INTERNATIONAL COURT OF JUSTICE

DISPUTE CONCERNING

CERTAIN ACTIVITIES CARRIED OUT BY NICARAGUA IN THE BORDER AREA

(COSTA RICA V. NICARAGUA)

WRITTEN OBSERVATIONS OF NICARAGUA ON THE ADMISSIBILITY OF ITS COUNTER-CLAIMS

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INTRODUCTION

1. On 30 November 2012, Costa Rica filed its written observations on the admissibility of Nicaragua's counter-claims. Costa Rica claims that:

- the first counter-claim (the Consequences of the Construction of a Road along the San Juan de Nicaragua River) is not admissible,[1] and the joinder of the case concerning the *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)* with the present case is not appropriate;[2] and

- the Court has no jurisdiction to entertain the second and third counter-claims (the Consequences of the Current Non-Existence of the Bay of San Juan del Norte, and the Right of Nicaraguan Vessels to Reach the Ocean via the Colorado River, respectively),[3] and that these two counter-claims are inadmissible.[4]

2. However, Nicaragua must note two important points. *First*, Costa Rica does not challenge the fact that Nicaragua's counter-claims are clearly

[1] Written observations of Costa Rica on the admissibility of Nicaragua's counter-claims, p. 4, para. 1.3 (hereinafter "CRWO").
[2] CRWO, paras. 2.3 and 2.30-2.33.
[3] CRWO, p. 4, para. 1.3.
[4] *Ibid*.

"distinguishable from a defence on the merits,"[5] and it must therefore be deemed as having accepted that they are distinguishable.[6] *Second*, "Costa Rica accepts that the fourth counter-claim, related to purported breaches of the Court's Order indicating Provisional Measures of 8 March 2011, is admissible."[7]

3. Therefore, Nicaragua must only show that: (I) the Court has jurisdiction to entertain Nicaragua's second and third counter-claims; and (II) Nicaragua's first three counter-claims are admissible. Nicaragua will also demonstrate that (III) far from showing that the joinder of the present case with the case introduced by Nicaragua concerning the *Construction of a Road in Costa Rica along the San Juan River* is inappropriate, the Written Observations of Costa Rica themselves show that joinder is highly appropriate.

PART I

THE COURT HAS JURISDICTION TO ENTERTAIN NICARAGUA'S SECOND AND THIRD COUNTER-CLAIMS

1.1 Costa Rica challenges the jurisdiction of the Court to examine Nicaragua's second and third counter-claims. Costa Rica claims that these two counter-claims are outside the temporal scope of the provisions on the settlement

[5] I.C.J., Order, 17 December 1997, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Counter-claims, I.C.J. Reports 1997*, p. 256, para. 27. *See also* Order, 29 November 2001, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), I.C.J. Reports 2001*, pp. 676-677, para. 29 and Order, 6 July 2010, *Jurisdictional Immunities of the State (Germany v. Italy), Counter-Claim, I.C.J. Reports 2010*, p. 315, para. 13.
[6] *See* NCM, pp. 447-449, paras. 9.65-9.70.
[7] CRWO, p. 4, para. 1.4.

of disputes contained in the Pact of Bogotá and Nicaragua's declaration under Article 36 (2) of the Statute of the Court and the reservation thereto of 23 October 2001. In particular, Costa Rica asserts:

> While Nicaragua has accepted the jurisdiction of the Court to decide the merits of the case submitted by Costa Rica, Nicaragua has not shown how its counter-claims meet the criteria set out in the Pact of Bogotá, and/or Article 36 (2) of the Statute of the Court for their admissibility. An application of the criteria set out in these instruments precludes examination by the Court of the second and third of Nicaragua's counter-claims as a matter of jurisdiction.[8]

A. THE PACT OF BOGOTÁ

1.2 Article VI of the Pact of Bogotá precludes the Court from settling *de novo* "matters … which are governed by agreements or treaties in force on the date of the conclusion of the present Treaty" (*i.e.*, 30 April 1948). However, it does not prevent the Court from applying or interpreting a treaty, whatever the date of its entry into force.

1.3 Article XXXI is worded in clear terms and reads as follows:

> In conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice, the High Contracting Parties declare that they recognize, in relation to any other American State, the jurisdiction of the Court as compulsory *ipso facto*, without the necessity of any special agreement so long as the present Treaty is in force, in all disputes of a juridical nature that arise among them concerning:
>
> *a)* The interpretation of a treaty ….

[8] CRWO, p. 17, para. 3.2.

1.4 The present dispute may usefully be compared with the case concerning the *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, in which the Court considered that:

> [I]t is clear on the face of the text of Article I that the matter of sovereignty over the islands of San Andrés, Providencia and Santa Catalina has been settled by the 1928 Treaty within the meaning of Article VI of the Pact of Bogotá. In the Court's view there is no need to go further into the interpretation of the Treaty to reach that conclusion and there is nothing relating to this issue that could be ascertained only on the merits.[9]

A contrario, this shows that had there been a need to "go further into the interpretation" of the 1928 Treaty between Colombia and Nicaragua, the Court would have decided that it had jurisdiction to do so notwithstanding Article VI of the Pact of Bogotá.

1.5 And, when called to interpret "agreements or treaties in force on the date of the conclusion" of the Pact of Bogotá,[10] the Court has never hesitated to do so. Thus, in the case concerning the *Dispute regarding Navigational and Related Rights*, it noted:

> The 1858 Treaty of Limits completely defines the rules applicable to the section of the San Juan River that is in dispute in respect of navigation. Interpreted in the light of the other treaty provisions in force between the Parties, and in accordance with the arbitral or judicial decisions rendered on it, that Treaty is sufficient to settle

[9] I.C.J., Judgment, 13 December 2007, *Territorial and Maritime Dispute (Nicaragua v. Colombia), I.C.J. Reports 2007*, p. 861, para. 88.
[10] *See* Article VI of the Pact.

> the question of the extent of Costa Rica's right of free navigation which is now before the Court.[11]

Before giving its interpretation of the 1858 Treaty of Limits,[12] the Court added:

> In the first place, it is for the Court to interpret the provisions of a treaty in the present case. It will do so in terms of customary international law on the subject, as reflected in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties, as the Court has stated on several occasions (*see Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007 (I), pp. 109-110, para. 160; *see also Territorial Dispute (Libyan Arab Jamahiriya/ Chad)*, Judgment, I.C.J. Reports 1994, pp. 21-22, para. 41.)[13]

1.6 In the present case, Nicaragua does not seek to challenge what was agreed between the Parties in the 1858 Treaty of Limits, but, on the contrary, asks the Court to apply and interpret the Parties' agreement in Articles IV[14] and V[15] of the 1858 Treaty of Limits. Furthermore, Costa Rica's Application and Memorial are based on similar facts and law as invoked by Nicaragua in its Counter Claims as indicated below[16] and Nicaragua has not opposed the jurisdiction of the Court to entertain these claims on the basis of the Pact of Bogotá.

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[11] I.C.J., Judgment, 13 July 2009, *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), I.C.J. Reports 2009*, p. 233, para. 36.
[12] I.C.J., Judgment, 13 July 2009, *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), I.C.J. Reports 2009*, pp. 232-248 paras. 30-84.
[13] *Ibid.*, p. 237, para. 47. *See also* I.C.J., Judgment, 19 November 2012, *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, paras. 40-56.
[14] NCM, pp. 425-437, paras. 9.34-9.41.
[15] *Ibid.*, pp. 438-439, paras. 9.42-9.45.
[16] *See* paras. 2.14-2.16. *See also* paras. 2.23 and 2.41.

B. NICARAGUA'S OPTIONAL DECLARATION

1.7 Costa Rica also objects to the Court's jurisdiction by invoking Nicaragua's reservation to its Declaration under Article 36, paragraph 2, of the Statute, according to which:

> Nicaragua will not accept the jurisdiction or competence of the International Court of Justice in relation to any matter or claim based on interpretations of treaties or arbitral awards that were signed and ratified or made, respectively, prior to 31 December 1901.

1.8 There is no need to discuss this objection in depth: as shown above, the Court has jurisdiction to decide Nicaragua's counter-claims on the basis of Article XXXI of the Pact of Bogotá; this is a clear and sufficient basis for its competence. Therefore, even if Nicaragua's reservation could be interpreted as excluding the Court's jurisdiction to entertain an examination of Nicaragua's second and third counter-claims, the Court could nevertheless decide on the basis of the Pact.

1.9 This is made clear by the position taken by the Court in its 1988 Judgment on the preliminary objections in the case concerning *Border and Transborder Armed Actions* between Nicaragua and Honduras. In that case, Nicaragua invoked two distinct titles of jurisdiction – as does Costa Rica in the present case[17]: Article XXXI of the Pact of Bogotá on the one hand, and "the

[17] *Application of the Republic of Costa Rica* instituting proceedings, 18 November 2010, pp. 2-3, para. 3.

declarations of acceptance of compulsory jurisdiction made by Nicaragua and Honduras under Article 36 of the Statute"[18] on the other hand. "Since, in relations between the States parties to the Pact of Bogota, that Pact is governing, the Court [examined] first the question whether it has jurisdiction under Article XXXI of the Pact,"[19] concluding:

> Article XXXI of the Pact of Bogota … confers jurisdiction upon the Court to entertain the dispute submitted to it. For that reason, the Court does not need to consider whether it might have jurisdiction by virtue of the declarations of acceptance of compulsory jurisdiction by Nicaragua and Honduras set out in paragraphs 23 to 25 above.[20]

Similarly, in *Hissène Habré*, the Court concluded that:

> Given that the conditions set out in Article 30, paragraph 1, of the Convention against Torture have been met … [the Court] has jurisdiction to entertain the dispute between the Parties concerning the interpretation and application of Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention.
>
> Having reached this conclusion, the Court does not find it necessary to consider whether its jurisdiction also exists with regard to the same dispute on the basis of the declarations made by the Parties under Article 36, paragraph 2, of its Statute.[21]

The same holds true in the present case: there is no reason to differentiate the reasoning applying to the jurisdiction of the Court in relation to counter-claims

[18] I.C.J., Judgment, 20 December 1988, *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility*, *I.C.J. Reports 1988*, p. 82, para. 26.
[19] *Ibid.* p. 82, para. 27.
[20] *Ibid.*, p. 90, para. 48.
[21] I.C.J., Judgment, 20 July 2012, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, para. 63

from the reasoning it applied to acknowledge its jurisdiction over the Application itself.

1.10 Regardless, Costa Rica's objection is untenable in the present case.

1.11 As is made clear by the inclusion of Article 80, in Section D of Part III of the Rules of Court, counter-claims are "Incidental Proceedings". And, as the Court noted in its Judgment of 13 September 1990 concerning Nicaragua's Application to Intervene in the *Land, Island and Maritime Frontier Dispute* between El Salvador and Honduras: "Incidental proceedings by definition must be those which are incidental to a case which is already before the Court or Chamber."[22]

1.12 In the present case, Costa Rica has interpreted Nicaragua's declaration as a title for the jurisdiction of the Court, which it expressly invokes both in its *Application*[23] and in its *Memorial*:

> 3. The Court has jurisdiction over the present dispute by virtue of:
>
> …

[22] I.C.J., Judgment, 13 September 1990, *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene*, *I.C.J. Reports 1990*, p. 134, para. 98. *See also* I.C.J., Order, 17 December 1997, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Counter-claims, I.C.J. Reports 1997*, p. 257, para. 30: "incidental proceedings, that is to say, within the context of a case which is already in progress".

[23] *Application of the Republic of Costa Rica* instituting proceedings, pp. 1-3, para. 3 ("The Court has jurisdiction over the present dispute by virtue of: … (b) the operation of the declarations of acceptance made respectively by the Republic of Costa Rica dated 20 February 1973, and by the Republic of Nicaragua dated 24 September 1929 (as modified 23 October 2001), pursuant to Article 36(2) of the Statute of the Court.").

> (b) the operation of the declarations of acceptance made respectively by the Republic of Costa Rica dated 20 February 1973, and by the Republic of Nicaragua dated 24 September 1929 (as modified 23 October 2001), pursuant to Article 36(2) of the Statute of the Court."
>
> The Court has jurisdiction over the present dispute in accordance with the provisions of article 36, paragraph 2, of its Statute, by virtue of the operation of the following:
> …
>
> The declarations of acceptance made respectively by the Republic of Costa Rica dated 20 February 1973, and by the Republic of Nicaragua dated 24 September 1929), pursuant to Article 36(2) of the Statute of the Court".

1.13 Having based its claim for jurisdiction in this case on the optional declarations made by both Parties, it is now impossible for Costa Rica to reject this same jurisdiction to rule on the counter-claims. This is all the more evident given that, in its *Application*, Costa Rica expressly noted that Nicaragua's declaration had been modified on 23 October 2001.[24] This fact did not prevent the Claimant from considering said declaration as establishing the jurisdiction of the Court in the present case; it cannot now be heard to argue that the Court lacks jurisdiction over Nicaragua's counter-claims regarding facts of the same kind.

1.14 There can therefore be no doubt that the Court has jurisdiction over Nicaragua's second and third counter-claims on the same two titles of jurisdiction invoked by Costa Rica in the present case. However, if one of these titles were

[24] *Application of the Republic of Costa Rica* instituting proceedings, 18 November 2010, para. 3, b.

found to be inapplicable – *quod non* – the Court's jurisdiction still would be established on the basis of the other.

PART II

NICARAGUA'S COUNTER-CLAIMS ARE ADMISSIBLE

2.1 In its written observations, Costa Rica argues that "the first three counter-claims are inadmissible. All three fail to meet the requirement of direct connection with the Claimant's claims in this case, as required by Article 80, paragraph 1 of the Rules of the Court."[25] As Nicaragua will demonstrate below, Costa Rica mischaracterizes both the facts and the legal requirements of Article 80, especially the "direct connection" condition: all three counter-claims are directly connected both (A) factually and (B) legally with the case brought by Costa Rica.

A. COSTA RICA'S DISTORTED APPROACH TO THE "DIRECT FACTUAL CONNECTION" REQUIREMENT

2.2 Basing itself on the Order of the Court of 17 December 1997 in the *Genocide* case, Costa Rica contends that:

> To satisfy the requirement in Article 80(1) of the Rules that the counter-claim is "directly connected with the subject-matter" of the principal claim, there must be a direct factual connection between the counter-claim and the principal claim. This requirement is satisfied if the counter-claim:
>
> (a) relates to facts of the same kind, and

[25] CRWO, p. 4, para. 1.3.

(b) forms part of the same factual complex, in that it relates to facts that occurred in the same territory during the same time period and concerned the same events.[26]

2.3 As shown below[27] Nicaragua's counter Claims match this criteria, but it might be recalled that, in that case, the Court noted that the parties' submissions had revealed "that their respective claims rest on facts of the same nature; … they form part of the same factual complex since al1 those facts are alleged to have occurred on the territory of Bosnia and Herzegovina and during the same period."[28] But Costa Rica conspicuously omits relevant words from the previous paragraph of that same Order, in which the Court emphasises that:

> [T]he Rules of Court do not define what is meant by … "directly connected"; … it is for the Court, in its sole discretion, to assess whether the counter-claim is sufficiently connected to the principal claim, taking account of the particular aspects of each case; and … as a general rule, the degree of connection between the claims must be assessed both in fact and in law.[29]

2.4 In other words, the connection between the principal claim and the counter-claim must be assessed in each case in light of the special circumstances of the case. This is the general rule. The precise circumstances on which the Court based its findings in the *Genocide* case must not necessarily be present in

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[26] CRWO, p. 5, para. 1.6 – footnotes omitted.
[27] *See* paras. 2.17-2.20, 2.23
[28] I.C.J., Order, 17 December 1997, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Counter-claims, I.C.J. Reports 1997*, p. 258, para. 34 – emphasis added.
[29] *Ibid*., para. 33 – emphasis added. *See also* I.C.J., Order, 10 March 1998, *Oil Platforms (Islamic Republic of Iran v. United States of America), Counter-Claim, I.C.J. Reports 1998,* pp. 204-205, para. 37; I.C.J., Order, 29 November 2001, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), I.C.J. Reports 2001*, p. 678, para. 36.

all other cases for establishing the admissibility of counter-claims. As noted by President Guillaume,

> *Au total, la Cour a compétence liée pour admettre une demande reconventionnelle si les conditions fixées par l'article 80 sont remplies, mais elle dispose d'une grande liberté dans l'appréciation de ces conditions.*[30]

2.5 And, contrary to what Costa Rica suggests, the Court has frequently exercised "large freedom of appreciation" on the matter.

2.6 In its Written Observations, Costa Rica presents the factual requirements for the admissibility of counter-claims in a misleading manner. It adds a condition to Article 80(1) of the Rules of Court and interprets too restrictively the Court's case law.

2.7 In particular, Costa Rica seems to argue that, to be considered admissible, a counter-claim must be based on the same facts on which the Applicant's main claim rests. According to Costa Rica, counter-claims must "concern the same events"[31] or be "directly dependent on the facts of the main action."[32] A review of the Court's case law shows that the Court's approach is much more nuanced.

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[30] Exposé de G. Guillaume in J.-M. Sorel et F. Poirat eds., *Les procédures incidentes devant la Cour internationale de Justice : exercice ou abus de droits?*, Pedone Paris, 1001, p. 99.
[31] CRWO, pp. 5-6, para. 1.6.
[32] *See* CRWO, p. 11, para. 2.17 quoting Judge Fromageot (Acts and Documents Concerning the Organization of the Court, Third Addendum to No. 2, Elaboration of the Rules of Court of March 11th, 1936, Thirty-second Session, Fourteenth Meeting (May 29th, 1934), *P.C.I.J. Series D*, p. 112).

2.8 A comparison between the findings of the Court in the *Genocide* case and *Cameroon v. Nigeria* is particularly telling. In the latter case, even assuming that Nigeria's counter-claims on responsibility could be considered to be connected with Cameroon's *main claim*, it is clear that Cameroon's claims and Nigeria's counter-claims relating to international responsibility did not concern the same events. The incidents invoked by the parties were of differing nature and did not occur in either the same place or at the same time. The Court found, nonetheless, that the Nigeria's counter-claims were "directly connected with the subject-matter of the claim[s] of the other [Party]," as required by Article 80, paragraph 1, of the Rules of the Court.[33]

2.9 Similarly, in the *Oil Platforms* case, the United States' counter-claims were also not "directly dependent on the facts of the main action."[34] In particular, the facts on which the United States' counter-claims were based occurred before "the facts of the main action" and were clearly different in nature.[35]

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[33] I.C.J., Order 30 June 1999, *Land and Maritime Boundary between Cameroon and Nigeria, I.C.J. Reports 1999*, pp. 985-986.

[34] Acts and Documents Concerning the Organization of the Court, Third Addendum to No. 2, Elaboration of the Rules of Court of March 11th, 1936, Thirty-second Session, Fourteenth Meeting (May 29th, 1934), *P.C.I.J. Series D*, p. 112. *See also* CRWO, p. 11, para. 2.17.

[35] Comp. paras 1 (attack and destruction of three offshore oil production complexes, owned and operated for commercial purposes by the National Iranian Oil Company, by several warships of the United States Navy on 19 October 1987 and 18 April 1988, respectively") and 4 ("laying mines in the Gulf and otherwise engaging in military actions in 1987-1988 that were dangerous and detrimental to maritime commerce") of the ICJ's Order, 10 March 1998, *Oil Platforms (Islamic Republic of Iran v. United States of America), Counter-Claim, I.C.J. Reports 1998*, pp. 190-191, para. 1.

2.10 The Court's case law regarding the interpretation of the "direct factual connection" condition establishes two main points.

2.11 *First*, three criteria may be examined by the Court in order to determine whether the different events are part of the same factual complex:

1. The facts invoked in support of the claims and the counter-claims must be of a similar nature;
2. These facts must have occurred in the same area; and
3. These facts must have occurred during the same time period.

Costa Rica refers to these three criteria but applies them in a very restrictive and rigid way, one that has never been upheld by the Court, which enjoys a large margin of appreciation in that matter.

2.12 *Second*, contrary to what Costa Rica argues, in exercising its discretionary power, the Court may apply these guidelines freely, without requiring them to be cumulative. For instance, in the *Armed Activities* case, the Court only took into account the identical nature of the facts on which the DRC's claim and Uganda's second counter-claim were based.[36] Similarly, regarding Uganda's first counter-claim,[37] and in the *Cameroon v. Nigeria* case,[38] the Court ignored a lack of temporal connection between the claims and counter-claims.

[36] I.C.J., Order, 29 November 2001, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), I.C.J. Reports 2001*, p. 679, para. 40.
[37] I.C.J., Order, 29 November 2001, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), I.C.J. Reports 2001*, pp. 678-679, para. 38.
[38] I.C.J., Order 30 June 1999, *Land and Maritime Boundary between Cameroon and Nigeria, I.C.J. Reports 1999*, pp. 985-986. *See also* para. 2.18 below.

1. Nicaragua's First Counter-Claim

2.13 In any event, were the Court ready to accept Costa Rica's restrictive interpretation of Article 80(1) of the Rules, Nicaragua's first counter-claim would no doubt be admissible as it does meet all three of the criteria that Costa Rica alleges are cumulative:

1. It rests on facts of the same nature as those underlying some of Costa Rica's claims;
2. These facts occurred in the same area; and
3. They occurred in the same period of time.

2.14 Nicaragua's first counter-claim, as expressed in the Submissions of the *Counter-Memorial*, reads as follows:

> (3) Costa Rica bears responsibility to Nicaragua-for the construction of a road along the San Juan de Nicaragua River in violation of Costa Rica's obligations stemming from the 1858 Treaty of Limits and various treaty or customary rules relating to the protection of the environment and good neighbourliness.[39]

As summarized in paragraph 9.29 of Nicaragua's *Counter-Memorial*, this submission is founded, *e.g.*, on the following facts:

> Much harm has been observed, including:
>
> • The dumping of trees, debris, and sediments into the San Juan River, making navigation more difficult and more dangerous; [and]

[39] NCM, p. 456; *see also*, p. 417, para. 9.7.

- The destruction of the vegetation and disturbance of fragile soils along the right bank of the river, resulting in increased erosion and sedimentation in the River.

2.15 *First*, these facts are certainly "of the same nature" as those alleged by Costa Rica in this case. Indeed, the "Dumping of Sediments", "Felling of Trees" and "Removal of Soil and Destruction of Undergrowth" are precisely the three first headings of the environmental damage Costa Rica complains of in its *Memorial*.[40] Both Costa Rica and Nicaragua argue that these acts amount to a violation of their territorial integrity[41] and of their respective environmental obligations,[42] and that they could affect the San Juan River.[43]

2.16 *Second*, contrary to Costa Rica's allegations,[44] the facts in question occurred in the same area, *i.e.*, along or in the San Juan River or its immediate vicinity. As Costa Rica itself describes these facts, "Nicaragua's actions that form the object of the present case are located in the northern part of Isla Portillos (Costa Rica) and in the eastern sector of the San Juan River, whose waters are on Nicaraguan territory."[45] The fact that part of Costa Rica's claims concern only the

[40] *See* CRM, pp. 226-236, paras. 5.63-5.79. *See also Application Instituting Proceedings*, 18 November 2010, para. 4, and CRM, p. 23, para. 1.9; p. 69, para. 3.2; p. 121, para. 3.104; or pp. 129-130, paras. 3.111-3.115.
[41] As for Costa Rica, *see*, *e.g.*, *Application instituting proceedings*, 18 November 2010, p. 3, paras. 4-5 or CRM, p. 23, para. 1.9, p. 69, para. 3.2, pp. 298-299, paras. 7.4-7.5. As for Nicaragua *see*, *e.g.*, NCM, pp. 428-429, para. 9.25 and pp. 433-434, par. 9.31.
[42] As for Costa Rica, *see* CRM, Chapter V (Nicaragua's breaches of the environmental protection regime). As for Nicaragua, *see* NCM, pp. 420-424, paras. 9.13-9.19, pp. 429-434, paras. 9.26-9.31 and p. 456.
[43] As for Costa Rica, *see* CRM, p. 248, para. 5.98. As for Nicaragua, *see* NCM, p. 429, para. 9.26.
[44] CRWO, p. 13, paras. 2.21-2.22.
[45] *Ibid.*, para. 2.22.

northern part of Isla Portillos is irrelevant. The Court has never required an identity of location. For instance, in the *Armed Activities* case, events relied on by the Democratic Republic of Congo happened in two specific regions of the DRC, Kitona in the *Bas Congo* province and in the east of the DRC. The facts invoked by Uganda "occurred in well-defined and clearly different geographic areas,"[46] *i.e.*, in Uganda (first counter-claim) and in Kinshasa (second counter-claim), which is located 500 kilometres away from Kitona and more than 1,000 kilometres away from the eastern regions of the DRC. These two counter-claims were nonetheless considered admissible by the Court.[47]

2.17 The important element is not that the facts invoked by the Parties took place at the exact same location, but that they are all related to the same geographical feature, in the present case the San Juan River, which Costa Rica has acknowledged:

- Regarding its own claims, Costa Rica has said that "[t]he facts underlying the present dispute are as follows. Nicaragua has, in two separate incidents, occupied the territory of Costa Rica in connection with the construction of a canal across Costa Rican territory from the San Juan River to Laguna los

[46] *Ibid*.
[47] I.C.J., Order, 29 November 2001, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), I.C.J. Reports 2001*, pp. 678-679, paras. 38 and 40.

Portillos (also known as Harbor Head Lagoon), and certain related works of dredging on the San Juan River."[48]

- Regarding Nicaragua's counter-claims, Costa Rica has said that "[t]he two basic issues in the present case are the questions of sovereignty in the area in and around the mouth of the San Juan River and the questions relating to the right of Nicaragua to maintain and improve the navigation of the San Juan de Nicaragua River."[49]

2.18 *Finally*, the facts alleged by both Parties also occurred in the same time period. It is not enough for Costa Rica to say that "[t]he facts that Nicaragua invokes in its counter-claim occurred one year after Costa Rica filed its application."[50] As the Court's case law reflects, Article 80(1) of the Rules of the Court does not require that the facts occur within the same week or month. In the *Oil Platform* case, the facts invoked by Iran and those invoked by the United States occurred within a two-year period.[51] The *Cameroon v. Nigeria* case is even more telling. In that case, the incidents referred to the Court by Cameroon happened between 1981 and 2004,[52] whereas some of the incidents raised by Nigeria occurred in 1970[53] and 1976.[54] Nigeria's counter-claims were nonetheless considered admissible by the Court.

[48] *Application Instituting Proceedings*, p. 3, para. 4.
[49] NCM, p. 4, para. 1.9.
[50] CRWO, p. 12, para. 2.19.
[51] *See* para. 2.21 below.
[52] *See, e.g.*, Memorial of Cameroon, p. 563, paras. 6.03-6.04.
[53] *See* Counter-Memorial of Nigeria, pp. 822-823, para. 25.68.

2.19 In the present case, Costa Rica's Emergency Decree 36440-MP authorizing the construction of Road 1856 is dated 7 March 2011, and the works officially began in the following month, much less than one year after Costa Rica's *Application* of 18 November 2010. Moreover, as explained below[55] and in Nicaragua's *Memorial* in the case concerning the *Construction of a Road in Costa Rica along the San Juan River*,[56] the construction of the Road (and the adoption of the Decree) were retaliatory measures adopted in response to Nicaragua's alleged "incursions," allegations which are the very basis of the present case.

2.20 Clearly, "in the present case, it emerges from the Parties' submissions that their respective claims rest on facts of the same nature" and that "they form part of the same factual complex," [57] as all of the facts on which the Parties have based their claims and counter-claims:

1. Are of the "same nature";
2. Have occurred in relation with the same geographical feature; and
3. Have occurred during the same period of time.

2.21 It must also be noted that, in order to assess the existence of this "factual complex" criterion, the Court takes into account the relationship between

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[54] *Ibid.*, p. 805, para. 25.9.
[55] *See* paras. 2.232-2.25 below.
[56] *See* pp. 19-30, paras. 2.15-2.26.
[57] I.C.J., Order, 17 December 1997, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Counter-claims, I.C.J. Reports 1997*, p. 258, para. 34 – *see* above para. 2.3.

the events relied upon by the parties, such as a causal relationship. For instance, in the *Oil Platforms* case, Iran's claim and the United States' counter-claim had such a direct causal connection: the United States claimed that the facts on which its counter-claim rested were the cause of its attacks on Iran's oil platforms. In that case, the two series of events happened consecutively in 1987 and 1988. Similarly, in the case concerning *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, the Court noted that:

> [W]hile Uganda's counter-claim ranges over a longer period than that covered by the Congo's principal claim, both claims nonetheless concern a conflict in existence between the two neighbouring States, in various forms and of variable intensity, since 1994.[58]

2.22 Costa Rica's internationally wrongful acts, of which Nicaragua complains in its first counter-claim, are expressly a retaliation for Nicaragua's alleged wrongful acts as presented in Costa Rica's *Application* and *Memorial* in this case.

2.23 Costa Rica itself acknowledges the direct causal connection between Nicaragua's first counter-claim and its own claims. In its Written Observations, Costa Rica explains: "The road was built within the framework of Emergency Decree 36440-MP, and the Emergency Decree itself is a consequence of Nicaragua's invasion and occupation of Costa Rica specifically."[59] According

[58] I.C.J., Order, 29 November 2001, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), I.C.J. Reports 2001*, pp. 678-679, para. 38.
[59] CRWO, p. 12, para. 2.20.

to Costa Rica, this alleged invasion constitutes "the main facts of the principal case"[60] and was partly caused by the execution of Nicaragua's dredging programme.[61] And, as in the *Oil Platforms* case, the facts relied on by Costa Rica and Nicaragua occurred consecutively in a similar time period, *i.e.*, in 2010 and 2011-2012.

2.24 The direct causal connection between Costa Rica's claims and Nicaragua's first counter-claim is undisputable.

2.25 Probably conscious that it lacks arguments on the admissibility of Nicaragua's first counter-claim, Costa Rica seeks to persuade the Court that it should not be considered admissible because of an alleged lack of substantial foundation.[62] By discussing the soundness of Nicaragua's first counter-claim, Costa Rica puts the cart before the horse. At the present stage, the Parties are asked to present their observations on the *admissibility* of Nicaragua's counter-claims, not on the *merits* of those counter-claims, as such arguments are irrelevant to the issue of the admissibility of counter-claims. Nicaragua cannot but agree with Costa Rica when it finally acknowledges that "[i]t is true that the Court cannot at this stage, facing a claim of this nature, determine whether it is

[60] *Ibid.*, p. 11, para. 2.17.
[61] *See, e.g., Application Instituting Proceedings*, 18 November 2010, *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, p. 3, paras. 4-5 and CRM, p. 23, para. 1.9 and p. 69, para. 3.2.
[62] CRWO, pp. 14-15, paras. 2.26-2.28.

sustainable on the merits."[63] Nicaragua will therefore only deal with these grossly misconceived arguments very briefly.

2.26 Suffice it to say in this respect that, while Costa Rica asserts that "[e]ven assuming that the alleged Costa Rican construction of the road might be an international wrongful act (*quod non*), it cannot be invoked as a breach of the Treaty of Limits."[64] As explained above, both Costa Rica and Nicaragua claim that the other Party dumped sediments and trees on their territory and that these acts constitute a violation of their territorial integrity and amount to an occupation, which imply a violation of the land boundary as established in Article II of the 1858 Treaty of Limits.

2. Nicaragua's Second Counter-Claim

2.27 Nicaragua's second counter-claim is based on the current non-existence of the Bay of San Juan del Norte. This is why Nicaragua asks the Court to declare that "Nicaragua has become the sole sovereign over the area formerly occupied by the Bay of San Juan del Norte."[65]

2.28 Costa Rica's assertion that "in the *Certain Activities* case Costa Rica makes no claim to the Bay and indeed does not refer to the Bay in the

[63] *Ibid.*, pp. 14-15, para. 2.26.
[64] CRWO, p. 14-15, para. 2.26.
[65] NCM, p. 456; *see also*, p. 16, para. 1.29 or p. 437, para. 9.41.

operative part of its submissions"[66] is not an argument: clearly, counter-claims do not need to respond directly to a claim, which would make them defences, not counter-claims.[67]

2.29 And, even if Costa Rica's Submissions do not mention the Bay of San Juan del Norte, its status, as fixed by the 1858 Treaty of Limits, is indisputably part of the case submitted by Costa Rica to the Court. Paragraph 1 of Costa Rica's *Application* includes among the obligations allegedly breached by Nicaragua "the Treaty of Territorial Limits between Costa Rica and Nicaragua of 15 April 1858 (the Treaty of Limits)" and, in particular, Article V, which it describes as a "transitional provision" relating to the regime applicable to the port of San Juan del Norte.[68] Paragraph 1.1 of the *Memorial* proceeds likewise.

2.30 Factually,[69] despite Costa Rica's attempt to show otherwise,[70] it is clear that Nicaragua's second counter-claim does form part of the same "factual complex". It bears upon a geographical aspect which is part of Costa Rica's own description of the "geographical background" of the case.[71] More importantly, the need of the dredging begun by Nicaragua, which is one of the main elements of Costa Rica's case,[72] is closely and directly connected with the drying out of the

[66] CRWO, p. 20, para. 4.1.
[67] *See* para. 2, and note 5 above.
[68] *See Application Instituting Proceedings*, p. 7, para. 11.
[69] For the legal connection, *see* para. 2.39-2.456 below.
[70] CRWO, p. 20, para. 4.2.
[71] CRM, p. 34, para. 2.3; *see also* p. 48, note 85.
[72] *See*, *e.g.*, paras. 1 (e) and 2 (b) and (c) of the Costa Rican Submissions.

Bay[73] and the dispute on the factual situation in the general area of the mouth of the River. As indicated in Nicaragua's Counter Memorial, the situation of the former Bay of San Juan "is part of the issues of sovereignty at the mouth of the San Juan River which lies at the heart of the present case."[74]

2.31 The direct connection of the question of the situation of the Bay of San Juan was pointed out and emphasized during the public hearings in this case on the request by Costa Rica for provisional measures. The Agent stated: "Other very important issues stemming from the 1858 Treaty are still in dispute between the Parties and involve, for example, the situations of the Bays of San Juan and Salinas."[75]

2.32 In addition, the following passage from the Court's Order on Interim Measures of 8 March 2011 demonstrates that, when the dispute arose, Costa Rica agreed that the status of the Bay of San Juan del Norte was part of the dispute submitted to the Court:

> Whereas Costa Rica declared that it is not opposed to Nicaragua carrying out works to clean the San Juan river, provided that these works do not affect Costa Rica's territory, including the Colorado river, or its navigation rights on the San Juan river, *or its rights in the Bay of San Juan del Norte*; whereas Costa Rica asserted that the dredging works carried out by Nicaragua on the San Juan river did not comply with these conditions, firstly because Nicaragua has deposited large amounts of sediment from the river in the Costa

[73] *See* NCM, p. 452, paras 9.79-9.81.
[74] NCM, p. 452, par. 9.81.
[75] CR 2011/4, 13 January 2011 at 4:30 p.m. *available at* http://www.icj-cij.org/docket/index.php?p1=3&p2=1&k=ec&case=150&code=crn&p3=2

> Rican territory it is occupying and has proceeded to deforest certain areas; secondly, because these works, and those relating to the cutting of the disputed canal, have as a consequence the significant deviation of the waters of the Colorado river, which is situated entirely in Costa Rican territory; and, thirdly, because these dredging works will spoil portions of Costa Rica's northern coast on the Caribbean Sea.[76]

3. Nicaragua's Third Counter-Claim

2.33 Nicaragua's third counter-claim relates to the right of Nicaraguan vessels to reach the ocean via the Colorado River.[77] This counter-claim is also tightly linked to Costa Rica's claims concerning Nicaragua's dredging activities on the San Juan River.[78] It appears in the Submissions in the *Counter-Memorial* as follows:

> Nicaragua requests a declaration by the Court that: … (2) Nicaragua has a right to free navigation on the Colorado Branch of the San Juan de Nicaragua River until the conditions of navigability existing at the time the 1858 Treaty was concluded are re-established.[79]

2.34 During the public hearings on provisional measures, Nicaragua pointed out that President Ortega had announced on 2 November 2010 (that is, shortly before Costa Rica filed its Application instituting this case on 18 November 2010) that "Nicaragua would also claim the right to navigate out to the Caribbean Sea via the branch of the Colorado river at least until Nicaragua was

[76] I.C.J., Order, 8 March 2011, *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, para. 32 – emphasis added.
[77] NCM, pp. 438-439, paras. 9.42-9.45.
[78] *See* above, para. 2.30**,** and, in particular note 68.
[79] NCM, p. 456.

able to clean the San Juan river from the sedimentation provoked by the Costa Rican deforestation of its territory and recover the possibility of navigating it out to sea…"(and further added that Nicaragua was)…"preparing a case against Costa Rica along the lines announced by President Ortega that involve the real issues that are at the heart of this dispute." [80]

2.35 Nicaragua's dredging of the Lower San Juan is necessitated by the fact that the Caribbean Sea can no longer be reached via the San Juan by vessels of any size, and by even small boats for much of the year. Yet Costa Rica has requested the Court to curtail Nicaragua's dredging activities and has prevented Nicaragua from reaching the sea via the Colorado Branch of the San Juan River.[81]

2.36 In its Counter-Memorial Nicaragua has pointed out that the 1858 Treaty contemplates this situation and in effect provides for Nicaraguan navigation to the sea via the Colorado for so long as this is impossible via the San Juan. Article 5 of the Treaty provides as follows:

> As long as Nicaragua does not recover the full possession of all her rights in the port of San Juan del Norte, the use and possession of Punta de Castilla shall be common and equal both for Nicaragua and Costa Rica; and in the meantime, and as long as this community lasts, the boundary shall be the whole course of the Colorado river.

[80] CR 2011/2, 11 January 2011 at 3 p.m., *available at* http://www.icj-cij.org/docket/index.php?p1=3&p2=1&k=ec&case=150&code=crn&p3=2
[81] NCM, para. 4.66.

2.37 Nicaragua's third counter-claim simply asserts a right flowing from Article 5, and does so as a consequence of a situation – the non-navigability of the Lower San Juan and the occlusion of the river's mouth – which Costa Rica in this case is attempting to prevent Nicaragua from addressing. The third counter-claim is thus certainly part of the same factual complex as Costa Rica's principal claim.

2.38 In its *Memorial*, Costa Rica describes at length the Colorado River and presents it as part of the geographical background of the case.[82] It further claims that "Nicaragua's activities risk causing further significant environmental harm to Costa Rican territory, and affecting the flow of the Colorado River."[83] This claim has been acknowledged by the Court in its Order of 8 March 2011 as "forming part of the subject of the case":

> Whereas the rights claimed by Costa Rica and forming the subject of the case on the merits are, on the one hand, its right to assert sovereignty over the entirety of Isla Portillos and over the Colorado river and, on the other hand, its right to protect the environment in those areas over which it is sovereign; whereas, however, Nicaragua contends that it holds the title to sovereignty over the northern part of Isla Portillos…and whereas Nicaragua argues that its dredging of the San Juan river, over which it has sovereignty, has only a negligible impact on the flow of the Colorado river, over which Costa Rica has sovereignty.[84]

[82] CRM, pp. 33-36, paras. 2.2-2.7. *See also Application Instituting Proceedings*, p. 10, para. 17.
[83] *Ibid*., p. 70, para. 3.5. *See also*. *e.g.*, pp. 102-103, para. 3.70, p. 104, para. 3.72, pp. 206-207, para. 5.18, p. 225, para. 5.58 and p. 248, para. 5.98.
[84] I.C.J., Order, 8 March 2011, *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, para. 55.

B. COSTA RICA'S DISTORTED APPROACH TO THE "DIRECT LEGAL CONNECTION" REQUIREMENT

1. Nicaragua's First Counter-Claim

2.39 The 1858 Treaty of Limits on which both Parties rely extensively is at the very heart of the present case. However, Costa Rica argues that "the applicable law of Costa Rica's claim and Nicaragua's counter-claim are different."[85] As regards the first counter-claim, Costa Rica explains that "the alleged Costa Rican construction of the road … cannot be invoked as a breach of the Treaty of Limits"[86] and that "Nicaragua itself recognises that neither the Treaty of Limits nor any other specific treaty governs its new claim."[87] Costa Rica's position calls for the following remarks.

2.40 *First*, Nicaragua has never recognized that "neither the Treaty of Limits nor any other specific treaty"[88] is applicable to its first counter-claim. On the contrary, in Chapter 9 of its *Counter-Memorial*, Nicaragua has demonstrated that the "dump[ing] into the river of substantial volumes of sediments, soil, uprooted vegetation and felled trees" caused by the construction of Road 1856 "resulted in the invasion of Nicaraguan territory,"[89] which constitutes a violation of Article VI of the 1858 Treaty of Limits and of the land boundary between the

[85] CRWO, p. 21, para. 4.7.
[86] *Ibid.*, pp. 14-15, para. 2.26.
[87] *Ibid.*, p. 15, para. 2.27.
[88] *Ibid.*, p. 15, para. 2.27.
[89] NCM, pp. 428-429, para. 9.25.

Parties as established in Article II of that Treaty.[90] Nicaragua has further shown that Costa Rica's activities directly affected navigation on the San Juan River. This constitutes a violation of the 1858 Treaty of Limits.

2.41 In the present case, Costa Rica and Nicaragua "pursue, with their respective claims, the same legal aim, namely the establishment of legal responsibility for violations of the [1858 Treaty of Limits]."[91] In paragraph 2.25 of its written observations, Costa Rica describes its claims as follows:

> In the present case, Costa Rica's claims are based: first, on the breach by Nicaragua of the obligation to respect the boundary established by Article II of the Treaty of Limits of 1858 and by the first Alexander Award through the occupation, construction of an artificial channel and its late claim of sovereignty over Costa Rican territory located at the southern or eastern side of that boundary; second, on the breach of paragraph 6 of the Third article of the Cleveland Award relating to the obligation by Nicaragua not to execute works that "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."[92]

For its part, Nicaragua formulates its claim as follows in its *Counter-Memorial*;

> As explained in Chapter 3, Article VI of the 1858 Treaty establishes that Nicaragua has sovereignty over the waters of the San Juan river, the right bank of which constitutes the boundary between the two States. This fact was reaffirmed by the Court in its 2009 Judgment. As the Court put it, "[t]he 1858 Treaty of Limits completely defines the rules applicable to the section of the San Juan River" relevant to the present case. Apart from the right of navigation with commercial objects, the 1858 Treaty confers no

[90] *Ibid*.
[91] I.C.J., Order, 17 December 1997, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Counter-claims, I.C.J. Reports 1997*, p. 258, para. 35.
[92] CRWO, p. 14, para. 2.25.

> other right over the San Juan River to Costa Rica – and certainly not the right to dump into the river substantial volumes of sediments, soil, uprooted vegetation and felled trees which resulted in the invasion of Nicaraguan territory.[93]

Indeed these are different claims, but they clearly correspond to each other: both Parties seek to hold the other Party responsible for breaches of the 1858 Treaty of Limits. And, as established above, these breaches are closely interrelated in fact.

2.42 Moreover, as Costa Rica recognizes, the 1858 Treaty of Limits goes beyond merely defining the boundary between the Parties. In its own words, its claim based on that Treaty bears upon "a breach of an internationally agreed boundary, the territorial integrity of a State, a right of consultation and the obligation not to cause harm to the territory of the other State explicitly arising from the Treaty of Limits and its interpretation by the Cleveland Award."[94] This phrase could be used, word-by-word, to describe Nicaragua's claim. And, in any case, the absence of total symmetry between the respective claims of the Parties is "not determinative as regards the assessment of whether there is a legal connection between the principal claim and the counter-claim in so far the two Parties pursue, with their respective claims, the same legal aim, namely the establishment of legal responsibility for violations of" the 1858 Treaty of Limits.[95]

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[93] NCM, pp. 428-429, para. 9.25.
[94] CRWO, p. 15, para. 2.26.
[95] *See* I.C.J., Order, 17 December 1997, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Counter-claims, I.C.J. Reports 1997*, p. 258, para. 35. *See also* I.C.J., Order, 10 March 1998, *Oil Platforms (Islamic Republic of Iran v. United States of America), Counter-Claim, I.C.J. Reports 1998*, p. 205, para. 38 or I.C.J., Order, 30 June 1999, *Land and Maritime Boundary between Cameroon and Nigeria, I.C.J. Reports 1999*, pp. 985-986.

2.43 Additionally, as Nicaragua explained in Chapter 9 of its *Counter-Memorial*, Costa Rica's construction of the Road also constitutes a violation of other conventions and principles of general international law,[96] namely

- The 1971 Ramsar Convention, as amended;[97]
- The 1990 bilateral Agreement over the Border Protected Areas between Nicaragua and Costa Rica;[98]
- The Convention on Biological Diversity of 21 May 1992;
- The Convention for the Conservation of the Biodiversity and Protection of the Main Wild Life Sites in Central America of 5 June 1992;
- The obligation to conduct an appropriate EIA;
- The principle of non-harmful use of the territory; and
- The obligation to inform, notify and consult.

Costa Rica expressly relies upon these very conventions and principles in its *Memorial*.[99]

2.44 While these very similar lists of violated treaties and breached principles demonstrate the striking interconnection of the respective cases of both Parties, it is also worth noting that the fact that "Costa Rica also invoked [two]

[96] NCM, pp. 417-434, paras. 9.8-9.33 and pp. 450-451, paras. 9.76-9.77.
[97] Convention on Wetlands of International Importance especially as Waterfowl Habitat, Ramsar (Iran) of 2 February 1971 as amended by the Paris Protocol of 3 December 1982, and Regina Amendments of 28 May 1987.
[98] Agreement over the Border Protected Areas between Nicaragua and Costa Rica (International System of Protected Areas for Peace [SI-A-PAZ] Agreement) of 15 December 1990.
[99] *See, e.g.*, CRM, pp. 13-14, para. 1.1 and Chapter V, Section B.

other international instruments that are not even invoked by Nicaragua"[100] is irrelevant. As explained below,[101] claims and counter-claims need not rest on identical instruments.[102]

2.45 It can also be noted that, in the *Factory at Chorzów* case, the P.C.I.J. observed that "the counter-claim is based on Article 256 of the Versailles Treaty, which article is the basis of the objection raised by the Respondent, and that, consequently, it is juridically connected with the principal claim."[103]

2.46 In the present case, Nicaragua relies on certain identical or similar facts in order both to refute Costa Rica's allegations and to obtain judgment against that State. It invokes Article II of the 1858 Treaty of Limits to demonstrate that it cannot be considered as having intruded into Costa Rica's territory. Nicaragua has also based its defence on Article VI of the Treaty, as well as on the Cleveland Award, in order to rebut Costa Rica's claim that Nicaragua lacks the right to dredge the San Juan River. It is therefore clear that Nicaragua "intends to rely on certain identical facts in order both to refute the allegations of [Costa Rica] and to obtain judgment against that State."[104]

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[100] CRWO, p. 14, para. 2.25.
[101] *See* paras. 2.49-2.50.
[102] I.C.J., Judgment, 19 December 2005, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, p. 275, para. 326.
[103] P.C.I.J., Judgment, 13 September 1928, *Factory at Chorzów (Merits)*, Series A, No. 17, p. 38.
[104] Cf. I.C.J., Order, 17 December 1997, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Counter-claims, I.C.J. Reports 1997*, p. 258, para. 34. *See also* I.C.J., Order, 10 March 1998, *Oil Platforms (Islamic Republic of Iran v. United States of America), Counter-Claim, I.C.J. Reports 1998*, p. 205, para. 38.

2. Nicaragua's Second and Third Counter-Claims

2.47 Nicaragua's second and third counter-claims, which concern, respectively, the status of the San Juan del Norte Bay and Nicaragua's right of navigation on the Colorado River (which is but a branch of the San Juan de Nicaragua River), call in part for the same remarks:

- They too are based on the 1858 Treaty of Limits, which is at the core of the present case;

- Both concern the treaty regime of the boundary as fixed by that Treaty; and

- More precisely, both relate to the consequences of the drying out of the Bay, which is itself the consequence of Costa Rica's internationally wrongful acts.

2.48 Costa Rica argues that these counter-claims have no direct legal connection with its claims because the Parties do not refer to the same articles of the 1858 Treaty of Limits. Costa Rica further specifies that "it does not deal with the interpretation of Article IV at all"[105] nor has it "relied upon Article V of the Treaty of Limits."[106] Once again, Costa Rica distorts the legal requirements of Article 80.

[105] CRWO, p. 21, para. 4.7.
[106] *Ibid.*, p. 25, para. 5.19.

2.49 As Costa Rica does in the present case, Iran argued in the *Oil Platforms* case that the United States' counter-claim was inadmissible because it was based on provisions of the Treaty of Amity – which was also the basis of Iran's claims – never relied upon by Iran:

> [T]he United States seeks to widen the dispute to provisions of the Treaty of Amity, Articles X (2)-(5), which were never in question in the proceedings to date, and have never been mentioned before by the United States. Second, the United States also seeks to widen the dispute to include US claims concerning Iran's overall conduct throughout the period 1987-1988, when it has always been its position in the preliminary objection phrase that such overall conduct, at least in so far as it concerned the United States, was irrelevant in this case, and specifically brought its preliminary objection to limit Iran's claim as far as possible.[107]

The Court dismissed this argument and found that "the counter-claim presented by the United States is directly connected with the subject-matter of the claims of Iran"[108] since both the claim and the counter-claim were based on the 1955 Treaty of Amity.[109]

2.50 To be considered admissible, a counter-claim does not need to be based on the same instrument, let alone the exact same provision of the instrument, which constitutes the basis of the Applicant's claim. As the Court

[107] I.C.J., Order, 10 March 1998, *Oil Platforms (Islamic Republic of Iran v. United States of America), Counter-Claim, I.C.J. Reports 1998*, p. 196, para. 12.
[108] *Ibid.*, p. 205, para. 39.
[109] *Ibid.*, p. 205, para. 38. *See also* for a similar finding concerning the Genocide convention: I.C.J., Order, 17 December 1997, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Counter-claims, I.C.J. Reports 1997*, p. 258, para. 35.

made clear in the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* case:

> As the jurisprudence of the Court reflects, counter-claims do not have to rely on identical instruments to meet the "connection" test of Article 80 (*see Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections, Judgment, I.C.J. Reports 1998, pp. 318-319).[110]

2.51 In the present case, not only do the Parties rely on the same instrument, the 1858 Treaty of Limits, they rely upon the same provisions of that instrument:

- Costa Rica refers to Article IV of the 1858 Treaty of Limits, both in the introductory chapter of its *Memorial*[111] and repeatedly in one of the substantive chapters.[112] These cannot be considered mere references given that Costa Rica expressly claims on four different occasions that it has sovereignty over the Bay of San Juan del Norte.[113] Costa Rica also uses its own interpretation of Article IV as a rebuttal to Nicaragua's position on the location of the land boundary between the Parties:

> Second, the San Juan del Norte Bay is common to both States. If Nicaragua's argument were followed, it would mean that Costa Rica would not have a direct water access to the common bay, a possibility that would be at odds not only with the letter and spirit

[110] I.C.J., Judgment, 19 December 2005, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, p. 275, para. 326.
[111] CRM, p. 41, para. 2.20.
[112] *Ibid.*, pp. 134-135, para. 4.4, pp. 140-141, para. 4.13 and pp. 142-143, para. 4.16.
[113] *Ibid.*, p. 41, para. 2.20, pp. 134-135, para. 4.4, pp. 140-141, para. 4.13 and pp. 142-143, para. 4.16.

> of the Treaty of Limits, but also with the very notion of commonality.[114]

- As regards the third counter-claim and contrary to what it erroneously asserts, Costa Rica has, "in the present case, relied upon Article V of the Treaty of Limits".[115] In the very first paragraph of its *Memorial*, Costa Rica states that:

> The case concerns breaches by Nicaragua of obligations owed to Costa Rica under [inter alia]: … the Treaty of Territorial Limits between Costa Rica and Nicaragua of 15 April 1858 (the Treaty of Limits), in particular Articles I, II, V, VI and IX.[116]

Furthermore, in its *Memorial*, Costa Rica started discussing the subject-matter of Nicaragua's third counter-claim. It explains that:

> He [President Ortega] also indicated that Nicaragua would disregard the OAS resolution and would ask the International Court of Justice to grant Nicaragua navigational rights on the Colorado River, a river belonging wholly to Costa Rica and over which Nicaragua has no navigational rights.[117]

2.52 It is apparent that Costa Rica's claims and Nicaragua's counter-claims have a direct connection that is both factual and legal. By making its four counter-claims in the present case, Nicaragua makes it possible for the Court to have a complete view of the background of the dispute – which encompasses a

[114] CRM, pp. 142-143, para. 4.16.
[115] CRWO, p. 25, para. 5.19.
[116] CRM, p. 13, para. 1.1 – emphasis added.
[117] CRM, pp. 79-80, para. 3.29 – emphasis added.

large range of issues, a complex set of disagreements on points of law and fact,[118] all primarily related to the interpretation and application of the 1858 Treaty of Limits. In deciding on Nicaragua's counter-claims, the Court will, at last, completely and finally, settle the dispute between the Parties, in accordance with its function as defined in Article 38, paragraph 1, of its Statute.

PART III

THE JOINDER OF THE CASES IS APPROPRIATE

3.1 The Court will certainly recall that, on 21 December 2011, Nicaragua filed an application concerning its dispute with Costa Rica regarding the *Construction of a Road in Costa Rica along the San Juan River*. That case concerns Costa Rica's breaches of its obligations in relation to the legal regime applicable to the San Juan River (in particular under the 1858 Treaty of Limits) and Costa Rica's related responsibility for the construction of its Road. This is also the subject-matter of the first counter-claim raised in Nicaragua's *Counter-Memorial* in the present case, with which it is directly connected.

3.2 These are the reasons Nicaragua suggested the joinder of both cases in paragraph 1.27 of its *Counter-Memorial*. In its *Application* in the *Construction of a Road* case, Nicaragua reserved "its rights to consider in a subsequent phase of

[118] Cf. the celebrated definition of a dispute by the PCIJ (P.C.I.J., Judgment, 30 August 1924, *The Mavrommatis Palestine Concessions*, Series A, No. 2, p. 11).

the present proceedings and after further consideration of the other pending case whether to request that the proceedings in both cases should be joined."[119]

3.3 The Agent of Nicaragua renewed this suggestion in the letter accompanying the deposit of Nicaragua's *Memorial* in that case:

> [G]iven the factual and legal connection between the two case before the Court,[120] the Republic of Nicaragua respectfully draws the attention of the Court to the need to join the proceedings, and formally request the Court to decide on this matter in the interest of the proper administration of Justice and in accordance with Article 47 of the Rules of Court.[121]

3.4 For its part, Costa Rica objects to such a joinder which, it asserts, would not be "appropriate".[122] Besides repeating that the two cases "relate to different subject-matters,"[123] Costa Rica's argument is exclusively of a procedural nature:

> The two cases each have their own procedural timetable. The Court took notice that the parties agree that no second round of written pleadings is needed in the present case. The other case awaits the filing by Nicaragua of its *Memorial* in 19 December 2012. Nicaragua requested a time-limit of one year, and as a corollary Costa Rica will have a year to file its *Counter-Memorial*. Procedural economy dictates that these two cases be kept separate, not joined. Coherence does not require the joinder of cases either: no finding of fact or law in the one case is necessary for a

[119] *Application Instituting Proceedings*, 22 December 2011, para. 56.
[120] *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).*
[121] Letter to the Registrar, 19 December 2012.
[122] CRWO, pp. 15-16, paras. 2.30-2.34.
[123] CRWO, p. 16, para. 2.32.

> determination of the other. Finally, the composition of the Court is different in the two cases.[124]

3.5 As shown above, the two cases involve the same Parties and are tightly connected both in law and in fact. There is therefore no reason why they could not be joined: this would be in line with the spirit in which Article 47 of the Rules was adopted and included in the 1978 Rules.[125] It can be further noted that in all previous cases where the issue of a joinder arose, either a single applicant had brought a case against two or several respondents, or two or several applicants had brought a case against a single respondent[126] – which certainly made the procedural arrangements more problematic than they would be here where both cases to be joined involve, exclusively, the same Parties.

3.6 This is also true with respect to the composition of the Court, which, the Applicant alleges, "is different in the two cases".[127] This argument is far from compelling. In reality, the composition of the Court is almost identical: all the 15 permanent Judges of the Court are called to sit in both cases, and Nicaragua has appointed Mr. Gilbert Guillaume as Judge *ad hoc* in both cases. Therefore, the only difference lies in the Judges *ad hoc* appointed by Costa Rica in the two cases.[128] In this respect, it must be noted that when joinder had been

[124] CRWO, p. 16, para. 2.33.
[125] *See* Sh. Rosenne, *The Law and Practice of the International Court (1920-2005)*, Nijhoff, Leiden/Boston, 2006, p. 1214.
[126] *See* the list given *ibid.*, pp. 1218-1219.
[127] CRWO, p. 16, para. 2.33 prec.
[128] Mr. Christopher J. R. Dugard in the case concerning *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and Mr. Bruno Simma in the case

decided in previous cases with different Applicants[129] or Respondents,[130] only one Judge *ad hoc* could be appointed, which certainly raised more problematic legal or problematic issues than the fact that one of the two Judges *ad hoc* appointed by a single Party would have to resign.[131]

3.7 Costa Rica's argument based on the time factor is hardly more convincing: although the present case will indeed be ready for hearing when the present Observations are completed (*i.e.*, after 30 January 2013), the *Counter-Memorial* in the case concerning the *Construction of a Road* is due on 19 December of this year, and it can hardly be expected that the case concerning *Certain Activities* could be heard before this deadline specially in view of the Counter Claims filed by Nicaragua in that case.

3.8 In fact, notwithstanding Costa Rican's quibbles, a joinder of both cases would certainly be most appropriate:

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concerning the *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*.

[129] I.C.J., Order, 20 May 1961, *South West Africa Cases (Ethiopia v. Union of South Africa; Liberia v. Union of South Africa)*, *I.C.J. Reports 1961*, p. 14.

[130] I.C.J., Order, 26 April 1968, *North Sea Continental Shelf (Denmark/Federal Republic of Germany; Federal Republic of Germany/Netherlands)*, *I.C.J. Reports 1968*, p. 10.

[131] *Mutatis mutandis* the hypothesis is not completely unprecedented (*see*, *e.g.*, the *Navigational and Related Rights* case: "[s]ince the Court included upon the Bench no judge of the nationality of either of the Parties, each Party proceeded to exercise its right conferred by Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case. Costa Rica chose Mr. Antônio Cançado Trindade and Nicaragua Mr. Gilbert Guillaume. Mr. Cançado Trindade was subsequently elected as a Member of the Court. Costa Rica informed the Court that it had decided not to choose a new judge *ad hoc*." (I.C.J., Judgment, 13 July 2009, *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, *I.C.J. Reports* 2009, p. 219, para. 4); in *Nicaragua v. Colombia*, "[f]ollowing his election as a Member of the Court, Mr Gaja decided that it would not be appropriate for him to sit in the case. Nicaragua then chose Mr Thomas Mensah as judge *ad hoc*." (I.C.J., Judgment, 19 November 2012, *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, para. 3).

- It would not unduly delay the settlement of the dispute;
- It would enable the Court to get a full picture of the situation and to settle the global dispute between the two states completely; and
- The joinder of the two cases would "achieve a procedural economy whilst enabling the Court to have an overview of the respective claims of the parties and to decide them more consistently."[132]

3.9 This is precisely what a sound administration of justice commands.

3.10 Incidentally, it can be noted that the last quote, from the 1997 Order of the Court in the *Genocide* case, relates to counter-claims, not to joinder. And, to be sure, both institutions achieve the same purpose: procedural economy in view of a sound administration of justice.

3.11 Moreover, Article 47 of the Rules of Court leaves a large measure of flexibility to the Court when two or more cases are interconnected:

> The Court may at any time direct that the proceedings in two or more cases be joined. It may also direct that the written or oral proceedings, including the calling of witnesses, be in common; or the Court may, without effecting any formal joinder, direct common action in any of these respects.

[132] I.C.J., Order, 17 December 1997, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Counter-claims, I.C.J. Reports 1997*, p. 257, para. 30. *See also* Order, 10 March 1998, *Oil Platforms (Islamic Republic of Iran v. United States of America), Counter-Claim, I.C.J. Reports 1998*, p. 205, para. 43 and Order, 29 November 2001, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), I.C.J. Reports 2001*, p. 680, para. 44.

3.12 In the present case, Nicaragua would welcome any procedural decision aiming at procedural economy: either a joinder or, at least the joined discussion of Nicaragua's counter-claims. Either solution would facilitate the sound administration of justice.

PART IV

SUBMISSIONS

4.1 For the reasons expressed in its *Counter-Memorial* and in the present Observations, the Republic of Nicaragua requests the Court to adjudge and declare that:

- it has jurisdiction to decide on the counter-claims made by Nicaragua in its Counter-Memorial; and
- that these counter-claims are admissible;

and to decide the joinder of the proceedings in the cases concerning *Certain Activities Carried out by Nicaragua in the Border Area* and *Construction of a Road in Costa Rica along the San Juan River* in accordance with Article 47 of the Rules of Court.

The Hague, 30 January 2013.

Carlos J. Argüello Gómez

Agent of the Republic of Nicaragua