

**INTERNATIONAL COURT OF JUSTICE**

**CERTAIN ACTIVITIES CARRIED OUT  
BY NICARAGUA IN THE BORDER AREA  
(COSTA RICA *v.* NICARAGUA)**

**WRITTEN OBSERVATIONS OF COSTA RICA  
ON THE ADMISSIBILITY  
OF NICARAGUA'S COUNTER-CLAIMS**

**30 November 2012**



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## I. INTRODUCTION

1.1 In its Counter-Memorial of 6 August 2012 in the *Certain Activities* case, Nicaragua purported to introduce no less than four counter-claims relating to a variety of matters. By letter of 28 September 2012 the Registrar notified Costa Rica that its observations on the admissibility of the counter-claims were invited by 30 November 2012.

1.2 The four counter-claims submitted by Nicaragua concern the following matters:

- (1) The Consequences of the Construction of a Road along the San Juan River;
- (2) The Consequences of the Current Non-Existence of the Bay of San Juan del Norte;
- (3) The Right of Nicaraguan Vessels to Reach the Ocean via the Colorado River; and
- (4) Costa Rica [*sic*] Violation of the Court's Order on Provisional Measures.<sup>1</sup>

1.3 Costa Rica considers 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. Further, the first counter-claim is identical to the claim advanced by Nicaragua in its application of 21 December 2011 in the case concerning *Construction of a Road by Costa Rica along the San Juan River* and should be rejected also for that reason. Finally, as to the second and third counter-claims, the Court lacks jurisdiction to admit them.

1.4 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. It is inappropriate to deal here with the merits of that counter-claim, or with the much more credible claims Costa Rica has documented of Nicaraguan breaches of the Court's Order: see Costa Rica's letters of 8 April 2011, 13 April 2011, 23 June 2011, 3 July 2012 and 21 November 2012. Nicaragua's fourth counter-claim, therefore, will not be further addressed here: the Court will be in a position to deal with both Parties' claims of breach of the Order of 8 March 2011 at the hearing on the merits.

1.5 Article 80 of the Court's Rules provides:

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<sup>1</sup> NCM, Chapter 9.

1. The Court may entertain a counter-claim only if it comes within the jurisdiction of the Court and is directly connected with the subject-matter of the claim of the other party.
2. A counter-claim shall be made in the Counter-Memorial and shall appear as part of the submissions contained therein. The right of the other party to present its views in writing on the counter-claim, in an additional pleading, shall be preserved, irrespective of any decision of the Court, in accordance with Article 45, paragraph 2, of these Rules, concerning the filing of further written pleadings.
3. Where an objection is raised concerning the application of paragraph 1 or whenever the Court deems necessary, the Court shall take its decision thereon after hearing the parties.

1.6 The law relating to jurisdiction and admissibility of counterclaims before the Court is well established.

- (1) The counter-claim must come within the jurisdiction of the Court, as recognized by the parties.<sup>2</sup>
- (2) 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,<sup>3</sup> and
  - (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.<sup>4</sup>

This is the reason why counter-claims raised by Belgium in the *Diversion of Waters from the Meuse* case,<sup>5</sup> by Peru in the *Right of Asylum* case,<sup>6</sup> by the Federal Republic of Yugoslavia (as it then was) in the *Bosnian Genocide*

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<sup>2</sup> Article 80(1) of the Rules; *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. 257, para. 31; *Jurisdictional Immunities of the State (Germany v. Italy), Counter-Claim, Order of 6 July 2010, I.C.J. Reports 2010*, p. 321, para. 31.

<sup>3</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Counter-claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 258, para. 34.

<sup>4</sup> *Ibid.*

<sup>5</sup> *The Diversion of the Water from the Meuse, P.C.I.J. Series A/B, No. 70, Judgment of 28 June 1937*, p. 28.

<sup>6</sup> *Asylum Case (Colombia / Peru), Judgment of 20 November 1950, I.C.J. Reports 1950*, pp. 280-281.

case,<sup>7</sup> by the United States of America in the *Oil Platforms* case,<sup>8</sup> by Nigeria in *Cameroon v. Nigeria*,<sup>9</sup> and two out of three Ugandan counter-claims in the *Armed Activities in the Territory of the Congo* were considered admissible, while the third one, not meeting those conditions, was declared inadmissible.<sup>10</sup>

- (3) For the direct connection requirement to be satisfied there must also be a sufficient legal connection between the counter-claim and the claim.<sup>11</sup> This requirement will only be satisfied if the counter-claim and claim pursue the same legal aim, e.g., the establishment of responsibility under the same international instrument.<sup>12</sup>

1.7 Applying these rules, these Written Observations will show why the first, second and third counter-claims are inadmissible. It proceeds in the following order:

**Section II:** The first counter-claim (construction of a road) is inadmissible;

**Section III:** The Court lacks jurisdiction over the second and third counter-claims;

alternatively:

**Section IV:** The second counter-claim (Bay of San Juan del Norte) is inadmissible; and,

**Section V:** The third counter-claim (transit via the Colorado River) is inadmissible.

There follow Costa Rica's Submissions.

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<sup>7</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Counter-claims, Order of 17 December 1997, I.C.J. Reports 1997, p. 258, para. 34.*

<sup>8</sup> *Oil Platforms (Islamic Republic of Iran v. United States of America), Counter-Claim, Order of 10 March 1998, I.C.J. Reports 1998, p. 205, para. 38.*

<sup>9</sup> *Land and Maritime Boundary between Cameroon and Nigeria, Order of 30 June 1999, I.C.J. Reports 1999, pp. 985-986.*

<sup>10</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Order of 29 November 2001, I.C.J. Reports 2001, pp. 678-680, paras. 38-43.*

<sup>11</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Counter-claims, Order of 17 December 1997, I.C.J. Reports 1997, p. 258, para. 35; Oil Platforms (Islamic Republic of Iran v. United States of America), Counter-Claim, Order of 10 March 1998, I.C.J. Reports 1998, p. 205, para. 38; Land and Maritime Boundary between Cameroon and Nigeria, Order of 30 June 1999, I.C.J. Reports 1999, p. 985.*

<sup>12</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Counter-claims, Order of 17 December 1997, I.C.J. Reports 1997, p. 258, para. 35.*

## II. THE FIRST COUNTER-CLAIM (CONSTRUCTION OF A ROAD) IS INADMISSIBLE

2.1 The first counter-claim relates to the construction of a road by Costa Rica along the San Juan River. It is presented by Nicaragua in the following way:

The impairment and possible destruction of navigation on the San Juan River caused by the construction of a road next to its right bank by Costa Rica in violation of its obligations stemming from the 1858 Treaty of Limits and various treaty or customary rules relating to the protection of the environment and good neighbourliness ...<sup>13</sup>

2.2 In the submissions, judgment on the counter-claim is requested in the following terms:

... Nicaragua requests a declaration by the Court that ...

(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 ...<sup>14</sup>

2.3 The first counter-claim is inadmissible on the following grounds:

- (1) The counter-claim is identical to the request made by Nicaragua in its application instituting proceedings in a separate case. It is contrary to general principle for a state to pursue the same claim through two procedural avenues at any one time: this principle is reflected in Article IV of the Pact of Bogotá which expressly prohibits such proceedings.
- (2) There is no direct connection (*'connexité directe'*), as required by Article 80, paragraph 1, of the Rules of the Court, either:
  - (a) in law; or
  - (b) in fact.
- (3) Nicaragua is effectively seeking the joinder of the two different cases currently pending between both Parties before the Court. But joinder here is inappropriate.

2.4 An initial obstacle to the Court's consideration of Nicaragua's first counter-claim of 6 August 2012 is that this counter-claim involves the same claim that Nicaragua is pursuing in

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<sup>13</sup> NCM, para. 9.7.

<sup>14</sup> NCM, p. 456.

its Application instituting proceedings of 21 December 2011. As a result, it is not necessary to examine whether this counter-claim meets the requirements of jurisdiction and direct connection as set out in Article 80, paragraph 1 of the Rules of Court. For the sake of completeness, however, it is demonstrated that even if Nicaragua's first counter-claim had not been previously submitted as a claim in separate proceedings before this Court, it should nevertheless be rejected as not being a genuine counter-claim and not meeting the requirement of direct connection.

**A. Nicaragua cannot pursue the same claim against Costa Rica through two different actions before the Court**

2.5 The first counter-claim is identical in terms to, or plainly included in and covered by, the claim raised in its Application instituting proceedings in the case concerning *Construction of a Road in Costa Rica along the San Juan River*. The facts alleged to sustain the claims in this latter case are explained in the Application in the following terms:

This Application is Nicaragua's response to Costa Rica's unilateral actions that threaten to destroy the San Juan de Nicaragua River and its fragile ecosystem, including the adjacent biosphere reserves and internationally-protected wetlands that depend upon the clean and uninterrupted flow of the River for their survival.

The most immediate threat to the River and its environment is posed by Costa Rica's construction of a road running parallel and in extremely close proximity to the southern bank of the River, and extending for a distance of at least 120 kilometres, from Los Chiles in the west to Delta in the east.<sup>15</sup>

2.6 Nicaragua's *petitum* in its Application instituting new proceedings against Costa Rica requests the Court to adjudge and declare that Costa Rica has breached:

- a) Its obligation not to violate Nicaragua's territorial integrity as delimited by the 1858 Treaty of Limits, the Cleveland Award of 1888 and the five Awards of the Umpire EP Alexander of 30 September 1897, 22 March 1898, 26 July 1899 and 10 March 1900.
- b) Its obligation not to damage Nicaraguan territory;
- c) Its obligations under general international law and the relevant environmental conventions, including the Ramsar Convention on Wetlands, the Agreement over the Border Protected Areas between Nicaragua and Costa Rica (International System of Protected Areas for Peace [SI-A-PAZ] Agreement), the Convention on Biological Diversity and the Convention for the Conservation of the Biodiversity and Protection of the Main Wild Life Sites in Central America.

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<sup>15</sup> *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Application instituting proceedings, 21 December 2011, paras. 4-5.

...

Finally, Nicaragua requests the Court to adjudge and declare that Costa Rica must:

- a) Cease all the constructions underway that affect or may affect the rights of Nicaragua.
- b) Produce and present to Nicaragua adequate environmental impact assessment with all the details of the works.<sup>16</sup>

2.7 It is apparent that Nicaragua is pursuing the same claim both in the new case that it initiated before the Court on 21 December 2011 and in the first counter-claim that it raised in its Counter-Memorial of 6 August 2012 in the present case. Indeed, the relevant paragraphs of NCM that address the first counter-claim contain a wealth of quotations taken from Nicaragua's Application in the *Construction of a Road* case, references to the same facts and documents, and identical claims alleging breaches by Costa Rica, particularly the 'lack of blueprints and Environmental Impact Assessment', 'lack of consultation' and 'damages caused to Nicaraguan territory and the environment'.<sup>17</sup>

2.8 It is a basic principle that two legal actions cannot be pursued simultaneously in the same forum against the same party for the same cause of action. This principle is expressed in the maxim *ne bis in idem*, although it is usually invoked in the field of criminal law. A broader expression of the principle, generally applicable, is *electa una via, non datur recursus ad alteram*. It cannot be open to a party to request the Court to condemn the same State twice, on the basis of the same facts and for the same alleged breaches.

2.9 Nicaragua has accepted the principle of *electa una via* in the Pact of Bogotá. Article IV of the Pact of Bogotá contains a clear expression of that principle,<sup>18</sup> stating that:

Once any pacific procedure has been initiated, whether by agreement between the parties *or* in fulfillment of the present Treaty *or* a previous pact, no other procedure may be commenced until that procedure is concluded'.<sup>19</sup>

The principle is expressed in entirely general terms. It does not only apply to disputes under the Pact of Bogotá but to '*any* pacific procedure' (emphasis added), whether initiated 'by agreement between the parties or in fulfillment of the present Treaty or a previous pact'. It thus covers proceedings commenced under the Optional Clause as well as under the Pact of Bogotá.

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<sup>16</sup> *Ibid.*, paras. 49-51.

<sup>17</sup> NCM, paras. 9.8-9.33.

<sup>18</sup> Eduardo Valencia-Ospina, 'Bogotá Pact (1948)', in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2012), vol. I, p. 974, para. 10.

<sup>19</sup> American Treaty on Pacific Settlement (Pact of Bogotá), 30 April 1948, 30 UNTS 83, Article IV (emphasis added).

2.10 Nicaragua has clearly initiated a pacific procedure by lodging its Application in the *Construction of a Road* case, and that procedure is not yet concluded. As the Court stated in *Nicaragua v. Honduras*:

For the purposes of Article IV of the Pact, no formal act is necessary before a pacific procedure can be said to be ‘concluded’. The procedure in question does not have to have failed definitively before a new procedure can be commenced. It is sufficient if, at the date on which a new procedure is commenced, the initial procedure has come to a standstill in such circumstances that there appears to be no prospect of its being continued or resumed.<sup>20</sup>

It cannot be said that there is ‘no prospect’ of the *Construction of a Road* case being continued. It is proceeding in accordance with the lengthy timetable chosen by Nicaragua.

2.11 Nicaragua filed its Application instituting proceedings in the *Construction of a Road* case on 21 December 2011, when it had in hand the Memorial filed by Costa Rica in the *Certain Activities* case on 5 December 2011. Thus, in full knowledge of Costa Rica’s position in the present case, Nicaragua chose to initiate fresh proceedings before the Court concerning the construction of a road by Costa Rica. Nicaragua had the choice either to institute new proceedings, or, insofar as that counter-claim meets the criteria set out in article 80 of the Rules of Court, to address the matter by submitting a counter-claim in the present case. Nicaragua chose to pursue this claim in a separate case. It cannot now also pursue the same claim by way of a counter-claim in the present case.

2.12 For the above reasons, Nicaragua’s first counter-claim should be dismissed as inadmissible *in limine*.

### **B. The first ‘counter-claim’ has no direct connection to the present case**

2.13 Nicaragua’s first ‘counter-claim’ concerning the construction of a road in Costa Rica along the San Juan river fails to meet the condition of direct connection, as required by Article 80, paragraph 1, of the Rules of Court and developed in the case law of the Court. There is a lack of direct connection both in fact and time, as well as in law and aims.

#### **(a) There is no factual connection**

2.14 As noted above, in order to fulfil the requirement of a direct factual connection, a counter-claim must satisfy the following cumulative conditions: (1) it must relate to facts of the same character; (2) it must form part of the same factual complex; (3) it must have arisen in or in relation to the same territory; and, (4) it must have arisen during the same period of

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<sup>20</sup> *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988, p. 100, para. 80.*

time. None of these conditions are met by the first Nicaraguan ‘counter-claim’.

2.15 Nicaragua explains the purported factual direct connection in the following terms:

The road building project is directly connected to the main Costa Rican claim directed against the Nicaraguan dredging programme:

*First*, like the dredging programme, the construction of the road is undertaken in the border area;

*Second*, the road construction project appears to be an answer by Costa Rican authorities to the Nicaraguan dredging programme; and

*Third*, as demonstrated above, erosion, sediment-laden runoff, and the dumping of trees, debris, and sediments into the San Juan as a result of the road construction project makes the dredging of the river even more necessary and, by the same token, aggravates the present dispute.<sup>21</sup>

2.16 None of these arguments is sustainable, as is explained in the following subsections.

(i) *Relevant facts are different in character*

2.17 In the process of drafting the article of the Rules of the Permanent Court of International Justice related to counter-claims, Judge Fromageot, discussing the notion of ‘direct connection’, advanced the following definition of counter-claims: ‘a claim directly dependent on the facts of the main action’.<sup>22</sup> The main facts of the principal case brought by Costa Rica relate to the invasion and occupation of the northern part of the Costa Rican territory of Isla Portillos and the construction of an artificial canal by Nicaragua on that territory. The case also relates to actions accomplished or planned by Nicaragua concerning dredging operations along the eastern part of the San Juan river. By simple definition, the construction of a road by Costa Rica on Costa Rican territory is a fact of a completely different nature to that of the occupation and claim over foreign territory and the attempted construction of a canal thereon. Likewise the dredging of a river over which the other side enjoys navigational and other rights and has a right to information and consultation with regard to works planned to be carried out on the river.

(ii) *Relevant facts occurred at a different place and time*

2.18 An initial point of factual clarification is necessary. The road constructed by Costa Rica only goes as far as the point where the Colorado branches off from the San Juan river

<sup>21</sup> NCM, para. 9.75 (footnotes omitted).

<sup>22</sup> Acts and Documents Concerning the Organization of the Court, Third Addendum to No. 2, Elaboration of the Rules of Court of March 11<sup>th</sup>, 1936, Thirty-second Session, Fourteenth Meeting (May 29<sup>th</sup>, 1934), *P.C.I.J. Series D*, p. 112.

(Delta Costa Rica), some 25 kilometres before Isla Portillos begins (See **Sketch Map 1**). In other words, the road stops at the right bank of the Colorado River. It does not go to Isla Portillos or to the *caño* or approach the area which Nicaraguan personnel have occupied. Nor has it any effect whatever on navigation on the San Juan.

2.19 The facts Nicaragua alleges to justify both its Application in the *Construction of a Road* case and its first counter-claim in the present case are not part of the same factual complex that led Costa Rica to institute the present proceedings, namely facts relating to military and civilian activities undertaken by one State on the territory of another, work related to the construction of an artificial channel, including the felling of primary forest and the continued presence of personnel in an area now claimed by both sides, and planned dredging activities. The facts that Nicaragua invokes in its counter-claim occurred one year after Costa Rica filed its application. This first ‘counter-claim’ drastically differs from the fourth one, in which there is an obvious direct connection with the facts of the case. Even if it is legally groundless on the merits, the latter Nicaraguan counter-claim relates to purported breaches by Costa Rica of the provisional measures indicated by the Court in its Order of 8 March 2011. The aim of this fourth counter-claim is twofold: to reject the corresponding Costa Rican claim, and to advance its own claim with respect to similar facts; the sending of personnel to the same area (the northern part of Isla Portillos) during the same period of time as the breaches invoked by Costa Rica following the Order of the Court indicating provisional measures. But what is present in Nicaragua’s fourth counter-claim (an activity forming part of the same factual complex) is entirely absent from its first counter-claim.

2.20 In order to invoke a factual direct connection, Nicaragua argues that ‘the road construction project appears to be an answer by Costa Rican authorities to the Nicaraguan dredging programme’ and the purported ‘erosion, sediment-laden runoff, and the dumping of trees, debris, and sediments into the San Juan as a result of the road construction project makes the dredging of the river even more necessary and, by the same token, aggravates the present dispute’.<sup>23</sup> These flawed and unsubstantiated arguments fail for the following reasons. First, Costa Rica’s reason for building the road is unrelated to the dredging program. The Respondent has not advanced any evidence in support of its assertion. 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. Furthermore, the road was built to facilitate the mobilization of Costa Rican police and riparians in case of armed conflict and due to the increased restrictions imposed by Nicaragua on navigation on the San Juan river; it is not a response or a measure against the dredging program.

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<sup>23</sup> NCM, para. 9.75.

2.21 Second, the fact that Nicaragua is carrying out a dredging programme on the San Juan river is not the basis of any of Costa Rica's claims in this case. As Costa Rica has stated, it does not oppose the dredging of the river as such.<sup>24</sup> What Costa Rica has invoked was the breach by Nicaragua of the relevant requirements of the Treaty of Limits and the Cleveland Award with regard to river works that may affect Costa Rica.<sup>25</sup> The relevant facts are not the dredging programme as such, but the acts pleaded by Costa Rica as breaches of these requirements.

2.22 As to the territorial connection, it is not enough, as Nicaragua does, to state that facts occurred in the 'border area'. The situation is very different from that of the *Cameroon v. Nigeria* case. The fact that the Court stated that the facts invoked to sustain the counter-claims 'are alleged to have occurred along the frontier between the two States'<sup>26</sup> in no way can be compared with the situation of the first Nicaraguan counter-claim. In the *Cameroon v. Nigeria* case what was at stake was *a boundary dispute existing all along the frontier* between the two States, coupled with a request for reparation by the Applicant. In the instant case, on the contrary, the facts invoked in the Nicaraguan Application initiating separate proceedings, as well as those invoked by way of the first counter-claim to the present case, relate to acts taking place in different areas of the frontier region (see **Sketch Map 1**). 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. As can be seen in Sketch Map 1, the dredging operations relevant to the present case, as indicated in Nicaragua's Counter-Memorial,<sup>27</sup> are taking place at an area that extends from the junction of the Colorado and the San Juan rivers to the mouth of the latter river. The road being constructed by Costa Rica starts further West in Los Chiles (at a location where the boundary between the two countries does not follow the San Juan river) and stops precisely at the location of Delta Costa Rica, at the point where the Colorado branches off from the San Juan river. The road does not cross the Colorado nor enter the wetland area occupied by Nicaragua (and there are no plans that it should do so). The inescapable consequence is that the facts of the present case, compared with the facts in the new proceedings brought by Nicaragua on December 2011 and repeated here as a counter-claim, occurred in well-defined and clearly different geographic areas.

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<sup>24</sup> *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, 11 January 2011, CR 2011/1, p. 70, paras. 49-50 (Crawford); CRM, para. 5.57.

<sup>25</sup> *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Application instituting proceedings, 18 November 2010, para. 39(e) and (f); CRM, paras. 5.17-5.123.

<sup>26</sup> *Land and Maritime Boundary between Cameroon and Nigeria, Order of 30 June 1999, I.C.J. Reports 1999*, pp. 985-986.

<sup>27</sup> NCM, Figure 5.3, p. 225.

2.23 Thus there is no direct factual connection between Nicaragua's first counter-claim and the facts of the principal case brought by Costa Rica: the relevant facts are entirely different and occurred in different places and at different times.

**(b) The artificiality of Nicaragua's 'direct legal connection'**

2.24 Nicaragua makes no effort to disguise the fact that its first counter-claim mirrors the *Construction of a Road* case. In both proceedings Nicaragua advances the same international agreements that Costa Rica invoked in the present case.<sup>28</sup>

2.25 However, it is not enough artificially to mention the same international instruments on which the Applicant bases its claims to establish a direct legal connection with the claims of that Party. 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;<sup>29</sup> *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.'<sup>30</sup> Costa Rica also invoked other international instruments that are not even invoked by Nicaragua in its new claim, either in its Application in the *Construction of a Road* case or in its Counter-Memorial in the present one. These include notably the Charter of the United Nations and the Charter of the Organization of American States.<sup>31</sup>

2.26 The new claim brought twice by Nicaragua does not concern the Treaty of Limits of 1858, which, in the words of Nicaragua, constitutes the *lex specialis*<sup>32</sup> and 'is the main international instrument applicable in the present case'<sup>33</sup>. Even 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. As Nicaragua recognises, the road is being constructed entirely on Costa Rican territory. Even if its construction could cause harm to Nicaraguan territory (*quod non*), neither the existence of the boundary as depicted by

<sup>28</sup> *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Application instituting proceedings, 21 December 2011, paras. 47-48; NCM, para. 9.76.

<sup>29</sup> *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Application instituting proceedings, 18 November 2010, para. 39(a); CRM, Chapter IV.

<sup>30</sup> Cleveland Award, CRM, Annex 7.

<sup>31</sup> CRM, para. 1.1.

<sup>32</sup> NCM, paras. 3.51, 4.36, 5.173.

<sup>33</sup> NCM, para. 9.79.

Article II of the Treaty of Limits nor any other right that Nicaragua could claim on the basis of that Treaty, let alone the Cleveland Award or the Alexander Awards, are at stake. It is true that the Court cannot at this stage, facing a claim of this nature, determine whether it is sustainable on the merits. But what the Court can determine at this incidental phase is that there is no direct legal connection between a claim of 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 on the one hand, and the claim of an alleged violation of the same treaty by the construction of a road by Costa Rica on Costa Rican territory, on the other hand.

2.27 Furthermore, Nicaragua itself recognises that neither the Treaty of Limits nor any other specific treaty governs its new claim. While invoking the alleged lack of blueprints and environmental impact assessment for the construction of the road in Costa Rica, NCM states: ‘Absent a treaty constituting a *lex specialis*, general international law applies’.<sup>34</sup>

2.28 Finally, the construction of the road cannot be considered as a measure aggravating the dispute before the Court, putting to one side that it is an activity lawfully undertaken by Costa Rica on its own territory, for the simple reason that this construction is considered by Nicaragua to constitute a separate dispute in a separate case.

2.29 The considerations above also demonstrate that the Parties are pursuing different legal aims through their claims. Nicaragua’s purported first ‘counter-claim’ lacks both a direct factual and legal connection with the claims in the present case.

### **C. Joinder of the cases is not appropriate**

2.30 Conscious that it cannot bring the same claim twice, Nicaragua is in effect seeking the joinder of the two cases. In Nicaragua’s own words:

Nicaragua considers that with the filing of its Counter Claims in the present case, including its claim based on the harm caused to the San Juan de Nicaragua River caused by the construction of this road and particularly, on its navigability, a discussion of the joinder of the cases becomes more opportune. This is a question that will have to be decided by the Court.<sup>35</sup>

2.31 In the present circumstances, it would be neither timely nor equitable either to admit this ‘counter-claim’ or to join the two cases. On the contrary, it would run against the sound administration of justice to do so.

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<sup>34</sup> NCM, para. 9.14.

<sup>35</sup> NCM, para. 1.27.

2.32 The two cases (*Certain Activities carried out by Nicaragua in the Border Area* and *Construction of a Road in Costa Rica along the San Juan River*) relate to different subject-matters. The first case essentially concerns the exercise of territorial sovereignty. Until this case is resolved by the Court, Costa Rica is prevented from exercising sovereignty over part of its territory. There is urgency demanding the swift determination of this dispute.

2.33 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 determination of the other. Finally, the composition of the Court is different in the two cases.

2.34 For these reasons, to join the two different cases would constitute a serious prejudice to the right of Costa Rica to seek and obtain a decision from the Court with regard to the case it initiated in November 2010, the written phase of which is (unless the counterclaims are allowed) in practice closed.

#### **D. Conclusion**

2.35 To sum up, the first ‘counter-claim’ by Nicaragua must be declared inadmissible because:

- (1) It is in contradiction with the principle *electa una via*, as articulated in Article IV of the Pact of Bogotá, since it is identical to the claims raised by Nicaragua in a separate case;
- (2) It does not meet the requirement of direct connection, in fact, in space, in time, in law and in the aims that it pursues.

### **III. THE COURT LACKS JURISDICTION OVER THE SECOND AND THIRD COUNTER-CLAIMS**

3.1 The first test of admissibility necessarily requires the Court to determine if it has jurisdiction to ascertain the merits of a counter-claim. In its Counter-Memorial, Nicaragua stated that the Court’s jurisdiction to admit its counter-claims is based on Article XXXI of the American Treaty on Pacific Settlement signed in Bogotá on 30 April 1948 (the Pact of

Bogotá)<sup>36</sup> and on the Declaration of Acceptance made by both parties pursuant to Article 36 (2) of the Statute of the Court.<sup>37</sup>

3.2 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.

3.3 Regarding Article 36 (2) of the Statute of the Court, it is recalled that on 23 October 2001 Nicaragua submitted to the Secretary-General of the United Nations a reservation to its declaration of acceptance of the Court's Jurisdiction in the following terms:

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.<sup>38</sup>

3.4 While Nicaragua may accept the jurisdiction of the Court as a respondent on a case by case basis, Nicaragua is barred from submitting claims against another party relying on treaties or arbitral awards signed and ratified or made prior to 31 December 1901 whilst its reservation remains in force. The effect of Nicaragua's reservation is twofold: it applies equally to itself as it does to any other party to the Statute of the Court. Costa Rica can, and it does hereby, invoke the reservation made by Nicaragua by way of reciprocity. As the Court stated, 'Reciprocity in the case of Declarations accepting the compulsory jurisdiction of the Court enables a Party to invoke a reservation to that acceptance which it has not expressed in its own Declaration but which the other Party has expressed in its Declaration... Reciprocity enables the State which has made the wider acceptance of the jurisdiction of the Court to rely upon the reservations to the acceptance laid down by the other Party'.<sup>39</sup>

3.5 The result is Nicaragua's inability to request adjudication by the Court on matters that are covered by its own reservation to the Court's jurisdiction.

3.6 In relation to the Pact of Bogotá, a similar temporal limitation to the Court's jurisdiction is contained in Article VI, which reads:

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<sup>36</sup> NCM, para. 9.4.

<sup>37</sup> NCM, para. 9.5.

<sup>38</sup> Nicaragua's reservation to the Jurisdiction of the International Court of Justice, available at: <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3&code=NI>.

<sup>39</sup> *Interhandel Case (Switzerland v. United States of America)*, Judgment of 21 March 1959, I.C.J. Reports 1959, p. 23.

ARTICLE VI: The aforesaid procedures, furthermore, may not be applied to matters already settled by arrangement between the parties, or by arbitral award or by decision of an international court, or which are governed by agreements or treaties in force on the date of the conclusion of the present Treaty.<sup>40</sup>

3.7 The procedures to which Article VI refers include the Judicial Procedure contained in Chapter IV of the Pact of Bogotá. Therefore, in accordance with the Pact of Bogotá, any matter already settled by arrangement, by arbitral award or judgment of an international court, or governed by treaties in force before 30 April 1948 excludes recourse to judicial procedure, in this case, recourse to the International Court of Justice.

3.8 Consequently, by virtue of both Nicaragua's own exclusion from the Court's jurisdiction of 'any matter or claim based on interpretations or treaties or arbitral awards that were signed and ratified or made, respectively, prior to 31 December 1901', as well as by the effect of Article VI of the Pact of Bogotá, which excludes 'matters already settled by arrangement between the parties, or by arbitral award or by decision of an international court, or which are governed by agreements or treaties in force on the date of the conclusion of the present Treaty' (30 April 1948), the second and third counter-claims do not fall within the Court's jurisdiction.

3.9 In relation to the second counter-claim, that is, the situation of the Bay of San Juan del Norte and its shared sovereignty by both Costa Rica and Nicaragua, this is a matter that has been settled by article IV of the 15 April 1858 Treaty of Limits, which reads as follows:

The Bay of San Juan del Norte, as well as the Salinas Bay, shall be common to both Republics, and, therefore, both the advantages of their use and the obligation to contribute to their defence shall also be common ...

3.10 Neither the 1888 Cleveland Award nor the Alexander Awards (1897-1900) decided the rights of the parties regarding the Bay or in any way interpreted or limited the right of the parties to the Bay. Thus, the shared ownership of the Bay is a matter which is exclusively governed by article IV of the 1858 Treaty of Limits.

3.11 Article VI of the Pact of Bogotá determines that the procedures set out in the Pact, including the Judicial Procedure, cannot apply to matters that are governed by agreements or treaties in force on the date of the conclusion of the Pact. Accordingly Nicaragua is barred from submitting its second counter-claim regarding the Bay of San Juan del Norte as a result of the temporal limitation contained in the Pact of Bogotá. The 1858 Treaty of Limits was in force for approximately 90 years before the Pact of Bogotá was concluded.

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<sup>40</sup> American Treaty on Pacific Settlement (Pact of Bogotá), 30 April 1948, 30 UNTS 83, Article VI.

3.12 Even if the 1888 Cleveland Award and/or the Alexander Awards had contained specific provisions regarding the legal situation of the Bay of San Juan del Norte, the same temporal limitation established by the Pact of Bogotá applies to both awards. In fact, however, none of these instruments refer to issues regarding the common ownership of the Bay of San Juan del Norte.

3.13 This matter would also not fall within the Court's jurisdiction by virtue of Nicaragua's reservation to its declaration of acceptance of the Court's jurisdiction based on Article 36 (2) of the Statute of the Court. Evidently, the 1858 Treaty of Limits was concluded prior to 31 December 1901 (the date stipulated in Nicaragua's reservation) and, therefore, the Court does not have jurisdiction to hear matters contained in said instrument relied upon Nicaragua, or any other instrument and award concluded or made prior to that date.

3.14 The third counter-claim, relating to the purported right of Nicaraguan vessels to access the ocean via the Colorado River, faces similar difficulties to those discussed above. Nicaragua attempts to justify the admissibility of this counter-claim on the argument that the 1858 Treaty of Limits governs the subject matter of the claim.<sup>41</sup> Nicaragua quotes Article V of the 1858 Treaty in support of this claim:

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.<sup>42</sup>

3.15 Nicaragua bases the Court's jurisdiction to entertain this counter-claim on the 1858 Treaty of Limits. However, as has been observed, Nicaragua's reservation to its declaration of acceptance of the Court's Jurisdiction based on Article 36 (2) of the Statute of the Court, on the one hand, and the temporal effect of Article VI of the Pact of Bogotá, on the other hand, mean that Nicaragua's third counter-claim does not fall within the scope of the Court's jurisdiction. The same conclusion concerning lack of jurisdiction is reached even if it was presumed that 1888 Cleveland Award addressed the issue raised by Nicaragua in its third counter-claim.

3.16 Consequently, Nicaragua's second and third counter-claims fail to meet the jurisdictional requirements set out in Article 80 of the Rules of Court.

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<sup>41</sup> See NCM, para. 9.43.

<sup>42</sup> *Ibid.*

#### IV. THE SECOND COUNTER-CLAIM (BAY OF SAN JUAN DEL NORTE) IS INADMISSIBLE

4.1 Nicaragua seeks to bring a counter-claim alleging that the Bay of San Juan del Norte no longer exists.<sup>43</sup> This counter-claim is unrelated in fact and in law to the claims made in Costa Rica's application. In particular, in the *Certain Activities* case Costa Rica makes no claim to the Bay and indeed does not refer to the Bay in the operative part of its submissions. On this basis, Nicaragua cannot show that its fresh claim to exclusive ownership of the Bay bears any relation to Costa Rica's principal claim.

##### A. Lack of factual connection

4.2 Nicaragua's second counter-claim and Costa Rica's claims do not form part of the same *factual complex*.

4.3 First, they concern geographically distinct areas. Costa Rica's claims are concerned with Isla Portillos, located on the eastern side of the San Juan River,<sup>44</sup> and with a limited section of the River; Costa Rica's claim concerning the breach of its sovereignty relates to Nicaragua's actions in Isla Portillos; Costa Rica's claim concerning the breach of the environmental protection regime relates to Nicaragua's actions in Isla Portillos. It also concerns the dredging program, with respect to which Nicaragua failed to consult with Costa Rica. In contrast, Nicaragua's second counter-claim relates to the Bay of San Juan del Norte, located on the western side of the San Juan River.<sup>45</sup> It is not correct to say, as Nicaragua does, that Costa Rica's case concerns the 'question of sovereignty over territory in the *general area* of the mouth of the San Juan River'.<sup>46</sup> The statement of the Court relied on by Nicaragua, that 'the rights at issue ... derive from the sovereignty claimed by the Parties over the same territory',<sup>47</sup> does not relate to the Bay of San Juan del Norte. The statement was made by the Court in its provisional measures order and it clearly relates to the northern part of Isla Portillos.<sup>48</sup>

4.4 Secondly, Nicaragua's second counter-claim and Costa Rica's claims are not temporally related. Costa Rica's claims concern events which occurred from 2010. In contrast, Nicaragua's second counter-claim concerns events which it claims occurred in the

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<sup>43</sup> NCM, para. 1.29.

<sup>44</sup> As shown, e.g., in Sketch Map 1.3: CRM, p. 18.

<sup>45</sup> As shown, e.g., in Sketch Map 1.3: CRM, p. 18 (labelled 'Bahía San Juan del Norte').

<sup>46</sup> NCM, para. 1.29 (emphasis added).

<sup>47</sup> NCM, para. 9.80, citing *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Request for the Indication of Provisional Measures, Order of 8 March 2011, para. 56.

<sup>48</sup> *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Request for the Indication of Provisional Measures, Order of 8 March 2011, paras. 55-56.

19<sup>th</sup> century. Nicaragua alleges that the Bay of San Juan del Norte had become a lagoon before the beginning of the 20<sup>th</sup> century.<sup>49</sup> Therefore, this counter-claim is inadmissible.

### **B. Lack of legal connection**

4.5 Despite Nicaragua's attempt to link its second counter-claim to Costa Rica's case on the basis that the latter 'involves a question of sovereignty',<sup>50</sup> the two are not legally related.

4.6 First, Costa Rica's claim concerning breach of sovereignty and Nicaragua's counter-claim do not concern reciprocal obligations, nor do they pursue the same legal aim. Costa Rica's claim is that Nicaragua has *breached* its sovereignty by actions it carried out in Isla Portillos; Nicaragua's counter-claim is that it *has* exclusive sovereignty over an entirely separate area on the basis that that area has become sedimented.

4.7 Secondly, the applicable law of Costa Rica's claim and Nicaragua's counter-claim are different. Nicaragua's counter-claim relates primarily to the interpretation of Article IV of the 1858 Treaty of Limits,<sup>51</sup> as it believes that Article IV not longer governs the shared community over the Bay, interpreting that the Bay belongs to Nicaragua because of sedimentation. Costa Rica's claim does not deal with the interpretation of Article IV at all. Costa Rica claims that Nicaragua has breached its sovereignty over the territory appertaining to it as determined by Article II of the Treaty of Limits, and as interpreted by the 1888 Cleveland Award and the Alexander Awards, only and inasmuch as the territory of Isla Portillos is concerned.<sup>52</sup>

4.8 Therefore, as there is no direct factual or direct legal connection between the claims, the second Nicaraguan counter-claim is inadmissible.

### **V. THE THIRD COUNTER-CLAIM (TRANSIT VIA THE COLORADO RIVER) IS INADMISSIBLE**

5.1 Even if the Court were to find that it does have jurisdiction to entertain this counter-claim,<sup>53</sup> Nicaragua has failed to show that it meets the other criteria for its admissibility set out in Article 80 of the Rules of Court. At the outset, the counter-claim is not a valid counter-claim to a connected Costa Rican claim.

5.2 The third Nicaraguan counter-claim is not 'directly connected' with the subject matter of Costa Rica's claims. Indeed it bears no relation whatever to any of the submissions

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<sup>49</sup> NCM, paras. 6.147-6.151.

<sup>50</sup> NCM, para. 1.29.

<sup>51</sup> NCM, para. 6.141.

<sup>52</sup> CRM, Chapter IV.

<sup>53</sup> See *supra* Section III.

presented by Costa Rica in its Application and Memorial. In other words, Nicaragua has not identified the ‘direct connection’ between the purported ‘right of Nicaraguan vessels to reach the ocean via the Colorado River’, and any corresponding claim by Costa Rica. Obviously such a connection cannot be found because it is not, not even indirectly, a subject matter of the dispute at hand. In fact, Nicaragua cannot refer to a single paragraph in Costa Rica’s Memorial that bears any connection to an alleged Nicaraguan right of navigation on the Colorado River.

5.3 The direct connection outlined in article 80 of the Rules of Court, as the Court has observed, means that the counter-claim must ‘*pursue the same legal aim*’.<sup>54</sup> The legal aim in this case is a determination of the legality or not of the activities carried out by Nicaragua in the border zone, which Costa Rica claims amount to serious breaches of Costa Rica’s right to territorial sovereignty and integrity, and which have also resulted in breaches of certain obligations under the Treaty of Limits of 1858 and its interpretation by the Cleveland Award as well as rules related to the protection of the environment.<sup>55</sup> This case does not deal at all with, and is not even remotely related to, navigational rights on the Colorado River.

#### **A. Lack of factual connection**

5.4 The facts presented by Nicaragua in support of its third counter-claim do not correspond to the facts relating to any of the claims made by Costa Rica, but are entirely independent. They in no way correspond to the same *factual complex*.

5.5 To support its third counter-claim, Nicaragua argues the following:

- (1) ‘[A]s a result of Costa Rica’s activities, Nicaraguan boats and ships cannot navigate on the San Juan River to the sea because the outlet of the San Juan to the sea is blocked for much of the year, and is, in any case, navigable only by small craft.’<sup>56</sup>
- (2) ‘In spite of this, Costa Rica opposes Nicaragua’s dredging the lower reach of the San Juan.’<sup>57</sup>
- (3) ‘Moreover, Costa Rica has put in place physical obstacles across the entrance to the Colorado to prevent Nicaraguan vessels from reaching the sea by this route or navigating on the river at all, and enforces this blockade with armed patrol boats.’<sup>58</sup>

5.6 These statements of fact made by Nicaragua are either untrue or irrelevant. But true

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<sup>54</sup> See NCM, para. 9.73.

<sup>55</sup> See CRM, para. 1.6.

<sup>56</sup> NCM, para. 9.42.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

or not, they bear no connection to the subject matter of Costa Rica's claims. The case *Dispute Concerning Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, as its name indicates, deals with activities carried out in the border area, i.e. the occupation of Costa Rican territory, the construction of an artificial canal and the felling of primary forest therein, and the planning and partial execution of dredging works that could endanger Costa Rican territory, without consultation with Costa Rica. The above-mentioned 'facts' presented by Nicaragua, even if they were true (*quod non*), would not have any direct connection with the facts of this case. They derive from its desire to fabricate a *factual complex* intended to distort and complicate the case actually brought.<sup>59</sup>

5.7 Even if Nicaragua's statement of the facts was plausible, they would not have any relation to the substance of the case or to Costa Rica's claims.

5.8 Even if the characterization of the 'scope of the dispute'<sup>60</sup> presented in Nicaragua's Counter-Memorial were to be accepted at face value – *quod non* – Nicaragua did not attempt to portray the scope of the dispute as one dealing with facts related to the Colorado River, or navigational rights on that River, or purported activities of Costa Rica on that River. There is no connection, not even an indirect connection, between the facts of the dispute and the facts presented by Nicaragua to support the admissibility of its third counter-claim. Consequently, Nicaragua's third counter-claim must be declared inadmissible.

## **B. Lack of legal connection**

5.9 Nicaragua also fails to establish a direct connection between the applicable law of the case and the law it invokes to support its third counter-claim.

5.10 Nicaragua states that

[t]he third Nicaraguan claim relates to its right of navigation on the Colorado River, whilst it does not have the possibility of doing so down the San Juan River proper. This question is based squarely on the 1858 Treaty. Furthermore, the issue is inherently tied to the imperative need (and exclusive right of Nicaragua) to dredge the San Juan River on the basis of the stipulations of the 1858 Treaty. Costa Rica is precisely contesting Nicaragua's rights to dredge the River and at the same time denying Nicaragua's use of the waters of the Colorado for accessing the Atlantic Ocean (Caribbean Sea).<sup>61</sup>

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<sup>59</sup> Although – if the counterclaims were admissible – the proof of facts alleged in their support would be a matter for the merits, Nicaragua can hardly allege itself into admissibility by making statements not only unfounded but in some cases on their face incredible.

<sup>60</sup> NCM, para. 1.9.

<sup>61</sup> NCM, para. 9.82.

5.11 It should be observed that Costa Rica cannot be required to deny a fabricated right, or to make a claim about one which was formally introduced by Nicaragua in its Counter-Memorial for the first time.

5.12 According to Nicaragua, it allegedly has navigational rights on the Colorado River on the basis of the 1858 Treaty<sup>62</sup>. This assertion is entirely baseless. There is nothing in the Treaty to support such a claim. It is equally groundless to assert that its dredging activities on the San Juan constitute a valid reason to justify asking for navigational rights on the Colorado for the first time.

5.13 There is nothing in the 1858 Treaty that can be construed as giving Nicaragua navigational rights on any Costa Rican river, including the Colorado. On the contrary, Article V of the Treaty, upon which Nicaragua bases its novel claim, does not grant navigational rights to it at all. It does not even refer to navigation on the Colorado. Article V reads 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.

5.14 This article clearly stipulated the temporary shared use and possession of Punta Castilla, and temporarily designated the Colorado river as a boundary, only and inasmuch as Nicaragua did not recover full possession over the *Port* of San Juan del Norte since that portion of territory was at that time under the control of the British Crown. Article V of the Treaty of Limits established clearly that the Colorado River would serve as boundary only as long as that situation lasted. The community over Punta Castilla ended when Nicaragua recovered the full possession of the Port of San Juan del Norte in 1860. At that time, the Colorado River ceased to be the boundary, and the boundary became the line agreed to in Article II of the 1858 Treaty of Limits, i.e. the right margin of the San Juan River.

5.15 In other words, when the possession over the Port of San Juan del Norte reverted to Nicaragua – by virtue of the ‘Treaty Between Great Britain and Nicaragua Relative to the Mosquito Indians and the Rights and Claims of British Subjects’,<sup>63</sup> signed at Managua on 28 January 1860 – Costa Rica’s temporary undertaking (the sharing of Punta Castilla and allowing the Colorado River to serve as the boundary) ended.

5.16 Article V of the 1858 Treaty referred to Nicaragua’s lack of possession of the Port of

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<sup>62</sup> *Ibid.*

<sup>63</sup> 28 January 1860, 121 CTS 317.

San Juan due to its control by another power. To portray this historical fact as a different concept, i.e. a ‘lack of possession’ of the River due to sedimentation of the lower San Juan, falsifies the object and purpose of Article V, which was concerned with ‘possession’ of a Port, not a River, and distorts the meaning of the concept of “possession” itself.

5.17 The 1858 Treaty does not establish navigational rights in favour of Nicaragua on the Colorado, nor does it state that the boundary will be the Colorado in the event that Nicaragua subsequently loses ‘possession’ or use of the Port of San Juan del Norte. Any transitory Nicaraguan rights by virtue of article V were limited by the unique circumstance that barred Nicaragua from exercising full possession of the Port of San Juan del Norte at the time of the conclusion of the Treaty of Limits. Once that temporary circumstance ended and Nicaragua recovered the possession of the Port, as it in fact did, that part of the Treaty was duly fulfilled, and Costa Rica ceased to have an obligation to allow the Colorado to serve as a temporary boundary, much less to recognize Nicaragua’s navigation on the Colorado. It should be said that Nicaragua has never claimed to have that right at any time since 1860.

5.18 It is an uncontroversial fact, as was clearly recalled by both parties and the Court in *Navigational and Related Rights (Costa Rica v. Nicaragua)*, that the boundary between the countries is the Costa Rican bank of the San Juan River in the relevant area.

5.19 Furthermore, Costa Rica has not, at any point in the present case, relied upon Article V of the Treaty of Limits. Costa Rica claims that Nicaragua is in breach of Article II of the Treaty, inasmuch as it has violated the territorial integrity of Costa Rica as set out in Article II, which evidently has no connection with Article V of the Treaty.

5.20 Not only is there no direct connection between the applicable law of the case and the law Nicaragua has invoked to support its third counter-claim, there is no ‘law’ whatsoever to support that counter-claim. In particular there is no connection whatever either in the 1858 Treaty or the Cleveland Award between the question of dredging the San Juan and navigation on the Colorado. Paragraph 6 of the Third Article of the Cleveland Award gives Nicaragua a qualified right to engage in works of improvement on the River. Paragraph 9 of the Third Article of the Award gives Costa Rica the right to “deny to the Republic of Nicaragua the right of deviating the waters of the River San Juan in case such deviation will result 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”. These provisions are unrelated to the question of control over the Colorado, as to which paragraph 7 of the Third Article of the Award is categorical:

The branch of the River San Juan known as the Colorado River must not be considered as the boundary between the Republics of Costa Rica and Nicaragua in any part of its course.

This is unqualified and unconditional.

5.21 In short, as a matter both of treaty law and general international law the two things – sedimentation of the San Juan and rights of navigation on the Colorado – are wholly unrelated. Consequently Nicaragua's third counter-claim must be declared inadmissible.

## **VI. SUBMISSION**

For all these reasons, Costa Rica respectfully requests the Court to determine that Nicaragua's counter-claims 1, 2 and, 3 as presented in its Counter-Memorial, are inadmissible in these proceedings.

Co-Agent of Costa Rica

The Hague

The Netherlands

30 November 2012

