DECLARATION OF JUDGE *AD HOC* GUILLAUME

[Translation]

Dredging of the San Juan River — Interpretation of Article 6 of the Cleveland Award — Activities of the two States on the disputed territory — Protection of the environment — Co-operation required between Costa Rica and Nicaragua.

1. I subscribe to a number of the conclusions reached by the Court. Nevertheless, I would like to make some observations and explain why I disagree with one of the points in the adopted Order.

The Dredging of the San Juan River

2. In its Request for the indication of provisional measures, Costa Rica asked the Court to order the suspension of Nicaragua's dredging programme in the San Juan River. In its final submissions, it only seeks the suspension of that programme in the area adjacent to Isla Portillos. The Court found that the rights claimed by Costa Rica in respect of the dredging operations undertaken by Nicaragua on the San Juan River are "plausible" (Order, para. 59). However, it observed that those operations were not "creating a risk of irreparable prejudice to Costa Rica's environment or to the flow of the Colorado River" (*ibid.*, para. 82). Consequently, it dismissed Costa Rica's request on that issue.

3. I fully support that solution, but think it would be helpful to clarify its scope.

4. The Treaty of Limits of 15 April 1858 fixes the boundary between Costa Rica and Nicaragua from the Pacific Ocean to the Caribbean Sea. Between a point 3 English miles below Castillo Viejo and the sea, the boundary follows the right bank of the San Juan River. The Treaty gives dominion and sovereign jurisdiction *("dominio y sumo imperio")* over the waters and riverbed to Nicaragua, while acknowledging that Costa Rica enjoys a right of navigation, the limits of which the Court had occasion to fix in its Judgment of 13 July 2009.

5. The Parties' rights and obligations as regards the maintenance and improvement of the San Juan for the purposes of navigation, and its dredging in particular, were defined in the Cleveland Award of 22 March 1888. According to Article 6 of that Award:

> "6. The Republic of Costa Rica cannot prevent the Republic of Nicaragua from executing at her own expense and within her own ter-

ritory such works of improvement, provided such works of improvement do not result in the occupation or flooding or damage of Costa Rica territory, or in the destruction or serious impairment of the navigation of the said river or any of its branches at any point where Costa Rica is entitled to navigate the same. The Republic of Costa Rica has the right to demand indemnification for any places belonging to her on the right bank of the River San Juan which may be occupied without her consent, and for any lands on the same bank which may be flooded or damaged in any other way in consequence of works of improvement."

6. It is clear from that provision that, as the Court held in its Judgment of 13 July 2009,

> "Nicaragua may execute [at its own expense] such works [to improve navigation on the San Juan River] as it deems suitable, provided that such works do not seriously impair navigation on tributaries of the San Juan belonging to Costa Rica" (*Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 269, para. 155).

7. Furthermore, in accordance with the Cleveland Award, maintenance and improvement works for the purposes of navigation on the San Juan River must be carried out without occupation, flooding or other damage of Costa Rican territory. The Award adds that Costa Rica has the right to be compensated for any such damage.

8. The Parties disagree as to how that final provision should be interpreted. Nicaragua contends that, if damage is caused by works to maintain or improve the river, Costa Rica is not entitled to prevent those works from continuing, but only to seek reparation for the damage suffered. Costa Rica holds an opposing view.

9. The Court has not expressed an opinion on that matter at this stage. In considering Costa Rica's Request for the indication of provisional measures, it confined itself to deciding whether the latter's claim was plausible. It did not need to consider whether Nicaragua's claim was also plausible (Order, para. 57).

10. For my part, I readily acknowledge that both claims can be supported, and that they are both "plausible". I am not certain that the Court will necessarily be required to rule on those claims when it considers the merits of the case. Thus, if it appears that no damage has been caused to Costa Rican territory, it will be sufficient for the Court to note that the Applicant has not suffered any harm as a result of the dredging operations carried out by Nicaragua. On the other hand, if it appears otherwise, the Court might need to interpret Article 6 of the Cleveland Award. To my mind, in so doing it could only conclude that the Article's first and second clauses do not carry the same weight. Thus Costa Rica's

right to indemnification is only recognized in the second clause in the event of damage to its territory, not in the event of serious disruption to navigation. It is easy to see why: such disruption would be counter to the very object and purpose of the works being carried out, and would need to be remedied. By contrast, isolated damage to Costa Rican territory caused by works carried out on the San Juan would only give rise to indemnification for the harm suffered. In my view, that is transboundary damage, which falls under a régime of objective responsibility (for a comparable case, see the Arbitral Awards of 16 April 1938 and 11 March 1941 in the *Trail Smelter* case, United Nations, *Reports of International Arbitral Awards*, Vol. III, p. 1905).

The Activities on the Disputed Territory

11. Costa Rica also brings a complaint before the Court about the construction on its territory of a canal by which Nicaragua has reportedly joined the San Juan to the Harbor Head Lagoon, through Isla Portillos. Nicaragua, for its part, contends that it has merely cleared a natural channel (or "*caño*") in that area, whose south bank forms the boundary between the two States. There are thus two disputes between the Parties in the area concerned. The first concerns the lawfulness of the works carried out by Nicaragua; the second, the sovereignty over a territory of approximately 3 square kilometres located to the north of the disputed waterway (which the Court terms "the disputed territory"). Naturally, the Court did not express an opinion on either the legality of the works or the claims to sovereignty. It merely observed that the rights claimed by Costa Rica were plausible; it was not required to rule on the rights asserted by Nicaragua which, in my view, were also plausible.

12. The Court did on the other hand rule on the provisional measures sought by Costa Rica in the area. In its submissions as finally presented, the latter asked the Court to order Nicaragua not to,

> "in the area comprising the entirety of Isla Portillos[,] . . .
>
> (1) station any of its troops or other personnel;
> (2) engage in the construction or enlargement of a canal;
> (3) fell trees or remove vegetation or soil;
>
> (4) dump sediment".

13. During the hearings and in response to questions put to it by one of the judges, Nicaragua stated that "[t]here are no Nicaraguan troops currently stationed in the area in question" and that it "does not intend to send any troops or other personnel to the region". Thus, Costa Rica's

submissions that the Court request Nicaragua not to station any of its troops or other personnel on Isla Portillos could have been dismissed as no longer having any object (in this respect see the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 139).

14. Nicaragua added, however, that "[t]he *caño* is no longer obstructed. It is possible to patrol the area on the river, as has always been the case, for the purposes of enforcing the law". In so doing, Nicaragua signalled its intention to exercise its sovereignty over the disputed *caño*. Since Costa Rica is claiming sovereignty over the same area, there was "a real and present risk of incidents" (Order, para. 75) and, in such circumstances, it fell to the Court to indicate *proprio motu* any provisional measures which it might consider necessary.

15. On this point, the Court decided not to prohibit Nicaragua from sending armed forces or other personnel to the disputed territory, but to enforce a general ban. Thus, in point 1 of the operative clause of the Order, it stated that "[e]ach Party shall refrain from sending to, or maintaining in the disputed territory, including the *caño*, any personnel, whether civilian, police or security". I voted in favour of that point, and of points 3 and 4 of the operative clause, with a view to protecting the right to sovereignty advanced by each of the Parties and safeguarding peace in the region.

16. All that remained were Costa Rica's submissions requesting the Court to call upon Nicaragua not to construct or enlarge the *caño*. In that connection, the Court began by observing that Nicaragua had "asserted at the hearings that the cleaning and clearing operations in respect of the *caño* were over and finished" (*ibid.*, para. 71). The Court took note of that unequivocal statement and rightly deduced from it that there was no reason to ask Nicaragua not to proceed with work which it was not intending to carry out (*ibid.*, para. 74).

17. The Court observed, however, that the disputed territory was part of a wetland of international importance declared as such by Costa Rica under the Ramsar Convention of 2 February 1971. It considered whether, in the light of a report drawn up by the Secretariat of that Convention on the basis of information supplied by Costa Rica, the very existence of the *caño* risked causing irreparable prejudice to the environment protected under the Convention. In keeping with its established jurisprudence, the Court looked to determine this as at the date of the Order (see the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Provisional Measures, Order of 1 July 2000, I.C.J. Reports 2000*, p. 128, para. 43). It found that on that date there was no imminent risk of irreparable prejudice, and therefore refrained from indicating provisional measures aimed at averting such a risk.

18. Nevertheless, the Court felt that it could be useful for civilian personnel responsible for the protection of the environment to be able to

visit the disputed territory, including the *caño*, but only in so far as such visits might be necessary to prevent such prejudice occurring in the future. To my mind, that is a situation which is unlikely to arise, and I believe that the Court has shown undue apprehension in this respect. To allow this hypothetical danger to be dealt with, the Court saw fit to give Costa Rica, and Costa Rica alone, the possibility of dispatching to the disputed territory civilian personnel responsible for the protection of the environment and capable of assessing the situation. Recognizing, however, that a solution of this kind was not without drawbacks, the Court attached a number of safeguards to such visits. It stipulated that, before acting, Costa Rica must consult with the Secretariat of the Ramsar Convention, give Nicaragua prior notice, and use its best endeavours to find common solutions with Nicaragua. Nonetheless, it is to Costa Rica, and to Costa Rica alone, that the Court has given the ultimate responsibility of deciding whether, in the event of an imminent risk of irreparable prejudice, personnel from the administration responsible for the protection of wetlands should go to the disputed territory.

19. For my part, I would have preferred that responsibility to have been conferred jointly on both Parties.

(a) Firstly, in the area in question, as the Court has observed (Order, para. 79), there are two wetlands of international importance covered by the Ramsar Convention. One, "Humedal Caribe Noreste", was established by Costa Rica on Isla Portillos. The other, "Refugio de Vida Silvestre Río San Juan", was established by Nicaragua on the river and the Harbor Head Lagoon. To my mind, especially given the fact that the *caño* links the river and the lagoon, it is difficult to separate the protection of the environment of the *caño* from that of the environment upstream and downstream of it, by ultimately entrusting the supervision of the disputed territory to a single State.

(b) Secondly, it seems to me that the solution adopted by the Court is based on the fact that the territory in question is located in the "Humidal Caribe Noreste" wetland established by Costa Rica. This appears to be aimed at enabling Costa Rica to fulfil certain obligations incumbent upon it under the Ramsar Convention. However, as the Court has noted, the rights to environmental protection relied upon in this case "derive from the sovereignty claimed by the Parties over the same territory" (*ibid.*, para. 56). Consequently, the Court's decision to entrust to Costa Rica alone the responsibility for dispatching personnel to the disputed territory in the event of imminent irreparable prejudice could be interpreted as favouring Costa Rica's right to sovereignty over that territory.

20. I appreciate that such an interpretation would be wrong. The solution adopted by the Court does not prejudge any question relating to the merits of the case (*ibid.*, para. 85), and especially not the sovereignty over the disputed territory (*ibid.*, para. 57). It does not imply that Costa Rica's

title is better than Nicaragua's. It merely supposes that that title is plausible.

21. However, to my mind that solution is of limited value. I believe that it would have been more beneficial to compel the Parties to negotiate. Despite strongly recommending that Costa Rica hold such negotiations with Nicaragua, should the need arise, in my view the Order did not go far enough and, accordingly, I was unable to vote in favour of point 2 of the operative clause. It remains for me to express the hope that, in the unlikely event that an imminent risk of irreparable prejudice should arise, the two States will be able to reach an agreement.

(Signed) Gilbert GUILLAUME.