, pursue the same legal aims because, according to Colombia, "each Party is contesting the legality of the conduct of the other in the same maritime areas".

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31. For its part, Nicaragua contends that some of the alleged facts upon which Colombia relies in its first two counter-claims, i.e., the incidents of alleged predatory fishing and pollution by Nicaraguan fishermen, do not relate to the same geographical area as the facts invoked in its own claims. According to Nicaragua, the facts adduced by Colombia took place "in the territorial sea around Colombia's Serrana Cay or in the Colombia-Jamaica Joint Regime Area"; by contrast, the facts underpinning Nicaragua's claims occurred in its exclusive economic zone (EEZ). Nicaragua further contends that the first two counter-claims and Nicaragua's principal claims involve different types of conduct — Colombia relies on the alleged failure of Nicaragua to protect and preserve the marine environment in the south-western Caribbean Sea, while Nicaragua invokes Colombia's interference with, and violations of, Nicaragua's exclusive sovereign rights and jurisdiction in the maritime areas adjudged by the Court in 2012 to appertain to it. In Nicaragua's view, the facts on which Nicaragua and Colombia rely "are of a fundamentally different nature". Indeed, according to Nicaragua, its claims concern the "active assertion" by Colombia of rights and jurisdiction in areas which do not appertain to Colombia; whereas Colombia's counter-claims "are based on the alleged *inactivity* of Nicaragua in the face of the environmentally destructive practices of Nicaragua's own citizens" (emphasis in the original).

32. Nicaragua also argues that Colombia's first two counter-claims and Nicaragua's claims are not based on the same legal principles and instruments, and therefore do not pursue the same legal aim. In Nicaragua's view, Colombia seeks to establish Nicaragua's international responsibility for alleged violations of the rules of customary international law relating to the preservation and protection of the environment, and the exercise of due diligence, as well as of the provisions of various international instruments, including the Convention on International Trade in Endangered Species of Wild Fauna and Flora (the "CITES Convention"), the Convention for the Protection and Development of the Marine

Environment in the Wider Caribbean Region (the “Cartagena Convention”), and the Code of Conduct on Responsible Fisheries of the Food and Agriculture Organization (FAO). Nicaragua, for its part, relies on the Court’s 2012 Judgment in the case concerning *Territorial and Maritime Dispute (Nicaragua v. Colombia)* (hereinafter referred to as the “2012 Judgment”) and the rules of customary international law as reflected in Parts V and VI of UNCLOS, which recognize the exclusive sovereign rights and jurisdiction of a coastal State within its maritime areas.

33. Nicaragua accordingly concludes that Colombia has failed to show that its first and second counter-claims meet the condition of direct connection set out in Article 80 of the Rules of Court, and contends that, consequently, these two counter-claims must be declared inadmissible as such.

* *

34. The Court has already noted that Colombia’s formulations of the first and second counter-claims differ in the submissions contained at the end of the Counter-Memorial, and in the body of the Counter-Memorial and in its written observations. While broadly similar in scope, these formulations are worded in a different way (see paragraphs 26 and 27 above). In this respect, the Court notes that submissions formulated by the parties at the end of their written pleadings must be read in light of the arguments developed in the body of those pleadings. In the present case, the Court further observes that the arguments of the Parties on direct connection are based on the wording used by Colombia in the body of its Counter-Memorial and written observations. Consequently, for the purposes of considering the admissibility of the first and second counter-claims as such, the Court will refer to the wording used by Colombia in the body of its Counter-Memorial and written observations.

35. Both the first and second counter-claims relate to Nicaragua’s purported violations of its obligation to protect and preserve the marine environment. The first counter-claim is based on Nicaragua’s alleged breach of a duty of due diligence to protect and preserve the marine environment of the south-western Caribbean Sea. The second counter-claim deals with Nicaragua’s breach of its alleged duty of due diligence to protect the right of the inhabitants of the San Andrés Archipelago, in particular the Raizales, to benefit from a healthy, sound and sustainable environment. The Court notes that Colombia characterizes the second claim as a “logical consequence” of the first one and that Nicaragua does not challenge this assertion. Therefore, the Court will examine the first and second counter-claims jointly, keeping in mind, nevertheless, that they are separate.

36. A majority of the incidents referred to by Colombia in its first and second counter-claims allegedly occurred in Nicaragua’s EEZ, and more

specifically in the maritime area around the Luna Verde Bank, which is located in the Seaflower Biosphere Reserve. Yet, in its counter-claims, Colombia also refers to certain incidents that have allegedly taken place within Colombia's territorial sea and the Joint Regime Area with Jamaica (around Serranilla and Bajo Alicia). However, since the number of these incidents is limited and most of the incidents referred to by Colombia have allegedly occurred in the maritime area around the Luna Verde Bank in Nicaragua's EEZ, the Court is of the view that Colombia's first and second counter-claims essentially relate to the same geographical area that is the focus of Nicaragua's principal claims.

37. With regard to the alleged facts underpinning Colombia's first and second counter-claims and Nicaragua's principal claims, respectively, the Court observes that Colombia relies on the alleged failure of Nicaragua to protect and preserve the marine environment in the south-western Caribbean Sea. In particular, Colombia contends that private Nicaraguan vessels have engaged in predatory fishing practices and have been destroying the marine environment of the south-western Caribbean Sea, thus preventing the inhabitants of the San Andrés Archipelago, including the Raizal community, from benefiting from a healthy, sound and sustainable environment and habitat. By contrast, the principal claims of Nicaragua are based upon Colombia's Navy's alleged interference with and violations of Nicaragua's exclusive sovereign rights and jurisdiction in Nicaragua's EEZ. Nicaragua states that Colombia has prevented Nicaraguan fishing vessels and its naval and coast guard vessels from navigating, fishing and exercising jurisdiction in Nicaragua's EEZ. Thus, the Court finds that the nature of the alleged facts underlying Colombia's first and second counter-claims and Nicaragua's principal claims is different, and that these facts do not relate to the same factual complex.

38. Furthermore, there is no direct legal connection between Colombia's first and second counter-claims, and Nicaragua's principal claims. First, the legal principles relied upon by the Parties are different. In its first two counter-claims, Colombia invokes rules of customary international law and international instruments relating essentially to the preservation and protection of the environment; by contrast, in its principal claims, Nicaragua refers to customary rules of the international law of the sea relating to the sovereign rights, jurisdiction and duties of a coastal State within its maritime areas, as reflected in Parts V and VI of UNCLOS. Secondly, the Parties are not pursuing the same legal aim by their respective claims. While Colombia seeks to establish that Nicaragua has failed to comply with its obligation to protect and preserve the marine environment in the south-western Caribbean Sea, Nicaragua seeks to demonstrate that Colombia has violated Nicaragua's sovereign rights and jurisdiction within its maritime areas.

39. The Court therefore concludes 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.

B. Third Counter-Claim

40. In its third counter-claim, Colombia requests the Court to declare that Nicaragua has infringed the customary artisanal fishing rights of the local inhabitants of the San Andrés Archipelago, including the indigenous Raizal people, to access and exploit their traditional fishing grounds. In particular, Colombia refers to various alleged acts of intimidation and harassment of the artisanal fishermen of the San Andrés Archipelago by Nicaragua's Navy — such as the seizure of the artisanal fishermen's products, fishing gear, food and other property.

41. In order to demonstrate that there is a direct connection between its third counter-claim and Nicaragua's principal claims, Colombia contends that the third counter-claim, in the same manner as Nicaragua's principal claims, relates to events that occurred in the aftermath of the 2012 Judgment in the maritime zones declared by the Court to appertain to Nicaragua and, in particular, "in the shallow waters of the area of Cape Bank known as Luna Verde, or the deep-sea banks situated between the Northern Colombian islands of Quitasueño and Serrana". Thus, according to Colombia, there is "an obvious temporal and geographic overlapping" between Nicaragua's principal claims and Colombia's third counter-claim inasmuch as they relate to the same time period and the same geographical area. Furthermore, Colombia alleges that the facts relied upon by Nicaragua in its principal claims and by Colombia in its third counter-claim are of the same nature, in that they allege similar types of conduct. It explains that "Nicaragua has complained because of the conduct of the Colombian Navy vis-à-vis Nicaraguan fishermen" and that "Colombia has complained because of the conduct of the Nicaraguan Navy vis-à-vis Colombian fishermen in the same area".

Finally, Colombia asserts that there is a legal connection between Nicaragua's principal claims and Colombia's counter-claim because the Parties' respective claims are based on the same legal principles or instruments, that is customary international law. Indeed, Nicaragua's claims concern customary rules relating to the coastal State's rights to exploit marine resources in its own EEZ, and Colombia's counter-claim relates to customary rights to access and exploit marine resources located in the same maritime zone. Colombia adds that the Parties are pursuing the same legal aim, since they are both seeking to establish the international responsibility of the other by invoking violations of customary rules relating to the access to fishing resources in the same maritime zone.

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42. For its part, Nicaragua contends that, although the facts underlying Colombia's third counter-claim "generally relate to the same geographical area and the same time period as the facts stated in Nicaragua's claim", their nature is different because they took place "in very different legal zones". Nicaragua considers that, while the harassment of which it complains occurred "in its own maritime zones and was committed by another State that has no sovereign rights or jurisdiction in those areas", the harassment of which Colombia complains allegedly took place "outside Colombia's maritime zones in areas that are subject to exclusive sovereign rights and jurisdiction of Nicaragua".

43. Furthermore, Nicaragua asserts that the legal principles that underlie Colombia's third counter-claim are not the same as those that support Nicaragua's principal claims and that the Parties' claims do not pursue the same legal aim. In this regard, Nicaragua argues that, while it "seeks to vindicate its *exclusive sovereign rights* as adjudged by the Court in its 2012 Judgment", Colombia's third counter-claim concerns "the alleged *non-exclusive private rights* of its citizens to continue traditional fishing activities in Nicaragua's EEZ despite the 2012 Judgment" (emphasis in the original). Nicaragua adds that it is seeking "reaffirmation of its rights and jurisdiction *qua* sovereign", unlike Colombia, which is "acting as *parens patriae* on behalf of its people to assert putative private rights".

* *

44. The Court observes that the Parties agree that the facts relied upon by Colombia, in its third counter-claim, and by Nicaragua, in its principal claims, relate to the same time period (following the delivery of the 2012 Judgment) and the same geographical area (Nicaragua's EEZ). The Court further notes that the facts underpinning the third counter-claim of Colombia and the principal claims of Nicaragua are of the same nature in so far as they allege similar types of conduct of the naval forces of one Party vis-à-vis nationals of the other Party. In particular, Colombia complains about the treatment (alleged harassment, intimidation, coercive measures) by Nicaragua's Navy of Colombian artisanal fishermen in the waters in the area of Luna Verde and in the area between Quitasueño and Serrana, while Nicaragua complains about the treatment (alleged harassment, intimidation, coercive measures) by Colombia's Navy of Nicaraguan licensed vessels fishing in the same waters. At this stage of the proceedings, for the purposes of deciding on the question whether Colombia's third counter-claim is admissible as such, the Court does not need to address the issue of the relationship between the legal status of the maritime zones involved and the rights of the respective Parties, which belongs to the merits.

45. With regard to the legal principles relied upon by the Parties, the Court notes that Colombia's third counter-claim is based on the alleged right of a State and its nationals to access and exploit, under certain conditions, living resources in another State's EEZ. The Court further notes that Nicaragua's principal claims are based on customary rules relating to a coastal State's sovereign rights and jurisdiction in its EEZ, including the rights of a coastal State over marine resources located in this area. Thus, the respective claims of the Parties concern the scope of the rights and obligations of a coastal State in its EEZ. In addition, the Parties are pursuing the same legal aim by their respective claims since they are both seeking to establish the responsibility of the other by invoking violations of a right to access and exploit marine resources in the same maritime area. Consequently, the Court considers that there is a direct legal connection between Colombia's third counter-claim and Nicaragua's principal claims.

46. The Court therefore concludes that there is a direct connection, as required by Article 80 of the Rules of Court, between Colombia's third counter-claim and Nicaragua's principal claims.

C. Fourth Counter-Claim

47. In its fourth counter-claim, Colombia requests the Court to declare that Nicaragua, by adopting Decree No. 33-2013 of 19 August 2013, which established straight baselines and, according to Colombia, had the effect of extending its internal waters and maritime zones beyond what international law permits, has violated Colombia's sovereign rights and jurisdiction. According to Colombia, "Nicaragua's unlawful decision to establish a system of straight baselines to determine the limit from which the breadth of its maritime zones are measured has directly infringed Colombia's rights in the Caribbean Sea" in three different ways: first, Nicaragua's adoption of Decree No. 33-2013 extended its internal waters eastward, thereby "den[ying] the right of innocent passage and freedom of navigation in vast stretches of sea in which these rights and freedoms should be enjoyed"; secondly, it extended the territorial sea of Nicaragua, having the consequence of unduly restraining Colombia's navigational rights; thirdly, it extended Nicaragua's exclusive economic zone, which "created an artificial overlap with Colombia's entitlement to its exclusive economic zone and continental shelf". Colombia considers that there is a direct connection between its fourth counter-claim and Nicaragua's principal claims regarding Colombia's Decree 1946 of 9 September 2013 establishing its "Integral Contiguous Zone", as subsequently amended by Decree 1119 of 17 June 2014. It recalls that Nicaragua contends that, by virtue of these decrees, Colombia has claimed for itself large parts of the maritime area that the Court had determined to belong to Nicaragua and has,

therefore, allegedly “violated Nicaragua’s maritime zones and sovereign rights”.

48. Colombia asserts that its fourth counter-claim and Nicaragua’s principal claims — both dealing with the adoption of the respective decrees — are connected in fact and in law. First, Colombia points out that the two decrees were adopted during the same period, namely Nicaragua’s decree on 19 August 2013 and Colombia’s decree on 9 September 2013. Secondly, according to Colombia, they “are domestic acts that relate to the delineation of Coastal States’ maritime areas”. Thirdly, both decrees “allegedly extend the Parties’ maritime areas beyond what is allowed under international law”. Fourthly, they concern the implementation of the 2012 Judgment.

49. As far as the legal connection is concerned, Colombia is of the view that its fourth counter-claim and Nicaragua’s principal claims regarding Colombia’s Decree 1946 are based on legal principles pertaining to the same corpus of international law, namely the customary international law of the sea. That is, according to Colombia, sufficient to establish their direct connection in law. Colombia also considers that both claims have the same legal aim.

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50. For its part, Nicaragua contends that Colombia’s fourth counter-claim has no direct factual connection with Nicaragua’s principal claims. First, Nicaragua explains that these claims do not concern the same geographical area. In particular, Nicaragua’s claims relate to “Colombia’s violations of Nicaragua’s rights and jurisdiction in its EEZ”, while Colombia’s fourth counter-claim relates “only to the extent of Nicaragua’s internal waters and territorial sea”. Secondly, according to Nicaragua, the facts relied upon by Colombia are not of the same nature as the facts underlying Nicaragua’s claims. Whereas Colombia refers to Nicaragua’s decree which relates to the extent of Nicaragua’s maritime zones in the Caribbean Sea, the facts underpinning Nicaragua’s claim “concerning Colombia’s Integral Contiguous Zone relate to Colombia’s challenge to the *existence* of Nicaragua’s exclusive sovereign rights and jurisdiction in maritime areas delimited in the 2012 Judgment” (emphasis in the original). Finally, Nicaragua alleges that its claim concerns matters that were expressly settled by the Court in its 2012 Judgment. In contrast, Colombia’s fourth counter-claim relates to an issue which was not addressed in that Judgment, namely the baselines from which Nicaragua is to measure the breadth of its maritime spaces.

51. Nicaragua argues that Colombia has equally failed to show a direct legal connection between its fourth counter-claim and Nicaragua’s princi-

pal claims. Nicaragua contends that its claims are based on the 2012 Judgment which established the maritime boundary between the Parties “within 200 [nautical miles]”, as well as on the customary international law rules governing a coastal State’s rights, jurisdiction and duties in the EEZ and its rights over the continental shelf. Nicaragua notes that Colombia’s claim is premised on the assertion that Nicaragua’s decree is not in conformity with the customary international law rules governing the use of straight baselines as a method for drawing the baselines from which the breadth of maritime spaces is measured. Finally, Nicaragua contends that the Parties are not pursuing the same legal aim, because Nicaragua’s 200-nautical-mile limit is the same whether measured from straight or normal baselines. Nicaragua’s decree, therefore, “does not have the effect of impinging on Colombia’s EEZ or continental shelf” whereas Colombia’s decree “violates Nicaragua’s EEZ and continental shelf”.

* *

52. The Court observes that the facts relied upon by Colombia in its fourth counter-claim and by Nicaragua in its principal claims — i.e. the adoption of domestic legal instruments fixing the limits or the extent of their respective maritime zones — relate to the same time period. Nicaragua’s Decree No. 33-2013 was adopted on 19 August 2013 and Colombia’s Decree 1946 was adopted on 9 September 2013. The Court notes, above all, that both Parties complain about the provisions of domestic law adopted by each Party with regard to the delineation of their respective maritime spaces in the same geographical area, namely in the south-western part of the Caribbean Sea lying east of the Nicaraguan coast and around the Colombian Archipelago of San Andrés.

53. The Court observes that Nicaragua claims the respect of its rights in the EEZ and that the limits of Nicaragua’s EEZ depend on its baselines, which are challenged in Colombia’s fourth counter-claim. Furthermore, the Court notes that, in their respective claims, Nicaragua and Colombia allege violations of the sovereign rights they each claim to possess on the basis of customary international rules relating to the limits, régime and spatial extent of the EEZ and contiguous zone, in particular in situations where these zones overlap between States with opposite coasts. The fact that the limits of these zones in the south-western part of the Caribbean Sea (lying east of the Nicaraguan coast and around the Colombian Archipelago of San Andrés) were established by the 2012 Judgment does not change the ultimate legal basis of the rights pertaining to Nicaragua and Colombia. Although the Court observed in its Judgment on preliminary objections that “[t]he 2012 Judgment of the Court is undoubtedly relevant to [the] dispute [between the Parties] in that it determines the maritime boundary between the Parties and, consequently, which of the Parties possesses sovereign rights under customary

international law in the [relevant] maritime areas”, it made clear, however, that “those rights are derived from customary international law” (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, pp. 41-42, para. 109). In addition, the Parties are pursuing the same legal aim by their respective claims, since each is seeking a declaration that the other Party’s decree is in violation of international law. Consequently, the Court considers that there is a direct legal connection between Colombia’s fourth counter-claim and Nicaragua’s principal claims.

54. The Court therefore concludes that there is a direct connection, as required by Article 80 of the Rules of Court, between Colombia’s fourth counter-claim and Nicaragua’s principal claims.

*D. Conclusion of the Court with respect
to the Direct Connection Requirement*

55. The Court concludes that there is no direct connection between Colombia’s first and second counter-claims and Nicaragua’s principal claims. It does however consider that Colombia’s third and fourth counter-claims are directly connected with the subject-matter of Nicaragua’s principal claims.

III. JURISDICTION

56. It is now for the Court to examine whether Colombia’s third and fourth counter-claims meet the requirement of jurisdiction contained in Article 80, paragraph 1, of the Rules of Court.

* *

57. Nicaragua contends that the Court has no jurisdiction to entertain Colombia’s counter-claims. It argues that the critical date for determining jurisdiction over Colombia’s counter-claims is the date on which they were submitted, not the date of Nicaragua’s Application. In this regard, it notes that Colombia submitted its counter-claims nearly three years after the Pact of Bogotá had ceased to be in force between the Parties, by virtue of its denunciation by Colombia. Nicaragua concludes that, since the Pact is the only basis of jurisdiction in the present case, Colombia’s counter-claims do not come within the jurisdiction of the Court and must be dismissed.

58. Nicaragua also asserts that, under Article XXXI of the Pact of Bogotá, the existence of a dispute between the Parties is a condition of the

Court's jurisdiction. Nicaragua argues that Colombia, however, has failed to establish the existence of such a dispute with respect to the subject-matter of its third counter-claim. It contends that there is nothing in the record, either by way of diplomatic Note, public statements from high-ranking officials or anything else, that shows that this counter-claim was positively opposed by Nicaragua. According to Nicaragua, there is therefore no basis on which the Court can infer the existence of a dispute.

59. Finally, Nicaragua is of the view that Colombia has not met the precondition stated in Article II of the Pact of Bogotá. Under this provision, Nicaragua recalls, States parties may have recourse to the dispute settlement mechanisms provided in the Pact, only in the event that the dispute "in the opinion of the parties, cannot be settled by direct negotiations through the usual diplomatic channels". In this regard, Nicaragua observes that Colombia has not demonstrated that the Parties were of the opinion that the matters raised by Colombia in its third counter-claim could not be settled by direct negotiations.

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60. For its part, Colombia contends that its counter-claims come within the jurisdiction of the Court on the basis of the Pact of Bogotá. Colombia observes that the Court's jurisdiction over incidental proceedings must be assessed at the time of the filing of the main proceedings, i.e., on 26 November 2013 in the present case, when Nicaragua filed its Application instituting proceedings. Colombia adds that all the facts it alleges in its counter-claims occurred before that critical date. Thus, the fact that the Pact of Bogotá ceased to be in force on 27 November 2013 between the Parties does not deprive the Court of the jurisdiction already established under this instrument with regard to the principal proceedings to entertain Colombia's counter-claims. Therefore, according to Colombia, as long as the issues raised in Colombia's counter-claims are directly connected with the principal claims and relate to situations that arose between Nicaragua and Colombia before the critical date of 26 November 2013 — when the Pact of Bogotá was still in force — the Court has jurisdiction to entertain those counter-claims.

61. Colombia further observes that it does not have to establish the existence of a dispute with Nicaragua on the subject-matter of its counter-claims, nor does it need to provide evidence that the matters presented in its counter-claims could not, in the opinion of the Parties, be settled by negotiations. It is of the view that these conditions are irrelevant in determining the Court's jurisdiction under Article 80 of the Rules of Court.

62. As for the first condition, Colombia considers that Article 80 of the Rules of Court does not require the respondent presenting counter-claims

to demonstrate that it has a dispute with the applicant regarding the subject-matter of these counter-claims because that provision “presupposes the existence of a dispute over which the Court has already accepted jurisdiction”. According to Colombia, its counter-claims are admissible under the same basis of jurisdiction upon which the Court entertains Nicaragua’s claims, that is the Pact of Bogotá, because Colombia’s counter-claims are “inextricably linked to the subject-matter of the dispute”, as defined by the Court in its Judgment on preliminary objections. In any event, Colombia considers that it has submitted sufficient and substantial evidence that Nicaragua was aware or could not have been unaware of the existence of a dispute between the Parties relating to the subject-matter of Colombia’s counter-claims. In particular, with regard to the first, second and third counter-claims, it maintains that

“Nicaragua and Colombia have opposite views regarding the rights, obligations and duties of the coastal State (Nicaragua) and the rights and duties of other States (in this case, Colombia) in the exclusive economic zone, as well as opposite views regarding how their counter-party is performing or failing to perform its obligations and duties or guaranteeing the rights of the other”.

63. As for the second condition, Colombia disagrees with Nicaragua that the matters presented in Colombia’s counter-claims should have been the subject of prior negotiations. It claims that “a dispute has already crystallized, adjudication is the mean chosen to resolve it and the Colombian counter-claims are reactions to the Nicaraguan claims that could not be settled by negotiations”. In any event, Colombia is of the view that Nicaragua has not presented any evidence that the maritime issues between the Parties which have arisen after the 2012 Judgment could be settled by direct negotiations through the usual diplomatic channels.

* *

64. The Court recalls that, in the present case, Nicaragua has invoked Article XXXI of the Pact of Bogotá as a basis of the Court’s jurisdiction. According to this provision, the parties to the Pact recognize as compulsory the jurisdiction of the Court “so long as the present Treaty is in force”. Under Article LVI, the Pact remains in force indefinitely, but “may be denounced upon one year’s notice”. Thus, after the denunciation of the Pact by a State party, the Pact shall remain in force between the denouncing State and the other parties for a period of one year following the notification of denunciation.

65. Colombia ratified the Pact of Bogotá on 14 October 1968 but subsequently gave notice of denunciation on 27 November 2012. The Application in the present case was submitted to the Court on 26 November 2013, i.e., after the transmission of Colombia’s notification of denunciation but

before the one-year period referred to in Article LVI had elapsed. In its Judgment on preliminary objections of 17 March 2016, the Court noted that Article XXXI of the Pact was still in force between the Parties on the date that the Application in the present case was filed, and considered that the fact that the Pact had subsequently ceased to be in force between the Parties did not affect the jurisdiction which existed on the date that the proceedings were instituted (see *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, *Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, pp. 25-26, para. 48).

66. Colombia, relying on Article XXXI of the Pact of Bogotá, presented its counter-claims, which appeared as part of the submissions contained in its Counter-Memorial, on 17 November 2016, i.e. after the Pact of Bogotá had ceased to be in force between the Parties. Accordingly, the question that arises is whether, in a situation where a respondent has invoked in its counter-claims the same jurisdictional basis as that invoked by the applicant when instituting the proceedings, that respondent is prevented from relying on that basis of jurisdiction on the grounds that it has ceased to be in force in the period between the filing of the application and the filing of the counter-claims.

67. Once the Court has established jurisdiction to entertain a case, it has jurisdiction to deal with all its phases; the subsequent lapse of the title cannot deprive the Court of its jurisdiction. As the Court stated in the *Nottebohm* case, in the context of the lapse, after the filing of the application, of the respondent's declaration of acceptance of the compulsory jurisdiction of the Court:

“When an Application is filed at a time when the law in force between the parties entails the compulsory jurisdiction of the Court . . . the filing of the Application is merely the condition required to enable the clause of compulsory jurisdiction to produce its effects in respect of the claim advanced in the Application. Once this condition has been satisfied, the Court must deal with the claim; it has jurisdiction to deal with all its aspects, whether they relate to jurisdiction, to admissibility or to the merits. An extrinsic fact such as the subsequent lapse of the Declaration, by reason of the expiry of the period or by denunciation, cannot deprive the Court of the jurisdiction already established.” (*Nottebohm (Liechtenstein v. Guatemala)*, *Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 123.)

Although, as the Court noted above (see paragraph 18), counter-claims are autonomous legal acts the object of which is to submit new claims to the Court, they are, at the same time, linked to the principal claims, and their purpose is to react to them in the same proceedings in respect of which they are incidental. Consequently, the lapse of the jurisdictional title invoked by an applicant in support of its claims subsequent to the filing of the application does not deprive the Court of its jurisdiction to entertain counter-claims filed on the same jurisdictional basis. The Court notes that the opposite approach would have the disadvantage of allow-

ing the applicant, in some instances, to remove the basis of jurisdiction after an application has been filed and thus insulate itself from any counter-claims submitted in the same proceedings and having a direct connection with the principal claim.

68. The Court recalls that, in its Judgment on preliminary objections of 17 March 2016, it recognized that, at the time the Application was filed, it had jurisdiction on the basis of Article XXXI of the Pact of Bogotá. It also recalls that the title of jurisdiction had elapsed before Colombia's Counter-Memorial was filed. However, Colombia's third and fourth counter-claims were brought under the same title of jurisdiction as Nicaragua's principal claims and have been found to be directly connected to these claims (see paragraph 55 above). It follows that the termination of the Pact of Bogotá as between the Parties did not, per se, deprive the Court of its jurisdiction to entertain those counter-claims.

69. The Court observes that, in order to establish if counter-claims come within its jurisdiction, it must also examine whether the conditions contained in the instrument providing for such jurisdiction are met (see for example *Jurisdictional Immunities of the State (Germany v. Italy), Counter-Claim, Order of 6 July 2010, I.C.J. Reports 2010 (I)*, pp. 316-321, paras. 17-31). It follows that, in ascertaining whether it has jurisdiction to entertain Colombia's third and fourth counter-claims, the Court needs to examine whether the conditions set out in the Pact of Bogotá have been met.

70. The Court recalls that by virtue of Article XXXI of the Pact of Bogotá, the States parties agreed to accept the compulsory jurisdiction of the Court, in conformity with Article 36, paragraph 2, of the Statute, for "all disputes of a juridical nature that arise among them". Thus, the existence of a dispute between the parties is a condition of its jurisdiction. Therefore the Court, for the purposes of determining whether it has jurisdiction under this instrument in a given case, must establish the existence of a dispute between the parties with regard to the subject-matter of the counter-claims.

71. According to the established case law of the Court, a dispute is "a disagreement on a point of law or fact, a conflict of legal views or of interests between [parties]" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016 (II)*, p. 849, para. 37). In order for a dispute to exist, "[i]t must be shown that the claim of one party is positively opposed by the other" (*South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328).

72. In the present case, with regard to the third counter-claim, the Court considers that the Parties hold opposing views on the scope of their respective rights and duties in Nicaragua's EEZ. Nicaragua was aware that its views were positively opposed by Colombia, since, after the 2012 Judgment, the senior officials of the Parties exchanged public statements expressing their divergent views on the relationship between the alleged rights of the inhabitants of the San Andrés Archipelago to continue traditional fisheries, invoked by Colombia, and Nicaragua's assertion of its right to authorize fishing in its EEZ. According to Colombia, Nicaragua's naval forces have also intimidated Colombian artisanal fishermen who seek to fish in traditional fishing grounds. Therefore, it appears that a dispute has existed between the Parties regarding the alleged violation by Nicaragua of the rights at issue since November 2013, if not earlier.

73. With regard to the fourth counter-claim, the Court considers that the Parties hold opposing views on the question of the delineation of their respective maritime spaces in the south-western part of the Caribbean Sea, following the Court's 2012 Judgment. In this regard, the Court notes that, in a diplomatic Note of protest addressed to the Secretary-General of the United Nations on 1 November 2013, the Minister for Foreign Affairs of Colombia stated, *inter alia*, that "[t]he Republic of Colombia wishe[d] to inform the United Nations and its Member States that the straight baselines . . . claimed by Nicaragua [in Decree No. 33-2013 of 19 August 2013] [were] wholly contrary to international law". The Court further observes that, referring to this diplomatic Note, Nicaragua acknowledged that "[t]here [was] therefore a 'dispute' on this issue". Therefore, it appears that a dispute has existed between the Parties on the matter since November 2013, if not earlier.

74. The Court now turns to the question whether, in accordance with the condition set out in Article II of the Pact of Bogotá, the matters presented by Colombia in its counter-claims could not "in the opinion of the Parties . . . be settled by direct negotiations". The Court recalls that it must determine whether the evidence demonstrates that "neither of the Parties could plausibly maintain that the dispute between them could be settled by direct negotiations through the usual diplomatic channels" (*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. 37, para. 95).

75. With respect to the third counter-claim, the Court recalls that, in its Judgment on preliminary objections of 17 March 2016, it acknowledged that "[t]he issues that the Parties identified for possible dialogue include[d] fishing activities of the inhabitants of San Andrés, Providencia and Santa Catalina in waters that have been recognized as appertaining

to Nicaragua by the Court” (*I.C.J. Reports 2016 (I)*, p. 38, para. 97). However, it also observed that the fact that the Parties remained open for dialogue was not a “decisive factor”, because what was essential for the Court to decide was whether “the Parties considered in good faith a certain possibility of a negotiated settlement to exist or not to exist” (*ibid.*, para. 99). The Court notes that, although following the 2012 Judgment the Parties have made general statements on issues relating to fishing activities of the inhabitants of the San Andrés Archipelago, they have never initiated direct negotiations in order to resolve these issues. This shows that the Parties did not consider that there was a possibility of finding a resolution of their dispute regarding the question of respect for traditional fishing rights through the usual diplomatic channels by direct negotiations. Therefore the Court considers that the condition set out in Article II of the Pact of Bogotá is met with respect to the third counter-claim.

76. With respect to the fourth counter-claim, the Court considers that Nicaragua’s adoption of Decree No. 33-2013 of 19 August 2013 and Colombia’s rejection of it by means of a diplomatic Note of protest from the Minister for Foreign Affairs of Colombia dated 1 November 2013 (see paragraph 73 above) show that it would, in any event, no longer have been useful for the Parties to engage in direct negotiations on the matter through the usual diplomatic channels. The Court therefore finds that the condition set out in Article II of the Pact of Bogotá is met with respect to the fourth counter-claim.

77. The Court concludes that it has jurisdiction to entertain Colombia’s third and fourth counter-claims.

IV. CONCLUSION

78. Given the above reasons, the Court concludes that the third and fourth counter-claims presented by Colombia are admissible as such.

* * *

79. The Court observes that a decision given on the admissibility of a counter-claim taking account of the requirements of Article 80 of the Rules of Court, in no way prejudices other questions with which the Court would have to deal during the remainder of the proceedings.

80. In order to protect the rights which third States entitled to appear before the Court derive from the Statute, the Court instructs the Registrar to transmit a copy of this Order to them.

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81. Taking into account the conclusions it has reached above regarding the admissibility of the third and fourth counter-claims, the Court considers it necessary for Nicaragua to file a Reply and Colombia a Rejoinder, addressing the claims of both Parties in the current proceedings, the subsequent procedure being reserved.

* * *

82. For these reasons,

THE COURT,

(A) (1) By fifteen votes to one,

Finds that the first counter-claim submitted by the Republic of Colombia is inadmissible as such and does not form part of the current proceedings;

IN FAVOUR: *President* Abraham; *Vice-President* Yusuf; *Judges* Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Gevorgian; *Judge ad hoc* Daudet;

AGAINST: *Judge ad hoc* Caron;

(2) By fifteen votes to one,

Finds that the second counter-claim submitted by the Republic of Colombia is inadmissible as such and does not form part of the current proceedings;

IN FAVOUR: *President* Abraham; *Vice-President* Yusuf; *Judges* Owada, Tomka, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari, Robinson, Gevorgian; *Judge ad hoc* Daudet;

AGAINST: *Judge ad hoc* Caron;

(3) By eleven votes to five,

Finds that the third counter-claim submitted by the Republic of Colombia is admissible as such and forms part of the current proceedings;

IN FAVOUR: *President* Abraham; *Vice-President* Yusuf; *Judges* Owada, Bennouna, Cançado Trindade, Greenwood, Xue, Donoghue, Bhandari, Robinson; *Judge ad hoc* Caron;

AGAINST: *Judges* Tomka, Gaja, Sebutinde, Gevorgian; *Judge ad hoc* Daudet;

(4) By nine votes to seven,

Finds that the fourth counter-claim submitted by the Republic of Colombia is admissible as such and forms part of the current proceedings;

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IN FAVOUR: *President* Abraham; *Vice-President* Yusuf; *Judges* Owada, Bennouna, Cançado Trindade, Xue, Bhandari, Robinson; *Judge ad hoc* Caron;

AGAINST: *Judges* Tomka, Greenwood, Donoghue, Gaja, Sebutinde, Gevorgian; *Judge ad hoc* Daudet;

(B) Unanimously,

Directs Nicaragua to submit a Reply and Colombia to submit a Rejoinder relating to the claims of both Parties in the current proceedings and *fixes* the following dates as time-limits for the filing of those pleadings:

For the Reply of the Republic of Nicaragua, 15 May 2018;

For the Rejoinder of the Republic of Colombia, 15 November 2018; and

Reserves the subsequent procedure for further decision.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this fifteenth day of November, two thousand and seventeen, 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*) Ronny ABRAHAM,
President.

(*Signed*) Philippe COUVREUR,
Registrar.

Vice-President YUSUF appends a declaration to the Order of the Court; Judges TOMKA, GAJA, SEBUTINDE, GEVORGIAN and Judge *ad hoc* DAUDET append a joint opinion to the Order of the Court; Judge CANÇADO TRINDADE appends a declaration to the Order of the Court; Judges GREENWOOD and DONOGHUE append separate opinions to the Order of the Court; Judge *ad hoc* CARON appends a dissenting opinion to the Order of the Court.

(*Initialled*) R.A.

(*Initialled*) Ph.C.