

DECLARATION OF JUDGE GEVORGIAN

Paragraph 1 of the dispositif — The Court's finding that Costa Rica has sovereignty over the "disputed territory" is unnecessary — The limits of that territory are not clear — The geography of the area is unstable — Possible source of future disagreement — Article II of the Treaty of Limits of 1858 — First, second and third Alexander Awards — "First channel met".

1. While I agree with most of the conclusions of the Court (in particular, paragraph 2 dealing with Nicaragua's violation of Costa Rica's territorial sovereignty), I have voted against paragraph 1 of the *dispositif*, which provides that "Costa Rica has sovereignty over the 'disputed territory', as defined by the Court in paragraphs 69-70 of the present Judgment", for reasons that I will explain below.

2. Costa Rica's claims to sovereignty have their origin in Nicaragua's activities carried out in the border area, which included the construction of three channels or *caños*, the deposit of sediments resulting therefrom and the establishment of a military presence in the area. The area where the said activities took place is located in the northern part of "Isla Portillos" or "Harbor Head", in close proximity to the Caribbean Sea and an enclosed area of water known as "Laguna Los Portillos" or "Harbor Head Lagoon". In essence, Costa Rica argues that the alleged activities violated its territorial boundary, which, according to Article II of the 1858 Treaty of Limits — as interpreted by the 1888 Cleveland Award and the 1897 Alexander Awards — runs along the right bank of the San Juan River. For its part, Nicaragua, while not denying the undertaking of the said activities, has contended that they were carried out on its own territory. In Nicaragua's view, the eastern *caño*, which it began constructing in October 2010, is the "first channel met" linking Harbor Head Lagoon with the San Juan River, a geomorphological feature identified by General Alexander as part of the boundary line between both States in that area (first Alexander Award, Memorial of Costa Rica, Vol. II, Ann. 9). According to Nicaragua, the said *caño* was not an artificial construction, but rather a natural watercourse that it was entitled to "clear", in full compliance with its international obligations.

3. This is the essence of a dispute which, for the greater part of the proceedings, had been litigated by the Parties primarily as a problem of territorial sovereignty over the area where the above-mentioned *caño* is situated. In fact, Costa Rica's initial Application had only requested the Court to declare that Nicaragua had breached "the territory of the Republic of Costa Rica, as agreed and delimited by the 1858 Treaty of Limits, the Cleveland Award and the first and second Alexander Awards". A similar request was made in the written pleadings (Memorial of Costa Rica, Vol. I, p. 303). It was only on 28 April 2015, the date of pre-

sentation of its final submissions in the *Certain Activities* case, that the Applicant formally broadened this claim so as to request the Court to declare its “[s]overeignty over the ‘disputed territory’, as defined by the Court in its Orders of 8 March 2011 and 22 November 2013”.

For its part, Nicaragua never made a formal sovereignty claim extending to the whole of the “disputed territory”, but only referred to the *caño* that it had begun constructing in October 2010. In my opinion, the latter claim encapsulates with more precision the subject-matter of the dispute, since, in essence, the Court is requested to determine whether the said *caño* is in Nicaraguan or Costa Rican territory, that is, whether it constitutes “the first channel met” in the sense of the first Alexander Award.

4. When defining the “disputed territory”, the Judgment correctly avoids delimiting the course of the boundary in the whole area. Instead, the Court reiterates the definition given in its Orders for provisional measures rendered on 8 March 2011 and 22 November 2013. However, at the same time, the Judgment declares Costa Rica’s sovereignty over an area whose limits are far from being clear. In the circumstances of the present case, I believe that the Court should have avoided such a finding for two main reasons.

5. First, the Parties did not address the issue of the precise location of the mouth of the river or of the boundary at the coast, as the Court majority rightly indicates in paragraph 70. Although, as stated above, Costa Rica’s final submission referred to the “disputed territory”, neither Party had submitted adequate information on its whole perimeter. The Judgment thus deliberately refrained from establishing the geographical limits of the “disputed territory” — an approach that is reflected in sketch-map No. 1. As a consequence, it is my view that the Court was not in a position to fully address Costa Rica’s final submission.

6. Second, the geography of the disputed area is highly unstable. Since General Alexander demarcated the boundary of the area, several important geomorphological alterations have occurred. In particular, Harbor Head Lagoon appears today as an area of water totally isolated from the sea and disconnected from the San Juan River. The possibility that such changes might occur had already been envisaged by General Alexander during the demarcation process. In fact, his second and third Awards had aimed precisely at striking a fair balance between, on the one hand, the stability of the boundary line, and, on the other, the flexibility required to adjust the demarcated line to “gradual or sudden” changes. For this reason, the Court’s conclusion on sovereignty over the disputed territory may become the source of future disagreement between the Parties.

(Signed) Kirill GEVORGIAN.
