INTERNATIONAL COURT OF JUSTICE

DISPUTE CONCERNING NAVIGATIONAL AND RELATED RIGHTS (COSTA RICA v NICARAGUA)

COUNTER - MEMORIAL

OF THE REPUBLIC OF NICARAGUA

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INTRODUCTION

Section 1
The Procedure and the Jurisdiction of the Court

1 On 29 September 2005, Costa Rica filed an Application before the Court by which she requested the Court "to adjudge and declare that Nicaragua is in breach of its international obligations ... in denying to Costa Rica the free exercise of its rights of navigation and associated rights on the San Juan River"[1].

2 Costa Rica filed her *Memorial* on 29 August 2006, within the time-limit fixed by the Court's Order of 29 November 2005. The present *Counter-Memorial* is filed in accordance with the same Court's Order which fixed 29 May 2007 as the time-limit for its deposit.

3 In her *Memorial*, Costa Rica bases the jurisdiction of the Court on "the declarations of acceptance made respectively by the Republic of Costa Rica dated 20 February 1973, and by the Republic of Nicaragua dated 24 September 1929" combined with the Tovar-Caldera Declaration of 26 September 2002 and on Article XXXI of the American Treaty on Pacific Settlement of Disputes, Bogotá, of 30 April 1948 (the Pact of Bogotá)[2]. Nicaragua does not take issue with these assertions and fully accepts the Court's jurisdiction in the present case.

4 However, Nicaragua wishes to make very clear that while she accepts the jurisdiction of the Court, she nevertheless considers that the issues raised

[1] CRM, para. 12.
[2] CRM, p. 3, para. 1.09.

by Costa Rica have already been settled by the 1858 Treaty and the 1888 Cleveland Award. [3] The 1886 treaty by which the parties submitted the dispute to President Cleveland provides in Article VII that the award "shall be held to be obligatory between the contracting parties. No other recourse shall be admitted."[4] Costa Rica should thus not be permitted to raise again matters that have already been decided.

Section 2
The History and the Background of the Case

5. Soon after the Spanish arrived in America and explorer Vasco Nuñez de Balboa discovered the Pacific Ocean in 1513, the search for a natural waterway or strait that would connect both Oceans began. One of the most promising candidates for having this natural channel between the Oceans was thought to be Nicaragua with her huge Lake and her outlet to the Atlantic, the San Juan de Nicaragua River.

6. This possibility of finding a natural channel through Nicaragua and then as a most favourable site for the cutting of an interoceanic canal, made Nicaragua a most coveted prize by foreign powers and her immediate neighbours. As was acutely observed by an American Diplomat early in the 20th Century, in all the international controversies of Nicaragua the true cause of the problem was the desire to control the route of the interoceanic channel.[5]

7. Costa Rica's interest became manifest immediately after independence from Spain in 1821. Although the principle of *uti possidetis iuris* was

[3] See below, Chap. 3, Sec. 1 and Chap. 4.
[4] CRM, Vol. 2, Annex 14.
[5] See para. 1.2.26 below.

supposed to rule the division of the colonial territories, Costa Rica took advantage o a civil war raging in Nicaragua and annexed an important part of Nicaragua called Nicoya. The annexation of this territory brought Costa Rica closer to the coveted shores of the Lake of Nicaragua which, added to her post-colonial claim of shared sovereignty over its outlet, the San Juan River, made Costa Rica see herself as the sovereign over any canal route through this natural waterway or, at the very least, a necessary partner in any such enterprise.

8. In 1857, after Nicaragua was prostrated by a war against foreign invaders, Costa Rica took over control of the Lake and River route through Nicaraguan territory. This was seen by Nicaragua as a *casus belli* and declared war on Costa Rica. This declaration of war prompted the Parties to reach an agreement, an agreement that Nicaragua considered would at long last put an end to Costa Rica's attempts to take over or to at least be considered co-sovereign over the San Juan River. The Agreement was the 1858 Jerez- Cañas Treaty of Limits.

9. Nicaragua will come back in some details on the circumstances of the conclusion of the Treaty of Limits later in this *Counter-Memorial.*[6] It is however in order to recall out of hand that, in exchange for her full sovereignty over the waters of the San Juan River, Nicaragua made very significant concessions since she gave up her well founded claims over the district of Nicoya and the areas south of the San Juan River which appertained to Nicaragua on the basis of the principle of *uti possidetis iuris*[7]. The other element of the *quid pro quo* precisely was the limited

[6] See e.g., Sections 1.2 and 1.3.
[7] See the Report to the arbitrator, the President of the United States, by George L. Rives, Assistant Secretary of State, 2 March 1888. NCM, Annex 70.

right of navigation with articles of trade (con objetos de comercio) granted by Nicaragua to Costa Rica on the lower part of the San Juan River as defined by Article 6 of the Treaty[8].

10. Thirty years later, coinciding with negotiations between Nicaragua and the United States for the building of the interoceanic canal through Nicaragua, Costa Rica revived the dispute on her navigational rights in the San Juan River by attempting to patrol the waterway with a war ship. The crisis brought about by this incident, together with Nicaragua's claim that the 1858 Treaty was not valid because it violated her Constitution, prompted the Parties to authorize the President of the United States to arbitrate on the issue of its validity and of the limits of certain rights of navigation in the San Juan River. President Cleveland brought in his award on 22 March 1888.

11. Since both Parties have accepted the Cleveland Award as binding and final, it could have been expected that it had put a final end to the dispute over the validity and scope of the Treaty of Limits. This has been the position of Nicaragua – unfortunately not of Costa Rica which has constantly endeavoured to expand the rights she derives from the Treaty.

12. In fact, Costa Rica's application purely and simply aims at reviving the case which was brought before the President of the United States and to obtain from the International Court what she could not get from the President of the United States 120 years ago.

[8] The Treaty of Limits is reproduced as CRM, Vol. 2, Annex 7, pp. 54-60.

13. In a nutshell, Costa Rica seeks, once again,[9] to broaden her rather limited right to navigate with articles of trade (con objetos de comercio) on the River San Juan in order to obtain an almost unrestricted right of navigation for whatever purpose and with any type of vessels.

14. However, as is clear from the text of the Treaty itself and from its interpretation by President Cleveland, no such right has ever been granted to Costa Rica by Nicaragua, not even remotely.

15. One hundred and twenty years ago, Costa Rica sought to navigate the San Juan with ships of war. The Cleveland Award denied Cost Rica this right. This time around since it could not claim a right to navigate with war ships as such, it resuscitates this long buried issue by claiming rights of navigation with armed military personnel.

16. In light of the foregoing, it is perhaps fitting to conclude this section with a quotation from a former President of Costa Rica. President Abel Pacheco made the following declarations to the Costa Rican newspaper *La Nación*, which it published on 19 May 2002: "We must understand that it is absurd that a country with no army is fighting over the passage of armed persons on a navigable river that is drying up... So, what's this row about?" [10]

17. The present case ("this row") is about a new avatar of the traditional Costa Rican strategy of seeking to erode Nicaragua's sovereignty over the San Juan de Nicaragua River.

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[9] Cf. infra, para. 14.

[10] NCM, Annex 81. La Nación, 19 May 2002, "País debe integrarse" [Country forced to integrate], section subtitled: "Pacheco a dialogo informal por el río" [Pacheco to Take Part in Informal Dialogue Over River].

Section 3
The Scope and the Nature of the Dispute

18. Costa Rica's presentation of the "Scope of the Dispute"[11] and of "The Dispute before the Court"[12] is biased in many respects which will be explained more fully in the body of this *Counter-Memorial.*

19. The cornerstone of the present dispute, as revealed by its historical background, is, no more and no less, the 1858 Treaty of Limits and its interpretation in respect to the navigational rights granted in this legal instrument to Costa Rica. The allegations of the Applicant with regard to the violations of the 1858 Treaty, and in particular of its Article VI, stand or fall with the interpretation of this legal instrument and the subsequent Cleveland Award which already settled this salient question some 120 years ago. Indeed, and this is not frontally questioned by the Applicant, the San Juan River is under the sovereignty of Nicaragua. This case is not about "navigation on international waterways" and the international law general rules regulating those activities are of no help, contrary to the allegations of the Applicant[13]. It is for the Court to determine if the acts and/or omissions of Nicaragua alleged by the Applicant may constitute violations of the obligations imposed to Nicaragua under the special regime of the 1858 Treaty. This is consequently a case about a treaty, its interpretation and its application.

[11] CRM, Introduction, pp. 1-3.
[12] CRM, Chap. 3, pp. 27-.45.
[13] CRM, p. 155, para. A19.

Section 4
The Structure of Nicaragua's *Counter-Memorial*

20. The *Counter-Memorial* will be structured according to the schema indicated below. Part of the *Counter-Memorial* will consist of Annexes containing documents cited in the text. Nicaragua does not have at present original or copies certified as accurate of some of the documents cited. The national archives of Nicaragua have been ravaged by two major earthquakes last century and the wanton destruction of some of her main cities by invaders since the time of Independence. Therefore, some of the documents cited in the text will be referred to those filed by Costa Rica in her *Memorial*. Hence, Nicaragua reserves the right to produce in due course other more accurate versions of these instruments if they should be so found. Furthermore, in some cases, these documents filed by Costa Rica are accompanied by inaccurate translations of the text or certain parts of the text that had previously not been disputed and hence little interest was placed on its correct translation. In these cases, there is an indication of Nicaragua's position on this question. The most salient of these inaccuracies of translation is that of the phrase used to describe the type of navigation rights granted to Costa Rica in the San Juan River. Thus the phrase "con objetos de comercio" contained in the Treaty of Limits of 1858 is loosely translated as "with purposes of commerce" and not its accurate meaning of "with objects of commerce" or "with articles of trade". Since the question had not been at issue during the Cleveland Arbitration in 1888 and only in recent times has become an issue, little attention had been placed on this discrepancy.

21. The schema of Nicaragua's *Counter-Memorial* is as follows:

Chapter 1 addresses the background to the dispute. This Chapter is divided in three sections: The first section is the geography of the San Juan de Nicaragua River, the second, the historical background in general, and the third, the precedents and subsequent practice related to the 1858 Jerez-Cañas Treaty.

Chapter 2 reaffirms Nicaragua's sovereignty over the San Juan de Nicaragua River according to the 1858 treaty.

Chapter 3 analyses the Cleveland award and other considerations related to the dispute.

Chapter 4 demonstrates that Nicaragua has not breached Costa Rica's right of navigation under the 1858 Treaty.

Chapter 5 continues explaining that Nicaragua has also not breached any other rights alleged by Costa Rica.

Chapter 6 explains Costa Rica's response to Nicaragua's policy of cooperation and good neibourliness.

Chapter 7 contains the Remedies and declarations requested by Nicaragua.

And, finally, a note on certain Reservation of rights made by Nicaragua and then the Submissions.

CHAPTER 1
BACKGROUND TO THE DISPUTE

Section 1.1
Geography of the San Juan de Nicaragua River

1.1.1 The purpose of this section is to describe the current status of the San Juan de Nicaragua River, including the present day situation of the historical bay at its mouth, and the difficulties for navigation at the lower end of its course, as well as the presence of large Natural Reserves on its margins and the impact of all of this on the scarce riparian population.

1.1.2 The San Juan de Nicaragua River, also known as the Desaguadero ("the drainage", in Spanish) is the outlet of Lake Nicaragua (also known by its native name of Lake Cocibolca). It flows out of the southeastern end of Lake Nicaragua, next to the city of San Carlos, and empties into the Caribbean Sea along the shores of the municipality of San Juan de Nicaragua.[14] (See Sketch Map 1)

1.1.3 The San Juan River is a natural channel that drains the waters of the Great Lake into the Caribbean Sea, following a rectilinear and winding course, 205 kilometers long, and descending 31 meters from the level of the lake into the sea. The river jumps over a series of rapids interposed in its median course, amongst which the rapids of Toro, Castillo, San Pablo, Balas, Diamante, Machuca and Campana can be appreciated. Its main affluents originating entirely in Nicaraguan territory are the rivers Malacatoya, Oyate, Mayales, Acoyapa, Tepenaguazapa, Tule, Camastro, Ochomogo and Sábalos; and the rivers San Carlos, Sarapiquí, Frío, Medio

[14] Sketch Map 5 of the Costa Rican *Memorial* does not reflect the correct attribution of territory of Nicaragua and Costa Rica at the general area of the mouth of the San Juan River. Nicaragua therefore reserves her rights generally on these questions.

Queso, Palo de Arco, Negro and Pocosol that partially originate in Costa Rica's territory.

1.1.4 The San Juan is not a border river but an integral and indivisible part of the Republic of Nicaragua and thus runs along its whole course within Nicaraguan territory, in the department of the same name, which is located in the country's southeast region. The border between Costa Rica and Nicaragua runs along the right bank of the lower course of the River from Punta de Castilla, at its mouth, to a point upstream three English miles below Castillo Viejo. From that point until its origin in Lake Nicaragua, the right bank of the River ceases to mark the border and the San Juan runs entirely inside the Nicaraguan territory.[15]

1.1.5 The volume of water of the river is remarkable. Its drainage area[16] is approximately 40,660 square kilometers. The water flow varies in time and space along the 205 kilometers of the river. According to measurements made by the United States Corps of Engineers[17] between 1930 and 1950, the flow of the river immediately downstream from the mouth of the Sarapiquí River was 1,100 cubic meters per second during the indicated period. In the measurements made by the National Power and Light Company (ENALUF)[18] at the rapids of El Castillo between 1971 and 1973, the average flow was 516.9 cubic meters per second.

[15] See Sketch Map 1 and CRM Vol. 2, Annex. 7, Article II of the Treaty of 1858, at pp. 54-60.
[16] San Juan River Hydroelectric and Navigation Project, Volume 1, p. 43. The Governments of Nicaragua and Costa Rica. December 1977.
[17] *Ibid*, p. 47.
[18] Hydrometric database of the Nicaraguan Institute for Territorial Studies (INETER).

1.1.6 This volume of water not only originates from the lake and its tributaries, but also from the waters of its affluents. The water volume is reinforced by the region's heavy rainfall that ranges from 2,000 to 6,000 millimetres annually, one of the highest figures registered in the American continent.

1.1.7 In the second half of the 19th century, part of the river waters was diverted to Costa Rican territory, flowing out into the Colorado River. This process of diversion of water has also occurred in the affluents of the San Juan originating in Costa Rican territory where the waters are diverted indiscriminately for agricultural and industrial purposes.

1.1.8 The sediment load that the San Juan River receives from rivers originating in Costa Rica is very heavy. Thus, the sediment load immediately downstream from the Sarapiquí River, measured at the beginning of the seventies, was 10.2 million metric tons per year[19].

1.1.9 The result of all this has been that the bay of San Juan de Nicaragua has undergone sedimentation and obstruction over time, in such way that now the bay communicates with the sea through a narrow outlet.

1.1.10 These affluents of the San Juan originating in Costa Rica have also carried substantial amounts of pollutants that have damaged the San Juan de Nicaragua River.

[19] According to the calculations made by the Central American Hydrological Project (PHCA), with the assistance of the United Nations Development Programme, San Juan River Hydroelectric and Navigation Project, Volume 1, page 69. The Governments of Nicaragua and Costa Rica. December 1977.

1.1.11 The geomorphology of the San Juan valley is defined by certain structural elements located on each side of the old continental dividing line that was part of the Central Mountain Shield, which declines and ends in front of the median course of the river.

1.1.12 In its first segment, comprised from its outlet in the lake to El Castillo, the river course flows broadly, with an average width of 300 meters; its banks are low and prone to flooding, the main affluents in this sector being the Frío, Melchora, Medio Queso, Pocosol, Sábalos and Santa Cruz rivers. Sandy islands covered with vegetation are located in the median of the elongated current. The tree vegetation that originally covered the banks of the river in this sector has been significantly altered and replaced by grazing land.

1.1.13 In its median course, the river descends through a series of interposed rapids, where rocks protrude to the surface making navigation difficult. These rapids constitute the projection of the Central Shield, at the south extreme, made up of old volcanic and sedimentary rocks. In this sector, the river narrows, passing through necks not more than 50 meters wide; the current becomes deeper and forms ponds, creating the so-called "dead waters". The Bartola, Infiernillo and Las Cruces affluents have a short course. Beyond the Bartola River, the great Indio-Maíz Biosphere Reserve (2,639.8 km²)[20] begins, extending downstream, adjacent to the Nicaraguan bank, and ending in the Caribbean Sea.

1.1.14 After passing the confluence of the San Carlos River, which descends from the volcanic chain of Costa Rica, the river recovers its original width;

[20] Decree 66-99. "Update and Definition of categories and limits of Protected Areas located in Nicaragua's southeast territory". 31 May 1999. NCM, Annex 61.

the elongated isles reappear and the current forms rectilinear shoals followed by closed curves in the alluvial and marshy plains of the Caribbean Sea, up to the confluence of the Sarapiquí, another river originating in Costa Rica.

1.1.15 When it reaches the delta, the current begins to bifurcate in the middle of a very flat and sedimentary terrain, where the banks of the different river tributaries are very low, connecting in some parts with marshy areas, and leaving behind small enclosed lagoons (Sílico, Ebo, La Barca, Harbor Head), which not too long ago formed part of the main course of the river. Sedimentation is predominant in this sector, which is further exacerbated by the sands dragged by the San Carlos and Sarapiquí rivers from Costa Rican volcanoes. This sedimentation from rivers originating in Costa Rica is responsible for almost blocking the Nicaraguan outlet into the sea of the San Juan de Nicaragua River during the last hundred years, and for diverting the largest volume of water into the Colorado River, the other outlet of the San Juan located in Costa Rica. In effect, during the driest months of the summer, the Nicaraguan outlet of the San Juan de Nicaragua River does not even reach half a meter in depth, which hinders navigation by even small-draft boats.

1.1.16 The vegetation around the delta is predominantly marshy and emergent, dotted with palms, while the formation of mangroves is scarce and limited to certain areas in the bay of San Juan de Nicaragua.

1.1.17 At present, the bay of San Juan del Norte is about three kilometres long. It is highly sedimented and is partially covered by floating invasive

vegetation (Eichornia). This process has accelerated since the main current of the river was diverted to the Colorado on or about 1860.

RESERVES

1.1.18 The lower part of the San Juan de Nicaragua River, the natural conditions of the territory, its climate and topography, have allowed for the existence of important ecosystems and natural areas that have facilitated the structuring of a National System of Protected Areas, that constitutes a form of organization that commands special attention.

1.1.19 It includes the Southeast Biosphere Reserve of Nicaragua, recognized by the Man and Biosphere Programme, coordinated by the United Nations Educational, Scientific and Cultural Organization (UNESCO) since 2003, as part of the world-wide network under the name "San Juan de Nicaragua Biosphere Reserve".

1.1.20 Likewise, Nicaragua's southeast region is one of the main links of the Mesoamerican Biological Corridor and constitutes one of Nicaragua's principal contributions to the Corridor.

1.1.21 The southeast region, with an estimated area of 18,341 square kilometers, includes the department of Río San Juan and part of the South Atlantic Autonomous Region (RAAS).

1.1.22 On 17 April 1990, the Government of Nicaragua created the Southeast Natural Protected Areas of Nicaragua, through Presidential Decree 527,

published in Official Gazette Nº 78 of 23 April 1990[21]. This decree creates the Solentiname Archipelago National Monument, the "Los Guatuzos" Wildlife Refuge, the "Fortaleza de la Inmaculada Concepción de María" Historical Monument and the Great Indio-Maiz Biological Reserve, as well as the National Commission for Management and Development of Nicaragua's Southeast Natural Protected Areas.

1.1.23 On 8 June 1994, Decree 28-94 was published in Official Gazette Nº 106, declaring Nicaragua's southeast region a Sustainable Development Territory. The objective of the declaration is to foster "rational use of natural resources, environmental conservation, biodiversity and development, based on the capacity of use of the land and, in particular, ecotourism"[22]. The limits of the Indio-Maíz Biological Reserve were extended by this decree.

1.1.24 On 31 May 1999, the Government of the Republic of Nicaragua, through Decree number 66-99, "Update and Definition of Categories and Limits of Protected Areas located in Nicaragua's southeast territory", declared the Southeast Protected Areas System as the "Southeast Biosphere Reserve of Nicaragua", initiating a new phase in the management of natural areas in the region comprised by the following protected areas:

(See Sketch Map 2)

"Los Guatuzos" Wildlife Refuge
Solentiname Archipelago National Monument
"Fortaleza de la Inmaculada Concepción de María" Historical Monument
Cerro Silva Natural Reserve

[21] See NCM, Annex 59.
[22] See NCM, Annex 60.

Indio-Maíz Biological Reserve
Punta Gorda Natural Reserve
San Juan River Wildlife Refuge"[23].

1.1.25 The reserves, which enjoy a special protection regime, occupy a large portion of the territory adjacent to the lower course of the river, thus population in the adjacent zones is scarce, dispersed and fragmented in small houses, farms and villages.

Section 1.2
The Treaty of Limits of 1858: Historical Background

1.2.1 The borders between Nicaragua and Costa Rica were established during the Colonial Period when the present day Central American States were part of the Captaincy General of Guatemala, an administrative and political dependency of the Spanish Empire. When the Central American States gained their independence from Spain in 1821 they accepted that their borders would be ruled by the principle of *uti possidetis iuris*. The adoption of this legal imperative sought to avoid territorial disputes that might provoke border wars between the new States.

1.2.2 Although in this early period the borders were not exactly demarcated, the two territorial questions that plagued the relations of Nicaragua after independence were quite clearly established. One was that on the Pacific Ocean or western side of the border was located the District of Nicoya (also referred to in Spanish Colonial terms as the "Partido de Nicoya") that was part of Nicaragua and extended to the river El Salto. On the Atlantic

[23] See NCM, Annex 61.

or eastern side the border was the mouth of the San Juan River that "belonged to Nicaragua"[24].

1.2.3 These colonial borders clearly established that on the Pacific or western side of the Central American Isthmus, the Nicaraguan borders went from the Gulf of Fonseca to the North down to the Gulf of Nicoya on the South, whilst on the Atlantic the San Juan River was entirely Nicaraguan.

1.2.4 Shortly after independence, a civil War broke out in Nicaragua in 1824 that deeply divided the country and weakened its capacity for defending her territory. During this turmoil, and turning her back on the principle of *uti possidetis iuris*, Costa Rica annexed the large District of Nicoya and with this territory in hand, began her crusade for getting a part of what was considered the most important territorial treasure of the area: the extensive Lake Nicaragua and its outlet to the sea, the San Juan River, that was considered the most important and feasible canal route for uniting the Pacific and Atlantic Oceans.

1.2.5 The territorial dispute prompted by this situation continued until the 1850s when Nicaragua was invaded and taken over by military elements proceeding from the United States. It was clearly perceived by Nicaragua's neighbours that the ultimate aim of this invasion was to take over Central America. This prompted a crusade involving all Central America in order to defeat these foreign forces. Prominent among these Central American forces that came to assist Nicaragua was a Costa Rican army.

[24] Royal Charter of 1573, NCM, Annex 86.

1.2.6 After the invaders were expelled from Nicaragua and the danger to Central America was over, Nicaragua signed a Treaty with Costa Rica in 1858 that aimed to settle the territorial dispute that had rankled their relations since the annexation of the District of Nicoya by Costa Rica in 1824. By means of this Treaty Nicaragua accepted the Annexation of Nicoya by Costa Rica; Costa Rica for her part recognized that Nicaragua was the entire and sole sovereign of the San Juan River and that her border with Nicaragua did not reach as far as the coast of Lake Nicaragua. In this Treaty Nicaragua also granted limited rights of navigation to Costa Rica in a part of the San Juan River. The extent of these rights of navigation of Costa Rica is the issue presently before the Court.

1.2.7 This section provides an overview of the legal history of the issues related to the limited rights of navigation that were granted to Costa Rica in the San Juan de Nicaragua River.

A. THE SAN JUAN RIVER UNDER SPANISH RULE (1527-1821)

1.2.8 Costa Rica asserts in her *Memorial* that "During the period of Spanish colonial rule the San Juan never belonged exclusively to any one of the provinces of the Captaincy-General of Guatemala."[25]

1.2.9 Not content with the previous misstatement of the facts, Costa Rica claims that at the time of independence from the Kingdom of Spain, both banks of the middle course corresponding to the lower course of the San Juan de Nicaragua River were part of the Province of Costa Rica, whilst Nicaragua's sovereignty was limited to the first fifteen leagues starting

[25] CRM, para. 2.0, p. 9.

from the mouth of the river at the Lake Nicaragua. She bases her allegations on a Royal Ordinance of 29 November 1540 to Diego Gutierrez[26].

1.2.10 It is true that there was a Royal Charter given by Emperor Charles V to Diego Gutierrez, on 29 November 1540 for the conquest and settlement of the Province of Veragua, from that time onwards known as the Province of Cartago, or Costa Rica.[27] However, the 1540 Royal Charter was repealed and substituted by a new Royal Charter given by Emperor Philip II to Diego de Artieda on 1 December 1573. Article 12 of this document states:

> "Firstly, we give you license and authority to discover, settle and pacify the aforesaid Province of Costa Rica and other lands and provinces contained therein, from the North Sea to the South Sea in latitude and in longitude from the border of Nicaragua in the Province of Nicoya, straight to the valleys of Chiriquí, up to the Province of Veragua, on the southern part, *and on the northern part, from the mouths of the Desaguadero, that belong to Nicaragua, all across the land, to the Province of Veragua.*"[28] (Emphasis and explanation added)

1.2.11 The above quoted Royal Charter granted to Diego de Artieda in 1573, set the definitive territorial bases for the common border between Nicaragua and Costa Rica until their independence from Spain in 1821. It established

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[26] Royal Charter given to Diego Gutiérrez, 29 November 1540; CRM, Vol. 2, Annex 1.

[27] Mr. Manuel M. De Peralta: Extraordinary Envoy and Minister Plenipotentiary of Costa Rica during the pleadings prepared for the arbitral process by the Spanish crown in 1891, in her territorial dispute against the Republic of Colombia, relates that this charter was challenged by the Province of Nicaragua: *"...Rodrigo de Contreras, governor of Nicaragua protested... and filed a claim against Diego Gutierrez for the part over which he believed he had right in the Desaguadero. The Council of the Indias... ruled on March 16, 1541....Contreras appealed this sentence and the Council amended it on April 9th next... depriving of the navigation and fishing enjoyment in common with the governor of Nicaragua..."* "Historia de la Jurisdicción territorial de la República de Costa Rica", Peralta, Manuel, p. 38 para. 55. NCM, Annex 77.

[28] Royal Charter given to Diego de Artieda, 1 December 1573. NCM, Annex 86.

very clearly that "the mouth of the Desaguadero (San Juan River)...belongs to Nicaragua..."[29].

1.2.12 Finally, Costa Rica's claim that during all the colonial period and until the moment of independence of both Republics (1821), the San Juan de Nicaragua River was a water course shared by both colonial provinces lacks historical documentary support. Apart from this, the geography of the area belies this assertion. Whilst there were no roads from the Costa Rican settlements to the San Juan River, the Province of Nicaragua enjoyed safe and speedy communication with the San Juan de Nicaragua River from all its major population areas, through Lake Nicaragua.

B. THE POST-INDEPENDENCE AND FEDERAL PERIOD (1821-1838)

1.2.13 Shortly after independence, when Nicaragua's internal rivalries heated up to cause the first Civil War (1824), the Government of Costa Rica exerted pressure on the authorities and the population of the Nicaraguan District of Nicoya in order to annex it to its jurisdiction. The pressure resulted in a declaration by authorities of the District of Nicoya of annexation to Costa Rica (1824).

[29] According to Spanish Colonial law, applicable in 1821, the Costa Rican Territory was: "... from the North Sea [Caribbean Sea] to the South Sea [Pacific Ocean], in latitude and in longitude from the border of Nicaragua in the Province of Nicoya, straight to the valleys of Chiriquí, up to the Province of Veragua, on the southern part, *and on the northern part, from the mouths of the Desaguadero, that belong to Nicaragua, all across the land, to the Province of Veragua...."* (Royal Charter of 1573- Article 12); NCM, Annex 86. Also the Academia Costarricense de la Historia has stated that: "...it would not be until 1573, with the Royal Charter granted to Artieda y Chirinos, that a significant change occurred with respect to the limits. This latter date would also fix the limits that would reign during the entire colonial regime." Academia Costarricense de la Historia: *IV Centenario de la entrada de Cavallón a Costa Rica. 1561-1961.* San José, Imprenta Nacional, 1961, pp. 45.

1.2.14 As things stood, the Federal Congress issued a Decree on 9 December 1825, which provided in Article 1: "For the time being, and until the demarcation of the territory of the States is carried out as prescribed in Art. 7 of the Constitution, the Party of Nicoya will continue separated from the State of Nicaragua and annexed to that of Costa Rica."[30] The words *"for the time being"* and *"until the demarcation"* reflected the transitory situation of the territory of Nicoya, claimed by Nicaragua as legitimate owner.

1.2.15 Costa Rica continued to recognize the colonial borders in her first Constitution of 1825 where she defines her territory under Article 15, the following way: "The State's territory will extend, for now, from West to East, from El Salto River, which divides it from that of Nicaragua, up to the Chiriquí River, which is the border of the Republic of Colombia, and from North to South, from one sea to the other, being its limits on the north the mouth of the San Juan River and the shield of Veraguas, and in the south the mouth of the Alvarado River and that of the Chiriquí"[31] (See Sketch Map 3). It is important to point out the coincidence between the language of the Royal Charter of 1573 and the Costa Rican Constitution of 1825. The River, El Salto (within the confines of the Nicaraguan District of Nicoya) and the mouths of the San Juan River composed the westernmost and easternmost points that separated the territories of the Provinces of Costa Rica and Nicaragua since the colonial period. These points made up the southern boundaries of the Nicaraguan District of Nicoya. This was another, explicit recognition that the District of Nicoya and the San Juan River both belonged to Nicaragua during the Colonial Period (See Sketch Map 4).

[30] NCM Annex 55.
[31] CRM, Vol. 6, Annex 193, p. 769.

1.2.16 The 1825 Federal Congress of Central America's decree was not only temporary, it was not ratified by the respective State Congresses as prescribed in the Fundamental Charter of Central America. On her part, Nicaragua vigorously and consistently claimed her rights over these territories before the Federal Congress.

1.2.17 In 1838, at the time of the dissolution of the Central American Federation, the Federal Authorities had not undertaken any action to solve the matter of the temporary annexation of the District of Nicoya to Costa Rica. Costa Rica's unilateral decision not to return the territory temporarily annexed to it by the Federal Congress was thereon, the cause of constant friction with Nicaragua.

1.2.18 As will be seen below, this dispute would affect the bilateral relations until their definitive settlement under the Treaty of Limits of 1858. Before this Treaty was signed, Nicaragua had not accepted Costa Rica's annexation of Nicoya (Guanacaste) as definitive and irrevocable.

C. THE POST-FEDERAL PERIOD (1838-1848)

1.2.19 Disregarding the accepted principle of *uti possidetis iuris*, and setting aside the territorial borders previously established in her own 1825 Constitution, Costa Rica staked out new territorial claims for the first time, by granting constitutional rank to her thesis of "natural limits" in her "Decree of Bases and Guarantees" of 1841[32], according to which her northern border began at the mouth of the La Flor River (on the Pacific),

[32] CRM, Vol. 6, Annex 194.

continuing along the southern bank of Lake Nicaragua and the San Juan River, down to the mouth of the latter on the Atlantic Ocean. That is, by her own Decree Costa Rica made herself a riparian of the coveted Lake Nicaragua and her outlet to the Atlantic, the San Juan River. Undoubtedly, this decision "constituted a unilateral act that logically did not obligate our northern neighbour [Nicaragua]"[33], as confirmed by a Costa Rican historian.

1.2.20 In an apparent attempt to conceal the weakness of her historical claims, Costa Rica portrays the borders fixed in the 1825 Constitution as being the equivalent of those appearing in her 1841 Constitution. In effect, Costa Rica affirms in her *Memorial*:

> "The fundamental Law of the State of Costa Rica of 25 January 1825, Article XV, reasserted the limits of Costa Rica, establishing that the territory reached both seas and extended from south to north, being her limits on the north, the mouth of the San Juan River and the shield of Veragua. Likewise, the Decree of Basis and Guarantees of 1841, established the limits of the national territory of Costa Rica, declaring the limit of the national territory in the following terms:
>
> > "On the west, the La Flor River and continuing along the shore of the Lake of Nicaragua and the San Juan River, down to the mouth of the latter on the Atlantic Ocean; on the north, the same ocean from the mouth of the San Juan River to the Shield of Veragua."[34]

[33] Sáenz Carbonell, Jorge Francisco, "Historia diplomática de Costa Rica (1821-1910)". San José, C. R., Editorial Juricentro, 1996, p. 70.
[34] CRM, para. 2.13.

1.2.21 In other words, Costa Rica attempts to portray both constitutional texts as concurring in their description of the borders with the State of Nicaragua. Such and attempts flies against the clear wording of the legal texts. Thus, Costa Rica conveniently leaves out the complete text of Article XV of her first Political Constitution of 1825, which provides as follows: "The State's territory will extend, for now, from West to East, from the Salto River, which divides it from that of Nicaragua,..."[35].

1.2.22 Furthermore, as regards the border with Nicaragua, both Constitutional texts do not concur. The 1825 Constitution recognizes the colonial principle of *uti possidetis iuris*, based on the 1573 Royal Charter, which established that the division between both provinces was located "from the border of Nicaragua in the Province of Nicoya," (in the South Sea) and, "*...from the mouths of the Desaguadero, that belong to Nicaragua...*" (in the North Sea), while the 1841 Constitution unilaterally modified the colonial borders in violation of the *uti possidetis iuris* principle that had been accepted by both countries at independence.

1.2.23 To summarize, Costa Rica is incorrect when she states that the principle of *uti possidetis iuris* was determined by the Royal Charter granted to Diego Gutierrez in 1540[36]. Costa Rica is also mistaken when it points out to the Court that the San Juan River did not belong exclusively to the territorial district of the province of Nicaragua during the colonial period[37]; and now it is being inaccurate again when she states that her first and second Political Constitutions concurred with respect to the definition of *uti*

[35] CRM, Vol. 6, Annex 193, p. 769.
[36] CRM paras. 2.08 and 2.10.
[37] CRM para. 2.08.

possidetis iuris[38], thus suggesting that since 1540 Costa Rica was a riparian of the San Juan River.

D. PERIOD OF INTERNATIONALIZATION OF THE DISPUTE

1.2.24 The possibility of cutting a canal across the Central American isthmus was recognized early on by the Spanish conquistadores. The two routes that were considered ran one through Nicaragua and the other through Panama. The Nicaraguan route from the Atlantic would run up the San Juan River, cross Lake Nicaragua, and be completed by a channel dug through the narrow isthmus of Rivas on the Pacific.

1.2.25 After independence from Spain, when the key to the canal route through the San Juan river and lake Nicaragua rested on even weaker hands than that of the waning Spanish Empire, other stronger contestants for this route came more openly into play.

1.2.26 The most difficult international problems that Nicaragua has faced have usually been related to this potential as a canal route. A keen observer, the Minister of the United States in Nicaragua in 1913, Mr. George Weitzel, considered that these Nicaraguan problems had their origin in the possibility of the canal route: "In all the cases of controversies of Nicaragua with Europe, Mexico and Colombia, the true cause of the problem was desire to control the route of the interoceanic channel."[39] In this enumeration of interested outsiders Minister Weitzel did not mention

[38] CRM para. 2.13.

[39] American Policy in Nicaragua. Memorandum on the Convention Between the US and Nicaragua relative to an Interoceanic Canal and a Naval Station in the Gulf of Fonseca, signed at Managua, Nic. on 8 February 1913. By George T. Weitzel, Former American Minister to Nicaragua, 1912-1913. Washington, Government Printing Office, 1916, p. 7.

William Walker[40] and others of his compatriots that had also shown extreme interest in the Nicaraguan canal route that at one time was even referred to as the "filibuster freeway"[41]

1.2.27 The fatal attraction of this canal route has also tainted the relations of Nicaragua with her neighbours. Costa Rica in particular always viewed with longing the advantages of Lake Nicaragua and the San Juan River. It has been a temptation so near and yet so far...

1. <u>First stage:</u> the threat of England and her alliance with Costa Rica

1.2.28 After the withdrawal of Spain, Great Britain decided to "resurrect," her old protectorate over the Miskito Indians that lived in the Caribbean Coast of Nicaragua. Great Britain had renounced her claims to this "protectorate" by virtue of the Treaties of Peace celebrated with Spain in 1783 and 1786. But this time Great Britain went beyond her previous claims. She extended the geographical area of the protectorate further to the south, in such a way as to include the mouth of the San Juan River and the Nicaraguan port of San Juan del Norte located in the estuary. Thus, on 1 January 1848 combined British and Mosquito (Miskito Indians) forces disembarked at the port of San Juan de Nicaragua, lowered Nicaragua's flag, and appointed authorities on behalf of the Mosquito King.

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[40] "Walker became president of Nicaragua on July 12, 1856, and maintained himself against a coalition of Central American states until May 1, 1857. In order to avoid capture, he surrendered to the United States Navy and returned to the United States." "Walker, William." *Encyclopædia Britannica. 2007.* Encyclopædia Britannica 2006 Ultimate Reference Suite DVD 28 Apr. 2007.

[41] Bermann, Karl: "Under the Big Stick: Nicaragua and the United States Since 1848" (South End Press, Boston 1986), p. 91. The United States citizens who invaded Nicaragua in the 1850s were referred to as "filibusteros" (filibusters). Their leader was William Walker.

1.2.29 Costa Rica saw an opportunity to obtain British recognition for her territorial claim on the southern bank of the San Juan River as well as to obtain a right of navigation on the river for her wares under advantageous conditions. Therefore, Costa Rica approved the British use of force, proclaimed her recognition of British claims and in return obtained British support for her own claims. This diplomatic action, in contravention of her previous official position was repudiated by the rest of Central American Governments who felt equally threatened in their own territories by these British claims and actions.[42]

1.2.30 Costa Rica's backing of Great Britain's reinstating and expansion of the Protectorate it had imposed on the Mosquito Indians, further internationalized the dispute. Thus, faced with this threat, Nicaragua sought to enter into an alliance with the United States of America.

2. Second stage: The transit route and the concession contracts granted by Nicaragua to U.S. concessionaires

1.2.31 The interest of Great Britain on the transit and canal route through Lake Nicaragua and the San Juan River found her counterpart in that of the United States of America. The discovery of gold in California in 1848 spurred a multitude of travellers to that territory and transit through the Central American isthmus became of strategic interest to the United States. The main routes followed were through Nicaragua and Panama.

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[42] Costa Rican historian Clotilde Obregón recognizes her country's less than candid strategy in these terms: "*Costa Rica accepted the limits given by the English, even though years earlier it had stated that the Mosquito territory did not extend to the San Juan [...] Christie [...] stated that [Costa Rica] had a right of free navigation from the confluence of the Sarapiquí [with the San Juan] up to the outlet [...] The fact that Costa Rica was dealing with a British consular representative, accredited before the Mosquito King, was a terrible tactic, even during those moments of crisis ...*" Obregon, Clotilde. "El río San Juan en la lucha de las potencias (1821-1860)". San José, C. R., Editorial Universidad Nacional a Distancia, 1993, pp. 93-94.

The Nicaraguan route, located further to the North than Panama, was shorter by several hundred miles and even cheaper for those sailing from the east coast of the United States to California. Consequently, the U.S. government, in view of the British attempts to control any feasible canal route through Nicaragua, countered by promoting a canal built by a U.S., private company.[43]

1.2.32 Three companies -two U.S. and one British enterprise- were openly competing for a canal contract in 1849. The contract was finally awarded to the American Atlantic and Pacific Ship-Canal Company, established in New York by a group of investors headed by Cornelius Vanderbilt. The contract was concluded and signed on 27 August 1849. A short review of these concessions may be appreciated below in the following section[44].

3. The Anglo-American Treaty: Clayton-Bulwer of 1850

1.2.33 The possibility of a transatlantic canal in Nicaragua under control of the United Sates, increased diplomatic tensions between this Government and Great Britain. In order to avoid a major confrontation both countries entered into the so called Clayton-Bulwer Treaty, on 18 April 1850. According to its preamble, the object of the treaty was to set forth and fix their views and intentions "with reference to any means of communication by Ship Canal, which may be constructed between the Atlantic and Pacific Oceans, by way of the river San Juan de Nicaragua and wither or both of

[43] Rosengarten, Frederic Jr.; "Freebooters must die!" Haverford House, Publishers, Wayne Pennsylvania, p. 59.
[44] NCM, paras. 1.3.10-1.3.18.

the Lakes of Nicaragua or Managua, to any port or place on the Pacific Ocean."[45]

1.2.34 Article I of the Clayton-Bulwer Treaty further asserted that neither Party would ever "obtain or maintain for itself any exclusive control over the said Ship Canal", and that neither Party would "erect or maintain any fortification commanding the same"[46].

E. Period of the National Anti-Filibuster War (1855-57)

1.2.35 In 1855, as a consequence of Nicaragua's Civil War between the legitimist (conservative) party and the democratic (liberal) party, American soldiers of fortune known as filibusterers (filibusteros) started arriving in Nicaragua. In the course of the hostilities, the United States' based Accessory Transit Company, at the time facing pending claims for fiscal payment from the Nicaraguan Government, initially entered into collusion with the leader of the filibusterers, William Walker. The Company offered its steamers to transport Walker's mercenaries at no cost. Later on, Walker displaced the parties at war and proclaimed himself President of Nicaragua, not without first convincing the coalition government, which he already controlled, to revoke the 1849 contract granted to the U.S. Accessory Transit Company.[47]

1.2.36 Costa Rica declared war on Walker, stating (in the Presidential Proclamation) that it was not driven by any desire to conquer territories, but simply wanted to aid Nicaragua against the Walker invasion. The

[45] Clayton-Bulwer Treaty. CRM, Vol. 2, Annex 4.
[46] *Ibid.*
[47] NCM, Annex 56. Decree revoking the rights and privileges granted to the American Atlantic and Pacific Ship Canal Company and Accessory Transit Company, 18 February 1856.

Governments of Guatemala, El Salvador and Honduras also declared war on Walker.

1.2.37 Betrayed by Walker, U.S., financier Cornelius Vanderbilt also orchestrated a military and financial plan to defeat him and the other usurpers of his interests in the accessory Transit Company. To those ends, Vanderbilt provided advice and finance to the Costa Rican expedition that would take over the transit route and the Company's steamers. With the loss of the transit route the filibusterers were isolated and were not able to receive reinforcements and materiel to resist the attacks of the combined Central American forces. In May 1857 Walker capitulated and abandoned Nicaraguan territory.

1.2.38 The end of the bloody war, and Costa Rica's support during the struggle created a positive climate in Nicaragua to subscribe with Costa Rica the 1857 Treaty of Limits, known as the Juárez - Cañas Treaty (not to be confused with the definitive 1858 Treaty of Limits, known as the Jerez - Cañas Treaty), that sought to put an end to the territorial and boundary dispute.

1.2.39 The 1857 Juarez-Cañas Treaty of Limits was not ratified by Costa Rica for reasons explained below; however the stipulations of the Treaty are of the utmost importance, since it is one of the closest precedents to the 1858 Jerez-Cañas Treaty of Limits. Its main objective was the solution of the intractable question of sovereignty over the Province of Nicoya. The first article of this Treaty was addressed to this purpose:

> "First: The Government of Nicaragua, as a sign of special gratitude to the Government of Costa Rica for the solid

> determination and great sacrifices made for the cause of national independence, waives, takes and put away every right on the District of Guanacaste, which is now called the Province of Moracia of the Republic of Costa Rica, to be understood, held, and acknowledged, from now and forever, as an integral part of said Republic, under the *sovereign jurisdiction of said Government....*" (Emphasis added)[48]

1.2.40 This Treaty was signed soon after the end of the first war against Walker at a moment when Costa Rica had retained military control of the San Juan and the transit route through Nicaragua. Nonetheless, it is important to point out that the Republic of Nicaragua when renouncing its claim to the District of Nicoya (also called Guanacaste or Moracia, at different times), took painstaking care to safeguard its sovereignty over the San Juan de Nicaragua River. Thus, in tune with its obligations and economic interests it had the precaution to establish clearly the nature of Costa Rica's rights of navigation, which was to be limited to "*articles of trade*", either for international, bilateral or local trade. This was a reaffirmation that Costa Rica accepted to be excluded perpetually, from the right to transport passengers.[49]

1.2.41 In the end, this 1857 Treaty of Limits was not ratified by Costa Rica. The reason for this was that after the withdrawal of Walker, Costa Rica seeing herself in control of the transit route and of the steamers destined for her

[48] Juárez – Cañas Treaty, 6 July 1857; CRM Vol. 2, Annex 5.

[49] About this Treaty, Costa Rican historian Sáenz Carbonell comments: "In general terms, and considering that at that time the region of Rio San Juan was under Costa Rican military control, the agreement was relatively balanced because Nicaragua renounced its claims over Moracia (Guanacaste) and *Costa Rica renounced its claims over the waters of the San Juan and the Southern shores of Lake Nicaragua;* besides, Nicaragua received the zone between the La Flor River and the bay of Salinas, which was considered important for the inter-oceanic transit." (Emphasis added). Sáenz Carbonell, Jorge Francisco, "Historia diplomática de Costa Rica (1821-1910)". San José, C. R., Editorial Juricentro, 1996, p. 236.

business exploitation, decided to transform her anti-filibusterer campaign into a war of territorial conquest. In an attempt to implement her territorial "conquests", Costa Rica signed a Concession with William Webster (14 July 1857)[50] ceding rights for the business exploitation of the transit route that passed entirely through Nicaraguan territory.[51]

1.2.42 This intention of territorial conquest by Costa Rican Government can be appreciated in the diplomatic note sent, on 30 July 1857, by Lewis Cass, Secretary of State of the United States, to William Carey Jones, Special Agent of the United States to Central America,: "SIR: Reports have reached here...that the Government of Costa Rica ... intends to appropriate to itself portions of the Territory of Nicaragua, thus converting the war which has just been terminated by the accomplishment of the object for which it was avowedly undertaken into a scheme for territorial acquisition. Such a design is so unjust in itself, in view of the circumstances...she would violate the solemn pledges given when she proposed to go to the aid of Nicaragua by attempting to convert this into a war of conquest." [52]

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[50] Webster - Harris - Escalante Contract, 14 July 1857; NCM, Annex 16.

[51] About this contract, Sáenz Carbonell stated: "Through the Escalante-Webster, Costa Rica granted to the Britton (Webster) and Harris exclusive rights over the Transit route, through the San Juan, the Lake Nicaragua and the Sapoá River. As consideration Webster and Harris agreed to lend Costa Rica 500,000 pesos and part of the revenues from the exploitation of the transit route... Our country would try to get Nicaragua *to grant those* exclusive rights over the Transit route to Costa Rica *or to approve the terms of the contract.* In this contract, the Escalante-Webster, Costa Rica again granted concessions over Nicaraguan territory *that had never been claimed before.* This time it granted rights of transit over La Virgen and San Juan del sur and the land in those localities." (emphasis added); Sáenz Carbonell, Jorge Francisco, "Historia diplomática de Costa Rica (1821-1910)". San José, C. R., Editorial Juricentro, 1996, p 240.

[52] Note Lewis Cass, Secretary of State of the Unites States, to William Carey Jones, Special Agent of the United States to Central America. Washington, 30 July 1857. Diplomatic Correspondence of the United States. Interamerican Affairs 1831-1860. William R. Manning Volumen IV. Central América 1851-1860. p. 95. NCM, Annex 37.

1.2.43 In her efforts to take by force the transit route and pressure Nicaragua into accepting the concession granted to Webster, on 14 October 1857 Costa Rica gave an ultimatum to the Government of Nicaragua to hand over the lakeside port of San Carlos[53], located at the mouth of Lake Nicaragua into the San Juan River. This ultimatum was considered by President Tomás Martínez as a declaration of war and the Nicaraguan Government responded with a decree dated 19 October 1857, that stated the following:

> "Art. 1. Nicaragua accepts the war declared by the Government of Costa Rica and will vindicate its rights which have been deliberately violated by the conduct of that Government.
>
> Art.2. The Republic of Nicaragua will protect and preserve its rights along the entire transit route, from San Juan del Norte, through the river and lake, to San Juan del Sur, as well as the rights it has in the district of Guanacaste, including its lands, forests and rivers.
>
> Art.3. The necessary force will be organized to execute the provisions of this decree."[54]

1.2.44 The situation worried the United States that saw her interests threatened. Thus, in a note sent to the Minister of Foreign Affairs of Nicaragua, D. Gregorio Juárez, on 17 October 1857, by the US special envoy to the Republics of Nicaragua and Costa Rica, the position of his Government was expressed in these terms: "...It is the opinion of the government of the United States that the government of Costa Rica in inaugurating the war of which Nicaragua was lately the scene, precluded herself by her public

[53] Note from Coronel Jorge Cauty to Coronel Segundo Cuarezma, Commander of the San Carlos Fort. San Carlos, 14 October 1857; NCM, Annex 22.

[54] Decree No. 139 through which Nicaragua accepted the war declared by Costa Rica. Managua, 19 October 1857. Published at the Official Gazette of the Republic of Guatemala, Monday 16 November 1857. Exterior. Nicaragua, NCM, Annex 57.

declarations from any territorial acquisition or advantages in the result of it; and that therefore if the two States still differ as to a divisory line, the position in which they were anterior to the war ought to be restored, both in respect of fact and law, that is, leaving the Republic of Nicaragua in the exclusive jurisdiction of the transit. It is further the opinion of the United States that the route by way of the river San Juan and Lake Nicaragua ought to be under a sole jurisdiction, and that that jurisdiction ought to remain with the State which, in full possession of it, heretofore granted the use of it."[55]

1.2.45 The strongest regional and international opposition to Costa Rica's attitude notwithstanding[56], she did not refrain from attempting to seize to her advantage the favourable circumstances in order to impose upon Nicaragua "her" territorial and boundary ambitions. Nicaragua was prostrated economically and militarily after years of civil war that had decimated her population and razed her productive infrastructure. Aside from the Costa Rican military occupation, Nicaragua had to face a new invasion by the Walker-led filibusterers, which in November 1857 had disembarked on the port of San Juan de Nicaragua in an attempt to retake control of the country.

1.2.46 The news of the arrival of the filibusterers had the effect of prompting the withdrawal of the Costa Rican occupation forces in the San Juan de Nicaragua River, but not before forcing Nicaragua under these dire

[55] Note from William Carey Jones, Special Agent of the United States of America to Central America, to Gregorio Juárez, Minister of Foreign Affairs of Nicaragua. Managua, dated 17 October 1857. Diplomatic Correspondence of the United States, Inter-American Affairs Department of State, 1831 -1860. William R. Manning, Volume IV. Washington, pp. 613-617. NCM, Annex 23.

[56] See, for example, "Nicaragua y Costa Rica". Edición del Centroamericano. 24 October 1857, NCM, Annex 80.

circumstances to sign a detrimental Treaty of peace with Costa Rica on 8 December 1857 known as the Martínez - Cañas[57]. Fortunately, the filibusterers were quickly captured and taken to the United States aboard a United States war frigate before they were able to advance further into Nicaraguan territory. The Costa Rican withdrawal and the capture of the filibusterers allowed Nicaragua to reclaim control of the San Juan route, and to immediately reject on January of 1858 the Treaty of Peace which circumstances had forced it to enter into with Costa Rica and which in any case had not entered into force.

1.2.47 The rejection of these last agreements cleared the way for both Governments to negotiate, under less duress for Nicaragua, a Treaty of Limits that would definitively settle the territorial dispute, as well as the nature of the navigational rights that Nicaragua was willing to grant Costa Rica. This was accomplished in a single instrument, a solemn Treaty of Limits known as the Jerez-Cañas, of 15 April 1858[58].

CONCLUSIONS

1.2.48 The Costa Rican *Memorial* systematically differs from historical facts with regard to the period prior to the signature of the Jerez - Cañas Treaty of Limits of 1858. In effect, Costa Rica is not consistent with well known historical facts when it states in her *Memorial*:

a. That during the colonial period, the San Juan River did not belong exclusively to any of the Provinces that integrated the Captaincy-

[57] CRM, Vol. 2, Annex 6.
[58] Jerez-Cañas Treaty, 15 April 1858; CRM, Vol. 2, Annex 7, pp. 54-60.

General of Guatemala[59]. This statement lacks historical support given that the San Juan de Nicaragua River belonged exclusively to the territorial district of the Province of Nicaragua since 1573.

b. That the colonial border between the Provinces of Nicaragua and Costa Rica was constituted by the Royal Charter dated 6 May 1541[60]. This statement is also inaccurate given that the border was ultimately determined by the later Royal Charter granted to Diego de Artieda on 1 December 1573[61].

c. That her first political constitutions (1825 and 1841) concurred in pointing out the colonial border between Costa Rica and Nicaragua[62]. This statement is inaccurate given that these texts do not concur on this question. The Constitution of 1825 accepted that the border was ruled by the principle of *uti possidetis iuris* and hence by the limits set by the Royal Charter of 1573. The constitutional text of 1841 ignores this in order to justify the illegal annexation of Nicaragua's District of Nicoya.

d. That prior to the Jerez-Cañas Treaty of Limits (1858), Costa Rica unilaterally or jointly with Nicaragua participated in the canalization or transit contracts granted in the San Juan River and Lake of Nicaragua[63]. This statement lacks any historical or documentary support given that Costa Rica did not participate

[59] See CRM, para. 2.08.
[60] See CRM, para. 2.09 and Vol. 2, Annex 2.
[61] Royal Charter granted to Diego de Artieda, 1 December 1573; NCM, Annex 86.
[62] See CRM, para. 2.13.
[63] See CRM, para. 2.16.

effectively in any unilateral or joint exploitation with Nicaragua of passenger transit through the San Juan de Nicaragua River.

e. That during the period of the National War or Filibuster War (1856-1857), Costa Rica remained active in the region of the San Juan de Nicaragua River and controlled the fluvial steamers that were destined to develop the concession (for passenger transit) that was granted to the Accessory Transit Company[64]. This statement is misleading since it fails to mention that it was a temporary and illegal military occupation by Costa Rica in the San Juan de Nicaragua River, and furthermore, that the illegal concession contract granted by Costa Rica never entered into force. This episode simply reflects a blatant attempt by Costa Rica to implement her occupation of Nicaraguan territory by force, *manu militari,* an attempt which was rejected by Nicaragua and denounced by the international community.

1.2.49 Nicaragua, on the other hand, has furnished documentary evidence that when she entered into the negotiation of the Jerez-Cañas Treaty of Limits of 1858, she had exclusively the dominion and sovereignty of the San Juan de Nicaragua River and that the District of Nicoya was part of her territory under the principle of *uti possidetis iuris.* Under these circumstances, Nicaragua undertook a negotiation that entailed surrendering to Costa Rica her rights to the District of Nicoya with the purpose of being able to peacefully and undisturbed enjoy her exclusive dominion and sovereignty over the waters of the San Juan de Nicaragua River. The very narrow and limited right of free navigation with articles of trade, or wares, (objetos de

[64] See CRM, para. 2.21.

comercio) that was also granted to Costa Rica in part of the San Juan de Nicaragua River, should be understood within the context of the 1858 Treaty of Limits.

Section 1.3

Precedents and subsequent practice related to the 1858 Jerez – Cañas Treaty

1.3.1 As indicated in the previous section, after independence in 1821 there were several diplomatic attempts to settle the controversy originating in Costa Rica's ambitions over the San Juan de Nicaragua River. Some of the Agreements resulting form these diplomatic endeavours were not ratified by either side, others were ratified by one or the other. None were valid. Their importance lies in their usefulness as *travaux préparatoires* to the 1858 Treaty of Limits,[65] and thus as a means of understanding the careful wording of this Treaty. These instruments were also taken into consideration in the interpretation of this Treaty by the Award rendered by President Cleveland in 1888[66].

1.3.2 Concurrently with these Agreements, Nicaragua signed a series of Transit Concessions and Canal Contracts which were not objected by Costa Rica and hence indicate what the Parties understood to be their respective rights at that point in time.

1.3.3 Other documents are also of assistance in this interpretation such as the written instructions or briefing papers given by the Government of Costa Rica to her negotiators, the Yearbooks of the Costa Rican Foreign

[65] Jerez-Cañas Treaty, 15 April 1858; CRM, Vol. 2, Annex 7, pp. 54-60.
[66] CRM, Vol. 2, Annex 16.

Ministry, the exchange of notes between the two countries or of either government with third parties and the statements made by authorities on both sides.

A. PRECEDENTS TO THE 1858 TREATY

1. Treaties

1.3.4 At a very early stage of independent life, when territorial differences sprung forth, several attempts were made to settle these issues; for instance, through The Treaties of Granada of 16 August, 1823[67] and León of 9 September 1823[68]. Although these treaties were not ratified, the language is revealing, for they confirm Nicaragua's sovereignty over the San Juan de Nicaragua River.

1.3.5 Nicaragua's exclusive sovereignty over the San Juan River and Costa Rica's restricted right to navigation on said river are referred to in other texts prepared by the parties during this same period. In the Marcoleta-Molina Treaty of 28 January 1854, it is established that "the citizens of Costa Rica shall be allowed to freely enter and leave by the port of San Juan with their vessels and merchandise, and to navigate, *except by steamer* on the Sarapiquí River and the tributaries of the San Juan River..."[69] (emphasis added).

1.3.6 This Treaty also clearly shows that Nicaragua had dominion and possession of the San Juan River and that Costa Rica acknowledged this

[67] Montealegre-Velasco Treaty. Granada, 16 August 1823, NCM, Annex 1.
[68] Montealegre-Solis Treaty. León, 9 September 1823; NCM, Annex 2.
[69] See NCM Chap. 2, paras. 2.125 and 4.1.41, Annex 4.

situation as is evident from the Costa Rican attempts to obtain authorization to navigate the San Juan River. The Treaty also evinces that at the time Nicaragua did not consider granting any rights of navigation to Costa Rica in the San Juan River with steamers. Furthermore, that the right granted by Nicaragua to Costa Rica in relation to a limited navigation on the San Juan referred only merchandise.

1.3.7 This Treaty also confirmed what had already been indicated in the Webster–Crampton Propositions of 1852[70], which excluded Costa Rican navigation by steamers with passengers.

1.3.8 On 6 July 1857 the Juarez-Cañas Treaty[71] was concluded with the objective of entering into a definitive treaty of limits between the two countries. This treaty recognizes that Guanacaste is "from now and forever" [72] part of Costa Rica and that Costa Rica shall freely use the waters of the San Juan River to navigate and transport articles of trade (objetos de comercio). Although the treaty was not ratified by Costa Rica, the negotiations carried out at the time by the parties showed the intention of both governments to achieve an integral territorial agreement, attributing Guanacaste to Costa Rica; exclusive sovereignty over the San Juan River to Nicaragua; and the restricted right of free navigation over said river (with articles of trade) to Costa Rica.

[70] Webster- Crampton Propositions, 30 April 1852, NCM, Annex 88 and below paras. 1.3.19-1.3.20.
[71] CRM, Vol. 2, Annex 5 and NCM, paras. 1.2.38-1.2.39 and 2.1.26.
[72] CRM, Vol. 2, Annex 5.

1.3.9 As indicated above, Nicaragua also concluded a series of contracts with private foreign companies, as well as treaties with other states in relation to concessions for the transit of passengers and for cutting an interoceanic canal through Nicaragua that would make use of the San Juan River. These contracts signed with private parties and the treaties then concluded by Nicaragua regarding these same matters, clearly confirm Nicaragua's full exercise of sovereignty over the San Juan River, including the exclusive right to navigate with passengers and the consequential and equally exclusive right to grant concessions and concede the right to navigation with passengers on the river. That is the reason why this right was expressly excluded from all agreements with Costa Rica prior to and including the Treaty of Limits of 1858. This right has never been the subject of negotiation. Nicaragua has always had, as will be seen and confirmed below, the exclusive right to navigate the river with passengers.

1.3.10 The contract signed with the *American Atlantic and Pacific Ship Canal Company*[73] *(Canal Company),* ratified by the Nicaraguan Assembly on 26 September 1849, granted the company the exclusive right and privilege to build a maritime canal, at her own expense and through Nicaraguan territory, from the port of San Juan de Nicaragua to any other point in the Pacific.[74] The building of the canal would conclude within twelve years and the term of the contract was 85 years. Additionally, the company obtained exclusive rights of passenger transit by steamship.

[73] Canalization contract entered into by the Government of Nicaragua and a company formed by U.S. citizens. Zepeda-Juárez-White. León, Nicaragua, 27 August 1849; NCM, Annex 14.See above para. 1.2.32.
[74] *Ibid.*

1.3.11 Article 23 of the concession contract granted to the Canal Company provides: "The *exclusive right* acquired by the Company under this contract *to navigate* on the lakes, rivers and waters of the State [Nicaragua] *with steamships*, from one sea to the other, shall be understood not to preclude natives from free inland navigation on sailboats or any other type of vessels *other than steamships*".[75] (Emphasis and explanation added).

1.3.12 Article 32 reads as follows: "The State [Nicaragua] also agrees to protect and defend the Company with respect to the full enjoyment of the rights and privileges granted thereto under this contract, and also agrees not to grant or contract to any Government, individual, or any other company the right to build a maritime canal, railroad, or any other inter-oceanic route through its territory, *or the right to navigate on the rivers and lakes occupied by the Company for steamships, as long as this contract remains in force*. However, if this contract ceases to have effect, then the State shall be free to contract any other individuals or companies, as it may deem most convenient."[76] (Emphasis and explanation added).

1.3.13 It should be noted that in assigning the concession *ut supra*, Nicaragua acted as exclusive territorial sovereign and administrative grantor, without any participation whatsoever by the Republic of Costa Rica. It is therefore surprising to learn that, Costa Rica, in her *Memorial* submitted before this Court, asserts without providing supporting evidence that: "Most of these contracts and treaties were negotiated with Nicaragua, although the earliest contracts were negotiated by the Central American Republic and

[75] NCM, Annex 14.
[76] *Ibid.*

subsequent to the dissolution of the federation Costa Rica was also closely involved as a Party, solely or jointly."[77]

1.3.14 In 1851, the Canal Company was reorganized, without affecting the original concession granted by the Government of Nicaragua. The part relating to steamship navigation in the waters of Nicaragua was separated from the contract of 27 August 1849, and transferred to the White-Chamorro-Mayorga Canal Convention[78], which was ratified by Nicaragua through a decree issued on 20 August 1851. This spun off the Accessory Transit Company, which was limited to transporting passengers through the Nicaraguan route.

1.3.15 The "Accessory Transit Company," whose steamships -in 1854 alone, transported 13,128 passengers from New York to San Francisco and 10,461 passengers from San Francisco to New York, just 447 less than the Panama route, which it had surpassed by 2,130 passengers during the previous year. Further, the company had built a macadam road between the port of San Juan del Sur in the Pacific and the port of La Virgen on the Lake (in other words, along the isthmus of Rivas) and Nicaragua had an established port and customs facilities.[79] After all, Commodore Vanderbilt's company had netted 5 million dollars during its first year of operations.[80]

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[77] CRM, para. 2.16.
[78] NCM, Annex 3. Chamorro-Mayorga-White Convention. Granada, Nicaragua, 14 August 1851.
[79] Folkman Jr., David I.; "The Nicaragua Route". University of Utah Press, Jr. Salt Lake City: 1972; Appendix B "Passangers by the Isthmian Routes 1848-1869." p. 163.
[80] Berman, Karl: Under the Big Stick: Nicaragua and the United States since 1848", South End Press, Boston, 1986, p. 32.

1.3.16 In this canal contract, a clear distinction is made between "steam" ships and "sail" ships. The former are related to passengers and the latter to merchandise (Articles 20, 25 and 32). Similarly, the treaty affirms the exclusive right acquired by the company to "navigate on the lakes, rivers and waters of the State with steamships, from one sea to the other ..."[81] Nicaragua, on the other hand, commits not to "...grant or contract to any Government, individual, (...) the right to navigate on the rivers and lakes occupied by the Company for steamships,"[82] demonstrating that this right was never granted to Costa Rica.

1.3.17 Nicaragua also agrees "...not to grant or contract to any Government, individual, or any other company the right to build a maritime canal, railroad, or any other inter-oceanic route through its territory, or the right to navigate on the rivers and lakes occupied by the Company for steamships, as long as this contract remains in force..."[83] This clearly emphasizes again Nicaragua's exclusive rights with respect to the San Juan River, in particular in this context, to transport passengers and to grant concessions for said transport.[84]

1.3.18 An off-shoot of the Clayton-Bulwer Treaty was the so-called Crampton-Webster Propositions of 30 April 1852. This procedure involving the Parties to the Clayton-Bulwer Treaty attempted to settle the differences between Nicaragua and Costa Rica. For present purposes what is relevant

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[81] NCM, Annex 14. Article 23.
[82] NCM, Annex 14. Article 32.
[83] *Ibid.*
[84] By Chamorro - Mayorga - White, Transit Company Convention of 14 August 1851, the Company was entitled and enjoyed the protection of the Government of Nicaragua on the same terms as those stipulated in the original treaty of 27 August 1849 and its amendment of 11 April 1850, regarding the construction of the maritime canal; NCM, Annex 3.

is that reference is made to the exclusive right of Nicaragua to navigate and dispose of navigation in the San Juan by steam boats.

1.3.19 It is also relevant to underline that the Clayton-Bulwer Treaty and the Webster-Crampton Propositions coincide in that they recognize not only Nicaragua's territorial sovereignty over the San Juan River, but also that Nicaragua is the only State authorized to grant concessions for canalization and the transit of persons on the San Juan River. In effect, the Proposition states that "It is understood however that Costa Rica retains the right in common with Nicaragua to navigate said rivers and lake by sail vessels, barges or vessels towed *but not by steam* but this right is in no wise to interfere with the paramount right in Nicaragua or her grantees to appropriate the waters of said rivers and lake to a ship canal from Ocean to Ocean or from the Caribbean Sea to said lake...."[85] Costa Rica approved by Decree the Crampton-Webster Propositions, accepting, consequently, the validity of the exclusive concessions granted by Nicaragua for transit of passengers through the San Juan River.[86] It is important to highlight that Costa Rica accepted the Propositions by Congressional Decree, [87] whilst Nicaragua did not approve it.

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[85]Crampton-Webster Propositions, 30 April 1852, NCM Annex 88. Article 3.

[86] The propositions provided a recommendation in Article 3 fixing the limits between Nicaragua and Costa Rica: "...shall begin on the South Bank of the Colorado at its confluence with the sea at high water mark on said river thence along said South Bank also at high water mark to the confluence of the Colorado with the river San Juan thence at *hight water mark along the South Bank of the San Juan* to its source on lake Nicaragua thence at high water mark along the South and West Shore of that lake to the point nearest the mouth of the river La Flor River thece by a direct line drawn from that point to the mouth of the said river in the Pacific Ocean...Costa Rica retains the right in common with Nicaragua to navigate said rivers and lake by sail vessels, barges or vessels towed *but no by steam...*" (emphasis added).

[87] The decree consists of only one article, as follows: "Single Article. The assent, adhesion and subscription that the Supreme Government of the Republic of Costa Rica has accorded through act of 16th of the current month to the bases agreed upon in Washington on 30th of April, by Representatives of the Governments of Great Britain and the United States, for as settlement between the Republic of Costa Rica and the State of Nicaragua over the issue of territorial limits

1.3.20 These instruments show that Costa Rica implicitly accepted that Nicaragua held the exclusive right to grant licenses for construction of the route and also to grant the exclusive right to navigate with passengers. This right was always exercised by Nicaragua, even after 1858, as is verified in the Nicaraguan Decree of 11 September 1862, which asks that "the authorities of the border (of Nicaragua) not to allow the crossing of foreign persons without them presenting passports..."[88] Costa Rica was not excluded from this regulation. The only exception refers to the Transit Company.

1.3.21 The Irisarri- Stebbins Contract[89] confirms Nicaragua's right over the river and over passenger transport, granting to the company in question a concession that authorizes and regulates transport.

1.3.22 By means of the Cass-Irisarri Treaty of 16 November 1857,[90] Nicaragua again concedes the right of transit with passengers via the river, this time to citizens and properties of the United States, thus reaffirming the country's exclusive right to transport passengers on the river. In this text, Nicaragua granted the United States and her citizens and properties the right to transit between the Atlantic and Pacific oceans through the territory of the former Republic using any route or means of transportation. However, the Republic of Nicaragua reserved the right of sovereignty over said route or means of communication. The Irisarri-

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pending between the both countries, is hereby approved." It is very clear that Costa Rica accepted that the right to transport passengers belonged to Nicaragua (navigation by steam). CRM, Vol. 6, Annex 199.

[88] Decree "Ordering the commanders of ports and perfects of the frontiers of Nicaragua not to permit any foreign person to go into the interior of the country, unless presenting a passport issued by the respective ministers or consuls at the ports or places of their departure". Nicaragua, 11 September 1862. Article VII. NCM, Annex 58.

[89] Irisarri-Stebbins Contract, New York, 19 June 1857. NCM, Annex 15.

[90] Cass-Irisarri Treaty. Washington, 16 November 1857. NCM, Annex 5.

Stebbins Contract (19 June 1857), and the Cass–Irisarri Treaty (16 November 1857) clearly demonstrate that at the time of the signing of the Jerez-Cañas Treaty, of 1858, Nicaragua had the exclusive right to navigate with passengers on the river.

B. The Treaty of Limits of 15 April 1858

1.3.23 The Jerez-Cañas Treaty of Limits signed on 15 April 1858, was a comprehensive settlement of the disputes involving the territorial limits between the two countries. Nicaragua, as part of the negotiations, gave up the territories of Nicoya and to the south of the lower right margin of the San Juan River, whilst Costa Rica recognized the dominion and exclusive sovereignty of Nicaragua over the San Juan River. Nicaragua further granted to Costa Rica perpetual rights of free navigation, restricted to articles of trade in a limited section of the river.

1.3.24 Thus, Article 2 of the treaty determines the limits between the two countries but at the same time confirms the sovereignty of Nicaragua on the San Juan River and regulates the rights of the parties over the same. The Treaty gives to Nicaragua the full exercise of sovereignty over the entire course of the waters and a limited right of navigation to Costa Rica "*con objetos de comercio*" (with articles of trade)[91] as is established in its Article 6.

1.3.25 The fundamental character of the 1858 Treaty and the 1888 Arbitral Award in relation to the boundary limits and Nicaragua's exclusive sovereignty over the San Juan River, and the rights established therein, have always and reiteratively been acknowledged by the two States.

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[91] CRM, Vol.2, Annex 7, pp. 54-60, Article 6.

1.3.26 A clear recognition of this in recent times may be seen, for example, in the Note addressed to the Minister of Foreign Affairs of Nicaragua on 12 August 1998, by the Minister of Foreign Affairs of Costa Rica, in referring again to the 1858 Treaty and 1888 Arbitral Award, stating that "Costa Rica has never intended to exercise more or less rights other than those granted by said instruments..."[92]

1.3.27 And, in another Note addressed to the Minister of Foreign Affairs of Nicaragua on 22 May 2000, by the Minister of Foreign Affairs of Costa Rica, the Government of Costa Rica reiterates that "It is a question, rather, of a special regime established by a Treaty and an Award that are characteristic of and specific to Public International Law..."[93]

1.3.28 This recognition is reiterated in the same manner by the President of the Republic of Costa Rica in a Note addressed to the President of Nicaragua on 29 July 2000, which recognition is even more precise in relation to the nature and relationship between the two instruments, stating as follows:

> "b) that, in accordance with the Cleveland Award of 1888, which constitutes an obligatory interpretation of the Cañas-Jerez Treaty of Limits of 1858.... c) that since 1888 nothing has occurred to change this legal status."[94]

1.3.29 Also, in official documents, the Government of Costa Rica has recognized these instruments as governing relations between the two countries in part of the San Juan River. Thus, the Yearbook of the Ministry of Foreign

[92] CRM, Vol. 3, Annex 50.
[93] CRM, Vol. 3, Annex 63.
[94] CRM, Vol. 3, Annex 66.

Affairs and Worship of Costa Rica, corresponding to the year 2001-2002, affirms that:

> "...on 11 January: Chancellor Roberto Rojas, in referring to aspects related to Nicaragua, emphasized that Costa Rica's perpetual rights of free navigation in the San Juan River are those established in the Cañas-Jerez Treaty and clarified by the 1888 Cleveland Arbitral Award. 'Costa Rica does not want any right that does not correspond to it according to those international instruments..."[95]

1.3.30 Likewise, other government agencies have made the same reference in relation to the juridical regime of the San Juan River. This is the case of the document published in 1997 by Costa Rica's Ministry for the Environment and Energy, together with Nicaragua's Ministry for the Environment and Natural Resources, with support from UNEP (United Nations Environment Programme) and the OAS (Organization of American States), regarding environmental and sustainable development management in the basin of the San Juan River, which states as follows:

> "The Governments of the Republics of Costa Rica and Nicaragua reiterate that the approval of this document and other related documents, as well as the technical concepts contained therein, including the concept relating to the 'basin of the San Juan River', do not affect the territorial limits and rights consigned in the Cañas-Jerez Treaty of Limits, the Cleveland Award, the Matus-Pacheco Convention and the Records of the Alexander Commission."[96]

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[95] Yearbook of the Ministry of Foreign Affairs and Worship of Costa Rica, 2001-2002. Pp. 143-144; NCM, Annex 79.

[96] "Manejo Ambiental y Desarrollo Sostenible de la Cuenca del Río San Juan. Estudio de Diagnóstico de la Cuenca del Río San Juan y Lineamientos del Plan de Acción". United Nations Environment Programme, Washington, 1997, p. iv.

1.3.31 The Treaty of 1858, interpreted in 1888, has not been explicitly or implicitly modified. The rights and obligations of the parties with respect to the use of the San Juan River are –only- those established by said parties in the Treaty of Limits, concluded in 1858 and interpreted in 1888.

C. The Period from 1858 to 1888

1.3.32 A series of bilateral treaties were signed from 1858 to 1888[97] that also serve to clarify the meaning of certain expressions such as "articles of trade" (*objetos de comercio*). It is clear that this expression was used in all cases to mean "objects" in the sense of "things", in spite of the erroneous and self serving interpretation proposed by Costa Rica that this phrase really means "purposes of commerce" (*fines de comercio*)

1.3.33 The Alvarez-Zambrana Treaty of 5 February 1883 reaffirms "the eminent dominion" and "sovereignty" [98] of Nicaragua over the San Juan and Colorado rivers. This is also included in the Navas-Castro Treaty of 19 January 1884,[99] which also sets the border in the zone. The above-

[97] These texts include the Zelaya-Volio Convention of 13 July 1868, completed in order to improve one of the two Atlantic ports: that of San Juan del Norte or that at the mouth of the Colorado; NCM, Annex 6, the additional Rivas-Esquivel Convention of 21 December 1868, by means of which Costa Rica concedes to Nicaragua the waters of the Colorado River so that, by changing their course, the port of San Juan may be reestablished or improved; NCM, Annex 7, the Carazo-Soto of 26 July 1887 CRM, Vol. 2, Annex 15.

[98] Alvarez-Zambrana Treaty, 5 February 1883. Article 3 reads: "... corresponding to Nicaragua the eminent dominion and sovereignty over the aforesaid rivers [San Juan y Colorado] and lake..."; NCM, Annex 9.

[99] Navas-Castro Treaty of Limits of 19 January 1884 was approved by the Government of Nicaragua on 14 May 1884; NCM, Annex 10. Article 1 reads: "The boundary line between the Republics of Nicaragua and Costa Rica is the right bank of the Colorado River, from its mouth in the Atlantic Ocean until it separates from the San Juan River, thence it follows the right bank of that River to a point at a distance of three English miles from the exterior fortifications of the Castillo Viejo; thence it runs along the circumference of a circle with a radius of three English miles from the exterior fortifications, and ends on the same right bank of the San Juan River; thence from this same bank up to a distance of three English miles from a point on the bank in front of the San Carlos fort; thence it runs along the circumference of another circle, with a radius

mentioned Alvarez-Zambrana Treaty also establishes the obligation "to fly, in addition to one's own, the national flag of the State that exercises sovereignty."[100] A similar reference is made in the Navas-Castro Treaty of 19 January 1884.[101] Without any support Costa Rica claims in her *Memorial*, that Nicaragua violates her international obligations when she requests Costa Rican vessels navigating the river also to hoist the flag of Nicaragua. Apart from this express conventional obligation, the Government of Nicaragua has noted that "...[t]his act is considered one of respect and recognition of the exercise of sovereignty on the said waters..."[102]; in this case, the San Juan River.[103]

1.3.34 The discussion about the validity of the Treaty of 1858, that was questioned by Nicaragua at least since 1871, led to the completion of the Román-Esquivel-Cruz Arbitral Convention of 24 December 1886,[104] to definitively resolve the matter[105] and, in the event that the Arbiter decided that the treaty was valid, to interpret it in order to determine whether Costa Rica had the right to navigate the San Juan River with men-of-war or

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of three English miles and at the center the aforesaid boundary point on the same bank in front of the San Carlos fort; from there to the mouth of the Frío River, in the Lake of Nicaragua, following the bank of this river to the mouth of the Sapoá River; and from this point an astronomic straight line extending to the center of Salinas Bay, demarcated by the intersection of its largest and smallest axis.

[100] Alvarez - Zambrana Treaty, Article. 3 "...In recognition to the respective sovereignty of both Nations, the vessels of the one entering into the waters of the other shall hoist, in addition to its own flag, the flag of the other in the respective place."; NCM, Annex 9.

[101] NCM, Annex 10, Navas-Castro Treaty. Article XI reads at the end that ".... In recognition to the respective sovereignty of both Nations, the vessels of one nation entering the waters of the other shall hoist, in addition to its own flag, the flag of the other in the respective place."

[102] CRM, Vol. 3, Annex 72, Note dated 3 August 2001.

[103] NCM, paras. 5.3.1-5.3.4.

[104] NCM, Annex 11, Article I reads: "The question pending between the contracting Governments in regard to the validity of the Treaty of Limits of the 15th April, 1858, shall be submitted to arbitration".

[105] *Ibid*, Article VII reads. "Whatever the decision of the Arbitration be, it shall be held to be obligatory between the Contracting Parties. No other recourse shall be admitted, and it shall into force 30 days after it has been communicated to both Governments or to their Representative."

revenue cutters. Furthermore, the Arbitrator could decide any other point expressly submitted by the Parties once the decision on the validity of the Treaty had been taken. [106] The question of navigation with passengers was not in dispute and thus was not submitted for decision by the Arbitrator.

1.3.35 On 22 March 1888, Arbiter Cleveland announced his Award.[107] The first part of the Award recognized the validity of the Treaty of Limits of 1858 and, having established this, the Arbitrator continued deciding on the points of doubtful interpretation that were submitted for his consideration.

1.3.36 The arbitral award definitively resolved the controversy proposed with respect to the San Juan River. This definitive nature of the arbitral decision is recognized in several Notes and official texts of the Costa Rican Government dating from 1886.[108] The Yearbook of the Costa Rican Ministry of Foreign Affairs clearly expresses such recognition: "...the President of the United States has proven himself worthy of the gratitude of Costa Rica and Nicaragua (...) for having put an end, with his illustrious decision, to the *sole motive for disagreement that separated*

[106] NCM, Annex 11, Article VI reads: "If the decision of the Arbitration declares the validity of the Treaty, the same award shall declare whether Costa Rica has the right to navigate the River San Juan with ships of war or revenue boats. Also the decisions aforesaid shall, in case of the validity of the said Convention, decide the other points of doubtful interpretation found by either of the Parties in the Treaty, and communicated to the other Party within 30 days form the exchange of the ratifications of this Convention."

[107] CRM, Vol. 2, Annex 16.

[108] NCM, Annex 29, Note of 31 October, 1886, from the Costa Rican Minister of Foreign Relations, Ascension Esquivel, to the Nicaraguan Minister of Foreign Affairs; NCM, Annex 33, 30 July 1887, from the Costa Rican Delegation in Washington to the US Secretary of State; NCM, Annex 35; 23 March 1888, from the Costa Rican Delegation in Washington to the US Secretary of State, and NCM, Annex 37 Note from the National Palace to the Minister of Foreign Relations, dated 9 August 1895.

these two countries[109] (emphasis added). A similar affirmation is made in the 1900 Yearbook of the same Ministry. [110]

1.3.37 The Government of Costa Rica has clearly recognized on several occasions that the Arbitral Award of 1888 is definitive and binding and that, until now, together with the Treaty of Limits of 1858, forms the juridical regime applicable to the San Juan River, without any change in this juridical situation having taken place. This manifestation was made, most recently, in 2000 by the President of Costa Rica, Miguel Angel Rodríguez, who claimed the following: "... it was particularly pleasing to verify that we fully agree on three fundamental aspects:...b) that, in accordance with the Cleveland Award of 1888, which constitutes an obligatory interpretation of the Cañas-Jerez treaty of Limits of 1858 ... c) that since 1888 nothing has occurred to change this legal status"[111].

D. Period Subsequent to 1888

1.3.38 In order to comply with the Treaty of Limits of 1858 and the Arbitral Award of 1888, based on the Convention of 24 December 1886 (Article I),[112] certain treaties were concluded between the two countries. The purpose was to demarcate the boundary between the two Republics, in the light of the Treaty of Limits of 1858 and the Arbitral Award of 1888.[113] On

[109] NCM, Annex 75. Yearbook of the Ministry of Foreign Affairs and Worship of Costa Rica. 1888, pp. 3-4.
[110] NCM, Annex 76. Yearbook of the Ministry of Foreign Affairs and Worship of Costa Rica. 1900, pp. 10-11.
[111] CRM, Vol. 3, Annex 66, Note of 29 July 2000.
[112] NCM, Annex 11.
[113] Among them, the Guerra-Castro Treaty of 23 December 1890, ratified by Nicaragua on 11 November, 1891, which article II reads: "The Commissioners appointed by the Governments of Costa Rica and Nicaragua to carry out the demarcation of the boundaries between the two Republics, according to the provisions of the Treaty of 15 April 1858 and the Arbitration Convention signed at the city of Guatemala on 24 December 1886, will proceed to its

27 March 1896 the Matus-Pacheco Treaty was signed by means of which both Parties agreed to establish a Commission of three Engineers, one appointed by each Party and the third one by the President of the United States. This third Commissioner appointed by the President was General E.P. Alexander.

1.3.39 Implementation of the Treaty of Limits of 1858 took place through the five Awards of Arbitrator Alexander, issued between 1897 and 1900, all in accordance with Article IX of the Convention of December 1886. Although these awards referred to the demarcation of the border agreed to earlier, Arbitrator Alexander presented conclusions very pertinent to the effects of establishing the applicable juridical regime. In his first Award, on 30 September 1897, Arbitrator Alexander affirms that the interpretation to be given to the Treaty of Limits of 1858 had to be in accordance with "the way in which it was mutually understood at the time by its makers."[114]

1.3.40 Consideration of the Treaty of Limits of 1858 and the Arbitral Award of 1888 as constituting the applicable juridical regime is also confirmed in

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implementation on the Atlantic side, tracing a straight line, beginning at a point on the coast in front of the sea, two hundred meters east from the seawall being built by the Canal Company, and ending at the extremity on the right bank of the nearest stream of the San Juan River. From this point, the line shall continue along the right bank of the same stream up to the right bank of the Ánimas stream and that of the San Juan River, until it reaches the point indicated in the Treaty of 1858..."; NCM, Annex 12. The Matus-Pacheco Convention of 27 March 1896, ratified by Nicaragua on 25 September 1896; CRM, Vol 2, Annex 17 and the Matus-Pacheco-Lainfiesta Treaty of Peace of 26 April 1898, where the parties agreed to submit their mutual complaints and claims to the decision of a tribunal made up of three Central Americans citizens, one appointed by the Greater Republic of Central America, one by the Republic of Costa Rica, and a third by the Republic of Guatemala, the latter in the role of peaceful mediator. (Art. III). NCM, Annex 13. It is also important to underline that both Parties declare that no claims shall be submitted to the Arbitrator regarding the boundary questions that were resolved in the Treaty of 15 April 1858, in the arbitral award of President Cleveland, or in the San Salvador Convention of 1896.

[114] CRM, Vol 2, Annex 18.

subsequent treaties. In the Pact of Amity of 21 February 1949,[115] in which the countries agree to the peaceful resolution of conflicts, and in the Agreement concluded based on Article IV of the Pact of Amity of 21 February 1949, Nicaragua and Costa Rica agreed that they

> "...shall collaborate ...in order to facilitate and expedite traffic on the Pan American Highway and on the San Juan River *within the terms of the Treaty of 15 April 1858 and its interpretation given by arbitration on 22 March 1888...*"[116] (Emphasis added)

1.3.41 More recent texts demonstrate Costa Rica's recognition of Nicaragua's rights over the San Juan River and, in particular, the right to adopt measures applicable to tourism in her territory, particularly on said river. The Memorandum of Understanding, signed in 5 June 1994, the Ministries of Tourism of the two countries "in strict compliance with directives from the Presidents of the Republics of Nicaragua and Costa Rica, in their meeting of May the twenty ninth, nineteen hundred and ninety four, in San Juan del Sur, Nicaragua." literally states that Costa Rica must purchase tourist cards from Nicaragua. The language used is clear and leaves no doubt regarding "the obligation [Costa Rica has] to [purchase tourist cards]"[117] and to register Costa Rican tourist businesses.

1.3.42 Commenting this Memorandum of Understanding, President Pacheco of Costa Rica stated that it demonstrated that Nicaragua has the sole right to regulate tourism on the waters of the San Juan River and that Costa Rica consequently, does not have the right to free navigation for tourism purposes under the 1858 treaty. This question is also dealt with later, in

[115] CRM, Vol 2, Annex 23.
[116] CRM, Vol 2, Annex 24.
[117] CRM, Vol 2, Annex 26, numeral 3, letter b.

2002, in the Declaration of Alajuela signed by the Minister of Foreign Affairs of both countries.[118]

1.3.43 In 1998, a dispute was artificially brought about when Costa Rica sought to navigate the San Juan River with military weapons, without the respective authorization or permission from Nicaraguan authorities. This motivated Nicaragua to terminate the concession of operational permits that she had been granting to Costa Rica within a framework of cooperation and neighborliness during the period from 1995 to 1998, as an act of "border courtesy" and never as an act that could be construed as a juridical relationship. With a renewed spirit of cooperation with Costa Rica, Nicaragua initiated almost immediately a process of conversations and exchanges of notes that, ultimately, did not result in the reestablishment of the *modus operandi* that formerly existed, since Nicaragua maintained her willingness to cooperate based, as had been the case at the time, on permits requested from the sovereign nation for each case and on a temporary basis. Costa Rica finally made clear that it sought the right of armed navigation -although temporary and according to each case- subject to a simple notification to be given to the Nicaraguan Authorities. This did not meet the requirements of the necessary request that Nicaragua was entitled to as sovereign.

1.3.44 The initiation of incursions of vessels that transported public forces of Costa Rica, without permission, in Nicaraguan territory and particularly on the waters of the San Juan River, led to Nicaragua's adoption of measures to regulate the situation. In this way, on 14 July 1998, the Government of Nicaragua, in full exercise of its sovereignty over the San Juan River,

[118] CRM, Vol. 2, Annex 29.

prohibited the navigation of Costa Rican vessels that transported members of the public forces carrying arms. This alleged "right" to navigate the river with arms, as clearly stated by the Minister of Foreign Relations of Nicaragua in a Note addressed to the Minister of Foreign Relations of Costa Rica on 23 April 2002, is not one of "...the rights of navigation other than those enunciated in the Jerez-Cañas Treaty and the Cleveland Award, the provisions of which we must strictly adhere to."[119]

1.3.45 Faced with the persistence of the existing differences, due to Costa Rica's pretensions over the San Juan River, the Ministers of Foreign Relations of the two countries met in Alajuela and adopted a Declaration on 26 September 2002.[120] This Declaration granted reciprocal concessions that once more demonstrate the right of each of the parties to impose administrative and control measures in their respective territories, with the San Juan River and the totality of its waters being Nicaraguan territory.

CONCLUSIONS

1.3.46 The 1858 Treaty of Limits and the 1888 Cleveland Arbitral Award make up the Applicable Legal Regime on the San Juan de Nicaragua River. This condition has been repeatedly recognized by both parties since 1888. This regime clearly sets the limits between the two countries. These limits were demarcated precisely by the Alexander Arbitral decisions rendered between 1897 and 1900. These awards were designed to be a cartographical exercise but the Arbitrator, nevertheless had to determine the Applicable Law in order to set the border marking stones in the

[119] CRM, Vol. 3, Annex 75. Note from the Minister of Foreign Affairs of Nicaragua (MRE/DM-JI/481/04/02), dated 23 April, 2002 and addressed to the Minister of Foreign Affairs and Worship Affairs of Costa Rica.
[120] CRM, Vol 2, Annex 29.

appropriate places. Alexander's instruments reiterate Nicaragua's sovereignty over the river and confirm the restricted nature of Costa Rica's right of free navigation, a) physically, over a part of the river and juridically, covering only the transportation of things, wares, goods or more specifically "articles of trade".

1.3.47 The preparatory work of this Treaty of Limits cannot be appreciated with the usual drafts prepared and discussed during the phase of negotiation of the Treaty, which was only scantily recorded, but by all treaties and contracts negotiated and concluded by the parties before 1858. Careful reading of these texts can explain the nature and scope of the rights and obligations of the parties in regards to the uses of the river and provide a context for the text of the 1858 Treaty of Limits. Special attention is called to the several ways in which the phrase (objetos de comercio) "articles of trade" was used in these texts to define the extent of the right of navigation of Costa Rica.

1.3.48 The analysis of relevant documents as presented above, leads to the inescapable conclusion that Nicaragua always exercised sovereignty over the San Juan de Nicaragua River, including the policing of its waters and the regulation of all navigation on the river and, further more, enjoyed the exclusive and historical right for the transport of passengers. The Costa Rican right of Free Navigation granted by those documents that make up the applicable law, is not absolute, it is restricted geographically and limited to the transportation of "wares", or "articles of trade" as defined by the Spanish term *objetos de comercio.*

1.3.49 The Parties have repeatedly recognized that all territorial differences between them, and in particular those related to the San Juan River, were definitively settled by the Treaty of Limits and the Cleveland Arbitral Award that validated and interpreted it and that these instruments are binding and definitive and admit no recourse.

CHAPTER 2
NICARAGUA'S SOVEREIGNTY OVER THE SAN JUAN DE NICARAGUA RIVER

Section 2.1

Character, Object and Purpose of the 1858 Treaty

A. INTRODUCTION

2.1.1 The original title of the Treaty signed on 15 April 1858 is 'Tratado de Limites entre Costa Rica y Nicaragua'. The instrument is frequently referred to in English as the 'Treaty of Limits', as, for example, in the Cleveland Award of 1888. The object and purpose of the Treaty was to settle a long-standing dispute concerning title to territory. This aspect of the Treaty is evidenced by the text of the Treaty itself, by its negotiating history, by the prior treaties relating to the subject-matter, by the subsequent treaties, and by the text of the Cleveland Award of 1888.

2.1.2 The dispute between the parties relates to the nature of the rights of navigation appertaining to Costa Rica within the waters of the River San Juan, which waters are subject to the sovereignty of Nicaragua. It follows that the provisions concerning navigation appear in the particular context of a territorial settlement, and not in the different context of a Treaty creating a regime for an international river, such as the Rhine or the Danube. Thus, for example, the Treaty of 1858 does not create rights for third parties.

2.1.3 Costa Rica has not only recognised Nicaragua's sovereignty over the river in numerous notes and communiqués, but has explicitly recognised since the XIX Century the national character of the San Juan River, not only vis

a vis Nicaragua but also to the Executive Committee (Dieta) of the Major Republic of Central America formed by El Salvador, Honduras and Nicaragua. At that time Costa Rica published a decree which was harmful to Nicaragua's sovereignty and prompted the reaction of the Executive Committee (Dieta) of the Major republic of Central America who wrote a note to Costa Rica dated 27 July 1897, pointing out that

> "When the State of Nicaragua became aware of it, it caused the overall impression that the abovementioned decree threatens the sovereignty of the Nation that has exclusive dominion and sovereign jurisdiction over the waters of the San Juan River, and Costa Rica only has the right to free navigation for purposes of commerce, from the mouth in the Atlantic up to three English miles before reaching *Castillo Viejo*; however, it is in no way authorized to transfer it to other nations, as inferred in the broad sense of the said decree, since it does not limit it to its national ships. Thus, the Government of the State of Nicaragua, in fulfillment of its duty to ensure their sovereign rights are upheld unharmed, has instructed the Diet, in which I am honoured to partake, to present the following protest to Your Excellency's Government..."[121]

2.1.4 Costa Rica's reply could not have been more candid. In a note of 31 July 1897, Ricardo Pacheco, Minister of Foreign Affairs and Worship answers Mr. E Mendoza in the following terms:

> "It takes no effort whatsoever to understand that the licence to introduce merchandise into the valleys that the decree refers to *has to be subordinate to the conditions set for the navigation of the San Juan River, and that this is an interior river, not open by its sovereign to foreign traffic.* It should be understood that such permit was referred only to Costa Rican ships, which under the Treaty of 58 and the

[121] CRM,Vol. 3, Annex 37.

> Arbitral Award of President Cleveland, have a right to do it, which cannot in lack of a national authorisation, be utilised to embark and disembark products through ports not open to sea trade...." [122](emphasis added).

2.1.5 The *Memorial* tends to obscure the legal and historical context and to conduct the argument essentially on the assumption that the Treaty of 1858 consists of a single provision related to the rights of navigation of Costa Rica. In fact Article VI, the relevant provision, deals with the legal status of the waters of the San Juan River as such, and the drafting makes clear that the provision forms part of the overall territorial settlement. As the text stipulates:

> "The Republic of Nicaragua shall have exclusive dominion and supreme control of the waters of the river San Juan from its outlet from the lake until it empties into the Atlantic; but the Republic of Costa Rica shall have perpetual rights, in the said waters; of free navigation from the river's mouth to three English miles below Castillo Viejo for the purposes of commerce, [objetos de comercio] whether with Nicaragua or the interior of Costa Rica, by way of the rivers San Carlos or Sarapiquí or any other route proceeding from the tract on the shores of San Juan that may be established as belonging to this Republic. The vesselsof both countries may indiscriminately approach the shores (atracar) of the river where the navigation is common to both, without the collection of any class of imposts unless so established by the two Governments..."[123]

2.1.6 In the conclusions to Chapter 4 of the Costa Rican *Memorial* the primary conclusion is as follows:

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[122] NCM, Annex 38.
[123] CRM, Vol. 2, Annex 7, pp. 54-60.

> "(1) Costa Rica has a conventional perpetual right of free navigation over the portion of the San Juan where it is a riparian State, and is entitled to exercise this right without restrictions or interference."[124]

2.1.7 Similar expressions are to be found in the diplomatic correspondence, as, for example, in the Costa Rican Note dated 19 August 1982:

> "I deplore that the Government of Nicaragua insists on denying what, by virtue of a standing Treaty, belongs to Costa Rica, that is, the perpetual, perpetual, and inviolable right that its vessels navigate, without any condition, on the San Juan River. Therefore, the Government of Costa Rica cannot, and does not accept, the unilateral, unlawful, and capricious interpretation that the Government of Nicaragua gives the Cañas-Jerez Treaty of 1858, ratified by the Cleveland Award in 1888. Much less, it cannot and does not accept, the thesis of the Government of Nicaragua that this country has the right 'to establish regulations over said river', in detriment of the right of Costa Rica, nor the thesis that Nicaragua has 'the obligation' to 'exercise acts of sovereignty and jurisdiction over that part of its national territory and over the vessels that navigate on it', in detriment of Costa Rica's right. This interpretation, which the Government of Costa Rica rejects, contradicts and limits what by virtue of the Treaty does not admit contradiction or limitation."[125]

B. The Pertinent Principles Of Treaty Interpretation: Reference To The Object And Purpose

2.1.8 The interpretation and application of the provisions of Article VI of the instrument entitled 'Treaty of Limit between Costa Rica and Nicaragua' must be in accordance with its object and purpose. The modern law is set forth in Article 31 of the Vienna Convention on the Law of Treaties. As

[124] CRM, para. 4.129.
[125] CRM, Vol. 3, Annex 45.

the Court will readily recall, the general rule of interpretation set forth in Article 31 includes as its basic provision, in paragraph 1:

> "A Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Treaty in their context and in the light of its object and purpose."

2.1.9 The object and purpose of the Treaty of 1858 was to effect a territorial settlement and was consequently related to the resolution of questions of sovereignty. The evidence of this will be reviewed in due course. The main focus was thus the determination of boundaries and not the creation of a regime of fluvial navigation for the States of the region.

2.1.10 The principle of reference to the object and purpose is affirmed in all the major authorities, including the following:

(i) McNair, *The Law of Treaties*, 1961, pp.380-81.
(ii) Rousseau, *Droit International Public*, Vol. I, 1970, pp.272-73, para. 241.
(iii) Jennings and Watts (editors), *Oppenheim's International Law*, Vol. I, Peace, 9th ed., 1992, pp.1271-73.
(iv) Podesta Costa and Ruda, *Derecho Internacional Publico*, Vol. 2, 1985, pp.103-5.
(v) Pastor Ridruejo, *Curso de Derecho Internacional Publico*, 2nd ed., 1987, pp. 120-21.

2.1.11 This Court has referred to the object and purpose of a treaty on several occasions, including the *Nicaragua Case*, I.C.J. *Reports*, 1986, page 136 paragraph 271; and the *Case Concerning Border and Transborder Armed Actions, ibid.*, 1988, page 89, paragraph 46; *Case Concerning the Gabcikovo – Nagymaros Project, ibid.*, 1997, page 76 paragraphs 133-47; *La Grand Case, ibid.*, pages.501-4, paragraphs 99-104.

2.1.12 It must be noted that, whilst Costa Rica ratified the Vienna Convention on 22 November 1996, Nicaragua has not ratified the Convention. In any event it is generally accepted that the provisions of Article 31 of the Vienna Convention represent principles of general international law.

2.1.13 There can be no doubt that the principle of inter-temporal law applies to the interpretation of treaties: see the Judgment of this Court in the *Rights of United States Nationals in Morocco, I.C.J. Reports*, 1952, p.176 at page 189; and Jennings and Watts, *op cit.* pages 1281-82. In this context there is a presumption that the general principles of Treaty interpretation, familiar to the practitioners of today, also formed part of the law applicable in 1858. Whilst the principle of inter-temporal law may be applied with some flexibility in certain contexts, this approach is clearly not appropriate in the case of boundary treaties.

2.1.14 The significance of the object and purpose of a Treaty as an element in the negotiation process has an appreciable seniority, which is reflected in the legal sources. Thus Professor Rousseau described the position in his treatise (in 1970):

> "La doctrine s'est généralement borné à recommander la 'prise en considération des buts du traité' en tant que moyen légitime d'interprétation (résolution précitée de l'Institut de droit international adoptée le 19 avril 1956), formule qui se retrouve dans plusieurs sentences arbitrales (sentence du surarbitre Gray en date du 8 avril 1858 dans l'affaire des *pêcheries réserves* entre les Etats-Unis et la Grande-Bretagne, interprétation de l'Article 1er du traité du 5 juin 1854, *R.A.I.*, tome II, p.447; sentence arbitrale Unden du 4 novembre 1931 entre la Bulgarie et la Grèce dans l'affaire des *forêts du Rhodope*, interprétation de l'Article

181, paragraphe 3 du traité de Neuilly, *R.S.A.*, vol. III, p.1403; sentence arbitrale René Cassin du 10 juin 1955, entre la Grande-Bretagne et la Grèce dans l'affaire des *cargaisons déroutées, interprétation* de l'accord financier anglo-hellénique du 11 février 1942, *R.S.A.*, vol. XII, p. 70)."[126]

2.1.15 Thus the precedents cited by Rousseau go back as far as the Arbitral Award of 1858 in the case of the *Reserved Fisheries* between the United States and Great Britain, de la Pradelle and Politis, *Recueil des Arbitrages Internationaux*, II, p. 440, at page 447.

2.1.16 The significance of the object lying behind the express provisions of the Treaty is given emphasis in leading Latin-American authorities published in the same era as the Treaty of 1858. Thus, in his work published in 1868, the Argentinean jurist Carlos Calvo stated the position as follows:

> "Passing, then, to expound the particular rules, it is expressed in these terms, by enumerating the most important:
>
> First. In all obscure passages, the object ought to be to discover the thoughts of the author, from which it results that on occasion we should take the expressions in their general sense and others in their particular sense according to the cases."[127]

2.1.17 The classical work by Andres Bello expresses an identical opinion in the fourth edition published in Paris in 1882:

> "Passing to the particular rules that are deduced from these axioms, I merely give a bare catalogue of them, and

[126] *Droit International Public* ,Vol. I, p.272, para 241.
[127] *Derecho Internacional Teórico y Práctico*, Second Volume, Paris, 1868, para. 818.

referring, with respect to their illustrations, to Vattel, 1.II, Chapter 17.

1. In all obscure passages, the object ought to be to discover the thoughts of the author, from which it results that we should take some expressions in their particular sense and others in a general sense, according to the cases."[128]

2.1.18 The first edition of Bello was published in 1832. The fourth edition, quoted above, was also prepared by the author.

C. The Pertinent Principles Of Treaty Interpretation: The Duty To Construe A Treaty As A Whole

2.1.19 The standard authorities formulate a principle which is a logical corollary of the reference to the object and purpose of a treaty. The principle is stated in the form of a duty to construe a treaty as a whole and not to focus attention upon any of its provisions in isolation. This principle is stated in McNair, *Law of Treaties*, 1961, page 382. As the editors of *Oppenheim* point out, the principle requiring reference to the context is another form of the duty to construe a treaty as a whole: Jennings and Watts, *Oppenheim's International Law*, Volume 1, 9th edition, page 1273. The significance of the context is also emphasised by Rousseau, *Droit International Public*, Volume I, pages 284-85, paragraph 248.

2.1.20 Sir Gerald Fitzmaurice formulates what is essentially the same principle as 'the principle of integration', namely, that 'treaties are to be interpreted as a whole, and with reference to their declared or apparent objects, purposes,

[128] *Principios de Derecho Internacional*, 4th Edition, 1882, pp. 135-6. See also the second edition published in Valparaiso, 1844, p. 114.

and principles: see Fitzmaurice, *The Law and Procedure of the International Court of Justice*, 1986, Volume I, page 50 (and see also pages 59-61).

D. The Evidence Of The Object And Purpose Of The Treaty Of 1858

2.1.21 The evidence of the object and purpose of the Treaty of 1858 will now be presented as fully as possible, and within convenient categories.

1. The Negotiating History

2.1.22 The negotiating history affirms that the issues between Costa Rica and Nicaragua were related to disputed territory and boundaries. The negotiating history is described in some detail in the Rives Report dated 2 March 1888[129] during the Arbitration procedure of President Cleveland. The report is as follows:

> "I now proceed to state the history of the negotiations which resulted in the Treaty in question, and of the executive and legislative acts which are relied on by Costa Rica as constituting a sufficient ratification.
>
> The long and bitter struggle in which Nicaragua and other Central American States had been involved, and of which the part played by Walker and the filibusters was the most notorious incident, came to an end in 1857. The Republic of Costa Rica had taken part in that struggle, and her case

[129] President Cleveland empowered Mr. George L. Rives, Assistant Secretary of State, to examine the arguments and evidence submitted by the two sides and to prepare a report to the President upon which a decision in the case might be based. The instrument by which President Cleveland delegated this authority to George L. Rives is reproduced in J.B. Moore, *History and Digest of International Arbitrations to which the United States has been a Party*, Vol. 2, p. 1945, note 2, U.S. Government Printing Office, Washington, DC., 1898. Mr. Rives communicated a copy of the President's order to Costa Rica and Nicaragua on the day it was made. For. Rel. 1888, part I, pp. 455-456.

states as a fact that at the close of the contest the Costa Rican troops held military positions on both sides of the San Juan. The argument of Nicaragua seems to imply that such possession was not taken until after the close of the war; but the fact itself is not in dispute. It was regarded by Nicaragua at the time, as constituting a *casus belli*; and Costa Rica having failed to withdraw her troops, war was declared by Nicaragua on the 25th November, 1857,- although negotiations for a settlement of the difficulty still continued, but without success.

In this posture of affairs the Republic of San Salvador offered mediation through its Minister Colonel Don Pedro Rómulo Negrete. Owing principally, as it would seem, to Colonel Negrete's earnest efforts, the opposing Governments appointed Ministers Plenipotentiary, who met with the Salvadorian Minister at San José de Costa Rica, and there concluded the Treaty of Limits,- the validity of which is now under examination.

By that instrument, the boundary line is made to begin at Punta de Castilla, at the mouth of the San Juan River; thence it follows the right or Southern bank of that stream to a point 3 miles below the Castillo Viejo; thence it runs along the circumference of a circle drawn round the outworks of the Castle as a center, with a radius of three miles, to a point on the Western side of the Castle, distant two miles from the River; thence parallel to the San Juan and the Lake, at distance of 2 miles therefrom to the Sapoá River; and thence in a straight line to the center of Salinas Bay on the Pacific Ocean. The Treaty further provides that surveys shall be made to locate the boundary; that the Bay of San Juan del Norte and Salinas Bay shall be common to both Republics; and that Nicaragua shall have, exclusively, dominion and supreme control of the waters of the San Juan – Costa Rica having the right of free navigation for the purposes of commerce in that part of the River on which she is bounded. It was further agreed that in the event of war between Costa Rica and Nicaragua, no act of hostility was to be practiced in the Port of the River of San Juan, or on the Lake of Nicaragua; and the observance of

this article of the Treaty was guaranteed by the Republic of San Salvador.

It is admitted by the parties to the present arbitration that the Treaty was duly ratified by Costa Rica on the 16th April, 1858; and that it was not ratified at all by San Salvador. It is further established that there was some ratification by representatives of Nicaragua – but whether or not such ratification was sufficient is one of the points now in controversy, and it is therefore necessary to examine fully the powers and the proceedings of the Nicaraguan authorities.

The Republic of Nicaragua, as appears from the evidence, was a Constitutional Government of limited powers, which were defined by a written Constitution. Nicaragua, as one of the States of the Central American Republic, adopted her first Constitution on the 8th April, 1826. Upon the dissolution of the Federal Republic she assumed the rank of an independent nation; and in 1838 adopted a new Constitution, which her representatives now contend was in full force and vigor at the time of the execution of the Treaty of Limits. The full text of the Nicaraguan Constitution of 1838 is not contained in the arguments which have been laid before the Arbitrator; but it sufficiently appears that power was vested in an elective President and a Congress. It also appears that by Article 2 (cited in full below), the boundaries of the State were defined; and that by Article 194, quoted in the argument of Nicaragua, a complicated method of amendment was provided, of which the only feature now necessary to notice is that no proposed amendment shall take effect until it has been approved by two successive Legislatures.

In 1857 the necessity for a complete revision of the Constitution of 1838 seems to have been generally recognized. The long and exhausting conflicts which had been waged from 1854 to 1857, and the existence, during the greater part of that time, of two hostile governments, each claiming to exercise constitutional and supreme power throughout the country, had demonstrated, to the satisfaction of the inhabitants, the importance of changes in

the organic law. Accordingly a Constituent Assembly, with ample powers, was duly elected. The due election, and the full constituent powers of this body, are facts not disputed in the arguments now submitted on behalf of Nicaragua.

In November, 1857, the Constituent Assembly met, and addressed itself at once to the task of framing a new Constitution for Nicaragua, as well as of legislating upon the ordinary affairs of the nation.

On the 18th of January, 1858, the previous negotiation with Costa Rica having failed, the Assembly ordered new Commissioners to be appointed to negotiate treaties of peace, limits, friendship, and alliance between Nicaragua and Costa Rica.

On the 5th February, 1858, a further and supplemental decree on the same subject, was adopted, which is as follows:

The Constituent Assembly of the Republic of Nicaragua, in use of the legislative faculties with which it is invested, decrees:

Article 1. For the purpose that the Executive may comply with the decree of January 18 instant, the said Executive is hereby amply authorized to act in the settlement of the difficulties with Costa Rica in such manner as it may deem best for the interest of both countries, and for the independence of Central America, without the necessity of ratification by the legislative power.

Article 2. Such treaties of limits as it may adjust shall be final, if adjusted in accordance with the bases which separately will be given to it; but, if not, they shall be subject to the ratification of the Assembly.

What were the separate bases of negotiation given to the Nicaraguan Executive does not appear from any of the documents submitted to the Arbitrator. But it is not distinctly asserted by the representatives of Nicaragua that such instructions were disregarded in the negotiation of the

Treaty.- the arguments relied on to prove its invalidity resting upon entirely different grounds, which will be stated hereafter.

On the 15th April, 1858, the Treaty of Limits was signed by the Plenipotentiaries of Costa Rica, Nicaragua and San Salvador; and on the 26th April, 1858, ratifications were personally exchanged by the Presidents of Costa Rica and Nicaragua, who met for the purpose on Nicaraguan territory at the City of Rivas. The Treaty had not then been passed upon by the Assembly, the decree of ratification being by the President alone. It is as follows:

TOMAS MARTINEZ, the President of the Republic of Nicaragua:

Whereas General Máximo Jerez, Envoy Extraordinary and Minister Plenipotentiary of Nicaragua to the Republic of Costa Rica, has adjusted, agreed upon and signed, on the 15th instant, a Treaty of Limits, fully in accordance with the bases which, for that purpose, were transmitted to him by way of instructions; finding that said Treaty is conducive to the peace and prosperity of the two countries, and reciprocally useful to both of them, and that it facilitates, by removing all obstacles that might prevent it, the mutual alliance of both countries, and their unity of action against all attempts of foreign conquest; considering that the Executive has been duly and completely authorized by legislative decree of February 26th ultimo to do everything conducive to secure the safety and independence of the Republic; and by virtue, furthermore, of the reservation of faculties spoken of in the Executive decree of the 17th instant:

Does hereby ratify each and all of the articles of the Treaty of Limits, made and concluded by Don José Maria Cañas, Minister Plenipotentiary of the Government of Costa Rica, and Don Maximo Jerez, Minister Plenipotentiary of the Supreme Government of Nicaragua, signed by them on the 15th instant and ratified by the Costa Rican Government on the 16th. And the additional act of the same date is likewise ratified.

> On the 28th May, 1858, thirty-two days after the ratification, and forty-three days after the signature of the Treaty of Limits, the following decree was passed by the Constituent Assembly:
>
> The Constituent Assembly of the Republic of Nicaragua, in use of the legislative powers vested in it, decrees:
>
> Sole Article. The Treaty of Limits concluded at San José on the 15th of April, instant, between General Don Máximo Jerez, Minister Plenipotentiary from this Republic, and General Don Jose Maria Cañas, Minister Plenipotentiary from the Republic of Costa Rica, with the intervention of Colonel Don Pedro Rómulo Negrete, Minister Plenipotentiary from Salvador, is hereby approved."
>
> On the 19th August, 1858, the Constituent Assembly adopted the new Constitution, of which it is only needful to cite the first Article, viz:
>
> The Republic of Nicaragua is the same which was, in ancient times, called the Province of Nicaragua, and, after the independence, State of Nicaragua. Its territory is bounded on the East and Northeast by the Sea of the Antilles; on the North and Northwest by the State of Honduras; on the West and South by the Pacific Ocean; and on the Southeast by the Republic of Costa Rica. The laws on special limits form part of the Constitution."[130]

2.1.23 This source has been presented in full and without summary. It constitutes a significant and reliable account of the negotiating history, prepared by an official of a third State in the context of a major arbitration. As appears from the Rives Report, the background included a war declared by Nicaragua on 25 November 1857.

[130] NCM, Annex 70, Rives Report at pp. 462-4, dated 2 March 1888.

2. The Reflection of the Dispute Relating to Nicoya in the Diplomatic History

2.1.24 Both during the existence of the Federal Republic of Central America, and following its dissolution in 1838, the question of boundaries acquired greater importance. The position is described as follows in the Rives Report:

> "But with the establishment of the Federal Republic, and still more, with the dissolution, the questions of boundary began to assume importance.
>
> The Federal Constitution seems to have provided by its Article VII for the demarcation of each State; but nevertheless nothing was done towards the establishment of the line between Costa Rica and Nicaragua.
>
> In 1838 Costa Rica seems to have urged upon Nicaragua – then assuming the rank of an independent State upon her withdrawal from the Federation – a desire for a recognition of the annexation of Nicoya. In 1846, 1848 and 1852 other fruitless negotiations were undertaken with a view to settling the boundary; and in 1858, when the Treaty of Limits was signed, the question, in one form or another, had been before the two Governments for at least twenty years.
>
> That the documentary evidence was slight and unsatisfactory, has been already shown; and that Costa Rica had for nearly the same period of twenty years laid claim to more territory than she obtained under the Treaty of Limits, fully appears from her decree of 'Basis and Guaranties' of the 8th March, 1841- which asserts as the boundaries of Costa Rica the line of the River La Flor, the shore of Lake Nicaragua, and the River San Juan."[131]

[131] NCM, Annex 70.

2.1.25 The conclusion of the Treaty of 1858 was prefigured by several treaties concerning dispute settlement which remained unratified. One such instrument was the Preliminary Treaty (Marcoleta – Molina), signed on 28 January 1854. The first two Articles provide as follows:

"Article 1

The Governments of the Republics of Nicaragua and Costa Rica mutually commit themselves to putting an end as soon as possible to the differences that unfortunately have arisen and still exist between said Republics, regarding sovereignty of certain territories and certain inland navigation rights, either through a direct compromise between the two interested parties, without third-party intervention, or by submitting themselves to the decision made by a friendly Power.

Article 2

In case the currently pending negotiations in San José, between the Government of Costa Rica and the Nicaraguan Plenipotentiary, do not unfortunately have the effect intended by both parties, it is hereby provided that immediately after exchanging ratifications of this Convention, the Republics of Nicaragua and Costa Rica shall submit the decision on each and every pending issue between the two Governments, with respect to borders, inland navigation, and sovereignty of whichever disputed territories, rivers, and lakes, without any reserve, to the arbitration award of His Majesty the French Emperor, or of any other Government which any of the contracting parties deem it convenient to designate upon exchanging ratifications of this Convention." [132]

2.1.26 Another instrument is the Juarez – Cañas Treaty signed on 6 July 1857. This remained unratified but the content indicates the general intention to

[132] Marcoleta – Molina Preliminary Treaty, 28 January 1854; NCM, Annex 4.

establish a basis for peaceful and stable relations. The preamble and the first two provisions of the English text read as follows:

> "Gregorio Juárez and José Maria Cañas, special Commissioners; the first for the Supreme Government of Nicaragua, and the second for Costa Rica, to enter into a definite border treaty which divides both Republics and ends the disputes that until now have stalled the good understanding that should reign between them, for their mutual safety and exaltation; having exchanged our respective powers, which we found to be in good and due form, we have agreed on the following:
>
> First: The Government of Nicaragua, as a sign of gratitude for the Government of Costa Rica, for its good offices on behalf of the Republic, for the solid determination and great sacrifices made for the cause of national independence, waives, takes and puts away every right on the District of Guanacaste, which is now called the Province of Moracia of the Republic of Costa Rica, to be understood, held, and acknowledged, from now and forever, as an integral part of said Republic, under the sovereign jurisdiction of said Government.
>
> Second: As that Province of Moracia is located between the San Juan del Norte River and the South Sea, both parties agree that the border should be an imaginary line, drawn from a point in the middle of the Golfo de Salinas de Bolaños in the South Sea, up to a point below Castillo Viejo, that will be marked two English miles from the outside fortifications of said castle, downstream of the river, up to the aforementioned point; and whilst this one is made, Raudal del Mico, across the river known as Bartola, will be taken as a natural border marker on that side; and following the margin and the shore of said river, the same dividing line will follow down, until it reaches Punta de Castilla." [133]

[133] Juarez – Cañas Treaty, 6 July 1857, CRM, Vol. 2, Annex 5.

2.1.27 This agreement would have constituted a definitive boundary, had it been ratified. The first provision makes a clear renunciation of any claim to the District of Guanacaste. The agreement clearly recognizes that the River San Juan is entirely within Nicaragua.

3. The Conclusion of the Treaty of 15 April 1858

2.1.28 In the wake of the previous failures to adopt an agreed settlement in January 1858 the National Assembly of Nicaragua ordered new commissioners to be appointed to negotiate treaties of peace, limits, friendship and alliance, between Costa Rica and Nicaragua. A further Decree on the same subject was adopted on 5 February 1858. The new Treaty was signed on 15 April 1858. The text will now be reviewed in order to elucidate its object and purpose.

(a) The Title

2.1.29 The original title of the Treaty of 1858 is 'Tratado de Limites entre Costa Rica y Nicaragua'. The title thus speaks for itself.

(b) Preamble

2.1.30 The principle of integration and the reference to the text of a Treaty as a whole necessarily involves taking account of the preamble. In the *Beagle Channel Arbitration* the Court observed:

> "Although Preambles to treaties do not usually – nor are they intended to – contain provisions or dispositions of substance – (in short they are not operative clauses) – it is

nevertheless generally accepted that they may be relevant and important as guides to the manner in which the Treaty should be interpreted, and in order, as it were, to 'situate' it in respect of its object and purpose. As the Vienna Convention says (Article 31, paragraph 2),

> 'The context for the purpose of the interpretation of a Treaty shall comprise, in addition to its text, *including its* preamble and annexes ...."[134] (emphasis added)

2.1.31 The preamble to the Treaty of 1858 indicates very clearly the character of the agreement as dealing with the peaceful resolution of questions concerning boundaries. The instructions to the negotiators were 'to conclude a Treaty on the boundaries of the two Republics ...'

(c) The Text of the Treaty

2.1.32 The first seven Articles of the Treaty, that is to say, its main substance, relate either to the fixing of the boundary line, or to the question of the procedure of future demarcation, or to the legal status of particular locations. Article IV concerns the legal status of the Bay of San Juan del Norte and Punta Castilla.

2.1.33 In this context Article VI forms part of the overall territorial settlement and resolution of the differences which resulted in a war in 1857. The primary provision concerns 'the exclusive dominion and sovereignty' accorded to Nicaragua over the waters of the River San Juan.

[134] International Law Reports, Vol. 52, p.93 at p.132, para. 19.

2.1.34 The provisions of Article VII are also significant:

> "It is agreed that the territorial division made by this treaty shall in wise be understood as counteracting obligations subscribed to, whether under political treaties or under contracts for a canal (*canalizacion*) or transit made on the part of Nicaragua before this present agreement, it shall rather be understood that Costa Rica assumes those obligations in the tract (*parte*) belonging to her territory without in any way interfering with the eminent domain and sovereign rights held by her over the same."[135]

2.1.35 This provision describes the object and purpose of the Treaty as a whole very well in its reference to the 'territorial division made by this Treaty...'

(d) Diplomatic Correspondence Subsequent to the Treaty of 1858

2.1.36 The diplomatic correspondence reflects the general character of the Treaty of 1858 as a Treaty of peace and boundaries. Thus, on 6 May 1858, the Legation of El Salvador, which had acted as mediator, wrote to the Governments of Nicaragua and Costa Rica in the following terms:

> "Having been signed at San Jose, Costa Rica, the important treaty of peace and limits between this and that Republic, which was concluded in the city of Rivas on April 26th last, according to the act of exchange of that date, the undersigned Plenipotentiary of El Salvador has the pleasure to inform you that he has just arrived to this Court to cordially greet the Government of Nicaragua, and to *congratulate it for the conclusion of the serious questions that existed with Costa Rica* and to announce the withdrawal of this Legation to the capital of El Salvador to inform its Government *of the successful result achieved by*

[135] CRM, Vol. 2, Annex 7, pp. 54-60.

> *the undersigned Minister of that Republic in those of Nicaragua and Costa Rica.* In saying farewell, I am very pleased to state in this note that my heart vehemently wishes that the present social wellbeing of the Nicaraguans, the internal and external policy of its Government, and its well-founded hopes for improvement in all senses shall consolidate each day more and more and shall soon become a reality." [136](Italics in the original, underline added)

2.1.37 The generosity of the territorial arrangements exhibited by Nicaragua attracted comment from third States. Mirabeau B. Lamar, United States Resident Minister to the Governments of Costa Rica and Nicaragua, wrote to the Secretary of State on 28 May 1858, commenting on the Treaty of 15 April 1858:

> "You will find in the *Gazette* a Treaty of Limits between the two Republics, by which it appears that Nicaragua has conceded all that Costa Rica demanded and probably more than she ever expected to obtain."[137]

2.1.38 By the year 1870 the Nicaraguan Government started to raise the question of the validity of the 1858 Treaty, and asserted that its provisions were incompatible with the Constitution of Nicaragua. The relevant correspondence includes the following items:

i) Nicaragua to Costa Rica, 1 February 1871[138]. In this Note Nicaragua complains of the loss of Guanacaste as a consequence of the Treaty of 1858.

ii) Costa Rica to Nicaragua, 22 July 1872.[139] This substantial document sets forth arguments relating to the boundaries of Nicoya

[136] NCM, Annex 24.
[137] NCM, Annex 25. See also Manning, Doc. 1436, pp.676-8
[138] CRM, Vol. 3, Annex 30.

(Guanacaste), and the claim of Costa Rica to title. And it is pointed out that the Treaty of 1858 confirmed that Nicoya was an integral part of Costa Rica.

iii) Message of the State Department of Nicaragua to the Senate of Nicaragua on 8 January 1876,[140] giving the history of the boundary question with Costa Rica and the invalidity of the 1858 Treaty.

2.1.39 The correspondence on this theme persisted until the two States agreed to the arbitration of President Cleveland in 1888. Two letters from the year 1888 are fairly typical of the milieu. The immediate subject of discussion was the legality of the presence on the San Juan of a Costa Rican steamship: see the Note of Nicaragua to Costa Rica, dated 3 August 1886[141] and the response of Costa Rica, dated 31 August 1886[142].

2.1.40 In any event, soon after the exchange of Notes in August, on 24 December 1886 the two States concluded a Convention to submit the question of the validity of the Treaty of 1858 to the arbitration of the Government of the United States[143].

(e) The Cleveland Award of 22 March 1888 and the Report to the Arbitrator by George L. Rives, Assistant Secretary of State, of 2 March 1888

2.1.41 The Cleveland Award of 22 March 1888[144] was concerned with the issue of the validity of the Treaty of 1858 and certain other specific questions

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[139] NCM, Annex 26.
[140] NCM, Annex 27.
[141] CRM, Vol. 3, Annex 32.
[142] CRM, Vol. 3, Annex 34.
[143] NCM Annex 11.
[144] CRM, Vol. 2, Annex 16.

indicated in the Convention on submission of these issues to arbitration dated 24 December 1886. The text of the Arbitral Award is economical and it is necessary to examine the Report to the Arbitrator prepared in the Department of State in order to appreciate the conclusions more fully. The Report was prepared by George L Rives, the Assistant Secretary of State, and is dated 2 March 1888. The Report of Rives is printed in the *Papers Relating to the Foreign Relations of the United States*, 1888, Part I, as the enclosure to the Award of the Arbitrator (which is Doc. 314 at page 456)[145]. The Award is included in the Costa Rican *Memorial*, Volume 2 at pages 97 to 100, but the enclosure, that is to say, the Rives Report, is not included.

2.1.42 The Rives *Report* has been quoted earlier in this Chapter. It gives a detailed account of the historical background of the Treaty of 1858. The *Report* elaborates the prominence of territorial claims: see the quotations above, paragraphs 2.1.22 to 2.1.24.

(f) The First Award by the Umpire E.P. Alexander of 30 September 1897

2.1.43 This Award was rendered in accordance with the Matus-Pacheco Agreement, concluded on 27 March 1896, relating to the process of demarcation called for by the Cleveland Award. The Agreement appears in the Costa Rica *Memorial*, Volume 2, Annex 17.

2.1.44 The views of the learned Umpire on the interpretation of the Treaty of 1858 are of relevance for present purposes. As can be seen, the Umpire

[145] NCM, Annex 70.

was seeking to identify the object and purpose of the Treaty of 1858. In his words:

> "The conclusion at which I have arrived and the award I am about to make do not accord with the views of either commission. So, in deference to the very excellent and earnest arguments so faithfully and loyally urged by each commission for its respective side, I will indicate briefly my line of thought and the considerations which have seemed to me to be paramount in determining the question; and of these considerations the principal and the controlling one is that we are to interpret and give effect to the Treaty of April 15, 1858, in the way in which it was mutually understood at the time by its makers.
>
> Each commission has presented an elaborate and well argued contention that the language of the treaty is consistent with its claims for a location of the initial point of the boundary line at a place which would give to its country great advantages. The points are over six miles apart, and are indicated on the map accompanying this award.
>
> The Costa Rican claim is located on the left-hand shore or west headland of the harbor; the Nicaraguan on east headland of the mouth of the Taura branch.
>
> Without attempting to reply in detail to every argument advanced by either side in support of his respective claim, all will be met and sufficiently answered by showing that those who made the treaty mutually understood and had in view another point, to wit, the eastern headland at the mouth of the harbor.
>
> It is the meaning of the men who framed the treaty which we are to seek, rather than some possible meaning which can be forced upon isolated words of sentences. And this meaning of the men seems to me abundantly plain and obvious.

This treaty was not made hastily or carelessly. Each State had been wrought up by years of fruitless negotiations to a state of readiness for war in defense of what it considered its rights, as is set forth in Article 1. In fact, war had actually been declared by Nicaragua on November 25, 1857, when, through the mediation of the Republic of Salvador, a final effort to avert it was made, another convention was held, and this treaty resulted. Now, we may arrive at the mutual understanding finally reached by its framers by first seeking in the treaty as a whole for the general idea or scheme or compromise upon which they were able to agree. Next, we must see that this general idea of the treaty as a whole harmonizes fully with any description of the line given in detail, and the proper names of all the localities used, or not used, in connection therewith, for the non use of some names may be as significant as the use of others. Now, from the general consideration of the treaty as a whole, the scheme of compromise stands out clear and simple.

Costa Rica was to have as a boundary line the right or southeast bank of the river, considered as an outlet for commerce, from a point 3 miles below Castillo to the sea.

Nicaragua was to have her prized *sumo imperio* of all the waters of this same outlet for commerce, also unbroken to the sea.

It is to be noted that this division implied also, of course, the ownership by Nicaragua of all islands in the river and of the left or northwest bank and headland.

This division brings the boundary line (supposed it to be traced downward along the right bank from the point near Castillo) across both the Colorado and the Taura branches.

It can not follow either of them, for neither is an outlet for commerce, as neither has a harbor at its mouth.

It must follow the remaining branch, the one called the Lower San Juan, through its harbor and into the sea.

The natural terminus of that line is the right-hand headland of the harbor mouth.

Next let us note the language of description used in the treaty telling whence the line is to start and how it is to run, leaving out for the moment the proper name applied to the initial point. It is to start at the mouth of the river San Juan de Nicaragua, and shall continue following the right bank of the said river to a point three English miles from Castillo Viejo.

This language is evidently carefully considered and precise, and there is but one starting point possible for such a line, and that is at the right headland of the bay.

Lastly, we come to the proper name applied to the starting point, 'the extremity of Punta de Castillo'. This name Punta de Castillo does not appear upon a single one of all the original maps of the bay of San Juan which have been presented by either side, and which seem to include all that were ever published before the treaty or since. This is a significant fact, and its meaning is obvious. Punta de Castillo must have been, and must have remained, a point of no importance, political or commercial, otherwise it could not possibly have so utterly escaped note or mention upon the maps. This agrees entirely with the characteristics of the mainland and the headland on the right of the bay (emphasis added).[146]

2.1.45 As can be seen the in the underlined sections in the previous paragraph, the Umpire focuses upon the existence of 'a scheme of compromise' and the establishment of a division.

[146] CRM, Vol.2, Annex 18, Text of First Award.

E. The Evidence of the Object and Purpose of the Treaty of 1858: The Legal Consequences

2.1.46 Having set forth the substantial evidence available of the object and purpose of the Treaty of 1858, it is necessary to assess the legal implications of this material for the process of interpretation.

2.1.47 The position of Costa Rica is that Costa Rican vessels must be permitted to navigate the Rio San Juan 'sin ninguna condicion' ("without any condition"), and that, in consequence, Nicaragua may not exercise *any* rights of sovereignty and jurisdiction.[147]

2.1.48 This position is difficult to justify in terms of international law. Two sets of considerations support the view that Nicaragua has a regulatory power in respect of Costa Rican vessels exercising 'los derechos perpetuos de libre navegacion' ('the perpetual rights of free navigation') in accordance with Article VI of the Treaty of 1858. The first set of considerations derives from the textual interpretation of the Treaty. The right of free navigation is referred to subsequent to, and as a qualification of, the recognition of the full sovereignty of the Republic of Nicaragua over the waters of the Rio San Juan. Although the term 'soberania' is not employed, the words which do appear in the text – 'exclusivamente el dominio y sumo imperio' – constitute a comprehensive and affirmative formulation which connotes full title or sovereignty to the river together with the plenary jurisdiction which such title or sovereignty connotes. The right of free navigation appears as a *qualification* of the sovereignty of Nicaragua and is introduced by the term 'pero' (but). Thus a *particular* right of Costa Rica is presented as a qualification of the *general* grant of

[147] See CRM,Vol. 3, Annex 45, the Costa Rica Note dated 19 August 1982.

rights (in the form of title (dominio) and sovereignty ('sumo imperio') to Nicaragua. The term 'sumo imperio' is as strong as the term 'soberanía' and the result is the establishment of a boundary; and thus Article VII refers to 'la division territorial'. The principal object of the Treaty was to establish a *boundary*, hence it is entitled 'Tratado de Limites'.

2.1.49 Thus the right of Costa Rica is a specific right in respect of territory under the sovereignty of Nicaragua. The right of free navigation is not an absolute right and, apart from the evidence from the text of Article VI, there is a second set of considerations which supports the view that Nicaragua has a regulatory power in respect of Costa Rican vessels.

2.1.50 Considerations of ordinary logic and good sense require that the right of free navigation be articulated by reference to two other elements. The first such element is political and legal: it is the fact that the right of navigation occurs within the territory of another State and the balancing of the two rights excludes the idea that the right of navigation is in some sense absolute or peremptory. The right of navigation must be exercised by reference to the legitimate interests of the territorial sovereign. The second element pertinent to the right of navigation can only be guaranteed if the territorial sovereign is permitted to make the arrangements to maintain the physical and other conditions necessary for navigation. For it is only the territorial sovereign which can make provision for the safety of navigation, the buoying of channels, and the maintenance of public order. It is difficult to envisage, at the functional level, a regime of 'free navigation' in the absence of such conditions of safety and security.

2.1.51 There is a further important consideration arising from the fact that Article VI does not provide for 'free navigation' *tout court*, but only 'for the purposes of commerce either with Nicaragua or with the interior of Costa Rica, through the San Carlos River, the Sarapiqui, or any other way, proceeding from the bank of the San Juan River.' Thus the right of free navigation is articulated in the form of a careful statement of purposes. Indeed, the content of the Cleveland Award of 1888, in its second finding, underlines the special purpose of the right of navigation recognized in Article VI. This part of the Award provides:

> "The Republic of Costa Rica under said Treaty and the stipulations contained in the sixth article thereof, has not the right of navigation of the river San Juan with vessels of war; but she may navigate said river with such vessels of the revenue service as may be related to and connected with her enjoyment of the 'purposes of commerce' accorded to her in said article, or as may be necessary to the protection of said enjoyment."[148]

2.1.52 From this premiss two conclusions follow. First, the fact that the right of navigation is subject to careful definition and precise limitation confirms the view that the right is to be exercised in a context of Nicaraguan sovereignty and general jurisdiction. Secondly, Nicaragua must have the power to regulate Costa Rican traffic for the purpose of ensuring that the conditions of the right of navigation laid down in the Treaty are being observed.

2.1.53 The position adopted in the previous paragraphs, according to which Nicaragua has a power of regulation consistent with the provisions of

[148] CRM, Vol. 2, Annex 16.

Article VI of the Treaty of 1858, is confirmed by the opinion of experts and the practice of States in comparable situations.

2.1.54 Thus the well-known authority of the nineteenth century, Wheaton, makes the following statement of principle:

> "Things of which the use is inexhaustible, such as the sea and running water, cannot be so appropriated as to exclude others from using these elements in any manner which does not occasion a loss or inconvenience to the proprietor. This is what is called *innocent use*. Thus we have seen that the jurisdiction possessed by one nation over sounds, straits, and other arms of the sea, leading through its own territory to that of another, or to other seas common to all nations, does not exclude others from the right of innocent passage through these communications. The same principle is applicable to rivers flowing from one State through the territory of another into the sea, or into the territory of a third State. The right of navigating, for commercial purposes, a river which flows through the territories of different States, is common to all the nations inhabiting the different parts of its banks; but this right of innocent passage being what the text-writers call an *imperfect right*, its exercise is necessarily modified by the safety and convenience of the State affected by it, and can only be effectually secured by mutual convention regulating the mode of its exercise."[149]

2.1.55 It is not suggested that this reasoning is directly applicable to the present case, especially in view of the fact that the right of navigation presently in issue arises from a bilateral Treaty. However, the significant point is presented in the final sentence of the passage which clearly assumes that, when it exists, a right of navigation for commercial purposes is subject to certain conditions as to the mode of its exercise.

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[149] Wheaton, *Elements of International Law*, 1866, Part II, Chapter IV, section 193.

2.1.56 The same point is made by the great classical Latin American jurist, Andres Bello, in the following passage:

> "Passage of foreign vessels through territorial seas is generally seen as a right of innocent use and some nations grant it to others without difficulty.
>
> The same is naturally applicable to rivers and lakes. The difference of circumstances, however, produces some important modifications with respect to rivers, in which passage through foreign waters is usually absolutely essential for the trade of the riparian States. A State that is the owner of the upper part of a navigable river has the right of navigation to the sea, which cannot be hampered by the state that owns the lower part, nor disturbed with regulations and duties that are not necessary for its own security or compensation for the inconvenience caused by the navigation. In 1792, when Spain owned the mouth and both sides of the lower Mississippi, and the United States owned the left side of the upper part of the same river, it was strongly advocated by the United States that the laws of nature and of nations gave them the right to navigate that river up to the sea, only subject to the rules that Spain deemed reasonably necessary for its own security and for the protection of its tax ordinances. The United States also advocated that since the right to an end entails the right to the essential means to achieve that end, the right to navigate the Mississippi entailed the right to anchor or moor on the beach, and even the right to disembark if necessary. The question ended in favor of the United States. Today, however, the owners of the two sides of this river exclusively enjoy the right of navigation."[150]

2.1.57 It is common for modern authorities to recognize that any right of free navigation is subject to 'the necessary regulatory power of the riparian

[150] Bello, *Derecho Internacional*, 1872 edition, Obras Completas, La Universidad de Chile, Sixth Volume, pp. 95-96, notes omitted.

States': see O'Connell, *International Law*, 2nd ed., London, 1970, Volume I, page 579.

2.1.58 In any case a process of deduction from other Treaty regimes is not a safe guide to the interpretation of the Treaty of 1858 between Nicaragua and Costa Rica. On a reasonable interpretation of that instrument three types of regulation by the Nicaraguan authorities would be compatible with the principle of free navigation, namely:

(a) The right to monitor the character of the vessels exercising the right of navigation in order to restrict the passage of 'vessels of war' [151] in accordance with the Cleveland Award 1888 as well as any vessel not carrying objetos de comercio. Certainly, the passage of any vessel which appeared to be a vessel of war from its external aspect and mode of handling could be challenged.

(b) The application of regulations concerning buoying, lighting and other matters connected with the maintenance of conditions of safe navigation.

(c) The implementation of measures reasonably necessary for the security of the Republic of Nicaragua and the safety of the people living and working in the vicinity of the frontier.

2.1.59 There is authority for the view that a State may exercise a police power in respect of vessels exercising a Treaty-based right of free navigation in rivers within its territory: see the General Claims Commission in *James H. McMahan (U.S.A.) v United Mexican States* (1929), *Reports of International Arbitral Awards*, Volume IV, p.486, at page 490.

[151] CRM, Vol 2, Annex 16.

2.1.60 The reasoning of the General Claims Commission has considerable relevance in the present context. In the words of the Decision:

> "In view of these provisions, there is no doubt but that McMahan and his companions were exercising a perfectly recognised right in navigating on a part of the Rio Grande which serves as boundary between the two nations.
>
> But, on the other hand, it is also necessary to take into account that the same Treaty of 1848 to which reference has been made above, in its Article VII further provides that:
>
> "The stipulations contained in the present Article shall not impair the territorial rights of either republic within its established limits."
>
> The Treaty of 1853, as has been noted, leaves in force all of Article VII, in so far as it relates to all of that portion of the Rio Grande which under this Treaty was established as a boundary, and, consequently, leaves in force the reservation hereinbefore alluded to.
>
> It appears that the reservation expressly made of the territorial rights of either Republic, within the limits which were established, covers the right of exercising the police power, inasmuch as it is one of the rights which the sovereign exercises over its territory. It is pertinent to recall at this point that the boundary or dividing line between both nations in reference to the Rio Grande, is the middle of this river, following the deepest channel, which signifies that up to this point, the two nations may exercise their full territorial rights. But if this alone were not sufficient, by studying the subject of navigation on international rivers, whether they be boundary lines between two or more territories, and empty into the sea, it is found that the tendency is to establish the principle of free navigation, provided it be always limited by the right of the riparian States to exercise police rights in that portion

of the course which corresponds to them. (See Oppenheim, *International Law*, Vol. 1, pp. 314-322, 3rd. Ed. 1920; Fauchille, *Droit International Public*, Vol. 1, 2nd Part. Pp. 453 *et seq.* 8th Ed. 1925; Moore, *International Law Digest*, Vol. 1, pp. 616. *et. seq.;* J. de Louter, *Le Droit International Positif*, Vol. 1, p.445; Oxford Ed. 1920.) The Congress of Vienna of 1815 fixed the free navigation of certain rivers, *subject to police regulations*. Since this date, the restriction appears in nearly all treaties, and has at times been accepted by the United States: Treaty of Washington of May 8, 1871, Article XXVI; Treaty of June 15, 1845, Article 11. It should also be observed that the Institute of International Law in its session at Heidelberg on September 9, 1887, adopted regulations for the navigation of international rivers, applicable to rivers separating two States as well as those traversing several States, in which the right of the riparians to exercise police power over the stream is recognised.

What extension this right of exercise of the police power may have, as confronted with the principle of free navigation, is a matter as yet not defined by theory or precedent. It is reasonable to think, however, that the right of local jurisdiction shall not be exercised in such a manner as to render nugatory the innocent passage through the waters of the river, particularly if it be established by treaty.

Therefore, it does not seem possible to deny that Mexico is entitled to exercise police powers, *some* police powers, at least, over the course of the Rio Grande, and it does not appear excessive or contrary to the right of free navigation, that jurisdictional action of the Mexican authorities, which in one specific occasion and for special causes bearing on its primary right of defense, was intended to ascertain what was being done and what objects were being carried by suspicious individuals who were travelling over deserted places in small crafts."[152]

[152] Loc.cit., pp.490-91.

2.1.61 The *McMahan* case concerns a Treaty regime establishing the middle of the river as the boundary. The General Claims Commission recognized that up to this point 'the two nations may exercise their full territorial rights', and accepted, as a consequence, that both riparian States had the right to exercise police powers "in that portion of the course that corresponds to them."

2.1.62 In the present case, in the absence of a median line boundary, it is clear that Costa Rica cannot be accorded a general police power over the Rio San Juan. In the Award of President Cleveland, as Arbitrator, the question of the right of navigation of vessels of war was resolved not by recourse to a generalized 'right of free navigation' but to the conditions of navigation specified in the Treaty: that is to say the right of 'free navigation ... *for the purposes of commerce.*' (Article VI). Thus the right of navigation is given a configuration related to the object and purpose of the Treaty of Limits, and not related to a general principle of free navigation. To decide otherwise would be to compromise the territorial settlement which was generous to Costa Rica in certain respects, but recognized the extent of Nicaraguan sovereignty as far as the right bank.

2.1.63 There are certain materials which, whilst not directly relevant, provide support by way of analogy for the proposition that a right, freedom, or liberty, may be subject to a certain degree of regulation by the sovereign of the territory within which the right, freedom, or liberty is to be exercised. Thus, in the *North Atlantic Coast Fisheries* arbitration (1910), the United States claimed that Great Britain had no right to make regulations for a fishery in which American citizens had been granted 'a liberty to take fish of every kind' by a Convention of 1818. The Tribunal (created by a

Special Agreement of 1909) decided that it was lawful for Great Britain to make regulations if they were *bona fide* and not in violation of the Treaty and also if they were: "(1) appropriate or necessary for the protection or preservation of such fisheries, or (2) desirable or necessary on grounds of public order or morals without unnecessarily interfering with the fishery itself; and in both cases equitable and fair as between local and American fishermen ..."[153].

2.1.64 Of considerable interest is the decision of the International Court of Justice in the *Right of Passage* case (Portugal v India)[154]. In that case the Court found that Portugal had, on the basis of a local custom, a right of passage over intervening Indian territory between the enclaves of Dadra and Naga-Aveli and the coastal district of Daman, and between these enclaves, to the extent necessary for the exercise of Portuguese sovereignty over the enclaves and subject to the regulation and control of India, in respect of private persons, civil officials and goods in general[155]. Both Portugal and the Court recognized that the passage was subject to the regulation and control of India. Moreover, the Court held that it was within this right of regulation and control for India to refuse passage when there was tension in intervening Indian territory because of political events in the enclaves[156]. Whilst the relevance of this decision is reduced by the fact that the context was a local custom dependent upon the particular practice of the Parties (and of the British authorities as predecessors to India), the general approach of the Court is relevant to the matter at hand.

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[153] Scott, *Hague Court Reports*, New York, 1916, p.,141, at p.171; Wilson, *The Hague Arbitration Cases*, Boston, 1915, p.135 at p.170; Parry (ed.), British Digest of International Law, Vol. 2b, London, 1967, p.585 at p. 594.
[154] *I.C.J. Reports*, 1960, p. 6.
[155] *Ibid.*, pp. 40, 45-46.
[156] *Ibid.*, pp. 44-45.

2.1.65 It has not been the purpose of the present chapter to deal in detail with the precise issues which have arisen between the parties at various times and which was to some extent the subject of the Cleveland Award. However, the general purpose has been to identify the criteria which necessarily arise from the object and purpose of the Treaty of Limits, together with the duty to construe the Treaty as a whole (the principle of integration).

2.1.66 In the result Nicaragua, as the territorial sovereign, must have regulatory powers for the following purposes:

(a) The protection and maintenance of the right of navigation, that is to say, the power to maintain public order and standards of safety in respect of navigation; and;

(b) The maintenance of the Treaty provisions prescribing the conditions of navigation in accordance with the Treaty, that is to say, the maintenance of the discipline of the Treaty as such, together with the terms of the Cleveland Award.

CHAPTER 3
THE CLEVELAND AWARD AND OTHER CONSIDERATIONS

Section 3. 1

Interpretation of the 1858 Treaty in the Cleveland Award

A. INTRODUCTION

3.1.1 The rights and obligations of the parties in the present case are governed, first and foremost, by the 1858 Jerez-Cañas Treaty. The Arbitral Award of the President of the United States of America, Grover Cleveland, rendered on March 22, 1888, upheld the validity of the 1858 Treaty and answered other questions put to the arbitrator by the parties. Nicaragua, of course, fully accepts the Cleveland Award. However, the Award did not replace the Treaty, as Costa Rica seems to suggest. In fact, as this Subsection will show, President Cleveland was careful not to depart from the text of the Treaty in his Award. Moreover, an important issue before the Court in this case – the meaning of navigation "*con objetos de comercio*" – was not before the arbitrator and was not addressed in his Award. Especially as to that issue, therefore, it is the 1858 Jerez-Cañas Treaty rather than the Cleveland Award that constitutes the principal determinant of the parties' rights and obligations in this case.

3.1.2 The main reason Costa Rica and Nicaragua went to arbitration was to resolve a dispute between them over the validity of the Jerez-Cañas Treaty of April 15, 1858. This is evident from both the very title of the 1886 Román-Esquivel-Cruz Convention of Arbitration ("Convention...to submit to arbitration...the question in regard to the validity of the treaty of

15 April, 1858"[157]) and the first sentence of the preamble of that agreement, according to which: "The Governments of the Republics of Nicaragua and Costa Rica desiring to terminate the question pending since 1871, viz., whether the Treaty signed by both on the 15th April, 1858, is or is not valid, have named [their respective plenipotentiaries, etc.]..."[158]

3.1.3 Only if the arbitrator found the 1858 Treaty to be valid was he asked to address subsidiary questions, namely: "whether Costa Rica has the right to navigate the River San Juan with ships of war or revenue boats"; and all "the other points of doubtful interpretation found by either of the Parties in the Treaty...."[159] Nicaragua communicated to Costa Rica eleven "points of doubtful interpretation" that it proposed to submit to the arbitrator while Costa Rica communicated none, finding "nothing in that [the 1858] Treaty which is not perfectly clear and intelligible."[160]

3.1.4 This statement by Costa Rica is especially interesting since, as discussed below, the Treaty says nothing about whether Costa Rica had a right to navigate on the San Juan de Nicaragua River with vessels of war or of the revenue service. If the Treaty was "perfectly clear and intelligible," one might wonder, what ground did Costa Rica have for believing it had a right to navigate in Nicaraguan territory, on the San Juan River, with such vessels?

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[157] NCM, Annex 11, Convention between the Governments of Nicaragua and Costa Rica to submit to the arbitration of the Government of the United States the question in regard to the validity of the treaty of 15 April 1858 (the Román-Esquivel-Cruz Convention of Arbitration), 24 Dec. 1886, see also CRM, Vol. 2, Annex 14.

[158] NCM, Annex 11, preamble.

[159] *Ibid.*, Article 6.

[160] NCM, Annex 70, Arbitration between the Republics of Costa Rica and Nicaragua in relation to the validity of the treaty of 15 April 1858. –Report to the arbitrator, the President of the United States, by George L. Rives, Assistant Secretary of State, U.S. Department of State.

3.1.5 This Subsection will show that the dispute over this question arose out of a unilateral act by Costa Rica in 1886 in clear contravention of the Treaty whereby Costa Rica navigated on the San Juan River with a national steamship to enforce her customs laws. That this is not permitted by the text of the Treaty is clear. President Cleveland, being aware of this, denied Costa Rica any right whatsoever under the Treaty to navigate on the San Juan with vessels of war, and allowed Costa Rica only the most restrictive of rights to navigate on the river with vessels of the revenue service, and even then only under certain conditions, as shown below.

3.1.6 Moreover, of the eleven points of doubtful interpretation raised by Nicaragua[161], none related in any way to Costa Rica's right under Article VI of the 1858 Treaty to navigate on the San Juan River with articles of trade ("*con objetos de comercio*"). This point was simply not regarded by the parties at the time as being in any way "of doubtful interpretation" and was therefore not submitted to the arbitrator for decision.

3.1.7 Thus the Cleveland Award sheds no direct light on the meaning of the phrase, "*con objetos de comercio*". Indeed, if the content and scope of Costa Rica's right to navigate "*con objetos de comercio*" had been at issue, it seems certain that the parties would have paid more attention to the translation of the original Spanish words in their pleadings, as would President Cleveland in his Award. Yet from all that appears, they paid no attention at all to this phrase. Indeed, the translations of the 1858 Treaty prepared by both parties for the Cleveland Arbitration were identical on this point ("for the purposes of commerce"). President Cleveland, for his part, was careful not to prejudice in any way the meaning of the Spanish

[161] Note from the Minister of Foreign Affairs of Nicaragua Fernando Guzmán to Minister of Foreign Affairs of Costa Rica, 22 June 1887. CRM, Vol. 3, Annex 36.

text, as shown by his enclosing the English translation of the phrase in quotation marks in the *Second* paragraph of his Award[162]. It is thus the 1858 Treaty, not the Cleveland Award, that is controlling on the question of the nature and scope of Costa Rica's right to navigate in Nicaraguan territory, on the San Juan River, "*con objetos de comercio*".

3.1.8 On the other hand, some indication of what the parties, and the arbitrator, must have assumed was meant by the phrase "*con objetos de comercio*" – or even "for the purposes of commerce" – is provided by the arbitrator's treatment of a related question: whether and to what extent Costa Rica had the right of navigation on the San Juan River with vessels of the "revenue service".

3.1.9 This Subsection will show that the meaning of the phrase "*con objetos de comercio*" was not before President Cleveland; that President Cleveland in his Award was in fact careful not to express any view regarding the meaning of navigation "*con objetos de comercio*"; that it is the 1858 Treaty that determines the rights and obligations of the parties on that question in the present case; that the Treaty makes no reference to vessels of the revenue service; that it is clear from the Award and from the arbitrator's rejection of broader rights of navigation that any right of Costa Rica to navigate with such vessels in Nicaraguan territory, on the San Juan River, arises only in respect of articles of commerce and only when necessary; and that no armed navigation by Costa Rican vessels, or exercises of jurisdiction by them, is permitted by the Treaty on the San Juan River without the prior authorization of Nicaragua.

[162] CRM, Vol. 2, Annex 16.

3.1.10 Before proceeding to these points, however, it is worth recalling that like Nicaragua, Costa Rica has always recognized the Cleveland Award as definitive, binding and final.

1. Costa Rica's Recognition of the Cleveland Award as Definitive, Binding and Final

3.1.11 Both Nicaragua and Costa Rica have always recognized that the Cleveland Award interprets the 1858 Treaty in a definitive, binding and final manner. This is reflected in various bilateral instruments as well as in statements of representatives of the two Governments.

3.1.12 The Government of Costa Rica, in particular, has constantly recognized the Cleveland Award as having this character. The Minister of Foreign Affairs of Costa Rica stated at the time of the Award that:

> "...my Government desires nothing more earnestly than to remove any reason that could serve as an opportunity for new discussions between this and that sister Republic, now that the old ones have happily ended with the award of the President of the United States." [163]

3.1.13 Subsequent Notes reflect the same recognition on the part of Costa Rica. Thus, in a note to the Nicaraguan Foreign Minister of 9 August 1895, the Minister of Foreign Affairs of Costa Rica, referring to the boundary line dispute, reaffirms Costa Rica's recognition of the finality of the Award in his observation that:

[163] Note from the Minister of Foreign Affairs of Costa Rica to the Minister of Foreign Affairs of Nicaragua, 25 September 1888; NCM, Annex 36.

> "Otherwise, the great efforts of both Republics to put an end to their disputes would be worthless, thereby undermining the incontestable authority of the Award and offending the dignity of the Arbitrator, who, opportunely and with such high spirit of conciliation, gladly responded to our common call and put himself at the service of peace..."[164]

3.1.14 More recently, the President of Costa Rica, in a Note to the President of Nicaragua of 29 July 2000, stated that:

> "a) the sovereignty over the entire course of the San Juan River corresponds to Nicaragua; b) that in accordance with the Cleveland award of 1888, which constitutes *a n obligatory interpretation of the Cañas-Jerez treaty of limits of 1858*..." (Emphasis added)[165]

3.1.15 Costa Rica's recognition of the binding and final nature of the Cleveland award is also reflected in an important official document of the Ministry of Foreign Affairs, the Yearbook, in 1888, which states:

> "The President of the United States has proven himself worthy of the gratitude of Costa Rica and Nicaragua by accepting the duty that these have entrusted to his erudition and highest respectability; and for having put an end, with his illustrious decision, to the sole motive for disagreement that separated these two countries." [166]

3.1.16 President Cleveland's Arbitral Award definitively settled the questions regarding the interpretation of the 1858 treaty, in particular, all questions that existed then. By necessary implication, therefore, there were no other questions that created doubts for the parties in the Treaty. As regards the

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[164] NCM, Annex 37, Note of 9 August 1895.
[165] CRM, Vol. 3, Annex 66.
[166] NCM, Annex 75. Yearbook of the Secretary to Foreign Affairs of Costa Rica. 1888. pp. 3-4.

juridical situation, as Costa Rican President Miguel Angel Rodriguez recognized in the Note of 29 July 2000 mentioned above that it is worth noting that "...c) that *since 1888 nothing has occurred to change this legal status...*" (Emphasis added)[167]

3.1.17 Costa Rica, however, after constantly and repeatedly recognizing the definitive, final and binding character of the 1888 Arbitral Award with respect to the interpretation of the 1858 Treaty, has effectively modified her juridical position, as can be noted in the Application filed before the Court on 29 September 2005, and in the *Memorial* submitted to the Court in 29 August 2006.

3.1.18 By thus arguing for a new interpretation of the 1858 Treaty, as finally and definitively interpreted in the Cleveland Award, Costa Rica clearly appears to be calling into question the character of those two sources of law governing her navigational rights on the San Juan River.

2. The Parties Did Not Request President Cleveland to Determine the Meaning of "con objetos de comercio", Nor Did President Cleveland Purport to Do So

3.1.19 As already noted above in paragraphs 3.1.2 to 3.1.3, on 24 December 1886, Costa Rica and Nicaragua concluded the Román-Esquivel-Cruz Convention of Arbitration in which they submitted certain questions to United States President Grover Cleveland for his final and binding decision. These questions are stated in Articles 1 and 6 of the 1886 treaty as follows:

[167] CRM, Vol. 3, Annex 66.

"(1) The question pending between the contracting Governments in regard to the validity of the Treaty of Limits of the 15th April, 1858, shall be submitted to arbitration.

[...]

(6) If the decision of the Arbitration declares the validity of the Treaty, the same award shall declare whether Costa Rica has the right to navigate the River San Juan with ships of war or revenue boats. Also the decision aforesaid shall, in case of the validity of the Convention, decide the other points of doubtful interpretation found by either of the Parties in the Treaty, and communicated to the other Party within 30 days from the exchange of the ratifications of this Convention".[168]

3.1.20 The two principal questions submitted to the President of the United States as sole arbitrator were thus whether the 1858 Treaty of Limits was valid and whether Costa Rica had the right to navigate on the San Juan River with vessels of war or of the revenue service. As has been seen, the arbitrator answered the first question in the affirmative and, as to the second question, decided that Costa Rica did not have the right to navigate on the San Juan River with vessels of war but did have a right to navigate on the river with vessels of the revenue service – a right which, however, would arise only under certain narrowly circumscribed conditions. The present Subsection will return to the latter right presently.

3.1.21 As already noted, none of the eleven "points of doubtful interpretation" [169] communicated by Nicaragua raised the question of the scope of Costa

[168] NCM, Annex 11 and CRM, Vol. 2, Annex 14.
[169] CRM, Vol. 3, Annex 36.

Rica's rights to navigate on the San Juan River "*con objetos de comercio*". This issue was thus not before the arbitrator.

3.1.22 Yet Costa Rica would have the Court give the Cleveland Award sweeping effect. Thus Costa Rica states in her *Memorial*: "[T]he Cleveland Award confirmed and authoritatively interpreted the extent of Costa Rican rights of use of the River."[170] The Award, of course, did no such thing. It simply answered the two questions put to the Arbitrator by the parties and decided upon the points of doubtful interpretation communicated by Nicaragua. Costa Rica, therefore, may not rely on the Cleveland Award as having decided anything with regard to the meaning of the phrase, "*con objetos de comercio*".

3.1.23 It is true that President Cleveland, in the second section of his Award, referred to an English translation of the phrase. Here the Arbitrator declared that Costa Rica "may navigate said river with such vessels of the revenue service as may be related to and connected with her enjoyment of the 'purposes of commerce' accorded to her in said article..."[171] However, no conclusions may be drawn as to the meaning of the phrase "*con objetos de comercio*" on the basis of the arbitrator's having used an English translation of those words, particularly when their meaning was not at issue in the arbitration as just pointed out.

3.1.24 Moreover, the fact that President Cleveland enclosed the phrase "purposes of commerce" in quotation marks is striking. This clearly shows that while using the English translation of the phrase, the arbitrator was at pains not to prejudice the meaning of the original and authoritative

[170] CRM, para. 1.04, at p. 2.
[171] CRM, Vol. 2, Annex 16.

Spanish text. It is entirely understandable that President Cleveland should have been careful in this regard because later in the same sentence of the Award he linked Costa Rica's right to navigate with "vessels of the revenue service" to "her enjoyment of the 'purposes of commerce' accorded to her in [Article 6 of the 1858 Treaty]..."[172] Costa Rica's right to navigate with vessels of the revenue service was therefore tied to, and measured by, her right to navigate "*con objetos de comercio*". That the content of the latter right was not before the arbitrator is underscored by his having enclosed the English translation of the phrase in quotation marks.

3.1.25 Further evidence of the fact that the meaning of the phrase "*con objetos de comercio*" was not at issue in the Cleveland Arbitration is provided by the *travaux préparatoires* of the Award. Under the authority of Article V, paragraph 5, of the Román-Esquivel-Cruz Convention of Arbitration of 24 December 1886[173], President Cleveland empowered Mr. George L. Rives, Assistant Secretary of State, to examine the arguments and evidence submitted by the two sides and to prepare a report to the President upon which a decision in the case might be based.[174] In the second part of his report, Mr. Rives addressed the questions raised in Article VI of the 1886 Arbitration Agreement, in particular, whether Costa Rica had the right of navigation on the San Juan River with vessels of war or of the revenue service. After stating that "[t]he answer to this question depends upon a

[172] CRM, Vol. 2, Annex 16.
[173] NCM, Annex 11. (Article 5)
[174] The instrument by which President Cleveland delegated this authority to George L. Rives is reproduced in J.B. Moore, History and Digest of International Arbitrations to which the United States has been a Party, vol. 2, p. 1945, note 2, U.S. Government Printing Office, Washington, DC., 1898. Mr. Rives communicated a copy of the President's order to Costa Rica and Nicaragua on the day it was made. For. Rel. 1888, part 1, pp. 455-456.

consideration of Article VI of the Treaty of 1858," [175] Mr. Rives set forth an English translation of Article VI. What is of present interest, however, is that he included in this version of Article VI the original Spanish versions of the phrases he appears to have considered to be most important for purposes of the arbitration. These phrases, and their Spanish counterparts inserted by Rives, are as follows:

> -"...shall possess exclusively the dominion and supreme control (tendrá exclusivamente el dominio y sumo imperio) ...
>
> [...]
>
> -...the perpetual right of free navigation (los derechos perpetuos de libre navegación)...
>
> [...]
>
> -...which is hereby declared to belong (que.... se establece corresponder ...)". [176]

3.1.26 Mr. Rives utilized a translation of the phrase "*con objetos de comercio*", which also appears in Article VI, reading "for the purposes of commerce". However, he did not include the original Spanish version of this phrase in his report. It seems clear that if Rives had thought this phrase had significant bearing upon the issues before the arbitrator he would have included the original Spanish version, as he did with the phrases set forth above. Since he did not, the conclusion may be drawn that Mr. Rives did not believe that this phrase was in any way germane to the dispute before the arbitrator.

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[175] George L. Rives, "Second: If the Treaty of the 15th April, 1858 is valid, what is its true meaning in respect of the various matters submitted for decision?", Department of State, Washington, 2 March 1888, NCM, Annex 70.

[176] NCM, Annex 70.

3. Costa Rica May Navigate on the San Juan de Nicaragua River with Vessels of the Revenue Service Only to the Extent Necessary to the Exercise of her Right to Navigate with Articles of Trade (con objetos de comercio). This right is not mentioned in the 1858 Treaty

3.1.27 Costa Rica has repeatedly accepted that she may not navigate on the San Juan with warships or with revenue vessels exercising jurisdiction. For example, Article 6 of the Carazo-Soto Treaty of 1887 provides: "3° The right granted to Costa Rica...does not comprise the right to navigate with vessels of war or vessels of the revenue service exercising jurisdiction"[177] Similarly, in the Montealegre-Jiménez Convention Costa Rica accepted the Ayón-Chevalier Treaty of Canalization, which stated that:

> "...Costa Rica may establish customs and warehouses at the expense of the State, upon prior notice to the Government of Nicaragua, in no case, however, may Costa Rica place armed forces ..."[178]

3.1.28 In her *Memorial*, Costa Rica understandably focuses upon the Cleveland Award and seeks to deflect attention from the 1858 Jerez-Cañas Treaty. Costa Rica also seeks to aggrandize her rights under the Treaty through references to treaties concluded by other states in the 19th century,[179] none of which is apposite to the unique circumstances of the San Juan, and through an extensive discussion of the character of United States Revenue Cutters in the late nineteenth century.[180] Costa Rica explains the relevance of the latter as follows: "In drawing a distinction between men-of-war and revenue cutters, the Cleveland Award evidently took into account

[177] Carazo-Soto Treaty, Managua, 26 July 1887. This treaty did not enter into force for want ratification by Nicaragua. CRM, Vol. 2, Annex 15.
[178] Montealegre – Jiménez Convention, 18 June 1869, Article 12, NCM, Annex 8.
[179] CRM, para. 4.80.
[180] CRM, paras. 4.81-4.82.

contemporary naval practice..."[181] Costa Rica thus ignores entirely the special regime of the San Juan, a wholly Nicaraguan river, attempting to suggest that because U.S. Revenue Cutters that ply U.S. waters have certain characteristics, including armaments, Costa Rican revenue vessels wishing to sail on Nicaraguan waters – the San Juan River – have a right to be outfitted in like manner. Along this same line, Costa Rica accepts that "President Cleveland excluded the possibility of Costa Rica navigating with vessels of war" but goes on to state that he "acknowledged that *other public vessels* could do so, particularly 'such vessels of the Revenue Service as may be related to and connected with her enjoyment of the "purposes of commerce" accorded to her in said article, or as may be necessary to the protection of said enjoyment.'"[182] What those "other public vessels", apart from revenue vessels, might be, and precisely where President Cleveland stated that they would have a right to navigate on the San Juan, Costa Rica does not say.[183] Instead, it attempts to leave the implication that the San Juan should be treated as if it is not a Nicaraguan river but rather one over which jurisdiction, and sovereignty, is shared, as if the border followed the median line or *thalweg* of the stream rather than the right (Costa Rican) bank, in the pertinent sector.

3.1.29 Nicaragua would respectfully request that the Court put to one side Costa Rica's arguments concerning treaties between other states concerning rivers that are not situated similarly to the San Juan, as well as interesting but in the end irrelevant information about United States Revenue Cutters

[181] CRM, para. 4.81.
[182] *Ibid.*, para. 4.83(emphasis added).
[183] The second Paragraph of the Cleveland Award simply indicates that Cost Rica "has not the right of navigation of the River San Juan with vessels of war; but she may navigate said river with such vessels of the revenue service as may be related to and connected with her enjoyment of the "purposes of commerce" accorded to her in said Article, or as may be necessary to the protection of said enjoyment." Nowhere does it mention "other public vessels".

in the nineteenth century. As shown in Chapter 4, Section 3, below, the latter information actually reveals why President Cleveland was so careful to constrain narrowly Costa Rica's navigation with such vessels – namely, because they can easily be transformed or evolve into warships, with which he had found Costa Rica had no right to navigate on the San Juan. To be sure, as shown in Chapter 2, Nicaragua would have the right, within her police power, to stop any vessel suspected of exceeding Costa Rica's navigational rights under the 1858 Treaty and the Cleveland Award. But rather than accepting Costa Rica's invitation to dwell upon inapposite treaties between third states and irrelevant information regarding revenue vessels, also of a third state, Nicaragua would direct the Court's attention to the principal source of the parties' rights and obligations: the 1858 Jerez-Cañas Treaty.

3.1.30 Specifically, in reading the Cleveland Award, it is important to bear constantly in mind that vessels of the revenue service are not mentioned at all in the Jerez-Cañas Treaty. Article 6 of that agreement, which in fact is silent as to the right of navigation by any sort of public vessel,[184] restricts Costa Rica's right to navigate on this wholly-Nicaraguan river to vessels carrying articles of trade ("*objetos de comercio*"). These would ordinarily be private commercial vessels carrying goods to market or to be shipped abroad. Costa Rica's *Memorial* ignores these boats almost entirely, seeking instead to construct an inverted pyramid of rights upon these simple craft. The rights that Costa Rica asks the four words "*con objetos de comercio*" to bear seem to entail navigation on the San Juan by Costa Rican public vessels, possibly armed and of various sizes and descriptions.

[184] This point did not escape George L. Rives, who noted with reference to Article 6 of the 1858 Jerez-Cañas Treaty that "the foregoing Article it will be observed is silent as to the right of navigation by public vessels." Report of George L. Rives, (Second), NCM, Annex 71.

Surely this cannot have been the intent of the parties to the Jerez-Cañas Treaty, or indeed of President Cleveland. Some background on how the question of navigation by revenue vessels arose confirms that this is the case.

3.1.31 The specific question to be examined is why, in the arbitral agreement, the parties requested the arbitrator to determine whether Costa Rica had a right to navigate on the San Juan River with vessels of the revenue service, especially when the 1858 Treaty itself appears, by its silence on this point, to answer this question in the negative. Some light is shed on the issue by an episode involving a public steamship sent by Costa Rica, almost thirty years after the conclusion of the Jerez-Cañas Treaty, to navigate on the San Juan River, under protest by Nicaragua.

4. Origin of the Controversy over Costa Rica's Navigation with Vessels of the Revenue Service: The 1886 Dispute between the Parties over Costa Rica's Use of a National Steamship to Patrol the Entire Length of the San Juan River Navigable by Costa Rica to Conduct Customs Reconnaissance and Surveillance

3.1.32 An episode in 1886 involving a Costa Rican customs steamship is alluded to, although only with great subtlety, in Article IX of the 1886 Román-Esquivel-Cruz Convention of Arbitration. That Article states as follows:

> "Pending the decision of the validity of the Treaty, the Government of Costa Rica, consents to suspend the fulfilment of its agreement of 16th March last relative to the navigation of the River San Juan by a Government steamer."[185]

[185] NCM, Annex 11, see also CRM, Vol. 2, Annex 14.

3.1.33 The controversy between the two countries regarding the Costa Rican national steamship stems from two decrees adopted by the Government of Costa Rica on 16 March 1886. Decree No. XXXI of that date provides for the creation of "a guard, that will depend on the General Treasury Inspection, which will be stationed at the mouth of the Colorado River, subject to the provisions of the corresponding law."[186] The decree further provides that "this guard will consist of one Commander and five guards..."[187]

3.1.34 According to Decree No. XXXII of the same date (16 March 1886), the customs post "shall have at its disposal a national steamer with its respective crew made up of a captain-pilot, an engineer, and a stoker and his helper."[188] Its tasks were to include the following:

> " 1st To prevent contraband in the water and territories of its circumscriptions.
>
> 2nd To give the relevant notice and information for the persecution of smuggling to the guards in the San Carlos and Sarapiquí, or the Inspector General, according to the circumstances.
>
> 3rd To request assistance from the guard of Sarapiquí and San Carlos and obtain it whenever the Commander of Colorado deems it necessary....
>
> 5th To reconnoitre at least once a week the River San Juan, Colorado, Sarapiquí and San Carlos; the first in the whole extent that it is navigable for Costa Rica, the second in its entire extent, and the latter two along the entire stretches that are *navigable by steamer*....[189] (emphasis added)

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[186] CRM, Vol. 6, Annex 205.
[187] *Ibid.*
[188] CRM, Vol. 6, Annex 206.
[189] *Ibid.*

3.1.35 On 5 June 1886, the Minister of Foreign Relations of Nicaragua, Francisco Castellón, sent a note of protest to the Minister of Foreign Relations of Costa Rica, Ascensión Esquivel, concerning the decree's provision for a national steamship. Minister Castellón, assuming arguendo that the 1858 Treaty was valid, reminded his counterpart that Article 6 of the 1858 Treaty reserves for Nicaragua the exclusive dominion and sovereign jurisdiction over the waters of the San Juan, conceding to Costa Rica nothing more than the right to navigate "*para objetos de comercio*".[190]

3.1.36 The Costa Rican Foreign Minister responded in a Note of 29 June 1886, that the decree providing for a national vessel to travel on that part of the San Juan River that is navigable to Costa Rica does not impair the rights of Nicaragua. He argued that while the 1858 Treaty reserves for Nicaragua exclusively the dominion and sovereignty over the waters of the San Juan, it also allows Costa Ricans to navigate with articles of commerce and gives the Government of Costa Rica:

> "...the same navigational rights with all kinds of vessels, for if it is to fulfil the obligations imposed on it [the treaty] and which it [Costa Rica] expressly recognizes of contributing to the custody and defence of the river in case of external aggression, it is clear that it has the right to make use of the indispensable means to comply with that duty. Furthermore, the vessel that is to navigate the San Juan shall limit itself to use the waters of the river to cross from one to the other Costa Rican river and it shall not exercise any jurisdictional act over them."[191]

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[190] NCM, Annex 28, Note from Minister of Foreign Affairs of Nicaragua, Francisco Castellón, to Minister of Foreign Affairs of Costa Rica, Ascensión Esquivel, 5 June 1886.

[191] CRM, Vol. 3, Annex 31, Note from the Minister of Foreign Affairs of Costa Rica, Ascensión Esquivel, to Minister of Foreign Affairs of Nicaragua, Francisco Castellón, 29 June 1886.

3.1.37 Nicaraguan Foreign Minister Castellón replied to Costa Rican Foreign Minister Ascensión Esquivel on 3 August 1886, stating in relevant part:

> "The navigation on San Juan waters of a Costa Rican national steamship carrying armed forces of that Republic- the verification of which this Government finds particularly surprising- following my aforementioned letter 5th June, is an outright violation of Nicaragua's sovereign rights, and cannot be justified by invoking a treaty the validity of which is being questioned, and that even if it were valid, would not be authorized except when, in a given case, as with all alliance, Nicaragua would require Costa Rica to comply with the rights, stipulated therein, to concur to its guard and defence.
> The President, therefore, demands Your Excellency's Government withdraw the abovementioned steamship from the waters of the San Juan".[192]

3.1.38 Costa Rican Foreign Minister Esquivel responded to this note from his Nicaraguan counterpart on 31 August 1886, in the following terms:

> "...Costa Rica has the perpetual right to navigate the San Juan River, or part of it, in accordance with the treaty: that it is obliged, and naturally so, to guard and defend the river, since it has the use of its waters, and because a part of its right bank belongs to it, because the river is the common entry for both Republics, and it is in the direct interest of both to defend it: that, given this obligation, Costa Rica may use the necessary means to fulfil it and it may, for the same reason, navigate the river in any kind of vessels: that, in order to do so, Costa Rica does not require Nicaragua's approval or request, since it would not be acting as Nicaragua's ally but in the exercise of its own right: and

[192] CRM, Vol. 3, Annex 32, Note from the Minister of Foreign Affairs of Nicaragua, Francisco Castellón, to Minister of Foreign Affairs of Costa Rica, Ascensión Esquivel, 3August 1886.

that, should the opposite occur, Costa Rica would be left totally defenceless at Nicaragua's will".[193]

3.1.39 Then, as has been seen, on 24 December 1886, the Román-Esquivel-Cruz Arbitration Convention was signed, containing the aforementioned clause regarding the suspension of the Costa Rican Decree of March 16 of that year providing for the navigation of a national steamship on the San Juan River.[194]

3.1.40 But pending the outcome of the arbitration the matter of the Costa Rican steamship remained unresolved, and on 14 February 1887, Nicaraguan Foreign Minister Joaquín Elizondo addressed a note on the subject to his Costa Rican counterpart, stating in part:

> "The decision of the Government of Costa Rica last year to establish a customs post at the mouth of the Colorado River, as a dependence of the General Inspection Unit of the Ministry of Finance; to make available to said customs post a national steamship to carry out reconnaissance at least once a week on the San Juan, Colorado and Sarapiquí rivers; and to establish a village on the left bank of the second of these rivers to be named Irazú, *was precisely the cause that rekindled the old border issue between the two Governments and the debate acquired such proportions that it seemed to close the door to a peaceful outcome.* It was this aspect of the debate which led the President of Guatemala to offer his mediation, which after long debates, in which the Minister Plenipotentiary of Costa Rica did not seem as conciliating as expected, led to the signing on 24 December of a Convention at the capital of that Republic, which shall bind the two Contracting Parties, once it has been ratified, to submit to arbitration the question regarding

[193] CRM, Vol. 3, Annex 34, Note from the Minister of Foreign Affairs of Costa Rica, Ascensión Esquivel, to Minister of Foreign Affairs of Nicaragua, Francisco Castellón, 31 August 1886.
[194] CRM, Vol. 6, Annex 206.

the validity or nullity of the Treaty of Limits signed in 1858, for which they have appointed the President of the United States of America as arbitrator."[195] (emphasis added)

3.1.41 The principal impetus for the dispute over the validity of the 1858 Treaty, as well as the controversy over Costa Rica's right to navigate on the San Juan River with public vessels, including vessels of the revenue service, thus seems clear. It was the Costa Rican decree of 16 March 1886, authorizing the use of a national steamship for customs enforcement, including on the San Juan River, and its implementation[196]. When this dispute could not be resolved through negotiation, it was submitted to arbitration by the President of the United States. Still, the diplomatic exchanges continued.

3.1.42 On 21 March 1887, Costa Rican Foreign Minister Cleto González Víquez responded to the Nicaraguan note of 14 February, noting the recent construction of roads in the "fertile" regions of the Sarapiquí, San Carlos and Frío rivers in his country, and laying stress on Costa Rica's concern with the use of the San Juan River to smuggle goods into the country that had arrived at the port of San Juan del Norte, impairing customs revenues of Costa Rica. After indicating Costa Rica's interest in exploring the development of the "valuable" area referred to, he continued:

"...[The Government] has the duty to avoid the defalcation of customs duties derived from smuggling, to impede the illegal exportation of natural products from those regions and to object to the undue importation that often takes place by those means. It is true that the Government

[195] NCM, Annex 31. Note of 14 February 1887, from the Minister of Foreign Affairs of Nicaragua, Joaquín Elizondo, to the Minister of Foreign Affairs of Costa Rica, Cleto Gonzalez Viquez.
[196] CRM, Vol. 6, Annex 206.

> commissioned Mr. Alpizar, through the Ministry of Finance, to carry out a reconnaissance not of the strategic points, but rather of the points which are more accessible for smuggling and of the zone in general, on the one hand, to facilitate industrial activity and, on the other hand, to establish customs posts at those locations which provide greater confidence to smugglers."[197]

Costa Rica thus seems in effect to be arguing, much as it is today, that the development of her resources justifies the unilateral expansion of her rights of navigation in Nicaraguan territory, on the San Juan River.

3.1.43 On 26 July 1887, less than a year before President Cleveland rendered his Award, Nicaragua and Costa Rica signed an agreement by which they intended to settle the issues pending between them regarding the San Juan River. Article 6.3 of this agreement provided that "[t]he right granted to Costa Rica to navigate with articles of trade on the San Juan River, from its mouth up to 3 English miles below Castillo Viejo, does not comprise the right to navigate with vessels of war or vessels of the revenue service exercising jurisdiction" [198] Article 8 of the agreement provided that "the vessels of the revenue service of Costa Rica which need to protect any point on the right bank of the San Juan which belongs to Costa Rica, or on the part of the Frío River which belongs to Costa Rica, or need to assist the established customs posts, may cross Nicaraguan waters as long as they do not exercise any jurisdictional act thereon."[199] That is, they may only use "Nicaraguan waters" – the San Juan River – as a means of getting from point A to point B, both points being on the Costa Rican bank of the river, and may not "exercise jurisdiction" thereon, i.e., may not conduct any

[197] NCM, Annex 32. Note of 21 March 1887, from the Minister of Foreign Affairs of Costa Rica, Cleto González Víquez, to Minister of Foreign Affairs of Nicaragua, Joaquin Elizondo.
[198] CRM, Vol. 2, Annex 15, Carazo – Soto Treaty.
[199] *Ibid.*

official activities such as stopping a vessel or arresting its occupants while on the river.

3.1.44 This agreement never entered into force; it was ratified by Costa Rica but not by Nicaragua. However, it is of present interest for two reasons: First, through its signature and ratification of the agreement, Costa Rica indicated clearly that it accepted the proposition that Costa Rica's right to navigate on the San Juan River with articles of trade "does not comprise the right to navigate with vessels of war or vessels of the revenue service exercising jurisdiction."[200] And second, the fact that Nicaragua did not give her consent to be bound by the agreement may be taken as an indication that even transit on the river with such vessels, without exercising any jurisdiction, was unacceptable to Nicaragua.

3.1.45 Not only are vessels of the revenue service not mentioned in the 1858 Treaty, the Cleveland Award, while permitting Costa Rica to navigate with such vessels on the San Juan River, sharply restricts and conditions that right. A careful reading of the Award itself and of its preparatory work clearly shows that Costa Rica does not possess the rights of navigation with public vessels it claims in her *Memorial*.

5. The Restrictiveness of Costa Rica's Rights to Navigate with Vessels of the Revenue Service is Evident from the Changes made by President Cleveland to the Recommendations in the Second Part of Rives' Report

3.1.46 In light of the practice that has just been reviewed it is clear that the right of Costa Rica to navigate in Nicaraguan territory, on the San Juan River, is sharply restricted by the 1858 Treaty and that Nicaragua has always

[200] CRM, Vol. 2, Annex 15.

interpreted the Treaty in this way. It is therefore surprising to find that Costa Rica claims virtually unrestricted rights of navigation in her *Memorial*. For example, in Chapter 4 of her *Memorial*, entitled "Costa Rica's Navigational and Related Rights", Costa Rica concludes as follows with regard to her right of navigation under the Treaty on the San Juan River:

> "1) Costa Rica has a conventional perpetual right of free navigation over the portion of the San Juan where it is a riparian State, and is entitled to exercise this right without restrictions or interference."[201]

This implication that Costa Rica has an unrestricted right of free navigation on the San Juan is without support either in the 1858 Treaty or in the Cleveland Award. This is evident from both the text of the Treaty itself and President Cleveland's rejection of recommendations of broader navigational rights based on sources outside the Treaty.

3.1.47 As noted earlier (paragraph 3.1.25), President Cleveland delegated authority to George L. Rives to prepare recommendations for his Award in the case, as permitted by Article V, paragraph 5, of the 1886 Román-Esquivel-Cruz Convention of Arbitration. Pursuant to this authorization, Mr. Rives prepared a report comprised of two parts, corresponding to the two questions asked of the arbitrator in the Román-Esquivel-Cruz Convention: the first concerned the validity of the 1858 Treaty[202]; and the second concerned navigation by Costa Rica on the San Juan River with vessels of war and of the revenue service, as well as the points of doubtful

[201] CRM, para 4.129.
[202] NCM, Annex 70. Report of George L. Rives. 2 March 1888.

interpretation[203]. President Cleveland adopted the first part of Rives' report as submitted, but made substantial changes to recommendations made in the second part, adopting positions that were, in essence, diametrically opposed to Rives' recommendations on key issues. The changes are reflected in the *Second* paragraph of the Cleveland Award[204]. Since Costa Rica's alleged rights of navigation by public vessels bear a striking similarity to the recommendations by Rives that were rejected by President Cleveland, those recommendations bear scrutiny.

3.1.48 The Draft award prepared by George L. Rives contains a handwritten introductory note which states as follows:

> "The following is the draft award prepared by me and handed to the President. The corrections appearing thereon in ink are made by the President, and are all in his own handwriting. It was returned to me by the President on March 17th, 1888. G. L. Rives".[205]

3.1.49 This document clearly shows that Rives presented an Article 2 of the Award which is very different from that which President Cleveland corrected by hand and eventually incorporated into his Award. Its contents and the changes made by Cleveland provide insight into the different approaches of – and outcomes reached by – the two individuals.

3.1.50 The approach followed by Rives was similar to that advocated by Costa Rica in the arbitration – i.e., to assimilate the right to navigate on the San Juan River to the general right to navigate in the waters of a state's

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[203] NCM, Annex 71. Report by George L. Rives (Second).
[204] CRM, Vol. 2, Annex 16.
[205] NCM, Annex 72. Draft Award prepared by G. L. Rives and handed to the Arbitrator Mr. Grover Cleveland. 17 March 1888.

territorial sea. After examining the writings of authorities on international law (Hall, Blüntschli, Calvo and Twiss) as well as case law on this point, Rives concluded that although there was "at least an apparent contradiction between these authorities,...it is understood that civilized nations at the present day, impose no restriction upon the friendly visit of foreign men-of-war in time of peace; and this general usage may be said to constitute an imperfect right to entitle such vessels to claim hospitality."[206] He therefore recommended to President Cleveland the following answer to the second question put to the arbitrator:

> "The preliminary question of interpretation as to the right of navigation of the San Juan by public vessels of Costa Rica should, therefore, in my judgment, be answered by saying that the vessels of war and of the revenue service belonging to Costa Rica have the same privilege of navigating the River San Juan as are usually accorded in their territorial waters by civilized nations to the public vessels of friendly powers in time of peace, - but no other, or greater privileges."[207]

3.1.51 This conclusion – which, again, suggested rights similar to those being claimed by Costa Rica today – was radically altered by President Cleveland in his Award. Rather than searching for a situation that was analogous to the one established by the 1858 Treaty, President Cleveland began – and ended – with the treaty itself. This is evident from paragraph *Second* of his Award, in which he refers, directly or indirectly, to the Jerez-Cañas Treaty three times. This short but crucial section reads in its entirety as follows:

[206] NCM, Annex 71. Report by George L. Rives (Second).
[207] *Ibid*, pp. 218-219 of handwritten version.

> "The Republic of Costa Rica under said treaty and the stipulations contained in the sixth article thereof, has not the right of navigation of the river San Juan with vessels of war; but she may navigate said river with such vessels of the revenue service as may be related to and connected with her enjoyment of the 'purposes of commerce' accorded to her in said article, or as may be necessary to the protection of said enjoyment."[208]

3.1.52 The first reference to the treaty occurs in the first line ("under said treaty"); the second several words later, when the arbitrator refers to "the stipulations contained in the sixth article"; and the third in the final portion of the section, relating to vessels of the revenue service, when President Cleveland clearly ties any right Costa Rica may have to navigate with such vessels to "enjoyment of the 'purposes of commerce' accorded to her in said article." The importance ascribed by President Cleveland to the treaty was such that, as demonstrated elsewhere in the present *Counter-Memorial*,[209] he took care not to prejudice the meaning of its original Spanish text by enclosing the phrase, "purposes of commerce" in quotation marks, thus referring back to the original text.

3.1.53 Thus President Cleveland took an entirely different approach from that followed by Rives. Since the treaty was valid, and made unmistakably clear that the San Juan was part of Nicaraguan territory, any right Costa Rica might have to navigate on the river with vessels of the revenue service would have to find its source in the treaty; it could not be separated from the agreement. In particular, no right of navigation, whether with public or private vessels, could be disassociated from navigation with articles of trade (*objetos de comercio*). Interestingly, Costa Rica herself

[208] CRM, Vol. 2, Annex 16. Cleveland Award, section "*Second*".
[209] See Chap. 4 paras. 4.1.8-4.1.48, below.

later, in the context of the Alexander Arbitration, argued that the Treaty should be interpreted literally: "The principles upon which the language and intent of treaties are to be interpreted are well set forth in the Costa Rican argument by many quotations from eminent authors. All concur that words are to be taken as far as possible in their first and simplest meanings – 'in their natural and obvious sense, according to the general use of the same words'– 'in the natural and reasonable sense of terms' – 'in the usual sense, and, not in any extraordinary or unused occupation'."[210] This position contradicts Costa Rica's current attempts to build an edifice of rights – to navigate with armed public vessels, re-supply border posts, carry tourists, etc. – on the slender reed of "articles of commerce."

3.1.54 The language in paragraph *Second* of the Cleveland Award is especially worthy of close attention since the arbitrator substituted it entirely for the proposal made by George Rives for that part of the Award. For President Cleveland, the only navigation by Costa Rican vessels of the revenue service that was permitted by the treaty was that which is "related to and connected with" the right to navigate with articles of trade. As if to avoid any possible misunderstanding, the arbitrator requires that navigation with revenue vessels be both (a) "related to" *and* (b) "connected with" navigation with articles of trade. He thus underscores the inextricable connection between public revenue vessels and private boats carrying articles of trade: the two go together, but only if the former are "related to and connected with" the latter.

[210] NCM, Annex 73. "Award Number 4" of Engineer Arbitrator Alexander. Also cited in National Geographic magazine by author Arthur P. Davis (Chief Hydrographer, Isthmian Canal Commission) in his article "Location of the Boundary between Nicaragua and Costa Rica."

3.1.55 However, the arbitrator also conditions Costa Rica's right to navigate on the San Juan River with vessels of the revenue service upon its being "necessary to the protection of said enjoyment" (i.e., enjoyment of the right to navigate with articles of trade). Since Costa Rica was capable of enforcing her customs laws from her own territory in 1888, and is even more capable of doing so today, enforcing those laws by patrolling the river in boats is not "necessary". Indeed, it is difficult to imagine situations in which navigation on the San Juan with public vessels of the revenue service would be "necessary".

3.1.56 In sum, for President Cleveland, Costa Rica's right to navigate on the San Juan River with vessels of the revenue service, which was not provided for by the treaty, could be recognized only to a very limited extent and under strict conditions. He found that there was an inextricable link between navigation with vessels of the revenue service and navigation with articles of trade, specifying that navigation with revenue vessels must be "related to and connected with" navigation with articles of trade. This leaves no doubt that, for President Cleveland, Costa Rica does not have an autonomous right of navigation on the San Juan. In further requiring that navigation with revenue vessels be "necessary" to the protection of navigation with articles of trade, the arbitrator set the bar very high, since while protection of such navigation by use of revenue vessels might be convenient, it would seldom be "necessary". According to President Cleveland, therefore, there could be no navigation by Costa Rican vessels of the revenue service except in conjunction with the enjoyment of the right to navigate with articles of trade; and all navigation by revenue vessels had to be related to and connected with Costa Rica's enjoyment of navigation with articles of trade or necessary to the protection thereof.

3.1.57 It is thus clear that the Cleveland Award does not recognize an objective, abstract right of navigation by Costa Rican revenue service vessels. It is a right that is activated only when certain conditions obtain. Under any other circumstances, while such navigation might be convenient, "it is not so necessary an incident to the right of Costa Rica to enforce her customs laws as to be inevitably implied *ex necessitate* from the provisions of the Treaty."[211] This is only sensible, in view of Nicaragua's exclusive possession of dominion and supreme control of the San Juan, according to the terms of the Treaty.

CONCLUSIONS

3.1.58 The following points emerge from the foregoing analysis:

a. First, neither in the agreement submitting their dispute to arbitration nor otherwise did the parties request President Cleveland to determine the meaning of the phrase, "*con objetos de comercio*", and the arbitrator did not purport to do so.

b. Second, taken together, the Cleveland Award and those sections of the second part of Rives' report that were not in any way contradicted by the arbitrator make clear that it is the 1858 Treaty that, first and foremost, governs the rights and obligations of the parties. In his Award, President Cleveland was at pains to apply the terms of the Treaty, and not to go beyond those terms. This is amply demonstrated by his repeated references to the Treaty in paragraph *Second* of the Award. It is therefore clear that the

[211] NCM, Annex 71. George L. Rives, Report to President Cleveland, (Second), p. 211 of original handwritten version.

Award must be understood in the light of the Treaty, not the other way around as Costa Rica seems to imply.

c. Third, the Treaty makes no mention of vessels of the revenue service. The question of whether Costa Rica could navigate on the San Juan River with such vessels thus arose not from the Treaty itself, but from Costa Rica's unilateral decision in 1886 to navigate on the San Juan with a national steamship charged with customs enforcement, in clear and blatant contravention of the provisions of the Treaty. It is evident beyond any doubt that President Cleveland was acutely aware of the need not to enlarge Costa Rica's rights of navigation beyond what was expressly provided for in the Treaty, except insofar as was strictly necessary under specific circumstances: President Cleveland rejected a broad right of navigation proposed by his delegate, George L. Rives, based not on the Treaty but on an analogy to marine navigational rights; and in recognizing a limited right to navigate with vessels of the revenue service under exceptional circumstances President Cleveland made clear that there was no such right except to the extent its exercise was closely "related to and connected with" navigation with articles of trade, and except to the extent that navigation with such vessels was "necessary" under the circumstances. Mere convenience is not enough to trigger such a right, especially since under most circumstances customs enforcement could take place in Costa Rican territory. It follows that nothing said in either the Award or Rives' report can be construed to imply a right of Costa Rica to navigate on the San Juan for the purpose of re-supplying border posts: there are no articles of trade involved in such

navigation; and it is not necessary, since it can be accomplished by land.

d. And fourth, in any event, no armed navigation by Costa Rican vessels is permitted by the Treaty, as interpreted in the Award, without the prior authorization of Nicaragua. Not only would this not be necessary, it would fly in the face of President Cleveland's finding that Costa Rica "has not the right of navigation of the river San Juan with vessels of war". It is a slippery slope from revenue vessels to vessels of war. George Rives recognized this, and President Cleveland was careful in framing his Award to establish conditions designed to prevent revenue vessels from evolving into warships with liberal access to Nicaraguan waters. Nor may Costa Rican revenue vessels exercise any form of jurisdiction on the San Juan, even if the twin conditions of a link to "*objetos de comercio*" and necessity are established, since this would violate the jurisdiction and prerogatives retained by Nicaragua by virtue of her sovereignty over the river.

Section 3. 2

Other Documents Invoked by Costa Rica

3.2.1 As shown in Chapter 2 and the previous Section of this Chapter, the Jerez-Cañas Treaty of Limits of 15 April 1858 is *the* relevant instrument in the present dispute. However, other instruments have been mentioned in the *Memorial* of Costa Rica. It is therefore appropriate to evaluate their legal significance in this case.

3.2.2 In her *Memorial*, Costa Rica has mentioned a number of other texts to which it seems to confer a legal authority. They can be divided into two categories:

- some relate to the jurisdiction of the Court in the present case;
- others are supposed to be relevant on the very substance of the case.

3.2.3 The first ones relating to the jurisdiction of the Court have been dealt with in the Introduction of the present *Counter-Memorial*[212] and there is no need to go back to them.

3.2.4 Costa Rica also bases herself on various instruments which more directly relate to the subject matter of this case, in particular:

- the Roman-Esquivel-Cruz Convention of 24 December 1886 submitting the question of the validity of the Treaty of 15 April 1858 to the arbitration of the President of the United States[213];
- the 1916 Judgment of the Central American Court of Justice[214];
- the Sevilla - Fournier Agreement concluded pursuant to Article IV of the 1949 Pact of Amity of 9 January 1956[215];
- the "Memorandum of Understanding" of 5 June 1994 between the Ministers of Tourism of both countries[216];

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[212] NCM Introduction, para 3.

[213] CRM, p. 18, para. 2.32, or p. 20, para. 2.38 (see the partial reproduction of this Convention in CRM, Vol. 2, Annex 14 and NCM, Annex11).

[214] CRM, p. 2, para. 1.04 and especially pp. 21-25, paras. 2.42-2.49. For the English translation of the Award see 11 *A.J.I.L.* 181-229 (1917), reproduced in CRM, Vol. 2, Annex 21.

[215] CRM, p. 2, para. 1.04, p. 3, para. 1.08, p. 26, para. 2.52, p. 72, paras. 4.70-4.71, pp. 88-89, para. 4.121-4.123 or p. 133, para. 5.139 (see the partial reproduction of this Agreement in CRM, Vol., 2, Annex 24).

[216] CRM, p. 33, para. 3.20 (see CRM, Vol. 2, Annexes 25 and 26). However, the content of this instrument, whatever its legal nature shows that Nicaragua has the right to regulate tourism on the

- a Joint-Communiqué issued on 8 September 1995 by the Commander-in-Chief of the Army and the Chief of National Police for Nicaragua, and by the Minister of Public Security and a Colonel of the Police Force on behalf of Costa Rica[217];

- various so-called "understandings" and joint-communiqués of the year 1998[218]; or

- another agreed arrangement resulting from an exchange of letters of 28-29 June 2000[219].

3.2.5 The content and the interpretation of those various instruments will be discussed in due course in the present *Counter-Memorial*. Suffice it to note at this stage that the legally binding nature of the 1886 Convention and of the 1956 Agreement, which does nothing more in its Article 1 than to reaffirm "the terms of the Treaty of 15 April 1858 and its interpretation given by arbitration on 22 March 1888", are not challenged.

3.2.6 The Judgment of the Central American Court of Justice of 30 September 1916[220] is of limited relevance in the present case. In effect, the action brought by Costa Rica at the time did not relate to the extent of her navigational rights, but only, as emphasized by the Court, to "the conclusion of a treaty between the latter [the Government of the Republic of Nicaragua] and the Government of the United States of North America, relating to the construction of an interoceanic canal"[221]. Of course, the

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waters of the San Juan de Nicaragua River and that Costa Rica was clearly conscious that she had no right to free navigation for tourism purposes under the 1858 Treaty.

[217] CRM, pp. 83-84, para. 4.104. CRM, Vol 2, Annex 27.

[218] CRM, pp. 34-35, para. 3.23, p. 37, para. 3.31 or p. 130, paras. 5.129-5.130 (see CRM, Vol. 2, Annexes 28, 49, 50 and 51, and 134, 141 or 144).

[219] CRM, p. 40, para. 3.38. Also CRM Vol. 3, Annexes 64 and 65.

[220] CRM, Vol. 2, Annex 21.

[221] CRM, Annex 21, p. 122.

Central American Court had to take into account the relevant legal instruments in order to ascertain the effect and impact of the Bryan-Chamorro Treaty[222] on these instruments. Therefore, the 1858 Treaty and the 1888 Cleveland Award "serve[d] as a guide to th[e] Court"[223] in order to establish the applicable legal regime – but nothing more. The Judgment did not establish any new rights or obligations for Costa Rica or Nicaragua concerning the San Juan River. Costa Rica seems to accept this fact: in her *Memorial* reference to the 1916 Judgment is made only in order to submit that it reaffirmed the rights recognized by the 1858 Treaty as interpreted by the 1888 Cleveland Award[224]. By no means did the Central American Court's Judgment further specify the rights recognized by the relevant instruments, *i.e.* the 1858 Treaty and the Cleveland Award, or create any new rights for the Parties[225].

3.2.7 The legally binding nature of the other documents on which Costa Rica bases herself is however even more dubious.

3.2.8 Thus, the "Memorandum of Understanding" signed by the Ministers of Tourism of Costa Rica and Nicaragua, Carlos Roesch and Fernando Guzmán, at Barra del Colorado on 5 June 1994 can certainly not be defined as "treaties" within the usual meaning of the word in public international law:

[222] CRM, Vol 2, Annex 20.
[223] *Ibid.* p. 160.
[224] CRM, p. 80, para. 4.96 and p. 81, para. 4.98.
[225] NCM, Annex 47. Note by Minister Tovar of 6 December 2004 (DM-566-04).

- they have been signed by the Ministers of Tourism, not by authorities which, "in virtue of their functions (...) are considered as representing their State" without having to produce full powers;

- they do not provide for their transmission to the Secretariat of the United Nations for registration and publication, and have not been transmitted by either country to that effect;

- they have not been subject to any formality for formal adoption or incorporation into the legal order of either State; and

- their drafting clearly shows that it was not the purpose of the signatories to legally bind their respective States; expressions like: "They will endeavour...", the Ministers (not the States as such) express their "willingness to cooperate" or "to offer [their] assistance" or "their commitment to participate in and cooperate with the efforts of...", "Both Ministers will take all the steps they consider necessary for.." or "expressed[226] their whole hearted intention...", the Ministers "agree to seek out and implement all the mechanisms at their disposal in order to promote...", endeavour "insofar as it is possible" [227], etc., are telling in this respect.

3.2.9 Indeed this is not a terminology that implies the creation of "rights and obligations in international law for the Parties"[228]. Those instruments constituted at best "gentlemen's agreements" without binding force for the signatories. This conclusion holds true *a fortiori* with respect to the Joint-Communiqué of 8 September 1995 (the so-called "Cuadra-Castro

[226] The Spanish original text is in the present (*manifiestan*), not the past tense (*expressed*).
[227] CRM, Vol. 2, Annexes 25 and 26.
[228] Cf. ICJ, Judgment, 1 July 1994, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, ICJ Reports* 1994, p. 121, para. 25; see also: Judgment, 19 December 1978, *Aegean Sea Continental Shelf, ICJ Reports* 1978, p. 39, para. 96, or p. 44, para. 107.

Agreement"), which is nothing more than a commitment to cooperate[229], devoid of any particular legal significance, and the 1998 so-called "agreements" invoked by Costa Rica.

3.2.10 In the first place, it will be immediately apparent that, concerning the latter, there is simply no basis for alleging that the high level contacts between authorities of the two States 'were perceived' to have given rise to "an understanding reached on 16 July 1998"[230]. By itself this drafting denotes embarrassment on the part of Costa Rica – and for good reason: the Costa Rican side is incapable of even giving a text or a precise content to this alleged "understanding", whose sole evidence is supposed to be found in a press article published in the Costa Rican newspaper *La Nación*, which by no means mentions any kind of agreement – and even the unilateral declarations quoted from officials of both side do not coincide[231].

3.2.11 The Cuadra-Lizano Joint-Communiqué was signed on 30 July 1998 by the Minister of Defence of Nicaragua and the Minister of Government, Police and Public Security of Costa Rica. The wording used in this instrument resembles that of an agreement but certainly not a self-executing one since it was conditioned on the adoption of "operational mechanics ... in a subsequent meeting of senior officers from the Nicaraguan military authorities and the Costa Rican police force"[232]. However, again, the signatories are not national authorities who "in virtue of their functions (...) are considered as representing their State" at the international level

[229] See CRM, Vol. 2, Annex 27.
[230] CRM, p. 34, para. 3.23.
[231] "Prohibition Lifted", *La Nación*, San José, 17 July 1998 – original Spanish text not provided by Costa Rica; CRM, Vol. 5, Annex 134.
[232] CRM, Vol. 2, Annex 28, third point, para. 3; see also Vol. 5, Annex 143, p. 656.

and it was not contemplated that the "agreement" be communicated to the Secretariat of the United Nations for registration and publication. In any case, if it was anything more than just a joint communiqué, it was declared "legally null and void and non-existent" ("*jurídicamente nulo e inexistente*") by the Government of Nicaragua, as was explained by the Nicaraguan acting Minister of Foreign Affairs in a letter to the Costa Rican Minister of Foreign Affairs and Worship of 11 August 1998[233].

3.2.12 As explained in that letter, the reason for this was that this agreement could be seen as contravening the constitutional requirements in force in Nicaragua. Not only was it signed by authorities not vested with treaty making powers[234], but also, after due analysis, it appeared that it could infringe the national sovereignty of Nicaragua[235]. The National Assembly of Nicaragua considered that said agreement could be "harmful to the national sovereignty of the Nicaraguan territory, clearly established in the Jerez-Cañas Treaty, the Cleveland Award and consecrated in our Political Constitution"[236] and approved the Decision of the Foreign Minister to declare null and void the Joint-Communiqué. Moreover, in accordance with Article 138 (12) of the Constitution, it belongs to the National Assembly "To approve or reject all international treaties, conventions,

[233] CRM, Vol. 3, Annex 49.

[234] NCM, Annex 65. Article 150 of the Political Constitution of Nicaragua of 1987 as modified in 1995, which provides: "The President of the Republic has the following powers: ... 8. To direct the international relations of the Republic. To negotiate, enter into and sign treaties, conventions or agreements and other instruments set forth in subparagraph 12) of Article 138 of the Political Constitution to be ratified by the National Assembly".

[235] NCM, Annex 65. Political Constitution of Nicaragua, Article 1: "Independence, sovereignty and national self-determination are irrevocable rights of the people and the foundation of the Nicaraguan nation." In conformity with Article 182, "The Political Constitution is the fundamental law of the Republic; all other laws will be subordinate to it. No law, order, treaty or other arrangement that opposes or alters the Constitution will be valid."

[236] NCM, Annex 68. Resolution of the Republic of Nicaragua's National Assembly on the Joint - Communiqué Cuadra – Lizano, 30 July 1998. Ordinary Session # 5. Managua, 18 August 1998.

pacts, agreements and contracts covering economic, international trade, regional integration, defense and security; those which increase the external debt or commit the credit of the nation and those that constitute an obligation to the internal legal order of State"[237] . In any case, it was certainly within the powers of Nicaragua not approve this "agreement".

3.2.13 Finally, it must be noted that, contrary to what Costa Rica seems to imply[238], the exchange of letters of 28-29 June 2000[239] can certainly not be analysed as a binding agreement between the Parties. As noted in the subsequent letter of the President of Costa Rica to his Nicaraguan counterpart on 29 July 2000[240] these were pure "demonstrations of willingness" ("*manifestaciones de voluntad*") which proved impossible to be put in practice and, in his letter of 3 August 2000[241], in turn, the President of Nicaragua reiterated that such an arrangement required "the concurrence of other Powers of the State, in accordance with our internal legislation" ("*concurso de otros Poderes del Estado, en consonancia con nuestra legislación interna*").

3.2.14 It can however be noted that throughout their exchange of correspondence in the year 2000[242], both Heads of States made extremely clear that the Treaty of Limits of 1858 and the award of 1888 were "the instruments that

[237] NCM, Annex 65.
[238] CRM, p. 40, para. 3.38.
[239] CRM, Vol. 3, Annex 64 and 65.
[240] CRM, Vol. 3, Annex 66.
[241] CRM, Vol. 3, Annex 67.
[242] See CRM, Vol. 3, Annexes 64 to 67.

define the legal framework for the respective rights" [243] of both Parties, and "that since 1888 nothing has occurred to change this legal status"[244].

Section 3.3
General International Law

3.3.1 At the same time, these statements make crystal clear that general international law only plays an ancillary role in the present dispute.

3.3.2 It must however be noted that, while in principle acknowledging that the 1858 Treaty of Limits as interpreted by the Cleveland Award applies in the present case, Costa Rica endeavours to qualify this acquiescence and to limit this application. She does so in particular in an "Appendix A" [245] appended to her *Memorial*, where it explains at some length that, as an "international river", the San Juan River is subject to the application of "international law rules relative to navigation on international waterways"[246].

3.3.3 In a very wide perspective, Nicaragua can accept that, since "the notion of the 'course of [a] river' covers a range of possibilities: a boundary on either bank or a boundary somewhere within the river"[247], the San Juan river, the right bank of which belongs to Costa Rica, includes an international element. However, Costa Rica does not challenge that the

[243] CRM, Vol. 3, Annex 65. Letter of the President of Nicaragua to the President of Costa Rica, 29 June 2000.
[244] CRM, Vol. 3, Annex 66. Letter of the President of Costa Rica to the President of Nicaragua, 29 July 2000.
[245] CRM, pp. 149-157. The very fact that this point is developed not in the *Memorial* itself but in an Appendix shows the discomfort of Costa Rica with this dubious argument.
[246] CRM, p. 155, para. A19.
[247] ICJ, Chamber, Judgment of 12 July 2005, *Frontier Dispute (Benin/Niger)*, para. 72.

river itself entirely belongs to Nicaragua: "Costa Rica at all times since the entry into force of the Treaty of Limits has recognised that the northern bank, the waters and the bed of the San Juan belong to Nicaragua"[248]. In this respect, the San Juan indisputably is a Nicaraguan national river to which Nicaragua's full sovereignty applies, with the only limitations provided for in the 1858 Treaty of Limits. In other words, the basic principle of international law which applies in the present case is the territorial sovereignty of Nicaragua on the waters and the bed of the river.

3.3.4 The decisive element is that "the rights and obligations of both riparian States with regard to the San Juan are specifically regulated by international instruments"[249], that is the Jerez-Cañas Treaty of 1858 and the Cleveland Award. In this measure only, the right of territorial sovereignty belonging to Nicaragua over the San Juan river "is not absolute, but is subject to the restrictions imposed by the treaty itself"[250] – and by that Treaty only.

3.3.5 It cannot therefore be accepted that "general international law rules relative to navigation on international waterways are also applicable"[251]. Once again, the applicable principle of general international law is that of Nicaragua's territorial sovereignty, with the restrictions provided in the Treaty of Limits.

3.3.6 The situation is quite different from that prevailing in the case concerning the *Territorial Jurisdiction of the International Commission of the River*

[248] CRM, p. 149, para. A4.
[249] CRM, p. 152, para. A9.
[250] CRM, Vol. 2, Annex 21, p. 160. Central American Court of Justice, 30 September 1916, Opinion and Decision of the Court.
[251] CRM, p. 155, para. A19.

Oder before the PCIJ[252]. In the first place, the Oder River was, without any restriction, a truly international river and was declared such by Article 331 of the Treaty of Versailles. And, in the second place, the Court found a *confirmation* of this character in general international law[253]. While, in the present instance, Article VI of the Treaty of Limits very clearly proclaims that "[t]he Republic of Nicaragua shall have exclusive dominion and supreme control of the waters of the river San Juan from its outlet from the lake until it empties into the Atlantic"[254]; the remaining part of this Article provides for the exceptions to this principle, that is, "free navigation", not in general, but "with articles of trade [*con objetos de comercio*]" exclusively[255].

3.3.7 Consequently, whether the Treaty expands or limits the rights and obligations belonging respectively to one or the other riparian State under general international law does not matter: the law applicable to the present dispute is not the general international law concerning navigational rights on international waterways but the legal consequences stemming from the cardinal principle of the Nicaraguan territorial sovereignty over the waters and the bed of the San Juan River with the exception of the limited rights of navigation over the river conferred to Costa Rica by the 1858 Treaty of Limits.

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[252] See CRM, p. 151, para. A8, or pp. 155-156, para. A20.

[253] PCIJ, Judgment, 10 September 1929: "*The actual wording of Article 331* shows that internationalization is subject to two conditions: the waterway must be navigable and must naturally provide an access to the sea. These are the two characteristics ... by which a distinction has for a long while been made between the so-called international rivers and national rivers". (Series A, N° 23, p. 25 – italics added).

[254] CRM, Vol. 2, Annex 7, pp. 54-60. Jerez-Cañas Treaty, 15 April 1858.

[255] For a fuller discussion of this point, see below, NCM, Chap. 2, para. 2.1.63, *passim*.

3.3.8 *Mutatis mutandis*, this situation may be compared with that of a right of passage of States on the territory, or within the territorial sea, or in an international canal in the territory of another State. As the Permanent Court noted in the *Wimbledon* case: "... the fact remains that Germany has to submit to an important limitation of the exercise of the sovereign rights which no one dispute she possesses over the Kiel Canal. This fact constitutes a sufficient reason for the restrictive interpretation in case of doubt, of the clause which produces such a limitation"[256]. Similarly in the present case, "[t]he Court is here dealing with a concrete case having special features"[257] resulting from the right of navigation recognized to Costa Rica on the San River by the Jerez-Cañas Treaty. This right, although strictly qualified, limits the exercise by Nicaragua of the rights deriving from her territorial sovereignty over the river, calling for a restrictive interpretation in case of doubt as to its extent and scope[258].

3.3.9 Under these conditions, Costa Rica is not entitled to invoke, as it abundantly does[259], provisions of other treaties concerning other rivers. "[T]hese arguments, drawn from independent provisions and diplomatic negotiations, cannot modify the conclusion which [can be] reached by means of a direct interpretation of the provisions applicable in the particular case..."[260]. The questions raised by the Parties in the present

[256] Judgment of 17 August 1923, Series A, N° 1, p. 24.
[257] ICJ, Judgment, 12 April 1960, *Right of Passage over Indian Territory*, *ICJ Reports* 1960, p. 44.
[258] See also *ibid.*, pp. 45-46; for more comments, see above, Chap. 2, para. 2.1.65-2.1.66.
[259] See e.g.: CRM, pp. 151-152, paras. A8-A10, p. 153, para. A13, pp. 153-154, paras. A15-A16, pp. 155-156, para. A20.
[260] PCIJ, Judgment, 10 September 1929, *Territorial Jurisdiction of the International Commission of the River Oder*, Series A, N° 23, p. 30.

case must be determined solely by the interpretation and application of the 1858 Treaty of Limits[261].

3.3.10 This, of course, does not mean that other norms and principles of general international law do not apply. Indeed, relevant rules of general international, and especially "secondary" rules of international law, do apply as far as they do not contradict the relevant provisions contained in the 1858 Treaty as interpreted by the 1888 Cleveland Award. Therefore, it will be apparent that general international law applies to incidental questions, not to the core issues of the case.

CONCLUSION

3.3.11 In the present Chapter, Nicaragua has shown that:

(1) The 1858 Treaty and the Cleveland Award are the only instruments relevant for establishing the situation of the San Juan River.

(2) Other instruments invoked by Costa Rica, are of little or no relevance in the present case since they are either not legally binding upon the Parties or bear upon different subject matters.

(3) Similarly, the general rules and principles relating to international rivers do not apply as they are set aside by the precise and comprehensive rules provided for in the 1858 Treaty as interpreted by the Cleveland Award; and

[261] See PCIJ, Judgment, 28 June 1937, *The Diversion of Water from the Meuse*, Series A/B, N° 70, p. 16.

(4) The other rules and principles of general international law can only play a role in the present case inasmuch as they do not contradict these instruments.

CHAPTER 4

NICARAGUA HAS NOT BREACHED COSTA RICA'S TREATY RIGHT OF NAVIGATION

Section 4.1

Costa Rica's Right of Free Navigation under the Jerez - Cañas Treaty

INTRODUCTION

4.1.1 Let us recall again the provisions of Article VI in the Jerez-Cañas Treaty:

> "The Republic of Nicaragua shall have exclusive dominion and supreme control of the waters of the river San Juan from its outlet from the lake until it empties into the Atlantic; but the Republic of Costa Rica shall have perpetual rights, in the said waters; of free navigation from river's mouth to three English miles below Castillo Viejo for the purposes of commerce (con objetos de comercio), whether with Nicaragua Nicaragua or to the interior of Costa Rica, by way of the rivers San Carlos or Sarapiqui or any other route proceeding from the tract on the shores of San Juan that may be established as belonging to this Republic. The vessels of both countries may indiscriminately approach the shores (atracar) of the river where the navigation is common to both, without the collection of any class of impost unless so established by the two Governments."[262]

4.1.2 There is no controversy as to the geographical area where Costa Rica enjoys her right of free navigation with articles of trade. The Parties agree that such right may only be exercised in the part of the San Juan de Nicaragua River comprised from its mouth in the Atlantic to a point three

[262] CRM, Vol. 2, Annex 7, p. 57. See NCM Introduction para.4.

English miles below Castillo Viejo[263]. Thus, Nicaragua will not dwell upon that point.

4.1.3 However, based on Article VI of the Jerez-Cañas Treaty of Limits, Costa Rica claims to have an unlimited, autonomous and absolute right to navigate that sector of the San Juan de Nicaragua River, asserting that Nicaragua violates the Treaty by impeding Costa Rica's exercise of this right. The *Memorial* goes as far as affirming that *"any limitation imposed upon navigation that by right is 'free' constitutes a denial of that right."*[264]

4.1.4 Nicaragua entirely rejects both the premise and its conclusion. Costa Rica, through a self serving interpretation of Article VI, has come to the Court seeking to obtain by adjudication what she has been unable to achieve through negotiations, that is, a revision of the Treaty and of the Cleveland Award.

4.1.5 When evaluating Costa Rica's many claims of navigational and related rights on the San Juan de Nicaragua River, it is important to bear in mind certain fundamental points:

a. First, the Jerez-Cañas Treaty is a single undertaking that must be read in its entirety. It effected a *quid pro quo*: Nicaragua relinquished the Nicoya/Guanacaste region and the Colorado River to Costa Rica in exchange for Costa Rica's recognition of full sovereignty of Nicaragua over the San Juan River, subject only to a

[263] See CRM, para. 4.02: "There is no dispute between the parties as to the geographical scope of the rights of navigation recognized to Costa Rica by the Treaty of Limits". See Note of the Ministry of Foreign Affairs of Costa Rica of 12 August 1998, CRM, Vol. 3, Annex 50; Notes of the President of Costa Rica of 28 June and 29 July 2000, CRM, Vol. 3, Annexes 64 and 65.
[264] CRM, para. 4.09.

narrowly-defined right of navigation by Costa Rica with articles of trade.

b. Second, to ensure that the exchange was fair and that Nicaragua would have full competence to arrange for the construction and operation of an inter-oceanic route, the 1858 Treaty provided that the border between the two countries would follow the right bank of the San Juan River up to a point three miles downstream of Castillo Viejo, leaving the entire river in Nicaraguan territory and subject to her full sovereignty (Article II); it also stressed that Nicaragua had "exclusive dominion and supreme control" ("*exclusivamente el dominio y sumo imperio*") over the waters of the San Juan (Article VI). Given that the river is part of Nicaraguan territory and as such is subject to her sovereignty, the recognition that Nicaragua enjoys "exclusive dominion and supreme control" over it serves chiefly to emphasize the very limited nature of any rights that could be enjoyed by Costa Rica and that these must be consistent with Nicaragua's sovereignty. This is particularly true since Costa Rica's right to navigate with articles of trade is provided for in the same article of the Treaty that stresses Nicaragua's "exclusive dominion and supreme control" over the waters of the river. It is also true, *a fortiori*, of the panoply of rights alleged by Costa Rica to navigate on the San Juan with public, armed vessels, in contravention of Nicaragua's "exclusive dominion and supreme control" over the waters of the river.

c. And third, since at least the 1880s, Costa Rica has been attempting to enlarge the clearly circumscribed rights accorded to her under

the 1858 Treaty to navigate on the San Juan de Nicaragua River.[265] It has in effect acted as if the boundary lay *in* the river rather than on its right bank. While this may be the more usual situation with regard to international watercourses generally, as Costa Rica stresses,[266] there were good reasons for delimiting the boundary between Nicaragua and Costa Rica in this way, as has been seen. From the beginning, Nicaragua has protested Costa Rica's efforts to increase the navigational rights granted by the 1858 Treaty. For example, on 5 June 1886, Nicaragua's Minister of Foreign Affairs wrote to his Costa Rican counterpart that the Costa Rican "government's disposition that a national steamer navigate the waters of the San Juan authorizes an act not granted by [the 1858] treaty, which in Article 6 reserves for this Republic, exclusively, the dominion and sovereignty over its waters, conceding to Costa Rica nothing more than free navigation with articles of trade..."[267] Yet some one hundred fifty years after the conclusion of the Jerez-Cañas Treaty Costa Rica still seems to have great difficulty in accepting Nicaragua's sovereignty over the entire river. This is seen not only in the repeated attempts to enlarge her navigational rights but also in statements in the *Memorial* such as the following one, referring to delimitations in which the border follows one bank of a contiguous watercourse as in the case of the San Juan: "The general drawbacks of this method of delimitation are such that in some cases, States agreed to modify such early delimitations, to replace them with the *thalweg* or the median

[265] See the discussion of the incident (above in Chap. 3 paras. 3.1.33-3.1.45) in 1886 involving navigation by Costa Rica on the San Juan River with a national customs steamship.
[266] CRM, Vol. 1, Appendix A, para. A5.
[267] NCM Vol. 3, Annex 28. Note of 5 June 1886.

line."[268] Be this as it may, there is no ground for such a modification of the boundary as delimited by the 1858 Treaty; indeed, the circumstances resulting in the delimitation of the boundary between the two countries in the way it was agreed have not changed in any way.

4.1.6 In the foregoing chapter it has been established that Costa Rica's right of free navigation, according to Article VI of the Jerez-Cañas Treaty, can only be conceived and exercised in the natural and inevitable framework of the sovereignty that corresponds to Nicaragua over the entire watercourse and her exclusive "dominion and supreme control" over the San Juan River in the terms used in the same provision.

4.1.7 The purpose of this section is to further highlight that this right of free navigation is limited from a material standpoint. It is a right of navigation *"with articles of trade"* through the rivers situated on its right bank, which appertain to this Republic.

A. A RIGHT OF *FREE* NAVIGATION, YES, BUT WITH *ARTICLES OF TRADE*

4.1.8 In her *Memorial*, Costa Rica attempts to blow up the "perpetual right of free navigation" with articles of trade accorded her in Article VI of the 1858 Treaty through references to inapposite international instruments.[269] "Freedom of navigation" cannot have an objective, autonomous meaning that overrides specific limitations on navigational rights provided for in the same provision that grants rights of free of navigation. Yet this is what Costa Rica in effect argues by focusing on the Treaty's grant of the right

[268] CRM, Vol. 1, Appendix A, para. A5.
[269] CRM, paras. 4.13-4.16.

of free navigation and ignoring the accompanying restriction of that right to navigation with articles of trade.

4.1.9 The language of Article VI relating to "freedom of navigation" that is relevant for present purposes reads as follows: "The Republic of Nicaragua shall have exclusive dominion and supreme control of the waters of the river San Juan ...; but the Republic of Costa Rica shall have perpetual rights, in the said water; of free navigation *[con objetos de comercio]*...."[270] . It is the latter restriction – that navigation can only be "with articles of trade" – that Costa Rica conveniently leaves out, in her overall conception of her navigational rights.

4.1.10 In an effort to bolster her argument, the effect of which is that her rights of navigation on the San Juan are virtually unrestricted, Costa Rica cites various definitions of "free" and "freedom of navigation". After quoting definitions of the adjective "free" from contemporary dictionaries, Costa Rica reaches the breathtaking conclusion that: "It follows that any limitation imposed upon navigation that by right is 'free' constitutes a denial of that right."[271] This may be true of a general right of free navigation that is subject to no restrictions in the instrument creating it. It is quite another matter when the right granted is itself a limited one, as is the case of Costa Rica's right under Article VI. Thus Costa Rica's interpretation not only takes the grant of "free navigation" entirely out of

[270] CRM, Vol. 2, Annex 7, p. 57.

[271] CRM, para. 4.09. That the word "free" does not necessarily connote an absolute and unrestricted right has been recognized by the Costa Rican Supreme Court in a decision interpreting the expression "freedom of commerce" in Article 46 of Costa Rica's Constitution. The Court declared: "The exercise of the freedoms established in the Constitution is not absolute and may be subject to regulation and even restrictions." The Court later stated: "The freedom of trade, consecrated in Article 46 of the Constitution, is not a subjective right of an unrestricted or absolute character given that, like all laws, it is subject to regulations or limitations of general interest...." (NCM, Annex 64).

the context by focusing exclusively on a part of the right ("free navigation" vs. "free navigation ... *with articles of trade*"); but also detaches it from the greater context of the sovereign rights of Nicaragua in her river, out of which the limited right of free navigation with articles of trade is eked out. The doctrinal and practical difference between a right of "free navigation" and a right to navigate only with articles of trade emerges clearly from an examination of the very sources cited by Costa Rica on the meaning of "freedom of navigation".

4.1.11 The first of these is the judgment of the Permanent Court of International Justice in the *Oscar Chinn* case.[272] That case involved a British citizen, Oscar Chinn, who in 1929 established a river transport and ship-building and repairing company in what was then the Belgian Congo. As the Court pointed out, the U.K. "never contended that the impugned measures [adopted by the Colony] constituted an obstacle to the movement of vessels,"[273] only that they produced a "*de facto* monopoly"[274] in favor of a company controlled by Belgium. Thus, freedom of navigation, per se, was not before the Court. However the Court did, in passing, address the meaning of this concept under the provisions of the 1919 Convention of Saint-Germain-en-Laye[275], which is no longer valid,[276] that dealt with navigation on the Congo River. In the passage quoted by Costa Rica, the Court stated: "According to the conception universally accepted, the freedom of navigation referred to by the Convention comprises freedom of movement for vessels, freedom to enter ports, and to make use of plant

[272] Judgment of 12 Dec. 1934, Great Britain/Belgium, PCIJ, Ser. A/B, No. 63, Ser. C, No. 75.
[273] *Ibid.*, p. 83
[274] *Ibid.*, p. 81.
[275] Convention of Saint-Germain-en-Laye, 10 Sept. 1919, Martens, 3rd ser., p. 691.
[276] See, e.g., Strategies for Crime Prevention and Control, Particularly in Urban Areas and in the Context of Public Security, Measures to Prevent Trafficking in Children, Report of the Secretary-General, para. 60, U.N. Doc. E/CN.15/1997/12, 28 Feb. 1997.

and docks, to load and unload goods and to transport goods and passengers."[277] It will be recalled that this definition referred to navigation by vessels of European powers on the rivers of a colony. Their right to navigate was subject to no restriction akin to the one involved in this case and again, importantly, the rivers involved were those of colonies, not sovereign states.[278] Thus the difficulty with using sweeping definitions like the one in *Oscar Chinn* is that they do not take into account the relevant context or specific restrictions provided for by treaty. Further evidence of the latter is the Permanent Court's inclusion in its broad definition of "freedom of navigation" the freedom "to transport... passengers" – something that would never have been agreed to by a Nicaraguan Government well aware that the most lucrative use of the River for Nicaragua was the transport of passengers, as attested by the contracts for this purpose detailed in Chapter 1, Section 3 above, and ever mindful of the need to have exclusive authority over the transport of passengers on the San Juan in order to conclude agreements relating to the prospective inter-oceanic route. When read against the background of these historical facts and of the 1858 Treaty's restriction of Costa Rica's rights to navigation with articles of trade, what the Permanent Court had to say about freedom of navigation was not at all inconsistent with the rights under the 1858 Treaty enjoyed by Costa Rican vessels carrying articles of trade. However, the Permanent Court's definition cannot be read – as Costa Rica purports that this Court should do – to enlarge Costa Rica's navigational rights beyond those granted by the 1858 Treaty.

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[277] CRM, para. 4.13, Oscar Chinn, Judgment, PCIJ, Series A/B, N 63 (1934), 83.

[278] This fact is brought home by Article 1 of the 1885 Act of Berlin concerning freedom of trade, which is incorporated into the Convention of Saint-Germain by Article 1 thereof, and which is subject to the following "reservation" articulated in its last paragraph: "...in the territories belonging to an independent sovereign State this principle [of freedom of trade] shall only be applicable in so far as it is approved by such State." Convention of Saint-Germain-en-Laye, 10 Sept. 1919, Martens, 3rd ser., p. 691.

4.1.12 The second source cited by Costa Rica on the meaning of "freedom of navigation" is Article XIV of the well known Helsinki Rules on the Uses of the Waters of International Rivers, adopted by the International Law Association in 1966.[279] This definition, of "free navigation", broadly follows that of the Permanent Court in the *Oscar Chinn* case, by which it was inspired.[280] Its use to interpret Costa Rica's rights of navigation on the San Juan River accordingly suffers from the same problems identified in the preceding paragraph with respect to *Oscar Chinn*: it is a general definition which is subject to derogation by a *lex specialis*, in this case, the 1858 Treaty. The only vessels entitled to such "free navigation" are those carrying articles of trade. Therefore, as with the definition of the Permanent Court in *Oscar Chinn*, the reference in the Helsinki Rules to the "freedom to transport....passengers" must give way to the specific provisions of the Jerez-Cañas Treaty. Costa Rica enjoys the rights of "free navigation" identified, but only as to boats carrying articles of trade.

4.1.13 Whilst dealing with the Helsinki Rules it is useful to recall one of its provisions which is not quoted by Costa Rica:

> "The rules stated in this Chapter are not applicable to the navigation of vessels of war or of vessels performing police or administrative functions, or, in general, exercising any other form of public authority."[281]

This rule would presumably exclude navigation by the vessels of the revenue service which the Cleveland Award permitted under carefully

[279] International Law Association, *Report of the Fifty-Second Conference, Helsinki, 1966*, p. 484, at p. 507 (1966).
[280] *Ibid.*, Article XIV, *Comment*, at p. 508, quoting from *Oscar Chinn*.
[281] *Ibid.*, Art. XIX.

defined circumstances, and would clearly prohibit navigation by boats used to re-supply border posts and to transport personnel to and from those posts. The quoted provision has a counterpart in the updated version of the Helsinki Rules, the so-called "Berlin Rules" of 2004, and entitled "Exclusion of Public Vessels." That provision reads: "Freedom of navigation does not apply to the navigation of warships or of a government vessel used for non-commercial purposes except by agreement of the States concerned."[282] Thus, this respected effort at codification[283] indicates that public vessels enjoy no right to freedom of navigation under general principles of international law. As has been seen (Chapter 1, Section 3, above), Costa Rica also has no such right under the 1858 Treaty. Thus even the authorities cited by Costa Rica serve to emphasize that Costa Rica has no rights of navigation on the San Juan with any kind of public vessel except those mentioned in the *Second* part of the *dispositif* in the Cleveland Award, and only under the very limited circumstances spelled out there.

4.1.14 After setting forth the passages from *Oscar Chinn* and the Helsinki Rules just referred to, Costa Rica concludes: "Clearly, a broad interpretation has been adopted."[284] This statement is typical of Costa Rica's tactic of over-generalization; it is of little assistance to the Court in the present case. In fact, careful examination of Latin American practice and doctrine have concluded that there is no general right of freedom of navigation in that region, in the absence of special agreement. Thus Lucius Caflisch, in his

[282] Berlin Rules on Water Resources, Art. 48, International Law Association, Berlin Conference (2004), available at http://www.asil.org/ilib/WaterReport2004.pdf, accessed 10 December 2006.
[283] For example, Costa Rica claims "general international law" status for Article XIII of the Helsinki Rules. CRM, Appendix A, para. 21
[284] CRM, para. 4.15.

Hague course, after reviewing Latin American treaties, doctrine, and cases, including the well-known *Faber* case,[285] concludes as follows:

> "La sentence arbitrale en l'affaire *Faber* met en relief l'opposition entre la doctrine de la libre navigation, création de l'Europe du XIX[e] siècle, et la conception latino-américaine, qui fait dépendre la navigation de la volonté de l'Etat riverain ou des Etats riverain. Cette conception...consistait à limiter la libre navigation aux trajets sans transbordement vers la mer ou en provenance de celle-ci.
> La doctrine, quant à elle, semble à peu près unanime: en Amérique latine, il n'existe pas de liberté de navigation en l'absence de concession unilatérale ou de disposition conventionnelle."[286]

4.1.15 Even if it is accepted that "a broad interpretation" of the principle of freedom of navigation "has been adopted", we are not told whether Costa Rica believes that such an interpretation forms part of general international law. Even if it does, which is by no means certain given the Latin American practice just referred to, that "broad interpretation" would apply only to the extent it was not derogated from by treaty; it hardly qualifies as *jus cogens*.

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[285] Award of 1903 rendered by Henry M. Duffield, umpire, appointed by a German-Venezuelan Mixed Claims Commission, under Agreement of 13 Feb. 1903, 10 U.N.R.I.A.A. p. 438. The case involved a complaint by Germany that Faber, one of its nationals, had suffered injury from Venezuela's suspension of navigation on the Venezuelan portion of the international river system of the Catatumbo and Zulia Rivers, which have their sources in Colombia. In supporting Germany's claim, the German member of the mixed commission relied on principle of freedom of navigation. The umpire rejected Germany's claim.

[286] Lucius Caflisch, *Règles générales du droit de cours d'eau internationaux*, 219 *Recueil des cours* (1989-VII) p. 9, at p. 125.

B. A RIGHT OF NAVIGATION RESTRICTED TO ARTICLES OF TRADE (OBJETOS DE COMERCIO)

4.1.16 Costa Rica resorts, in her Application and *Memorial*, to different stratagems with the aim of transforming the limited right of navigation into a master key that would allow her in fact complete freedom to navigate that sector of the San Juan de Nicaragua River indicated in the 1858 Treaty. To that effect, Costa Rica has played with the meaning of the phrase "*with objects of commerce*" or "*with articles of trade*" in order to interpret it as "*for purposes of commerce*" or "*with the object of commerce*".

4.1.17 It is worth highlighting that in the abundant diplomatic correspondence exchanged between Nicaragua and Costa Rica, logically written in the Spanish language, the customary reference was to "objects of trade" (objetos de comercio) [287]. The attempts to change the express wording of Article VI of the Jerez-Cañas Treaty, are of recent origin[288], and serve to unveil the objectives pursued by the Applicant.

4.1.18 The expression "*purposes of commerce*" is used by President Grover Cleveland in the second Article of the Award of 2 March 1888[289]. President Cleveland redrafted this article in his own handwriting and was

[287] The references to "objects of trade" are numerous in the diplomatic notes and annual reports of the Ministry of Foreign Affairs of Costa Rica, even when the second Article of the Cleveland Award is translated to Spanish, for example, in the Note of 23 March 2000. (NCM Annex 43) To the same effect see the judgment of the Constitutional Chamber of the Supreme Court of Costa Rica of 14 August 2001 (NCM, Annex 66).

[288] In the Note sent by Costa Rican President Miguel Angel Rodriguez on 29 July 2000. CRM, Vol. 3, Annex 66.

[289] CRM, Vol. 2, Annex 16.

careful to place the expression within quotation marks[290]. This can only be understood to mean that the use of the phrase in English did not alter its meaning in the original Spanish text. This meaning was in any case not in dispute at that time by the Parties.[291] Thus, the Arbitrator refers, as could not be otherwise, to "purposes of commerce" accorded to her (Costa Rica) *in said Article* (VI)" of the Treaty (emphasis added)[292], no more.

4.1.19 The debate here, in the English language, is the interpretation of a provision of a treaty drafted and authenticated in the Spanish language, and not its translations, more or less felicitous, more or less interested. Arbitrator Cleveland never intended to make a judgment on something that was not before him. He was well aware that if he had done so, his *ultra petita* decision would have been null.

4.1.20 What are the "*objects of commerce*" (*articles of trade*) with which Costa Rica can navigate?

4.1.21 Nicaragua is not a party to the Vienna Convention, but the rules of interpretation of Articles 31 and 32 are an expression of customary international law rules, as the Court has affirmed on various occasions (for example, recently in *Sovereignty over Pulau Ligitan and Pulau Sipidan*,

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[290] NCM, Annex 72. Draft award prepared Secretary of State George Rives, in accordance to Article 5 of the Román-Esquivel Cruz Convention of 24 December 1886.

[291] Let us recall that Costa Rica had no questions regarding the interpretation of the Treaty, considering that according to the Rives Report *"The Government of Costa Rica did not communicate any corresponding statement and now declares that it finds nothing in that treaty which is not perfectly clear and intelligible."* Regarding the basis of the validity of the Jerez-Cañas Treaty, the only points of debate were those concerning navigation with vessels of war and of the revenue service, and the eleven points of doubtful interpretation submitted by Nicaragua.

[292] See NCM, Chap. 2.

2002[293], and *Legality of Use of Force*, 2004).[294] On this question, see further Chapter 2, paragraphs 2.1.8 to 2.1.12.

4.1.22 In 1898 Costa Rica, today a party to the Vienna Convention, flooded Arbitrator Alexander with such a torrent of doctrinal quotations on the rules of interpretation of the treaties that in his *Award No. 4* [295] he could only echo these by concluding that: "All concur that words are to be taken as far as possible in their first and simplest meanings – 'in their natural and obvious sense, according to the general use of the same words'..."[296]

4.1.23 What then are the *objetos de comercio* (articles of trade/purposes of commerce) to which reference is made in Article VI of the Jerez-Cañas Treaty? The terms of a treaty, as stated in Article 31.1 of the Vienna Convention, must be interpreted in principle according to their *ordinary or usual sense* in the *context* of the treaty. It is this last clarification that allows the interpreter to choose between the different meanings of each term.

4.1.24 Article 31.4 adds that "a *special* meaning shall be given to a term if it is established that the parties so intended." The meaning given to a term will be *special* when it does not match its ordinary meaning in its own context. But nobody claims that this is our case.

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[293] ICJ, *Sovereignty over Pulau Ligitan and Pulau Sipadan,* judgment of December 17, 2002, para. 37

[294] ICJ, *Legality of use of Force* (Serbia and Montenegro v. Belgium), Judgment of 15 December 2004, para. 100

[295] NCM, Annex 73.

[296] *Ibid*, Fourth Award of July 26, 1899 (H. La Fontaine, *Pasicrisie internationale 1794-1900. Histoire documentaire des arbitrage internationaux,* 1902, reprinted 1997, M. Nijhoff, The Hague, pp. 535-537). According to Article II of the Matus-Pacheco Treaty, 27 March 1896 (see Ch. 1, para. 1.3.39), the President of the United States named the engineer Edward P. Alexander to decide the points still in dispute between the parties, on the demarcation of the boundary. CRM, Vol. 2, Annex 17.

4.1.25 If we turn, in first place, to the maximum grammatical authority of the Spanish language, we will note that the word "objeto" (*object*) means, according to the Royal Spanish Academy Dictionary (tenth edition, 1852, in use in 1858), "*lo que se percibe con alguno de los sentidos o acerca de lo cual se ejercen*" ("that which is perceived by one or more of the senses, or with respect to which they are exercised") and only later "*el término o fin de los actos de las potencias*" ("the conclusion or end of the act of the powers", "*el fin o intento a que se dirige o encamina alguna cosa*" (the purpose or end to which a thing is directed or aimed."[297]

4.1.26 These usages have not changed substantially since then.

4.1.27 If the term *objeto* is appropiate for referring to a matter, good or thing, and also to a purpose or aim, the same cannot be said of the plural form of the word, namely: *objetos*. Although the Royal Spanish Academy Dictionary does not offer a direct and express definition of this usage, it is entirely beyond the normal and usual use of the Spanish language to speak of the *objetos* of a treaty or science when referring to its purposes, aims or objectives. On the other hand, the term *objetos* is used to identify things, goods, merchandise and matters dealt with by a science or treaties, if used in the plural.

4.1.28 A literal translation of the phrase "con objetos de comercio" into English is "with objects of commerce". The word "object" in English and "objeto" in Spanish have the same Latin root of "objectus" and basically have the same meaning. Thus, the phrase in English "with commercial objects" (or with objects of commerce) would perhaps not be the most felicitous use of

[297] NCM, Annex 74.

the phrase but it could never be construed to mean "with object of commerce" or of linguistic necessity with an added "the": "with *the* object of commerce". Equally in Spanish "con objetos de comercio" cannot be construed to mean "con objeto de comercio" in singular because this would imply not only eliminating the plural "s" in the original text, but would also have needed an accompanying "the" or "el" in Spanish: "con *el* objeto de comercio".

4.1.29 If we follow the dictum of the Court in the cases of the *Rights of Nationals of the United States of America in Morocco* or the *South West Africa case* [298]and consider similar texts of the period, we inevitably would be drawn to the text used by the Congress of Vienna in 1815 for international rivers: that is, rivers that flow through more than one State. The San Juan is of course not an international River since it flows entirely within one country and besides is subject to a special Treaty Regime, but the texts of the almost coetaneous regulations of the European rivers must have been perfectly known by the Parties in 1858. Thus, if they wanted an ample freedom of navigation for commercial purposes why did not they use the more ample phrase of the Congress of Vienna that proclaimed navigation to be entirely free "sous le rapport du commerce", that is, for commercial purposes or objectives.

4.1.30 Is it possible that the Parties in 1858 understood that they were establishing a similar freedom of navigation with commercial purposes?

[298] *Rights of Nationals of the United States of America in Morocco*, 1952. *ICJ Reports*, 1952, Judgment of 27 August 1952, pp. 186 ff.; too, *ICJ Reports*, 1966, *South West Africa (2nd phase)*, judgment of 18 July 1966, pp. 23-24, para. 16-18. Likewise, in referring to the agreement between the League of Nations and South Africa regarding the mandate over South-West Africa, the ICJ found that, "Any enquiry into the rights and obligations of the Parties must proceed principally on the basis of considering the texts of the instruments and provisions in the setting of their period". ICJ *Reports, 1966*, judgment of 18 July 1966, p. 23, para. 17.

Hardly likely! Less than a year previously on 6 July 1857 the Parties had entered into the Juarez-Cañas Treaty to which we have referred above in Chapter 2[299] and although it was not ratified, its non ratification was not due to any disagreement on the type of navigation, and thus it is an indisputable aid in the interpretation of the 1858 Treaty. This earlier Treaty stipulated in Article 5 that Costa Rica could freely use the waters of the San Juan to transport articles of trade (articulos de comercio).[300] Here we see exactly the type of navigation that was envisioned: it was circumscribed to objects of commerce (articles of trade) that were imported from outside the area and those articles that were exported also outside the area. It was not freedom for any type of navigation but only a more restricted freedom but nonetheless the freedom of navigation that was of crucial interest for Costa Rica at that time in which it had no other means of transportation for the merchandise coming and going from and to Europe and the United States.

4.1.31 The results of the text's exegesis is consistent with its context (Article 31.2 of the VCLT), in our case, the text of the Treaty as a whole[301] as well as its purpose. The Jerez-Cañas Treaty of Limits, as the name in its header indicates is a Treaty of Territorial Adjudication that "sets the limits" between the Republics of Nicaragua and Costa Rica. In the preamble[302], the treaty's objective is to "end the differences that have prevented the

[299] NCM, paras. 2.1.26, see also paras. 1.2.38, 1.2.41, 3.1.32.
[300] NCM, para. 1.3.8.
[301] As the PCIJ observed (*The Diversion of Water from the Meuse*) "the Treaty brought into existence a certain regime which results from all of its provisions in conjunction. It forms a complete whole, the different provisions of which cannot be dissociated from the others and considered apart by themselves" (Judgment of June 28th, 1937, Series A/B, fas. 70, p. 21).
[302] The preambles, notwithstanding the extent of the binding value that might be attributed to them, are especially important in the interpretation of the provisions of the text of the treaty. (see for instance, *Rights of Nationals of the United States of America in Morocco, ICJ Reports,* 1952, Judgment of 27 August 1952, p. 196; *Sovereignty over Frontier Land, ICJ Reports,* 1959, Judgment of 20 June 1959, pp. 221-222).

most perfect understanding and harmony that should prevail between them, for their common security and growth".

4.1.32 The consideration of the object and purpose of the treaty points to an interpretation that ensures the greatest effectiveness compatible with the ordinary meaning of the terms of the treaty within its context. It is unquestionably a matter of satisfying the ultimate aim sought by the parties within the limits of the provisions agreed upon. In no case can extensive interpretations be admitted that go beyond that which is expressed or necessarily implicit in the terms of the treaty, much less to feel inclined toward ideal solutions that the parties never had the intention to consent.

4.1.33 In exchange for Nicaragua giving up her rights over Nicoya that were solidly based on the principle of *uti possidetis iuris* of 1821, Costa Rica had to recognize that the entire course of the San Juan de Nicaragua River, as its name indicates, appertains to Nicaragua.

4.1.34 Given that the application of the *General Rule* of interpretation offers a perfectly clear and reasonable meaning of the Article VI of the Jerez-Cañas Treaty recourse to the *supplementary means of interpretation* mentioned by Article 32 of the Vienna Convention of Law of Treaties is not needed.

4.1.35 Within the unruly and turbulent history that the Central American Republics represented on the chessboard of the financial and strategic interests of the United States and Great Britain, associated with the construction of an inter-oceanic canal and the use of the river and lake as a

rapid transit route for passengers traveling from the Atlantic to the Pacific after gold was discovered in California, Costa Rica endeavoured in the moments of Nicaragua's greatest weakness to seek to share her sovereignty over the San Juan river and even Lake Nicaragua. But having to abandon this aspiration, Costa Rica's other vital national aim was to secure for her products, mainly coffee, a way out to the Atlantic that would ensure faster and cheaper access to the European market, particularly Great Britain, which absorbed half of her production at a time when Costa Rica lacked ports on the Caribbean and her exports to Europe had to head for Cape Horn. This last is what the Jerez-Cañas Treaty granted to Costa Rica.

4.1.36 Any diplomatic document or preliminary treaty in the years prior to the Jerez-Cañas Treaty always bears relation to the transport of merchandise, fruits, products, commodities.[303]

C. EXCLUSION OF TRANSPORT OF PASSENGERS

4.1.37 The most lucrative business at the time of the signing of the Treaty of 1858 was by far the transport of passengers. Thus this transport of passengers as a commercial activity was, needless to say, carefully excluded from the right of navigation with articles of trade recognized by Article VI of the Jerez-Cañas Treaty.

4.1.38 It is important to underline that the exclusive right of navigation with passengers in the San Juan River is derived from Nicaragua's exclusive dominion and sovereignty as well as the right to grant concessions for the

[303] See the instruction to Oreamuno (instruction number 17th, 26 July 1838), NCM, Annex 87 and the Marcoleta-Molina Treaty (28 January 1854, art. 4). NCM, Annex 4.

construction of a canal and for the transport of passengers through it. There is a juridical line inter-connecting these sovereign rights. It is equally important to underscore that the 1858 Treaty of Limits, leaves this issue out, based on the clear recognition by Costa Rica of Nicaragua's sovereign rights as explicitly expressed, for example, in the Transit as well as the Canal contracts that were recognized as validly granted and in force by Costa Rica under the Articles VII and VIII.

4.1.39 In effect, Article VII of the Jerez-Cañas Treaty of Limits, sets safely aside

> "...obligations subscribed to, whether under political treaties or under contracts for a canal (canalizacion) or transit made on the part of Nicaragua before this present agreement..."[304]

4.1.40 The Contracts celebrated by Nicaragua turn out to be, without a doubt, very relevant as a basis for the exclusivity of navigating with passengers and the exclusive right of Nicaragua of granting concessions for the transit of passengers on the river. From the conclusion of the Treaty and the fact that third parties respected such Concessions one can deduct the exclusive nature of the right of Nicaragua to grant them.

4.1.41 This right was recognized by Costa Rica on numerous occasions. The first of these was when she accepted (Congressional Decree of 22 June 1852)[305] the Webster-Crampton Propositions of 30 April of the same year,[306] and later, in the Preliminary Marcoleta-Molina Treaty of 28

[304] CRM, Vol. 2, Annex 7, p. 58.
[305] CRM, Vol. 6, Annex 199.
[306] Said Propositions stated (Article 3) that Costa Rica would have the right to navigate those rivers with sail vessels only; NCM, Annex 88. See also Obregón, Clotilde, *El Río San Juan en la Lucha de las Potencias (1821-1860)*, San José, Costa Rica, UNED, at 143.

January 1854 (Articles 4 and 5).[307] It was always one of the elements present in any global agreement.

4.1.42 Subsequent to the conclusion of the Jerez-Cañas Treaty of Limits, Nicaragua subscribed the Zeledón-Rosa Pérez Convention of 1860 with associates and shareholders of the American Atlantic and Pacific Maritime Canal Company for the "establishment of an inter-oceanic way through the Nicaraguan isthmus." In this Convention the Government of Nicaragua granted "the exclusive right (...) to transport all kinds of passengers, luggage, chests, merchandise and properties by land or waters, by way of any ship, including steamships."[308]

4.1.43 Nicaragua granted such privileges in exercise of her sovereignty and her exclusive right to navigate the river with passengers. This can be seen in the wording of Article VII of the contract of 10 November 1863 signed by Luis Molina as Minister of Nicaragua in Washington and Francis Morris, president of the Central-American company, in which it was stipulated that: "the exclusive right of inter-oceanic transit for passengers, luggage, chests, treasures, cargo and articles of trade in general, by land or sea within the following limits: by way of water, said Company will have exclusive rights of navigation as part of the inter-oceanic traffic and only on that part from the San Juan river from the Atlantic through to bay of la Virgen in lake Nicaragua, or any other lacustrine port."[309]

[307] NCM Annex 4 Applying the same measure, and Costa Rica excluded the right of steam navigation by Nicaraguans in the rivers under its sovereignty and tributaries of the San Juan River.
[308] Zeledon – Rosa Pérez Convention. Art. V, NCM, Annex 17.
[309] NCM, Annex 18. Luis Molina and Francis Morris Contract. Art. 7.

4.1.44 The same can be said about the Pellas Contract, ratified on 16 March 1877 where it states in Article 1 that: "The Government of Nicaragua grants to Mr. F.A. Pellas, partners and heirs, the exclusive privilege, for an eighteen year period, to navigate with steamboats the San Juan del Norte river and Lake Granada [lake Nicaragua]..."[310]

4.1.45 Nicaragua's exclusive of this exclusive right is also reflected in the Cardenas-Menocal Contract, granted to the Nicaragua Canal Association of New York on 23 March 1887[311]. This Contract grants the exclusive rights to excavate and operate a maritime canal through her territory between the Atlantic and Pacific Oceans.

D. THE RIGHT TO LAND AT ANY PART OF THE NICARAGUAN BANK

4.1.46 Costa Rica refers in her *Memorial*, to the right to land at any part of the banks of the River where navigation is common as a right which arises from Article VI of the Jerez-Cañas Treaty, associated to the right of navigation[312].

4.1.47 Nicaragua does not dispute such right, but points out that it can only be used for the enjoyment of Costa Rica's right to navigate with articles of trade, as expressed in Article VI of the Treaty, in that section of the River, from the Atlantic to a point three English miles below the Castillo Viejo.

4.1.48 The right to land does not entail freedom to trade anywhere along the route. The 1858 Treaty was not a free trade agreement. Furthermore, the

[310] NCM, Annex 19, Pellas Contract.
[311] NCM Annex 20.
[312] CRM, paras. 4.118-4.120

exercise of this right cannot supersede or invalidate the intrinsic rights and duties of Nicaragua to regulate matters of health and security in her territory.

Section 4.2
The right of Costa Rica under the Jerez-Cañas Treaty as interpreted in the Cleveland Award

A. INTRODUCTION

4.2.1 It has been shown in Section 1 of the present Chapter that Nicaragua has not breached, and indeed has fully respected, Costa Rica's rights under the Jerez-Cañas Treaty of 1858[313]. Since the 1888 Award by President Grover Cleveland interpreted that treaty and since it did not involve the question of the meaning of Costa Rica's right to navigate on the San Juan River with articles of trade ("*con objetos de comercio*"), it follows that with respect to navigation with articles of trade Costa Rica can have no greater rights under the Award than she has under the Treaty itself. As to the many other rights of navigation claimed by Costa Rica, these also find no support in the Cleveland Award, as will be shown in the present Section.

4.2.2 Specifically, this Section will show that Costa Rica offers no support, nor is there any basis, for her alleged right of protection of commerce and revenue control, nor is there any basis for her alleged right to "safeguard" the river, except under very limited circumstances, none of which is present. Costa Rica's alleged right to the re-supply of and transport of personnel to and from border posts, and "other related rights", are similarly without foundation, as shown in Chapter 5.

[313] CM, Vol. 2, Annex 7, c) English translation: Nicaragua's version submitted to Cleveland.

B. COSTA RICA'S ALLEGED RIGHTS OF NAVIGATION FOR SPECIFIC PURPOSES

4.2.3 In Chapter 4 of her *Memorial*, Costa Rica devotes full sections to the following alleged navigational rights: Right of protection of commerce and revenue control (Section D); Rights and obligations to safeguard (*guarda*) the River and to contribute to its defence, as well as defence of the common bays (Section E); Re-supply of and transport of personnel to and from border posts (Section F); and Other related rights (Section G). The short answer to many of these allegations is that Nicaragua has not breached the rights in question because they do not exist. That Nicaragua has not breached Costa Rica's rights of navigation under the 1858 Treaty has been demonstrated in Sections 1 and 3 of the present Chapter. The present subsection will show that Nicaragua similarly has not breached any right of navigation Costa Rica enjoys under the interpretation of the Treaty in the 1888 Cleveland Award.

4.2.4 It should be emphasized at the outset that it is, in the first instance, the 1858 Treaty that governs the rights and obligations of the parties.[314] The parties never intended that President Cleveland be authorized to create new rights or obligations, and the arbitrator himself was careful not to do so. As has been seen, the questions put to him concerned the Treaty itself: its validity and its interpretation.[315] Therefore, if Nicaragua has not violated Costa Rica's navigational rights under the 1858 Treaty, she has also not violated them under the Cleveland Award. However, because that award, particularly in the *Second* paragraph of the *dispositif*, elaborates on

[314] On this point see, e.g., Chap. 3, Sec. 1, above.
[315] See Articles I of the Convention of Arbitration of 24 December 1886, NCM, Annex 11 and Article VI, CRM, Vol. 2, Annex 14.

the meaning of the Treaty, it is worth confirming that it provides no basis for the novel rights claimed by Costa Rica.

4.2.5 As has been seen in Chapter 3, Section 1, President Cleveland recognized only a bare minimum of navigational rights by Costa Rican public vessels in Nicaraguan territory, on the San Juan River. He began by finding that under the Treaty, Costa Rica "has not the right of navigation of the river San Juan with vessels of war..." In so deciding he rejected the following recommendation of George L. Rives:

> "The preliminary question of interpretation, as to the right of navigation of the San Juan by public vessels of Costa Rica, should, therefore, in my judgment, be answered by saying that the vessels of war and of the revenue service belonging to Costa Rica have the same privileges of navigating the River San Juan as are usually accorded in their territorial waters by civilized nations to the public vessels of friendly powers in time of peace, – but no other or greater privileges."[316]

4.2.6 Thus, while Rives recommended that public vessels of Costa Rica should have the "privilege" of navigating on the river, President Cleveland, no doubt influenced by the fact that under the Treaty the entire San Juan River was part of Nicaragua's sovereign territory, rejected all but the smallest vestige of the recommendation. He was content neither with the analogy to marine navigation, nor with even a mere "privilege" of navigation with vessels of war, nor with a general finding that Costa Rica may navigate on the San Juan with vessels of the revenue service. Instead, President Cleveland sharply restricted the circumstances under which

[316] NCM, Annex 71. George L. Rives, Report to President Grover Cleveland, (Second), pp. 218-219 of handwritten version.

navigation by such vessels would be permissible, as shown in Chapter 3, Section 1. Costa Rica could only navigate with such vessels on the San Juan when there was also navigation by Costa Rican boats with articles of trade, and further, only with such vessels "as may be related to and connected with" her enjoyment of the right to navigate with articles of trade, "or as may be necessary to the protection of said enjoyment."[317] President Cleveland thus kept Costa Rican revenue vessels on a very short leash indeed, demonstrating his reluctance to allow Costa Rica to navigate with public vessels of any sort on a wholly Nicaraguan river.

C. COSTA RICA'S ALLEGED RIGHT OF PROTECTION OF COMMERCE AND REVENUE CONTROL

4.2.7 But President Cleveland's obvious efforts to keep activities of Costa Rican public vessels on the San Juan to a bare minimum seem to have been lost on Costa Rica. Under the heading, "Costa Rica's right of protection of commerce and revenue control," Costa Rica states in her *Memorial*:

> "the perpetual right of free navigation is a State right and as such it is not limited to private vessels. Public vessels also enjoy this right. This was the position successfully upheld by Costa Rica before President Cleveland in 1888 and it is its position today."[318]

4.2.8 There is nothing in the 1858 Treaty or the Cleveland Award that supports this proposition. Costa Rica's only rights of navigation on the San Juan River are to navigation with articles of trade and the closely associated rights of navigation by revenue vessels specified in the Cleveland Award. It is of course conceivable, though it would seem highly unusual especially

[317] CRM, Vol. 2, Annex 16. Cleveland Award, *Second* paragraph of *dispositif*.
[318] CRM, para. 4.73.

for the period involved, that Costa Rican public vessels would carry articles of trade – such as coffee, for example – to market or a shipping terminal via the San Juan River. But Costa Rica has not done this and there is neither any hint in the 1888 award that President Cleveland had such a role of public vessels in mind nor any such suggestion in the 1858 Treaty. Absent that, the only role left for public vessels is the extremely limited one carefully defined by President Cleveland.[319]

4.2.9 President Cleveland's appreciation of Nicaragua's sovereignty over the San Juan and the effects thereof is also illustrated by his answers to two questions put by Nicaragua concerning points of doubtful interpretation of the 1858 Treaty. In points 4 and 5 of the *Third* paragraph of the *dispositif*, the arbitrator said:

> "4. The Republic of Costa Rica is not bound to concur with the Republic of Nicaragua in the expenses necessary to prevent the bay of San Juan del Norte from being obstructed; to keep the navigation of the river or port free and unembarrassed, or to improve it for the common benefit.
>
> 5. The Republic of Costa Rica is not bound to contribute any proportion of the expenses that may be incurred by the Republic of Nicaragua for any of the purposes above mentioned."[320]

4.2.10 Here President Cleveland recognizes that Nicaragua's exclusive possession of the "dominion and supreme control of the waters of the river

[319] As indicated in Chap. 3, Sec. 1, President Cleveland's statements about vessels of the revenue service in the Second section of his award is informed by the limitations described in the report of George L. Rives to the arbitrator. CRM, Vol. 2, Annex 16.
[320] Ibid. *Third* paragraph of *dispositif*, paras. 4 and 5

San Juan"[321] means not only that Nicaragua is responsible for the upkeep of her territory, but also that Costa Rica need not contribute to the expense of doing so, a point also recognized by George Rives.[322] He was doubtless sensitive to the fact that requiring Costa Rica to contribute to maintenance and related expenses might suggest that she had some rights in the river that she clearly did not possess.

4.2.11 Nicaragua's sovereignty over the San Juan River, and the historical considerations described in Chapters 1 and 3 explaining why the boundary was delimited in the way that it was, make this a special, even a unique case. Therefore the fact that other treaties concluded between South American countries in the 19th and early 20th centuries recognized "rights of navigation for public vessels of a neighbouring country...even extend[ing] to war vessels",[323] has no bearing on the present case. The treaty provisions cited by Costa Rica refer exclusively to warships, not to public vessels generally. Since President Cleveland decided that Costa Rica had no right to navigate on the San Juan with warships, these treaties have absolutely no relevance to the question before the Court. Moreover, the treaties themselves do not create the special kind of territorial regime that is established by the Jerez-Cañas Treaty.

4.2.12 Also of no present relevance is the practice of the United States in the 19th century with regard to the "revenue cutters" used to guard her coast.[324] As noted in Chapter 1, Section 3, by invoking this U.S. practice Costa Rica attempts to suggest that because U.S. Revenue Cutters that ply U.S. waters

[321] CRM, Vol. 2, Annex 7, p.57.
[322] NCM, Annex 71. Report of George L. Rives (Second).
[323] CRM, para. 4.80.
[324] CRM, paras. 4.81-4.82.

have certain characteristics, including armaments, Costa Rican revenue vessels wishing to sail in Nicaraguan territory, on the San Juan, have a right to be outfitted in like manner. This conclusion is a *non sequitur* and ignores entirely the special characteristics of the San Juan, a wholly Nicaraguan river, as well as the source of any rights of navigation of Costa Rica on that river, the 1858 Treaty. The chief point of interest regarding Costa Rica's description of nineteenth century U.S. revenue cutters is that it shows why President Cleveland was so careful to circumscribe tightly the navigational rights of Costa Rican revenue vessels: such ships can, and do, easily become ships of war.

4.2.13 Costa Rica also seeks to bolster her case for a right of her armed vessels to navigate on the San Juan by noting that Nicaragua argued in the Cleveland arbitration that Costa Rica's revenue cutters were "armed vessels, capable of enforcing their demands by force."[325] Costa Rica's argument continues:

> "But President Cleveland refused to assimilate those vessels of the revenue service to war vessels. Only the latter were declared to be excluded from the perpetual right of free navigation recognized by the Cañas-Jerez Treaty."[326]

4.2.14 This argument misses the point entirely. The entire passage from which the above excerpt from Nicaragua's argument was taken reads as follows:

> "Vessels of the revenue service are akin to vessels of war. While they have not all the means of aggression as the former, still they are armed vessels, capable of enforcing

[325] *Ibid.*, para. 4.84. Costa Rica gives no reference for this quotation, but it appears to have been taken from the Reply of the Republic of Nicaragua submitted to H.E. Hon. President Cleveland, p. 49.
[326] CRM, paras. 4.84.

> their demands by force, and must be classed in the same category as vessels of war. Neither have the right, under a commercial license, to invade the territory, domain, or sovereignty of the Republic of Nicaragua."[327]

4.2.15 This passage affords a clear understanding of the fears of Nicaragua regarding the navigation in her territory of armed Costa Rican vessels. President Cleveland, clearly aware of the blurred line between warships and revenue vessels, crafted an ingenious solution. Rather than merely prohibiting the former and permitting the latter, which could have resulted in Costa Rican revenue vessels becoming the functional equivalent of warships (Costa Rica's description of U.S. Revenue Cutters demonstrates this[328]), the arbitrator prohibited navigation by warships and permitted navigation by revenue vessels, but only under extremely restrictive conditions,[329] conditions that would eliminate the possibility of revenue vessels evolving into, or being used as, the functional equivalent of warships. President Cleveland clearly would not have intended to issue an award that contained the seeds of its own destruction. Yet this would have been the case if Costa Rica's interpretation is correct: the award would have prohibited navigation by Costa Rican warships but permitted navigation by her "public armed vessels,"[330] which might well have been entirely undistinguishable from ships of war.[331] Such an interpretation of President Cleveland's award, which would give back with one hand what the other hand had taken away, would clearly make no sense. As Judge Weeramantry said in the *East Timor* case, "A time-honoured test of the

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[327] NCM, Annex 69. Reply of the Republic of Nicaragua submitted to H.E. Hon. President Cleveland, p. 49.

[328] CRM, paras. 4.81-4.82.

[329] These conditions are discussed in Chap. 3, Sec. 1.

[330] CRM, para. 4.79.

[331] Of course, as discussed in Chap. 2, in the exercise of its police power in its own territory Nicaragua would have the right to stop and examine any vessel of doubtful character to determine whether it conformed to the 1858 Treaty as interpreted in the Cleveland Award.

soundness of a legal interpretation is whether it will lead to unreasonable, or indeed absurd, results."[332]

4.2.16 However, Costa Rica maintains that "Following the Cleveland Award, [it] continued to navigate with armed personnel on revenue cutters or other vessels on the lower part of the River and Nicaragua respected this right."[333] It should first be observed that Costa Rica has not introduced evidence to support the proposition that she had, since her first attempts in 1886, navigated on the lower San Juan with "armed personnel on revenue cutters or other vessels" up to the rendering of the arbitral award. Therefore, it is incorrect to state that any attempts she made to do so following the Cleveland Award were "continu[ations]" of past conduct.

4.2.17 In fact, strikingly, there is no record of any navigation on the lower San Juan by Costa Rican vessels of the revenue service after the incident in 1886 involving a Costa Rican customs steamship.[334] This speaks volumes about the need, or lack thereof, for Costa Rica to navigate with such vessels on the lower San Juan, which even today is populated only sparsely on both sides of the river. The commerce that takes place along the stretch of the river in which Costa Rica has the right to navigate with articles of trade is in fact akin to the trade of small local stores (*pulperías*, or "mom and pop" stores). This is confirmed by annual reports of customs offices in Costa Rica, which demonstrate that there does not exist any significant transport of merchandise by Costa Rica on the San Juan under

[332] *East Timor* (Portugal v. Australia), 1995 I.C.J. 90, at p. 161 (June 30) (dissenting opinion of Judge Weeramantry). See also, e.g., the separate opinion of Judge De Castro in the *ICAO Council* case, "A rule of law may not be interpreted in a way which leads to an absurd result." *Appeal relating to the Jurisdiction of the ICAO Council* (India v. Pakistan), 1972 I.C.J. 46, at p. 136, (August 18) (separate opinion of Judge De Castro).
[333] CRM, para. 4.85.
[334] This incident is discussed in Chap. 3, Sec 1, paras. 3.1.33-3.1.45..

the terms of the 1858 Treaty; to the extent that trade is conducted by residents of the Costa Rican side of the San Juan, all indications are that it is with the interior of Costa Rica, not with Nicaragua or other countries. However, the fact that there is little use of the San Juan by Costa Rica to transport merchandise obviously constitutes no ground for the invention by Costa Rica of new rights.

4.2.18 It therefore appears that Costa Rica, realizing that she has a right – to navigate with articles of trade – for which there is little use, now seeks to replace that right with a new right to transport tourists. The problem for Costa Rica is that no such right has ever, even remotely, been granted to Costa Rica by Nicaragua.

4.2.19 Returning to Costa Rica's contention that she navigated on the lower San Juan with armed vessels following the Cleveland Award "and Nicaragua respected this right [*sic*]",[335] the case cited by Costa Rica to support this allegation hardly shows any such attitude on the part of Nicaragua. In fact, it shows the contrary. As Costa Rica describes this incident, which occurred in 1892[336], the Costa Rican steamer *Adela* "began its voyage... at the mouth of San Carlos River in the direction of Castillo Viejo."[337] Thus the steamer entered Nicaraguan territory from the San Carlos River, which joins the San Juan from its southern side, at a point where the right bank constitutes the border. The author of the report cited by Costa Rica, Ciro A. Navarro, of the Costa Rican Treasury, states that before going ashore at Castillo Viejo to request permission to navigate in "the waters under the exclusive dominium of Nicaragua, I did hide in Costa Rican territory the

[335] CRM, para. 4.85.
[336] CRM, Vol. 6, Annex 209.
[337] CRM, para. 4.85.

arms and ammunitions that I carried for [a fiscal] post"[338] in Costa Rica, a post located a considerable distance to the west of the point at which the right bank of the San Juan becomes the border.

4.2.20 Costa Rica concludes that this incident shows that "navigation on the part of the San Juan that constitutes the border between Costa Rica and Nicaragua" (*sic* – the river does not, of course, constitute the border, which lies on the right, or Costa Rican, bank in this sector) by a "steamer carrying fiscal guards with their arms and ammunition was usual and did not provoke objection or response from the Nicaraguan authorities."[339]

4.2.21 As has been seen, the incident shows no such thing; in fact, it shows the opposite. The Costa Rican official felt the need to "hide in Costa Rican territory the arms and ammunitions" the vessel carried, prior to seeking permission from the Nicaraguan officials. Nicaragua can hardly be said to have failed to object to navigation by a steamer carrying arms and ammunition when the arms and ammunition were not being carried at all when permission was requested, but were instead "hid[den] in Costa Rican territory". This tends to show instead that the Costa Rican officers did not want the Nicaraguan authorities to know they were navigating with arms on the stretch of the San Juan where the right bank constitutes the border (between the confluence of the San Carlos River with the San Juan and the point three miles downstream of Castillo Viejo where the border departs from the right bank), suggesting strongly that they believed they had no right to do so.

[338] CRM, Vol. 6, Annex 209.
[339] CRM, para. 4.87.

4.2.22 Moreover, there is nothing in the account to suggest that Nicaragua had previously tolerated the carriage of arms on the portion of the San Juan in which Costa Rica enjoys limited rights of navigation – or indeed that she tolerated such navigation by the vessel in question once its presence became known. Indeed, according to the report cited by Costa Rica, the Nicaraguan commander of the post at Castillo Viejo responded to the request for permission to pass by stating that "he had to follow previous orders which forced him to deny permission to let weaponry pass by the river;..."[340] In addition, following the denial of permission, the report states that "the steamboat carrying the guards was searched, as well as the river's coastlines; and the Castillo was reinforced with at least 25 soldiers."[341] This indicates that, far from being a routine occurrence which Nicaragua "respected", navigation even by steamboats carrying guards, let alone arms, gave rise to considerable alarm on the part of Nicaragua.

4.2.23 Before leaving this incident it is worth noting that just as Costa Rica may not claim new navigational rights because she chooses not to exercise significantly her right to navigate with articles of trade, so also the difficulty of transporting by land items for the re-supply of Costa Rican border posts does not result in the creation of new Costa Rican navigational rights on the San Juan. Thus the fact that "the Costa Rican Commander was obliged to transport its arms and ammunition by land, which was extremely difficult to do",[342] may be unfortunate, but it does not give Costa Rica a license to navigate with arms and ammunition in Nicaraguan territory. Instead, it suggests that land routes to border posts are still needed in Costa Rican territory.

[340] CRM, Vol. 6, Annex 209, p. 847.
[341] CRM, Vol. 6, Annex 209.
[342] CRM, para. 4.86.

4.2.24 In an effort to show that she is abiding by the Cleveland Award, Costa Rica states that she cannot navigate with vessels of war because she "does not possess an Army..."[343] She continues: "Costa Rica does not have any vessels of war, but only police vessels with minimum defensive capacity."[344] The essence of this argument seems to be that whether or not a particular vessel is a warship depends upon what the state of its registry calls it. Surely this cannot be the correct test. Yet it demonstrates why President Cleveland was at pains to require a close connection between navigation by Costa Rican revenue vessels and navigation with articles of trade: the former cannot occur without the latter. This restriction serves to keep Costa Rica's public vessels within proper bounds, preventing them from growing into warships and from being used for purposes unrelated to navigation with articles of trade.

4.2.25 It is precisely this latter function that Costa Rica obviously chafes under and from which she is attempting to escape. In her *Memorial*, Costa Rica states: "The purpose of ... vessels of the revenue service was and still is broadly the same: to prevent contraband, smuggling and trafficking of persons and other related activities proper to border areas."[345] This may

[343] In the past decade, the amount spent on the acquisition of materiel by Costa Rican armed forces has amply surpassed that of all the combined armed forces of Nicaragua. Costa Rica may not have forces denominated an "army", but she does possess armed forces with attributes of both police and army forces. In particular, Article 24 of her General Law of Police, "Attributions", provides that the attributions of the Border Police include: "a) To patrol and protect maritime, land and air borders, including public buildings where customs and immigration activities are carried out." The "police" are also charged with the safeguarding of "b) . . . the integrity of the national territory, territorial waters, the continental shelf, the patrimonial sea or exclusive economic zone, the air space and the exercise of the rights that correspond to the State." NCM. Annex 85. Moreover, according to the Costa Rican newspaper La Nación (6 June 2006) "Gobierno desechara armas de Guerra" (Government will change its military armament), the Costa Rican police force "currently uses" M-16 rifles, war armaments given to the police force several years ago.

[344] CRM, para. 4.90.

[345] CRM, para. 4.93.

be true, and Costa Rica obviously has the right to use her revenue vessels for these purposes in her own waters. But President Cleveland did not authorize Costa Rica to conduct any of these activities on the San Juan except insofar as navigation by her revenue vessels was "related to and connected with her enjoyment of"[346] navigation with articles of trade. If Costa Rica believes there are cases of "trafficking of persons" on the San Juan that are properly of Costa Rican concern, for example, she may always request the assistance of Nicaraguan authorities or even seek special permission to stop and verify how a specific boat is being used on the San Juan. Her vessels may not navigate on the San Juan for the purpose of preventing such trafficking; however, for the simple reason that it does not involve navigation with articles of trade.[347] The effect of Costa Rica's argument is that she has a right to armed navigation on the San Juan for the purpose of immigration control. But, to state the obvious, the San Juan is Nicaraguan territory. A right of one country to enter the territory of another with arms, and to capture there citizens of the latter, in their own national territory, is something no Government would accept – at least without explicit prior authorization.[348] And yet this is what Costa Rica argues in her *Memorial*.

4.2.26 In the lengthy section of her *Memorial* on "protection of commerce and revenue control", Costa Rica devotes only three paragraphs to that subject.[349] These paragraphs consist of unsupported assertions by Costa

[346] CRM, Vol. 2, Annex 16. Cleveland Award, *dispositif*, paragraph *Second.*
[347] It might be added that trafficking in persons also does not fall within any accepted definition of "commerce" but is rather a criminal activity.
[348] Evidence of Nicaragua's concern regarding Costa Rica's migration control activities in the vicinity of the San Juan is provided by the Note of Norman Caldera Cardenal, Foreign Minister of Nicaragua, to Minister Bruno Stagno of 2 June 2006; NCM, Annex 50.
[349] CRM, paras. 4.93-4.95.

Rican officials,[350] a description of the Costa Rican agencies that allegedly "protect its commercial navigation on the San Juan"[351] (although, as noted above, there is no record of any navigation on the lower San Juan by Costa Rican vessels of the revenue service after the 1886 incident), and affidavits of "several witnesses"[352] stating that Costa Rican police "regularly navigated the San Juan with personnel openly carrying their service weapons," and "even carried out joint tasks with the Nicaraguan armed forces."[353] There is no suggestion that Nicaragua acquiesced in the former activity, of which she may well have been unaware given the conditions on the San Juan. As to carrying out joint tasks with Nicaraguan armed forces, it is of course always open to Nicaragua in the exercise of her sovereignty to consent to specific instances of cooperative activity with Costa Rican forces in her territory, on the San Juan River.

4.2.27 In sum, therefore, Costa Rica offers no significant support for her assertion in this section of her *Memorial* (Chapter 4, Section D) that she has a right of "protection of commerce and revenue control". It is clear that under the Cleveland Award Costa Rica "may navigate [the San Juan] with such vessels of the revenue service ...as may be necessary to the protection of [the] enjoyment [of navigation with articles of trade]."[354] Surprisingly, Costa Rica does not address this right at all in this section of her *Memorial*, even though it is entitled "protection of commerce and revenue control". The reason for this omission is presumably that, as noted above, there is virtually no navigation by Costa Rica on the San Juan with articles

[350] This is the case of the statement of the Costa Rican Foreign Minister, set forth at length in the CRM para. 4.93.
[351] *Ibid.* para. 4.94.
[352] *Ibid.* para. 4.95, where the thrust of these affidavits are very briefly described as quoted in the text accompanying the following footnote of the *Memorial*.
[353] *Ibid.*
[354] CRM, Vol. 2, Annex 16. Cleveland Award, *Second* of *dispositif.*

of trade and therefore no need to protect such navigation. Yet this is where Costa Rica's right of protection with revenue vessels begins and ends. Without navigation with articles of trade, there is no right of protection.

D. COSTA RICA'S ALLEGED RIGHTS AND OBLIGATIONS TO SAFEGUARD (GUARDA) THE RIVER AND TO CONTRIBUTE TO ITS DEFENCE, AS WELL AS THE DEFENCE OF THE COMMON BAYS

4.2.28 Here again, Costa Rica takes a very limited obligation under Article IV of the 1858 Treaty to defend the Bays of San Juan del Norte and Salinas as well as her bank of the San Juan River and seeks to expand it into a sweeping right to safeguard and defend the entire lower San Juan River.

4.2.29 Such a sweeping right would support Costa Rica's apparent goal of navigating with armed public vessels on the San Juan, especially in view of the fact that, as demonstrated above, she has no case for doing so with vessels of the revenue service for the protection of commerce or revenue control. Costa Rica rests this obligation, from which she infers broad rights, on the 1858 Treaty and other agreements and practice.

4.2.30 It has been shown previously in the present chapter that there is in fact no such support for the rights claimed by Costa Rica. While Costa Rica states in the concluding paragraph of the relevant section of her *Memorial*[355] that her right to navigate on the San Juan for the purpose of carrying out the "tasks of custody and safeguarding of the San Juan" was "recognized in the Cleveland Award", *inter alia*, she makes no argument to this effect and does not otherwise support the proposition.

[355] CRM, para. 4.106.

4.2.31 Such an unsupported assertion of broad rights of armed navigation is in effect self-refuting. These are certainly rights that Nicaragua cannot accept, *inter alia*, because they are nowhere supported in the Cleveland Award. In fact, the following words of George L. Rives, to whom President Cleveland delegated the task of preparing a draft of the award, negate such a right. In addressing whether Costa Rica has a right to "maintain a river police" to "patrol the river in boats", Rives also explained the meaning of Article IV of the 1858 Treaty:

> "This may be a convenient way of preventing smuggling; but it is not so necessary an incident to the rights of Costa Rica to enforce her customs laws as to be inevitably implied *ex-necessitate* from the provisions of the treaty.
>
> The stipulations of Article IV throw no light on this question. All that article requires is that Costa Rica should repel foreign aggression on the river with all the efficiency within her reach. If under the terms of the Treaty, Costa Rica is not permitted to maintain vessels of war on the River she cannot be regarded as derelict if she fails to oppose foreign aggression in that quarter by her naval forces. Impossibilities are not required. Costa Rica would only be bound to contribute to the defence of the stream by land, a mode of defence, it may be added, which seems better adapted to a River of the size and character of the San Juan."[356] (Emphasis in original)

4.2.32 Thus, as explained by Rives, to the extent that "safeguarding" (*guarda*) against "foreign aggression" is needed, the 1858 Treaty provides for Costa Rica to accomplish it from her "shores of the San Juan River" ("*las márgenes del rio de San Juan*").

[356] NCM, Annex 71. Report of George L. Rives (Second), (p. 211-212 of original handwritten version.)

4.2.33 In any event, the terms of Article IV of the Treaty, given their ordinary meaning, frame this function as an *obligation*, not as a right. George L. Rives clearly views Article IV in this manner, as the passage quoted above demonstrates. This obligation would not arise unless and until there was an external threat or attack – an "attack from without" ("*aggression exterior*").

4.2.34 When viewed in the context of the entirety of Article IV, it becomes clear beyond doubt that the term in question ("*guarda*") refers to the obligation of Costa Rica to defend against external aggression, in the event such should actually occur or be threatened, not to patrol the river or even the banks on a routine basis in time of peace. The first sentence of Article IV concerns the "defense" of the bays of San Juan del Norte and Salinas; the second sentence of the article provides that Costa Rica is obligated ("*está obligado Costa Rica*"), as respects the portion of the banks of the San Juan corresponding to her, to unite with Nicaragua in "safeguarding" ("*guarda*") the river.

4.2.35 Thus, in sum, Costa Rica's obligation to "safeguard" (a) would only arise in the event of external aggression, (b) would have to be carried out together with Nicaragua, and (c) would have to be performed from her bank of the river, not from boats on the water. Both the 1858 Treaty and George L. Rives Rives frame this as an obligation, not as a right. There is no right to "safeguard" from boats on the river, and Costa Rica's obligation to "safeguard" from her banks must be exercised jointly with Nicaragua.

E. COSTA RICA'S ALLEGED RIGHT TO THE RE-SUPPLY OF AND TRANSPORT OF PERSONNEL TO AND FROM BORDER POSTS AND "OTHER RELATED RIGHTS"

4.2.36 As for other rights alleged by Costa Rica, these find absolutely no support in the Cleveland Award, as shown in Chapter 5.

Section 4.3

Costa Rica purports a right of navigation in the San Juan de Nicaragua River that is not granted by the Jerez – Cañas Treaty or by the Cleveland Award

4.3.1 It is significant that for more than one hundred years the observance of the Jerez-Cañas Treaty has not posed any problem in relation to the exercise of the limited right of navigation recognized to Costa Rica "with articles of trade". In fact, soon after the conclusion of the Treaty the occlusion of the mouth of the river rendered the San Juan River useless for the importation and exportation of Costa Rica's products. By 1862-1863, the port of San Juan del Norte was blocked[357]. The revenue service steamer that Costa Rica wanted to introduce in the river in 1886 no longer had anything to do with safeguarding the only right recognized by the Treaty.

4.3.2 The denial of Costa Rica's desires by the Cleveland Award, which granted her the right of navigation with revenue service vessels strictly linked to navigation with articles of trade that in practice it could only attempt to translate into a modest coasting trade, coupled with the abandonment of

[357] Reply of the Republic of Nicaragua to the Case of the Republic of Costa Rica submitted to his Excellency Hon. Grover Cleveland, President of the United States. 1887. Washington 1887. p. 38.

the inter-oceanic canal projects, once it was decided to build the canal in Panama, caused the sister Republic, today petitioner, to lose any strategic and commercial interest in the San Juan River it may have had in the past.

4.3.3 Indeed, diplomatic correspondence is notorious by its absence, and can be described as episodic and specific, dealing with other difficulties and conflicts between the parties that may have had for scenario the river, as well as other points along their extensive border. Costa Rica is unable to document a single incident in one hundred years that had anything to do with a breach of her right to navigate the San Juan River with articles of trade. Nor is there any record that after the Cleveland Award any Costa Rican revenue service vessel navigated the San Juan River under the terms established by the Award.

4.3.4 It was only until the nineteen eighties[358] that Costa Rica invoked, at first cautiously, and then more brazenly in the nineties[359], the Jerez-Cañas Treaty to affirm rights of navigation and other rights over the river that

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[358] On 8 June 1982, Costa Rican Minister of Foreign Affairs Fernando Volio addressed, for the first time, Nicaragua's *chargé d'Affaires a.i.* to transmit the complaint lodged by *Swiss Travel Service S.A.* after a boat belonging to that Costa Rican company was intercepted by a Nicaraguan patrol in the San Juan River. According to the Note, the incident affected "The right of free navigation on the San Juan River that are categorical and in perpetually guaranteed for Costa Rica, and *because it economic interests of the country*" (emphasis added). CRM, Vol. 3, Annex 41. Nicaragua rejected the protest in a Note of 2 August of that year. CRM, Vol. 3, Annex 44.

[359] On 15 March 1994, Costa Rican Minister of Foreign Affairs Bernd Niehaus addressed his Nicaraguan counterpart Ernesto Leal in reference to the fact that Nicaraguan agents had demanded payment of a toll tax from Costa Rican vessels navigating in the San Juan River that were carrying tourists (NCM, Annex 41). On 21 March 1994, Minister Leal replied that "the expression in the Treaty '*con objetos de comercio*' [with articles of trade] excludes any other activity", adding that "the terms of the treaty should be interpreted in the standard sense they had at that time" and that "being it a Treaty of Limits, it should be interpreted in a restrictive way." The Nicaraguan Minister went on to conclude: "...Costa Rica's perpetual right of free navigation, ... does not include tourism, and much less the free access to Nicaragua's sovereign territory to foreign citizens who travel in Costa Rican vessels that navigate on the said River." CRM, Vol. 3, Annex 48. This would become a formulation constantly repeated in Nicaragua's Notes and diplomatic statements every time Costa Rica sought a different interpretation.

have nothing to do with the limited right of navigation "with articles of trade" recognized in Article VI of the Treaty, nor with the rights of its revenue service vessels *related to the exercise of this right* as interpreted by the Cleveland Award. These are the two instruments upon which the special regime of San Juan River is exclusively based, as has been repeatedly recognized by the parties.[360] "Nothing has occurred since 1888 that modifies that juridical situation", said Costa Rican President Miguel Ángel Rodríguez.[361]

4.3.5 Costa Rica again and again pays *lip service* to Nicaragua's sovereignty and "dominion and sovereign jurisdiction", while attempting to undermine and empty it of any content by claiming for itself a status, which has no basis in the Treaty, that in fact would allow the exercise of competencies proper of a sovereign in the course of a river that does not belong to Costa Rica.

4.3.6 Costa Rica intends to transfigure this limited right of navigation "with articles of trade", recognized in Article VI of the Jerez-Cañas Treaty, into a right to use a section of the San Juan River to engage in tourism, sports or any other activities she may choose to undertake, as well as to link the watercourse to the defense and protection of its interests in the area of customs, migration or struggle against illegal trafficking.

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[360] See NCM, Annex 62 Constitution of Costa Rica of 1917 (Article 5) and NCM, Annex 63, Constitution of Costa Rica of 1949 (Article 5). See also the Note of 12 August 1998, (CRM, Annexes Vol. 3, Annex 50) and the Note of Costa Rican Minister of Foreign Relations Roberto Rojas of 22 May 2000: "we are before a Special Regime established by a Treaty and an Award that are inherent and specific to public international law...". (CRM, Vol. 3, Annex 63) See also NCM, 79. Yearbook of the Ministry of Foreign Affairs, 2001-2002, at 143. NCM, Annex 47. Note of 6 December 2004.

[361] Note of 29 July 2000. CRM, Vol. 3, Annex 66.

4.3.7 In all the aforesaid points, it is possible to establish mechanisms of border cooperation through an agreement between the neighboring Republics. Nicaragua has always been and continues to be willing to negotiate and implement these types of agreements as has already been done in the past.

4.3.8 However, Nicaragua is not willing nor could be willing to accept a crude revision of the Jerez-Cañas Treaty, through a self-serving interpretation that renders it unrecognizable and destroys the foundation on which the delicate balance of Nicaragua and Costa Rica's territorial interests were erected in 1858. When Costa Rica frivolously claims the violation of her rights by Nicaragua, it is only providing evidence of Nicaragua's persistent and unequivocal denial that such rights exist.

4.3.9 Costa Rica attempts to extend the right of navigation "with articles of trade" (with commercial objects) to the transportation of "tourists". This activity is not contemplated in the 1858 Treaty. The reason it was not included is not that this was an unknown occupation at the time of the Treaty. Quite the contrary. The transport of passengers, especially foreign passengers which would be the nearest equivalent of the tourist trade, was a booming business. Nicaragua had signed contracts for example with Commondore Vanderbilt that had been extremely lucrative.[362] Costa Rica herself, taking advantage of the Filibusterer War in Nicaragua had signed in December 1856 a similar contract with Mr. Webster (the Mora-Webster contracts). The transport of passengers was thus a very important business and it was in dispute between both States. In fact, this business of the transport of passengers (tourists in fact) was one of the most heatedly disputed questions between the Parties. Then, why was no mention of this

[362] NCM, Chap. 1, para. 1.3.15.

line of business made in the 1858 Treaty that very carefully only referred to "commercial objects" (objetos de comercio) whilst the 1857 Juarez-Cañas Treaty only referred to "commercial articles" (articulos de comercio)? The answer clearly is that the transportation of merchandise (objects, articles of trade) was included but not the transport of passengers.

4.3.10 Costa Rica asserts that trade and the notion and contents of "trade" have changed. Now it not only includes commodities, but also services, among others, tourism. Should this affect the interpretation of the Jerez-Cañas Treaty? Costa Rica believes so[363]. Nicaragua firmly asserts the contrary.

4.3.11 Should the terms used in the treaty be interpreted according to their meaning at the time it was concluded (principle of *contemporaneousness*), or is it appropriate to assume meanings that emerge later? The Vienna Convention does not make any provision on this matter. It is necessary to take into account the intention of the parties when adopting the text or infer it from *subsequent agreements between the parties* and *any subsequent practice in the application of the treaty*. In such circumstances, recourse to the treaty's *object and purpose* is decisive.

4.3.12 The award in the case of *Petroleum Development Ltd. v. Sheikh of Abu Dhabi* (1951) is illustrative, even though it refers to a contract between a State and a foreign investor. The arbitrator deemed that the hydrocarbon concession granted in 1939 by the sheikh of Abu Dhabi to *Petroleum Development Ltd* over his territory should not extend to the continental shelf, a notion unknown at that date, based on the assumption that the person who grants property rights of great value does not have the

[363] CRM, paras. 4.58-4.72.

intention to grant more rights than those in his possession at the time of the transfer[364].

4.3.13 On the contrary, in the case concerning the *Aegean Sea Continental Shelf* (1978), the Court, forced to interpret the reservation formulated by Greece in 1931 to the 1928 General Act for Pacific Settlement of International Disputes, which excluded the Court's competence in any disputes relating to territorial status, ruled that the reservation also affected disputes concerning the continental shelf because it was presumed, given the circumstances and the purpose of the same, that the meaning of territorial status was to follow the evolution of the law and assumed, at all times, the meaning given by the rules in force[365].

4.3.14 However, both judgments respond to the same objective of restrictively interpreting any assignment of sovereignty. The references to territory exclude the continental shelf, a recent concept, since it cannot be presumed that the intention of the sovereign is to extend a concession over new spaces subject to its jurisdiction, but include it when it is a matter of limiting the set of controversies, the solution of which the sovereign is placing in the hands of a third party.

4.3.15 "In appreciating the intention of a Party to an instrument", says the Court (Judgment of 19 December 1978), "there is an essential difference between a grant of rights of exploration and exploitation over a specified area in a (mineral oil) concession and the wording of a reservation to a treaty by which a State excludes from compulsory procedures of pacific settlement disputes relating to its territorial status. While there may well be

[364] Arbitral Award of 28 August 1951. *International Legal Materials,* 1951, p. 144.
[365] *ICJ Reports*, 1978, p. 32, Judgment of 19 December 1978, para. 77.

a presumption that a person transferring valuable property rights to another intends only to transfer the rights which he possesses at that time, the case appear to the Court to be quite otherwise when a State, in agreeing to subject itself to compulsory procedures of pacific settlement, excepts from that agreement a category of disputes which, though covering clearly specified subject-matters, is of a generic kind. Once it is established that the expression 'the territorial status of Greece' was used in Greece's instrument of accession as a generic term denoting any matters comprised within the concept of territorial status under general international law, the presumption necessarily arises that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time"[366].

4.3.16 In general, treaties imposing limitations on the territorial sovereignty of a State must be interpreted in restrictive terms. This is obvious in case of doubt. Already on the first judgment of the Permanent Court of International Justice, when ruling on the right of the S.S. Wimbledon to free passage through the Kiel Canal under the terms of Article 380 of the Treaty of Versailles the Court held that: "Whether the German Government is bound by virtue of a servitude or by virtue of a contractual obligation undertaken towards the Powers entitled to benefit by the terms of the Treaty of Versailles, to allow free access to the Kiel Canal in time of war as in time of peace to the vessels of all nations, the fact remains that Germany has to submit to an important limitation of the exercise of the sovereign rights which no one disputes that she possesses over the Kiel Canal. *This fact constitutes a sufficient reason for the restrictive interpretation, in case of doubt, of the clause which produces such*

[366] *Ibid.*

limitation"[367]. Naturally, the restrictive interpretation does not proceed when the text is clear: "the Court feels obliged to stop at the point where the so-called restrictive interpretation would be contrary to the plain terms of the article and would destroy what has been clearly granted"[368].

4.3.17 In any case, an *evolutionary* interpretation should not be confused with the incorporation of mechanisms in a treaty that allow for the *evolution* of its provisions and facilitate their adaptation to new international law rules.

4.3.18 The latter is what the Court actually emphasized in its judgment concerning the case of the *Gabcíkovo-Nagymaros Project* (1997)[369]. However, as Judge Bedjaoui stated in his separate opinion, *interpretation* of a treaty has not be confused with its *revision* and when applying the so-called principle of *evolutionary interpretation* of a treaty the Court should have in mind that the general rule governing the interpretation of a treaty remains that set out in Article 31 of the 1969 Vienna Convention[370].

4.3.19 If we apply this reasoning to the case at hand, we will easily reach the conclusion that the reference to *commerce* in Article VI of the Jerez-Cañas Treaty comprised in 1858, and still comprises today, traffic in commodities and not services unrelated to said traffic. This is particularly the case when the words "with articles of" are added to "commerce".

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[367] Emphasis added. PCIJ, *Case of the S.S. Wimbledon*, Judgment of 17 August 1923, *Recueil des arrêts*, A/01, pp. 24.
[368] *Ib.*, pp. 24-25. See too PCIJ, *Case of the Free Zones of Upper Savoy and the District of Gex*, Judgment of 7 June 1932, Series A/B, Judgments, Orders and Advisory Opinions, fasc. 46, p. 167.
[369] *ICJ Reports*, 1997, Judgment of 25 September 1997, pp. 67 ff., para. 112 ff.
[370] *Ibid.*, pp. 121-124, para. 6-18.

4.3.20 It is not just a matter of arguing the nature, object and purpose of a treaty of territorial limits, in which the territorial sovereignty limitations should be restrictively interpreted; it is rather a matter of further respecting the grammatical, logical and systematic meaning of a text that does not refer to "trade", but rather to "articles of trade".

4.3.21 Not only that. Costa Rica deliberately forgets that the right in question is a right *of* "navigation". To *navigate* is to travel by water from one point to another. Neither more nor less. Any added value exceeds the concept of navigation and as this value increases, navigation ends up being a mere support of a different activity, whether it be tourism, radio broadcasting, fishing or gambling. This has nothing to do with the mere transport or carrying of things or persons (these last, in any case, are by the express limitation to navigation with "articles of trade"). The purpose of Costa Rica is not to navigate, but to commercially exploit, for tourism purposes, a river that does not belong to her.

4.3.22 As Judge Kooijmans stated in his separate opinion that accompanied the judgment of the Court of 13 December 1999, in the case of the *Kasikili/Sedudu Island* (Botswana/Namibia), the navigation for tourist purposes "has virtually nothing to do with fluvial transport in the normal sense of the word 'navigation', as this is understood to mean transport by boat in a river from one place to another"[371].

4.3.23 Nicaragua could not assert an interpretative mummification that would lead her to demand that the right of navigation be exercised according to the nautical means of 1858. It is possible to assume the gradual

[371] Judgment of 13 December 1999, Separate Opinion of Judge Kooijmans, para. 29.

modernization of the means of transport to the extent allowed by Nicaragua's obligations with third parties and the measures that she must adopt for security reasons and environmental conservation in the exercise of her sovereign responsibility over the river.

4.3.24 It should also be acknowledged that the articles of trade, merchandise and goods being transported are subject to change over time. It would be unreasonable to seek a limitation to only the products concerned in 1858. But if the "articles" can change, they nonetheless have to continue being "articles".

4.3.25 The fact that the use of this limited right of navigation with articles of trade is modest today, even irrelevant, does not allow its beneficiary the right to use the river for developing other profitable activities as a form of compensation.

4.3.26 The right of navigation with articles of trade must not be confused with the commercial exploitation of a fluvial course through tourism or other activities. This is Costa Rica's claim, but it is not a right based on article VI of the Jerez-Cañas Treaty. The claim and any behaviour based on it is abusive.

4.3.27 This is so because it appears to reflect a deliberate policy in which first authorizations and permits are applied for, trusting that in a policy of good neighbourliness, Nicaragua will proceed to grant them as boundary courtesies, thereafter claiming said authorizations and permits as a right and invoking the Jerez-Cañas Treaty. This has occurred with her claimed

right to navigate (armed, it must be added) to re-supply her border posts (see Chapter 5.2) or for sporting or tourist activities.

4.3.28 This was the case, for example, with the *International Nautical Rally Sarapiquí River/San Juan River*. In 1993 ADENA of Costa Rica applied for the pertinent permit from the Nicaraguan authorities[372], which granted it[373]. The same occurred again each year from 1994 to 1999. However, in the year 2000, ADENA decided to hold the VII Rally without applying for a permit. Logically, when the participating boats entered the waters of the San Juan River, they were detained. On 26 October, five days after the events, the Minister of Foreign Affairs of Costa Rica formulated a formal protest, describing them as a serious violation of Costa Rica's right of free navigation, in accordance with the Jerez-Cañas Treaty[374]. In 2005, ADENA of Costa Rica once again applied for a permit (with a copy to its country's Ministry of Foreign Affairs)[375].

4.3.29 As regards tourism, it is worth mentioning in particular the Memorandum of Understanding signed on 5 June 1994, by the Ministers of Tourism of Nicaragua and Costa Rica regarding tourist activities in the border zone of the San Juan River[376]. It literally affirms that Costa Rican tourism companies have an *obligation* to acquire tourist cards and to register in Nicaragua. Whether this Memorandum of Understanding is or is not a

[372] NCM, Annex 39. Note from the Director of ADENA, Julio Martín to the Ambassador of Nicaragua in Costa Rica Mr. Alfonso Robelo. San José, 27 September 1993.
[373] NCM Annex 40. Note from Ernesto Leal, Minister of Foreign Affairs to the Ambassador of Nicaragua in Costa Rica, Alfonso Robelo, 8 October 1993.
[374] NCM Annex 44. Note from the Minister of Foreign Affairs and Worship of Costa Rica Mr. Roberto Rojas to the Minister of Foreign Affairs of Nicaragua Mr. Francisco Xavier Aguirre. San Jose, 26 October 2000.
[375] NCM Annex 48. Note from Miguel A. León, Director of ADENA to the Ambassador of Nicaragua, Francisco Fiallos Navarro San José, 27 May 2005.
[376] CRM, Vol. 2, Annexes 25 and 26.

legally binding agreement, there can be no more explicit admission by the Minister in charge of tourism on behalf of the Costa Rican Government that Nicaragua has a sovereign right to establish controls and demand payment of certain fees for carrying out an activity not covered in the Jerez-Cañas Treaty.[377]

4.3.30 Costa Rica's claim that her revenue service vessels may navigate the San Juan River to exercise competencies related to customs, migration or the struggle against illegal trafficking[378] lacks all basis in the Jerez-Cañas Treaty and Cleveland Award, and is manifestly incompatible with the "exclusive dominion and sovereignty" in a place where, as Costa Rican Foreign Minister Tovar stated, "a drop from the San Juan River is a Nicaraguan drop."[379]

CONCLUSION

4.3.31 The recognition that Nicaragua enjoys "exclusive dominion and supreme control" over the San Juan River emphasizes the very circumscribed rights accorded to Costa Rica under the 1858 Treaty. Costa Rica does not enjoy a right of "free navigation" as such, but a right of free navigation "con

[377] CRM Vol. 2, Annex 29. These fees for obtaining a tourist card were suspended in September 2002 (Alajuela Declaration) in reciprocity for the suspension by Costa Rica of a visa fee that was being charged to Nicaraguan citizens.

[378] See, for instance, Costa Rica's Note 12 August 1998, which directly ignores the conditions imposed by the Cleveland Award on navigation by revenue service vessels. (CRM, Vol. 3, Annex 50.) See also the Yearbook of the Ministry of Foreign Affairs, 1998-1999, at 33; the speech by Costa Rican Foreign Minister Roberto Rojas (OAS, 8 March 2000): "A vessel belonging to the revenue service, intended by its very nature to undertake tasks such as the prevention of smuggling, illegal immigration and other aspects related to border control necessarily requires that government agents aboard carry protective equipment. Otherwise, how can they be expected to fulfill these tasks?" CRM, Vol. 6, Annex 228.

[379] See article in La Prensa, dated 18 February 2005, titled "Tovar reconoce soberanía nica" (Tovar recognizes Nicaraguan Sovereignty). NCM, Annex 82.

objetos de comercio" (with articles of trade/objects of commerce) in the context of the Nicaraguan sovereignty over the course of the river.

4.3.32 The transport of passengers is excluded from the right of free navigation with articles of trade conceded to Costa Rica by Article VI of the 1858 Treaty.

4.3.33 The right to land at any part of the banks of the San Juan River is associated to the right to navigate with articles of trade.

4.3.34 This Chapter has also shown that under the 1858 Treaty as interpreted in the Cleveland Award, Costa Rica's rights of navigation on the San Juan River hinge on her navigation with articles of trade. Without navigation of the latter kind, Costa Rica enjoys no right of navigation with vessels of the revenue service. The only navigation that is permissible by such vessels under the Award is navigation that is "related to and connected with" Costa Rica's enjoyment of navigation with articles of trade, or navigation that "may be necessary to the protection of said enjoyment." Since Costa Rica does not engage in significant navigation with articles of trade, she has no right to navigate with vessels of the revenue service or, *a fortiori*, any other kind of public vessel. From all that appears, Costa Rica has not attempted to navigate on the San Juan with revenue vessels since 1886. There being no need for the only kind of navigation that is permitted by the 1858 Treaty and the Cleveland Award, Costa Rica attempts to create new rights of navigation for entirely different kinds of public vessels, serving completely different purposes, and seeks to re-interpret the phrase "*con objetos de comercio*" to permit carriage of passengers. None of these rights is recognized in the 1858 Treaty or the Cleveland Award. Thus if

Costa Rica is to navigate on the San Juan in ways that are not authorized by these two sources of the law governing her navigational rights on that Nicaraguan waterway, it must be with the express permission of Nicaragua.

CHAPTER 5

NICARAGUA HAS NOT BREACHED ANY OTHER RIGHTS ALLEGED BY COSTA RICA

5.1.1 The present proceedings concern alleged "breaches by Nicaragua of Costa Rica's rights of navigation and related rights in respect of the San Juan River"[380]. It is apparent that Costa Rica has a very extensive conception of these "related rights". According to the Costa Rican Submissions, they would include rights ensuing from an alleged obligation of Nicaragua "to permit riparians of the Costa Rican bank to fish in the River for subsistence purposes"[381] (Section 1). In other parts of the *Memorial*, Costa Rica stresses its "responsibilities to guard and protect the River under Article IV of the Treaty of Limits and Article 2 of the 1956 Agreement and otherwise"[382], which would include in particular the right to re-supply border posts (Section 2) and various other rights (Section 3).

Section 5.1

Alleged Breaches of an Alleged Customary Right to Fish

5.1.2 Under paragraphs 4.124 to 4.128 of her *Memorial*, Costa Rica asserts an alleged "customary right to fish in favour of residents of the Costa Rican bank" [383] of the San Juan River, which, it claims, would have been breached by Nicaragua[384] and requests a formal declaration of the Court on the alleged violation of this right[385].

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[380] CRM, p. 1, para. 1.01.
[381] CRM, p. 147, para. 2(i).
[382] CRM, p. 3, para. 1.08. On the alleged rights to safeguard and defence the river, see above, para. 2.1.52-2.1.70.
[383] CRM, p. 89, paras. 4.124-4.128.
[384] CRM, pp. 134, paras. 5.141-5.143; see also, p. 36, para. 3.28.
[385] CRM, p. 147, para. 2(i); see also p. 139, para. 6.03(i).

5.1.3 The legal basis for the "customary right" to fish thus claimed by Costa Rica is unclear. One thing is apparent: the Claimant does not allege that this alleged right (and the correlative obligation bearing upon Nicaragua) follows from the 1858 Treaty of Limits as interpreted by the Cleveland Award. In this respect, Costa Rica makes the following assertions:

- first, such a customary right would "not be uncommon for the inhabitants of border regions *in Africa*"[386];
- second, it would have been "recognized in cases in which the boundary delimitation entirely left a river to one of the neighbours"[387];
- third, "this *practice*" would correspond "with the first regime of the San Juan ever applied" [388] as established by the Royal Charter of 29 November 1540; and
- fourth, it would have "been respected by Nicaragua until very recently"[389].

5.1.4 This invocation of a "customary right to fish" contradicts Costa Rica's own approach in the present case, according to which the other rights associated with the navigational rights can only "arise from the same treaty [i.e. the Treaty of Limits] or from other international binding instruments"[390]. Furthermore, in the diplomatic exchanges having taken place between Nicaragua and Costa Rica, the latter constantly asked for the recognition of "neither more nor less rights than those established by

[386] See ICJ, Judgment, 13 December 1999, *Kasikili/Sedudu Island*, *ICJ Reports*, 1999, p. 1094, para. 74 – Italics added; see CRM, p. 89, paras. 4.124-4.126.
[387] CRM, p. 90, para. 4.127.
[388] CRM, p. 90, para. 4.128; see also, p. 134, para. 5.141. And see CRM, Vol. 2, Annex 1 – italics added.
[389] *Ibid.*
[390] CRM, p. 87, para. 4.118.

the Treaty [of Limits]"[391]. The "customary right" to fish clearly falls outside this scope and cannot be deduced in any way from the 1858 Treaty of Limits.

5.1.5 This being said, Costa Rica does not establish even a mere "customary right" to fish in the river. As recalled by the Court, "[t]he Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. [The Costa Rican Government in this case] must prove that the rule invoked by it is in accordance with a constant and uniform usage practiced by the States in question, and that this usage is the expression of a right appertaining to the State granting [the alleged right] and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom 'as evidence of a general practice accepted as law'"[392]. None of the above allegations, in itself or in combination with the others, is capable of establishing such a custom.

5.1.6 It is true that, as a matter of courtesy and convenience, Nicaragua has usually tolerated a limited use of the San Juan for non-commercial fishing by Costa Rican riparians, but this tolerance cannot be seen as a source of a

[391] See Note of the Minister of Foreign Affairs of Costa Rica to the Minister of Foreign Affairs of Nicaragua, 19 August 1886, CRM, Vol. 3, Annex 33, at p. 224; Note of the Foreign Affairs Secretariat of Costa Rica to the Minister of Foreign Affairs of Nicaragua, 11 November 1886, NCM, Annex 30; Note from the Ministry of Foreign Affairs and Worship of Costa Rica to the Vice-Minister of Foreign Affairs of Nicaragua, 12 August 1998, CRM, Vol. 3, Annex 50, at p. 311; Note from the Costa Rican Minister of Foreign Affairs and Worship to the Nicaraguan Minister of Foreign Affairs, 28 September 2005, CRM, Vol. 3, Annex 80, at p. 437; Communiqué of the Ministry of Foreign Affairs and Worship, 28 September 2005, NCM, Annex 83; Text from the National Radio and Television Chain address by the President of the Republic, Dr. Abel Pacheco - 2 October 2005, NCM, Annex 84.

[392] ICJ, Judgment, 20 November 1950, *Asylum Case*, *ICJ Reports* 1950, p. 276.

legal right[393] nor can it imply the recognition of a "right to fish" for commercial purposes:

- as indicated above[394], Costa Rica has constantly accepted that it has no rights except those stemming from the treaties and not from customary law;
- Nicaragua has accepted, as a matter of courtesy, subsistence or leisure fishery by Costa Rican riparians;
- but this tolerance was made in conformity with the spirit of cooperation and good neighbourhood which has characterized the relations between the two sister Republics.

5.1.7 As is well known, "[n]ot only must the acts concerned amount to a settled practice, but they must also be such or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency or even the habitual character of the acts is not in itself enough"[395]. In this respect, the present case is comparable to the *Lotus* case where the Permanent Court found that the practice invoked by France did not conclusively show that the States concerned "recognized themselves as being obliged to" abstain from acting in the way alleged by France; "for

[393] And if it were – *quod non* –, it would result in a right not for Costa Rica but for her nationals; if it were so, Costa Rica would have to be seen as acting on their behalf on the ground of diplomatic protection. The conditions for exercising diplomatic protection are clearly not fulfilled in the present case. See General Conclusions.
[394] NCM, para. 5.1.4.
[395] ICJ, Judgment, 20 February 1969, *North Sea Continental Shelf Cases*, *ICJ Reports* 1969, p. 44, para. 77.

only if such abstentions were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom"[396].

5.1.8 Similarly, in the present case, besides the fact that Costa Rica has only produced a handful of affidavits in support of the practice she invokes[397], she has certainly not shown that the fishing activities in question were accepted as being the exercise of a *right* belonging to the Costa Rican riparians of the south bank of the San Juan.

5.1.9 *First*, it goes without saying that a possible customary right of this kind "for the inhabitants of border regions *in Africa*"[398], could have nothing to do with the present case. It could, in the last event, not be more than a "regional" custom applying solely to Africa. And even as far as Africa is concerned, such a right is a mere invention of Costa Rica:

- if it existed at all in a remote past, it was not in an inter-State context;
- the extract of the *Kasikili/Sedudu Island* case quoted by Costa Rica in support of her allegations[399] has strictly nothing in common with the present situation;[400]

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[396] PCIJ, Judgment, 7 September 1927, *Lotus*, Series A, N° 10, p. 28.
[397] See CRM, Vol. 4, Annexes 105 to 109.
[398] See ICJ, Judgment, 13 December 1999, *Kasikili/Sedudu Island*, *ICJ Reports*, 1999, p. 1094, para. 74.
[399] CRM, p. 89, para. 4.124.
[400] The whole passage reads as follows: "While it is true that the early maps of the region placed the boundary around Kasikili/Sedudu Island in the southern channel of the Chobe, none of them officially interpreted the 1890 Treaty (see paragraph 84 below), and the evidence would tend rather to suggest that the boundary line was shown as following the southern channel as a result of the intermittent presence on the Island of people from the Caprivi Strip. However, there is nothing that shows, in the opinion of the Court, that this presence was linked to territorial claims by the Caprivi authorities. It is, moreover, not uncommon for the inhabitants of border regions in Africa

- nor has the passage of the Decision of the *Eritrea-Ethiopia Commission* also quoted by Costa Rica[401]; moreover and more generally, in neither decision is there any mention of fishing rights;
- it can certainly happen that fishing rights are expressly mentioned in treaties, and especially so when the river in question is the common boundary between the States concerned, where there can be no doubt that the populations of both banks have a right to fish in the common river, as is the case of the 1934 Agreement between Tanganyika and Rwanda-Urundi also quoted by Costa Rica[402], but, this again has not much to do with the present case, except, maybe, *a contrario* since such a treaty right applies to rivers forming the boundary between two States and shared by them.

5.1.10 *Second*, the same holds true in respect to Article 8 of the Protocol on the Border between Guinea and Sierra Leone concluded between France and Great Britain on 1 July 1912 also quoted by Costa Rica. According to this provision:

> "In the part of the Moa included between cairns XV and XVI the river and the islands belong entirely to France. The inhabitants of the two banks have, *however*, equal rights of fishing in this part"[403]. (Italics added)

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to traverse such borders for purposes of agriculture and grazing, without raising concern on the part of the authorities on either side of the border" (*ICJ Reports* 1999, p. 1094, para. 74).

[401] CRM, p. 89, para. 4.125. The whole paragraph from which this extract is part reads: "In these circumstances, the Commission holds that the determination of the boundary within rivers must be deferred until the demarcation stage. In the meantime, there will be no change in the *status quo*. The boundary in rivers should be determined by reference to the location of the main channel; and this should be identified during the dry season. *Regard should be paid to the customary rights of the local people to have access to the river.*" (the passage quoted by Costa Rica is in italics).

[402] CRM, pp. 89-90, para. 4.126.

[403] CRM, p. 90, para. 4.127; see 9 *Martens NRG* (3rd) 805.

5.1.11 The word "however" is telling: it shows that while the normal consequence of leaving the river to France alone would have been that the British subjects would normally *not* have had the right to fish, they got it as a *treaty right*. By contrast, the 1858 Treaty of Limits between Costa Rica and Nicaragua does not provide for such a right.

5.1.12 *Third*, the import of the provisions of the Royal Charter of 1540[404] are a moot question since it was replaced in 1573 by a Royal Charter of Philip II[405] which substantially modified the territorial limits of both provinces and fixed the limits which remained in force during the remaining colonial period until independence in 1821. There is nothing in this later instrument that could be quoted in order to justify any common fishing or any common use of the River by both provinces – quite to the contrary, the Sovereign accorded to Diego de Artieda "license and authority to discover, settle and pacify the aforesaid province of Costa Rica" only, "*on the northern part, from the mouths of the Desaguadero, which are parts of Nicaragua*"[406] (emphasis added). This clearly left the River under the authority of the sole province of Nicaragua.

5.1.13 Whatever might have been the situation between 1540 and 1573, it was deeply modified, and fixed without any change up to the present time, by the Treaty of Limits of 1858. As shown in Chapter 2 above, said Treaty put an end to any Costa Rican claims and recognized the full sovereignty of Nicaragua over the river, with the sole exclusion of the limited rights of navigation conceded to Costa Rica. Those rights do not include any fishing rights in favour of Costa Rican nationals.

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[404] CRM, Vol. 2, Annex 1.
[405] See *supra*, para. 1.2.10-1.2.12. ()
[406] NCM, Annex 86.

5.1.14 A final word on the question of the right to fish by Costa Rican riparians of the San Juan. Costa Rica claims in her *Memorial* (paragraph 4.128) that: "The right of fishing of the residents of the Costa Rican bank of the San Juan for subsistence purposes has been respected by Nicaragua until very recently, when – after the institution of these proceedings – it began to prevent the riparians from engaging in it."

5.1.15 Nicaragua wishes to make quite clear that notwithstanding its rights over the San Juan River, it has never ordered the prevention of fishing for subsistence purposes by Costa Rican riparians. Thus, the first part of the statement by Costa Rica is perfectly true and simply shows the policy of good neighborliness traditionally adopted by Nicaragua. What Nicaragua does not accept is that she has prevented fishing for subsistence purposes even for the short period involved since the instituting of these proceedings in September 2005.

5.1.16 Another question entirely is the matter of fishing for commercial purposes. On these matters the internal regulations of Nicaragua are naturally applicable and are generally enforced.

Section 5.2

Alleged Breaches of an Alleged Right to Re-supply Border Posts

5.2.1 According to Costa Rica, she would enjoy a "right to use the River for re-supply and relief of personnel in border posts" as a corollary of her "rights

and obligations to protect commerce, to safeguard the River and to defend it"[407].

5.2.2 Nicaragua has shown earlier in this *Counter-Memorial*[408], that those so-called "rights and obligations" had not the scope and object claimed by Costa Rica. Moreover, nowhere in the *Memorial* is it explained how this so-called right to re-supply and relieve personnel in the border posts would necessarily ensue from the rights and obligations emerging from the treaties in force. On the contrary:

- the obligation imposed on Costa Rica by Article IV of the 1858 Treaty to contribute to the security of the San Juan and to its defense in case of aggression is expressly limited to the *bank* of the river;
- neither this obligation nor any other argument induced President Cleveland to accept, in his Award, that Costa Rica was vested with a "right of navigation of the river San Juan with vessels of war"[409]; and,
- Costa Rica can of course comply with such an obligation by other means than by parading with weapons on a River that is under the territorial sovereignty of Nicaragua alone[410].

5.2.3 Apart from alleging a "corollary" of rights and obligations to protect the river, Costa Rica does not endeavour to base this alleged "right" to re-supply the border posts by using the River on any other legal argument.

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[407] CRM, p. 85, para. 4.107; see also, para. 4.109, p. 87, para. 4.117, or p. 130, para. 5.128.
[408] See above, paras. 4.2.28-4.2.35.
[409] CRM, Vol. 2, Annex 16, p. 98, "paragraph *Second, Dispositif*".
[410] See above, para. 3.2.9.

Hardly does Costa Rica mention *en passant* a so-called "acknowledgment" of this alleged right "through the agreement signed by the Nicaraguan Minister of Defence in Managua on 30 July 1998"[411], and imply that this could have been a customary right. Neither argument (if they must be treated as such) is well founded.

5.2.4 As for the 1998 "agreement"[412], Nicaragua has shown earlier in the present *Counter-Memorial*[413] that this joint-communiqué between authorities not vested in any case with full powers was finally never accepted by the Nicaraguan Government[414] and never entered into force – even under the hypothesis that it was conceived as a treaty which was not the case. Moreover, even if this document could be of any legal significance, *quod non*, the right claimed by Costa Rica was far from being unqualified:

- a previous notice from the re-supplying vessels was to be given to the Nicaraguan authorities;
- the crew could only carry their "normal weapons" ("*armas de reglamento*") and no mention was made of the transfer of weapons to or from the re-supplied posts or their personnel;
- they were to be accompanied, at Nicaragua's discretion, by Nicaraguan military[415] authorities ("*autoridades militares nicaragüense*"); and
- ought to report to the Nicaraguan posts throughout their journey along the San Juan River.

[411] CRM, p. 85, para. 4.107.
[412] CRM, Vol. 2, Annex 28.
[413] NCM, paras. 3.2.9-3.2.10.
[414] NCM, Annex 68. Resolution of the Republic of Nicaragua's National Assembly on the Joint Communiqué Cuadra – Lizano, 30 July 1998. Ordinary Session # 5. Managua, 18 August 1998.
[415] The word "military" ("militares") is missing in the English translation provided by Costa Rica (see CRM, Vol. 2, Annex 28, pp. 195 and 197, Third point, para. 1).

5.2.5 Significantly, even this joint communiqué of 30 July 1998 does not allude to any traditional or usual such right[416]. And Costa Rica only prudently alleges that before 1998, "Nicaragua had generally respected it"[417] and does not claim that the practice was well-settled and uniform; on the contrary, it accepts that there were "occasional incidents":

- "in the period prior to the Pact of Amity of 21 February 1949"[418];
- "again during the civil war in Nicaragua during the 1980s"[419]; and
- again from 1998 on.

5.2.6 It is also extremely revealing that the President of Costa Rica, requesting the re-establishment of the cooperation between the respective authorities in the zone of the River, did not qualify the previous practice as amounting to a "right" not even as a "general practice", but as a "*modus operandi*"[420].

5.2.7 Not only is this not a "general practice", but also this hesitant and intermittent usage clearly lacks the "evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it"[421]. Exactly as the customary right to fish also alleged by Costa Rica[422], this so-called right to re-supply border posts has no legal basis on any

[416] The declaration by Nicaraguan Minister of Defence Jaime Cuadra given that same day and quoted by Costa Rica (CRM, p. 87, para. 4.116) does not acknowledge the existence of such a practice either: it accept a traditional "transit on the river", but does not link it to any right to re-supply (see CRM, Vol. 5, Annexes 141 and 143).
[417] CRM, p. 85, para. 4.111.
[418] CRM, p. 86, para. 4.115. and CRM, Vol. 2, Annex 23.
[419] CRM, p. 86, para. 4.115.
[420] CRM, Vol. 3, Annex 64. Letter of President of Costa Rica to the President of Nicaragua, 28 June 2000.
[421] ICJ, Judgment, 20 February 1969, *North Sea Continental Shelf Cases*, *ICJ Reports* 1969, p. 44, para. 77; see above, para. 5.1.6.
[422] See above, Section 1.

established custom. If this has happened in the past (as it could happen in the future) then it has been so with the consent of Nicaraguan authorities, as an act of pure tolerance, not as of right.

5.2.8 This "tolerance" was never based on a general consent nor did it amount to acquiescence by the Nicaraguan authorities. Costa Rica's President, Miguel Ángel Rodríguez, recognized that the "*modus operandi*" consisted, in the relevant period, in allowing Costa Rican police forces "to navigate on this waterway....*having previously informed the Nicaraguan authorities in each case*"[423]. Similarly, the President of Nicaragua described the *modus operandi* in question as "the cooperation that Nicaragua offered Costa Rica for the purpose of provisioning their border posts in the lower part of the San Juan River, thus allowing the Costa Rican police authorities to navigate that part of the river, *with the acquiescence, in each case, of the Nicaraguan authorities [con la adquiesencia, en cada caso, de las autoridades nicaragüenses]*"[424]. It will be apparent that the practice invoked by Costa Rica was thus only followed on a case by case basis, and, in each case, with the express consent of the competent territorial sovereign, i.e. Nicaragua.

5.2.9 Indeed, Costa Rica insists that the question of re-supply of police posts must not be presented in terms of a *need* but of a so-called *right*[425]. As shown before, no such right exists. But even from a factual point of view, it is not true that "there are no other practicable means to achieve [the same result] by land" [426] or air. As often recalled by Nicaraguan

[423] CRM, Vol. 3, Annex 64. Letter of 28 June 2000, (emphasis added).
[424] CRM, Vol. 3, Annex 65. Letter of 29 June 2000, (emphasis added); see also CRM, Vol. 3, Annex 67. Letter of 3 August 2000.
[425] See CRM, p. 130, para. 5.128.
[426] CRM, p. 85, para. 4.108.

officials[427], Costa Rica possesses all the necessary roads or good tracks and airplane landing strips to that effect, *not* to speak of evident possibilities to re-supply some less easily accessible posts by helicopter[428].

5.2.10 It is also remarkable, in this regard that the Costa Rican authorities were able to re-supply her border post during the rather long periods of time during which the *modus operandi* did not operate and a re-supply by the waterway was not possible. Also of interest is that Costa Rica deliberately decided not to raise the issue of navigation to re-supply her border posts and to abstain from such activities during the three years during which the situation was frozen following the Alajuela Declaration in 2002[429]. In connexion with the conclusion of said accords, Costa Rica's Minister of Foreign Affairs, Mr. Tovar, underlined that "armed civil guard navigation will not be an issue to be dealt with during the period mentioned in the above paragraph [i.e. three years]"[430]. This shows that, first, the Costa Rican authorities themselves were not convinced about the existence of a "right" to navigate the river for the purpose of re-supplying the border posts[431], and, second, that there exist other ways and possibilities to secure the re-supplying.

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[427] See the quotes in CRM, p. 86, paras. 4.111-4.113, or pp. 129-130, paras. 5.126-5.127.

[428] NCM, Annex 91. Affidavit of Army Colonel Ricardo Sánchez Méndez, ("He knows that the Costa Rican Civil Guard usually re-supplies its posts by land, for which purpose they have feeder roads, and he has even observed that a highway is being built in their territory, running parallel to the San Juan River").

[429] CRM, Vol. 2, Annex 29.

[430] NCM, Annex 45. Note DM-300-02, 26 September 2002.

[431] See also President Pacheco's public declaration of 19 May 2002; "We must understand that it is absurd that a country with no army is fighting over the passage of armed persons on a navigable river that is drying up ..." *La Nación*, 19 May 2002, NCM, Annex 81.

5.2.11 Costa Rican complaints that supply and relief of personnel at certain police posts are very difficult or even impossible[432] seem therefore to be greatly exaggerated. Now, admitting that the prohibition by Nicaragua of the use of the river for re-supplying purposes makes this activity more difficult for Costa Rica, it would not entail any responsibility for Nicaragua. As explained by the International Law Commission in a different context, in its commentary of Article 18 of the Articles on State Responsibility, on the effect of coercion of another State, "[i]t is not sufficient that compliance with the obligation is made more difficult or onerous ... It is not enough that the consequences of the coerced act merely make it more difficult for the coerced State to comply with the obligation"[433].

5.2.12 Indeed this does not correspond to the exact situation in the present case, since (i) Nicaragua has no intention to coerce Costa Rica whatsoever; and (ii) the decisions of the Nicaraguan authorities do not infringe any obligation bearing upon them. However, *mutatis mutandis*, it is certainly true that the same idea can be transposed here: Costa Rica cannot complain of the exercise by Nicaragua of her sovereign authority over the waters of the San Juan river insofar as this exercise does not breach a right belonging to her neighbouring State, even if it might make the re-supplying or relief of some post guards "more difficult or onerous".

[432] CRM, pp. 127-128, para. 5.121-5.122.

[433] Report of the International Law Commission of the Work of its Fifty-Third Session, (23 April-1 June and 2 July-10 August 2001), *Official Records of the General Assembly, Fifty-Sixth Session, Supplement No. 10* (A/56/10), p. 166, para. 2) of the commentary.

Section 5.3

Alleged Breaches of the Alleged Right of Costa Rican Vessels not to Carry the Flag of Nicaragua in the Waters of the San Juan River

5.3.1 The Government of Costa Rica has expressed its disagreement with the requirement of Nicaraguan authorities that Costa Rican vessels should carry the Nicaraguan flag while navigating the San Juan River. In the *Memorial*, she affirms that "Costa Rica's perpetual rights (...) entitle Costa Rican vessels to carry the Costa Rican flag while navigating..."[434]

5.3.2 International practice confirms that vessels authorized to navigate the territorial waters of another State – and such is the case of the San Juan River, should carry the flag of the territorial or recipient country.

5.3.3 Nicaragua has always maintained that such obligation is derived not only from international courtesy, but from international practice. In a Note to the Government of Costa Rica, the Government of Nicaragua recalls that:

> "...as regards international maritime navigation, every ship entering the sovereign waters of another State raises the flag of that State, in keeping with international custom and courtesy, so that the latter is hoisted higher than that of the vessel's national flag. This act is considered one of respect and recognition of the exercise of sovereignty on the said waters. If the vessel does not hoist the flag of the State in whose waters it finds itself, it may not raise its the national flag"[435].

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[434] CRM, para. 5.91.

[435] CRM, Vol. 3, Annex 72. Note from the Minister of Foreign Affairs of Nicaragua to the Minister of Foreign Affairs and Worship of Costa Rica on 3 August 2001. See also NCM para. 1.3.33.

5.3.4 *In conclusion*, it appears that none of the rights other than the right of free navigation on the river San Juan de Nicaragua "with articles of trade [*con objetos de comercio*]" alleged by Costa Rica exists and, *a fortiori*, belongs to that country:

(i) Nicaragua has tolerated fishing by Costa Rican residents for subsistence purposes but this tolerance has not created any customary right for the Claimant, nor does such a right exist under general international law;

(ii) similarly, during certain periods, Nicaragua has accepted the re-supplying of certain Costa Rican border posts by the river, but this was done on a case by case basis and, in each case, with the express consent of Nicaragua, which keeps full sovereignty over the river; and

(iii) for this very reason, Costa Rican boats must carry the Nicaraguan flag when they navigate on the river San Juan de Nicaragua.

CHAPTER 6

COSTA RICA'S RESPONSE TO NICARAGUA'S POLICY OF COOPERATION AND GOOD NEIGHBOURLINESS

The Attempts by Costa Rica to Revise the 1858 Treaty by Indirect Means

INTRODUCTION

6.1.1 Nicaragua has long had a policy of cooperation with her neighbors, has regularly extended courtesies to them, and followed a principle of good neighborliness toward countries in the region. Nicaragua follows these policies because she is convinced they are principled and right, not out of any sense of legal obligation. Unfortunately, Costa Rica has repaid the good will shown by Nicaragua by repeatedly, in a variety of sectors, engaging in patterns of conduct designed to enlarge her existing rights or even to establish new ones.

6.1.2 This Chapter will offer illustrations of instances in which Nicaragua has attempted to be accommodating toward Costa Rica, only to be repaid by assertions of new rights by the latter (Section 1). It will then focus upon the issue of "facilitation of traffic on the river" raised by Costa Rica in her *Memorial*.[436]

Section 6.1

Nicaragua's General Policy of Cooperation

6.1.3 This Section will offer, for purposes of illustration, two examples of the way in which Costa Rica responds to Nicaragua's policy of cooperation and good neighborliness. The responses by Costa Rica are part of a

[436] CRM, paras. 4.121-4.123.

strategy designed to enlarge her rights of navigation and other forms of use of the San Juan de Nicaragua River. In these instances and others, Costa Rica has taken advantage of Nicaragua's good-faith efforts to accommodate Costa Rican requests. Costa Rica's pattern of conduct, or *modus operandi*, in these cases has been as follows: She first requests that Nicaragua grant her permission, within the framework of courtesies and cooperation, to engage in a given form of conduct on the river. Nicaragua grants the requested permission. This process is repeated several times. Costa Rica then engages in the conduct without requesting or receiving any form of permission. Nicaragua responds by enforcing her laws and protecting her sovereign rights under the 1858 Treaty and the Cleveland Award. Then Costa Rica accuses Nicaragua of violating the 1858 Jerez-Cañas Treaty.

6.1.4 This Section will describe two instances of this pattern of conduct, one relating to armed navigation on the San Juan and the other involving an annual pleasure-boating rally. In each of these cases, Costa Rica has attempted to convert activities it could engage in only with Nicaragua's permission into activities it may engage in as of right.

A. ARMED NAVIGATION

6.1.5 This story begins with the aftermath of the Nicaraguan civil strife in the 1980s and ends with events in the early part of this century. Unfortunately, however, the pattern of Costa Rican conduct described here has continued.

6.1.6 In the context of the security-related problems relating to the remnants of the irregular forces, on 8 September 1995 the Nicaraguan Army and the Costa Rican Ministry of Public Safety signed a Joint Communiqué,

> "[w]ith a view to complying with the National Defence missions, in addition to those of the Defence of Territorial Integrity, Independence and Sovereignty conferred by both countries' respective Constitutions and, with the aim of joint operations that contribute to the peace and stability of the border sectors common to both nations."[437]

6.1.7 By virtue of this Communiqué, the forces of the two States agreed to "coordinate, as of this date, the operational plans that involve our authorities and allow for the necessary development of joint, parallel patrolling at the border of both countries... following the exchange of information and planning carried out by both parties."[438]

6.1.8 It will be noted that this Communiqué contemplates normal activities regarding neighborly cooperation in border areas. It in no way focuses upon the San Juan of Nicaragua River or implicates its juridical regime.

6.1.9 However, after receiving appropriate requests from the Costa Rican Authorities, Nicaragua allowed vessels of this State to supply her border posts during the period 1995-1998. These permits were suspended when Costa Rica began to abuse of this relaxation of controls by, among other things, patrolling the River in order to intercept illegal immigration.

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[437] CRM, Vol. 2, Annex 27. Joint-Communiqué, Cuadra Lacayo–Castro Fernández, 8 September 1995.
[438] *Ibid.*

6.1.10 It is interesting to note that when Nicaragua suspended the navigation permits it had been granting Costa Rica, due to the manner in which the limited permission to navigate had been violated, the Yearbook of the Costa Rican Ministry of Foreign Relations and Worship Affairs for 1998-1999 announced that it would prohibit the navigation of vessels belonging to the Nicaraguan armed forces on the Colorado River.[439] This confirms Costa Rica's attitude that navigation on the San Juan to supply border posts was permissive only, not a matter of right, for which Costa Rica could extend or deny like courtesies with respect to navigation on the Colorado River, both banks of which are in Costa Rican territory.

6.1.11 Despite Nicaragua's withdrawal of permission, in 1998 the Ministry of Tourism of Nicaragua discovered a heavily armed Costa Rican patrol navigating on the lower San Juan River without permission from Nicaragua. The press described this situation under banner headlines on their front pages.

6.1.12 In his speech to the Organization of American States in 2000, quoted at length in Costa Rica's *Memorial*,[440] Minister Rojas of Costa Rica also made reference to the invasive functions of these vessels, which are without any basis in the 1858 Treaty or the Cleveland Award, including the prevention of "illegal immigration, drug trafficking and other aspects involved in border control,"[441] using Nicaraguan waters. As noted earlier, Costa Rica is of course entirely free to take whatever measures of

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[439] Yearbook of Ministry of Foreign Affairs of Costa Rica, 1998-1999, p. 35. Annual Report of the Ministry of Foreign Affairs and Worship, presented to the Legislative Assembly in May 1999. Roberto Rojas López, Minister of Foreign Relations and Worship. NCM, Annex 78.

[440] CRM, para. 4.93.

[441] CRM, Vol. 6, Annex 228. Ordinary Session of the OAS, 8 March 2000, approved in the session of 18 May 2000.

prevention she deems necessary in respect of these illegal activities – but within her own territory, not in that of Nicaragua. As indicated in Chapter 3, Section 1, mere convenience does not create rights.

6.1.13 On 15 July 1998, the Minister of Home Affairs, Police and Public Safety of Costa Rica, Juan Rafael Lizano, sent a note to the Nicaraguan Minister of Home Affairs, José Antonio Alvarado, once again raising the matter of re-supplying and re-staffing border posts:

> "our public forces have been hindered from navigating on the San Juan River carrying regulation weapons in activities related to the provisioning and changing of the guard at the posts located on the right bank of said rivers, in Costa Rican territory... I reiterate that... the only means of access in some cases is the San Juan River, reason for which the activity of provisioning and changing our border guards finds itself absolutely impaired by the unilateral decision taken by Nicaraguan authorities. As you know, the inhospitable and dangerous border zone obliges our police to carry regulation weapons for their personal safety and that of the vessel carrying supplies."[442]

6.1.14 The note goes on to say that "the vessels used for the activities described earlier do not bear artillery and the weapons used by our police officers form part of their endowment of personal supplies, and in no way run counter to the bilateral international norms in force regarding the use of this waterway."[443] However, neither here nor elsewhere in the note did Minister Lizano attempt to characterize these craft as vessels of the revenue service or link their activities with articles of trade, the *sine qua non* for navigation by Costa Rican public vessels on the San Juan. Once again, the argument seems to be that because Costa Rica decided to

[442] NCM, Annex 42. Note of 15 July 1998.
[443] *Ibid.*

establish border posts at locations where "the only means of access... is the San Juan River", Nicaragua must allow Costa Rica to navigate on the river with public, armed vessels to re-provision them. But the fact that Costa Rica has put herself in a difficult situation does not oblige Nicaragua to come to her aid, much less create rights in Costa Rica to navigate in Nicaraguan territory where none otherwise exist.

6.1.15 On 28 August 1998 the interim Nicaraguan Minister of Foreign Affairs reminded his Costa Rican counterpart of the limited nature of Costa Rica's right of navigation on the San Juan: "by means of the Jerez-Cañas Treaty, Nicaragua granted Costa Rica a right of free navigation *con objetos de comercio* [with articles of trade], an not an unrestricted right. Any form of navigation undertaken by Costa Rica in the waters of the San Juan River that does not correspond to navigation *con objetos de comercio [*with articles of trade]... should be expressly authorized by Nicaragua... "[444]

6.1.16 The President of Costa Rica appears to have accepted in the year 2000 that this was the correct position. On 28 June 2000 Costa Rican President Miguel Ángel Rodríguez wrote to the President of Nicaragua, stating that:

> "...Costa Rica's intention in this respect is that the *modus operandi* that functioned temporarily prior to July 1998, by which it was allowed to navigate on this waterway with vessels carrying Costa Rican police, having previously informed the Nicaraguan authorities in each case, be reestablished. For its parts, Costa Rica is more than willing to not navigate the San Juan River with police carrying their police equipment without having informed the

[444] CRM, Vol. 3, Annex 51. Carlos Roberto Gurdian to Don Roberto Rojas López, 28 August 1998.

authorities of Nicaragua in that area previously, each time they patrol the San Juan...."[445]

6.1.17 The President of Nicaragua replied positively on the next day, 29 June 2000, stating that he was:

> "willing to reestablish the cooperation that Nicaragua offered Costa Rica for the purposes of provisioning their border posts in the lower part of the San Juan River, thus allowing the Costa Rican police authorities to navigate that part of the river, with the acquiescence, in each case, of the Nicaraguan authorities. Said navigation would not involve, as it did not do previously, the exercising of any act of jurisdiction, neither will it adversely affect Nicaragua's authority as territorial sovereign.
> Nicaragua's willingness to this effect is based on the desire to strengthen the ties of friendship and cooperation that should prevail between our sister and neighbouring nations, which share common historic backgroung."[446]

6.1.18 The Nicaraguan President thus made clear Nicaragua's willingness to renew the courtesies it had previously extended, *ex gratia*, to Costa Rica, while being careful to state explicitly that Nicaragua's permission would be required in each case, and that the navigation in question would not involve the exercise of any jurisdiction by Costa Rica on the river or otherwise impair the full exercise of Nicaragua's sovereignty.

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[445] CRM, Vol. 3, Annex 64. President Miguel Miguel Ángel Rodríguez to President Arnoldo Aleman Lacayo, 28 June 2000.
[446] CRM, Vol. 3, Annex 65.

6.1.19 While nothing came of it immediately,[447] the exchange of notes between the two presidents holds several lessons. First, the President of Costa Rica accepted in his note of 28 June 2000 that Costa Rica did not have a right to navigate on the San Juan with "police and their police equipment" without informing "Nicaraguan authorities...each time they patrol the San Juan."[448] Indeed, in a later note he stated, referring to the rights of Costa Rica and Nicaragua under the 1858 Treaty and the Cleveland Award, that "since 1888 nothing has occurred to change this legal status"[449] Second, it is clear from the 29 June 2000 note of the President of Nicaragua that Costa Rica had no right to navigate on the San Juan for the purpose of provisioning border posts but that Nicaragua was willing to consider allowing Costa Rican police authorities to travel on the lower San Juan for the purpose of provisioning the posts on that part of the river so long as they were given permission in each case by the Nicaraguan authorities.[450] And third, in Costa Rica the exchange of notes between the two presidents was submitted to the Fourth Constitutional Court, which indicated that it found nothing in the note of 28 June 2000 sent by President Rodríguez that ran counter to Costa Rica's position:

> "VIII. – Conclusion. On the basis of the foregoing arguments, this Court concludes that the diplomatic note

[447] See the note of the President of Costa Rica to the President of Nicaragua of 29 July 2000, CRM, Vol. 3, Annex 66, (stating that "it has still not been possible to reach an agreement on the reestablishment of the *modus operandi*, or on the procedures by which Costa Rica, in each case, would inform Nicaragua, respectively, of the transit of Costa Rican police on the lower San Juan.") and the response of the President of Nicaragua of 3 August 2000, CRM, Vol. 3, Annex 67 (stating that "leaving pending situation that require, on our part, the concurrence of other Powers of State, in accordance with our internal legislation.").

[448] CRM, Vol. 3, Annex 64.

[449] Note of the President of Costa Rica to the President of Nicaragua of 29 July 2000, CRM, Vol. 3, Annex 66

[450] See also the Note of the President of Nicaragua to the President of Costa Rica of 3 August 2000. CRM, Vol. 3, Annex 67, in which the former indicates that "Said consent, in each of the cases, is to be expressed by the national authorities fully exercising their sovereign attributes."

sent by the President of the Republic of Costa Rica on 28 June 2000 to the President of Nicaragua, is not unconstitutional, and consequently declares the present action [of unconstitutionality] without basis, dismissing it from the Court."[451]

6.1.20 Finally, the rich diplomatic history of the parties shows that it would be entirely illogical to suppose that a right of such importance as one of armed navigation by Costa Rica in Nicaraguan territory would not have been directly and clearly established in the Treaty if this had been the intent of the parties. The long history of treaty relations based on the 1858 Treaty between the two countries clearly shows that whenever Costa Rica and Nicaragua mutually intended to grant a right, that right would be expressly stated. Thus, for example, the 1869 Montealegre–Jiménez Treaty, in Article 12, [452] and the Carazo–Soto Treaty of 26 July 1887[453] (neither of which was ratified by Nicaragua[454]) contained clauses regarding fiscal matters but clearly excluded armed forces.

6.1.21 Further evidence of this practice of precise and explicit statement of treaty rights is provided by former President[455] of Costa Rica Don Ricardo

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[451] NCM, Annex 66.

[452] Montealegre-Jimenez Treaty of 18 June 1869; Article 12 "...The Republic of Costa Rica may open such roads even in Nicaraguan territory and navigate on the rivers in that territory, for the purpose of transporting and introducing its agricultural, industrial and commercial products to the canal. *Nicaragua may not impede in any way whatsoever the opening of said roads*, nor the navigation of said rivers; and in the mouths of these rivers, Costa Rica may establish customs and warehouses at the expense of the State... after having informed the Government of Nicaragua; *in no case, however, may Costa Rica place armed forces there*, but only the employees necessary for the custody and security of the country's customs and warehouses, and vice versa..." (Emphasis added). NCM, Annex 8.

[453] Carazo-Soto Treaty, 26 July 1887, CRM, Vol. 2, Annex 15.

[454] NCM, Annex 34. Telegram of 28 September 1887, from Pedro Gonzalez, Minister of Foreign Affairs of Nicaragua, to the Minister of Foreign Affairs of Costa Rica.

[455] President of the Republic of Costa Rica for three presidential periods: 1910-1914, 1924-1928 and from 1932-1936.

Jiménez Oreamuno. In his memoire *Su pensamiento*, President Jiménez Oreamuno wrote of the Cleveland Award:

> "The New York [news media] criticizes the decision because it does not give us the right to navigate on the San Juan with vessels of war. I would say that this criticism is unfounded. The emphasis with which Article 6 of the treaty allocates that Nicaragua shall have *dominion and sovereignty* over the waters of the river shows that the desire was to establish differences between the rights that Nicaragua and Costa Rica agreed to have over said waters. If merchant ships and vessels of war from both Republics freely and indistinctly navigate the river, then how is this shown? What practical effect will be implied in the solemn declaration that dominion and sovereignty over the waters corresponds to Nicaragua? The rest of the article corroborates this meaning. It was seen that this absolute affirmation would take away from Costa Rica any and all usage of the river, but because this was not the intention, an exception was immediately added, stipulating that Costa Rica would have perpetual rights of free navigation over said waters with 'articles of trade'. If an exception in favor of vessels of war does not also appear in the article, then the inference is logical: Costa Rica was not believed to hold such right. The argument derived from Article 4, about the obligation assumed by Costa Rica to take part in the river's defense in the event of foreign aggression, was seen as much less than conclusive. Costa Rica shall take part in this defense when the foreseen hypothesis takes place.
>
> Meanwhile, in full peace, without the slightest risk of hostilities, to pretend that our ships of war navigate the river in order to take part in a defense provoked by no attack is to arrive at the subtlety with which the Nicaraguans have examined the treaty. Through Article 4, Costa Rica was obliged to defend the San Juan as an ally of Nicaragua. When has one seen that an ally, being an ally, purports to have the right, in the absence of war, to transit

with its troops the allied territory to navigate with warships her interior waters or station armadas in her ports?"[456]

6.1.22 Clearly, former President of Costa Rica Jiménez Oreamuno acknowledges here not only the limited sense of the rights granted to Costa Rica with respect to navigation with articles of trade, but also and especially the fact that Costa Rica cannot claim for herself any other or different rights that were not expressly stipulated in the treaty.

6.1.23 To conclude this subsection, the practice and other material reviewed above demonstrates a recurring pattern of conduct by Costa Rica that is, from all external appearances, designed to expand existing rights of navigation on the San Juan or create new ones. First, Costa Rica requests permission from Nicaragua to navigate on the San Juan in a manner that is inconsistent with the 1858 Treaty. Then she engages in such navigation without Nicaragua's permission. Finally, when Nicaragua protests the latter conduct Costa Rica alleges that Nicaragua has violated a right contained in the 1858 Treaty and the Cleveland Award. But the practice also shows that each time she has sought to create new navigational rights, Costa Rica has ultimately accepted Nicaragua's assertions of her own rights under the Treaty and Award, assertions that Nicaragua has consistently made whenever Costa Rica has exceeded her rights under the juridical regime of the river.

[456] Don Ricardo Jiménez Oreamuno, *Su pensamiento*, Editorial Costa Rica, San José, Costa Rica 1980 p. 55.

B. PLEASURE BOATING

6.1.24 Pleasure boating is, of course, a far less serious matter than armed navigation. Nevertheless, even pleasure boating is an activity that must respect principles of sovereignty and territorial integrity. The pattern of Costa Rican conduct that will be described in this subsection shows how that country uses even recreational activity to try to create, incrementally, new navigational rights.

6.1.25 This particular practice began in 1993, when the Nautical Sports Association (ADENA), a private, non-profit entity, applied to the Embassy of Nicaragua in San José for permission to hold its nautical rally on the San Juan River.[457] Nicaragua granted authorization by means of a special document signed by the Nicaraguan Ambassador to Costa Rica and by the Director of Commerce, Cooperation and Tourism at the diplomatic mission, which stated in part as follows:

> "The Ministry of Foreign Affairs acknowledge receipt of said request and declares that in exercise of the sovereignty and supreme control that Nicaragua exercises on the San Juan River, and in answer to the request presented, the Chancellery of the Republic [of Nicaragua], on this occasion, has decided to grant the corresponding AUTHORIZATION for the holding of the tourist Rally with regard to the Trinidad – El Delta stretch.
> Further, it is necessary to inform the Costa Rican Nautical Association of Sport (ADENA) that it will be the responsibility of the organizers of the event, as well as of the participants in it, to properly handle garbage, plastic waste and oil, to avoid contamination and any damage to the environment in which the competition will be held.

[457] NCM, Annex 39. ADENA note from Julio Martin (Director) to the Ambassador of Nicaragua, Alfonso Robelo, 27 September 1993.

> We hope that in the future any similar request will be presented sufficiently in advance in order to analyze them and give an adequate reply" [458]

6.1.26 This practice continued for seven years, from 1993 to 1999. On each occasion, ADENA applied for the pertinent permits and they were granted by Nicaragua.

6.1.27 Then, in 2000, ADENA decided to navigate without permission. On 26 October 2000, Foreign Minister Roberto Rojas of Costa Rica denounced the events which allegedly took place on 21 October, when military authorities of the Republic of Nicaragua "precluded the realization of the VII International Nautical Rally Sarapiquí River / San Juan River, on the waters of the San Juan River."[459] The note declared that this act constituted a serious violation of Costa Rican rights to free navigation as set forth in the Jerez-Cañas Treaty, the Cleveland Award and other instruments governing the matter.

6.1.28 This protest of Costa Rica, relating to an activity that had nothing to do with articles of trade (or even revenue vessels), clearly betrays Costa Rica's strategy of attempting to transform permission granted in the framework of cooperation and good neighborliness into an obligation derived from the 1858 Treaty.

6.1.29 In the case of the annual pleasure boating rallies, however, the Costa Rican strategy was interrupted by a change of government. In 2003 ADENA

[458] NCM, Annex 40. Note of 8 October 1993.
[459] NCM, Annex 44. Note DM-332-2000, 26 October 2000.

once again applied for permission from the Embassy of Nicaragua to hold its rally by means of notes.[460]

6.1.30 The Government of Costa Rica, which had protested to Nicaragua in the year 2000, could not possibly have been ignorant of these petitions, considering that the letters sent by ADENA, such as that dated 8 June 2005,[461] were sent with copy to the Costa Rican Minister of Foreign Relations, as well as to the Minister of Public Safety, both institutions that were direct actors in the protests of the year 2000. Yet it did not maintain that the pleasure boats participating in the ADENA rally had any right to navigate on the San Juan.

6.1.31 To conclude this Subsection, the ADENA case serves once again to illustrate the Costa Rican strategy of "fabricating" rights. First permission is requested, then action is taken without permission. Faced by the logical negative reaction on the part of Nicaragua, Costa Rica thereupon alleges a violation of her rights under the 1858 Treaty.

CONCLUSION

6.1.32 This Section has provided illustrations of the manner in which Costa Rica repays Nicaragua's efforts at cooperation and, generally, being a good neighbor: with a strategy designed to create rights of navigation on the San Juan de Nicaragua River that are provided for neither in the 1858 Treaty

[460] For example, in a noted dated 14 July 2003 ADENA requests "assistance in obtaining the authorization of the Government of your country through its different Ministries, specifically the Immigration and Naturalization Service, the Army, the Ministry of Natural Resources and any other you may consider appropriate. Likewise, were it possible, and considering that this is a sporting event, we request that you intercede on our behalf so we might be exempted from charges for visas (Migration) and clearance certificate fees (Army)." NCM, Annex 46.

[461] Letter of 8 June 2005 from the President of ADENA to Dr. Francisco Fiallos Navarro, Ambassador of Nicaragua to Costa Rica, NCM, Annex 49.

nor in the Cleveland Award. The Section has focused on two categories of conduct – armed navigation and pleasure boating – but others could be cited as well. In each of these areas, Costa Rica has attempted to convert activities it could engage in only with Nicaragua's permission into activities it may engage in as of right. The same situation obtains in respect of the present case. Costa Rica consistently attempts to enlarge the carefully restricted navigational rights she enjoys under the 1858 Treaty and the Cleveland Award. Nicaragua's policies of cooperation and good neighborliness should not be repaid by efforts to acquire rights in her territory. Certainly, nothing either Costa Rica or Nicaragua has done or failed to do to date establishes the rights Costa Rica claims.

6.1.33 More generally, Nicaragua's good-faith efforts to cooperate with Costa Rica, specifically in the border zone, are illustrated by the Alajuela Declaration of 26 September 2002, and subsequent related communications. In her *Memorial*, Costa Rica acknowledges that this instrument "was intended to permit other areas of the bilateral agenda to be advanced, regardless of the ongoing dispute relating to the San Juan"[462], and that it "was an important step towards improving bilateral relations."[463] Indeed, in the Declaration's Preamble the Foreign Ministers of the two countries record that they "Note[] the importance of deepening cooperation between the two States for the sustainable development of the border region, including the establishment of a special development fund;" and "Bear[] in mind that the strengthening of our good-neighbourly relations is essential to the energetic promotion of Central American

[462] CRM, para. 3.44
[463] *Ibid*, para. 3.45.

economic and cultural integration and the sustainable human development of our countries for the benefit of our peoples;..."[464]

6.1.34 Costa Rica further acknowledged, through a note from her Foreign Minister to the Foreign Minister of Nicaragua of 28 September 2005, that at the time of the Alajuela Declaration the two countries "agreed to promote... [*inter alia*], a Programme of border development to strengthen the economic and social conditions of the inhabitants of an area that should always be one of cooperation and never one of confrontation."[465] The Foreign Minister of Costa Rica then recognized that, "Today, as a result of an atmosphere of respect, fraternity and mutual trust, we have made those aspirations a reality of opportunities, that we must continue increasing."[466] (He then proceeded to inform Foreign Minister of Nicaragua that Costa Rica was bringing the present case before the Court.)

6.1.35 In these communications Costa Rica clearly recognizes the spirit of cooperation and good neighborliness displayed by Nicaragua in relation, *inter alia*, to the border area, extending up to the filing by Costa Rica of the Application in the present case. That spirit, in fact, continues to the present day. These documents thus demonstrate, contrary to the impression Costa Rica seeks to create, Nicaragua's sensitivity toward, and determination to take measures to address, the social and economic needs of the population living in the border area, including those in the vicinity of the San Juan de Nicaragua River. Some of these measures are being taken, in the form of concrete projects, and yielding positive results.

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[464] Alajuela Declaration, Caldera -Tovar, 26 September 2002, CRM, Vol. 2, Annex 29.
[465] Note from the Minister of Foreign Affairs of Costa Rica to the Minister of Foreign Affairs of Nicaragua, 28 Sept. 2005. CRM, Vol. 3, Annex 80.
[466] *Ibid.*

6.1.36 Unfortunately, Costa Rica, for her part, did not indicate any disposition to engage in dialogue concerning the matters referred to in the Alajuela Declaration. Instead, she only sought an extension of the Declaration and never complied with the commitment in its paragraph 1 to facilitate the "free movement across their common border by means of a temporary entry or exit permit"[467] or eliminated the visa fee as called for in paragraph 2.

6.1.37 This record suggests, once more, that Nicaragua's efforts to cooperate in good faith with her neighbor for their mutual benefit have been repaid not with corresponding cooperation by Costa Rica but instead by a single-minded focus on Costa Rica's interests – here, on the aspect of the Alajuela Declaration that Costa Rica regarded as being to her individual benefit.

Section 6.2

Nicaragua's Facilitation of Traffic on the River

6.2.1 Costa Rica contends in her *Memorial*[468] that a 1956 agreement between the two countries provides "evidence of the existence of the right of navigation for the purpose of transport of passengers in accordance with the Treaty of Limits and the Cleveland Award and constitutes an additional basis for the improvement of the conditions for its exercise."[469] This allegation ignores entirely not only the terms of the 1956 treaty but also its historical context and its object and purpose, which have to do with regional security.

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[467] CRM, Vol. 2, Annex 29.
[468] CRM, paras. 4.121-4.123.
[469] CRM, para. 4.122.

6.2.2 The impetus for the 1956 treaty was the presence of irregular forces operating in the territories of Costa Rica and Nicaragua in an effort to destabilize their respective governments. The Agreement's preamble indicates that it was concluded "in the presence of the Chairman and other Members of the Council of the Organization of American States."[470] Indeed, as further indicated in the preamble, the Council of the OAS, acting provisionally as the Organ of Consultation, had appealed to the two Governments to sign the Montevideo Convention on the Rights and Duties of States in the Event of Civil Strife.[471] Also in the preamble, the two countries "recogniz[e] the effective efforts to bring about peace made by the Council of the [OAS] acting provisionally as the Organ of Consultation"[472]

6.2.3 In short, the preamble of the Agreement makes clear that the object and purpose of the treaty is to strengthen cooperation in order to prevent civil strife. There is nothing in the preamble indicating that one of the desiderata for concluding it was to create any new rights of either party in the territory of the other. In fact, the clear implication is the opposite, in view of the Agreement's object of forestalling transborder armed activities. For example, Article II provides in relevant part as follows:

> "The two Parties shall, in so far as possible and with the utmost diligence, arrange for the supervision of their common border as a means of preventing the illegal entry

[470] Agreement between the Governments of the Republics of Costa Rica and Nicaragua Pursuant to Article IV of the Pact of Amity signed on 21 February 1949, 9 January 1956, Preamble, 1465 U.N.T.S. 233, CRM, Vol. 2, Annex 24.
[471] 134 L.N.T.S. 45.
[472] CRM, Vol. 2, Annex 24.

of either weapons or armed groups from the territory of one of the Parties into the territory of the other."[473]

6.2.4 The focus of the Agreement on insurrectionary activities is also illustrated by Article III, whose first paragraph provides: "Each Party undertakes to apply the necessary measures to prevent revolutionary movements from being fomented or from rising up in its territory against the other Party."[474] If this is what motivated the parties to conclude the Agreement, why would they create new rights, in "enterprises which are the nationals of the other [Party]"[475] or otherwise, to transport individuals into their territories? Such a motivation is against all logic.

6.2.5 In addition, the Agreement regulated such issues as territorial asylum and extradition. Article II, an excerpt from which is set forth above, also established a scheme of cooperation between the border authorities of the two countries. Border Committees were set up, whose functions included coordination of joint surveillance along the common border and prevention of any incident that might disturb the harmony between the two States.

6.2.6 Apart from the fact that this agreement deals with civil strife and other forms of armed conflict, not commerce on roads or waterways, the provision quoted by Costa Rica as the basis for her claimed right, Article I of the 1956 Agreement, fails utterly to support Costa Rica's contention. Article I reads as follows:

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[473] CRM, Vol. 2, Annex 24.
[474] *Ibid.* Article III, para. 1.
[475] *Ibid*, Article I.

> "The two Parties, acting in the spirit which should move the members of the Central American family of nations, shall collaborate to the best of their ability in order to carry out those undertakings and activities which require a common effort by both States and are of mutual benefit and, in particular, in order to facilitate and expedite traffic on the Pan American Highway and on the San Juan River within the terms of the Treaty of 15 April 1858 and its interpretation given by arbitration on 22 March 1888, and also in order to facilitate those transport services which may be provided to the territory of one Party by enterprises which are nationals of the other."[476]

6.2.7 It is difficult to see how this provision supports a claimed right in Costa Rica to transport passengers on the San Juan. The obligation to "facilitate and expedite traffic on the ... San Juan River within the terms of the [1858 Treaty and Cleveland Award] is just that: an obligation to *facilitate* and *expedite* any traffic that may take place on the river "*within the terms of*" – i.e., as permitted by – the Treaty and Award. It is not an obligation to *permit* traffic that is not allowed by those sources of law. Likewise, the obligation to "facilitate those transport services which may be provided to the territory of one Party by enterprises which are nationals of the other" creates no new rights. It is an obligation to "facilitate" services which may be provided pursuant to the juridical regime of the river.

6.2.8 Costa Rica maintains: "Clearly, the 1956 Agreement imposes an autonomous obligation of best efforts in order to facilitate transport in the San Juan on both parties, which necessarily include[s] navigation by Costa Rican enterprises of transport."[477] Unfortunately for Costa Rica, this argument does not take her very far. All it says is that Nicaragua has an "obligation of best efforts in order to facilitate transport in the San Juan"

[476] CRM, Vol. 2, Annex 24.
[477] CRM, para. 4.123.

in respect of vessels that are lawfully there – i.e., vessels carrying articles of trade, or accompanying such craft. Nicaragua has always done this in any event, irrespective of the 1956 Agreement, which creates no new rights of navigation.

6.2.9 Costa Rica has a propensity to use circumstances of this kind, which are governed by the Montevideo Convention on the Rights and Duties of States in the Event of Civil Strife,[478] as a vehicle for her efforts to expand her rights under the 1858 Treaty and the Cleveland Award. It is therefore not surprising that Costa Rica seizes upon the 1956 Agreement despite the fact that it deals with security issues that bear no relation to the 1858 Treaty or the Cleveland Award.

6.2.10 At various places in her *Memorial,* Costa Rica seeks to leave the impression that the local population living in the vicinity of the right (Costa Rican) bank of the San Juan, and others on Costa Rican territory, regularly uses the river for transportation, and that Nicaragua has allowed this to occur without requiring that the persons in question obtain permission.[479]

6.2.11 This is not the case. Consistent with the 1858 Treaty and the Cleveland Award, Nicaragua has consistently required that those from Costa Rica

[478] 134 L.N.T.S. 45.

[479] CRM, e.g., para. 2.06, at p. 8, See also Note of Roberto Tovar, Foreign Minister of Costa Rica, to his Nicaraguan counterpart of 20 October, 2005, referring to certain measures that came to hamper and in some cases prevent "daily navigation on the San Juan River to which they have always been the accustomed." CRM, Vol.3 Annex 81. The Foreign Minister of Nicaragua replied to this Note on 9 November, 2005, emphasizing that Nicaragua adheres strictly to the legal regime of the San Juan de Nicaragua River consisting of the 1858 Treaty and the Cleveland Award, rejecting the idea that border courtesies granted to facilitate local traffic could ever constitute a legal precedent, and recalling that respect for territorial sovereignty, with all the powers and rights inherent in it, forms the cornerstone of international relations; CRM, Vol. 3 Annex 82.

obtain authorization to cross into her territory, whether on the San Juan or elsewhere. Costa Rica has repeatedly recognized this need to obtain permission. Thus, this newly claimed right of "communication" is excluded both by the legal regime of the river – the 1858 Treaty and the Cleveland Award – and by practice. Moreover, Nicaragua has not withheld permission, where the request to transit the San Juan was reasonable. The following examples illustrate these points.

6.2.12 In a note of 19 June 2006, Dr. Thais Ching Zamora, Director of the Costa Rican Social Security Institute, a Costa Rican Public Sector Entity, requested permission from Nicaraguan Ambassador to Costa Rica, Leopoldo Ramírez Eva, *to provide public health services to the following communities close to the border: Tambor, Fátima and San Antonio. The request stated*:

> "We hereby request authorization from the Government of Nicaragua so that officials from the Health Unit of the Costa Rican Social Security Institute at Puerto Viejo de Sarapiquí may navigate the San Juan River to provide healthcare services to the communities of Tambor, San Antonio and... Due to the nature of our objective, we request that the issuance of a 6-month permit be considered". [480]

6.2.13 Similarly, the Christian and Missionary Alliance of Horquetas wrote Nicaraguan Ambassador Leopoldo Ramírez Eva requesting *permission to navigate a "small track" of the River San Juan to visit schools at Tambor and Remolinito* . The Note states:

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[480] NCM, Annex 51. Note of 19 June 2006, from Dr. Thais Ching Zamora, Director of the Costa Rican Social Security Institute, in Puerto Viejo, Sarapiquí, North Central Region, no. 358-2006.

> "Our organization "Comunidad Alianza Cristiana y Misionera" is located at Horquetas de Sarapiquí and we are interested in carrying out missionary work that includes social assistance in the schools of Tambor and Remolinito and we have scheduled a trip for 7 July 2006. Since we must navigate a short distance that corresponds to the San Juan River, we request permission from you to make this journey *because we want to abide by your strict regulations in said zone.*
> We do not have set dates for our subsequent journeys, but we would like to have permission to navigate that short distance and we ask for a waiver on charges inasmuch as the purposes for making use of that stretch are of social interest and the aforesaid communities have few resources..." [481]

6.2.14 In both cases the Nicaraguan reply was given along the following lines:

> "Authorization to Navigate... The Embassy of Nicaragua in Costa Rica, by authorization from the Ministry of Foreign Affairs of Nicaragua, grants this special authorization to navigate on the San Juan de Nicaragua River to the boat: ... The boat must carry the Costa Rican and Nicaraguan ... [description of the boat] ... *Nicaraguan authorities have the right to cancel this permit in case of any breach of the Nicaraguan laws. Furthermore, the holders of this permit must subject to routine inspections by the respective authorities...*"[482]

6.2.15 In each case the authorization was accompanied by a Note from the Nicaraguan Embassy stating:

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[481] NCM, Annex 52. Note of 30 June 2006, from Shepard Rodrigo Zamora, of the Christian and Missionary Alliance, Horquetas, Sarapiquí, to Ambassador Leopoldo Ramirez Eva, Nicaraguan Embassy in Costa Rica.

[482] Authorization to the Costa Rican Social Security Institute, No. 01/2006, sent on 6 July 2006; NCM, Annex 89. And Authorization to the Christian and Missionary Alliance located at Horquetas in Sarapiquí, No. 02/2006, sent on 6 July 2006. NCM, Annex 90.

> "...the Ministry of Foreign Affairs of Nicaragua, a special authorization is hereby issued to navigate the San Juan de Nicaragua River for the stated purposes, which may not be used for any purpose or places other than those indicated or in breach of Nicaragua's full Sovereignty over the San Juan River .... *This permit is a gesture of friendship, good neighborhood and courtesy of good faith that may not be used in any other form or with the intent to harm Nicaragua in any manner or circumstance...*"[483]

6.2.16 The regular and consistent practice illustrated in these examples is well known to Costa Rica and has followed it in nearly all cases without protest or question. For her part, Nicaragua has consistently required that Costa Rican boats not carrying articles of trade receive advance permission to navigate on the San Juan. Costa Rica's suggestion that there is a right of "communication" between points on the Costa Rican side, using Nicaraguan territory – the San Juan River – is novel and appears to be an opportunistic attempt to add more claimed "rights" to those she has already asserted in the present case. It seems doubtful that she would claim such rights if the San Juan were land territory rather than water. Yet in either case it is the sovereign territory of Nicaragua, and Costa Rica must have permission to cross it in any way not specifically authorized by the 1858 Treaty and the Cleveland Award, as Costa Rica herself has consistently accepted.

[483] Note of 6 July 2006, to Dr. Thais Ching Zamora, Director of the Costa Rican Social Security Institute, from Ambassador Leopoldo Ramirez Eva; NCM Annex 53 and Note of 6 July 2006, to Shepard Rodrigo Zamora, of the Christian and Missionary Alliance, from Ambassador Leopoldo Ramírez Eva. NCM, Annex 54.

6.2.17 This Chapter has dealt with difficulties that have arisen for Nicaragua from her policy of cooperation and good neighborliness toward Costa Rica. The Chapter has shown that in respect of both armed navigation and pleasure boating, Costa Rica has sought to create new navigational rights in the San Juan through a practice of abusing permission to navigate granted by Nicaragua; or establishing a pattern of requesting and receiving permission to navigate, then doing so without permission, claiming justification in the 1858 Treaty and Cleveland Award. The Chapter has shown, however, that Costa Rica's claims of new rights are unfounded. Her right to navigate on the San Juan derives solely from the 1858 Treaty and the Cleveland Award, which require that her vessels carry articles of trade or navigate with craft carrying such articles. The Chapter then turned to the issue of "facilitation of traffic on the river" raised by Costa Rica in her *Memorial*. It showed that Costa Rica's contentions in this regard are misplaced, since the treaty she relies upon creates no new rights of navigation in Costa Rican vessels; it only requires that Nicaragua use her best efforts to facilitate transport services of Costa Rican vessels that are permitted to navigate on the San Juan by the 1858 Treaty and the Cleveland Award. Finally, under the same rubric, the Chapter showed that Costa Rica's alleged right of "communication" between points on her side of the river is without foundation, as demonstrated not only by the 1858 Treaty and the Cleveland Award, but also by consistent practice reflecting her acceptance of the necessity of prior authorization to transit the San Juan River.

CHAPTER 7

REMEDIES

7.1.1 Chapter 6 of the Costa Rican *Memorial* is more of an overview of the general principles of law applicable in cases of state responsibility. Nicaragua has little to say on this matter since, as shown in this Counter-*Memorial*, Nicaragua has violated none of its international obligations vis-à-vis Costa Rica (Section 1). However, given the particular circumstances of this case, Nicaragua would request the Court to make a declaratory judgment establishing among other things that it has fully complied with the obligations incumbent upon her by virtue of the 1858 Treaty of Limits (Section 2).

Section 7.1
The Remedies Requested by Costa Rica

7.1.2 Chapter 6 of the *Memorial* of Costa Rica reviews the whole range of the "legal consequences of an internationally wrongful act" as codified by the International Law Commission in the Articles on State Responsibility annexed to General Assembly Resolution 56/82 of 12 December 2001. In general, Nicaragua has no objection of principle to accepting that this is the applicable law in case of State responsibility for an internationally wrongful act. However, for this to be the case, an internationally wrongful act – or several such acts – must have been committed. Nicaragua has shown in this *Memorial* that Costa Rica has not given evidence of the occurrence of any such act either:

- because the facts it has described are erroneous or wrongly interpreted; or;
- more often, because it made an erroneous or mistaken interpretation of the applicable law and, in particular, of the 1858 Treaty of Limits from which Costa Rica holds the only rights it possesses on the San Juan river.

7.1.3 As a result, the obligations alleged by Costa Rica either are non-existent or, when they exist, have not been breached by Nicaragua. Thus, Nicaragua has demonstrated that:

i) it has not violated and is not violating:

- the right of Costa Rica of free navigation with articles of trade [*con objetos de commercio*] as guaranteed by Article VI of said Treaty[484],
- including the right for the Costa Rican vessels to approach the northern shore of the river for that purpose (Article VI of the Treaty)[485],
- without "any class of impost" when said navigation is to this purpose (Article VI)[486]; nor
- its (in fact non-autonomous) obligation "to facilitate and expedite traffic ... on the San Juan River within the terms of the Treaty of 15 April 1858 and its interpretation given by arbitration on 22 March 1888" (Section I of the Treaty of 9 January 1956)[487];

[484] See e.g., paras. 4.18-4.1.36.
[485] See e.g., paras. 4.1.46, 5.2.1.
[486] See e.g., para. 4.2.36.
[487] See e.g., paras. 6.2.3-6.2.16.

and that

ii) Nicaragua is under no obligation to permit navigation beyond the limits contemplated in the 1858 treaty of Limits and, thus for example, Nicaragua is under no obligation:

- to accept free landing on the Nicaraguan bank of the river when this is not done for the purposes contemplated in the Treaty;
- to allow Costa Rican official vessels to re-supply or relieve the personnel of police posts on the territory of Costa Rica[488]; or
- to permit riparians of the Costa Rican bank to fish in the River for any purposes[489].

7.1.4 Absent any breach, there can, of course, be no question of reparation or other consequence of an internationally wrongful act, including the cessation of perfectly lawful conducts. Some very brief comments on some aspects of the Costa Rican requests are nevertheless in order. The following remarks are made *arguendo* as a purely academic discussion and, of course, do not imply any recognition by Nicaragua that it has committed any of the breaches alleged by Costa Rica in the *Memorial.*

7.1.5 *Concerning the reparation* requested by Costa Rica, a striking fact is the vague and indistinct character of the alleged damages and of the requested reparation. It is true that (i) restitution is the primary form of reparation, and (ii) the form and amount of compensation can be reserved for a subsequent phase of the proceedings. But this does not mean that the Claimant in a case before the Court can simply contend that it has endured

[488] See e.g., paras. 5.1.1 - 5.1.20.
[489] See e.g., paras. 5.2.2 - 5.2.11.

an injury without establishing the precise and effective nature of said injury and that it has been caused by the alleged internationally wrongful act or acts.

7.1.6 As made clear in the commentary of the International Law Commission Articles, "[i]t is only '[i]njury ... caused by the internationally wrongful act of a State' for which full reparation must be made. This phrase is used [in Article 31, paragraph 2, of the Articles on States Responsibility] to make clear that the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act"[490]. It belongs to the Claimant to establish both the reality of the injury and this causality.

7.1.7 It is true that, in its Judgments of 25 July 1974, in the *Fisheries Jurisdiction Case (Germany v. Iceland)*, the Court recognized that "[i]t is possible to request a general declaration establishing the principle that compensation is due, provided the claimant asks the Court to receive evidence and to determine, in a subsequent phase of the same proceedings the amount of damage to be assessed"[491]. However, in that same Judgment, the Court indicated that it "is prevented from making an all-embracing finding of liability which would cover matters as to which it has only limited information and slender evidence"[492].This is precisely the case in the present case, where Costa Rica only makes very broad assertions as to the injury allegedly endured[493] and gives no indication

[490] Report of the International Law Commission of the Work of its Fifty-Third Session, (23 April-1 June and 2 July-10 August 2001), Official Records of the General Assembly, Fifty-Sixth Session, Supplement No. 10 (A/56/10), p. 227, para. 9) of the commentary of Article 31 ("Reparation").
[491] *ICJ Reports* 1974, p. 204, para. 76 – see CRM, p. 143, para. 6.17.
[492] *Ibid.*, p. 205, para. 76.
[493] CRM, pp. 141-142, para. 6.15.

whatsoever as to the cause of those damages. Accordingly, the Court cannot accede to the submissions made by Costa Rica in such a cavalier form[494].

7.1.8 Moreover, in both cases to which Costa Rica refers[495], the Court expressly indicated that it specifically based its decision on Article 53 of its Statute[496], which provides for the rules to be applied when "one of the parties does not appear before the Court, or fails to defend its case". In such a case, "the principle of the equality between the Parties requires" that the absent Party be given the opportunity "to present its arguments on the question of reparation if it so wishes"[497]. This is not the situation prevailing in the present case.

7.1.9 More specifically, Costa Rica requests, by way of restitution, "the abrogation of all legislative and administrative measures taken by Nicaragua which contradict or deny the obligations enumerated above"[498]. Such a submission is not only vague and based on insufficient evidence, which does not allow the Court to decide in full knowledge, but also there is no legal basis for the Court to award this unfounded claim.

7.1.10 It is also appropriate to note, in respect to Costa Rica's allegations concerning the "obligation" which would be incumbent upon Nicaragua "to permit riparians of the Costa Rican bank to fish in the River for

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[494] Cf. *ICJ Reports* 1974, p. 205, para. 76, and p. 206, para. 77(5) (operative paragraph),
[495] CRM, p. 143, fn. 424.
[496] Judgments of 25 July 1974, *Fisheries Jurisdiction (Germany v. Iceland)*, *ICJ Reports* 1974, p. 205, para. 76, and 27 June 1986, *Military and Paramilitary Activities in and against Nicaragua (Merits)*, *ICJ Reports* 1986, p. 143, para. 284.
[497] *ICJ Reports* 1986, *ibid.*
[498] CRM, p. 141, para. 6.13.

subsistence purposes"[499] and, more generally, her claims for compensation for the losses and expenses incurred by Costa Rican citizens[500], that such claims could only be made as a matter of diplomatic protection, the conditions for which are not fulfilled in the present case.

7.1.11 *In respect to Costa Rica's request for assurances and guarantees of non-repetition*, Nicaragua notes that it seems, in recent years, to have become a usage for the Claimants before the Court to request such assurances and guarantees. It is true that, according to Article 30(b) of the ILC Articles on State Responsibility:

> "The State responsible for the internationally wrongful act is under an obligation:
> ...
> (*b*) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require".

7.1.12 However, as the text of this provision itself shows, such assurances and guarantees of non-repetition are not required in every and all circumstances. In the present case, such circumstances are certainly not present.

7.1.13 Nicaragua has constantly and consistently reaffirmed her commitment to strictly respect the 1858 Treaty of Limits[501] and this is presumably what the Costa Rican submission could aim at. This would add nothing to these firm commitments by Nicaragua or to the principle *pacta sunt servanda*. Moreover, as the Court has recalled, it "neither can nor should contemplate" the possibility that its Judgments would not be implemented

[499] CRM, p. 139, para. 6.03(i).
[500] See CRM, pp. 141-142, para. 6.15.
[501] See e.g.: NCM Chap. 4 and 5.

by the Parties[502]. In fact, as will be shown below[503], if assurances and guarantees of non-repetition are to be decided by the Court, they should bear upon the behaviour of Costa Rica, not that of Nicaragua.

7.1.14 In paragraph 6.22 of her *Memorial*, Costa Rica seems to base her request on this point on the fact that "[t]his is the third time in history that Costa Rica has been obliged to have recourse to adjudication (arbitration by President Cleveland, the Central American Court of Justice and this Court) in order to obtain recognition and respect of her rights as first established by the Treaty of Limits". This is a very misleading hotchpotch of precedents:

- as shown above[504], the questions asked to President Cleveland by Nicaragua and which were the object of the 1888 Award were entirely different of those submitted to the Court in the present case;
- the same holds true in respect to the 1916 Judgment of the Central American Court of Justice[505], which essentially related to the right of Costa Rica to be heard in respect to a canal concession in relation with Articles VII and VIII of the Treaty of Limits[506], while these provisions are of no relevance in the present case.

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[502] See e.g.: PCIJ, Judgment, 17 August 1923, *S.S. Wimbledon*, Series A, N° 1, p. 32; 18 September 1928, Series A, N° 17, *Factory at Chorzów (Claims for Indemnity) (Merits)*, Series A, N° 17, pp. 62-63; ICJ, 20 December 1974, *Nuclear Tests*, *ICJ Reports* 1974, p. 272, para. 60, and p. 477, para. 63, or 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Jurisdiction of the Court and Admissibility of the Application)*, *ICJ Reports* 1984, p. 437, para. 101.

[503] NCM, Chap. 7, sec.2.

[504] See e.g., NCM, paras. 3.1.1-3.1.26, 2.1.42-2.1.43.

[505] CRM, Vol. 2, Annex 21.

[506] See CRM, Annex 21, in particular at p. 150.

7.1.15 Finally, Nicaragua wishes to firmly reiterate, that the remarks in this section do not amount to any kind of recognition of any violation of the 1858 Treaty of Limits as interpreted by the Cleveland Award. They have been presented to the Court only very subsidiary, in order not to let unanswered any allegation made by the Costa Rican Party.

Section 7.2
Declaration Requested by Nicaragua

7.2.1 In the present case, the subject-matter of Costa Rica's claim is defined by the Application and the submissions of the *Memorial*. It will be apparent from the reading of both documents that it is mainly concerned with the interpretation and the application of Article VI of the Treaty of Limits of 1858, which according to Costa Rica would have been violated in several respects by Nicaragua.

7.2.2 In reality, Costa Rica has followed a pattern of conduct which amounts to a global strategy of challenge of her obligations under the Treaty of Limits. As has been explained in previous Chapters of this *Counter-Memorial*, Costa Rica's strategy has consisted in trying to expand her rights under the 1858 Treaty and the Cleveland Award by all means[507]. Nicaragua wishes to take the opportunity of the present case to put an end to this strategy which periodically inflames the relations between the sister Republics. A Judgment of the International Court clearly establishing the respective rights and obligations of the Parties under the 1858 Treaty as

[507] See NCM, Chap. 6.

interpreted by the Cleveland Award would be most helpful for that purpose.

7.2.3 Nicaragua shares the position of Costa Rica as to the possibility for this Court to make a declaratory Judgment. Such a possibility has been acknowledged by the Permanent Court[508] and confirmed by the present Court[509], and "has been foreseen in Article 63 of the Statute, as well as in Article 36..."[510].

7.2.4 In view of the Costa Rican pattern of conduct consisting of trying to put into question in every circumstance the limited character of her right of navigation on the San Juan River under the 1858 Treaty of Limits, and in order to clear up any ambiguity for the future application of the Treaty, Nicaragua formally requests the Court to reaffirm in the light of the Costa Rican claims in this case, the extent of this State's rights of navigation in the San Juan de Nicaragua River.

7.2.5 The Judgment of the Court should make clear that:

- the right of Costa Rica of free navigation with articles of trade [*con objetos de commercio*] as guaranteed by Article VI of said Treaty is strictly limited to the commerce of goods and does not include tourist activities;

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[508] See PCIJ, Judgments, 25 May 1926, *Certain German Interests in Polish Upper Silesia (Merits)*, Series A, N° 7, pp. 18-19; 16 December 1927, *Interpretation of Judgments N° 7 and 8 (Factory at Chorzów)*, Series A, N° 13, pp. 20-21.
[509] See ICJ, Judgment, 2 December 1963, *Northern Cameroon*, *ICJ Reports* 1963, p. 37: see also, 20 December 1974, *Nuclear Tests*, *ICJ Reports* 1974, p. 263, para. 30, and p. 457, para. 31.
[510] PCIJ, Series A, N° 7, p. 19.

- Nicaragua is under no obligation to accept free landing on the Nicaraguan bank of the river;
- nor to allow Costa Rican official vessels to re-supply or relieve the personnel of police posts on the territory of Costa Rica;
- nor to permit riparians of the Costa Rican bank to fish in the River; and that
- her alleged obligation "to facilitate and expedite traffic ... on the San Juan River within the terms of the Treaty of 15 April 1858 and its interpretation given by arbitration on 22 March 1888" provided for in Section I of the Treaty of 9 January 1956 has no autonomous character and is a pure reminder of the obligations of both Parties provided for in these instruments; and that;
- Costa Rica is under a strict legal obligation to comply with her obligation to respect Nicaragua's sovereignty over the river.

7.2.6 Finally, In view of the above considerations, and in particular those indicated in Chapter 2 (E), Nicaragua requests the Court to Declare that:

i. Costa Rica is obliged to comply with the regulations for navigation (and landing) in the San Juan imposed by Nicaraguan authorities in particular related to matters of health and security.

ii. Costa Rica has to pay for any special services provided by Nicaragua in the use of the San Juan either for navigation or landing on the Nicaraguan banks.

iii. Costa Rica has to comply with all reasonable charges for modern improvements in the navigation of the river with respect to its situation in 1858.

iv. Revenue service boats may only be used during and with special reference to actual transit of the merchandise authorized by Treaty.

v. Nicaragua has the right to dredge the San Juan in order to return the flow of water to that obtaining in 1858 even if this affects the flow of water to other present day recipients of this flow such as the Colorado River.

RESERVATIONS

1. In these proceedings Nicaragua has limited her arguments and claims to rights and obligations based solely on the bilateral International Instruments that regulate the questions at issue between the Parties, namely and fundamentally, the 1858 Treaty of Limits and the 1888 Cleveland Award. Costa Rica also alleges to base her claims on these same bilateral Instruments, nonetheless she has included in her *Memorial* an Appendix relating to the so called "status of the San Juan River in international law" and has made claims in favour of residents of the Costa Rican bank of the San Juan River based on Customary International Law.

2. Therefore, if the claims of Costa Rica, and more generally, if the legal situation of the San Juan de Nicaragua River, is to be considered on legal principles that go beyond or are independent of the bilateral Instruments in force for the Parties, then Nicaragua reserves her rights to claim that the only present day outlet of the San Juan to the sea that is permanently navigable, the Colorado River, is an international waterway subject to the provisions of general international law for international watercourses not subject to a special treaty regime.

3. Furthermore, and on the basis of these same principles of international law and also on the basis of the rights and duties imposed by the bilateral instruments in force between the Parties, Nicaragua makes express reservation of her rights to bring claims against Costa Rica for the ecological damage done to the waters of the San Juan River as well as for the diversion of its traditional water flow into agricultural, industrial and other uses in Costa Rican territory and into the water flow of the Colorado River.

4. Finally, The Government of Nicaragua, further, reserves the right to supplement or to amend her Submissions as well as the arguments and evidence filed with this *Counter- Memorial.*

SUBMISSIONS

On the basis of the facts and legal considerations set forth in the Counter *Memorial*, the Court is requested:

To adjudge and declare that the requests of Costa Rica in her *Memorial* are rejected, on the following bases:

(a) Either because there is no breach of the provisions of the Treaty of 15 April 1858 on the facts.

(b) Or, as appropiate, because the obligation breach of which is alleged is not included in the provisions of the Treaty of 15 April 1858.

Moreover, the Court is also requested to make a formal declaration on the issues raised by Nicaragua in Section 2 of Chapter 7.

Carlos José ARGUELLO GÓMEZ
Agent of the Republic of Nicaragua

29 May 2007

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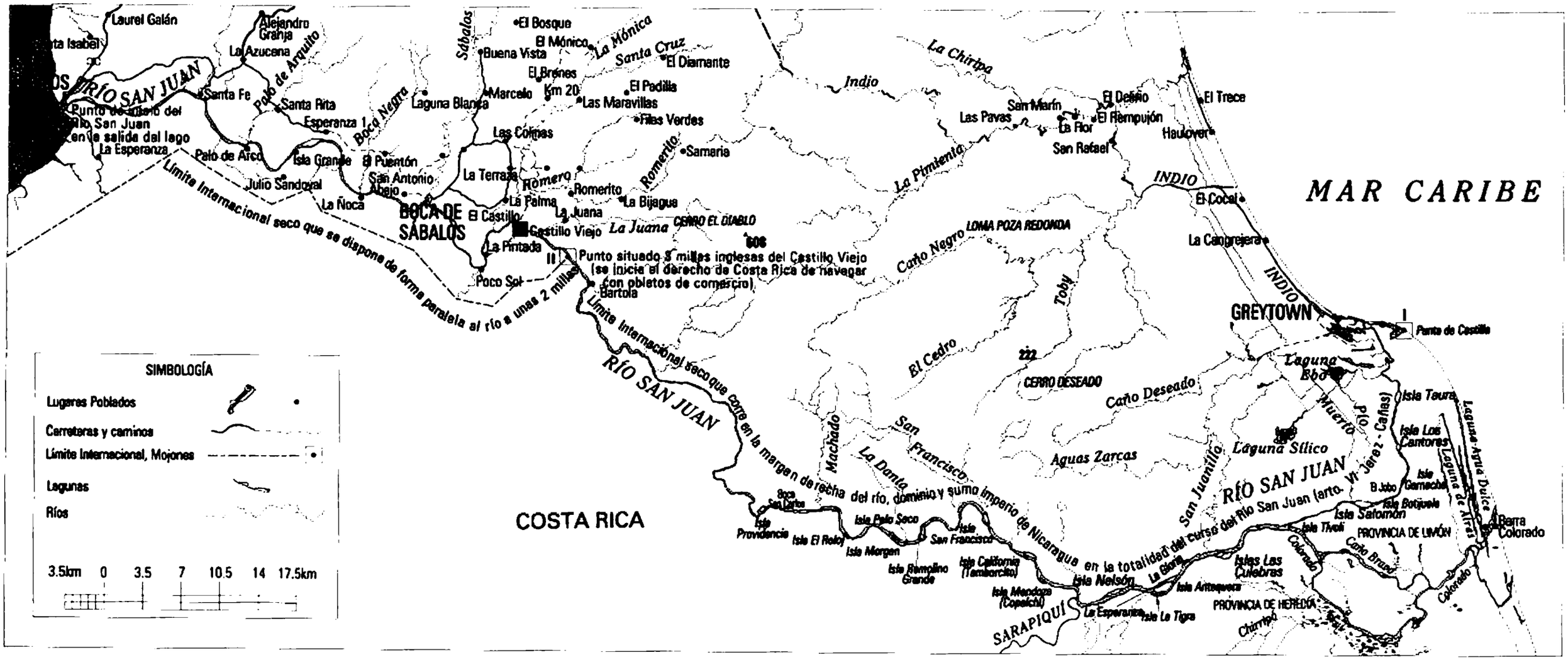
NICARAGUA'S SOVEREINGTY OVER THE WHOLE COURSE OF THE SAN JUAN DE NICARAGUA RIVER



Gobierno de Nicaragua

Ministerio del Ambiente
y los Recursos Naturales
MARENA

ÁREAS PROTEGIDAS DEL SURESTE DE NICARAGUA
DECRETO PRESIDENCIAL No. 66 - 99

Reserva Natural "Cerro Silva"

REGION AUTÓNOMA ATLANTICO SUR

Reserva Natural "Punta Gorda"

Monumento Nacional "Archipiélago de Solentiname"

Reserva Biológica "Indio Maíz"

Monumento Histórico "Parroquia de La Inmaculada Concepción de María"

MUNICIPIO DE SAN JUAN DE NICARAGUA

Refugio de Vida Silvestre Río San Juan

COSTA RICA

SIMBOLOGÍA

SKETCH MAP 3:
LIMITS OF COSTA RICA ACCORDING TO HER 1825 POLITICAL CONSTITUTION

ACTUAL POSITION OF THE POINTS USED AS LIMIT INDICATION, IN ACCORDANCE WITH THE 1825 COSTA RICAN POLITICAL CONSTITUTION

BOCA DEL RÍO SAN JUAN

RIO DEL SALTO

DESEMBOCADURA RÍO DE ALVARADO

ESCUDO DE VERAGUAS

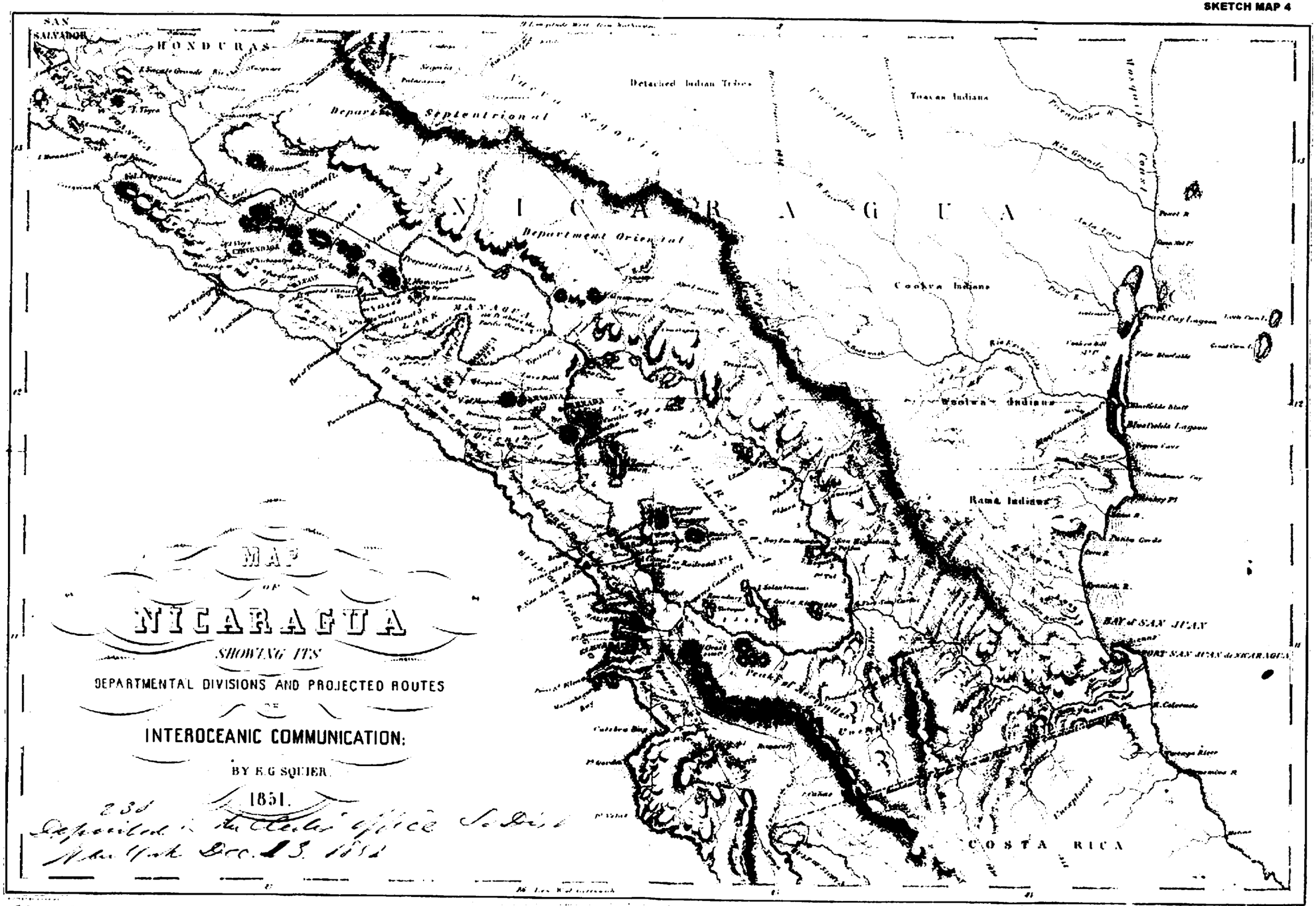
RÍO CHIRIQUÍ

DESEMBOCADURA RÍO CHIRIQUÍ

ESCALA GRÁFICA

75 20 0 25 50 100 km

I C O



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