

18 AVRIL 2013

ORDONNANCE

**CERTAINES ACTIVITÉS MENÉES PAR LE NICARAGUA
DANS LA RÉGION FRONTALIÈRE**

(COSTA RICA c. NICARAGUA)

**CONSTRUCTION D'UNE ROUTE AU COSTA RICA
LE LONG DU FLEUVE SAN JUAN**

(NICARAGUA c. COSTA RICA)

DEMANDES RECONVENTIONNELLES

**CERTAIN ACTIVITIES CARRIED OUT BY NICARAGUA
IN THE BORDER AREA**

(COSTA RICA v. NICARAGUA)

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ALONG THE SAN JUAN RIVER**

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COUNTER-CLAIMS

18 APRIL 2013

ORDER

INTERNATIONAL COURT OF JUSTICE

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COUNTER-CLAIMS

ORDER

Present: President TOMKA; Vice-President SEPÚLVEDA-AMOR; Judges OWADA, ABRAHAM, KEITH, BENNOUNA, SKOTNIKOV, CAÑADO TRINDADE, YUSUF, GREENWOOD, XUE, DONOGHUE, GAJA, SEBUTINDE, BHANDARI; Judges ad hoc GUILLAUME, DUGARD; Registrar COUVREUR.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Article 48 of the Statute of the Court and to Article 80 of the Rules of Court,

Makes the following Order:

Whereas:

1. By an Application filed in the Registry of the Court on 18 November 2010, the Government of the Republic of Costa Rica (hereinafter “Costa Rica”) instituted proceedings against the Government of the Republic of Nicaragua (hereinafter “Nicaragua”) in the case concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* (hereinafter referred to as the “*Costa Rica v. Nicaragua* case”) for “the incursion into, occupation of and use by Nicaragua’s army of Costa Rican territory”, contending, in particular, that Nicaragua had “in two separate incidents, occupied the territory of Costa Rica in connection with the construction of a canal across Costa Rican territory . . . and certain related works of dredging on the San Juan River”. Costa Rica alleges breaches by Nicaragua of its obligations towards Costa Rica under a number of treaty instruments and other applicable rules of international law, as well as under certain arbitral and judicial decisions. In this regard, Costa Rica refers to the Charter of the United Nations and the Charter of the Organization of American States; the Treaty of Territorial Limits between Costa Rica and Nicaragua of 15 April 1858 (hereinafter the “1858 Treaty of Limits”), namely, Articles I, II, V and IX; the arbitral award issued by the President of the United States of America, Grover Cleveland, on 22 March 1888 (hereinafter the “Cleveland Award”); the first and second arbitral awards rendered by Edward Porter Alexander dated respectively 30 September 1897 and 20 December 1897 (hereinafter the “Alexander Awards”); the 1971 Convention on Wetlands of International Importance (hereinafter the “Ramsar Convention”); and the Judgment of the Court of 13 July 2009 in the case concerning the *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*.

2. In its Application, Costa Rica invokes as a basis of the jurisdiction of the Court Article XXXI of the American Treaty on Pacific Settlement signed at Bogotá on 30 April 1948 (hereinafter the “Pact of Bogotá”). In addition, Costa Rica seeks to found the jurisdiction of the Court on the declaration it made on 20 February 1973 under Article 36, paragraph 2, of the Statute, as well as on the declaration which Nicaragua made on 24 September 1929 (and amended on 23 October 2001) under Article 36 of the Statute of the Permanent Court of International Justice and which is deemed, pursuant to Article 36, paragraph 5, of the Statute of the present Court, for the period which it still has to run, to be acceptance of the compulsory jurisdiction of this Court.

3. On 18 November 2010, having filed its Application, Costa Rica also submitted a Request for the indication of provisional measures, pursuant to Article 41 of the Statute and Articles 73 to 75 of the Rules of Court.

4. In accordance with Article 40, paragraph 2, of the Statute, the Registrar communicated a signed copy of the Application forthwith to the Government of Nicaragua; and, under paragraph 3 of that Article, all States entitled to appear before the Court were notified of the filing of the Application.

5. Pursuant to the instructions of the Court under Article 43 of the Rules of Court, the Registrar addressed to States parties to the Pact of Bogotá and to the Ramsar Convention the notifications provided for in Article 63, paragraph 1, of the Statute. In accordance with the provisions of Article 69, paragraph 3, of the Rules of Court, the Registrar moreover addressed to the Organization of American States the notification provided for in Article 34, paragraph 3, of the Statute. The Organization of American States indicated that it did not intend to submit any observations in writing under Article 69, paragraph 3, of the Rules of Court.

6. By an Order of 8 March 2011, the Court indicated certain provisional measures to both Parties.

7. By an Order of 5 April 2011, the Court fixed 5 December 2011 and 6 August 2012 as the respective time-limits for the filing of a Memorial by Costa Rica and a Counter-Memorial by Nicaragua. The Memorial and Counter-Memorial were filed within the time-limits thus fixed.

8. By an Application filed in the Registry of the Court on 22 December 2011, Nicaragua instituted proceedings against Costa Rica in the case concerning *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)* (hereinafter referred to as the “*Nicaragua v. Costa Rica* case”). The content of that Application and the procedural history of that case are set out in the Court’s Orders dated 17 April 2013 joining the proceedings in that case with those in the *Costa Rica v. Nicaragua* case.

By a communication dated 17 April 2013, Mr. Simma, who had been chosen by Costa Rica to sit as Judge *ad hoc* in the *Nicaragua v. Costa Rica* case, informed the Court of his decision to resign from his functions, further to the above-mentioned joinder of proceedings.

9. In Chapter 9 of its Counter-Memorial filed in the *Costa Rica v. Nicaragua* case, Nicaragua, making reference to Article 80 of the Rules of Court, submitted four counter-claims.

10. At a meeting held by the President of the Court with the representatives of the Parties on 19 September 2012, the Parties agreed not to request the Court’s authorization to file a reply and a rejoinder in the *Costa Rica v. Nicaragua* case. At the same meeting, and in a letter from its Co-Agent dated 19 September 2012, Costa Rica indicated that it considered the first three counter-claims contained in the Counter-Memorial of Nicaragua to be inadmissible. Costa Rica further added that, while it had no objection to the admissibility of the fourth counter-claim, it reserved the right to comment further on the substance of that counter-claim in the subsequent proceedings.

11. By letters dated 28 September 2012, the Registrar informed the Parties that the Court had decided that the Government of Costa Rica should specify in writing, by 30 November 2012 at the latest, the legal grounds on which it relied in maintaining that the Respondent’s first three

counter-claims were inadmissible, and that the Government of Nicaragua should present its own views on the question in writing, by 30 January 2013 at the latest. Costa Rica and Nicaragua submitted their written observations on the admissibility of Nicaragua's counter-claims within the time-limits thus fixed.

12. Having received full and detailed written observations from each of the Parties, the Court considered that it was sufficiently well informed of the positions they held as to the admissibility of Nicaragua's counter-claims, and did not consider it necessary to hear the Parties further on the subject.

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13. At the end of its Application filed in the *Costa Rica v. Nicaragua* case, Costa Rica set out its claims as follows:

“For these reasons, and reserving the right to supplement, amplify or amend the present Application, Costa Rica requests the Court to adjudge and declare that Nicaragua is in breach of its international obligations as referred to in paragraph 1 of this Application as regards the incursion into and occupation of Costa Rican territory, the serious damage inflicted to its protected rainforests and wetlands, and the damage intended to the Colorado River, wetlands and protected ecosystems, as well as the dredging and canalization activities being carried out by Nicaragua on the San Juan River.

In particular the Court is requested to adjudge and declare that, by its conduct, Nicaragua has breached:

- (a) the territory of the Republic of Costa Rica, as agreed and delimited by the 1858 Treaty of Limits, the Cleveland Award and the first and second Alexander Awards;
- (b) the fundamental principles of territorial integrity and the prohibition of use of force under the Charter of the United Nations and the Charter of the Organization of American States;
- (c) the obligation imposed upon Nicaragua by Article IX of the 1858 Treaty of Limits not to use the San Juan River to carry out hostile acts;
- (d) the obligation not to damage Costa Rican territory;
- (e) the obligation not to artificially channel the San Juan River away from its natural watercourse without the consent of Costa Rica;
- (f) the obligation not to prohibit the navigation on the San Juan River by Costa Rican nationals;

- (g) the obligation not to dredge the San Juan River if this causes damage to Costa Rican territory (including the Colorado River), in accordance with the 1888 Cleveland Award;
- (h) the obligations under the Ramsar Convention on Wetlands;
- (i) the obligation not to aggravate and extend the dispute by adopting measures against Costa Rica, including the expansion of the invaded and occupied Costa Rican territory or by adopting any further measure or carrying out any further actions that would infringe Costa Rica's territorial integrity under international law."

Costa Rica also requests the Court to "determine the reparation which must be made by Nicaragua, in particular in relation to any measures of the kind referred to . . . above".

14. At the end of its Memorial filed in the *Costa Rica v. Nicaragua* case, Costa Rica made the following submissions:

"For these reasons, and reserving the right to supplement, amplify or amend the present submissions:

1. Costa Rica requests the Court to adjudge and declare that, by its conduct, Nicaragua has breached:

- (a) the obligation to respect the sovereignty and territorial integrity of the Republic of Costa Rica, within the boundaries delimited by the 1858 Treaty of Limits and further defined by the Demarcation Commission established by the Pacheco-Matus Convention, in particular by the first and second Alexander Awards;
- (b) the prohibition of use of force under Article 2 (4) of the United Nations Charter and Articles 1, 19, 21 and 29 of the Charter of the Organization of American States;
- (c) the obligation of Nicaragua under Article IX of the 1858 Treaty of Limits not to use the San Juan to carry out hostile acts;
- (d) the rights of Costa Rican nationals to free navigation on the San Juan in accordance with the 1858 Treaty of Limits, the Cleveland Award and the Court's Judgment of 13 July 2009;
- (e) the obligation not to dredge, divert or alter the course of the San Juan, or conduct any other works on the San Juan, if this causes damage to Costa Rican territory (including the Colorado River), its environment, or to Costa Rican rights in accordance with the Cleveland Award;

(f) the obligation to consult with Costa Rica about implementing obligations arising from the Ramsar Convention, in particular the obligation to co-ordinate future policies and regulations concerning the conservation of wetlands and their flora and fauna under Article 5 (1) of the Ramsar Convention; and

(g) the Court's Order for Provisional Measures of 8 March 2011;

and further to adjudge and declare that Nicaragua is:

(h) obliged to cease such breaches and to make reparation therefor.

2. The Court is requested to order, in consequence, that Nicaragua:

(a) withdraw any presence, including all troops and other personnel (whether civilian, police or security, or volunteers) from that part of Costa Rica known as Isla Portillos, on the right bank of the San Juan, and prevent any return there of any such persons;

(b) cease all dredging activities on the San Juan in the area between the point of bifurcation of the Colorado River and the San Juan and the outlet of the San Juan in the Caribbean Sea ('the area'), pending:

(i) an adequate environmental impact assessment;

(ii) notification to Costa Rica of further dredging plans for the area, not less than three months prior to the implementation of such plans;

(iii) due consideration of any comments of Costa Rica made within one month of notification;

(c) not engage in any dredging operations or other works in the area if and to the extent that these may cause significant harm to Costa Rican territory (including the Colorado River) or its environment, or to impair Costa Rica's rights under the Cleveland Award.

3. The Court is also requested to determine, in a separate phase, the reparation and satisfaction to be made by Nicaragua."

15. Nicaragua, for its part, made the following submissions at the end of its Counter-Memorial filed in the *Costa Rica v. Nicaragua* case:

"For the reasons given herein, the Republic of Nicaragua requests the Court to:

(1) *dismiss and reject* the requests and submissions of Costa Rica in her pleadings;

(2) *adjudge and declare* that:

- (i) Nicaragua enjoys full sovereignty over the *caño* joining Harbour Head Lagoon with the San Juan River proper, the right bank of which constitutes the land boundary as established by the 1858 Treaty as interpreted by the Cleveland and Alexander Awards;
- (ii) Costa Rica is under an obligation to respect the sovereignty and territorial integrity of Nicaragua, within the boundaries delimited by the 1858 Treaty of Limits as interpreted by the Cleveland and Alexander Awards;
- (iii) Nicaragua is entitled, in accordance with the 1858 Treaty as interpreted by the subsequent arbitral awards, to execute works to improve navigation on the San Juan River as it deems suitable, and that these works include the dredging of the San Juan de Nicaragua River; and,
- (iv) in so doing, Nicaragua is entitled as it deems suitable to re-establish the situation that existed at the time the 1858 Treaty was concluded;
- (v) the only rights enjoyed by Costa Rica on the San Juan de Nicaragua River are those defined by [the] said Treaty as interpreted by the Cleveland and Alexander Awards.

As to Nicaragua's counter-claims as specified in Chapter 9 of this Counter-Memorial, Nicaragua requests a declaration by the Court that:

- (1) Nicaragua has become the sole sovereign over the area formerly occupied by the Bay of San Juan del Norte;
- (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;
- (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; and
 - for the non-implementation of the provisional measures indicated by the Court's Order of 8 March 2011.

Compensation in the form of damages, should be awarded by the Court in a subsequent phase of the case.

Nicaragua reserves its right to amend and modify these submissions in the light of the further pleadings in this case."

16. In its “Written observations on the admissibility of Nicaragua’s counter-claims” in the *Costa Rica v. Nicaragua* case, Costa Rica deals with those counter-claims in an order that differs from the presentation made by Nicaragua in the submissions of its Counter-Memorial. In fact, Costa Rica deals with the counter-claim concerning the construction of a road along the San Juan River under the heading of “The first counter-claim”, with the counter-claim concerning the status of the Bay of San Juan del Norte under the heading of “The second counter-claim”, and with the counter-claim concerning the right of free navigation on the Colorado River under the heading of “The third counter-claim”. At the end of its Written Observations, Costa Rica 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”.

With regard to the “fourth” counter-claim, concerning alleged breaches of the Court’s Order on Provisional Measures of 8 March 2011, Costa Rica accepts that it is admissible, although it reserves the right to deal with the merits of this counter-claim in subsequent proceedings.

17. At the end of its “Written observations on the admissibility of its counter-claims” in the *Costa Rica v. Nicaragua* case, 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”.

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I. GENERAL FRAMEWORK

18. Article 80 of the Rules of Court provides as follows:

“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.”

19. It is not disputed that, in the *Costa Rica v. Nicaragua* case, Nicaragua’s claims are “counter-claims” within the meaning of Article 80 of the Rules of Court, since they are autonomous legal acts the object of which is to submit new claims to the Court which are, at the same time, linked to the principal claims, in so far as formulated as “counter” claims that react to them (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 256, para. 27); nor is it disputed that the counter-claims have been “made in the Counter-Memorial and [appear] as part of the submissions contained therein”, in accordance with Article 80, paragraph 2, of the Rules of Court.

20. Under Article 80, paragraph 1, of the Rules of Court, two requirements must be met for the Court to be able to entertain a counter-claim at the same time as the principal claim, namely, that the counter-claim “comes within the jurisdiction of the Court” and, that it “is directly connected with the subject-matter of the claim of the other party.” In earlier pronouncements, the Court has characterized these requirements as relating to the admissibility of a counter-claim as such (*Oil Platforms (Islamic Republic of Iran v. United States of America), Counter-Claim, Order of 10 March 1998, I.C.J. Reports 1998*, p. 203, para. 33; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Counter-Claims, Order of 29 November 2001, I.C.J. Reports 2001*, p. 678, para. 35). In this context, the Court has accepted that the term “admissibility” must be understood to encompass both the jurisdictional requirement and the direct-connection requirement (*Jurisdictional Immunities of the State (Germany v. Italy), Counter-Claim, Order of 6 July 2010, I.C.J. Reports 2010 (I)*, p. 316, para. 14).

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21. Nicaragua, in its Written Observations in the *Costa Rica v. Nicaragua* case, follows the order of presentation of its counter-claims as dealt with by Costa Rica in its written observations (see paragraph 16 above). It is therefore appropriate to follow that same order for the purposes of the present Order.

II. FIRST COUNTER-CLAIM

22. In its first counter-claim, Nicaragua requests the Court to declare that “Costa Rica bears responsibility to Nicaragua” for “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.

23. Costa Rica maintains that the first counter-claim “is identical in terms to, or plainly included in and covered by, the claim” made by Nicaragua in its Application instituting proceedings in the *Nicaragua v. Costa Rica* case and that, consistent with a basic principle (*electa una via*), under which two legal actions cannot be pursued simultaneously by the same applicant against the same party for the same cause of action, it cannot be open to a party to request the Court to condemn the same State twice. Costa Rica refers, in this context, to Article IV of the Pact of Bogotá, which reads as follows: “Once any pacific procedure has been initiated, whether by agreement between the parties or in fulfilment of the present Treaty or a previous pact, no other procedure may be commenced until that procedure is concluded.”

24. The Court notes that, in the *Nicaragua v. Costa Rica* case, Nicaragua indeed put forward principal claims which in substance deal with the same subject-matter as its first counter-claim in the *Costa Rica v. Nicaragua* case. As a result of the joinder of the proceedings in these two cases (see paragraph 8 above), Nicaragua’s first counter-claim in the *Costa Rica v. Nicaragua* case is subsumed under its principal claim in the *Nicaragua v. Costa Rica* case relating to Costa Rica’s alleged responsibility for “the impairment and possible destruction of navigation on the San Juan River caused by the construction of a road next to its right bank”. This claim is to be examined as a principal claim, within the context of the joined proceedings, thereby eliminating the need to examine it as a counter-claim. In these circumstances, the first counter-claim has become without object, and the Court does not need to decide whether it is admissible within the meaning of Article 80 of the Rules of Court. In view of the foregoing, the Court need not address the question whether the consideration of the first counter-claim may be contrary to the rule stated in Article IV of the Pact of Bogotá.

III. SECOND AND THIRD COUNTER-CLAIMS

1. Content of the second and third counter-claims

25. In its second counter-claim, Nicaragua asks the Court to declare that it “has become the sole sovereign over the area formerly occupied by the Bay of San Juan del Norte”. In its third counter-claim, Nicaragua requests the Court to find that “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”.

2. Method of examination

26. The Court notes, with regard to the second and third counter-claims of Nicaragua, that the respective arguments presented by the Parties concerning the question of whether these counter-claims come within the jurisdiction of the Court and whether they are directly connected to the subject-matter of the claims of Costa Rica in the main proceedings are similar if not identical. Therefore, it is appropriate to examine the second and third counter-claims jointly, keeping in mind, nevertheless, that they are separate claims.

27. The requirements of admissibility under Article 80 of the Rules of Court are cumulative; each requirement must be satisfied for a counter-claim to be found admissible. In examining those requirements, the Court is not bound by the sequence set out in that Article. In the present circumstances, the Court deems it appropriate to begin with the question whether the second and third counter-claims are directly connected with the subject-matter of Costa Rica's principal claims.

3. Question of direct connection

28. Nicaragua asserts, with regard to its second counter-claim, that although Costa Rica did not claim sovereignty over the Bay of San Juan del Norte in its Application, the question of sovereignty over the Bay is part of the issue of sovereignty near the mouth of the San Juan River which lies at the heart of the *Costa Rica v. Nicaragua* case. Furthermore, the status of the Bay was fixed by the 1858 Treaty of Limits and is therefore, according to Nicaragua, indisputably part of this case. Nicaragua further observes that, in respect of its second counter-claim, both Parties rely on the same instrument, namely the 1858 Treaty of Limits, and even on the same provisions of that instrument, in particular its Article IV, and, more generally, its Articles I, II, V, VI and IX.

29. Nicaragua asserts in its third counter-claim that it possesses a "right of navigation on the Colorado River" on the basis of the 1858 Treaty of Limits and general international law. In particular, Nicaragua asserts that Costa Rica is attempting to prevent Nicaragua from taking the measures needed — that is, the dredging works of which Costa Rica complains — to restore the navigability of the San Juan River. In this regard, Nicaragua takes the position that one purpose of the 1858 Treaty of Limits was to guarantee navigation from the San Juan River to and from the Caribbean Sea. Nicaragua highlights Article V of the 1858 Treaty of Limits, which stated that the Colorado River, not the San Juan River, would constitute the course of the boundary until such time as Nicaragua had "recover[ed] the full possession of all her rights in the port of San Juan del Norte". In Nicaragua's view, this provision is applicable to the present situation because Nicaragua is currently without access to the sea via the San Juan River.

According to Nicaragua, its second and third counter-claims are thus part of the same factual complex as Costa Rica's principal claims and have a direct legal connection with them.

30. Examining the direct-connection requirement with regard to the second counter-claim, Costa Rica first underlines the fact that it has made no claim relating to the Bay of San Juan del Norte, nor does it refer to the Bay in the operative part of its submissions. Costa Rica further notes that this counter-claim and Costa Rica's principal claims do not form part of the same factual complex, as they concern geographically distinct areas and are not temporally related. Costa Rica maintains that the respective claims are not "legally related" as they do not concern reciprocal obligations and do not pursue the same legal aim. Finally, Costa Rica contends that the law applicable to its own claims differs from the law applicable to Nicaragua's second counter-claim.

31. As to the third counter-claim, Costa Rica considers that it is not directly connected to any of Costa Rica's principal claims as it bears no relation to any of the submissions presented by Costa Rica in its Application and Memorial. In particular, Costa Rica asserts that Nicaragua has failed to establish that a direct connection exists between the law applicable to its own claims and the law invoked by Nicaragua in support of its third counter-claim. Costa Rica observes that Nicaragua alleges that it possesses a right of navigation on the Colorado River based on Article V of the 1858 Treaty of Limits. In that regard, Costa Rica maintains, first, that there is nothing in the 1858 Treaty of Limits, including Article V thereof, that can be construed as giving Nicaragua navigational rights on any Costa Rican river, including the Colorado. Secondly, Costa Rica notes that it has not relied upon Article V at any point in support of the principal claims. Rather, it has complained that Nicaragua has breached Article II of the 1858 Treaty of Limits and has thereby violated its territorial integrity.

Costa Rica accordingly concludes that Nicaragua has failed to show that its second and third counter-claims meet the conditions for admissibility set out in Article 80 of the Rules of Court, and that, consequently, these two counter-claims must be declared inadmissible.

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32. The Court recalls that it is for the Court to assess "whether the counter-claim is sufficiently connected to the principal claim, taking account of the particular aspects of each case" (see *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. 33). In previous decisions relating to the admissibility of counter-claims, the Court has taken into consideration a range of factors that could establish a direct connection both in fact and in law between a counter-claim and the claims in the principal case for purposes of Article 80.

The Court has thus considered whether the facts relied upon by each party relate to the same geographical area or the same time period (see *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; *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). The Court has also considered whether the facts relied upon by each party are of the same nature, in that they allege similar types of conduct (see *Armed Activities (Democratic Republic of Congo v. Uganda), Counter-Claims, Order of 29 November 2001, I.C.J. Reports 2001*, p. 679, para. 38).

The Court has further examined whether there is a direct connection between the counter-claim and the principal claims of the other party based on the legal principles or instruments relied upon, or where the Applicant and the Respondent were considered as pursuing the same legal aim by their respective claims (see *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-Claims, Order of 10 March 1998, I.C.J. Reports 1998*, p. 205, para. 38; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Order of 30 June 1999, I.C.J. Reports 1999*, pp. 985-986; *Armed Activities (Democratic Republic of Congo v. Uganda), Counter-Claims, Order of 29 November 2001, I.C.J. Reports 2001*, p. 679, paras. 38 and 40).

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33. With regard to the nature of the alleged facts which constitute the basis of Costa Rica's principal claims and Nicaragua's second counter-claim, respectively, the Court observes that Costa Rica complains of Nicaragua's actions in Isla Portillos and of Nicaragua's dredging programme on the San Juan River. By contrast, Nicaragua's second counter-claim is based on alleged changes to the physical characteristics of the Bay of San Juan del Norte, which, in Nicaragua's view, extinguish any rights that Costa Rica may have once possessed in connection with that bay based on the 1858 Treaty of Limits.

34. In geographical terms, Nicaragua's second counter-claim relates, in a general sense, to the same region that is the focus of Costa Rica's principal claims, an area that is near the mouth of the San Juan River. However, the geographical point of reference of each Party's claims is different, in the sense that the claim and the counter-claim do not relate to the same area. Moreover, a temporal connection is lacking. Nicaragua's counter-claim refers to physical changes to the Bay of San Juan del Norte that apparently date to the nineteenth century. By contrast, Costa Rica's claims relate to alleged Nicaraguan conduct dating to 2010. In addition, the facts underpinning Nicaragua's second counter-claim are not of the same nature as those underpinning

Costa Rica's principal claims. While it may be said that both Parties invoke facts in connection with territorial sovereignty, Nicaragua's counter-claim does not relate to territorial sovereignty over Isla Portillos, nor does it relate to a question of territorial sovereignty based on the course of the river boundary as established by the 1858 Treaty of Limits, the Cleveland Award, or the subsequent Alexander Awards. In sum, the issues raised by Nicaragua with respect to the Bay of San Juan del Norte in its second counter-claim do not form part of the same factual complex from which Costa Rica's principal claims arise.

The Court is thus of the view that Nicaragua has failed to demonstrate that its second counter-claim is directly connected, as a matter of fact, to the principal claims of Costa Rica in this case.

35. Furthermore, no direct legal connection exists between Costa Rica's principal claims and Nicaragua's second counter-claim. The essence of Costa Rica's claims is that its sovereignty has been breached and its territorial integrity violated through Nicaragua's actions carried out in Isla Portillos, and that Nicaragua's dredging activities have not complied with international environmental law and pose a risk of serious environmental harm to Costa Rica, whereas Nicaragua's second counter-claim is in essence that it has exclusive sovereignty over the area "formerly occupied" by the Bay of San Juan del Norte. In addition, Costa Rica asserts sovereignty over Isla Portillos based on provisions of the 1858 Treaty of Limits and associated awards that govern the location of the boundary between the Parties, and also invokes international environmental law. By contrast, Nicaragua bases its second counter-claim on the contention that the legal situation of the Parties with respect to the Bay of San Juan del Norte has evolved since the conclusion of the 1858 Treaty of Limits, as a result of physical changes to that bay. Thus, the Parties do not pursue the same legal aims.

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36. With regard to the factual connection between Costa Rica's principal claims and Nicaragua's third counter-claim, the Court recalls that, while Costa Rica's claims are based on certain activities of Nicaragua in the border area, namely, the presence of Nicaraguan troops and other personnel at Isla Portillos and dredging activities on the San Juan River, Nicaragua's third counter-claim concerns the use of the Colorado River for navigation until access to the Caribbean Sea via the San Juan River can be restored. In particular, Nicaragua refers to the fact that the outlet of the San Juan River to the sea is blocked for much of the year, thereby hindering navigation for its vessels, and the fact that Costa Rica has barred the entrance to the Colorado River. The Court notes that there is, in a general sense, a geographical link between Nicaragua's third counter-claim and Costa Rica's claims relating to Nicaragua's dredging activities in that these claims relate to a common river system. An approximate temporal connection can also be made, in the sense that

Nicaragua claims that its right to navigate the Colorado River has been revived by Costa Rica's efforts to prevent Nicaragua from dredging the San Juan River in order to enhance its navigability. Nonetheless, the facts underpinning Nicaragua's third counter-claim are of a different nature from those underpinning Costa Rica's claims, which are invoked to demonstrate alleged violations of its territorial sovereignty and of Nicaragua's obligations under international environmental law. Nicaragua's third counter-claim, by contrast, is based on facts relating to damage allegedly caused by Costa Rica's effort to prevent Nicaragua from dredging the San Juan River. Under these circumstances, the factual link between Nicaragua's third counter-claim and Costa Rica's principal claims is not sufficient for purposes of admissibility under Article 80 of the Rules of Court. There is therefore no direct connection between the facts relied on by Costa Rica in its principal claims and the facts invoked by Nicaragua to substantiate its third counter-claim, because of their different nature.

37. Furthermore, Nicaragua has failed to establish the existence of a direct legal connection between its third counter-claim and Costa Rica's principal claims. Costa Rica and Nicaragua do not pursue the same legal aims in their respective claims and counter-claim. Costa Rica's claims concern allegations of violations of its territorial sovereignty and its navigational rights on the San Juan River, and of environmental damage to its territory. Nicaragua, for its part, seeks to assert its alleged navigational rights on the Colorado River, on the basis of Article V of the 1858 Treaty of Limits, which provided for the temporary shared use and possession of Punta Castilla and designated the Colorado River as a boundary until such time as Nicaragua recovered full possession over the Port of San Juan del Norte, which it did in 1860.

4. Conclusion of the Court as to the second and third counter-claims

38. The Court therefore concludes that there is no direct connection, either in fact or in law, between Nicaragua's second and third counter-claims and Costa Rica's principal claims. Consequently, those counter-claims are inadmissible as such under Article 80, paragraph 1, of the Rules of Court. It is not necessary for the Court to address the question whether those counter-claims come within its jurisdiction.

IV. FOURTH COUNTER-CLAIM

39. In its fourth counter-claim, Nicaragua alleges that Costa Rica did not implement the provisional measures indicated by the Court in its Order of 8 March 2011. Costa Rica does not contest the admissibility of this counter-claim.

40. The Court recalls that, where it "has jurisdiction to decide a case, it also has jurisdiction to deal with submissions requesting it to determine that an order indicating measures which seeks to preserve the rights of the Parties to this dispute has not been complied with" (see *LaGrand*

(*Germany v. United States of America*), *Judgment, I.C.J. Reports 2001*, p. 484, para. 45). It follows that the question of compliance by both Parties with the provisional measures indicated in this case may be considered by the Court in the principal proceedings, irrespective of whether or not the respondent State raised that issue by way of a counter-claim. The Parties thus remain at liberty to take up this issue in the further course of the proceedings. The Court, accordingly, finds that there is no need to entertain Nicaragua's fourth counter-claim, as such.

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41. For these reasons,

THE COURT,

(A) Unanimously,

Finds that there is no need for the Court to adjudicate on the admissibility of Nicaragua's first counter-claim as such;

(B) Unanimously,

Finds that Nicaragua's second counter-claim is inadmissible as such and does not form part of the current proceedings;

(C) Unanimously,

Finds that Nicaragua's third counter-claim is inadmissible as such and does not form part of the current proceedings;

(D) Unanimously,

Finds that there is no need for the Court to entertain Nicaragua's fourth counter-claim as such, and that the Parties may take up any question relating to the implementation of the provisional measures indicated by the Court in its Order of 8 March 2011 in the further course of the proceedings;

Reserves the subsequent procedure for further decision.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this eighteenth day of April, two thousand and thirteen, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Costa Rica and the Government of the Republic of Nicaragua, respectively.

(Signed) Peter TOMKA,
President.

(Signed) Philippe COUVREUR,
Registrar.

Judge *ad hoc* GUILLAUME appends a declaration to the Order.

(Initialed) P. T.

(Initialed) Ph. C.

DISSENTING OPINION OF JUDGE *AD HOC* DUGARD

Order of 2011 prohibits members of Guardabarranco Environment Movement (hereinafter GEM) from visiting disputed territory as they qualify as civilian personnel — Presence of GEM in disputed territory is contrary to object and purpose of Order of 2011 — Access of GEM to disputed territory poses risk of irreparable prejudice to Costa Rica.

1. In 2011 after Nicaragua's armed forces had entered and occupied the Isla Portillos (henceforth disputed territory), the Court found that Costa Rica's claim to sovereignty over the territory was plausible but ordered that both Nicaragua and Costa Rica should refrain from sending to, or maintaining in the disputed territory "any personnel, whether civilian, police or security" (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 27, para. 86 (1)). The Court's intention was to clear the disputed territory of any persons that might exacerbate the dispute and interfere with the ultimate finding of the Court on the merits. This explains why the personnel of both Parties were ordered to keep out of the disputed territory, despite the fact that Costa Rica's claim to sovereignty had been adjudged "plausible" (*ibid.*, p. 20, para. 59). This also explains why only Costa Rica's civilian personnel charged with the protection of the environment were permitted to enter the disputed territory, and then only under very strict conditions (*ibid.*, p. 27, para. 86 (2)). Someone had to ensure that the environment was protected pending the settlement of the dispute and the Court had no alternative but to allocate this task to Costa Rica because it alone had been adjudged to have a plausible title to the territory; and it alone was accountable for the environmental protection of the disputed territory under the Ramsar Convention. The Court's third provisional measure calling on Parties to "refrain from *any* action which might aggravate or extend the dispute before the Court" (*ibid.*, p. 27, para. 86 (3); emphasis added), should be construed as emphasizing that the disputed territory was to be cleared of all persons except those specifically authorized to be there. While the present Order expresses "concerns" that "the presence of organized groups of Nicaraguan nationals in the disputed area carries the risk of incidents which might aggravate the present dispute" (see paragraph 37 of the Order), it fails to modify its Order of 8 March 2011 to make it clear that the presence of such organized groups in the disputed territory is incompatible with this Order. The failure to clarify this matter may result in further incursions by organized groups of Nicaraguan nationals into the disputed territory with consequent irreparable prejudice to Costa Rica. For this reason, I dissent from the Order of the Court.

2. In its present Application Costa Rica asks the Court to modify its Order on provisional measures of 2011 to make it clear that *all* persons, other than environmental officials of Costa Rica specially authorized by the Order of 2011 to enter the disputed territory, are to be prevented by both Parties from accessing the disputed territory, in order to prevent irreparable harm being caused to both persons and the environment, pending the Court's determination on the merits. It may be that such an order is unnecessary, at least as far as it concerns the activities of environmental youth groups supported by either government, on the ground that such groups are already prohibited from accessing the territory in terms of the 2011 Order. However, in order to clarify this issue, Costa Rica seeks a modification of the 2011 Order.

3. Before examining Costa Rica's Application under Article 76 of the Rules of the Court to modify the Order of 2011, it is necessary to consider the question whether the prohibition imposed on both Parties by the first provisional measure ordered in 2011 requiring them to "refrain from sending to, or maintaining in the disputed territory, including the *caño*, any *personnel*, whether civilian, police or security" applies to the Guardabarranco Environment Movement (hereinafter GEM). Strictly, this is a matter for determination on the merits of the case. However, as Costa Rica's Application for modification of the Order is essentially a request for clarification and interpretation of the scope of the Order of 2011 it is necessary to examine this issue at this stage. Furthermore, as Costa Rica's application aims to ensure that irreparable prejudice is not caused to

Costa Rica's plausible right to the disputed territory by the incursion of members of GEM pending a decision on the merits, it is impossible to avoid consideration of this matter as it is essential to a decision on the modification of the existing provisional measures.

4. The answer to the question whether the members of GEM are covered by the Order of 2011 depends on the meaning to be attached to the term "personnel". In the present Order, the Court does not examine the meaning of the term "personnel" but seems to assume that the term "personnel" applies to government employees, because in 2011 Costa Rica complained only about the presence of the army, and possibly police (see paragraph 80 of the Order of 2011), and made no mention of the presence of private persons in the disputed territory (see paragraph 23 of the Order). The term "personnel" should, however, be given a broader meaning to include the members of the GEM for the following reasons.

5. First, the term "personnel" may be interpreted as applying to persons forming part of an organization employed in some service. The Free Online Dictionary defines personnel as "the body of persons employed by or active in an organization, business or service". The concise Oxford Dictionary defines personnel as a "body of persons engaged in some public service". GEM is clearly an organization employed in the service of protecting the environment of what it perceives to be Nicaraguan territory. Its members could therefore be described as constituting "any civilian personnel" falling within the prohibition contained in the first provisional measure in the Order of 2011.

6. It may be argued that the fact the Order requires each Party to refrain from sending "any personnel, whether civilian, *police or security*" into the disputed territory indicates that the civilian personnel should at least be employed in the service of Nicaragua — although there is no suggestion that this employment should take the form of work for remuneration. However, on the facts before the Court, it is clear that GEM and its members are engaged in a public service on behalf of Nicaragua.

7. The precise nature of GEM is not clear. It appears to have a dual purpose: the protection of the environment and the defence of the homeland of Nicaragua. According to an article by Tim Rogers in the *Nicaragua Dispatch* of 26 September 2012, the authenticity of which has not been challenged by Nicaragua, Oscar Garcia, a forestry engineer with the Ministry of Environment and Natural Resources, described GEM as being "about creating ecological awareness, building nationalism and defence of the homeland". It is common cause that there is a close connection between GEM and the Sandinista Youth, the youth movement of the governing party of Nicaragua. Furthermore, Nicaragua has not denied that members of GEM have placed Nicaraguan flags in the disputed territory and that they fly Nicaraguan flags on their missions into the disputed territory. It may be true, as asserted by Nicaragua that GEM does not act under the direction or control of Nicaragua. Moreover it is unnecessary to decide at this stage whether the acts of GEM may be attributed to Nicaragua, as this is an issue for determination on the merits. This does not, however, detract from the fact that GEM is a nationalistic youth movement, linked with the Sandinista Youth, which is concerned both with protecting the environment of the disputed territory and with asserting that it is Nicaraguan territory. The line between toleration of the presence of GEM in the disputed territory on the part of Nicaragua and sponsorship of their presence is very thin. That Nicaragua's support for GEM goes beyond mere toleration is clear from the letter of Samuel Santos Lopez of the Nicaraguan Foreign Ministry in which he "sees with great pleasure" the work of youth groups in the disputed territory. The Court's description of GEM in its Order as "organized groups of persons" (see paragraph 25 of the Order) and "organized groups of Nicaraguan nationals" (see paragraph 37 of the Order) fails to capture the true nature of GEM as a nationalistic youth movement, with ties to the governing Sandinista Party of Nicaragua. Although GEM may not be an organized group of paid Nicaraguan officials, it surely qualifies as a body of persons employed by or active in an organization engaged in furthering the objects and interests of the Nicaraguan Government. In short, it constitutes "civilian personnel" within the meaning of the first provisional measure in the Court's Order of 2011.

8. Although the activities of GEM appear to fall within the terms of the Order of 2011, Nicaragua denies that this is the case. Costa Rica has accordingly sought to have this Order modified in order to make it clear that these activities are covered. In doing so, it argues that if the activities of GEM do not fall within the letter of the Order of 2011, they are contrary to the object and purpose of the Order.

9. The object and purpose of the Order of 2011 was to keep all unauthorized persons, whether nationals of Nicaragua or Costa Rica, out of the disputed territory pending the determination of the merits of the case. The first provisional measure referred to “any personnel” of the Parties, perhaps suggesting government officials only (although this interpretation is challenged above, paras. 4-7), because in 2010/2011 only Nicaraguan Government officials and military had entered the territory and the entry of private persons into the territory was not considered by either Costa Rica or the Court (see paragraphs 23 and 25 of the Order). But the intention of the Order to keep all unauthorized persons out of the disputed territory was made clear by the second provisional measure which provided that only Costa Rican civilian personnel charged with the protection of the environment of the disputed territory— might enter the territory— subject to strict conditions. There was no suggestion that such “civilian personnel” were to be in the paid employment of the Costa Rican Government: presumably environmentalists attached to environmental NGO’s might be selected for this purpose. But it is clear that Costa Rica was barred from dispatching student activist environmentalists into the disputed territory in large numbers. By necessary implication Costa Rica’s equivalent of GEM was prohibited from accessing the disputed territory to carry out activities to protect the environment of the territory, despite the fact that Costa Rica’s title to the territory had been adjudged “plausible”. It is therefore simply not possible to interpret provisional measures 1 to 3 of the Order of 2011 as allowing private persons belonging to an organization of either Costa Rica or Nicaragua to access the disputed territory, whether such persons were motivated by a concern for the environment or not. *A fortiori* it prohibited nationalistic youth movements committed to protecting the environment and the national interest of either Party from accessing the territory.

10. It is necessary next to consider whether Costa Rica’s request for modifications of the Order of 2011 complies with the requirements for an order for provisional measures.

11. The Court has found that the presence of organized groups of persons in the disputed territory which was not contemplated in 2011, constitutes “a change in the situation within the meaning of Article 76 of the Rules of the Court, upon which Costa Rica may be entitled to rely in support of its request for the modification of the said Order” (see paragraph 25 of the Order). The Court has found it unnecessary to reconsider the requirements that the rights asserted by Costa Rica should at least be plausible and that there should be a link between the rights which form the subject of the proceedings before the Court and the provisional measures being sought (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, *Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, paras. 58-62).

12. The Court has found that Costa Rica has failed to show that the presence of GEM in the disputed territory constitutes a real and imminent risk of irreparable prejudice to Costa Rica’s rights to territorial sovereignty over the disputed territory or to the preservation of the environment of the territory (see paragraph 35 of the Order). I disagree with the Court’s finding.

13. My disagreement with the Court relates to its assessment of the nature of GEM and the risk it poses to Costa Rica’s rights in the disputed territory. As I have shown above (para. 7), GEM is not a body of young environmentalists *sans frontières*, concerned solely with the preservation of the environment. Instead it is a nationalistic youth movement, linked to the Sandinista youth movement, committed to both the protection of the environment and the defence of the homeland of Nicaragua. With the support and encouragement of the Government of Nicaragua, it sees the Nicaraguan homeland as including the disputed territory. It is not a small group of studious environmentalists who make serious visits to the disputed territory to study the environment in a

scientific manner. It is not clear how many have visited the disputed territory over the past years, but over 6,000 have carried out activities in the region of the San Juan River. Nicaragua does not deny the figure of 6,000 but explains that this number of GEM members have visited the San Juan River region, comprising both Nicaraguan territory and the disputed territory. Members of GEM do not travel in small groups. Instead they travel in large groups, waving the Nicaraguan flag, as befits a nationalistic movement. Fortunately, Costa Rica has neither encouraged nor allowed its youth to behave in a similar fashion. Had Costa Rica which, unlike Nicaragua, has demonstrated a plausible right to territorial title of the disputed territory, done so there would in all probability have been clashes between rival environmentalist groups in the disputed territory.

14. In my opinion, the presence of GEM in the disputed territory is a recipe for disaster. History is replete with instances of violence committed by youth movements committed to a national cause. These historical precedents cannot be ignored. There is a real risk of personal injury and damage to the environment. This arises from the likelihood of future harm based on the reasonable prospect that the present situation, if allowed to continue, will escalate. Moreover the matter is urgent. Unable to send its army or officials into the disputed territory by reason of the Order of 8 March 2011, the Government of Nicaragua has resorted to the stratagem of employing a surrogate force comprising young nationalistic environmentalists to carry out this task. The Court's expression of "concerns" (see paragraph 37 of the Order), falling short of serious concerns, is a gentle rebuke of this stratagem that fails to grasp the gravity of the situation.

15. In these circumstances I believe that the Court should have acceded to Costa Rica's request for modification of the Order of 2011 to make it clear that the presence of GEM or similar bodies, belonging to either Nicaragua or Costa Rica, is contrary to the Order of 8 March 2011. Such a modification would send out a message to both Parties that they are required to police access to the disputed territory and to prevent groups of private persons, whether they be environmentalists or not, from entering the disputed territory. This would be in line with a broad interpretation of the first provisional measure in the Order of 8 March 2011 and the object and purpose of the Order of 8 March 2011. Moreover it would accord with the third provisional measure calling on both Parties to "refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve".

(Signed) John DUGARD.
