SEPARATE OPINION OF JUDGE DONOGHUE

Article 80, paragraph 1, of the Rules of Court — Jurisdiction over counter-claims — Termination of the title of jurisdiction taking effect after the filing of the Application but before the submission of counter-claims — Consequence of such termination on the scope of the Court's jurisdiction.

1. Article 80, paragraph 1, of the Rules of the Court provides: "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. I consider that the Court has jurisdiction over Colombia's counter-claims only to the extent that each counter-claim falls within the dispute that was the subject-matter of Nicaragua's Application. As I do not believe that the first and second counter-claims meet this requirement, I find them to be inadmissible and have voted in favour of operative paragraphs 82 (A) (1) and 82 (A) (2). The third counter-claims falls within the scope of the dispute that was the subject-matter of Nicaragua's Application and the conditions of jurisdiction contained in the Pact of Bogotá have been met. The Court has jurisdiction over that counter-claim, which is directly connected to the subject-matter of Nicaragua's claims against Colombia. I therefore have voted in favour of operative paragraph 82 (A) (3). The fourth counter-claim falls outside the scope of the dispute that is the subject-matter of Nicaragua's Application and thus is outside of the Court's jurisdiction. On that basis, I have voted against operative paragraph 82 (A) (4). I submit this separate opinion to set out the reasons for these conclusions.

3. Article LVI of the Pact of Bogotá provides that the Pact "may be denounced upon one year's notice". Colombia denounced the Pact on 27 November 2012. On 26 November 2013, Nicaragua filed the Application in the present case. One day later, the Pact of Bogotá ceased to be in force between the Parties. Thereafter, Colombia presented four counter-claims in its Counter-Memorial.

4. According to Colombia, because the Pact of Bogotá was in force between the Parties as of the date of Nicaragua's Application, the Court has jurisdiction over its counter-claims. Nicaragua, on the other hand, maintains that the "critical date" is the date on which the counter-claims were presented to the Court, which took place after termination of the Pact of Bogotá as between the Parties.

5. Thus, both Parties take an all-or-nothing approach to the question of the Court's jurisdiction over Colombia's counter-claims, focusing on the date to be used in determining the Court's jurisdiction. Neither Party convinces me.

6. By becoming parties to the Pact of Bogotá, both Colombia and Nicaragua consented broadly to the Court's jurisdiction. Their shared consent to the Court's jurisdiction came to an end, however, when Colombia's termination of the Pact of Bogotá took effect. After that date, neither State could file an application relying on the Pact as the title of jurisdiction. In particular, had Colombia made its claims against Nicaragua in an application filed after the termination of the Pact of Bogotá had taken effect, the Pact would not have provided a basis for the Court's jurisdiction. Nonetheless, according to Colombia, the Court should approach its jurisdiction over the counter-claims as if there had been no change in Colombia's consent to the Court's jurisdiction.

7. The approach urged by Nicaragua is also problematic. An applicant that terminates a title of jurisdiction immediately after filing an application could prevent the respondent from making any counter-claim in the case. If instead (as is the case here) it is the respondent that notifies its intention to terminate a title of jurisdiction, the applicant could cut off the ability of the respondent to file a counter-claim, however closely linked to the applicant's claims, by filing the application just before the termination of the title of jurisdiction takes effect.

8. Although the *Nottebohm* case did not involve a counter-claim, I find the reasoning that the Court followed there to be instructive in determining the scope of the Court's jurisdiction over Colombia's counter-claims.

9. In the *Nottebohm* case, the respondent argued that the Court lacked jurisdiction over the case because the respondent's optional clause declaration had lapsed after the application was filed. The Court rejected this argument, stating that

> "[w]hen 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 . . . cannot deprive the Court of the jurisdiction already established." (*Nottebohm (Liechtenstein* v.

Guatemala), Preliminary Objection, Judgment, I.C.J. Reports 1953, p. 123.)

10. Both in the *Nottebohm* case and in the present case, the Parties had given their consent to the Court's jurisdiction through a title of jurisdiction that was broad, *ratione materiae*, was in force as between the Parties on the date of the application and conferred jurisdiction upon the Court with respect to "disputes" between States. Here, as in the *Nottebohm* case, the subsequent lapse of the title of jurisdiction (the Pact of Bogotá) did not deprive the Court of the jurisdiction that was established by the filing of the application. But what is the scope, *ratione materiae*, of the jurisdiction that is established by a State's application?

11. Applying the Court's approach, when a State acts to terminate a title of jurisdiction, the Court nonetheless retains jurisdiction over any claim by that State that falls within the scope of that title of jurisdiction, *ratione materiae*, so long as the claim is presented in the form of a counter-claim in response to an application filed before the title of jurisdiction terminated. This conclusion ignores a central insight of the *Nottebohm* case — that it is the application that enables a title of jurisdiction to produce its effect, which cannot be vitiated by the subsequent lapse of the title of jurisdiction.

12. Nicaragua's Application did not have the effect of establishing in all respects the Court's jurisdiction under the Pact of Bogotá. It enabled the title of jurisdiction to produce its effect only with respect to the subject-matter of the dispute presented by the Application. After the termination of the Pact of Bogotá, the Court retained jurisdiction only to that extent. Thus, when Colombia submitted its counter-claims, the Court's jurisdiction *ratione materiae* was limited to claims fitting within the subject-matter of the dispute presented in Nicaragua's Application. Because of this jurisdictional limitation, the present case is unlike most cases, in which counter-claims directly connected to the applicant's claim may "widen the original subject-matter of the dispute" (*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).

13. To determine whether the Court has jurisdiction over Colombia's counter-claims, it is necessary, first, to identify the subject-matter of the dispute presented in Nicaragua's Application over which the Court established its jurisdiction and then to consider whether each counter-claim fits within that subject-matter.

14. The subject-matter of a dispute is not identical to the claims that appear in the application. As the Court has repeatedly stated,

> "[i]t is for the Court itself . . . to determine on an objective basis the subject-matter of the dispute between the parties, that is, to 'isolate the real issue in the case and to identify the object of the claim' (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 262, para. 29; *Nuclear Tests (New Zealand* v. *France), Judgment,*

> *I.C.J. Reports 1974*, p. 466, para. 30). In doing so, the Court examines the positions of both parties, 'while giving particular attention to the formulation of the dispute chosen by the [a]pplicant' (*Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 448, para. 30; see also *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 848, para. 38)." (*Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015 (II)*, p. 602, para. 26.)

15. In identifying the subject-matter of the dispute presented by Nicaragua's Application and over which the Court established its jurisdiction, I consider the Application and the pleadings of the Parties. I also take account of the Court's Judgment of 17 March 2016.

16. Nicaragua's Application states that its dispute with Colombia "concerns the violations of Nicaragua's sovereign rights and maritime zones declared by the Court's Judgment of 19 November 2012 and the threat of the use of force by Colombia in order to implement these violations" (Application of Nicaragua, p. 4, para. 2). In 2016, however, the Court concluded that the dispute between the Parties did not extend to the alleged violations of the obligation not to use or threaten the use of force (*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. 33, para. 78).

17. Nicaragua appends to its Application and its Memorial various statements made by President Santos in the wake of the 2012 Judgment, whereby he "reject[ed]" the Court's delimitation (Application of Nicaragua, p. 28 (Annex 1)) and indicated that Colombia would not apply the Judgment until a treaty protecting the rights of Colombians is concluded (*ibid.*, p. 54 (Annex 9)). According to Nicaragua, Colombia has violated Nicaragua's rights in the maritime zones that appertain to Nicaragua pursuant to the 2012 Judgment by establishing an "Integral Contiguous Zone" which overlaps with Nicaragua's exclusive economic zone as delimited by the Court. Nicaragua also alleges incidents of enforcement and harassment by Colombia against vessels operating in Nicaragua's exclusive economic zone in the area around the Luna Verde Bank and complains of the issuance of "fishing licenses and marine research authorizations to Colombians and nationals of third States operating in" Nicaragua's exclusive economic zone (*ibid.*, pp. 12-20, paras. 10-15; Memorial of Nicaragua, pp. 26-51, paras. 2.11-2.52).

18. In its 2016 Judgment, the Court concluded that it had jurisdiction, pursuant to the Pact of Bogotá, to adjudicate the "dispute regarding the alleged violations by Colombia of Nicaragua's rights in the maritime

zones which, according to Nicaragua, the Court declared in its 2012 Judgment appertain to Nicaragua" (*I.C.J. Reports 2016 (I)*, p. 42, para. 111 (1) *(b)*; p. 43, para. 111 (2)). As the Court noted in 2016, after the 2012 Judgment, senior officials of the Parties spoke of a possible treaty or agreement. However, for Nicaragua, negotiations were to be "restricted to the modalities or mechanisms for the implementation" of the boundary established in the 2012 Judgment, whereas Colombia sought a treaty "*that establishes the boundaries*" (*ibid.*, p. 38, para. 98).

19. In speaking of a possible agreement, the two Presidents also addressed the particular question of fishing by Colombians in waters lying on Nicaragua's side of the boundary, but they did so in different terms. For example, in one of the statements that Nicaragua appends to its Application, President Santos is quoted as stating:

> "I have given peremptory and precise instructions to the Navy; the historical rights of our fishermen are going to be respected no matter what. No one has to request permission to anybody in order to fish where they have always fished." (Application of Nicaragua, p. 38 (Annex 6).)

Nicaragua also points to a statement in which President Santos is reported to have said that "his Government would 'not rule out any action' to defend Colombia's rights, especially those of the inhabitants on the island of San Andrés and surrounding archipelago" (Memorial of Nicaragua, p. 351 (Annex 25)).

20. These statements are to be compared with those attributed by Nicaragua to its President, who reportedly stated that Nicaragua is "not denying the right to fish to any sister nation, to any peoples" and that, within the framework of an agreement or treaty recognizing the delimitation of the Court,

> "Nicaragua will authorize [Colombian] fisheries in that area, where they have historically practiced fisheries, both artisanal and industrial fisheries, in that maritime area, in that maritime space, where even before the ruling by the Court, the permit was granted by Colombia and now, the permit is granted by Nicaragua" (*ibid.*, p. 360 (Annex 27)).

21. Thus, the statements on which Nicaragua has relied indicate that Colombia asserted that certain of its inhabitants maintained the "right" to fish without Nicaraguan authorization, whereas Nicaragua asserted the prerogative to "authorize" fisheries by Colombians, in maritime areas attributed to Nicaragua by the Court. As Nicaragua has stated in responding to Colombia's counter-claims, the dispute that it submitted in its Application "concerns Colombia's violations of Nicaragua's exclusive sovereign rights and jurisdiction as determined by the Court in 2012" (Written Observations of Nicaragua on the Admissibility of Colombia's Counter-Claims, p. 20, para. 2.33).

22. Taking into account the Application, the Parties' pleadings and the Court's 2016 Judgment, I therefore conclude that the subject-matter of the dispute is whether Nicaragua's rights in the maritime zones appertaining to it by virtue of the 2012 Judgment are exclusive to Nicaragua as a coastal State, as Nicaragua maintains, or are subject to limitations indicated by the actions and statements of Colombia.

23. I consider next whether Colombia's counter-claims fit within the subject-matter of the dispute.

24. *Colombia's first and second counter-claims.* Colombia bases its first two counter-claims on alleged conduct that it characterizes as "activities of predatory fishing by Nicaraguan vessels that . . . threaten the marine environment" (Counter-Memorial of Colombia, Vol. I, p. 247 para. 8.11). Most of the incidents on which these counter-claims are based allegedly took place in the maritime area around the Luna Verde Bank, an area which is part of both the Seaflower Biosphere Reserve and the Seaflower Marine Protected Area (*ibid.*, p. 251, para. 8.17). The first counter-claim alleges "Nicaragua's violation of its duty of due diligence to protect and preserve the marine environment of the Southwestern Caribbean Sea". Colombia's second counter-claim, which it describes as a "logical consequence of the first one" is that Nicaragua has violated "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" in the same maritime area around the Luna Verde Bank (*ibid.*, pp. 243-244, para. 8.2).

25. These two counter-claims do not appear to fall within the subject-matter of the dispute presented by Nicaragua's Application. In making these claims, Colombia does not counter Nicaragua's assertion that its rights in its exclusive economic zone are exclusive, nor does it invoke as a basis for these claims the series of incidents that, according to Nicaragua, violate those rights. Instead, it presents in its Counter-Memorial another set of alleged incidents that, according to Colombia, support its claim that Nicaragua has failed to meet certain duties that Nicaragua has in the area around the Luna Verde Bank.

26. *Colombia's third counter-claim.* In support of its third counter-claim, Colombia asserts that some residents of the San Andrés Archipelago engage in "artisanal" fishing in areas that are located within maritime areas allocated to Nicaragua by the Court, or are located within areas that appertain to Colombia, but that are reached by transiting areas appertaining to Nicaragua (*ibid.*, p. 75, para. 2.90; p. 300, para. 9.24). Colombia maintains that there exists a "local customary right" for these residents of the Archipelago to fish in maritime zones appertaining to Nicaragua "without having to request an authorization", and that Nicaragua has infringed these rights (*ibid.*, pp. 152-154, paras. 3.109 and 3.112).

27. As noted earlier, Nicaragua has supported its Application by invoking statements of Colombia's President asserting certain rights to fishing by Colombian nationals in waters appertaining to Nicaragua, whereas Nicaragua has maintained that it has the exclusive right to authorize activities in its exclusive economic zone. Colombia's third counter-claim, which claims that no Nicaraguan authorization is required for fishing by Colombians who are engaged in "artisanal" fishing, therefore fits within the dispute that is the subject-matter of Nicaragua's Application. The third counter-claim is within the jurisdiction, *ratione materiae*, that was established by the filing of Nicaragua's Application, notwithstanding the termination of the title of jurisdiction after the Application was filed.

28. The Parties have also addressed two conditions of the Court's jurisdiction — the existence of a dispute and the precondition contained in Article II of the Pact of Bogotá, requiring that the "controversy . . . in the opinion of the parties, cannot be settled by direct negotiations".

29. The above-cited statements of the Presidents of both States make clear the Parties' held opposing views on the question whether the inhabitants of the Colombian islands have a right to fish in maritime areas allocated to Nicaragua by the 2012 Judgment without Nicaraguan authorization, and that each Party was aware of the position of the other (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. 32-33, para. 73; *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. 850, para. 41).

30. With respect to the negotiation precondition, as the Court noted in the 2016 Judgment, there were indications that both Parties were willing to discuss the issue of fishing by the inhabitants of the Colombian islands (*I.C.J. Reports 2016 (I)*, p. 38, para. 97). However, the Parties' overall approaches to a possible agreement diverged. It appears that Colombia was seeking an agreement establishing maritime boundaries and protecting the historical rights of Colombian fishermen whereas Nicaragua was considering an agreement based on the maritime boundary already established by the Court and authorizing fishing activities by Colombian fishermen. Given that the overall dispute concerning the violation of the maritime zones as delimited by the Court could not be settled by negotiation (*ibid.*, pp. 38-39, paras. 100-101), it cannot be said that the Parties considered that there was a possibility of resolving through negotiation their differences regarding the particular question of fishing by Colombian nationals in waters appertaining to Nicaragua pursuant to the 2012 Judgment.

31. I therefore consider that the Court has jurisdiction over the third counter-claim. For the reasons set out in the Order, the third counter-

claim is "directly connected with the subject-matter" of Nicaragua's claims against Colombia. The third counter-claim is thus admissible.

32. *Colombia's fourth counter-claim.* Colombia's fourth counter-claim concerns

> "Nicaragua's straight baselines decree which extended its internal waters, territorial sea, contiguous zone, EEZ and continental shelf, in violation of international law and of Colombia's sovereign rights and jurisdiction" (Written Observations of Colombia on the Admissibility of its Counter-claims, p. 77, para. 3.62).

The exclusive rights of a coastal State that Nicaragua invokes in its Application, which Colombia allegedly violated, are neither predicated on nor affected by Nicaragua's assertion of straight baselines. Regardless of whether Nicaragua's straight baselines are applied, both the area around the Luna Verde Bank (where the incidents cited by Nicaragua allegedly occurred) and Colombia's "Integral Contiguous Zone" overlap with Nicaragua's exclusive economic zone. These areas are simply too far from Nicaragua's land territory to fall within its territorial sea, even using Nicaragua's straight baselines. It therefore appears that the fourth counter-claim does not fit within the subject-matter of the dispute presented in Nicaragua's Application. For this reason, the Court lacks jurisdiction over the fourth counter-claim. (I do not express any view here about Nicaragua's statement that its 200-nautical-mile limit would be the same whether measured from its asserted straight baselines or from normal baselines (Written Observations of Nicaragua on the Admissibility of Colombia's Counter-Claims, p. 46, para. 3.49), as the accuracy of this statement and the legality of Nicaragua's straight baselines are not matters to be decided today.)

(Signed) Joan DONOGHUE.