

INTERNATIONAL COURT OF JUSTICE

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**DISPUTE REGARDING  
NAVIGATIONAL AND RELATED RIGHTS  
(COSTA RICA V. NICARAGUA)**

**REJOINDER OF  
THE REPUBLIC OF NICARAGUA**

**VOLUME I**

15 JULY 2008

## **VOLUME I**

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## CHAPTER I:

### INTRODUCTION

1.1. Nicaragua submits this *Rejoinder* in response to Costa Rica's *Reply* of 15 January 2008, and in conformity with the Court's *Order* of 9 October 2007, which set the dates for the submission of the *Reply* and the *Rejoinder* as 15 January 2008 and 15 July 2008, respectively.

1.2. In this *Rejoinder*, Nicaragua will respond to the legal and factual arguments presented in the *Reply*, and to the evidence presented both in the *Reply* itself and in the Annexes thereto. In this Introduction, Nicaragua will first identify the legal and factual issues that now, at the conclusion of two rounds of written pleading, no longer appear to be in dispute. The written pleadings have narrowed the dispute in some significant respects, and these are pointed out in the first section of the Introduction.

1.3. The second section of the Introduction identifies the remaining disputed issues, and points out how they have been sharpened by the written pleadings. This section also provides an overview of the arguments and evidence that Nicaragua will add to the debate in Chapters II through VI of this *Rejoinder*.

1.4. The third and final section of the Introduction describes the structure of the *Rejoinder*.

1.5. Before proceeding further, however, Nicaragua wishes to comment on the tone of the *Reply*, which she hopes the Court will find not to have been replicated in this *Rejoinder*. In particular, Nicaragua wishes to express her dismay over the language in the *Reply*, which calls the *Counter-Memorial* "disingenuous" and



accuses Nicaragua of fabricating “distortions” of the law and the facts that are “not accidental”. Nicaragua, of course, rejects these accusations, and stands behind her *Counter-Memorial* in all respects. To be sure, Nicaragua regards it as entirely appropriate to criticize the arguments of the other party, and to point out, forcefully at times, the flaws in the other party’s logic or the lack of factual support for its contentions. Indeed, this *Rejoinder* does just that with respect to what Nicaragua regards as Costa Rica’s fallacious arguments in the *Reply*. However, the *Rejoinder* nowhere accuses Costa Rica of deliberate or “not accidental” distortions, or of “disingenuousness”, or similar forms of dishonesty or bad faith. Nicaragua believes that such accusations have no place in proceedings before the Court, and especially between two States that are good neighbours and sister republics of Central America with a long history of peaceful and positive relations.

## **Section I. Points of Agreement**

1.6. With the submission of the *Memorial*, the *Counter-Memorial*, the *Reply*, and now this *Rejoinder*, the parties have either agreed upon, or at least not disputed the following legal and factual issues, which may now be taken as fully established by the Court:

- The rights claimed by Costa Rica in this case, if they exist, come from the 1858 Treaty of Limits between Costa Rica and Nicaragua and/or the 1888 Cleveland Award, which interpreted that Treaty, and from no other legal instruments. Thus, the Treaty of Limits and the Cleveland Award represent the governing law for this case.

- The Treaty of Limits was a boundary treaty that had as its principal object and purpose the settlement of the entire land border between Costa Rica and Nicaragua, and that, *inter alia*, included Nicaragua's concession that her former District of Nicoya would be part of Costa Rica. The annexation by Costa Rica of this district four years after independence had been hotly disputed by Nicaragua.
- The Treaty of Limits provided, and the Cleveland Award recognized, that the waters of the San Juan River belong to Nicaragua, who enjoys "exclusive dominion and supreme control (*sumo imperio*)" over the river.
- The Treaty of Limits provided, and the Cleveland Award confirmed, that Costa Rica would enjoy the "right of free navigation...*con objetos de comercio*" on the San Juan River.
- The Cleveland Award provided that Costa Rica would enjoy the right to navigate on the San Juan River with vessels of her revenue service when necessary to protect her right to navigate "for purposes of commerce"; President Cleveland rejected Costa Rica's submission that she had a right to navigate on the river with vessels of war.
- In securing for herself a "right of free navigation...*con objetos de comercio*" on the San Juan River, Costa Rica achieved her longstanding objective of obtaining the right to use the river as an outlet to the Caribbean Sea and Atlantic Ocean for her export trade to the European market, principally her export of coffee.

- Although the importance of the San Juan to Costa Rica's export trade declined soon after the Treaty of Limits was executed, due to the construction of a railroad linking her coffee-growing region to her Caribbean ports and other factors, Costa Rica continued to use the river for the next 150 years principally for the small-scale trade of goods between the interior of the country and the small hamlets that were established along her (right) bank of the river.
- There was no regular transport of tourists to the San Juan River until the early 1990s, when Costa Rican vessels began bringing tourists along what the *Reply* describes as the "tourism route" down the Sarapiquí River (in Costa Rica) to the San Juan, then east along the San Juan for approximately 24 km, then down the Colorado River (in Costa Rica). Although Nicaragua claimed (and claims) that Costa Rican vessels have no right to transport tourists on the San Juan (since they are not "*objetos de comercio*" in Nicaragua's view), she never sought to prohibit or restrict this practice. Instead, she adopted and implemented regulations that serve her sovereign interests of environmental protection, crime prevention, navigational safety and border security.
- These regulations require vessels of all nationalities (including Nicaraguan vessels) carrying tourists to the San Juan to register with the Nicaraguan authorities upon entering and exiting the river, to undergo an inspection and obtain a clearance certificate assuring seaworthiness and the absence of contraband, to process passengers who are not Nicaraguan nationals or local Costa Rican residents through Nicaraguan immigration, and to refrain from navigating on the river after nightfall.

- Given the nature of Costa Rica's use of the river during the 150 years that the Treaty of Limits has been in effect, which has turned out not to involve a significant export or import trade, and the absence of any threat to commercial navigation on the river, Costa Rica has not had a need to deploy vessels of her revenue service on the river for the purpose of protecting her right to navigate "*con objetos de comercio*", and has not done so. Nicaragua has never prohibited or interfered with navigation on the river by any Costa Rican revenue service vessel.
- As shown in the *Reply* and the Annexes thereto, navigation on the San Juan by Costa Rican public (as distinguished from commercial) vessels has never been "*con objetos de comercio*", but for one of three public purposes: bringing supplies or replacement personnel to border posts on Costa Rica's bank of the river; engaging in joint law enforcement activities with Nicaragua; or delivering social services to local hamlets on the Costa Rican shore. Until the middle of 1998, Costa Rican authorities requested and obtained permission from their Nicaraguan counterparts prior to these voyages, and Nicaragua imposed conditions on the navigation which Costa Rica accepted and complied with, including the condition that the Costa Rican officials aboard these vessels travel unarmed.
- In May 1998, the newly-elected government of Costa Rica took office and changed Costa Rican policy regarding the San Juan River. Under the new policy, which the new President and Public Security Minister of Costa Rica said was aimed at stopping illegal immigration from Nicaragua, Costa Rican security forces (the

*Guardia Civil*) were directed to ignore the Nicaraguan requirements for navigating on the river, and to deploy their vessels on the river with armed personnel, without seeking permission from or notifying their Nicaraguan counterparts, for the purpose of intercepting and detaining Nicaraguan citizens navigating on the river who were suspected of preparing to enter Costa Rica illegally. After several such interceptions and detentions of Nicaraguans navigating on the river, on 14 July 1998 Nicaragua instructed Costa Rica to stop this practice. When Costa Rica refused, Nicaragua prohibited all further navigation on the river by Costa Rican security forces.

- Since then, Costa Rican security forces have not navigated on the San Juan River. They have brought supplies and replacement personnel to border posts along the San Juan by land. Delivery of social services to riparian communities has continued, however, subject to the same conditions that existed before July 1998: prior authorization by Nicaragua, registration of the vessel upon entering and exiting the river, and inspection of the vessel to assure seaworthiness and absence of contraband.

## **Section II. Remaining Points of Disagreement**

1.7. While there are a number of disputed legal and factual issues, they all derive from two fundamental points of disagreement between the parties. The two disputes at the heart of this case are:

- a) *First*, whether Costa Rica has a right to navigate on the San Juan River for purposes other than navigation with articles of trade; and

whether Costa Rica's right of navigation is subject to no controls by Nicaragua; or whether Nicaragua has a right to impose reasonable regulations on navigation to serve her sovereign interests in environmental protection, crime prevention, navigational safety and border security; and whether the regulations in fact imposed by Nicaragua for these purposes are reasonable.

- b) *Second*, whether Costa Rica has a right to navigate on the San Juan River with her public vessels for all purposes, including law enforcement activities and delivery of social services unrelated to trade or commerce; and, if so, whether Nicaragua has the right to regulate such navigation to protect her sovereign interests described above, and whether she has regulated reasonably in this case.

1.8. With regard to the former issue, Costa Rica claims a right under the Treaty of Limits and the Cleveland Award to transport tourists as well as commercial goods on the San Juan River. For Nicaragua, Costa Rica's navigation right under those controlling legal instruments is limited to navigation *con objetos de comercio*, which means "with articles of trade" not passengers. However, Nicaragua has not sought to stop Costa Rican vessels from transporting tourists along the San Juan; she has sought only to regulate the practice. Costa Rica claims that her right under the Treaty and the Award is "free" of all regulation by Nicaragua. Nicaragua argues that, as the State endowed with "exclusive dominion and supreme control (*sumo imperio*)" over the river, she necessarily has the right to regulate navigation, as long as she does so reasonably and in defence of her legitimate sovereign interests, and that in fact her regulation of this activity has been eminently reasonable.

1.9. Much of the debate thus far has centred on the meaning of the words “*con objetos de comercio*,” and, specifically, whether they are properly translated into English as “with articles of trade” (Nicaragua’s translation) or “for purposes of commerce” (Costa Rica’s translation). For example, Costa Rica devotes 37 paragraphs of her *Reply* (consuming 13 pages) to her argument that the Spanish word “*objetos*” means “purposes” or “objectives,” in addition to two lengthy tables of “contemporaneous usages” that occupy another 53 pages on the same general point. Presumably, Costa Rica’s intention is to demonstrate that the “purposes” or objectives” of commerce include performance of services, such as tourism, as well as trade in goods, although, curiously, only three paragraphs (and less than two pages) of the *Reply* address the issue of whether the quoted language gives Costa Rica a right to transport tourists on the San Juan.

1.10. Nicaragua’s position, first articulated in the *Counter-Memorial* and supported by new evidence in this *Rejoinder* from the Spanish Royal Academy (*Academia Real*), is not only that the correct translation of “*objetos de comercio*” is “articles of trade,” but that, even if Costa Rica’s translation were correct, the phrase would mean the same thing, and limit Costa Rica to a right to use the river to trade in goods. That is because the most important word in the phrase is not “*objetos*” but “*comercio*,” a word that the *Reply*, for all its focus on “*objetos*,” virtually ignores. As will be shown below, the word “*comercio*,” which is properly translated either as “trade” or “commerce,” could only have meant “trade in goods” to the mid-nineteenth century drafters of the Treaty of Limits. At that time, the concept of trade or commerce referred to the purchase, sale, delivery, export or import of tangible goods. The idea that trade or commerce could include performance of services, as well as trade in goods, did not emerge until the following century. It is a twentieth, not a nineteenth, century construction of the term. Furthermore, all of the evidence shows that the parties

clearly understood, both at the time they executed the Treaty of Limits and for the next 120 years or more, that the right that Costa Rica was accorded was a right to navigate with articles of trade, not a right to transport passengers, and that no one in 1858 or for the next 120 years envisioned that there would ultimately be an ecotourism industry that would transport tourists along the San Juan River. Indeed, this provision in the Treaty of Limits was the culmination of at least two decades of efforts by Costa Rica, which had continuously and urgently sought access to the San Juan as a trade route to the Atlantic, so that she could export her coffee and other products to Europe, not so that she could conduct sightseeing excursions to the area. Thus, even if “*objetos de comercio*” means “for purposes of commerce,” an interpretation with which Nicaragua disagrees, the “commerce” in question can only refer to the trade of tangible goods.

1.11. Costa Rica is not unaware that “*comercio*” in 1858 could only have meant the trade of tangible goods. That is why the *Reply* goes to such lengths to argue for an “evolutionary” interpretation of the Treaty of Limits, and struggles to characterize it as something other than a boundary treaty and thereby avoid the obvious legal difficulties of applying such an interpretation to a Treaty of this nature. These efforts are to no avail. As shown in the *Counter-Memorial*, and as will be further shown within, the Treaty of Limits is not a misnomer. It is an accurate reflection of what the Treaty is. It is a Treaty of Limits, that is, a boundary treaty, whose principal object and purpose was the settlement of the entire boundary between Nicaragua and Costa Rica. Among its provisions is its endowment of Nicaragua with “exclusive dominion and supreme control (*sumo imperio*)” over the San Juan River. As discussed below, great care must be taken to avoid the “evolution” of a treaty in a manner that diminishes a State’s sovereignty. Yet, that is exactly what Costa Rica seeks here.



1.12. While it should already be perfectly clear, Nicaragua wishes to leave no doubt that she fully understands and accepts that Costa Rica enjoys a right under the Treaty of Limits and the Cleveland Award to navigate on the river “*con objetos de comercio*,” and that she may not stop Costa Rica from navigating on the river “*con objetos de comercio*.” But she has never attempted to do so. This case is not about Nicaragua preventing Costa Rica from navigating on the river with articles of trade. Costa Rica has presented no evidence of a disposition by Nicaragua to engage in such behaviour, let alone evidence of actual interference by Nicaragua with the exercise of this right.

1.13. To the contrary, this case is not about trade, but about Costa Rica’s claim that her right of free navigation with “*objetos de comercio*” includes free navigation for all private commercial purposes including tourism. And even here, although Nicaragua stands by her interpretation of the Treaty of Limits that Costa Rica has no right to conduct tourism excursions along the San Juan, she has never sought to stop Costa Rica from engaging in this activity. Rather, Nicaragua’s conduct has been limited to adopting and implementing reasonable regulations to ensure both that (i) the activity will continue, and (ii) that it will be conducted in a manner that does not harm Nicaragua’s legitimate sovereign interests. As shown in the *Counter-Memorial*, and as will be further shown below, because she is the sovereign power over the river Nicaragua has a right to impose reasonable regulations on navigation, including navigation by Costa Rica; and the regulations imposed by Nicaragua are in fact reasonable. As indicated above, the parties are in agreement on what the regulations do: they require all tourism vessels (including those from Nicaragua) to register with Nicaraguan authorities on entering and exiting the San Juan, to undergo an inspection and obtain a clearance certificate as to seaworthiness and absence of contraband, to have foreign passengers processed by Nicaraguan immigration authorities, and to

navigate only during daylight hours. In this *Rejoinder*, Nicaragua will show that all of these requirements are justified by Nicaragua's legitimate sovereign interests, including her interests in environmental protection, crime prevention, navigational safety and border security. She will also show that these requirements impose no more than minor inconveniences on tourism operators and their passengers. In fact, contrary to the unsupported assertions in the *Reply*, it will be demonstrated below that the recently initiated Costa Rican tourism on the San Juan actually *increased* after Nicaragua's regulations went into effect.

1.14. In considering the reasons supporting Nicaragua's regulations, particular attention is due to her need to protect the delicate ecosystem of the San Juan River and the surrounding area. The river forms part of one of the most ecologically diverse, valuable and fragile areas in the Western Hemisphere. In 1990, Nicaragua designated more than 435 km<sup>2</sup> of the southeastern portion of her territory, including the San Juan River, as the environmentally-protected Indio Maíz Grand Biological Reserve, home to more than 500 species of wildlife, many of them endangered, and many rare plant species. The area covered by this Reserve was later expanded to more than 3,150 km<sup>2</sup>. In 2001, the San Juan River was designated as a wetland of international importance under the Ramsar Convention, obligating Nicaragua to afford greater protection to her dwindling and endangered species of fish, crustaceans and other aquatic life. To preserve the San Juan River Wildlife Refuge, which was carved out of the Indio Maíz Grand Biological Reserve, and to protect both of them against illegal poaching of animals, fish, trees and other plants, Nicaragua (unlike Costa Rica) prohibits human habitation on her side of the river. As a result, there are no settlements on the left bank of the river between the Bartola River (at the western end of the portion of the river where Costa Rica enjoys navigation rights) and the town of San Juan del Norte, where the river empties into the Caribbean Sea. Protection of

the San Juan River Wildlife Refuge and the adjoining Biological Reserve against the illegal clearing and settlement of land, and the poaching of animals, fish and plant life, also requires constant vigilance by the Nicaraguan Army (which is responsible for the security of this remote region, there being no police presence) and officials of the Ministry of the Environment and Natural Resources. It requires, *inter alia*, registration and inspection of all vessels travelling on the San Juan to assure that neither the vessels themselves nor their passengers pose pollution, predation or other serious risks to the ecosystem. Given Costa Rica's international image as a staunch defender and protector of the environment, it is disappointing that she seems so unsympathetic to Nicaragua's efforts to prevent the same type of human destruction of natural beauty on the left bank of the river that Costa Rica has, unfortunately, allowed to take place on her own right bank<sup>1</sup>.

1.15. With regard to the second fundamental dispute between the parties, it is Nicaragua's contention, based on the express language of the Treaty of Limits and the Cleveland Award, as well as the consistent practice of both parties subsequent thereto, that Costa Rica has no right to navigate on the San Juan River with her public vessels, save for the limited right to navigate with vessels of her revenue service, and even then only when there is a necessity to protect her right to navigate "*con objetos de comercio*". Costa Rica purports to find in these controlling legal instruments a general right of navigation for her public vessels. As Nicaragua has demonstrated in the *Counter-Memorial*, and as will be further shown below, no such right can be found in the text of the Treaty of Limits or the

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<sup>1</sup> Nicaragua is further dismayed by Costa Rica's recent announcement, in June 2008, that she has authorized the operation of an open pit gold mine at Las Crucitas near the border with Nicaragua, which is expected by Costa Rican and Nicaraguan environmental groups to pollute the San Juan River with cyanide and other toxic chemicals used in the mining process. See "Costa Rican Mine Has Unleashed Concern in Nicaragua," *Miami Herald* (Miami, FL), 21 June 2008. NR, Vol. II, Annex 27.

Cleveland Award. In fact, as explained below, Costa Rica's arguments in support of her alleged right to custody, protection and defence of the river with her public vessels is not only non-existent, but was specifically rejected by President Cleveland in 1888. There is nothing new about Costa Rica's arguments in the present case. They are the same ones she made unsuccessfully to President Cleveland 120 years ago. He rejected them and so should the Court. After a thorough review of the issue, all he conceded to Costa Rica was a right to navigate with her revenue vessels, and only then when it is necessary to do so in order to protect the right to navigate "for purposes of commerce." There is no other right to navigate with public vessels, let alone to navigate with public vessels for purposes unrelated to commerce.

1.16. This is confirmed by the consistent practice of the two parties between 1858 and 1998. Costa Rica presents some evidence in her *Reply* and Annexes on the use of the San Juan River by her public vessels during the century and a half following the execution of the Treaty of Limits. Nicaragua has carefully reviewed all of Costa Rica's evidence. As will be shown below, it actually supports Nicaragua's position, not Costa Rica's. Indeed, Costa Rica has produced no evidence that she has ever navigated on the river with vessels of her revenue service, or had a need to do so. Nor is there any evidence that Nicaragua ever interfered with her right to navigate in such manner. Instead, what the evidence produced by Costa Rica shows is that, during the past 150 years her public vessels have navigated on the river for only three purposes, none relating to her right to navigate "*con objetos de comercio*." In all cases, save for a brief period between May and July 1998, the Costa Rican vessels engaged in the navigation sought and obtained Nicaragua's express prior authorization to conduct the voyage, and agreed to and complied with the conditions imposed by Nicaragua on the navigation. Thus, the evidence of subsequent practice by the parties submitted

by Costa Rica is entirely consistent with Nicaragua's position that Costa Rican public vessels enjoy no right of navigation on the San Juan River, and may only do so upon Nicaragua's authorization and subject to Nicaragua's conditions.

1.17. Costa Rica's evidence shows that by far the most frequent use of the river by her public vessels has been to bring supplies and relief personnel to the border posts she has maintained on the right bank of the river. She has presented one example of this practice in 1892, and then many other examples between 1994 and 1998, and more thereafter. The *Reply* (including the documents and witness statements annexed to it) – as well as the statements from Nicaragua's witnesses annexed to this *Rejoinder* – make clear that Costa Rican authorities regularly sought and obtained authorization from their Nicaraguan counterparts before embarking on these supply and relief missions, that they stopped to report at Nicaraguan Army posts upon entering and leaving the river, that they submitted to inspection of their vessels, and that their personnel were unarmed while travelling on the river (with arms stored on the floor of the vessel) and accompanied by Nicaraguan Army personnel. The evidence submitted by both parties shows that this was the consistent practice between 1994 and the middle of 1998 when, tellingly, Costa Rica asserts that Nicaragua first began to violate her rights in a systematic way. In other words, Costa Rica admits that the system in place between 1994 and the middle of 1998, as described in the documentary evidence and as summarized above, did not violate her rights.

1.18. Nicaragua disputes that she ever violated Costa Rica's rights, much less in a systematic way. However, Nicaragua agrees that a major change in relations between the parties, and in their practices on the river, took place in the middle of 1998. The evidence shows that after newly-elected President Miguel Angel Rodríguez took office in May 1998, he and his new Minister of Public Security,

Juan Rafael Lizano, made an abrupt and aggressive change in Costa Rica's policy regarding navigation on the San Juan River. They publicly announced that they would no longer accept Nicaragua's conditions for navigating on the river with public vessels belonging to the *Guardia Civil* (which, although Costa Rica proclaims to the world that she has no army, constitutes nothing less than an army, with its more than 12,000 military personnel trained and armed by foreign powers, and its heavy weapons far in excess of anything possessed by Nicaragua). Instead, they announced, the *Guardia Civil* thenceforth would send its vessels onto the river with armed personnel, and without requesting authorization from Nicaragua, for the purpose of combating illegal immigration from Nicaragua. In implementation of this new policy, the *Guardia Civil*, by force of arms, began to intercept and detain Nicaraguans, who were navigating on the San Juan River (that is, in Nicaragua's sovereign territory) with an intention (as intuited by the *Guardia Civil*) to enter Costa Rica illegally. As reflected in the annexes to the *Reply*, the *Guardia Civil* carried out several of these missions in June and early July of 1998.

1.19. Nicaragua, through her Army, instructed the *Guardia Civil* to stop this practice immediately, explaining that it was a violation of Nicaragua's sovereignty for the *Guardia Civil* to navigate on the San Juan without Nicaraguan authorization, and an offence against Nicaragua's sovereignty for foreign military forces to detain and capture Nicaraguan citizens in Nicaraguan territory. When the *Guardia Civil* defied Nicaragua's instruction and claimed that the need to protect Costa Rica against illegal immigration justified her unilateral and unprecedented actions, Nicaragua, through her Army, prohibited all further navigation on the San Juan by vessels of the *Guardia Civil*. The documents and witness statements submitted by both parties, in the *Reply* and in this *Rejoinder*, concur that the Nicaraguan Army gave this order to the *Guardia Civil* on 14 July

1998, and that thereafter the *Guardia Civil's* interception and detention of Nicaraguans navigating on the river ceased, as did the *Guardia Civil's* practice of using the river to bring supplies and relief personnel to its posts along the river. According to the *Guardia Civil's* own records, annexed to the *Reply*, after 14 July 1998 the *Guardia Civil* regularly brought supplies and relief personnel to these posts by land instead of by boat.

1.20. Nicaragua maintains that her prohibition on the *Guardia Civil's* navigation on the San Juan after 14 July 1998 violated no right of Costa Rica. In the first place, Costa Rica enjoys no navigation rights for her public vessels, other than for vessels of her revenue service engaged in the protection of her right to navigate "*con objetos de comercio*". Beyond this, the practice of the parties prior to Costa Rica's sudden and dramatic policy change in May 1998 confirms that the *Guardia Civil* only navigated on the San Juan when authorized to do so by Nicaragua, and subject to conditions imposed by Nicaragua. Finally, the conditions imposed by Nicaragua, including the requirement that soldiers of a foreign military force transit Nicaraguan territory without bearing their arms, were reasonable exercises of Nicaragua's sovereign authority over the river, and warranted by Nicaragua's objective of protecting her own legitimate sovereign interests.

1.21. Costa Rica's evidence shows that the two other uses of the river made by her public vessels were also subject to the express prior authorization of Nicaragua. In the *Reply* and its Annexes, Costa Rica presents one instance of bilateral collaboration in law enforcement activities from 1892, and several examples of joint law enforcement exercises from the period 1994-1998. The documents submitted by Costa Rica show that the express authorization of Nicaragua's government was obtained before the 1892 incident, and that all of the

other law enforcement activities were planned and carried out jointly with Nicaraguan Army personnel, obviously with Nicaragua's authorization. Significantly, the logs of *Guardia Civil* activities covering the period 1994-1998, which Costa Rica annexed to the *Reply*, identify not a single case of law enforcement activities conducted on the river by Costa Rican personnel prior to June 1998 other than those conducted jointly with Nicaragua. As indicated, in June and early July 1998, the *Guardia Civil* unilaterally and without authorization sent its vessels on the river to intercept and detain Nicaraguans thought to be potential illegal immigrants, but Nicaragua immediately protested these actions and, because of them, prohibited further use of the river by the *Guardia Civil*. As a consequence of this prohibition, no further law enforcement activities by Costa Rica have been carried out on the river, either unilaterally or jointly with Nicaragua. Nicaragua's refusal to authorize further joint law enforcement exercises does not violate any rights of Costa Rica.

1.22. The *Reply* shows that the only other use of the river made by Costa Rican public vessels has been for the delivery of certain public services – including medical, educational and social welfare services – by Costa Rican public officials to the small hamlets on Costa Rica's side of the river. Although Nicaragua maintains that Costa Rica has no right to use the river with her public vessels for these purposes, she has not objected to the practice. Nicaragua merely requires that Costa Rican vessels engaged in this form of navigation obtain prior authorization, register at Nicaraguan posts upon entering and leaving the river, and undergo an inspection for seaworthiness and presence of contraband. In the case of vessels transporting Costa Rican officials engaged in the delivery of social services, no fees are charged for the inspection and clearance certificate, or for any other purpose. Costa Rica's own witness statements by government officials who navigated on the river for these purposes, annexed to the *Reply*, confirm that



Nicaragua has regularly permitted the navigation to take place subject to these very conditions. While Costa Rica has presented evidence that some of her officials had difficulties in 2006 obtaining visas to enter Nicaragua, it appears from the *Reply* itself that the visas were almost always issued, and that the problems were resolved by 2007, when Nicaraguan visas began to be issued more expeditiously to Costa Ricans.

1.23. Here again, Costa Rica has failed to make out a case that Nicaragua has violated her rights under the Treaty of Limits or the Cleveland Award. Neither provides a right for Costa Rican public vessels to navigate on the river in order to deliver social services. Moreover, Nicaragua does not prevent this practice; she merely regulates it, and her regulations are both reasonable and inherent to her “exclusive dominion and supreme control (*sumo imperio*)” over the river.

### **Section III. Structure of the Rejoinder**

1.24. Following this Introduction, Chapter II describes the Applicable Law in response to Chapter II of the *Reply*.

1.25. Chapter III addresses The Nature and Extent of Costa Rica’s Right To Navigate “*con Objetos de Comercio*,” and responds to Chapter III, Sections B and C of the *Reply*.

1.26. Chapter IV describes the Reasonableness of Nicaragua’s Regulation of Navigation on the San Juan River, and responds to Chapter III, Section E, and Chapter Four, Sections B and E of the *Reply*.

1.27. Chapter V addresses Costa Rica's Alleged Rights of Protection, Custody and Defence of the San Juan River, and responds to Chapter III, Sections D and F, and Chapter Four, Sections C, D and F, of the *Reply*.

1.28. Chapter VI discusses the Remedies requested by the parties, and responds to Chapter V of the *Reply*.

1.29. Following Chapter VI Nicaragua concludes Volume I of this *Rejoinder* with her Submissions and a historical Appendix, which responds to the Appendix in the *Reply*. Volume II of the *Rejoinder* contains the Annexes

## CHAPTER II: THE APPLICABLE LAW

### Section I. The Character of the 1858 Treaty as a Treaty of Boundaries

#### A. INTRODUCTION

2.1. The general character of the Treaty of 1858 remains a central element of the dispute before the Court. In her *Memorial* Costa Rica provides an Appendix in which it is asserted that the San Juan River “is governed by an international regime”<sup>2</sup>. This proposition is then elaborated on the basis that the San Juan is an “international river”<sup>3</sup>. This concept is based upon two considerations: first, that the San Juan is “a waterway regulated by international instruments”; and, secondly, that “the San Juan is a navigational waterway whose banks belong to two different States.”

2.2. In the same section of the Appendix the *Memorial* concludes:

“To sum up, the San Juan possesses an international status, since its banks belong to two different States, it provides access to the sea to both of them and its regime is regulated by international law, particularly treaty law.”<sup>4</sup>

2.3. In principle, the position of Costa Rica as presented in the *Reply* remains the same, as in these passages:

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<sup>2</sup> CRM, para. A2.

<sup>3</sup> *Ibid.*, para. A7.

<sup>4</sup> *Ibid.*, para. A3.

“2.35. According to Costa Rica, three elements are traditionally associated with the existence of international watercourses: (i) the presence of different riparians; (ii) the fact that the watercourse, if navigable, offers access to and from the sea to more than one State; and (iii) the existence of a treaty regime.

2.36. To qualify as an international watercourse, a river does not invariably have to fulfil all three conditions. But the San Juan fulfils them all. It is therefore, unquestionably, an *international* as well as a boundary river.”<sup>5</sup>

2.4. However, there are elements of confusion and contradiction. In particular, there is a new emphasis upon the role of the San Juan as a boundary river (see *Reply* paragraph 2.36, quoted above) and the allegation that this involves a “disadvantaged position”<sup>6</sup>.

2.5. The text of the *Reply* makes a very limited and fragmented effort to contradict the argument of Nicaragua in her *Counter-Memorial* relating to the character, object and purpose of the 1858 Treaty<sup>7</sup>. The purpose of this section of Chapter II is to counter the distortions in the *Reply* and to reinforce the central place of the evidence of the object and purpose of the Treaty of Limits.

2.6. It is clear that the applicable law takes the form of the provisions of the 1858 Treaty, the Cleveland Award and the principles of general international

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<sup>5</sup> CRR, para. 2.36.

<sup>6</sup> *Ibid.*, para. 2.33.

<sup>7</sup> See NCM, paras. 2.1.1-2.1.66

law<sup>8</sup>. The Cleveland Award is discussed in Section III, and the role of general international law is revisited in Section II of the present chapter.

## B. THE LEGAL AND HISTORICAL CONTEXT OF THE 1858 TREATY

2.7. It is the general position of the Applicant State that the case is related exclusively to navigation rights by virtue of Article VI of the 1858 Treaty. This position is intended to avoid a number of substantial flaws in the claim of Costa Rica. And a major difficulty faced by the Applicant is the true character of the legal and historical context.

2.8. The primary object and purpose of the 1858 Treaty was to settle a long-standing dispute concerning title to territory. In her pleadings Costa Rica appears to deny the reality of this, but fails to controvert the factual record. In her *Counter-Memorial* Nicaragua has set forth the negotiating history as recorded in the Rives Report dated 2 March 1888<sup>9</sup>. Costa Rica makes no effective challenge to this record. What she says is this:

“Nicaragua’s attempt to present itself as the loser in the bargaining leading to the Treaty of Limits of 1858 has no historical basis. Its presentation of the *quid pro quo* leading to the 1858 Treaty unjustifiably minimizes the importance of Costa Rica’s perpetual right of free navigation, as explained in the Appendix to this *Reply*. *Despite the fact that Nicaragua attached importance to Rives’ Report, it ignores the fact that Rives himself declared in that Report:*

‘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

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<sup>8</sup> See NCM, para. 3.3.1.

<sup>9</sup> See NCM, para. 2.1.22.

boundaries of Costa Rica the line of the River La Flor, the shore of Lake Nicaragua, and the River San Juan.”<sup>10</sup>

2.9. But in her *Counter-Memorial* Nicaragua does not ignore this part of the Rives Report, and the relevant passage is now quoted in full as follows:

“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.”<sup>11</sup>

2.10. This passage, as originally quoted in the *Counter-Memorial* with the key paragraph emphasised, provides a very clear indication of the historical context.

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<sup>10</sup> CRR, para. 2.67 (emphasis added).

<sup>11</sup> NCM, para. 2.1.24 (emphasis added).

The primary element in the context was the initiatives taken by Costa Rica relating to the recognition of the annexation of Nicoya.

2.11. In addition, Nicaragua refers to several bilateral treaties concerning dispute settlement which prefigure the 1858 Treaty and which, though not ratified, form part of the historical context, as Costa Rica accepts in her *Reply*<sup>12</sup>. The first of these treaties was the Marcoleta-Molina Treaty of 1854<sup>13</sup>. In her *Reply* Costa Rica asserts that Nicaragua states that the 1854 Treaty “clearly recognises that the River San Juan is entirely within Nicaragua”<sup>14</sup> and disputes whether this refers to a pre-existing sovereignty over the river. This observation in fact appears in paragraph 2.1.27 of the *Counter-Memorial* and refers to the Juarez-Cañas Treaty of 1857.

2.12. Whether or not the Marcoleta-Molina Treaty refers to a pre-existing sovereignty over the river, the text of Articles 1 and 2, quoted in the *Counter-Memorial*, makes a series of references to differences “regarding sovereignty of certain territories” (Article 1) and issues “with respect to borders, inland navigation, and sovereignty of whichever disputed territories, rivers, and lakes ...” (Article 2)<sup>15</sup>.

2.13. The second treaty invoked by Nicaragua in her *Counter-Memorial* is the Juarez-Cañas Treaty of 1857<sup>16</sup>. The *Reply* makes no attempt to justify the

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<sup>12</sup> See CRR, para. 2.68.

<sup>13</sup> See Marcoleta-Molina Preliminary Treaty, 28 January 1854. NCM, Vol. II, Annex 4.

<sup>14</sup> CRR, para. 2.68.

<sup>15</sup> NCM, para. 2.1.25.

<sup>16</sup> See Treaty of Limits (Cañas-Juárez), 6 July 1857 (unratified) (hereinafter “Cañas-Juárez Unratified Treaty”). CRM, Vol. II, Annex 5; quoted in NCM, para. 2.1.26.

allegation of Costa Rica that Nicaragua's presentation of this treaty is "misleading". In her *Counter-Memorial* Nicaragua observes that the Cañas-Juárez Treaty "would have constituted a definitive boundary, had it been ratified"<sup>17</sup>. What is certain is the fact that the first article of the treaty spells out, with great clarity, the predominance of the District of Nicoya, otherwise described as Guanacaste, in the agenda of disputes between Costa Rica and Nicaragua. The first Article is as follows:

"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 Moravia 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."<sup>18</sup>

2.14. These treaty texts refer to differences concerning title to territory, and the central feature of these differences was the unresolved issue created by the annexation of the large District of Nicoya by Costa Rica in 1824. The question of Nicoya has been carefully analysed in the *Counter-Memorial*<sup>19</sup>: The *Memorial* of Costa Rica presents an account of the historical facts which is based upon a series of omissions and distortions which have been chronicled in the *Counter-Memorial*<sup>20</sup>.

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<sup>17</sup> NCM, para. 2.1.27.

<sup>18</sup> Cañas-Jerez Unratified Treaty, para. 1. CRM, Vol. II, Annex 5.

<sup>19</sup> See NCM, paras. 1.2.2-1.2.4 and 1.2.13-1.2.23.

<sup>20</sup> See NCM, paras. 1.2.48-1.2.49.



2.15. In response to the detailed historical facts set forth in the *Counter-Memorial*, Costa Rica has nothing of substance to advance. What appears in the *Reply* is the following paragraph:

“Nicaragua presents the several diplomatic attempts to settle the disputes between the two countries after 1821 as being *travaux préparatoires* of the Treaty of Limits of 1858. Some of these attempts ended up in the signature of treaties, although they were not ratified and consequently never entered into force ... In any event, contrary to what Nicaragua now claims, the previous unratified treaties and other diplomatic exchanges do not support an interpretation of the phrase ‘*con objetos de comercio*’ as meaning exclusively transport of goods or as excluding transport of passengers, as will be shown below.”<sup>21</sup>

2.16. These perfunctory and arid observations do not meet the Nicaraguan argument relating to Nicoya. Moreover, whether or not the diplomatic materials presented by Nicaragua are, formally speaking, *travaux préparatoires* of the Treaty of Limits of 1858, they constitute cogent evidence of the issues the resolution of which was the object and purpose of the Treaty of Limits.

2.17. While the primary object and purpose of the Treaty of 1858 was to settle a long-standing dispute concerning title to territory, there was a connected object which involved giving Costa Rica the right to navigate the San Juan River “*con objetos de comercio*” and thus to provide Costa Rica with an Atlantic (Caribbean) outlet for her trade with, and especially coffee exports to, Europe. This aspect of the Treaty, and the proper interpretation of the limiting phrase “*con objetos de comercio*” will be examined in detail in Chapter III.

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<sup>21</sup> CRR, para. 2.53 (footnote omitted).

### C. ADMISSIONS BY COSTA RICA

2.18. At this stage in the argument it is opportune to point out the helpful admissions to be found in the *Reply* of Costa Rica. In the first place there is an admission of the centrality in the Treaty of Limits of the dispute relating to sovereignty over the frontier areas. The relevant passage is as follows:

“The present case is not one in which one or more riparian States decide to set up a particular fluvial regime, granting rights to other riparians or even to non-riparians. On the contrary, *this case concerns a treaty which settled a dispute with regard to sovereignty over the frontier areas of both countries, including over the San Juan River, recognising the sovereignty over the waters and one bank to one of the riparian States*, and granting a perpetual right of free navigation for purposes of commerce to the other. One attribution (Nicaraguan sovereignty) is inseparable from the other (Costa Rican navigation): the condition for the acceptance of the first was the acceptance by the other party of the second.”<sup>22</sup>

2.19. The text which is highlighted in the quotation is broadly accurate, but the final sentence involves a false opposition. It was in fact Nicaragua which was to suffer a large scale excision of territory, and the sovereignty of Nicaragua acknowledged in respect of the river as such constituted a modest recompense for the loss of the District of Nicoya (Guanacaste)<sup>23</sup>.

2.20. The next subject of admissions on the part of Costa Rica is the pertinence of the evidence of the object and purpose of the Treaty of Limits. The first passage on this topic reads as follows:

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<sup>22</sup> CRR, para. 2.69 (emphasis added).

<sup>23</sup> Title to the Nicoya (Guanacaste) District increased the territory of Costa Rica by more than 25% of her original territory at the time of Independence in 1821.

“Formally, Nicaragua acknowledges that the provisions of Article 31 of the Vienna Convention of the Law of Treaties reflect customary international law and must be applied in the present case. However, some paragraphs later, Nicaragua tries to focus on the need to ‘discover the thoughts of the author’ in order to interpret purported “obscure passages” of treaties. Clearly, Nicaragua is inviting the Court to depart from the main means of interpretation depicted in the first paragraph of that Article: ‘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.*’”<sup>24</sup>

In this passage the Applicant State recognises the legal significance of the context, together with the object and purpose, of the Treaty of Limits.

2.21. There is also a second passage in the *Reply* with the same emphasis:

“Secondly, the interpretation must correspond to the ordinary meaning to be given to the terms of the treaty *in their context and in the light of the treaty’s object and purpose.* As this Court stated even before the adoption of the 1969 Vienna Convention, ‘the words are to be interpreted according to their natural and ordinary meaning in the context in which they occur’ (*Case Concerning the Temple of Preah Vihear, ICJ Reports 1961, p.32*).”<sup>25</sup>

#### D. THE APPLICABLE PRINCIPLES OF INTERPRETATION

2.22. In the light of these passages from the *Reply*, Costa Rica appears to accept that the primary task is the interpretation of a bilateral treaty and that the applicable principles of interpretation of the Court are those contained in Article 31 of the Vienna Convention on the Law of Treaties. Within this broad context,

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<sup>24</sup> CRR, para. 2.48 (emphasis added, footnotes omitted).

<sup>25</sup> CRR, para. 2.51 (emphasis added).

Costa Rica contends that Nicaragua relies upon “a restrictive interpretation of the right of free navigation”<sup>26</sup>. The only reference used in the *Reply*<sup>27</sup> to support this assertion is to paragraph 2.1.51 of the *Counter-Memorial*, which reads in material part as follows:

“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 Sarapiquí, 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 recognised in Article VI.”<sup>28</sup>

2.23. The passage just quoted does not use the epithet “restrictive” and does not refer to a “principle of restrictive interpretation”. In any case, the pleading of Costa Rica accepts that “the issue is one of context”<sup>29</sup>, and this is surely the correct view of the law.

2.24. The *Reply* refers in this context to the case-law cited by Nicaragua<sup>30</sup>: In fact the only case discussed in the *Reply* is *The Wimbledon*. In the *Counter-Memorial*, the argument presented was based on the provisions of the Treaty of 1858 establishing Nicaraguan territorial sovereignty over the San Juan River, with the exception of certain limited rights of navigation<sup>31</sup>. A comparison was

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<sup>26</sup> CRR, paras. 2.57-2.66.

<sup>27</sup> See CRR, para. 2.59, fn 154: “See, for example, NCM, para. 2.1.51.”

<sup>28</sup> NCM, para. 2.1.51.

<sup>29</sup> CRR, para. 2.66.

<sup>30</sup> See CRR, para. 2.59.

<sup>31</sup> See NCM, para. 3.3.7.

then drawn with the similar legal scenario in the *Wimbledon* case<sup>32</sup>. In that case the Permanent Court had no hesitation in recognising that the limitation placed upon Germany in respect of her sovereign rights over the Kiel Canal entailed a restrictive interpretation of the clause which produced the limitation. This, of course, is not an example of the application of an intrusive principle of restrictive interpretation, but a reference to the outcome of the specific treaty arrangements.

E. THE APPLICATION OF THE GENERAL RULE OF INTERPRETATION TO THE  
TREATY OF LIMITS

2.25. The generally accepted principles are set forth in the Vienna Convention, and the dominant feature of these is the “general rule of interpretation” in Article 31. In essential part, Article 31 provides:

“General rule of interpretation

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. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes.
  - (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
  - (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.”  
(emphasis added)

2.26. In addition, Article 32 provides:

“Supplementary means of interpretation

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<sup>32</sup> See *ibid.*, para. 3.3.8.

Recourse may be had to supplementary means of interpretation, *including the preparatory work of the treaty and the circumstances of its conclusion*, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.”(emphasis added)

2.27. These provisions give prominence to the context and to the object and purpose of a treaty. At the same time, the starting point is always “the terms of the treaty”. In the pages which follow, the terms of the 1858 Treaty will be analysed with particular reference to the context and to the particular object and purpose of settling a major and long-standing dispute about land boundaries.

2.28. The attitude of Costa Rica to the question of discovering the object and purpose of the 1858 Treaty is one of ambivalence. On the one hand, the text of the *Reply* recognises the principle involved, as in the following passages:

“2.50 The first principle of interpretation is that of good faith  
(...)

2.51 Secondly, the interpretation must correspond to the ordinary meaning to be given to the terms of a treaty in their context and in the light of the treaty’s object and purpose ...”<sup>33</sup>

2.29. However, the Applicant State is remarkably reluctant in giving effect to the criteria clearly expressed in Article 31 of the Vienna Convention. In any event, the Court has found it helpful to rely on the criterion of applying the provisions of a treaty in order to give appropriate effect to its object and purpose,

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<sup>33</sup> CRR, paras. 2.50-2.51.

and has done so in eleven Judgments since 1986<sup>34</sup>. Two of these decisions involved the delimitation of boundaries. In the *Reply* Costa Rica seeks to draw assistance from the *Judgment* in the *Kasikili/Sedudu Island* case<sup>35</sup>. In her view, in that case navigation is treated as an important element of delimitation when the delimitation concerns international waterways<sup>36</sup>.

2.30. This argument is misconceived. The historical background was, of course, markedly different in the *Kasikili/Sedudu Island* case. The background motivation was not the nature of rights of navigation within a river ascribed to one riparian, but the question of access to navigable rivers, and especially to the Zambezi. To enable equality of access to the Chobe, as a navigable river, and to the Zambezi, the delimitation was to be the centre of the main channel. The present case is very different. In any case navigation was not the sole objective of the relevant provisions, as seen from the text of the *Judgment*.

2.31. The true position is spelled out clearly in the relevant passages from the *Judgment* (with emphasis added to the passage quoted out of context in the *Reply*):

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<sup>34</sup> See *Military and Paramilitary Activities case (Nicaragua v United States)*, ICJ Reports 1986, paras. 271-76; *Case Concerning Border and Transborder Armed Actions*, ICJ Reports 1988, para. 46; *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Reports 1996, para. 34; *Case Concerning Oil Platforms*, ICJ Reports 1996, paras. 23-28; *Case Concerning the Gabčíkovo-Nagymaros Project*, ICJ Reports 1997, paras. 133-47; *Case Concerning Kasikili/Sedudu Island*, ICJ Reports 1999, paras. 43-45; *La Grand Case*, ICJ Reports 2001, paras. 101-102, *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan*, ICJ Reports 2002, paras. 49-52; *Case Concerning Avena and Other Mexican Nationals*, ICJ Reports, 2004, para. 85; *Case Concerning Legality of the Use of Force (Preliminary Objections)*, ICJ Reports, 2004, paras. 100-114; *Case Concerning the Application of the Genocide Convention*, 2007, paras. 160-167.

<sup>35</sup> See ICJ Reports 1999, p.1045.

<sup>36</sup> See CRR, para. 2.71.

“44. The Court notes that navigation appears to have been a factor in the choice of the contracting powers in delimiting their spheres of influence. The great rivers of Africa traditionally offered the colonial powers a highway penetrating deep into the African continent. It was to gain access to the Zambezi that Germany sought ‘a strip of territory which shall at no point be less than 20 English miles in width’ – terms which were eventually included in the provisions of Article III, paragraph 2, of the Treaty. Admittedly, this strip of territory did provide access to the Zambezi, but its southern boundary was formed by the Chobe River, which was apparently assumed to be navigable, as suggested by the use of the word ‘Thalweg’ in the text of the German version of the Treaty. The difficulties of the land route owing to regular flooding, and the obstacles to navigation on the Chobe, were, in all probability, little known at the time.

45. The fact that the words ‘centre of the main channel’ were included in the draft Treaty on the initiative of the British Government suggests that Great Britain no less than Germany sought to have access to the Zambezi. In order to mark the separation of their spheres of influence the contracting parties chose ‘the centre of the main channel’ of the Chobe, thus ensuring that there was a well-defined, recognisable boundary, in a watercourse that was assumed to be navigable. There are grounds for thinking that one of the reasons underlying their decision was navigation, but the Court does not consider that navigation was the sole objective of the provisions of Article III, paragraph 2, of the Treaty. In referring to the main channel of the Chobe, the parties sought both to secure for themselves freedom of navigation on the river and to delimit as precisely as possible their respective spheres of influence.”<sup>37</sup>

2.32. These passages provide no support for the Costa Rican thesis. The situation involved the *de novo* partition of large regions of a continent and did not relate to the settlement of pre-existing territorial disputes like that concerning the annexation of Nicoya. Furthermore, the use of the centre of the main channel as a

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<sup>37</sup> *ICJ Reports, 1999*, pp.1073-1074.



division of areas of sovereignty (as well as access to navigable waters) is in complete contrast to the arrangements effected by the Treaty of Limits.

2.33. The decision in the *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan*<sup>38</sup> is relevant in indicating the utility of the determination of the object and purpose of a boundary treaty in the process of interpretation. However, the decision has no more specific application for present purposes<sup>39</sup>.

2.34. In addition to the jurisprudence of the Court, an extensive array of doctrine recognises the role of the object and purpose of a treaty as revealed in the text<sup>40</sup>. It is necessary to bear in mind that the reference to the object and purpose forms a part of the textual approach to the task of interpretation. The position is elucidated by Sir Ian Sinclair as follows:

“Reverting to the general rule expressed in paragraph 1 of Article 31, we now have to consider the relevance of the object and purpose of the treaty, in the light of which it falls to be interpreted. We have already noted that the preamble to the treaty may assist in elucidating that object and purpose. It is also worth stressing that reference to the object and purpose of the treaty is, as it were, a secondary or ancillary process in the application of the general rule on interpretation. *The initial search is for the ‘ordinary meaning’ to be given to the terms of the treaty in their ‘context’; it is in the light of the object and*

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<sup>38</sup> See *ICJ Reports*, 2002, p.625.

<sup>39</sup> See *ibid.*, p.652, para. 51, for the view of the Court on the delimitation.

<sup>40</sup> See the following sources: Mc Nair, *The Law of Treaties*, 1961, pp.380-381; Rousseau, *Droit International Public*, Vol. I, 1970, para. 241; Oppenheim’s *International Law*, 9<sup>th</sup> ed. by Jennings and Watts, Vol. 1, *Peace*, 1992, pp. 1271-1274; Thirlway, *British Year Book* Vol. 62 (1991), pp. 37-44; and *ibid.*, Vol. 77 (2006), pp. 45-52; Sinclair, *The Vienna Convention on the Law of Treaties*, 2<sup>nd</sup> ed., 1984, pp.113-135; Podesta Costa and Ruda, *Derecho Internacional Público*, Vol. II, 1985, pp. 103-105; Pastor Ridruejo, *Curso de Derecho Internacional Público*, 2<sup>nd</sup> ed., 1987, pp. 120-121.

*purpose of the treaty that the initial and preliminary conclusion must be tested and either confirmed or modified.”*<sup>41</sup>

2.35. The modalities of the provision which was to become Article 31 of the Vienna Convention were laid out very clearly in the Report of the International Law Commission to the General Assembly in 1966. There it is stated:

*“(12) Paragraph 1 contains three separate principles. The first – interpretation in good faith – flows directly from the rule pacta sunt servanda. The second principle is the very essence of the textual approach: the parties are to be presumed to have that intention which appears from the ordinary meaning of the terms used by them. The third principle is one both of common sense and good faith; the ordinary meaning of a term is not to be determined in the abstract but in the context of the treaty and in the light of its object and purpose. These principles have repeatedly been affirmed by the Court. The present Court in its Advisory Opinion on the Competence of the General Assembly for the Admission of a State to the United Nations said:*

*‘The Court considers it necessary to say that the first duty of a Tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter.’*

And the Permanent Court in an early Advisory Opinion<sup>42</sup> stressed that the context is not merely the Article or section of the treaty in which the term occurs, but the treaty as a whole:

In considering the question before the Court upon the language of the Treaty, it is obvious that the Treaty must be read as a whole, and that its meaning is not to

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<sup>41</sup> *Op. Cit.*, p.130 (emphasis added).

<sup>42</sup> *See Competence of the ILO to Regulate Agricultural Labour*, PCIJ (1922), Series B, Nos. 2 and 3, p. 23.

be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense.’

Again the Court has more than once had recourse to the statement of the object and purpose of the treaty in the preamble in order to interpret a particular provision.”<sup>43</sup>

1. *The Object and Purpose Indicated in the Text of the Treaty*

2.36. It is now appropriate to analyse the evidence of the object and purpose in the form of the title and text of the Treaty of 1858. This analysis remains necessary given that the *Reply* shows a strong aversion to the examination of the text of the Treaty as a whole.

(a) *The Title and the Preamble*

2.37. The title of the Treaty speaks for itself<sup>44</sup>. In the Spanish text it is *Tratado de Límites entre Nicaragua y Costa Rica* and, in English, the Treaty of Limits between Costa Rica and Nicaragua. In the text of the Cleveland Award it is referred to as the “Boundary Treaty of 1858 between Costa Rica and Nicaragua”<sup>45</sup>.

2.38. The preamble forms a part of the context of a treaty, as specified in paragraph 2 of Article 31 of the Vienna Convention. The Court has made

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<sup>43</sup> *Yearbook*, ILC, 1966, Vol. II, p. 221 (emphasis added, footnotes omitted).

<sup>44</sup> *See* CRM, Vol. II, Annex 7.

<sup>45</sup> Costa Rica-Nicaragua, Treaty of Limits (Cañas-Jérez), Nicaraguan English translation submitted to Cleveland. CRM, Vol. II, Annex 7(c), Appendix B, p. 55.

recourse to the statement of the object and purpose of the treaty in the preamble in the process of interpretation<sup>46</sup>.

2.39. The preamble to the Treaty of Limits of 1858 provides a clear confirmation of the object and purpose of the agreement as follows:

“We, Maximo Jerez, Minister Plenipotentiary of the Government of the Republic of Nicaragua, and Jose Maria Cãnas, Minister Plenipotentiary of the Government of the Republic of Costa Rica, having been commissioned by our constituents *to conclude a Treaty on the boundaries of the two Republics*, which may put an end to the differences that have retarded the better and more perfect understanding and harmony which ought to prevail between them for their common security and aggrandizement, having interchanged our respective powers, ..... and having in the presence and with the assistance of the Representative of San Salvador, discussed the different points with the necessary care and precaution, have agreed on, and concluded *the following Treaty of boundaries* between Nicaragua and Costa Rica...”<sup>46</sup>

2.40. Thus the explicit purpose of the two Governments was “to conclude a Treaty on the boundaries of the two Republics.”

(b) *The Provisions of the Treaty*

2.41. The provisions of the Treaty, both in their individual content and in their sequence, give priority and emphasis to the business of establishing a boundary line. Article 1 explicitly indicates the historical background in the reference to

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<sup>46</sup> See the *United States Nationals in Morocco* case, *ICJ Reports*, 1952, pp.183, 184, 196, 197, 198; *South West Africa* cases, *ibid.*, 1966, p.24, para 21 (emphasis added).

<sup>46</sup> Costa Rica-Nicaragua, Treaty of Limits (Cañas-Jérez), English translations. CRM, Vol. II, Annex 7(d), pp. 62-65 (emphasis added).

“differences about boundaries”, and the need to proceed to the consolidation of “peace, happily re-established”.

2.42. Articles II and III are devoted to the establishment of the boundary line as follows:

“II. The boundary line between the two Republics, setting out from the Northern Ocean, shall commence at the extremity of Punta de Castilla, in the mouth of the River San Juan de Nicaragua, and shall continue, always following the right bank of the said river, up to a point distant from Castilla Viejo 3 English miles, measured from the outer fortifications of the said Castilla to the said point. From thence the line shall continue in a curve, the centre of which shall be the said fortifications, and from which it shall be distant 3 English miles throughout its course, until it arrives at a point two miles distant from the river bank above the Castillo. From thence it shall continue in a direction towards the River Sapoa, which falls into the Lake of Nicaragua, always two miles distant from the right of the San Juan River, with its circumvolutions, up to its origin at the Lake, and from the right banks of the lake itself, until it arrives at the above-mentioned River Sapoa, where this line, parallel to the said banks, shall end. From the point where this line meets the River Sapoa, and which must, according to the aforesaid, be two miles distant from the lake, a straight line shall be drawn to the centre of Salinas Bay on the Pacific, where the boundary-line between the two Contracting Republic ends.

III. This boundary line shall be measured entirely or in part by Commissioners of the two Governments, at a time which shall be fixed by them. The said Commissioners shall be at liberty to deviate from the curve round the Castilla, for the parallel along the shores of the river and lake, and from the straight line between Sapoa and Salinas, if they should agree thereon, for the purpose of finding natural landmarks.”<sup>46</sup>

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<sup>46</sup> Costa Rica-Nicaragua, Treaty of Limits (Cañas-Jérez), English translations. CRM, Vol. II, Annex 7(d).

2.43. Articles IV and V are concerned with the legal status of particular locations. Following these four articles involving a territorial division, Article VI forms part of the overall settlement of the differences which resulted in the war of 1857 and provides as follows:

“VI. The Republic of Nicaragua shall have the exclusive dominion and supreme control over the waters of the River San Juan from their issue out of the lake to their discharge into the Atlantic Ocean. But the Republic of Costa Rica shall have the perpetual right of free navigation in these waters from the mouth of the river up to 3 English miles below Castillo Viejo, for commercial purposes [*“con objetos de comercio”*], whether with Nicaragua or with the interior of Costa Rica by the Rivers San Carlos or Sarapiquí, or any other route starting from any point on the bank of the San Juan River belonging to that Republic.

The boats of either country may touch at any part of the banks of the river where the navigation is common, without paying any dues except such as may be established by agreement between the two Governments.”<sup>47</sup>

2.44. The first element in this provision concerns “the exclusive dominion and supreme control (*exclusivamente el dominio y sumo imperio*)” over the waters of the River San Juan. This is the primary principle and the reference to navigation is logically a secondary element.

2.45. The provisions of Article VII emphasise the general purpose of the Treaty, as the creation of a “territorial division”. Thus Article VII provides that:

“It is agreed that the territorial division made by this Treaty, is in no wise to be understood as contrary to the obligations incurred either by political Treaties or contracts of canalization

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<sup>47</sup> *Ibid.*

or transit entered into by Nicaragua before the recognition of the present Convention; it is understood rather that Costa Rica assumes those obligations, in the part which belongs to her territory, without any prejudice to her sovereign rights and dominion over the same.”<sup>48</sup>

(c) *The General Character of the Treaty of 1858 as Revealed in the Diplomatic Correspondence and Negotiations Subsequent to the Treaty of 1858*

2.46. In the *Counter-Memorial* Nicaragua explains how the general character of the Treaty of 1858 as a treaty of peace and boundaries is reflected in the diplomatic correspondence subsequent to the conclusion of the Treaty<sup>49</sup>.

2.47. While the Applicant State recognises the relevance of subsequent practice in principle<sup>50</sup>, the materials invoked by Nicaragua on this subject are ignored.

2.48. In this context Costa Rica remains silent in face of the correspondence of the years preceding the agreement to the arbitration of President Cleveland in 1888. The relevant data of the *Counter-Memorial* which are ignored in the *Reply* are as follows:

“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:

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<sup>48</sup> *Ibid.*

<sup>49</sup> See NCM, paras. 2.1.36-2.1.39.

<sup>50</sup> See CRR, paras. 2.55-56.

i) Nicaragua to Costa Rica, 1 February 1871. 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. This substantial document sets forth arguments relating to the boundaries of Nicoya (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, giving the history of the boundary question with Costa Rica and the invalidity of the 1858 Treaty.”<sup>51</sup>

2.49. 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.<sup>52</sup>

(d) *The Object and Purpose as Revealed in 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*

2.50. The Rives Report provides a detailed account of the historical background of the Treaty of 1858, and an elaboration of the relevance of territorial claims. These materials are set forth in the *Counter-Memorial*<sup>53</sup> and will not be reiterated here.

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<sup>51</sup> NCM, para. 2.1.38.

<sup>52</sup> See Note of Nicaragua to Costa Rica, dated 3 August 1886, and the response of Costa Rica, dated 31 August 1886.

<sup>53</sup> See NCM, paras. 2.1.22-2.1.24.



## F. THE ROLE OF INTER-TEMPORAL LAW IN THE PRESENT CASE

2.51. In her *Counter-Memorial* Nicaragua has invoked the principle of inter-temporal law in relation to the determination of the object and purpose of the Treaty of Limits at the time of its conclusion. In doing so Nicaragua has presented ample legal materials in support of the law as understood at the relevant period<sup>54</sup>, including the Arbitral Award in the case of the *Reserved Fisheries* between the United States and Britain of 1858<sup>55</sup>, and the works of Carlos Calvo and Andres Bello.

2.52. In the *Reply* the Applicant State does not reject the application of the principle of inter-temporal law as such but introduces certain elements of confusion<sup>56</sup>.

### 1. First Element of Confusion

2.53. In the first place, Max Huber is quoted to support an alleged “second rule of the inter-temporal law” to the effect that the existence of a right “shall follow the conditions required by the evolution of law.” The passage from the Award requires a fuller presentation than appears in the *Reply*. In its full version the passage in the *Island of Palmas* case reads as follows:

“If the view most favourable to the American arguments is adopted – with every reservation as to the soundness of such view – that is to say, if we consider as positive law at the period in question the rule that discovery as such, i.e. the mere fact of seeing land, without any act, even symbolical, of taking

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<sup>54</sup> See NCM, paras. 2.1.14-2.1.17.

<sup>55</sup> De la Pradelle and Politis, *Recueil des Arbitrages Internationaux*, II, p.440, at p. 447.

<sup>56</sup> See CRR, paras. 2.43-2.45.

possession, involved *ipso jure* territorial sovereignty and not merely an 'inchoate title', a *jus ad rem*, to be completed eventually by an actual and durable taking of possession within a reasonable time, the question arises whether sovereignty yet existed at the critical date, i.e. the moment of conclusion and coming into force of the Treaty of Paris.

As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called inter-temporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law. International law in the 19th century, having regard to the fact that most parts of the globe were under the sovereignty of States members of the community of nations, and that territories without a master had become relatively few, took account of a tendency already existing and especially developed since the middle of the 18th century, and laid down the principle that occupation, to constitute a claim to territorial sovereignty, must be effective, that is, offer certain guarantees to other States and their nationals. It seems therefore incompatible with this rule of positive law that there should be regions which are neither under the effective sovereignty of a State, nor without a master, but which are reserved for the exclusive influence of one State, in virtue solely of a title of acquisition which is no longer recognised by existing law, even if such a title ever conferred territorial sovereignty. For these reasons, discovery alone, without any subsequent act, cannot at the present time suffice to prove sovereignty over the Island of Palmas (or Miangas); and in so far as there is no sovereignty, the question of an abandonment properly speaking of sovereignty by one State in order that the sovereignty of another may take its place does not arise.

If on the other hand the view is adopted that discovery does not create a definitive title of sovereignty, but only an 'inchoate' title, such a title exists, it is true, without external manifestation. However, according to the view that has prevailed at any rate since the 19th century, an inchoate title of discovery must be completed within a reasonable period by the effective occupation of the region claimed to be discovered.

This principle must be applied in the present case, for the reasons given above in regard to the rules determining which of successive legal systems is to be applied (the so-called inter-temporal law). Now, no act of occupation nor, except as to a recent period, any exercise of sovereignty at Palmas by Spain has been alleged. But even admitting that the Spanish title still existed as inchoate in 1898 and must be considered as included in the cession under Article III of the Treaty of Paris, an inchoate title could not prevail over the continuous and peaceful display of authority by another State; for such display may prevail even over a prior, definitive title put forward by another State. This point will be considered, when the Netherlands argument has been examined and the allegations of either Party as to the display of their authority can be compared.”<sup>57</sup>

2.54. The question of law elaborated by Huber is to be seen in its context. There is no issue of a rule of inter-temporal law, and certainly not of a rule pertaining to the interpretation of bilateral treaties.

## 2. *Second Element of Confusion*

2.55. The second element of confusion is to use reference to the ‘notion of inter-temporal law’ as an excuse to introduce the issue of the relevance of general international law. The relevance of general international law is a qualitatively different issue, and will be examined in Section II below. In any event it is clear that there can be no presumption that a principle of general international law can intrude in order to modify the effects of the negotiated provisions of a bilateral treaty. The provisions of such an instrument would inevitably reflect the precise concerns of the parties at the material time. It would be wholly irregular to seek

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<sup>57</sup> *Island of Palmas Case*, UNRIAA, II, pp.845-846.

to use the notion of inter-temporal law to disturb the stable regime embodied in a treaty establishing boundaries and settling territorial claims.

### 3. *Third Element of Confusion*

2.56. The further element of confusion is the proposal that the subject of the Treaty of 1858 must involve “the evolution of general international law regarding the right of navigation of riparian states in international waterways”<sup>58</sup>. No evidence is offered to show that the provisions of the 1858 Treaty are subject to a process of evolution. The governing principle is the intention of the parties at the time of the conclusion of the treaty. As the Court stated in the *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia*:

“53. Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account the fact that the concepts embodied in Article 22 of the Covenant – ‘the strenuous conditions of the modern world’ and ‘the well-being and development’ of the peoples concerned – were not static, *but were by definition evolutionary, as also, therefore, was the concept of the ‘sacred trust’*. *The parties to the Covenant must consequently be deemed to have accepted them as such. That is why, viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation. In the domain to which the present proceedings relate, the last fifty years, as indicated above, have brought important*

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<sup>58</sup> CRR, para. 2.45.

developments. These developments leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned. In this domain, as elsewhere, the *corpus iuris gentium* has been considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore.

54. In the light of the foregoing, the Court is unable to accept any construction which would attach to 'C' mandates an object and purpose different from those of 'A' or 'B' mandates. The only differences were those appearing from the language of Article 22 of the Covenant, and from the particular mandate instruments, but the objective and safeguards remained the same, with no exceptions such as considerations of geographical contiguity. To hold otherwise would mean that territories under 'C' mandate belonged to the family of mandates only in name, being in fact the objects of disguised cessions, as if the affirmation that they could 'be best administered under the laws of the Mandatory as integral portions of its territory'. (Art. 22, para. 6) conferred upon the administering Power a special title not vested in States entrusted with 'A' or 'B' mandates. The Court would recall in this respect what was stated in the 1962 Judgment in the *South West Africa* cases as applying to all categories of mandate:

'The rights of the Mandatory in relation to the mandated territory and the inhabitants have their foundation in the obligations of the Mandatory and they are, so to speak, mere tools given to enable it to fulfil its obligations.' (*I.C.J. Reports* 1962, p.329.)"<sup>59</sup>

2.57. This reasoning is directly related to developments concerning self-determination and human rights affecting "the entire legal system prevailing at the time of the interpretation". There is no comparison here with the principles relating to watercourses, and, even less, with a watercourse forming part of a Treaty of Limits closely anchored in specifics which are both regional and historical. In the present case the "entire legal system" consists essentially of the

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<sup>59</sup> *ICJ Reports*, 1971, pp.31-32, paras. 53-54 (emphasis added).

bilateral treaty, the character of its provisions, and especially the objective of achieving a stable territorial settlement.

G. THE PRIMARY OBJECT AND PURPOSE OF THE 1858 TREATY AS A TREATY OF LIMITS: THE LEGAL CONSEQUENCES

1. *The Theses of Costa Rica Concerning Treaty Interpretation*

2.58. It is obvious that the San Juan River is subject to a regime designated by a bilateral treaty. No rights are created for third states and the provisions of the Treaty of Limits reflect its purpose in establishing boundaries as a basis for peaceful relations. The object and purpose of the Treaty in relation to the settlement of boundaries is unequivocally indicated by the preamble, by the provisions, and by the historical background.

2.59. Prior to an examination of “the principles of interpretation” in her *Reply*<sup>60</sup>, Costa Rica seeks to use a typology of watercourses to create a set of suppositions intended to stand in front of, and to obscure, the process of treaty interpretation<sup>61</sup>.

2.60. The first of these suppositions is that the San Juan is a “boundary river”<sup>62</sup>. By this is meant a river in which the boundary is drawn on the shoreline of one of the riparian States. As will be demonstrated below, there is no basis in general international law for giving this fact any consequences in favour of the position of Costa Rica on her navigation rights.

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<sup>60</sup> CRR, paras. 2.41-2.73.

<sup>61</sup> See *ibid.*, paras. 2.02-2.40.

<sup>62</sup> *Ibid.*, paras. 2.19-2.33.

2.61. The second supposition in the *Reply* is to the effect that the San Juan is an “international boundary river”<sup>63</sup>. In the analysis offered by Costa Rica, the advantage this supposition gives Costa Rica remains very obscure. The key paragraphs are as follows:

“2.37 The characterisation of the San Juan as an international boundary watercourse entails that the rules of general international law apply to it unless they are pre-empted by treaty rules or binding decisions (here the Cleveland Award and the Judgment of the Central American Court of Justice). It also entails the applicability of the general rules on territorial sovereignty pursuant to which the respondent State exercises sovereignty over the waters of the San Juan, always subject to its international obligations.’

2.38 The Treaty and the pertinent arbitral and judicial rulings must be appreciated in the light of the rules of interpretation laid down by Articles 31 and 32 of the Vienna Convention on the Law of Treaties of 23 May 1969. The interpretation of the provisions of the 1858 Treaty must take account of the rules of general international law relating to watercourses and the circumstances surrounding that Treaty, including the fact that the boundary runs on the Costa Rican bank. The rules of interpretation in question do not in all aspects correspond to those invoked by Nicaragua in the present controversy.”<sup>64</sup>

2.62. As has been pointed out already, these passages exhibit considerable confusion concerning the applicable law. In particular, the relation of the treaty provisions and general international law is not clearly articulated.

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<sup>63</sup> *Ibid.*, paras. 2.34-2.39.

<sup>64</sup> CRR, paras. 2.32-2.38.

2.63. Invoking the typology of watercourses is unhelpful. The doctrine shows a reluctance to generalise from the European treaty practice. Thus Dr. Whiteman reports the opinion of Alvarez with approval:

“At the Barcelona Conference, the Chilean publicist, Alejandro Alvarez, in his report as chairman of the subcommittee on navigable waterways, noted:

‘The principle of freedom of navigation on rivers has not evolved in the same manner in the American Continent. Freedom of navigation on international rivers has been admitted there, not as an extension of the European principle, but as a concession accorded voluntarily by the riparian States through the medium of inter partes agreements or of legislative acts ...’

League of Nations, Barcelona Conference, Verbatim Records and Texts Relating to the Convention on the Regime of Navigable Waterways of International Concern (Geneva, 1921) 225-226.”<sup>65</sup>

## 2. *The Response of Costa Rica to the Analysis Presented in the Counter-Memorial*

2.64. In the *Counter-Memorial*<sup>66</sup> Nicaragua presents an analysis of the legal consequences flowing from the object and purpose of the Treaty. The *Reply* contains no clearly integrated response to what is said in the *Counter-Memorial*, and it is therefore necessary to seek out the disassociated comments which have been introduced in Chapters II and III of the *Reply*. Nicaragua maintains that

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<sup>65</sup> Marjorie M. Whiteman, *Digest of International Law*, Vol.3, Department of State Public. 7737, released October 1964, p. 881; see also the work of Carlos Sosa Rodriguez, *Les Fleuves de l’Amérique Latine et le Droit des Gens*, Paris, 1935, pp. 65-66 and 89-119.

<sup>66</sup> See NCM, paras. 2.1.46-2.1.66.



these comments, both individually and as a composite, do not constitute an effective response to the analysis contained in the *Counter-Memorial*.

2.65. The response of the Applicant State will now be analysed in relation to each relevant paragraph of the *Counter-Memorial*.

2.66. In her *Counter-Memorial* Nicaragua explains that the position of Costa Rica that her “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”<sup>67</sup> is untenable<sup>68</sup>. The response of the Applicant State to this reasoning, insofar as it is visible, is exiguous and fissiparous. The relevant passages of the *Reply* are in paragraphs 2.57 and 2.58.

2.67. It is difficult to understand why the Applicant State considers these observations in her *Reply* to be helpful to her case. No admission has been made by Nicaragua in her *Counter-Memorial* to back Costa Rica’s position. Moreover, generally speaking, these paragraphs from the *Reply* are consonant with the position of Nicaragua. Thus, a particular right of Costa Rica (free navigation) is presented in the Treaty of Limits as a qualification of the general grant of rights (in the form of title to territory) to Nicaragua. The Treaty provisions show that it is Nicaragua’s sovereignty which is limited by the particular right of Costa Rica of free navigation. As the *Reply* helpfully acknowledges in paragraph 2.58: “the rights and obligations of the parties in the present case are governed, first and foremost, by the 1858 Treaty of Limits.”

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<sup>67</sup> NCM, para. 2.1.47.

<sup>68</sup> See NCM, paras. 2.147- 2.1.50.

2.68. Nicaragua's *Counter-Memorial* recalls:

“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 Sarapiquí, or any other way, proceeding from the bank of the San Juan River....’

2.1.52 From this premise 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.”<sup>69</sup>

2.69. The response of Costa Rica in the *Reply* is two-fold. First, it is claimed that such a regulatory power “amounts to an effective denial of Costa Rica’s right” (of navigation). But this is clearly not the case<sup>70</sup>. Secondly, it is claimed that such regulatory powers do not stem from any of the applicable instruments<sup>71</sup>. But it is impossible both in law and in practice to have a right of navigation which is not subject to regulation and policing. This form of practical necessity is recognised by the standard authorities cited in the *Counter-Memorial* at paragraphs 2.1.53 to 2.1.57, including the opinions of Wheaton and O’Connell. In other words, the right of navigation must be compatible with the nature of territorial sovereignty.

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<sup>69</sup> *Ibid.*, 2.1.51-2.1.52.

<sup>70</sup> CRR, pp.47-48, para. 3.14.

<sup>71</sup> *See ibid.*, para. 3.24.

2.70. In response to the proposition in the above indicated paragraphs of the *Counter-Memorial*, Costa Rica observes in her *Reply*,

“3.25 Some of the writers cited by Nicaragua in support of its views on the purported right of regulation only address the issue of regulatory rights in relation to innocent passage or innocent use, situations which clearly fall outside a conventional right of free navigation such as that in the present case. But even in the case of an innocent use, the writers generally agree that a State cannot establish regulations that limit navigation.”

2.71. These observations lack any basis in law and no sources are cited. Indeed, the passage from Wheaton (cited in paragraph 2.1.54 of the *Counter-Memorial*) expressly refers to the “right of innocent passage” being “necessarily modified by the safety and convenience of the State affected by it ...” Moreover, the passage from O’Connell<sup>72</sup> does not employ the phrase “innocent use”.

2.72. In response to the quotation from Wheaton in paragraph 2.1.54 of the *Counter-Memorial*, Costa Rica comments as follows:

“3.36 Nicaragua gives the impression that Costa Rica’s right established in Article VI of the Treaty of Limits is an ‘imperfect right’...

Costa Rica quotes Wheaton’s *Elements of International Law*, published just eight years after the conclusion of the 1858 Treaty of Limits. Wheaton wrote that:

“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

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<sup>72</sup> See NCM, para. 2.1.57.

by it, and can only be effectually secured by mutual convention regulating the mode of its exercise”. (Emphasis added.)

And Costa Rica recalls in paragraphs 3.37 of her *Reply* that Nicaragua comments:

“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.*” (Emphasis added.)

Nicaragua’s embarrassment about this quotation is understandable. Wheaton mentioned the need of a convention to secure the mode of exercise in regards to such ‘right of navigation for the commercial purposes’, which is precisely the case of the San Juan River.”

2.73. There is no embarrassment in Nicaragua’s *Counter-Memorial* on the relevance of this quote. Moreover, the *Reply* is here accepting that a mutual convention, as required by Wheaton, would still govern “the mode of exercise” of the right of navigation.

2.74. The sources when considered as an ensemble justify the conclusion that the right of regulation in legal terms derives both from the provisions of the Treaty of 1858 and from the inherent and logical rights emanating from sovereignty. In her *Counter-Memorial* Nicaragua points out in paragraph 2.158 that at least three types of regulation by the Nicaraguan authorities would be compatible with the principle of free navigation, including the right to monitor the type of vessels exercising the right of navigation and those measures involving questions of security and safety. In Chapter IV of this *Rejoinder*, Nicaragua further demonstrates that the regulatory measures are necessary to

defend her sovereign interests in crime prevention, navigational safety, border security and, above all, environmental protection.

2.75. The response of Costa Rica in her *Reply* amounts to little more than a formal denial: and it is a denial which involves the rejection of any regulatory power whatsoever inhering in the territorial sovereign.

2.76. As Nicaragua explained in her *Counter-Memorial*:

“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 ...’”<sup>73</sup>

2.77. The response of Costa Rica in the *Reply* is as follows:

“3.17 Nicaragua also referred to the Award of the Tribunal of Arbitration in the Question relating to the North Atlantic Coast Fisheries of 7 September 1910. However, its reference to this Award is not clear. Again it is worth quoting the relevant paragraph of this arbitral award in its entirety:

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<sup>73</sup> Parry (ed.), *British Digest of International Law*, Vol., 2b, 1967, p.585 at p.594.

‘The exercise of that right by Great Britain is, however, limited by the said Treaty in respect of the said liberties therein granted to the inhabitants of the United States in that such regulations must be made bona fide and must not be in violation of the said Treaty...’

2.78. In relation to the first paragraph from the *Reply* it is simply mistaken to suggest that the award is in some way misrepresented. The right to make regulations “must not be in violation of the said Treaty”, as the Award states. But this proposition does not defeat the right of Great Britain to make regulations as long as they “*are not inconsistent with the obligation to execute the treaty in good faith, and are therefore reasonable and not in violation of the treaty.*” (emphasis added)

2.79. Thus, in this passage, which is adopted by Costa Rica, the Tribunal is expressly accepting that regulations necessary on grounds of public order and morals are *not in violation of the treaty in question.*

2.80. In paragraph 3.18 of her *Reply*, Costa Rica urges upon the Court a distinction between a resource subject to exhaustion, such as fisheries, and navigation “which is not destructive of any natural resource”. It is then asserted that free navigation does not need any regulation. This distinction lacks validity both in law and in the sphere of policy. In the first place, navigation is a notorious source of pollution and public order involves both environmental protection and safety of navigation, including avoidance of collisions and other disasters. In any event the concept of free navigation must include the necessary regulation to ensure that navigation is available in conditions of safety, freedom from criminal activity, and freedom from environmental hazards.

2.81. In paragraph 2.1.64 of the *Counter-Memorial*, Nicaragua brought to the fore the implication of the decision of the Court in the *Right of Passage Case* (Portugal v India)<sup>74</sup>. In that case, both Portugal and the Court recognised that the passage was subject to the regulation and control of India. In the *Reply* no attempt is made either to discuss, or to deny, the relevance of this decision of the Court. It is particularly striking that Costa Rica fails to challenge the analogy made by Nicaragua with the right of passage.

H. CONCLUSION: THE PRIMARY OBJECT AND PURPOSE OF THE 1858 TREATY WAS THE DEFINITIVE SETTLEMENT OF A LONG-STANDING DISPUTE CONCERNING TITLE TO TERRITORY

2.82. The evidence available leads to the inevitable conclusion that the primary object and purpose of the 1858 Treaty was the definitive settlement of the long-standing territorial dispute concerning the district of Nicoya and the overall limits of Costa Rica and Nicaragua. The evidence of the specific object and purpose is as follows:

- (i) The historical context, including several bilateral treaties which form part of the historical context<sup>75</sup>.
- (ii) The nature of the title, and the text of the preamble.
- (iii) The provisions of the Treaty, including the sequence of the provisions and the ranking of Article VI.
- (iv) The diplomatic correspondence subsequent to the conclusion of the Treaty<sup>76</sup>.

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<sup>74</sup> See *ICJ Reports*, 1960, p.6.

<sup>75</sup> See also NCM, paras. 2.1.36-2.1.39.

(v) The text of 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<sup>77</sup>.

2.83. The treatment of these sources in the *Reply* is incomplete and extremely shallow. Moreover, there are certain admissions in the text of the *Reply*, which have been examined above.

2.84. Given that the Treaty of 1858 recognises the territorial sovereignty of Nicaragua over the river as a whole, it must follow that the right of navigation is necessarily to be reconciled with the existence of Nicaraguan title. Moreover, according to the general principles of international law, Nicaragua has both the right and the duty, as territorial sovereign, to make provision for the safety of navigation and the maintenance of public order.

2.85. The ordinal significance of the interaction of territorial sovereignty and a regime of navigation is well-recognised in the doctrine. The authorities refer to the regulatory power of the riparian State in such circumstances<sup>78</sup>.

2.86. The position of contemporary authorities, such as Wheaton, was reflected in the opinions of Governments. This is evidenced by the advice offered to the British Secretary of State, the Earl of Aberdeen, in 1844 by Sir John Dodson<sup>79</sup>.

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<sup>76</sup> See also NCM, paras. 2.1.22-2.1.24.

<sup>77</sup> See NR, Chap. II, Sec. III.

<sup>78</sup> See NR, para. 2.69.

<sup>79</sup> See International Law Opinions, Vol. 1, 1956, p. 308.



2.87. In addition to these evidences, when essentially similar legal questions were examined by international tribunals their decisions explicitly recognised that a State may exercise a police power in respect of vessels exercising a treaty-based right of free navigation in rivers forming part of its territory. In face of the Awards in the *North Atlantic Coast Fisheries case* and *McMahan (U.S.A.) v United Mexican States* (1929), the Applicant State makes no attempt to deny either their authority or relevance<sup>80</sup>.

2.88. In her *Reply* Costa Rica is remarkably reluctant to recognise the force of the evidence, either in its separate manifestations, or as a whole. A careful examination of the individual sources is avoided. “Writers” are invoked but not quoted. In this setting it has been necessary to reaffirm the pertinent elements of the interpretation of the Treaty of Limits and to place its provisions within the appropriate legal perspective.

2.89. Therefore, whatever the nature and extent of Costa Rica’s navigation right (which will be addressed in Chapters III through V of this *Rejoinder*), within the provisions of the Treaty of Limits and the Cleveland Award, Nicaragua must have the exclusive competence to exercise the following regulatory powers:

- (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;
- (b) The protection of the border, including resort to immigration procedures in respect to foreign nationals navigating in Nicaragua’s territorial waters;

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<sup>80</sup> See CRR, paras. 3.17-3.18, 3.32.

- (c) The exercise of normal police powers;
- (d) The protection of the environment and natural resources; and
- (e) 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.

## Section II. The Role of General International Law and Other Particular Rules

2.90. Costa Rica devotes an entire chapter (Chapter II) of her *Reply* to “General International Law Relevant to the Dispute”<sup>81</sup>. The topic does not deserve so much emphasis: while it is certainly true that, in some limited respect, “the rules of general international law apply...”<sup>82</sup>, it remains that the case is primarily governed by the Treaty of 1858. Costa Rica’s Chapter II is cluttered with rather general and academic developments on the law of international rivers<sup>83</sup> which are of limited relevance for the present purpose.

2.91. As has been shown in Section I above, the 1858 Treaty recognises the territorial sovereignty of Nicaragua over the bed and the waters of the San Juan River. It does so in the first sentence of Article VI. The second sentence, introduced by the word “but” (“*pero*”), constitutes an exception to the usual consequences of the “exclusive dominion and supreme control over the waters of

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<sup>81</sup> CRR, paras. 2.01-2.74.

<sup>82</sup> CRR, para. 2.40.

<sup>83</sup> See e.g., the lengthy presentation of the practice of establishing boundaries on riverbanks at paras. 2.21-2.25.

the San Juan River...” (“*exclusivamente el dominio y sumo imperio sobre las aguas del río de San Juan*”). This exception is constituted by the “right of free navigation” (“*los derechos perpetuos de libre navegación*”) on the river with the important stipulations that this right is limited to navigation:

- (i) “with articles of trade” (“*con objetos de comercio*”) and
- (ii) that this commerce be “with Nicaragua or with the interior of Costa Rica” (“*con Nicaragua o al interior de Costa Rica*”).

2.92. Nicaragua will come back to these limitations in Chapter III below. In the present Section, she is only concerned with the respective roles of the 1858 Treaty (and of some other more minor instruments) and general international law, and with the relations between the former and the latter for the settlement of the present dispute. And the principles are straightforward:

- (i.) the Treaty prevails;
- (ii.) however, if it is incomplete or if its meaning is obscure, there can be recourse to other rules of international law.

A. THE TREATY PREVAILS: THE CONTINGENT AND SECONDARY RELEVANCE OF GENERAL INTERNATIONAL LAW

2.93. Whatever their content may be, the rules of general international law which might be applicable to a similar case are not peremptory: they would apply insofar as the States in question have not accepted special rules – which can be derogatory to said general rules. For this reason, the legal qualification of the situation is of rather little importance.

2.94. Costa Rica pays great attention to the issue of the definition of an international river. According to her, the San Juan River would be an

international river for three cumulative reasons: “(i) the presence of different riparians ; (ii) the fact that the watercourse, if navigable, offers access to and from the sea to more than one State ; and (iii) the existence of a treaty regime”<sup>84</sup>. It might well be so – but it does not really matter since, whatever the general rules applicable to international watercourses, the 1858 Treaty must prevail, as Costa Rica acknowledges from time to time<sup>85</sup>. But, in doing so, she does no more than pay lip service to the principle of *lex specialis*.

2.95. Thus, Costa Rica writes, “[r]egarding navigation ... any recourse to customary law is contingent on the *lex specialis* resulting from the 1858 Treaty, as interpreted by the 1888 Cleveland Award and the 1916 Judgment of the Central American Court of Justice”<sup>86</sup>. Nicaragua denies the relevance of the 1916 Judgment in the present case<sup>87</sup>, but leaving this aside for the moment, it is revealing that, while she seems to accept the principle of *specialia* [here the rules in the 1858 Treaty] *generalibus* [here general international law rules] *derogant*, Costa Rica goes to great lengths to base her right of navigation on the San Juan River on general international law.

2.96. In this respect, she attaches great importance to an allegedly “truncated version” of a quote from a writer (Professor Lucius Caflisch) commenting upon the *Faber* case decided in 1903 by the German-Venezuelan Claims Commission<sup>88</sup>. The alleged “truncating” is a venial sin: it has no bearing on the meaning of the sentence (and it is the reason why Nicaragua indulged herself not

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<sup>84</sup> CRR, p. 28, para. 2.35.

<sup>85</sup> See e.g., CRR, para. 2.08 or para. 2.58.

<sup>86</sup> CRR, p. 19, para. 2.15.

<sup>87</sup> See NR, paras. 2.124-2.128.

<sup>88</sup> See CRR, paras. 2.16-2.17.

to reproduce the phrase in question which attributes to the Umpire an alternative position, where the only purpose of the quote was to contrast two positions; moreover the learned author interprets “freely” what the Umpire effectively said<sup>89</sup>). Now, leaving aside these pettifogging quibbles, both the decision in the *Faber* case and Professor Caflisch’s comment are of interest regarding Costa Rica’s alleged rights of navigation under general international law.

2.97. As was usual at the time, the Award includes the opinions of the Commissioners. In the instant case, one of the Commissioners (Goetsch) wrote:

“In the first place it is undeniable that a sovereign state holds absolute authority over its rivers and water courses until these touch the frontiers of other states. This principle is nevertheless limited in two senses by international law. When a river constitutes the only way of communication, indispensable for the subsistence of another nation, or part of it, its use can not be entirely prohibited.”<sup>90</sup>

For his part, Commissioner Zuloaga considered that, “[t]ransitory commerce can therefore be prohibited by Venezuela at any time, as she is not obliged by any treaty to permit it. (...) Venezuela, as a sovereign nation, regulates this commerce in transit in its territory as it sees fit”<sup>91</sup>, and that “[t]he theory that navigable international rivers are free to navigation has not been admitted as a general rule of the law of nations. No nation up to now has recognized this absolute principle or this obligation as a perfect one, and in the cases where it has been agreed to by nations it has always been by virtue of special treaties”<sup>92</sup>. Umpire Duffield clearly concurred with this last opinion: “To sustain a claim for injuries to Cúcuta

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<sup>89</sup> See the Award of 1903, *Faber* case, *RIAA*, vol. X, p. 462 – fn. 97.

<sup>90</sup> *Ibid.*, p. 444.

<sup>91</sup> *Ibid.*, p. 447.

<sup>92</sup> *Ibid.*, p. 449.

merchants with the reasons adduced, to the effect that the river Zulia must be opened to international commerce, is to surreptitiously introduce questions as to the sovereignty of Venezuela”<sup>93</sup>; then, quoting Woolsey, who terms the alleged right of navigation on international rivers “only a moral or imperfect right to navigation”, the Umpire adds: “However, it is no longer to be doubted that the reason of the thing and the opinion of other jurists [whose opinion is analyzed at length in the Award], spoken generally, seem to agree in holding that the right can only be what is called (however improperly) by Vattel and other writers imperfect, and that the state through whose domain the passage is to be made ‘*must be the sole judge* as to whether it is innocent or injurious in its character’ (Phillimore, CLVII, citing Puffendorf, Wheaton’s Elements of International Law, Hesty’s Law of Nations, Wolff’s Institutes, Vattel)”<sup>94</sup>.

2.98. It is therefore not really true that “la sentence arbitrale dans l’affaire *Faber* met en relief l’opposition entre la doctrine de la libre navigation, création de l’Europe du XIXe siècle, et la conception latinoaméricaine, qui fait dépendre la navigation de la volonté de l’État riverain ou des États riverains.”<sup>95</sup> Nor indeed is it entirely true that, “[c]ette conception semble du reste l’emporter sur la thèse subsidiaire qui fut développée par le surarbitre Duffield et qui consistait à limiter la libre navigation aux trajets sans transbordement vers la mer ou en provenance de celle-ci”<sup>96</sup>. In reality, the position of the Umpire is clearly in favour of the first of those two theses; and the alleged “subsidiary thesis” is not at all presented as

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<sup>93</sup> *Ibid.*, p. 457.

<sup>94</sup> *Ibid.*, p. 466 (italics in the text).

<sup>95</sup> L. Caflisch, « Règles générales du droit des cours d’eau internationaux », *Recueil des cours*, 1989, Vol. II19, p. 125.

<sup>96</sup> *Ibid.*

an alternative to the former one but as concerning the different question “of regulating commerce, rather than restricting internal navigation”<sup>97</sup>.

2.99. What, on the other hand, is clearly true, is the conclusion arrived at by Professor Caflisch: “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”<sup>98</sup>. This is confirmed by the careful examination of the authorities by Umpire Duffield<sup>99</sup> – who does not limit his conclusion to Latin America but shows that “[f]rom this review of the authorities it seems that even in respect of rivers capable of navigation by sea-going vessels carrying oceanic commerce [wherever situated] the weight of authority sustains the right of Venezuela to make the decrees complained of”<sup>100</sup>.

2.100. In other words, general international law, as presented by more or less contemporaneous authorities, does not help Costa Rica, not only is it supplanted by the 1858 Treaty which introduces a qualified right of “free navigation” in favour of Costa Rica, but also, if it were to apply, it would not recognize *any* right of navigation in her favour: the principle would be (and only be) that of the absolute authority of the sovereign State (here Nicaragua) over the waters of her river (here the San Juan).

2.101. At this stage, Costa Rica’s fallback position is to claim that the limit fixed by the 1858 Treaty, being a limit on the shore, is a “bad” boundary:

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<sup>97</sup> Award of 1903, *Faber case*, *RIAA*, vol. X, p. 462.

<sup>98</sup> L. Caflisch, *op. cit.* fn. 95, p. 125.

<sup>99</sup> See Award of 1903, *Faber case*, *RIAA*, vol. X, pp. 463-466.

<sup>100</sup> *Ibid.*, p. 466.

- “The great injustice of this type of boundary (...) is that one of the border States is excluded from the use and exploitation of the river”<sup>101</sup>;
- “The effect of placing an international boundary on the shore of a *navigable* river may be particularly dramatic...”<sup>102</sup>;
- “Limits on the shore cannot be considered ‘good’ boundaries because they tend to generate conflict rather than to promote peaceful coexistence”<sup>103</sup>.

2.102. These are extraordinary allegations before a Court, “whose function is to decide in accordance with international law”. Two remarks are in order.

2.103. *First*, these limitations “imposed” on Costa Rica on the use of the river by the lawfully concluded Treaty of Limits of 1858 were agreed in exchange of the concession of enormous compensations -- of which the granting of qualified rights of free navigation was not the main part. In reality, in exchange for this supposedly unfavourable limit, Costa Rica gained sovereignty over the district of Nicoya -- an advantage which was the main *quid pro quo*, compensating with largesse the placing of the border at the bank<sup>104</sup>. There is nothing “inequitable” in this agreement, which can be seen as largely in favour of Costa Rica.

2.104. *Second*, and more importantly from a legal point of view, Costa Rica does not contend that the 1858 Treaty is unlawful or invalid for any reason. It must then be applied as it stands, with all its consequences. In particular, Costa Rica must accept that:

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<sup>101</sup> CRR, p. 26, para. 2.28, quoting L.J. Bouchez, “The Fixing of Boundaries in International River Boundary Rivers”, 12 *International and Comparative Law Quarterly* 1963, p. 792.

<sup>102</sup> *Ibid.*, para. 2.30.

<sup>103</sup> *Ibid.*, para. 2.31.

<sup>104</sup> See NCM, paras. 1.2.2-1.2.4 and paras. 1.2.13-1.2.23; see also NR, paras. 2.13-2.19.



- “[t]he relevant line between the two Republics (...) shall run along the right bank” of the San Juan de Nicaragua river (Article II);

- The Republic of Nicaragua has “exclusively the dominion and supreme control (*sumo imperio*) over the waters of the San Juan river from its origin in the Lake to its mouth in the Atlantic” (Article VI), with the exception that (“but”):

- the Republic of Costa Rica has the “right of free navigation (...), said navigation being ‘*con objetos de comercio*’ either with Nicaragua or with the interior of Costa Rica...” (Article VI).

2.105. Therefore, Costa Rica must accept that she only enjoys this last freedom, which clearly is an exception to the otherwise generally applicable rules when a river border is placed at the bank. As explained by Bouchez, with the apparent approval of Costa Rica, in the absence of any contrary express provision in a treaty, the State which does not possess the waters “is excluded from the use and exploitation of the river”<sup>105</sup>.

2.106. As shown above<sup>106</sup>, the real issue is not to interpret restrictively the freedom of navigation conceded to Costa Rica by the 1858 Treaty, but simply to interpret the Treaty in conformity with the usual canons of treaty interpretation as set forth in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties. Once this interpretation has been made<sup>107</sup>, general international law applies and, whether on the basis of a non-existent right of navigation or on that of the special law applicable when a border is fixed on the bank of a river, Costa Rica has no right on the San Juan outside the right of qualified freedom of

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<sup>105</sup> See NR, para. 2.101.

<sup>106</sup> See NR, para. 2.55.

<sup>107</sup> See NR, Chapter III.

navigation that she holds under the Treaty. Consequently, whether the river is “international” -- as Costa Rica insistently alleges<sup>108</sup> -- or not, or whether the San Juan is “a boundary river” -- as she strongly emphasises too<sup>109</sup> -- or not, does not matter; what does matter for the settlement of the present dispute is that the border follows the right (Costa Rican) bank and that the bed and the waters of the river are under the sovereignty of Nicaragua.

## B. OTHER APPLICABLE RULES

### 1. *Relevant Customary Rules*

2.107. As already indicated<sup>110</sup>, Nicaragua fully accepts that “customary international law is (...) relevant to adjudication of the present dispute and to the interpretation of the relevant treaty provisions”, with the important qualification that “any recourse to customary law is contingent on the *lex specialis* resulting from the 1858 Treaty...”<sup>111</sup>. In other words, that the Treaty, exactly as any treaty, does not apply in isolation. It is grounded in general international law which can clarify its terms if they are obscure or disputed, or complement them when they are silent. In other words, when properly interpreted in conformity with the usual rules of interpretation in international law, it can only be completed, but not contradicted, by customary international law.

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<sup>108</sup> Cf. CRR, paras. 2.02-2.40, and especially paras. 2.34-2.36.

<sup>109</sup> Cf. CRR, paras. 2.19-2.33.

<sup>110</sup> See NR, paras. 2.17 and 2.56.

<sup>111</sup> CRR, para. 2.15.

2.108. Concerning the first of these functions of general international law, as recalled above<sup>112</sup>, both parties agree that the “general rule of interpretation” together with the “supplementary means of interpretation” as described in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties apply for the purpose of the interpretation of the 1858 Treaty, and in particular to clarify the meaning of the expression “freedom of navigation with articles of trade” (*libre navegación ... con objetos de comercio*). There is no need to reconsider the issue of whether the general rule and the supplementary rules of interpretation are applicable. Both parties apply them to support their interpretations of the phrase “*con objetos de comercio*”. Nicaragua further addresses the issue of interpretation of this phrase in Chapter III of this *Rejoinder*.

2.109. It should not be necessary to emphasize again that besides this qualified freedom of navigation, the general applicable principles are a duty of abstention (or, to put it otherwise, no right on the river) for Costa Rica contrasted with an otherwise unlimited territorial sovereignty of Nicaragua on the waters of the river. As Costa Rica recognises: “No one disputes [Nicaragua’s] sovereignty over the waters of the San Juan river”<sup>113</sup>.

2.110. This being said, while a State cannot abandon its sovereignty, unless it accepts to disappear as a State, nothing impedes a sovereign State from freely limiting its sovereign rights over its territory (as Nicaragua did by granting a right of navigation, with limitations, to Costa Rica in Article VI of the 1858 Treaty). But here arises the principle according to which, when a State has agreed to submit to a limitation on the exercise of its sovereign rights over its own territory,

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<sup>112</sup> See NR, paras. 2.25-2.35.

<sup>113</sup> CRR, para. 2.61.

as is the case here, “[t]his fact constitutes a sufficient reason for the restrictive interpretation in case of doubt, of the clause which produces such a limitation”<sup>114</sup>.

2.111. It is of course not an answer to state, as Costa Rica does, that this argument “has no value, because the wording of Article VI of the Treaty of Limits is clear”<sup>115</sup>. Indeed the expression “*con objetos de comercio*” is clear, but it is contested by the Applicant – as more than amply shown by the lengthy arguments exchanged on this crucial point by the parties before and during the present proceedings; and the real scope of the expression “free navigation” (“*libre navegación*”) itself is disputed. Hence the need to have recourse to interpretation.

2.112. As Nicaragua explained in her *Counter-Memorial*, “[m]utatis 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”<sup>116</sup>. This has not been challenged by Costa Rica, which has not criticized the analysis made by Nicaragua of the *Judgment in the Right of Passage* case<sup>117</sup>, which shows that such a right is not unqualified under international law and is, in particular, subordinated to the “power of regulation and control” of the territorial State<sup>118</sup>.

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<sup>114</sup> PCIJ, Judgment of 17 August 1923, *Wimbledon*, Series A, n° 1, p. 24; See also the PCIJ Advisory Opinion of 21 November 1925 in the case concerning the *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne*, Series B, n° 12, p. 25, invoked by Costa Rica herself (CRR, para. 2.62).

<sup>115</sup> CRR, para. 2.63.

<sup>116</sup> NCM, para. 3.3.8.

<sup>117</sup> See NCM, paras. 2.1.64 and 3.3.8.

<sup>118</sup> Judgment of 12 April 1960, *ICJ Reports* 1960, p. 45.

2.113. It is the very purpose of the concept of territorial sovereignty to establish that the territorial State exclusively and fully possesses and exercises all the rights that it has not freely limited in favour of another State. This has been very clearly stated by Max Huber in his celebrated dictum, in the *Island of Palmas* arbitration, “[s]overeignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organisation of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory”<sup>119</sup>. And as the Arbitral Tribunal aptly considered in the *Lake Lanoux* case, “La souveraineté territoriale joue à la manière d’une présomption. Elle doit fléchir devant toutes les obligations internationales, quelle qu’en soit la source, mais elle ne fléchit que devant elles”<sup>120</sup>. As a consequence, in the present case, unless Costa Rica can positively show that other rules do apply, there is no room for any further limitation on Nicaragua’s sovereignty than that resulting from Article VI of the Treaty, when this provision is properly interpreted.

## 2. *The “Instruments” Invoked by Costa Rica*

2.114. Costa Rica puts forward a single rule of customary origin and a small handful of written instruments which would allegedly make the “presumption” linked to the territorial sovereignty of Nicaragua bend before them. As for the

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<sup>119</sup> Arbitral Award, 4 April 1928, *RIAA*, vol. II, p. 838.

<sup>120</sup> Arbitral Award, 16 November 1957, *RIAA*, vol. XII, p. 301 (“Territorial sovereignty plays the part of a presumption. It must bend before all international obligations, whatever their origin, but only before such obligations.” [53 *AJIL* 1956, at 159]).

alleged customary rule (introduced as “related rights” – in the plural<sup>121</sup>), it relates to fisheries and will be dealt with below, in Chapter IV. Leaving aside the Cleveland Award of 1888 and the Alexander Awards, which are relevant for the interpretation of the 1858 Treaty, Costa Rica mentions three other instruments, which, from her point of view, would be relevant for the settlement of the present dispute:

- the Fournier-Sevilla Agreement of 9 January 1956;
- the Cuadra-Castro Joint Communiqué of 8 September 1995; and
- the Cuadra-Lizano Joint Communiqué of 30 July 1998<sup>122</sup>.

The 1916 Judgment of the Central American Court of Justice is also invoked by Costa Rica but it is by no means relevant for the present case, as will be explained below.

(a) *The 1956 Fournier-Sevilla Agreement*

2.115. Leaving aside the unwelcome and superfluous remark made at the end of paragraph 2.11 of the Costa Rican *Reply*, the 1956 Fournier-Sevilla Agreement<sup>123</sup> adds nothing to the 1858 Treaty as interpreted by the Cleveland Award, contrary to Costa Rica’s allegations<sup>124</sup>. To demonstrate this, it will suffice to quote the text of two provisions of this Agreement invoked by the Applicant in support of her allegation.

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<sup>121</sup> See CRR, para. 2.15.

<sup>122</sup> See CRR, paras. 2.11-2.14.

<sup>123</sup> See Costa Rica-Nicaragua Agreement pursuant to Article IV of the Pact of Amity, 9 January 1956. CRM, Vol. II, Annex 24.

<sup>124</sup> See CRR, para. 2.11.

2.116. Article I provides:

“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 to facilitate those transport services which may be provided to the territory of one Party by enterprises which are nationals of the other.”<sup>125</sup>

This provision expressly invokes “the terms of the Treaty of 15 April 1858 and its interpretation given by arbitration on 22 March 1888” and it clearly adds nothing to those terms.

2.117. For its part, Article II provides:

“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 of either weapons or armed groups from the territory of one of the Parties into the territory of the other. The authorities of the two Governments, and, in particular, the border authorities, shall exchange, as fully as possible, any information which may come to their attention and which might help to avoid such incidents.”

According to Costa Rica – which, carefully, does not quote this provision: “This could only be done, on the part of Costa Rica, by allowing its police to navigate on the River with normal arms and on the basis of an ability to re-supply Costa

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<sup>125</sup> It might be noted that this Agreement dated 1956 only took into consideration the 1858 Treaty and the Cleveland Award of 1888 attributes no relevance to of the then more recent decision of the Central American Court in 1916. *See* NR, para. 2.125.

Rica's border posts"<sup>126</sup>. Nothing in the text or the spirit of Article II implies such a conclusion. The only precise means of cooperation which is provided for is mutual information. Moreover, even accepting Costa Rica's audacious interpretation according to which this provision amounts to an agreement "to cooperate to safeguard their common border"<sup>127</sup>, this certainly does not imply armed navigation or re-supplying border posts through the river on the part of Costa Rica; this can perfectly (and must) be done on and from the land itself. In any case, this is clearly a typical case where the presumption in favour of territorial sovereignty must fully apply.

(b) *The 1995 Cuadra-Castro Joint Communiqué*

2.118. The second "relevant text" -- to be noted: "text," not a treaty -- invoked by Costa Rica is the 1995 Cuadra-Castro Joint Communiqué<sup>128</sup>. According to the description given by Costa Rica, this instrument "refers to far-reaching cooperation for the joint or parallel surveillance of the common border. That such cooperation would not be possible without the assistance of Costa Rican public vessels is evident"<sup>129</sup>. In reality, as Nicaragua has indicated in her *Counter-Memorial*, this communiqué is nothing more than "a commitment to cooperate"<sup>130</sup>:

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<sup>126</sup> CRR, para. 2.11.

<sup>127</sup> *Ibid.*

<sup>128</sup> Cuadra-Castro Joint Communiqué, 8 September 1995. CRM, Vol. II, Annex 27.

<sup>129</sup> CRR, para. 2.12 (footnote omitted).

<sup>130</sup> NCM, para. 3.2.9.



- point one calls for “coordination” and parallel patrolling at the border of both countries;

- point two envisages that “the chiefs of the border units will coordinate and cooperate more closely in planning and carrying out joint parallel patrolling along our countries’ common border, exchanging operative information of the common entities involved”;

- according to point three, “[b]oth institutions will coordinate the training of guides and canine technique in each country’s national centres...”; and

- point four provides for various meetings.

2.119. Even accepting that the signatories could commit their respective States in matters relating to the boundary regime (which in the Nicaraguan case was not legally possible), it is indeed impossible to interpret those four points as an agreement given by Nicaragua to Costa Rica for a unilateral right to navigate on the San Juan with public vessels, thus clearly derogating from the 1858 Treaty as interpreted by the 1888 Award, and limiting again Nicaragua’s sovereignty over the river. Nowhere in the communiqué is Costa Rican Civil Guard navigation on the river mentioned, expanded or approved – in fact, the San Juan River is not mentioned at all. This document did nothing more than clarify in writing the existing collaborative relationship between the Nicaraguan and Costa Rican security forces in the border area, premised on the desire to exchange information, coordinate law enforcement efforts, and continue parallel patrols. As stated by Brigadier General Denis Membreño Rivas, the Commander of the Nicaraguan Military Detachment at the time this communiqué was signed:

“From my first day at the Southern Military Detachment in February 1992 until my departure at the end of December 1995, our relations with the Costa Rican security personnel were very good. From time to time, my Detachment

coordinated operations against crime with the Guardia Civil, where in a parallel manner we would travel the relevant sector of the border, then from their territory and us navigating the San Juan River. These efforts were primarily focused on the prevention of illegal activities or rescuing shipwreck victims. The Costa Rican security personnel never navigated on the river without first requesting authorization from my Detachment”<sup>131</sup>.

2.120. The communiqué did nothing to expand Costa Rica’s navigation rights as provided under the Treaty of Limits or the Cleveland Award. Pursuant to the communiqué, which put in writing the procedures that had previously been adopted informally by the respective military commanders in the area, patrolling of the border area for law enforcement purposes was coordinated and carried out in parallel. The evidence shows that Costa Rican security personnel only used the river after seeking and obtaining prior authorization by Nicaragua. As shown in Chapter V below<sup>132</sup>, Costa Rican security personnel have not patrolled the San Juan River for law enforcement purposes, or carried out law enforcement actions on the River, except on those infrequent and short-lived occasions when they were expressly authorized by Nicaragua to do so, and in conformity with the conditions and time limitations imposed by Nicaragua. At most, the Cuadra-Castro Communiqué is an authorization by Nicaragua for Costa Rican security personnel to use the river for limited purposes, subject to specific conditions. As sovereign over the river, it is Nicaragua’s prerogative to issue such authorizations, which would not have been necessary had Costa Rica enjoyed a right to engage in the authorized activity. Consequently, the Cuadra-Castro Communiqué is evidence not of Costa Rica’s right to navigate on the San Juan

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<sup>131</sup> Affidavit of Brigadier General Denis Membreño Rivas, 10 March 2008 (hereinafter “Membreño Affidavit”): NR, Vol. II, Annex 73.

<sup>132</sup> See NR, paras. 5.65, 5.77, and 5.80-5.84.

River with law enforcement vessels, but exactly the contrary. It is evidence of Costa Rica's lack of such right.

(c) *The 1998 Cuadra-Lizano Joint Communiqué*

2.121. The last relevant instrument, according to Costa Rica, would be the 1998 Cuadra-Lizano Joint Communiqué<sup>133</sup>, which, according to the Applicant “confirms the right of Costa Rican police officers to navigate on the San Juan”<sup>134</sup>. As already explained in some detail in the *Counter-Memorial*<sup>135</sup>, this alleged “agreement”, which has never been officially published anywhere, whether internally or, *a fortiori*, by the Secretariat of the United Nations, was declared null and void by the Government of Nicaragua less than two weeks after its creation (on 11 August 1998)<sup>136</sup>.

2.122. To fully understand the inherent limitation of the document, it is useful to describe the context in which it was concluded. The communiqué was signed by the Nicaraguan Minister of Defence and the Costa Rican Minister of Public Security in an attempt to assuage the tension between the two nations during the height of the diplomatic crisis in July 1998 – following Costa Rica's illegal arrests of Nicaraguans on the San Juan River and Nicaragua's resultant prohibition of Civil Guard navigation. During that meeting, the two Ministers prepared a joint communiqué, in which both parties manifested that Civil Guard boats could re-supply their posts via the river, after giving the required notice,

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<sup>133</sup> See Cuadra-Lizano Joint Communiqué, 30 July 1998. CRM, Vol. II, Annex 28.

<sup>134</sup> CRR, para. 2.13.

<sup>135</sup> See NCM, paras. 3.2.9-3.2.12.

<sup>136</sup> See Letter of the Nicaraguan acting Minister of Foreign Affairs to the Costa Rican Minister of Foreign Affairs and Worship of 11 August 1998. CRM, Vol. III, Annex 49.

carrying only their small arms, reporting at each Nicaraguan military post passed, and accompanied by a Nicaraguan military escort<sup>137</sup>. In essence, the document restored the practice which the Nicaraguan military had permitted at times in the past, but had stopped authorizing in July 1998. However, when the communiqué left the high-pressure meeting room and was objectively evaluated by the Nicaraguan Congress and Executive, the relevant legal authorities quickly realized that the hastily concluded communiqué had been executed in clear violation of the Nicaraguan Constitution and was invalid<sup>138</sup>.

2.123. In this regard, the Cuadra-Lizano Communiqué is similar to the earlier Cuadra-Castro Communiqué but even less relevant. At most, both were express authorizations by Nicaragua for Costa Rican public vessels to navigate on the San Juan River for specified purposes and subject to conditions providing for strict limitation and control by Nicaragua – authorizations that would not have been necessary if Costa Rica had already possessed the right to engage in the specified activities, and conditions that were totally contradictory to Costa Rica’s putative possession of such a right. Beyond this, the Cuadra-Lizano Communiqué was never a binding international legal document, nor did it create any rights of navigation for Costa Rican public vessels beyond the limited privileges that Nicaragua had chosen to grant in some previous moments of positive relations.

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<sup>137</sup> See Resolution of the Republic of Nicaragua’s National Assembly on the Cuadra-Lizano Joint Communiqué, 18 August 1998. NCM, Vol. II, Annex 68.

<sup>138</sup> The joint communiqué violated the Constitution of the Republic of Nicaragua, as discussed in NCM, para 3.2.12, as well as the following articles:

Article 92: “...The transit or stationing of foreign military ships, aircraft and machinery may be authorized for humanitarian purposes, always provided that such authorization is requested by the Government of the Republic and ratified by the National Assembly;”

Article 130: “No appointment grants, to that who exercises it, additional functions than those conferred to by the Constitution and the laws...All government officials from the State must provide an accounting of his or her assets before assuming a position and after the term is completed. The law regulates this matter.” NR, Vol. II, Annex 54.

Finally, as already discussed, the communiqué was declared null and void – and therefore lacks any legal force.

### 3. *The 1916 Judgment of the Central American Court of Justice*

2.124. Costa Rica insists in her *Reply* on the relevance of the decision of the Central American Court of Justice to the issues now before the Court<sup>139</sup>. In fact, as pointed out in the *Counter-Memorial*<sup>140</sup>, this judgment has no relevance whatsoever to the present case. The questions at issue before the Central American Court are completely unrelated to those before this Court. The 1916 case did not concern the extent of Costa Rica's navigational rights on the San Juan River but only, as the Court emphasized, the conclusion of a treaty between Nicaragua and the United States relating to the construction of an inter-oceanic canal<sup>141</sup>. The Central American Court purported to do no more than look to the 1858 Treaty and the Cleveland Award as the legal framework governing the San Juan. It certainly did not purport to enlarge or affect in any way Costa Rica's rights under those instruments.

2.125. In 1916, Costa Rica was not claiming any rights to navigate with state vessels with armed men on board, nor was she claiming any rights to bring foreign and national tourists to view the sights (on the Nicaraguan side, since on the Costa Rican side there is mainly farm land) along the San Juan River. What Costa Rica claimed before the Central American Court was that when Nicaragua

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<sup>139</sup> See CRR, para. 2.10.

<sup>140</sup> See NCM, para. 3.2.6.

<sup>141</sup> See *Republic of Costa Rica v Republic of Nicaragua*, Central American Court of Justice, Opinion and Decision of the Court (11 AJIL, 1917). CRM, Annex 21, p. 122.

entered into a treaty with the United States of America in 1914 (Chamorro-Bryan) giving that State an option to build a canal across Nicaraguan territory, she violated her obligation to first consult with Costa Rica in accordance with Article VIII of the 1858 Treaty and Paragraphs 10 and 11 of the Cleveland Award. Costa Rica furthermore alleged that since the treaty ceded parts of the territory of Nicaragua to the United States, it violated the rights of Costa Rica and those of the rest of the States of Central America, stipulated in the General Treaty of Peace and Amity agreed to by all the Central American States in 1907 in Washington, D.C.

2.126. The decision of the Central American Court was limited to these issues. It declared:

“that the Government of Nicaragua has violated, to the injury of Costa Rica, the rights granted to the latter by the Cañas-Jerez Treaty of Limits of April fifteen, eighteen hundred and fifty eight, by the Cleveland Award of March twenty-second, eighteen hundred and fifty-eight, and by the Central American Treaty of Peace and Amity of December twentieth, nineteen hundred and seven”<sup>142</sup>.

2.127. Any wording of that Judgment that might be construed to refer to Costa Rica’s other rights in the 1858 Treaty or the 1888 Award are at most *obiter dicta* and even these *dicta* are general statements paraphrasing loosely the wording of those same documents. The Central American Court had no authority to review or add anything to the 1858 Treaty as interpreted by the Cleveland Award; nor did it attempt to do so.

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<sup>142</sup> CRM, Vol. II, Annex 21 (*AJIL* 1917, p. 229).

2.128. The Central American Court of Justice consisted of five Judges appointed by the legislative bodies of each of the five member States. “Unfortunately,” as Hudson points out, “the judges of the court seem to have been looked upon not as international officials of all five States, but as officials of their respective States”<sup>143</sup>. And more unfortunately for Nicaragua, the Chamorro-Bryan Treaty she had entered into with the United States was hotly rejected by the other four member States. Three of them, Costa Rica, Honduras and El Salvador, had sent notes of protest to the United States<sup>144</sup>. In simple terms, all the Judges were pronouncing on a question that involved the national interests of each of their own States vis-à-vis Nicaragua. But even in this inevitable 4 to 1 decision, the Central American judges were not deciding any of the issues presently before the Court.

### **Section III. The Scope of the Cleveland Award**

2.129. Costa Rica accepts that the applicable law consists of the 1858 Treaty as interpreted in the 1888 Cleveland Award, but she mischaracterizes Nicaragua’s position on the Cleveland Award and reads much into the Award that is simply not there. This section will distinguish between what questions were decided in the Cleveland Award and what questions were not, and show why Costa Rica’s attempted use of the Cleveland Award to support her case is entirely misplaced.

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<sup>143</sup> M. Hudson, *The Permanent Court of International Justice*, Macmillan, New York, 1943, p. 46.

<sup>144</sup> See *AJIL* 1917, p. 192.

A. THE CLEVELAND AWARD LIMITED COSTA RICA'S RIGHTS TO NAVIGATE  
THE SAN JUAN WITH PUBLIC VESSELS

2.130. The Court will recall that in paragraph *Second* of his award, President Cleveland found that Costa 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.”<sup>145</sup>

2.131. As the text makes clear, the Arbitrator decided two issues: *First*, whether Costa Rica has the right of navigation on the San Juan with vessels of war; and *second*, whether she has the right of navigation on the river with vessels of the revenue service. The Arbitrator answered the first question clearly and emphatically in the negative.

2.132. As to the second question, President Cleveland was doubtless aware that a revenue vessel, or cutter, could be made to be the functional equivalent of a vessel of war – at least one that would be capable of navigating on a rather small river like the San Juan, its tributaries and distributaries (such as the Colorado River). The publication referred to by Costa Rica, *U.S. Coast Guard and Revenue Cutters, 1790-1935*, by Donald L. Canney<sup>146</sup>, leaves no doubt that contemporary versions of these revenue vessels could be quite formidable. Thus, if the Arbitrator were going to permit navigation by Costa Rican revenue vessels

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<sup>145</sup> Award of the Arbitrator, the President of the United States, upon the validity of the Treaty of Limits of 1858 between Nicaragua and Costa Rica (hereinafter “Cleveland Award”), para. *Second*. CRM, Vol. II, Annex 16.

<sup>146</sup> Naval Institute Press, Annapolis, Maryland, 1995. Costa Rica refers to this publication in CRM, para. 4.81.



he would have to do so in a way that prevented such craft from evolving into what were effectively vessels of war, thus rendering meaningless his holding on the first question.

2.133. President Cleveland therefore answered the second question quite carefully. The Court will note that he did not simply say “but she may navigate said river with vessels of the Revenue Service,” which he certainly had the authority to do had he found that this conformed with the text and spirit of the Treaty. Instead, the Arbitrator placed clear restrictions upon navigation by Costa Rican revenue vessels, so that he would not effectively give back something he had just taken away in prohibiting navigation by Costa Rican warships. He imposed these restrictions by tying any navigation by Costa Rican revenue vessels to the exercise of another right Costa Rica enjoyed under the 1858 Treaty (a right that was not at issue in the arbitration). Thus, President Cleveland limited navigation on the San Juan River by Costa Rican revenue vessels to that which is “related to and connected with her enjoyment of the ‘*objetos de comercio*’ accorded to her in [Article VI of the 1858 Treaty], or as may be necessary to the protection of said enjoyment.”

2.134. Nicaragua referred to this statement by the Arbitrator in her *Counter-Memorial* in the following words:

“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.”<sup>147</sup>

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<sup>147</sup> NCM, para. 3.1.54.

2.135. In her *Reply*, Costa Rica, referring to this passage of the *Counter-Memorial*, accuses Nicaragua of “misrepresent[ing] the language used by President Cleveland in the 1888 Award”<sup>148</sup>. Costa Rica makes this serious accusation simply because, in paraphrasing the arbitrator’s finding, Nicaragua used what in her view is the correct translation of “*objetos de comercio*” – articles of trade – a translation that is used throughout the *Counter-Memorial*. Costa Rica does not complain about the words Nicaragua placed in quotation marks -- and correctly attributed to President Cleveland-- “related to and connect with”. These quoted words, not “*objetos de comercio*” or articles of trade, were the focus of the section of Nicaragua’s *Counter-Memorial* in question -- and of the relevant portion of paragraph *Second* of the Cleveland Award.

2.136. The history of the case leading up to President Cleveland’s 1888 Award still further evidences the limits the Arbitrator intended to impose on Costa Rica’s public navigation on the San Juan. As the Court is aware, the mandate for the Cleveland Arbitration was contained in the Treaty signed by both parties at Guatemala City on 24 December 1886. Article I of this Treaty submitted to arbitration the validity of the 1858 Treaty. It further provided in Article VI that if the Treaty was declared valid, then “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 said Convention, decide the other points of doubtful interpretation found by either of the Parties in the Treaty...”<sup>149</sup>

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<sup>148</sup> CRR, para. 1.09.

<sup>149</sup> CRM, Vol. II, Annex 14, p. 88.

2.137. Nicaragua accordingly communicated eleven points it considered to be of doubtful interpretation. Question Number Eight (8) posed by Nicaragua asked:

“If Costa Rica, who, according to Article VI of the Treaty, has only the right of free navigation for the purposes of commerce in the waters of the San Juan River, can she also navigate with men-of-war or revenue cutters in the same waters?”<sup>150</sup>

2.138. The answer Costa Rica gave in her opening submission to President Cleveland was not at all surprising. It began “by calling the attention of the arbitrator to the fact that the word *only*...does not occur in Article VI of the treaty of limits.”<sup>151</sup> (Emphasis in original). After quoting Article VI, Costa Rica then added the following rhetorical question (which it naturally answered in the negative):

“Does this mean that Costa Rica cannot under any circumstances navigate with public vessels in the said waters, whether the said vessel is properly a man-of-war, or simply a revenue cutter, or any other vessel intended to prevent smuggling, or to carry orders to the authorities of the bordering districts, or for any other purpose not exactly within the meaning of transportation of merchandise?”<sup>152</sup>

2.139. This passage is critical with regard to two of the most central points before the Court today. *First*, it shows that Costa Rica understood that, literally, the words “*con objetos de comercio*” mean -- exactly as Nicaragua has always maintained -- “with articles of trade,” or, as Costa Rica put it, “transportation of merchandise”. This language will be discussed further in Chapter III of this *Rejoinder*.

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<sup>150</sup> *Argument of Costa Rica, op. cit.*, p. 155. NR, Vol. II, Annex 5.

<sup>151</sup> *Ibid.*

<sup>152</sup> *Ibid.*

2.140. The *second* critical point has to do with Costa Rica's contention before the Court today that she has the right under the Treaty and the award to navigate on the San Juan with virtually every kind of public vessel except warships, *stricto sensu*. It will be evident from the passage set forth above that Costa Rica made the same argument before President Cleveland, in the form of a rhetorical question, requesting the Arbitrator to decide that apart from the "transportation of merchandise", as she described it, she also had the right to navigate with all types of public vessels. Thus, the issue was presented quite clearly to the Arbitrator.

2.141. The Award of President Cleveland on this point leaves no doubt about his response. Under paragraph Second of his award, he decided that Costa Rica's public vessels had no right to navigate on the San Juan River -- except only that vessels of her revenue service could to the extent, and only to the extent "related to and connected with her enjoyment of the "purposes of commerce" accorded to her in Article VI of the 1858 Treaty, or as may be necessary to the protection of said enjoyment"<sup>153</sup>.

2.142. President Cleveland clearly did not accept Costa Rica's contention that she could navigate with "any other vessel intended to prevent smuggling, or to carry orders to the authorities of the bordering districts, or for any other purpose not exactly within the meaning of transportation of merchandise"<sup>154</sup>. Yet now, 120 years after the Cleveland Award, Costa Rica is insisting that the Court reverse that award and adjudge and declare that Nicaragua has

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<sup>153</sup> See Cleveland Award, *op. cit.*, para. Second. CRM, Vol. II, Annex 16, p. 98.

<sup>154</sup> See *Argument on the Question of the Validity of the Treaty of Limits Between Costa Rica and Nicaragua and Other Supplementary Points Connected With It, Submitted to the Arbitration of the President of the United States of America, Filed on Behalf of the Government of Costa Rica, 1887* (hereinafter "Argument of Costa Rica"), p. 155. NR, Vol. II, Annex 5.

“the obligation to allow Costa Rican official vessels the right to navigate the San Juan, including for purposes of re-supply and exchange of personnel of the border posts along the right bank of the River with their official equipment, including service arms and ammunition, and for the purposes of protection as established in the relevant instruments, and in particular article 2 of the Cleveland Award.”<sup>155</sup>

2.143. Nicaragua respectfully requests the Court to see this submission of Costa Rica for what it is: an effort to obtain in the early 21<sup>st</sup> century what she tried unsuccessfully to obtain in the late 19<sup>th</sup> century. The Court should consider this matter to be *res judicata*.

2.144. The practice of the parties subsequent to the 1858 Treaty but before the Cleveland Award is also consistent with the decision of the Arbitrator, as can be seen in the documents that were annexed to the Costa Rican Arguments during the Arbitration.

2.145. One of the annexes filed by Costa Rica consists of a note sent by Nicaragua on 23 April 1863 whereby she cautioned Costa Rica that some violence was anticipated from foreigners who “are accessories to the piratical and filibuster outrage”<sup>156</sup> that had recently been perpetrated. For this reason, Nicaragua suggested that Costa Rica “cause some forces to be stationed at Sarapiquí to meet *on that side* any emergency that the same events might occasion there”<sup>157</sup> (emphasis added).

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<sup>155</sup> CRM, Submissions, 2 (g), p. 147.

<sup>156</sup> See Argument of Costa Rica, *op. cit.*, p. 242. NR, Vol. II, Annex 5.

<sup>157</sup> See *ibid.*, p. 243.

2.146. Even in this case of anticipated danger, coming soon after the Filibuster Wars, Costa Rica was asked only to “meet *on that side*” – i.e., on the Costa Rican bank of the river – any further emergency. She was not asked to patrol the river itself.

2.147. Another telling point regarding how the parties understood the rights conferred on Costa Rica by the 1858 Treaty can be appreciated in a Costa Rican Decree of 28 April 1869 prohibiting, in Article 1, the export through the San Juan River of lumber and other resources of the forests. In Article 3, it established revenue posts in each point of intersection of the San Carlos and Sarapiquí rivers with the San Juan River<sup>158</sup>.

2.148. Two points are interesting about this decree. The *first* is that nowhere does it indicate that revenue patrols are to navigate the San Juan in search of contraband. The mandate is only for revenue stations on the Costa Rican side of the border.

2.149. The *second* point is that it is evident from the decree that even as far back as 1869 there was a problem of contraband lumber and other natural resources of the forests that had to be controlled. One hundred and forty years later, with the intense deforestation occurring everywhere and quite noticeably on the Costa Rican side of the border, it is unreasonable to claim that Nicaragua has no right to

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<sup>158</sup> See *Reply to the Argument of Nicaragua on the question of the validity or nullity of the treaty of limits of April 15, 1858, to be decided by The President of the United States of America as Arbitrator*, 1887 (hereinafter “Reply of Costa Rica”), pp. 201-202. NR, Vol. II, Annex 6.

care for her natural reserves along the river by inspecting the cargo of passing boats in her own territory<sup>159</sup>. More will be said on this issue in Chapter IV below.

2.150. The foregoing examination of the Cleveland Award in light of the parties' submissions to the Arbitrator, as well as the practice of Nicaragua and Costa Rica under the 1858 Treaty and prior to the Cleveland Award, demonstrates beyond any doubt that Costa Rica's right to navigate on the San Juan with public vessels was limited to navigation by revenue boats "related to and connected with her enjoyment of the 'purposes of commerce'"<sup>160</sup>.

B. THE MEANING OF "*CON OBJETOS DE COMERCIO*" WAS *NOT* DECIDED IN THE CLEVELAND AWARD

2.151. In the preceding paragraphs, Nicaragua discussed what the Cleveland Award decided. She will now turn to an issue that the Award did *not* decide. In particular, Nicaragua will demonstrate that President Cleveland's use of the English phrase "for purposes of commerce" in paragraph *Second* of his Award has no bearing on any of the issues in dispute in this case because he was not called upon to determine the meaning of that expression in any language.

2.152. In paragraph *Second*, President Cleveland found that Costa Rica "may navigate [the River San Juan] 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

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<sup>159</sup> See CRM, Submissions, 2 (d), p. 147.

<sup>160</sup> Cleveland Award, *op. cit.* CRM, Vol. II, Annex 16, p. 98.

enjoyment.”<sup>161</sup> Costa Rica seizes on the Arbitrator’s use of the phrase “for purposes of commerce” and suggests that this means that he necessarily determined the meaning of the expression “*con objetos de comercio*” in Article VI of the Treaty of 1858. In her *Reply*, for example, Costa Rica states:

“The parties agree that the case is primarily governed by the 1858 Treaty and the 1888 Cleveland Award, *that—award confirming Costa Rica’s right to sail vessels in the lower part of the San Juan ‘for purposes of commerce’ and its right to sail public vessels in connexion with such navigation.*”<sup>162</sup>

2.153. This paragraph implies that President Cleveland *decided* that Costa Rica had a “right to sail vessels in the lower part of the San Juan ‘for purposes of commerce’”, and that he *decided* that the meaning of the phrase “*con objetos de comercio*” was “for purposes of commerce”.

2.154. However, as demonstrated in Nicaragua’s *Counter-Memorial*<sup>163</sup>, President Cleveland could not have intended to decide anything about the meaning in English of the phrase “*con objetos de comercio*” because the issue was not before him. None of the “points of doubtful interpretation”<sup>164</sup> raised by Nicaragua related in any way to this expression.

2.155. In referring to Costa Rica’s “enjoyment of the ‘purposes of commerce’”, President Cleveland simply adopted the English translation of the 1858 Treaty submitted by both parties (there was no material difference in this respect as

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<sup>161</sup> *Ibid.*

<sup>162</sup> CRR, para. 2.08 (emphasis added).

<sup>163</sup> NCM, paras. 3.1.19-3.1.26.

<sup>164</sup> Letter from Fernando Guzmán to Costa Rican Foreign Minister, 22 June 1887. CRM, Vol. III, Annex 36.



between the two translations), being careful to place the expression “for purposes of commerce” within quotation marks. As Nicaragua has pointed out in her *Counter-Memorial*<sup>165</sup>, this can only be understood as a reference back to the original Spanish text, which the arbitrator did not intend to alter by use of the English translation – and indeed could not have intended to alter because of his obligation to apply the Treaty. His use of the translation -- a translation which Nicaragua has shown to be incorrect<sup>166</sup> -- is, at most, *obiter dicta*. And even that is likely an overstatement under the circumstances.

2.156. In fact, there is no evidence that President Cleveland considered the original Spanish text of the Treaty at all in the process of preparing his award. This is confirmed by a Note of 31 October 1887 from United States Secretary of State T.F. Bayard to Nicaraguan Envoy and Minister Plenipotentiary Horacio Guzmán, from which Costa Rica quotes in her *Reply*, in which Secretary Bayard stresses that it is the English text of the Treaty “upon which the arbitrator must necessarily depend for his understanding of the issues before him”<sup>167</sup>. Assistant Secretary of State George L. Rives, to whom Cleveland delegated the task of preparing a draft of his arbitral award, did note certain phrases in Spanish in his first report that he considered to be most important for the purposes of the arbitration – none of which was “*con objetos de comercio*”<sup>168</sup>. In any event, had

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<sup>165</sup> NCM, paras. 3.1.7 and 4.1.18.

<sup>166</sup> NCM, paras. 4.1.16-4.1.36; and Chap. III of this *Rejoinder*, below.

<sup>167</sup> Note from Secretary of State of the United States, T.F. Bayard, to Nicaraguan Envoy Extraordinary and Minister Plenipotentiary, Horacio Guzmán, 31 October 1887. CRR, Vol. II, Annex 29, quoted in CRR para. 3.43.

<sup>168</sup> NCM, para. 3.1.25.

either President Cleveland or George Rives wished to refer to the original Spanish text, they had access to it; it had been provided by Costa Rica<sup>169</sup>.

2.157. In an effort to give the Cleveland Award a legal effect it could not possibly have had, Costa Rica makes much of the fact that Nicaragua submitted to the Arbitrator only materials in English<sup>170</sup>. Yet, this fact only confirms that the parties were not asking the Arbitrator to interpret the original Spanish text. The two principal questions submitted to President Cleveland were whether the 1858 Treaty was valid and, if so, “whether Costa Rica has the right to navigate the River San Juan with ships of war or revenue boats”<sup>171</sup>. These questions had nothing to do with interpreting the original text in Spanish. Nor did the eleven points of doubtful interpretation submitted to the Arbitrator by Nicaragua<sup>172</sup>. Thus, Costa Rica’s preoccupation with Nicaragua’s having submitted materials to the Arbitrator only in English ignores the questions that were actually submitted to the Arbitrator. In addition, it ignores considerations of courtesy and efficiency that must also have motivated both Nicaragua and Costa Rica; President Cleveland, after all, worked in English.

2.158. The conclusion is therefore clear. The mere appearance of the phrase “for purposes of commerce” in the Cleveland Award is irrelevant to the determination

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<sup>169</sup> See NR, originals filed with the Court Registrar. Informe sobre la cuestión de validez del tratado de límites de Costa Rica y Nicaragua y puntos accesorios sometidos al Arbitraje del Señor Presidente de los Estados Unidos de América. Presentado en nombre del Gobierno de Costa Rica por Pedro Pérez Zeledón. Washington, D.C. Gibson Bros., Printers and Bookbinders, 1887. pp. 171-177.

<sup>170</sup> CRR, para. 3.43.

<sup>171</sup> Román-Esquivel-Cruz Convention of Arbitration, 24 December 1886. NCM, Vol. II, Annex 11; see also Article 6, and CRM, Vol. II, Annex 14.

<sup>172</sup> See Letter from Fernando Guzmán to Costa Rican Foreign Minister, 22 June 1887. CRM, Vol. III, Annex 36.

of the true meaning of the Spanish expression “*con objetos de comercio*”. That meaning is the subject of the following chapter of this *Rejoinder*.

### C. CONCLUSION

2.159. This section has shown that: (1) Nicaragua and Costa Rica both accept that the applicable law is the 1858 Treaty as interpreted in the 1888 Cleveland Award; (2) paragraph *Second* of the Cleveland Award, particularly as elucidated by Costa Rica’s arguments to the American President, make it clear that Costa Rica’s right to navigate the San Juan River with public vessels is limited to navigation by vessels of the revenue service to the extent, and only to the extent, “related to and connected with” her navigation “*con objetos de comercio*”; and (3) contrary to Costa Rica’s contention, the use by President Cleveland of the expression “for purposes of commerce” has no bearing on the present case because the meaning of the original Spanish expression “*con objetos de comercio*” as used in the 1858 Treaty was not in dispute in 1858 and was therefore not placed before the Arbitrator.

### Conclusions

2.160. The evidence available leads to the inevitable conclusion that the primary object and purpose of the 1858 Treaty was the definitive settlement of the long-standing territorial dispute concerning the district of Nicoya (and the overall limits of Costa Rica and Nicaragua). The evidence of the specific object and purpose is as follows:

- (i) The historical context, including several bilateral treaties which form part of the historical context<sup>173</sup>.
- (ii) The nature of the title, and the text of the preamble.
- (iii) The provisions of the Treaty, including the sequence of the provisions and the ranking of Article VI.
- (iv) The diplomatic correspondence subsequent to the conclusion of the Treaty<sup>174</sup>.
- (v) The text of 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<sup>175</sup>.

2.161. In her pleadings Costa Rica seeks to give a major role to the principles of general international law. The role of general international law, and related matters, have been examined in detail in Section II of the present Chapter. In the result it is clear that general international law, as presented in contemporary sources, does not help Costa Rica. In the first place it is supplanted by the 1858 Treaty which introduces a qualified right of “free navigation” in favour of Costa Rica. And, in addition, even if general international law were to apply, it would not recognise any right of navigation in her favour: the applicable principle would be the authority of the sovereign state (Nicaragua) over the waters of the San Juan.

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<sup>173</sup> See also NCM, paras 2.1.36-2.1.39.

<sup>174</sup> See also NCM, paras. 2.1-22-24.

<sup>175</sup> See NR, paras. 2.165 and 5.11-5.14

2.162. In Section II it is also demonstrated that, unless Costa Rica can positively show that other rules apply, there is no room for any further limitation upon Nicaragua's sovereignty apart from that resulting from Article VI of the Treaty. The attempts by Costa Rica to promote the application of other rules are shown to be failures.

2.163. The first such candidate rule concerns the so-called "related rights", and the relevant conjectures are rejected in Chapter IV below. The other candidates take the form of three bilateral instruments which have no legal relevance.

2.164. In her *Reply* Costa Rica insists on the relevance of the 1916 Judgment of the General American Court of Justice to the issues now before the Court. Not for the first time, Nicaragua must emphasise that this decision has no relevance whatsoever.

2.165. In the third section of the present chapter it has been shown that:

- (a) contrary to Costa Rica's contention, the Cleveland Award did not grant her a right to navigation with her public vessels, or to carry out police or other security-related functions on the river; the question put by the parties to President Cleveland was whether Costa Rica had the right under the 1858 Treaty to navigate on the river with her vessels of war, or with vessels of her revenue service, or whether her navigation was limited to "transportation of merchandise;" the Arbitrator determined that Costa Rica had no right to navigate with vessels of war, but only with vessels of her revenue service when such navigation is related to, connected with or necessary for the protection of her right to navigate "for purposes of commerce". Chapter V of this *Rejoinder* addresses

the nature and extent of Costa Rica's right to navigate with vessels of her revenue service, as well as Costa Rica's alleged rights regarding protection, custody, and defence of the river; and

- (b) contrary to Costa Rica's contention, the use by President Cleveland of the expression "for purposes of commerce" has no bearing on the present case because the meaning of the original Spanish expression "*con objetos de comercio*" as used in the 1858 Treaty was not in dispute in 1858 and was therefore not placed before the Arbitrator. Chapter III of this *Rejoinder* addresses the proper interpretation to be given to the expression "*con objetos de comercio*," and, accordingly, to the nature and extent of Costa Rica's right to navigate "*con objetos de comercio*" under the 1858 Treaty.

2.166. In her *Reply* Costa Rica is remarkably reluctant to recognise the force of the evidence, either in its separate manifestations, or as a whole. In this setting it has been necessary to reaffirm the character and main object and purpose of the Treaty of Limits, and to place its provisions within the appropriate legal perspective. As stated above in the Conclusions to Section I of this chapter, within the provisions of the Treaty and whatever the nature of Costa Rica's navigation rights thereunder, Nicaragua must have the exclusive competence to exercise the following regulatory powers.

- (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;

- (b) The protection of the border, including resort to immigration procedures in respect of foreign nationals entering Nicaraguan territory;
- (c) The exercise of normal police powers;
- (d) The protection of the environment and natural resources; and
- (e) 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 III:

### THE NATURE AND EXTENT OF COSTA RICA'S RIGHT TO NAVIGATE "*CON OBJETOS DE COMERCIO*"

#### Introduction

3.1. Nicaragua and Costa Rica agree that, under Article VI of the 1858 Treaty of Limits, Nicaragua has "exclusive dominion and supreme control (*sumo imperio*)" over the San Juan River, and that Costa Rica enjoys a "right of free navigation" on the River "*con objetos de comercio...*" There neither is nor can be a dispute over Nicaragua's "exclusive dominion and supreme control (*sumo imperio*)" over the River, and Costa Rica acknowledges this<sup>176</sup>. Nor is there a dispute that Costa Rica has a "right of free navigation" on a part of the river. There is disagreement, however, over the *nature* and *extent* of Costa Rica's right, and this disagreement is at the heart of the present case.

3.2. For Nicaragua, the Treaty of Limits conferred on Costa Rica, as an exception to Nicaragua's "exclusive dominion and supreme control (*sumo imperio*)" over the river, a "right of free navigation ... *con objetos de comercio...*" Pursuant to this linguistic formulation, the "free navigation" to which Costa Rica enjoys a "right" is necessarily limited to navigation "*con objetos de comercio;*" that is Costa Rica's "right of free navigation" exists when her navigation is "*con objetos de comercio.*" And, therefore, navigation that is

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<sup>176</sup> See CRR, para 2.69; see also Costa Rican Foreign Minister, Roberto Tovar Faja, to Nicaraguan Foreign Minister, Norman Caldera Cardenal, Note No. DM-462-05, 28 Sept. 2005. CRM, Annexes, Vol. III, Annex 80.



not “*con objetos de comercio*” is not a “right” afforded to Costa Rica by the Treaty.<sup>177</sup>

3.3. Costa Rica, by contrast, reads the Treaty as though there were a full stop after the word “navigation.” For her, the right of “free navigation” that she claims to enjoy is free-floating and unrestricted, and may be exercised without regard to the nature or purpose of the navigation. In particular, Costa Rica argues in these proceedings that her “right of free navigation” on the San Juan River is entirely separate from, and independent of, her right to navigate “*con objetos de comercio*.” In this chapter it will be shown that Costa Rica’s argument is entirely without merit, and that she enjoys no navigational rights other than those related to navigation “*con objetos de comercio*.”

3.4. A second disagreement between the parties concerns the proper interpretation of “*con objetos de comercio*.” For Nicaragua, the word “*objetos*” means tangible “objects” or “articles” or “goods,” such that the entire phrase is correctly translated as “with articles of trade.” For Costa Rica, “*objetos*” means “purposes,” and the phrase means “for purposes of commerce.” As shown in the *Counter-Memorial*, and as will be further explained below, Nicaragua’s understanding of “*objetos*” is the correct one: and the proper English translation of “*con objetos de comercio*” is “with articles of trade.” However, and more to the point, in 1858 both parties’ interpretations of the phrase “*con objetos de comercio*” -- that of Nicaragua and that of Costa Rica -- *had the identical meaning*. Whether the words of the Treaty are properly translated as “with

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<sup>177</sup> The “perpetual right of free navigation” does not include the right to be a party to any canal agreements that Nicaragua might enter into. This was made clear in the Cleveland Award, at paragraph 11. The “perpetuity” of Costa Rica’s right is thus contingent on this eventuality. In the text, the use of the original language of the 1858 Treaty is maintained, subject to this reservation of Nicaragua’s rights.

articles of trade” or “for purposes of commerce,” their meaning was the same, because -- as will be shown below -- in 1858 “commerce” necessarily meant “trade in goods.” The idea that commerce also includes services -- such as tourism or passenger transit -- is a late-twentieth century invention far removed from the vocabulary or conceptual understanding of those who drafted the Treaty of Limits more than 100 years earlier. Thus, whichever party is right about the English translation of “*objetos*,” the key word in the phrase is “*comercio*,” and the entire phrase is properly understood as referring either to “articles of trade (in goods)” or to “purposes of trade (in goods),” which in the context of the 1858 Treaty mean the same thing: Costa Rica’s “right of free navigation” exists whenever (but only whenever) her navigation involves trade in goods.

3.5. Costa Rica all but admits that “*con objetos de comercio*” meant trade in goods to mid-nineteenth century draftsmen, when she argues for an “evolutionary” interpretation of the phrase and invokes inter-temporal law to claim that, since we are now in the year 2008, the Court should supply a twenty-first century interpretation of “*comercio*,” one which injects into that word (as a nineteenth century interpretation would not), the concept of services, including tourism and passenger transit. By this logic, Costa Rica would extend her “right of free navigation” beyond navigation involving trade in goods (as the right was understood by the parties in 1858) to a right to navigate in performance of commercial services, including sightseeing excursions. This is a third area of disagreement between the parties, and it, too, is addressed in this chapter, where it is shown that the 1858 Treaty cannot be given the evolutionary interpretation advocated by Costa Rica without: (i) ignoring its status as a Treaty of Limits; (ii) upsetting the delicate and carefully-balanced *quid pro quo* that the parties incorporated into the Treaty (regarding Nicaragua’s acceptance of Costa Rica’s annexation of Nicoya/Guanacaste in return for her exclusive sovereignty over the

San Juan River); and (iii) violating the intentions of the parties at the time the Treaty was negotiated and executed.

## **Section I. Interpretation of the 1858 Treaty of Limits According to the Vienna Convention on the Law of Treaties**

### **A. THE LANGUAGE OF THE TREATY WITH RESPECT TO COSTA RICA'S NAVIGATION RIGHTS**

3.6. The Vienna Convention on the Law of Treaties is helpful in resolving at least the first two of the disagreements identified in the Introduction to this chapter: the disputes over (i) whether Costa Rica's right of free navigation under Article VI of the Treaty of Limits refers specifically and exclusively to her navigation "*con objetos de comercio*," and (ii) whether navigation "*con objetos de comercio*" refers to trade in goods, or whether it can be extended to cover performance of services where no goods are involved.

3.7. Nicaragua and Costa Rica agree that the 1858 Treaty of Limits must be interpreted according to the principles established in Articles 31 and 32 of the Vienna Convention. Despite this agreement, they are at odds over the correct interpretation of the 1858 Treaty. In Nicaragua's submission, this is because Costa Rica pays lip service to the principles of the Vienna Convention, but then ignores them in conjuring an interpretation of the 1858 Treaty that departs from the plain meaning of the text, and contradicts the objects and purposes of the Treaty.

3.8. The dependence of Costa Rica's "right of free navigation" on her navigation "*con objetos de comercio*" is unmistakable, based on a good faith interpretation of the ordinary meaning of the language of the first sentence of

Article VI of the Treaty of Limits. In the English translation provided by Costa Rica, the “right of free navigation” refers directly to a particular kind of navigation: that which is conducted for the purposes of commerce (“*said navigation*” -- i.e., the free navigation that is the subject of the right -- “being for the purposes of commerce...”). The ordinary meaning of this text makes it plain that it is Costa Rica’s right to navigation “*con objetos de comercio*” -- and no other -- that is deemed free under Article VI.

3.9. Contrary to this ordinary meaning, Costa Rica purports to find in the same language a right of free navigation dissociated from any substantive limit. To strengthen, even subliminally, the idea that the right of free navigation exists *per se*, autonomous and absolute, Costa Rica not only analyses such right in a separate section of her *Reply*, different from the one which is dedicated to navigation “*con objetos de comercio*”<sup>178</sup>, but distinguishes in an explicit manner among the alleged breaches of Costa Rica’s right of free navigation and the breaches of her right of navigation “for purposes of commerce”<sup>179</sup>, and systematically, throughout its *Reply*, bombards the reader with allusions to the “right of free navigation” *tout court*<sup>180</sup>.

3.10. Since the premises of Costa Rica’s reasoning are erroneous, the consequences deduced from them must be rejected. Costa Rica’s right of navigation over part of the San Juan River is not only situated within the framework of Nicaragua’s “exclusive dominion and supreme control (*sumo*

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<sup>178</sup> CRR, Chap. 3.B. (“A perpetual Right of Free Navigation”), Chap. 3.C (“*con objetos de comercio*”).

<sup>179</sup> CRR, Chap. 4.B (Breaches of Costa Rica’s perpetual right of free navigation), Chap. 4.C (Breaches of Costa Rica’s right of navigation “for purposes of commerce”).

<sup>180</sup> In this sense, for instance, in CRR, paras. 1.27, 2.26, 2.27, 2.30, 2.33, 2.39, 2.40, 2.57, 2.68, 2.74 (6), 3.79, 3.97, 3.134, 3.148, 4.38, 4.42, 4.50, 4.69, 4.70, 4.71, 4.87, 5.05, 5.25, 5.28 y 5.29.

*imperio*)” -- over the waters, but is also limited substantively in its exercise by its linkage to articles of trade/purposes of commerce (“*con objetos de comercio*”)<sup>181</sup>.

3.11. Thus, Costa Rica has no right of free navigation that is separate or independent from her navigation “*con objetos de comercio*.” As the text of Article VI, given its ordinary meaning, makes clear, it is only Costa Rica’s right to navigate “*con objetos de comercio*” that is free. No other navigation by Costa Rica enjoys this status under the ordinary meaning of Article VI.

3.12. Applying the same general rule of interpretation to the second disagreement between the parties -- over the meaning of “*con objetos de comercio*” -- the conclusion is inescapable that the language refers to trade in goods. If the word “*objeto*” in the singular may refer indistinctively to a matter, good or thing and, likewise, to a purpose, end or objective, depending on the context, the word normally does not include the latter concept when it is used in the plural form (“*objetos*”); and it definitely does not include the concept of “purpose” or “objective” when the plural form (“*objetos*”) is qualified or linked with the word “*comercio*”. The phrase “*con objetos de comercio*,” therefore can only mean trade (or commerce) with articles, goods, or commodities; it can never mean “for purposes.” This conclusion is supported by a leading expert on the Spanish language from the Spanish Royal Academy, the publisher of the official *Dictionary of the Spanish Language*. According to the Formal Opinion issued by Dr. Manuel Seco Reymundo, Member of the Royal Academy and Advisor to the Academy’s Institute of Lexicography since 2000: “My conclusion, consequently, in view of all of the elements studied, is that, in the text of Article VI of the Treaty of Limits between Costa Rica and Nicaragua signed on 15 April 1858, the

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<sup>181</sup> NCM, para. 4.1.8 ff.

phrase ‘*con objetos de comercio*’ must be understood as ‘with things that are used in commercial activity.’”<sup>182</sup>

3.13. Moreover, it is beyond dispute that, in 1858, the word “*comercio*” meant exclusively trade in goods (as opposed to services); at the time, “*con objetos de comercio*” could have only meant “with articles of trade.” Even if Costa Rica’s translation of the word “*objetos*” were accepted, the phrase “*con objetos de comercio*” would mean “for purposes of trade in goods.” In the middle of the nineteenth century, the concept of “*comercio*” had not evolved to incorporate “services.” It was exclusively concerned with “goods.” Indeed the expansion of the original concept would take at least another one hundred years to evolve. This is demonstrated by contemporaneous dictionaries, and representative examples of contemporaneous usage, as well as expert opinion. These points will be further elaborated below, at paragraphs 3.71-3.89.

3.14. Costa Rica pretends to replace the interpretation of the only authentic text, which was drafted in Spanish, by an English translation made on the occasion of the Cleveland Arbitration, which Costa Rica considers more to her liking. Costa Rica even pretends that the meaning that she wishes to give to the expression “for purposes of commerce” was shared by Nicaragua.

3.15. The translations of the Treaty into the English language, which the parties provided to President Cleveland (and, in particular, the translation of “*con objetos de comercio*” as “for the purposes of commerce”) did not imply an

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<sup>182</sup> Formal Opinion of Dr. Manuel Seco Reymundo (hereinafter “Seco Opinion”), 2 May 2008, para. 14. NR, Vol. II, Annex 64. (Original Spanish: “Mi conclusión, por consiguiente, a la vista de todos los datos estudiados, es que, en el texto del Artículo VI del Tratado de Límites entre Costa Rica y Nicaragua suscrito el 15 de abril de 1858, el sintagma *con objetos de comercio* debe entenderse ‘con cosas sobre las que recae la actividad comercial’.”)

acceptance of any particular view on the scope of the right to free navigation; indeed it was not a point of disagreement between the parties, let alone one that was submitted to the decision of the Arbitrator, or one that he resolved. At the time of the Treaty, Costa Rica claimed no more than a right to navigate freely “*con objetos de comercio*,” which Nicaragua accepted, and both understood that “*comercio*” -- in 1888 as well as in 1858 -- meant “trade in goods.” Regardless of the proper English translation of the word “*objetos*,” there could be only one meaning for the word “*comercio*,” and that was trade in goods. Notably, the practice under the Treaty for the next one hundred years following the Cleveland Award confirms that the “*comercio*” referred to in the Treaty was trade in goods. When Costa Rica made a new interpretation, in the 1990s, and redefined “*comercio*” to include services as well as goods, she encountered an immediate answer by Nicaragua, which expressed the position that Costa Rica’s right of navigation is with articles of trade, i.e. tangible goods, and does not include the performance of services, such as tourism or passenger transport<sup>183</sup>.

3.16. As shown in the following section of this chapter, the historical context confirms the interpretation that Nicaragua has consistently given to Costa Rica’s right of free navigation “*con objetos de comercio*” under the Treaty of Limits. The diplomatic documents and draft treaties preceding the 1858 Treaty demonstrate that the navigation rights under discussion were always for the purpose of allowing Costa Rica to carry on trade in merchandise, coffee in particular, half of whose production was exported to Great Britain, at a time when Costa Rica lacked any ports on the Caribbean Sea. In order to facilitate Costa Rica’s exports to Europe, and avoid the hazardous, long and prohibitively expensive route around Cape Horn at the southern tip of South America, Costa

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<sup>183</sup> See Note from Nicaraguan Foreign Minister, Ernesto Leal, to Costa Rican Foreign Minister, Bernd Niehaus Quesada, Note No. 940284, 21 March 1994. CRM, Annexes, Vol. III, Annex 48.

Rica repeatedly and urgently sought from Nicaragua the right to use the San Juan River as an outlet to the sea so that she could have a shorter and better route for her exports to Europe and other Atlantic destinations. Thus, the conduct of the parties both before and after the Treaty of Limits was executed consistently reflects their understanding that what was agreed to in the Treaty was a right of Costa Rican vessels to navigate on the San Juan River with articles of trade.

3.17. Nicaragua stated in her *Counter-Memorial* that: “Given that the application of the *General Rule* of interpretation offers a perfectly clear and reasonable meaning of the Article VI of the Cañas-Jerez Treaty, recourse to the *supplementary means of interpretation* mentioned by Article 32 of the Vienna Convention of Law of Treaties is not needed.”<sup>184</sup> Nevertheless, as will be shown below, the historical record fully confirms the conclusions reached by Nicaragua through application of the General Rule of interpretation.

B. THE OBJECT AND PURPOSE OF COSTA RICA’S NAVIGATION RIGHTS UNDER THE TREATY

3.18. Nicaragua reiterates that, because the phrase “*con objetos de comercio*” in the Treaty of 1858 means “with articles of trade,” recourse to supplementary means of interpretation is unnecessary. In the event the Court is nonetheless inclined to turn to supplementary principles of interpretation, as set forth in Article 32 of the Vienna Convention, those too confirm the reading Nicaragua advocates. In particular, the historical context of the 1858 Treaty makes clear that Costa Rica’s navigation rights on the San Juan River are limited to navigation with articles of trade.

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<sup>184</sup> NCM, para. 4.1.34.



3.19. At paragraph 4.1.35 of her *Counter-Memorial*, Nicaragua observed that,

“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 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 ... is what the Jerez-Cañas Treaty granted to Costa Rica.”

In other words, the purpose Article VI of the 1858 Treaty, which gave Costa Rica the right to navigate the San Juan River “*con objetos de comercio*,” was to give that State an Atlantic (Caribbean) outlet for her trade with (and, in particular, her coffee exports to) Europe.

3.20. Costa Rica’s *Reply* is conspicuously silent in response. Nowhere among its 231 pages does the *Reply* address, much less make any effort to refute, Nicaragua’s characterisation of Costa Rica’s needs and goals. And for good reason. As will be further demonstrated below, relying largely on Costa Rican sources -- many contemporaneous with the Treaty of 1858 -- Costa Rica’s consuming preoccupation with the San Juan River in the middle of the 19<sup>th</sup> century was to gain access to it as a trade route to Europe. It is this key fact that defines the object and purpose of Costa Rica’s navigation rights under Article VI of the Treaty of 1858.

*1. Costa Rica’s Need for a Trade Route to the Atlantic*

3.21. In order to fully appreciate the historical context which led to Article VI, some observations about the development of Costa Rica’s economy in the early 19<sup>th</sup> century are necessary. During the colonial period, Costa Rica was one of the

poorest, most sparsely populated Spanish possessions in the Americas<sup>185</sup>. As stated in a 1953 study, “Costa Rica ended its history as a province of the great Spanish Empire in 1821 a poverty-stricken nation, almost wholly without roads and schools, without a printing press, without any governmental funds and without any foreign commerce save for the small exchanges made by overland routes with its neighbours, Panama and Nicaragua.”<sup>186</sup>

3.22. At various moments during the colonial period, Costa Rica had made efforts to stimulate its languid economy by developing exportable surpluses of agricultural products. Both cacao (in the late 17<sup>th</sup> and 18<sup>th</sup> centuries) and tobacco (in the late 18<sup>th</sup> and early 19<sup>th</sup> centuries) were the subjects of early experiments, but both efforts met with only limited success<sup>187</sup>. Everything changed, however, with the coffee boom in the 1830s.

3.23. Coffee was initially introduced to Costa Rica in the late 18<sup>th</sup> and early 19<sup>th</sup> century<sup>188</sup>. Due to the unique suitability of the soil in Costa Rica’s central plateau, coffee growing quickly took hold. By 1839, coffee had become the country’s leading export; by 1843, it represented some 80% of Costa Rica’s then burgeoning exports to the world market; and by 1853, it comprised a full 94% of total exports<sup>189</sup>. According to Costa Rican historian Paulino González Villalobos:

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<sup>185</sup> Jorge León Sáenz. *Evolution of the Foreign Trade and Maritime Transport of Costa Rica 1821-1900* (hereinafter “Evolution of the Foreign Trade”), San José, Editorial de la Universidad de Costa Rica, 1997, p. 11. NR, Vol. II, Annex 33.

<sup>186</sup> Richard J. Houk. “The Development of Foreign Trade and Communication in Costa Rica to the Construction of the First Railway” (hereinafter “Development of Foreign Trade”), (*The Americas*, Vol. 10, No. 2., 1953, Oct., pp. 197-209). NR, Vol. II, Annex 30.

<sup>187</sup> Evolution of the Foreign Trade, *op. cit.*, p. 44. NR, Vol. II, Annex 33.

<sup>188</sup> Development of Foreign Trade, *op. cit.*, p. 200. NR, Vol. II, Annex 30.

<sup>189</sup> Evolution of the Foreign Trade, *op. cit.*, p. 53. NR, Vol. II, Annex 33.

“During the period of 1836-53, a series of qualitative changes took place within Costa Rican society that simultaneously increased the need for the road to Sarapiquí and generated contradictory processes. The determining element of these transformations was the dramatic development of coffee cultivation. This process had begun in 1832 with exportation to Chile. Years later, it would accelerate through direct trade with England and especially with the injection of financial capital from said nation.

“The coffee boom forced a rapid process of change in land use within the Intermountain Central Valley. Subsistence farming and formerly hegemonic products (sugarcane, tobacco and wheat) were replaced by coffee, and their cultivation was marginalized to peripheral zones of the valley. In this way, a monoculture system was developed...”<sup>190</sup>

3.24. The importance of coffee to the growth of the Costa Rican economy and the Costa Rican nation cannot be overstated. The money she made exporting coffee to the world allowed Costa Rica to lift herself out of poverty and to transform quickly into one of the richer countries in the region. Writing in 1850, one of Costa Rica’s leading citizens, Don Felipe Molina, captured the point succinctly: “Dedicated to farming and trade, [the Costa Rican people] live from the exportation of their fruits.”<sup>191</sup>

(a) *The Inadequacy of Existing Trade Routes*

3.25. In the 1840s and 50s, Costa Rica relied principally on ports on her Pacific coast -- in particular, at Punta Arenas -- for the shipment of her coffee and other exports to the world. In another work dated 1851, Molina observed:

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<sup>190</sup> Paulino González Villalobos, *The Sarapiquí Route: A Socio-Political History of a Road* (hereinafter “Sarapiquí Route”), 1976, p. 34. NR, Vol. II, Annex 29.

<sup>191</sup> Felipe Molina, *Report on the Border Questions Raised Between the Republic of Costa Rica and the State of Nicaragua* (hereinafter “Molina Report”), 1850, p. 22. NR, Vol. II, Annex 35.

“In the Pacific, the Republic of Costa Rica possesses many safe and spacious ports, such as: Golfo Dulce, Puerto Inglés, Las Mantas, Caldera, Punta Arenas, La Culebra, Santa Elena and Las Salinas. Among them, only Punta Arenas is currently frequented and has been outfitted for foreign trade, with the Free Port privileges granted by the legislature...”<sup>192</sup>

Statistics from the late 1840s show that more than 90% of Costa Rica’s external trade was passing through Punta Arenas on the Pacific, while less than 10% passed through the Caribbean port at Matina:

“From 1848 to 1849, the entry of ships to the Port of Punta Arenas increased in number to 70, with a total of 7,188 tons of imports. If we add a similar amount in exports and 1,200 tons for all trade from Matina [on the Caribbean], we would have the sum of 15,571 tons, representing mercantile movement as a whole.”<sup>193</sup>

3.26. The existing Pacific route had serious disadvantages, however. During this period, most of Costa Rica’s coffee was being exported to the United Kingdom, with lesser amounts to France and other European countries<sup>194</sup>. Yet, as stated in the *Counter-Memorial*, the shipment from Punta Arenas on Costa Rica’s Pacific coast necessitated the arduous journey around Cape Horn at the tip of South America, a voyage which took at least five months and cost a staggering (at the time) five pounds per tonne<sup>195</sup>. An Atlantic outlet for Costa Rica’s trade was the obvious solution. Yet, in contrast to the Pacific coast, Costa Rica’s Atlantic coast offered few suitable sites. Writing again in 1851, Molina observed:

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<sup>192</sup> Felipe Molina, *Study of the Republic of Costa Rica* (hereinafter “Molina Study”), 1851, p. 36. NR, Vol. II, Annex 36.

<sup>193</sup> *Ibid.*, p. 32.

<sup>194</sup> *See Ibid.*, pp. 31-32.

<sup>195</sup> *See Development of Foreign Trade, op. cit.*, p. 202. NR, Vol. II, Annex 30.

“On the Atlantic side, there is not a single site along the entire coast from San Juan, toward the southeast, to the cove of Veragua, that merits being called a good port, except for the magnificent bay of Boca Toro. Neither Matina nor Salt Creek (Moin) offer the necessary requisites, and this part of the seaboard is currently rarely frequented. Only a small amount of trade in sarsaparilla, tortoiseshell, coconut oil, etc. etc. is carried out from there.”<sup>196</sup>

3.27. The lack of an Atlantic outlet was badly hampering the growth of the Costa Rican economy. According to Molina:

“The growth of trade is paralyzed by the need to follow the long and laborious path of Cape Horn, as the several articles that it would be convenient to export cannot support the increased charter fees or heavy costs of such lengthy navigation.”<sup>197</sup>

And:

“Coffee, which is currently the primary export item, has been qualified as excellent, although it rarely reaches the marketplaces of Europe without having suffered deterioration due to the delays and setbacks experienced by shipments in the long and difficult trip that must be made around Cape Horn.”<sup>198</sup>

3.28. These already serious problems were exacerbated in 1846 when the price of coffee on the world market dropped precipitously. As Costa Rica subsequently wrote in its Argument to President Cleveland in 1887:

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<sup>196</sup> Molina Study, *op. cit.*, p. 36-37. NR, Vol. II, Annex 36.

<sup>197</sup> *Ibid.*, p. 32.

<sup>198</sup> *Ibid.*, p. 30.

“In 1846 Costa Rica had to pass through an exceptional crisis. Coffee, its principal export product, had experienced remarkable depreciation in the foreign markets, and could not stand competition, owing to the high freight that it had to pay when carried by the way of Cape Horn. It was of vital importance, and worthy of any sacrifice whatever, to have a passage open to the Northern Sea, that is, the Atlantic Ocean. The old port of Matina could not answer the purpose, owing to insuperable obstacles, and no recourse was left except making the exports through San Juan del Norte [at the mouth of the San Juan River].”<sup>199</sup>

(b) *The Idea of the San Juan Route*

3.29. Under the circumstances, the solution to Costa Rica’s problem seemed to be to send her coffee and other products (grown largely in the central plateau) north to the San Juan River by way of one of that river’s Costa Rican tributaries. Once on the San Juan, the coffee could be sent down the river, out to the Atlantic, and then on to Europe by way of the port of San Juan del Norte. In contrast to the five months required for the journey from Punta Arenas and around Cape Horn, the trip from San Juan del Norte to Europe took just forty days by sailing ship and half that by steamship<sup>200</sup>. The plan to make use of the San Juan River loomed large in the middle of the 19<sup>th</sup> century. According to Molina in 1851:

“There is no doubt that San Juan [del Norte] is destined to be a market of first order, as well as the main point of departure for trade from Costa Rica by means of the Atlantic”<sup>201</sup>.

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<sup>199</sup> Argument of Costa Rica, *op. cit.*, p. 47. NR, Vol. II, Annex 5 (emphasis added).

<sup>200</sup> See Development of Foreign Trade, *op. cit.*, p. 202. NR, Vol. II, Annex 30.

<sup>201</sup> Molina Study, *op. cit.*, p. 53: NR, Vol. II, Annex 36.

3.30. The idea of making use of the San Juan actually extended back several decades, at least to independence in 1821<sup>202</sup>. Several tributaries of the San Juan originating in Costa Rica offered possibilities, including both the San Carlos and Sarapiquí Rivers. From the beginning, however, the primary focus was on the Sarapiquí. On 12 March 1827, the Costa Rican government issued a decree offering land as a reward for discovering a route to the San Juan. Several individuals and companies accepted the challenge and began explorations for a route from San José to the Sarapiquí, but these early projects were abandoned for a variety of reasons, including a lack of man-power and capital, as well as the unexpectedly inhospitable terrain<sup>203</sup>. Contemporaneous records attest to the difficulties encountered. According to an account by the French Minister, Felix Belly:

“From San Jose to this port was a journey of thirty-six miles, which had to be covered partly by mule and partly by rude canoes. M. Belly found the sole official was a captain of the port. He had neither a soldier nor a subaltern. He lived in a house without furniture, only half enclosed with canes, and he slept in the attic. This official estimated the weight of goods entering annually at one hundred tons. As it was not a customs port, he issued passes for goods, and the duties on them were paid upon their arrival in San Jose. The capital was reached only after

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<sup>202</sup> See Molina Report, *op. cit.*, p. 20. NR, Vol. II, Annex 35 (Spanish Original: “En tales circunstancias ocurrió que los habitantes de Costa-Rica, habiendo descubierto desde 1821 la posibilidad de abrir una comunicación pasta el puerto, por medio del río Sarapiquí, tributario del San Juan, emprendieron hacer, como en efecto hicieron, un camino hacia aquel rumbo, y comenzaron dirigir su comercio por aquel lado...”)(English translation: “In such circumstances, it so occurred that the inhabitants of Costa Rica, having discovered since 1821 the possibility of opening communications to the port, by means of the Sarapiquí River, a tributary of the San Juan, undertook to build, and indeed did build, a road toward said course, and they began to direct their trade that side...”).

<sup>203</sup> See *ibid.*, pp. 27, *et seq.*

a long and arduous journey, for the road had to be opened with a machete”<sup>204</sup>.

3.31. After the 1846 coffee crisis, and given Costa Rica’s continued reliance on European markets for her coffee, the idea of improving the Sarapiquí route to the San Juan received renewed interest. Spurred on by coffee merchants, the Sarapiquí Company was created by decree dated 27 October 1851, and it was ordered to build a road between San José and the dock on the Sarapiquí in 18 months<sup>205</sup>. Again, the lack of labour proved to be a principal obstacle,<sup>206</sup> and the work was abandoned in 1853<sup>207</sup>. Even so, obtaining access to the San Juan as an outlet for her trade with Europe remained a high priority for Costa Rica.

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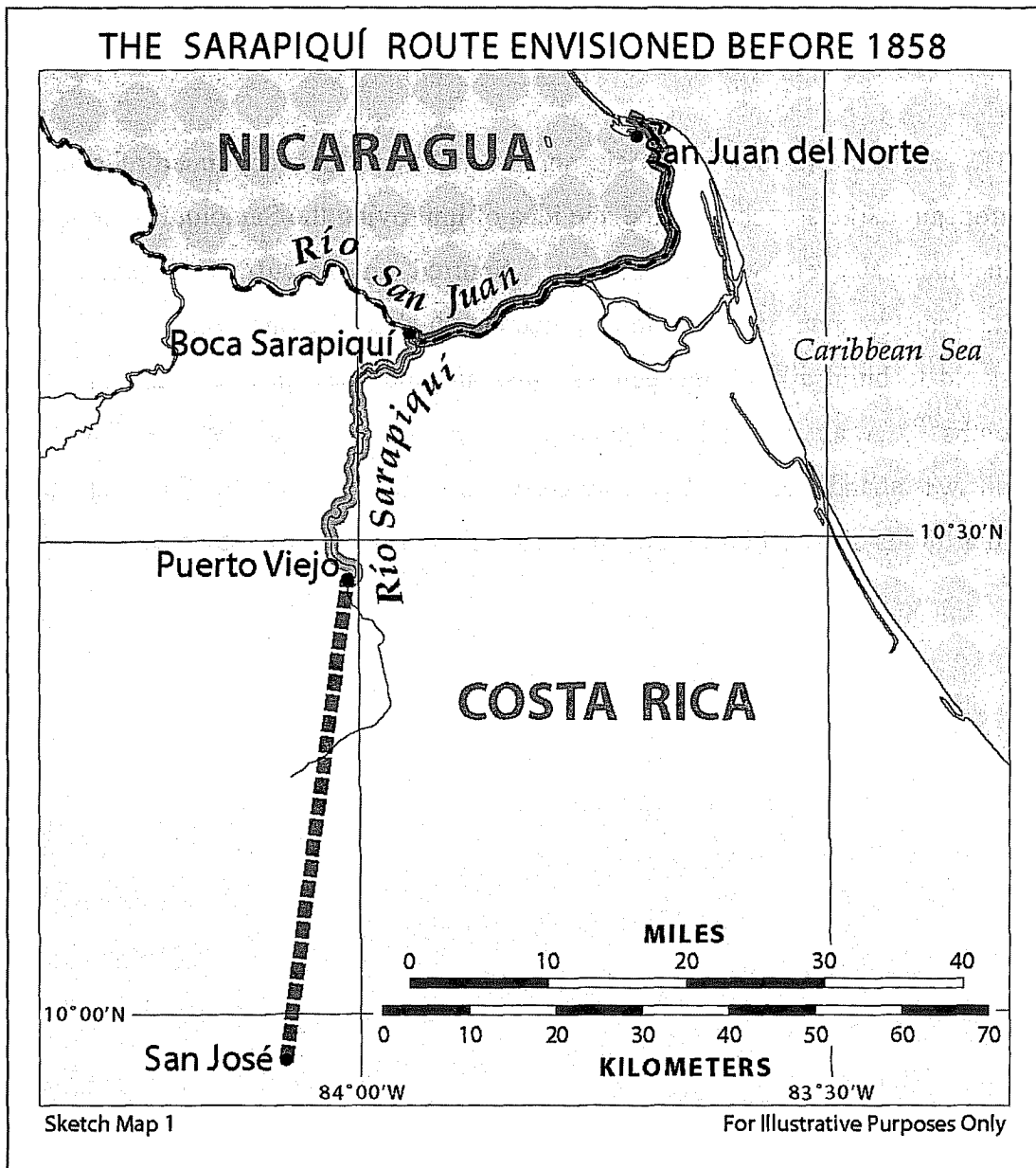
<sup>204</sup> Development of Foreign Trade, *op. cit.*, p. 202-03. NR, Vol. II, Annex 30. (In contrast to the 100 tonne figure cited, statistics show that in 1859, the volume Costa Rica’s coffee exports alone totaled 5,000 tonnes.)

<sup>205</sup> See *ibid.*, p.67; see also Costa Rica, “Basis for the formation of a Company, named the Sarapiquí Company...,” 27 October 1851, Art. 3. NR, Vol. II, Annex 49.

<sup>206</sup> See Sarapiquí Route, *op. cit.*, p. 70. NR, Vol. II, Annex 28.

<sup>207</sup> See *ibid.*, p. 71.





(c) *Negotiations with Nicaragua over the San Juan River prior to the 1858 Treaty*

3.32. Because Nicaragua was sovereign over both the San Juan River and the port of San Juan del Norte at the river's mouth, Costa Rica's aspirations for a San

Juan route necessitated negotiations with Nicaragua. But those negotiations proved difficult. Nicaragua continued to object to Costa Rica's annexation of the Pacific coastal region of Nicaragua known alternatively as Nicoya or Guanacaste during the 1820s, and resisted Costa Rica's attempts to secure access to the San Juan for the trans-shipment of her trade.

3.33. The earliest negotiations on the subject took place in 1838, just as the Costa Rican coffee trade was exploding. The Costa Rican negotiator in these early talks was Don Francisco María Oreamuno. The confidential negotiating instructions he received make clear Costa Rica's driving interest in obtaining access to the San Juan River. According to Instruction No. 17, Oreamuno was to attempt to secure free navigation on the San Juan for all import and export items. The instructions state that in the event this proved impossible, Costa Rica would yield on the free *import* of foreign goods. In no case, however, would it compromise on the free *export* of her coffee:

“[I]f necessary, this covenant shall include the prohibition of introducing foreign goods or merchandise to Costa Rica through the same waterway, in case entered goods could not be registered to pay duties at this State customs; and a fifth, fourth, or third of the annual liquid returns in favor of Nicaragua may be agreed upon, providing exports are done freely”<sup>208</sup>.

Nothing came of these initial efforts to find a compromise.

3.34. With the 1846 coffee crisis, however Costa Rica's need for a low-cost Atlantic route became acute, and she renewed efforts to negotiate an agreement with Nicaragua. As recounted in her 1887 Argument to President Cleveland:

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<sup>208</sup> Instructions carried by the special Minister appointed to the Government of Nicaragua, 1838, para. 17. NR, Vol. II, Annex 7 (emphasis added).

“Costa Rica decided to make an effort, and seek for a settlement, which, setting aside interminable discussions, would enable its Government to carry into effect the purpose above referred to [i.e., gaining access to the San Juan route to the Atlantic]. To this end it sent to Nicaragua Señores Madriz and Escalante, with such instructions as proper, to treat with her Government”<sup>209</sup>.

This effort did yield a treaty signed by the parties’ negotiators

“related to navigation of the San Juan. This stipulated that the Costa Ricans were to pay, at the port of San Juan, warehouse fees, a tax over the tonnage of ships, and a transit duty of two silver reales (or five reales made of a copper and silver allow) for every “quintal” of fruits exported, along with four percent of the value of the merchandise imported”<sup>210</sup>.

It was, however, subsequently rejected by Costa Rica, which was unwilling to pay the agreed charges. As Molina put it:

“Such treaties must naturally have been ratified within an instant in Nicaragua, whereas in Costa Rica they were received with the indignation they deserved”<sup>211</sup>.

3.35. Undeterred, Costa Rica continued to press ahead with her plans for a San Juan route, and in May 1848, she communicated to Nicaragua her intent to open a route to the San Juan via the Sarapiquí<sup>212</sup>. Nicaragua responded by threatening to break ties if Costa Rica pressed ahead without a prior agreement<sup>213</sup>. Molina was

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<sup>209</sup> Argument of Costa Rica, *op. cit.*, p. 47. NR, Vol. II, Annex 5.

<sup>210</sup> Molina Report, *op. cit.*, p. 30. NR, Vol. II, Annex 35.

<sup>211</sup> *Ibid.*, p. 31.

<sup>212</sup> See Sarapiquí Route, *op. cit.*, p. 59. NR, Vol. II, Annex 28.

<sup>213</sup> See *ibid.*, pp. 59-60.

sent to discuss both the route and, more generally, the two States' territorial disputes, but again nothing came of these efforts<sup>214</sup>. Nicaragua insisted on retaining control of the river route while Costa Rica continued to press for an outlet for her trade to the Atlantic<sup>215</sup>. Throughout these discussions, Nicaragua (in addition to insisting on the return of Nicoya/Guanacaste) refused to recognize Costa Rica's right to navigate on the San Juan, and attempted to levy duties on the transport of Costa Rican goods<sup>216</sup>.

3.36. In his 1850 recordings of these dealings, Molina made clear Costa Rica's rising frustration, made worse by what she perceived as the "vital need" for a San Juan route. He wrote:

"Transit by the San Juan had become a vital need for the Costa Ricans, so the uncivil opposition intimated by Nicaragua was the same as condemning [Costa Rica] to a certain decline in her trade and wealth"<sup>217</sup>.

As he saw it:

"[Nicaraguan gave Costa Rica] this hard alternative: either renounce Guanacaste or renounce the Sarapiquí and the San Juan. These conditions are equally inadmissible because, on the one hand, in Guanacaste Costa Rica possesses a significant population, extensive farms and a growing number of cattle; whereas on the other hand, the mentioned rivers are the two main arteries for the country's circulation to the Atlantic"<sup>218</sup>.

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<sup>214</sup> See *ibid.*, p. 60.

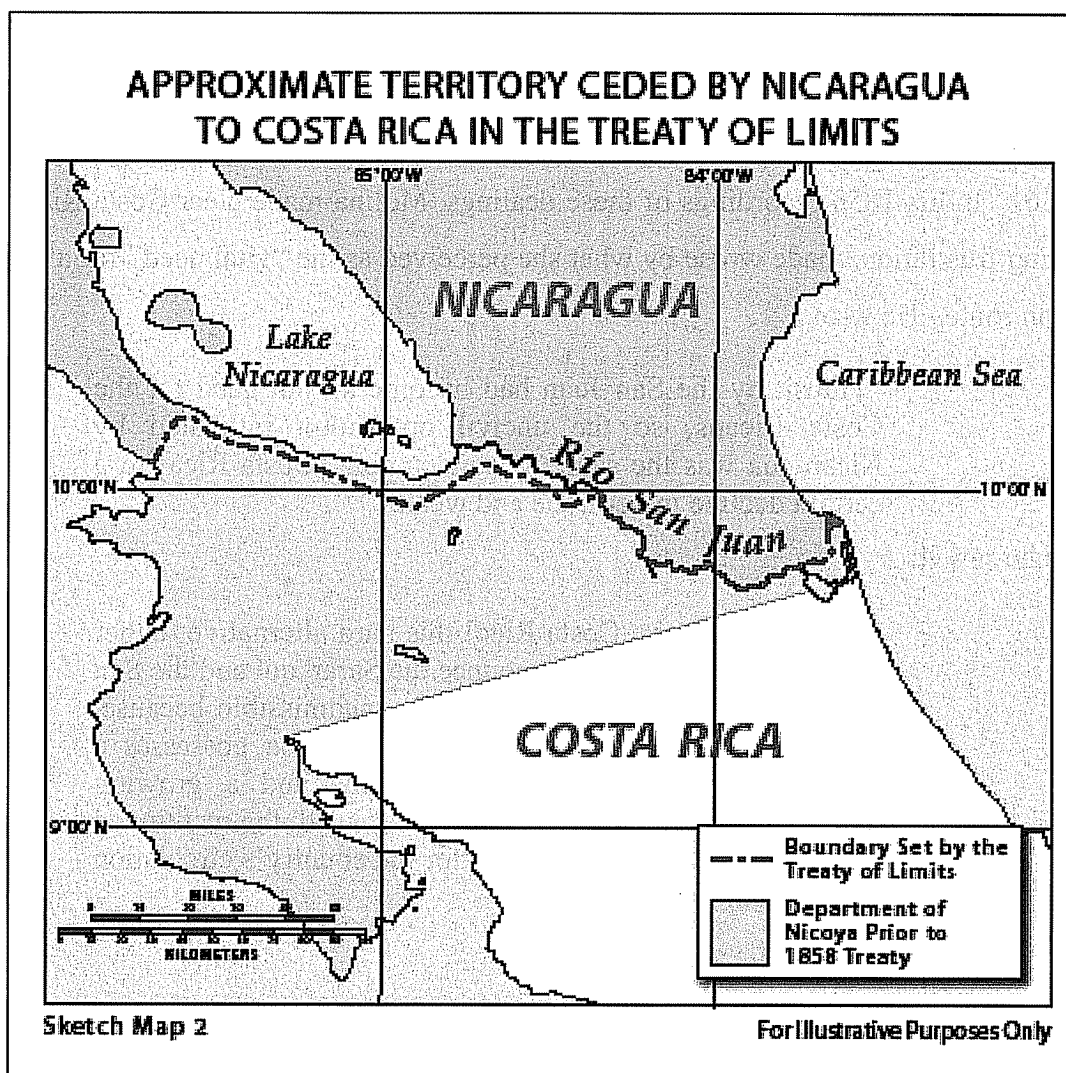
<sup>215</sup> See *ibid.*

<sup>216</sup> See *ibid.*, pp. 60-61.

<sup>217</sup> Molina Report, *op. cit.*, p. 32. NR, Vol. II, Annex 35.

<sup>218</sup> *Ibid.*, p. 36.

3.37. Nicaragua's claim to Guanacaste/Nicoya is shown in the map of Nicaragua published in 1855, which is reproduced following this page. The sketch map below compares the claim depicted on the 1855 map with the boundary that resulted from the 1858 Treaty of Limits.



3.38. Costa Rica and Nicaragua resumed their efforts to negotiate a treaty in 1854. Meetings were held between diplomatic representatives of the two States between 10 January and 17 February 1854. "Protocols," or official minutes of the meetings were signed by the two heads of delegation. The Protocol of the meeting



Map 1

held on 10 January 1854 states that the purpose of the discussion was to address “the issue of territorial limits pending between the two countries (*arreglar o transigir la cuestión de límites territoriales pendientes entre los dos países*).”<sup>219</sup>

3.39. Under discussion was the establishment of a boundary running parallel to, but several “leagues” south of, the San Juan River (leaving Nicaragua with the right bank of the river as well as the left) all the way to the Atlantic Ocean. Nicaragua’s sovereignty over the San Juan would be subject, however, to the concession to Costa Rica, either in a formal Treaty of Limits or a Treaty of Friendship and Commerce, of “free transit by the river and port of ‘San Juan,’ for the import and export trade by the citizens of Costa Rica...(*el tráfico libre por el río y puerto de ‘San Juan,’ para el comercio de importación y exportación de los hijos de Costa Rica...*).”<sup>220</sup> As earlier, it was Costa Rica’s objective in these negotiations to secure for herself the right to use the San Juan River as a route for her exports to the Atlantic and beyond.

3.40. To this same end, Costa Rica insisted in subsequent meetings and written communications that it should be “well understood that the waters of the river and port of ‘San Juan’ and of the Lake should be free at all times for the importation and exportation traffic of Costa Rica...(*bien entendido que las aguas del río y puerto de ‘San Juan’ y la del Lago deben ser libres en todo tiempo para el tráfico de importación y exportación de Costa Rica...*)”<sup>221</sup>. Costa Rica’s final proposal to

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<sup>219</sup> Protocol of the conference of 10 January 1854. NR, Vol. II, Annex 8.

<sup>220</sup> *Ibid.*

<sup>221</sup> Protocol of the conference of 9 February 1854. NR, Vol. II, Annex 9.

Nicaragua, communicated in a Memorandum dated 13 February 1854, insisted that: “The waters of the river and the Port of San Juan will be free to the importation and exportation traffic of Costa Rica, without at any time such trade being subject to any kind of taxation. (*Serán libres para el tráfico de importación y exportación de Costa Rica las aguas del río y Puerto de San Juan, sin que en tiempo alguno sea gravado el comercio con ninguna clase de impuesto*).”<sup>222</sup>

3.41. For various reasons indicated in the Protocols and the exchanges of correspondence between the parties, the negotiations failed and no treaty of limits was agreed. What is important for present purposes is the continuing centrality of Costa Rica’s objective of obtaining from Nicaragua a guaranteed right to freely use the San Juan River and the port of San Juan del Norte as an outlet for her import and export trade.

3.42. Shortly after the failed treaty negotiations, civil unrest took hold in Nicaragua, creating an opportunity for the American filibusterer, William Walker, and his mercenaries to invade. In October 1855, they captured the capital of Granada and seized control of the country. Walker’s history in Central America is notorious, as described in Nicaragua’s *Counter-Memorial*<sup>223</sup>. It need not be revisited here. The important point is that when Walker attempted further conquests in Central America, a combined force of Nicaraguan, Costa Rican, Guatemalan, Salvadoran and Honduran soldiers dislodged him from power in May 1857.

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<sup>222</sup> Memorandum from Costa Rica, dated 13 February 1854, mentioned in the protocol of the conference of 17 February. NR, Vol. II, Annex 10.

<sup>223</sup> See NCM, paras. 1.2.35, *et seq.*



3.43. Upon conclusion of the hostilities with Walker's forces in May 1857, Costa Rica's army was the most powerful in Central America. Her forces occupied all strategic positions on both sides of the San Juan River. They were thus in a position to control all navigation on the river<sup>224</sup>. Costa Rica seized the moment to renew discussions over both Nicoya/Guanacaste and navigational rights on the San Juan. The negotiations resulted in the July 1857 Juárez-Cañas treaty in which Nicaragua expressly renounced her claim to Nicoya/Guanacaste<sup>225</sup>. The treaty recognised Nicaragua's domain over the San Juan River, although the fifth article provided that the

“Republic of Costa Rica, as well as the one of Nicaragua, will have free use of the waters of the San Juan River, for navigation and transportation of articles of trade of import and export ...”<sup>226</sup>

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<sup>224</sup> See “Message of the President of the Republic of Nicaragua, Juan Rafael Mora Porras, to the Congress, 6 September 1857”, *Gazette of El Salvador*, Cojutepeque, 7 October 1857. NR, Vol. II, Annex 11. (“Great and infinite were the difficulties of all types that faced the Government, but all having been surpassed by a firm and decided will, I raised the voice of alarm yet again and was answered unanimously by all peoples. I ordered a column of brave men to march to the world of a general of known experience, to fight the enemy on the field of honor, as demonstrated gallantly in the area of Rivas. Convinced that our efforts and those of our allies would be made in vain unless we attacked the filibusterer at the source of his great resources and troops—that is, unless we stripped him of the forts and steamers with which he dominated the San Juan River and Lake Nicaragua, by means of which his men, arms and supplies would arrive every fifteen days on a scale much greater than ours and even greater than that of all Central America—I ordered the risky maneuver of surprising the enemy at these points.

...

God protected our objectives and our efforts, and within very few days the national flag fluttered over the forts on the river, at Punta de Castilla and on the beautiful Lake Nicaragua.”)

<sup>225</sup> See Juárez – Cañas Treaty, 6 July 1857. CRM, Vol. II, Annex 5. (“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 Moravia 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.”)

<sup>226</sup> *Ibid.*

3.44. The 1857 Juarez-Cañas treaty was ultimately rejected by Costa Rica for reasons, and in circumstances, that are amply described in Nicaragua's *Counter-Memorial* (at paragraphs 1.2.41 through 1.2.47). It is sufficient here merely to reiterate that Costa Rica decided that it might be more advantageous to press her apparent military advantage and expand her territory at Nicaragua's expense, rather than accept a Treaty. Nevertheless, the 1857 treaty is a further manifestation of the constant in the historical record: Costa Rica's abiding interest in the San Juan River as a trade route, especially for her exports to Europe. The record shows that this was the driving force behind the right of navigation "*con objetos de comercio*" that parties enshrined in Article VI of the Treaty of 1858.

3.45. In her *Reply*, Costa Rica takes issue with Nicaragua's argument that the fifth article of the 1857 Juarez-Cañas treaty has any bearing on the interpretation of the phrase "*con objetos de comercio*" in Article VI of the Treaty of 1858. Costa Rica suggests -- albeit without actually arguing that this was the case here -- that "if one party fails to ratify a treaty, one may presume that it was dissatisfied and wanted a new text having a meaning *different* from that of the previous unratified one."<sup>227</sup> Costa Rica's intimation has no support in the record. Indeed, quite the contrary.

3.46. First, it should be noted that Nicaragua's argument is not merely that Article VI of the Treaty of 1858 should be read in light of the fifth article of the 1857 Juarez-Cañas Treaty. The point is much broader than that. As stated, the 1857 Juarez-Cañas treaty is but one further link in a long chain of evidence,

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<sup>227</sup> CRR, para. 2.54.

consistent with the entire corpus of the historical record, demonstrating that Costa Rica's driving aspiration with respect to the San Juan was to secure access to it as a trade route for her goods. As such, it is not just the fifth article of the 1857 Juarez-Cañas Treaty, standing alone, that sheds light on the phrase "*con objetos de comercio*" in the Treaty of 1858, but rather it is the historical context taken as a whole, including the 1857 Treaty, that reveals the object and purpose of Article VI of the 1858 Treaty.

3.47. Moreover, even with respect to the narrow question of the interpretation of the 1857 treaty versus the Treaty of 1858, history shows that Costa Rica's bargaining position, especially with respect to the San Juan, had weakened considerably between the time of the unratified Juarez-Cañas Treaty in July 1857 and the Treaty of 1858 some nine months later. In the intervening time, Costa Rican soldiers had unexpectedly been dislodged from their positions on the Nicaraguan side of the San Juan. Costa Rica was thus no longer in *de facto* control of the river<sup>228</sup>. This fact was duly noted by a keenly interested William C. Jones, Special Agent of the United States to Nicaragua and Costa Rica, in a January 1858 report to Washington, where he observed that Nicaragua was now "in a better situation than before" in terms of her negotiation position vis-à-vis Costa Rica<sup>229</sup>.

3.48. In addition, as discussed at paragraphs 1.2.41 through 1.2.46 of the *Counter-Memorial*, the United States had made her interests in the region

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<sup>228</sup> See "Note from William Carey Jones, Special Agent of the United States of America to Central America, to Lewis Cass, Secretary of State of the United States," 30 January 1858, (*Diplomatic Correspondence of the United States: Inter-American Affairs 1831-1860*, edited by William R. Manning, Washington: Carnegie Endowment for International Peace, 1934, pp. 647-657). NR, Vol. II, Annex 13.

<sup>229</sup> *Ibid.*

abundantly clear during this period. She repeatedly informed Costa Rica that Washington would not countenance Costa Rica's bid for territorial aggrandizement at Nicaragua's expense. The United States likewise made plain her position that full sovereignty of the San Juan was to remain with Nicaragua, and Nicaragua alone. In his July 1857 instructions to Mr. Jones, the American Secretary of State, Lewis Cass, stated flatly: "[Y]ou will make known to the authorities of Costa Rica the confident expectation of the United States, that the possession of the territory, over which the line of communication passes [*i.e.*, the San Juan], will be left to Nicaragua."<sup>230</sup> Mr. Jones did as instructed and conveyed the message to Costa Rica. According to his 2 November 1857 letter to Secretary Cass:

"[A]s early as June last the Government of Costa Rica refused to deliver the fortress of 'Castilla [*sic*] Viejo' and refused also to confirm a Treaty of limits with Nicaragua which gives to Costa Rica the free passage of the River San Juan for her importations & exportations quite as much as according to my instructions agrees with the views of the department. I have therefore not hesitated to make known to the authorities of this State and by such means as have been in my power to the Government of Costa Rica & to the authorities of the other States of Central America that it was the opinion [*sic*] of the United States that the Jurisdiction of the entire Transit route ought to be sole & not divided and that that Jurisdiction ought to remain with the State (namely Nicaragua) to which it had previously belonged..."<sup>231</sup>

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<sup>230</sup> "Note from Lewis Cass, Secretary of State of the United State, to William Carey Jones, Special Agent of the United States to Central America," 30 July 1857. NCM, Annexes, Vol. II, Annex 21, p. 98.

<sup>231</sup> "Note from William Carey Jones, Special Agent of the United States of America to Central America, to Lewis Cass, Secretary of State of the United States," 2 November 1857, (*Diplomatic Correspondence of the United States: Inter-American Affairs 1831-1860*, edited by William R. Manning, Washington: Carnegie Endowment for International Peace, 1934, p. 624) (emphasis added). NR, Vol. II, Annex 12.

3.49. It is interesting to note, in the first of the two italicized phrases cited above, the recognition that the “free passage of the River San Juan” in the 1857 Treaty was for Costa Rica’s “importations & exportations.” Special Agent Jones delivered this pointed message -- including the U.S. position that Nicaragua was to have sole jurisdiction over the river -- to Costa Rica through the person of Costa Rican General José M. Cañas, the very same man who had negotiated the 1857 treaty on behalf of Costa Rica and who would subsequently negotiate the 1858 Treaty, as well<sup>232</sup>.

## 2. *Article VI of the 1858 Treaty in Its Historical Context*

3.50. Consistent with the historical facts presented just above, the text of Article VI of the Treaty of 1858 makes clear that Costa Rica’s navigational rights should, if anything, be interpreted more narrowly than the rights she would have enjoyed had she ratified the 1857 treaty, not more broadly as Costa Rica might like to suggest. For instance, the language of the 1857 Juarez-Cañas Treaty providing that the San Juan River constitutes Nicaraguan territory (article second) is worded rather generically, and states merely that the border between the two States shall be the southern bank of the San Juan River. In contrast, Article VI of the 1858 Treaty of Limits is notably more emphatic. It states: “Nicaragua shall have exclusive dominion and supreme control (*sumo imperio*) over the San Juan River.”

3.51. Similarly, the Treaty of 1858 articulates Costa Rica’s navigational rights in a very different way than the unratified 1857 treaty. In the 1857 Juarez-Cañas Treaty, Costa Rica’s navigational rights not only receive stand-alone treatment in

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<sup>232</sup> See *ibid.*

the fifth article thereof, they are presented as co-equal to Nicaragua's rights ("The Republic of Costa Rica, as well as the one of Nicaragua, will have free use ..." *etc.*). Article VI of the Treaty of 1858, on the other hand, is worded so as to make Costa Rica's navigational rights an express and limited exception to Nicaragua's otherwise unqualified sovereignty: "Nicaragua shall have exclusive dominion and supreme control (*sumo imperio*) of the waters of the San Juan River *but* the Republic of Costa Rica shall have perpetual rights of free navigation ... [*con objetos de comercio.*]" These, of course, are very different linguistic formulations and compel a narrower interpretation of Costa Rica's rights under the Treaty of 1858 than under the 1857 Treaty. It therefore cannot be true that Costa Rica acquired broader navigational rights under the Treaty of 1858 than she did under the 1857 Treaty. Under both treaties, Costa Rica's rights extend no further than navigation with articles of trade.

3.52. The language of Article VI further confirms that the parties' purpose in giving Costa Rica the right to navigate the San Juan "*con objetos de comercio*" was to afford her the Atlantic trade outlet she had long sought. Article VI states, for example, that Costa Rica shall have the right to navigate the San Juan "*con objetos de comercio*" either with Nicaragua or with the interior of Costa Rica, through the San Carlos river, the Sarapiquí, or any other way proceeding from the portion of the bank of the San Juan river, which is hereby declared to belong to Costa Rica."<sup>233</sup> Given the historical antecedents discussed above, these specific references to the Sarapiquí and San Carlos rivers are telling. They are obvious manifestations of Costa Rica's long-standing interest in making use of these watercourses as trade routes. As such, they constitute unmistakable connections

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<sup>233</sup> "Costa Rica-Nicaragua Treaty of Limits (Cañas-Jerez), 15 April 1858," Article VI. CRM, Annexes, Vol. II, Annex 7(b), p. 50. As will be discussed later in the text, this translation, taken from Costa Rica's *Application* is not precisely correct in several important respects.

between the specific text of Article VI and the historical context. Costa Rica's objective, which became an object and purpose of Article VI, was to secure a way, whether by the Sarapiquí, the San Carlos or some other tributary of the San Juan, to get her coffee -- her dominant article of trade -- to the European market as expeditiously as possible.

### 3. *Early Practice of the Parties under the Treaty of 1858*

#### (a) *The Fate of the Sarapiquí/ San Juan Trade Route*

3.53. It is ironic that soon after the Treaty of 1858 had been concluded and Costa Rica achieved her longstanding objective of gaining access to the San Juan to transport her exports to European markets, her interest in the San Juan diminished sharply. Indeed, as a trade route, the San Juan became all but irrelevant to Costa Rica -- within just two years of the Treaty's execution. Several causes were at play. The first was the completion of the trans-isthmian railroad across Panama in 1855. By 1860, Costa Rican merchants were shipping their goods via the Pacific to Panama, and relying on the railroad to get the goods to the Atlantic. As a consequence, they had less interest in using the more difficult land route to the Sarapiquí River and then to the San Juan<sup>234</sup>. Reflecting the decreased importance of the Sarapiquí/San Juan route, Costa Rica's customs post on the Sarapiquí was closed in July 1860<sup>235</sup>.

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<sup>234</sup> See Sarapiquí Route, *op. cit.*, p. 73. NR, Vol. II, Annex 28.

<sup>235</sup> See Decree closing Moín and Sarapiquí Ports, Costa Rica, 24 July 1860, Art. 2. NR, Vol. II, Annex 50 (Original Spanish: "Quedan suprimidas las Aduanas de ambos puntos [Puertos de Moín y Río Sarapiquí]").

3.54. A second reason diminishing the importance of the formerly “vital need” for an Atlantic outlet *via* the San Juan was the construction of a railroad across Costa Rica herself, from San José to Limón on Costa Rica’s Atlantic coast. The project, on which construction began in 1871 and concluded in 1890<sup>236</sup>, gave Costa Rica a wholly domestic solution to her problem that involved neither shipment to a foreign country (Panama), nor reliance on a neighbour with whom relations were not always smooth (Nicaragua).

3.55. The Costa Rican railroad was built in stages and actually began service from the coffee-producing Central Valley to Limón on the Atlantic coast in 1882, some eight years before completion of the entire route<sup>237</sup>. In these early years, goods were transported in stages, alternatively by road from San José to Carrillo, and then by rail from Carrillo to Limón on the Atlantic<sup>238</sup>. Once the railroad came into use in the early 1880s, the importance of the port of Punta Arenas on the Pacific diminished, as Costa Rica at long last had her prized outlet to the Atlantic for her trade<sup>239</sup>. By 1886, just five years after the railroad came into operation, and still four years before the entire line was completed, Limón had surpassed Punta Arenas in importance, and by 1907 fully 90% of Costa Rica’s foreign trade was passing through the port of Limón<sup>240</sup>.

3.56. Yet another factor contributing to Costa Rica’s abandonment of the San Juan as a trade route was the substantial change in the geography at the mouth of

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<sup>236</sup> See Evolution of the Foreign Trade, *op. cit.*, p. 167. NR, Vol. II, Annex 33.

<sup>237</sup> See *ibid.*

<sup>238</sup> See J. A. Rodríguez Bolaños & V. G. Borge Carvajal, *The Railroad to the Atlantic in Costa Rica*, 1979, p. 6. NR, Vol. II, Annex 38.

<sup>239</sup> See *ibid.*, p. 251.

<sup>240</sup> See Evolution of the Foreign Trade, *op. cit.*, Table 6-2, p. 170. NR, Vol. II, Annex 33.



the river. As early as the 1860s, the diversion of much of the flow of the San Juan into the Colorado River drastically reduced the volume of water flowing to the lower reaches of the San Juan, rendering the river substantially less navigable than it had been previously<sup>241</sup>. The silt carried down the San Juan also altered the geography at the mouth of river in the vicinity of the port of San Juan del Norte to such an extent that the river became all but inaccessible from the sea, except only for the smallest boats<sup>242</sup>.

3.57. As a result of all three developments -- the completion of the Panama railroad, the construction of the Costa Rican railroad, and the changes to the geography of the San Juan -- the Sarapiquí/San Juan route was all but abandoned as an outlet for Costa Rica's foreign trade. Costa Rican merchants stopped using the San Juan to transport their goods to the Atlantic coast and beyond. It is precisely these facts that account for the dearth of information supplied by Costa Rica concerning her pertinent practices between 1858 and the 1990s. The Applicant State's pleadings are remarkable for the scant information provided about her use of the river during this 130-year period.

3.58. In this respect, it is conspicuous that Costa Rica nowhere alleges, much less provides any evidence, that she actually made use of the San Juan for any trade-related purposes. For the 130 years subsequent to the Treaty of 1858, Costa Rica provides nothing because there was nothing. Put simply, there was no practice of navigating "*con objetos de comercio*" because Costa Rica was not using the San Juan as a trade route. It was only when tourism was initiated -- in the early 1990s-- that Costa Rica actually attempted to exploit the San Juan River.

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<sup>241</sup> See David I. Folkman Jr., *The Nicaragua Route*, 1976, pp. 115-6. NR, Vol. II, Annex 28.

<sup>242</sup> See *ibid.*

This use of the river will be discussed below in greater detail, in Chapter IV, Section II.

*(b) The Two Treaties of 1868*

3.59. Although, for the reasons discussed, Costa Rica lost her interest in the San Juan as a trade route in the years subsequent to the Treaty of 1858, there is at least one occasion on which the parties returned to the issue. They did so in a way that confirms yet again the extent to which the object and purpose of Costa Rica's navigation right on the San Juan River under Article VI of the Treaty was to afford her an outlet for her trade in goods.

3.60. In particular, in July 1868, several years before construction of the Costa Rican railroad began, Nicaragua and Costa Rica entered into a preliminary treaty concerning the improvement of either (a) the port of San Juan del Norte in Nicaragua, or (b) Boca del Colorado at the mouth of the Colorado River in Costa Rica. As discussed, the diversion of the flow of the San Juan into the Colorado rendered the lower reaches of the San Juan largely impassable to merchant traffic, and the mouth of the river inaccessible to the sea. Given this, Costa Rica and Nicaragua agreed to conduct a joint investigation to determine which of San Juan del Norte or Boca del Colorado was a better port site, and to conduct improvements at the chosen location.

3.61. Pursuant to the 1868 treaty, Costa Rica and Nicaragua carried out the stated site investigation and jointly concluded that the better site was San Juan del Norte. Subsequently, they adopted a follow-on convention dated 21 December 1868 which, read as a whole, confirmed that whatever interest Costa Rica had in

the San Juan was as an outlet for her foreign trade. The treaty is worth citing *in extenso* so that Court may appreciate the point for itself:

#### “Article II

The Government of Nicaragua, on its part, commits to stipulate, in the event that any transit contract is entered into, whether with nationals or foreigners, that the freight rates established by Nicaragua for imported or exported products or merchandise shall also extend to Costa Rica, and any grace, privilege or cohesion obtained by Nicaragua, as far as transportation on the San Juan River is concerned, shall extend to Costa Rica on an equal footing.

#### Article III

Vessels from Costa Rica, which arrive at the San Juan del Norte port, shall not pay any duties which are not charged to the national vessels of Nicaragua.

#### Article IV

In the event that San Juan ceases to be a free port, and the Government of Nicaragua subjects to registration or taxation the merchandise which is imported or the products which are exported through it, the merchandise and products imported or exported by Costa Rica shall be exempt from such formalities and from the payment of any duties.

#### Article V

If in the previous case, it were to occur that the Government of Nicaragua, as a result of any internal disorder or because it finds itself at war, could not efficiently protect the San Juan port, the Government of Costa Rica is granted the right to send the necessary force to the aforesaid port to protect the [interests of comercio] of Costa Rica, and the Government of Nicaragua shall not concur in the cost of this provision.”<sup>243</sup>

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<sup>243</sup> “Convention Between Nicaragua and Costa Rica, Supplemental to the Convention of July 13<sup>th</sup> of this Year, Related to the Improvement of the Colorado or San Juan Rivers (Rivas-Esquivel)”, 21 December 1868. NR, Vol. II, Annex 1.

3.62. As the Court will appreciate, the treaty makes clear that, as far as the San Juan River and port of San Juan del Norte were concerned, Costa Rica's "interests of commerce" were defined just as her navigation "*con objetos de comercio*" had been defined in the 1858 Treaty; that is, by her "merchandise which is imported or the products which are exported". Thus, Article 2 is designed to ensure that Costa Rica pays no greater tariffs on imports and exports shipped on the San Juan than Nicaragua herself. Similarly, Article 4 guarantees that Costa Rican imports and exports at the port of San Juan del Norte will remain free regardless of whether or not the port as a whole remains a free port. Indeed, Article 5 even gives Costa Rica the right to send her military to the port of San Juan del Norte to protect her "interests of '*comercio*'" in the event that Nicaragua is unable to do so. There can be no dispute that in 1868, as in 1858, Costa Rica continued to view the San Juan as an outlet, albeit a less important one, for her "*comercio*," meaning her import and export of goods.

(c) *Costa Rica's Written Submissions to President Cleveland*

3.63. Notably, Costa Rica herself admitted that her navigation rights on the San Juan were limited to the transportation of trade goods in her briefs to President Cleveland in 1887. The admission appears in the portion of Costa Rica's opening submission to the American President that addresses the question of whether or not Costa Rica had the right to navigate on the San Juan with vessels of war. At the beginning of her argument, Costa Rica first quotes the relevant passages of Article VI of the Treaty of 1858 giving her the right of navigation "*con objetos de comercio*." She then proceeds to pose the revealing rhetorical question:

"Does this mean that Costa Rica cannot under any circumstances navigate with public vessels in the said waters, whether the said vessel is properly a man-of-war, or

simply a revenue cutter, or any other vessel intended to prevent smuggling, or to carry orders to the authorities of the bordering districts, or for any other purpose not exactly within the meaning of transportation of merchandise?”<sup>244</sup>

3.64. Thereupon, Costa Rica naturally proceeds to argue that the answer to her own rhetorical question must be “no” (a conclusion with which President Cleveland very much did *not* agree). What is telling for present purposes, however, is that Costa Rica expressly equated her navigational rights “*con objetos de comercio*” under Article VI of the Treaty of 1858 to the “transportation of merchandise.”

(d) *The Alexander Award of 1897*

3.65. The arbitral award of 30 September 1897, issued by General E.P. Alexander, confirmed that the Treaty of 1858 gave Costa Rica the right of free navigation on the San Juan River “*con objetos de comercio*” so that she would have an Atlantic outlet for her import and export of goods. In fact, Award No. 1 by General Alexander is decisive on this issue. The Court will recall that by treaty dated 27 May 1896 Costa Rica and Nicaragua agreed to submit to an arbitrator (to be chosen by the President of the United States) any disputes that might arise in the work of the boundary commissions from both States then tasked with defining precisely the location of the boundary between them<sup>245</sup>.

3.66. The first question presented to General Alexander concerned the starting point of the boundary at the mouth of the San Juan River. After receiving

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<sup>244</sup> Argument of Costa Rica, *op. cit.*, p. 155. NR, Vol. II, Annex 5 (emphasis added).

<sup>245</sup> See NCM, para. 1.3.38; NCM, fn. 296.

extensive argumentation from the parties, he issued his ruling. Although Nicaragua quoted the decision in paragraph 2.1.44 of her *Counter-Memorial*, the Arbitrator's words are worth revisiting here for reasons that will immediately be obvious to the Court. He stated:

“[O]f 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. ... 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 or sentences. And this meaning of the men seems to me abundantly plain and obvious.

(...)

[F]rom 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* [emphasis in original] of all the waters of this same outlet for commerce, also unbroken to the sea.”<sup>246</sup>

3.67. As indicated in the first paragraph of the quoted text, General Alexander's understanding of the parties' intent very much informed his decision as to the boundary's starting point. The difficulty identifying this point had arisen because the San Juan spread out into a delta comprised of three different branches before reaching the sea. The arbitrator ultimately rejected a boundary following one of the two other branches precisely because neither was a viable trade outlet. He stated: “[The boundary] cannot follow either of them, *for neither is an outlet for*

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<sup>246</sup> “First Award rendered by the umpire, EP Alexander, San Juan el Norte on September 30, 1897, in the boundary question, between Costa Rica and Nicaragua”. CRM, Annexes, Vol. II, Annex 18, p. 107 (emphasis added).

*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.”<sup>247</sup> For General Alexander, the boundary between Nicaragua and Costa Rica could only be the branch of the river that “is an outlet for commerce” with “a harbor at its mouth,” because only that boundary fulfilled the purpose of Article VI of the 1858 Treaty, which was to provide Costa Rica with “an outlet for commerce.”

3.68. General Alexander similarly resolved a dispute concerning title to an island located near the mouth of the San Juan by reference to the object and purpose of Article VI. The precise question concerned an island that would have been connected to Costa Rica by a sand bar at the time of year the Treaty of 1858 was signed, which was at the end of the dry season. The arbitrator found that the presence of the sand bar during the dry season did not alter the course of the boundary along Costa’s Rica’s right bank, stating: “[I]t would be unreasonable to suppose that such temporary connection could operate to change permanently the geographic character and political ownership of the island. The same principle, if allowed, would give to Costa Rica every island in the river to which sand bars from her shore had made out during the dry season. But *throughout the treaty, the river is treated and regarded as an outlet for commerce.* This implies that it is to be considered as in average condition of water, in which condition, alone, it is navigable.”<sup>248</sup>

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3.69. For all these reasons, it is clear that the intent of Nicaragua and Costa Rica in 1858 was to afford Costa Rica the Atlantic outlet for her exports and imports

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<sup>247</sup> *Ibid.* (emphasis added).

<sup>248</sup> *Ibid.*, p. 108 (emphasis added).

that she long desired. It is equally clear, however, that the need for this outlet had all but evaporated soon after the ink had dried on the Treaty of Limits. Due to the construction of railroads across Central America in both Panama and later Costa Rica herself, as well as to morphological changes in the lower San Juan area, the San Juan route became unimportant to Costa Rica, and so it remained -- until the last decade of the 20<sup>th</sup> century, when the Costa Rican tourist boats first undertook regular voyages to the river, as further elaborated in Chapter IV.

#### 4. “Comercio” as Understood in 1858 Meant Trade in Goods

3.70. That the parties intended Costa Rica to have the right to use the San Juan as a trade route for her goods is still further confirmed by the fact that, as stated at paragraph 4.3.19 of the *Counter-Memorial*, the term “comercio” as understood in 1858 embraced only the traffic in commodities. It did not include broader notions which today may be included within the meaning of the term “commerce.” Thus, the right the parties to the 1858 Treaty gave to Costa Rica to navigate the San Juan River “*con objetos de comercio*” was a right to use the river as a route for her export and import of goods. In her *Reply* Costa Rica contends simply that Nicaragua’s position is unjustified<sup>249</sup>. Yet, as will be shown below, Nicaragua’s position is amply supported by multiple sources, many of them Costa Rican. Contemporaneous dictionaries, contemporaneous histories prepared by Costa Rican officials, the pleadings of Costa Rica before President Cleveland and official translations of other period treaties all show that “comercio,” as understood by the parties in 1858, encompassed only trade in goods; in the mid-nineteenth century, the term did not extend to services.

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<sup>249</sup> See CRR, para. 3.74.



(a) *Contemporaneous Dictionary Definitions*

3.71. Perhaps the best starting place for ascertaining the scope of the term “*comercio*” in 1858 is with the edition of the *Dictionary of the Spanish Royal Academy* current to the Treaty of 1858. In the 1852 edition, the primary definition of “*comercio*” is given as follows: “Business and trafficking that is done by buying, selling or exchanging some things for others (*Negociación y tráfico que se hace comprando, vendiendo ó permutando unas cosas con otras*).”<sup>250</sup> The term thus plainly embraced the exchange of physical objects.

3.72. Although the English translation that perhaps most naturally springs to mind for “*comercio*” is “commerce,” in fact (and consistent with the above definition from the Spanish Royal Academy), it can be and was equally translated as “trade.” Period dictionaries confirm the point. Indeed, it is interesting to note that the primary translation listed for “*comercio*” is typically “trade,” with “commerce” appearing only secondarily. The Spanish translation for the English “trade” is “*comercio*.”<sup>251</sup> In the 1858 edition of *A Dictionary of the Spanish and*

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<sup>250</sup> Royal Spanish Academy, *Dictionary of the Castilian Language*, Tenth edition, 1852. NR, Vol. II, Annex 59. [Excerpt: “The grammatical evidence is impressive. The first meaning of *commerce* given by the dictionary of the Spanish Royal Academy of 1803 is: ‘Negotiation and traffic which is made buying, selling, or exchanging some things for other’. The same meaning is repeated in the editions of 1817, 1822, 1832, 1837, 1843, 1852, applicable at the date of signature of the Cañas-Jerez Treaty, and then, in the editions of 1869, 1884, 1899 and successive editions until today where the word *commerce* continues to be, in the first place, ‘Negotiation which is made by buying or selling or exchanging genres or merchandises.’ (Footnotes omitted).]

<sup>251</sup> *The New Pocket Dictionary, of the Spanish and English Languages*, 1809. NR, Vol. II, Annex 58.

*English Languages*, “*comercio*” is translated as “[t]rade, commerce,” and “trade” is translated as “*comercio*.”<sup>252</sup>

(b) *Contemporaneous Usages*

3.73. The fact that the term “*comercio*” as used and understood in the middle of the 19th century embraced the traffic in goods, and was translatable into English as “trade,” is amply confirmed by numerous Costa Rican sources from the time. For example, the contemporaneous translation of Felipe Molina’s 1850 work “Memoir on the Boundary Question Pending Between the Republic of Costa Rica and the State of Nicaragua” contains an English translation of the February 1796 royal decree first establishing the port of San Juan del Norte, about which so much has been written:

“His Majesty, being desirous that the province of Nicaragua and the other provinces of the kingdom of Guatemala, which are situated more than three hundred leagues distance from the capital, and from the ports of Omoa and Santo Tomas de Castilla, may be enabled to carry on a direct trade (“*comercio*”) with the mother country, without being subject to the inconveniences of a long distance, has been pleased to declare that the harbor of San Juan de Nicaragua, on the river of the same name, shall be a port of the second class”<sup>253</sup>.

3.74. Similarly, in 1851, Costa Rica and the United States of America entered a Treaty of Friendship, Commerce and Navigation. Although the term “*comercio*” appears throughout the treaty in Spanish, it appears variously in the English

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<sup>252</sup> Mariano Velázquez de la Cadena, *A Dictionary of the Spanish and English Languages*, 1858, pp.106 and 805. NR, Vol. II, Annex 60.

<sup>253</sup> Felipe Molina, *Memoir on the Boundary Question Pending Between the Republic of Costa Rica and the State of Nicaragua*, 1851, pp. 5-6. NR, Vol. II, Annex 37 (emphasis added).

language version as either “commerce” or “trade.”<sup>254</sup> To exactly the same effect is the Treaty of Friendship, Commerce and Navigation between Costa Rica and the United Kingdom ratified in 1850. It is interesting to note further that the subject of these treaties of “commerce”/“*comercio*” was very much the reciprocal trade in goods -- underscoring the effective equivalence among “*comercio*”, “trade” and “commerce” in the mid-19th century lexicon.

3.75. Once again, the work of Molina is particularly helpful. In his 1851 “Study of the Republic of Costa Rica”, he devotes a section to the “*comercio*” of Costa Rica. It begins:

“This is carried out mainly with England, on English ships. Almost all products from the country end up in the United Kingdom, in exchange for English manufactured goods, which to date make up the greatest part of consumption. Nevertheless, there is a French firm that receives three or four expeditions each year, and the French goods are highly esteemed.”<sup>255</sup>

3.76. Molina goes on to discuss points already highlighted in the preceding section of this chapter; namely (1) that the growth of Costa Rica’s “*comercio*” is paralyzed by the need to travel around Cape Horn, and (2) that the majority of Costa Rica’s “*comercio*” was entering and exiting through Punta Arenas on the Pacific coast. It is thus clear that “*comercio*” as understood at the time meant trade in goods.

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<sup>254</sup> “Treaty of Friendship, Commerce, and Navigation, between the United States of America and the Republic of Costa Rica,” 10 July 1851. CRR, Annexes, Vol. II, Annex 9.

<sup>255</sup> Molina Study, *op. cit.*, pp. 31-32. NR, Vol. II, Annex 36.

3.77. Additional confirmation of this fact can be found in the provisions of the August 1868 Treaty of “*comercio*” between Nicaragua and Costa Rica<sup>256</sup>. As its title indicates, this brief treaty deals entirely with the subject of “*comercio*” between the two States, and is thus of interest for reasons that are obvious. The terms of the treaty make clear that “*comercio*” meant trade in goods. This shines through in the very first sentence of Article I which states: “There shall be between the Republics of Costa Rica and Nicaragua a reciprocal freedom of *comercio* in all the goods that are not prohibited by their respective laws. (*Habr  entre las Rep blicas de Costa Rica y Nicaragua una rec proca libertad de comercio con todos los  rtculos no prohibidos por sus respectivas leyes*).” By itself, and without more, this one line shows in the clearest possible way that “*comercio*” was something one did with goods.

3.78. The remaining provisions of the 1868 Treaty of “*comercio*” are consistent, and likewise make clear that “*comercio*” meant trade in goods. Although Nicaragua invites the Court to read the treaty in its entirety, just one other quotation should suffice to prove the point. Article 2 states:

“[I]t is therefore declared and established, regarding their particular and own products: that the imports and exports that are made from one point to the other, either by sea of land, of the goods or natural or industrial products natural to the sender’s country shall not pay rights or taxes of any kind...”<sup>257</sup>

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<sup>256</sup> “Costa Rica-Nicaragua, Treaty of Commerce (Volio-Zelaya), San Jos ,” 14 August 1868. CRM, Annexes, Vol. II, Annex 10, p. 73.

<sup>257</sup> *Ibid.* (Original Spanish: “[S]e declara y establece, respecto de sus particulares y propias producciones; que las importaciones y exportaciones que se hagan de uno   otro punto, ya sea por mar   por tierra, de los  rtculos   productos naturales   industriales, propios del pa s que los remite, no pagar n derechos ni impuesto de ninguna clase.”)

Although Nicaragua hesitates to belabour the obvious, this provision again makes abundantly clear that the “*comercio*” that was the subject of the treaty was the traffic in “imports and exports” of “natural or industrial articles or products”; that is, trade in goods.

(c) *The Full Text of Article VI Makes Clear That “Comercio” Means Trade in Goods*

3.79. Based on the contemporaneous understanding and read in proper context, it is clear that the term “*comercio*” as used in Article VI of the Treaty of 1858 meant trade in goods, and trade in goods only. Although the text of Article VI has now been cited many times by both parties, it is worth reviewing again with this point in mind. In pertinent part, it states:

“... the Republic of Costa Rica shall have the perpetual right of free navigation on the said waters, between the said mouth [of the San Juan River] and the point, three English miles distant from Castillo Viejo, [“con objetos de comercio”] either with Nicaragua or with the interior of Costa Rica ...”

Although Costa Rica has focused extensively on the phrase “*con objetos de comercio*,” she has given no attention to the language immediately following, which states that the “*comercio*” will either be “with Nicaragua or with the interior of Costa Rica”. The limitation is important because, as explained below, it only makes sense if the “*comercio*” referred to in Article VI is understood as trade in goods.

3.80. Before proceeding further, it must be stated that Costa Rica’s translation of Article VI (taken from Costa Rica’s *Application*), although broadly accurate, is

not entirely correct. The original Spanish provides that Costa Rica will have the right of free navigation “*desde la expresada desembocadura [del río San Juan] hasta tres millas inglesas antes de llegar al Castillo Viejo, con objetos de comercio, ya sea con Nicaragua ó al interior de Costa Rica.*”<sup>258</sup> More precisely rendered, this should read that Costa Rica has the right to navigate “from the said mouth [of the San Juan River] to three miles before arriving at the Castillo Viejo, [con objetos de comercio], whether it be with Nicaragua or to the interior of Costa Rica.”

3.81. These differences, although subtle, are significant for at least two reasons. First, the fact that Article VI gives Costa Rica the right to navigate “con objetos de comercio”, “whether it be with Nicaragua or to the interior of Costa Rica” underscores the fact that the parties to the Treaty of 1858 understood that, by definition, “comercio” under Article VI came in just two varieties (i) with Nicaragua (including, of course, the port of San Juan del Norte) or (ii) to Costa Rica’s interior. So understood, it becomes clear that, in context, the term can only mean “trade.” Trade can be “with Nicaragua;” trade can also travel “from” the mouth of the San Juan “to the interior of Costa Rica.” On the other hand, these limitations make little sense if the “comercio” referenced was intended to confer on Costa Rica some broadly defined right to navigate the San Juan for purposes beyond the trade in goods. With regard to that period, commerce “with Nicaragua” could only mean trade in goods. The same is true for “comercio” “to the interior of Costa Rica”.

3.82. The use of the terms “from” (“desde”) the mouth of the San Juan and “to” (“a”) the interior of Costa Rica have a directional component, and highlight the

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<sup>258</sup> Costa Rica- Nicaragua Treaty of Limits (Cañas-Jérez), 15 April 1858. CRM, Vol. II, Annex 7(a).

fact that the parties very much had in mind “*comercio*” moving between locations outside and inside Costa Rica -- *i.e.*, foreign trade -- exactly as the history recounted above would suggest.

3.83. The fact that the “*comercio*” referred to in the text of Article VI means trade in goods is still further underscored by the section of Costa Rica’s Argument to President Cleveland highlighted above, at paragraphs 3.63-3.64 in which Costa Rica specifically links her right to navigate on the San Juan “*con objetos de comercio*” with the “transportation of merchandise.” Here again, we have an obvious equation of the “*comercio*” of Article VI with trade in merchandise.

3.84. Viewed in the historical and linguistic context cited above, it is clear that the parties to the Treaty of 1858 understood “*comercio*” to include only trade in goods, not broader, modern conceptions of commerce that sweep up virtually any form of economic activity. So seen, the significance of the parties’ dispute over the meaning of the term “*objetos*” largely vanishes. Even if -- *quod non* -- that word could bear the heavy load Costa Rica attempts to impose on it, and it could be construed to mean “objectives” or “purposes” rather than being limited to physical “objects,” the fundamental meaning of the phrase “*con objetos de comercio*” is just the same. Under Costa Rica’s reading, Article VI would give her the right to navigate the lower San Juan “for purposes of trade.” Under Nicaragua’s reading, on the other hand, Article VI would give Costa Rica the right to navigate the lower San Juan “with objects of trade.” As the Court will appreciate, there is no meaningful difference between the two. In either case, Costa Rica’s navigation rights are limited to the trade in goods.

(d) *The Nineteenth Century Treaties and Documents Cited by Costa Rica in the Reply*

3.85. Costa Rica tries to overwhelm the Court with a long table of documents from the nineteenth century in which she alleges the word “*objetos*” means “purposes.”<sup>259</sup> According to Costa Rica, the table includes provisions from an “impressive number of relevant treaties, contracts and other instruments contemporary with the Treaty of Limits in which the term ‘objetos’ was overwhelmingly used as meaning ‘purposes.’”<sup>260</sup> However, the great majority -- sixty out of seventy-six -- of the provisions quoted, taken from thirty-one documents, do not speak of “*objetos*” but “*objeto*,” and therefore do not sustain Costa Rica’s pretension, because Nicaragua does not question the different meanings that the word “*objeto*” may have in its singular form, but only rejects the meaning that Costa Rica pretends to give to the word “*objetos*” in plural, in particular when those objects are qualified by the words “*de comercio*.”<sup>261</sup>

3.86. To correctly interpret the phrase “*con objetos de comercio*” as it appears in Article VI of the Treaty of Limits, Nicaragua consulted one of the leading experts on Spanish vocabulary and grammar from the Spanish Royal Academy (*Academia Real Español*), Dr. Manuel Seco Reymundo, whose impressive curriculum is appended to his Formal Opinion (in Volume II of this *Rejoinder*, Annex 64. In his Formal Opinion, Dr. Seco explains that the Spanish word “*objeto*” is susceptible of two different meanings, each of which could correspond to the English word “object.” According to Dr. Seco, “*objeto*” -- in its

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<sup>259</sup> See “Table 1: Use of the term ‘*objetos*’ meaning ‘purposes’ in 19th Century documents”. CRR, pp. 99-126.

<sup>260</sup> CRR, p. 62, para. 3.60.

<sup>261</sup> See *ibid*.



singular form -- could mean either a tangible “object” or an intangible “objective” or “purpose.” However, in its plural form (“*objetos*”) the word only refers to tangible “objects,” and not to “objectives” or “purposes.” As stated by Dr. Seco, whose analysis of the topic included a review of the Table incorporated in Costa Rica’s *Reply*:

“A simple review of the Costa Rica Table allows for a first general observation: use of the singular *objeto* is much more abundant than the plural *objetos*. Second, when it appears, it is mostly found in the sense of ‘purpose or objective,’ particularly in virtually lexicalized constructions, such as the prepositional phrase, *con el objeto de* (sometimes in variations, such as *con objeto de*, *con el único objeto de* and *para el objeto de*), or the adverbial phrase, *con este objeto* (and its variations, *con tal objeto*, *con ese objeto*, *con el objeto expresado*, *para este objeto*, and *para el dicho objeto*) – constructions that do not exist in the language for the plural form.”<sup>262</sup>

3.87. In addition to the documents identified in the Table presented by Costa Rica in the *Reply*, Dr. Seco examined other examples of contemporaneous usage of the relevant language dictionaries of the period and other authoritative sources. He stated his conclusion thusly:

“(...) Consequently, based on all the information studied, my conclusion is that, in the text of Article VI of the Border Treaty between Costa Rica and Nicaragua signed on April 15, 1858, the phrase *con objetos de comercio* should be understood as ‘with things on which commercial activity falls.’”<sup>263</sup>

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<sup>262</sup> Seco Opinion, *op. cit.*, paras. 8-9. NR, Vol. II, Annex 64.

<sup>263</sup> *Ibid.*, para 14.

3.88. As indicated, only 16 of the 76 references to “*objeto*” or “*objetos*” provided by Costa Rica in her Table use the plural form of the word, which is the form used in the Treaty of Limits. Besides Dr. Seco’s Formal Opinion, which refutes Costa Rica’s attempt to interpret “*objetos de comercio*” as “purposes of trade,” there are still other reasons why her Table is unimpressive. First, in ten of those 16 references the expression “*objetos*” is not accompanied by the expression “*de comercio*.”<sup>264</sup> Second, four of the remaining six examples refer to the right of the citizens of the parties to “*alquilar y ocupar casas y almacenes para los objetos de su comercio*” (hire and occupy houses and warehouses for the “*objetos*” of their “*comercio*”) in which “*objetos*” can only mean goods or articles, since “purposes” and “objectives” cannot be stored in houses or warehouses<sup>265</sup>. Third, the two remaining examples are those of the very Article VI of the 1858 Treaty, and the Cleveland Award, whose interpretation is at the centre of the controversy in this case<sup>266</sup>. So what Costa Rica demonstrates is just the opposite of what she pretends. “*Objetos de comercio*” are only goods in the

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<sup>264</sup> See “Table 1: Use of the term ‘*objetos* meaning “purposes” in 19th Century documents’. CRR, pp. 99-126: Doc. 3 (art. 37, at p. 101), 7 (arts. 3 and 7, at p. 106), 10 (art. VIII, p. 109), 11 (preamble, at p. 110), 14 (arts. I and VII, at p. 112), 15 (arts. VII y XIX, at P. 113), and 28 (para. V, at p. 123).

<sup>265</sup> See *ibid.* CRR, pp. 99-126: Doc. 6 (art. II, at p. 105), 9 (art. II, at p. 107), 12 (art. II, at p. 111) and 16 (art. II, at p. 114). In two of the nineteenth century treaties between the United States of America and Nicaragua (Cass-Irisarri, of 16 November 1857, and Lamar-Zeledón, of 16 March 1859), there is a common Article II which translates “*para objetos de su comercio*” as “for the purpose(s) of their commerce;” (CRR, pp. 60-62, para. 3.55-3.59) according to Costa Rica these expose “the fallacy of Nicaragua’s arguments...by reference to instruments contemporary to the 1858 Treaty of Limits.” (CRR, p. 60, para. 3.55) But Costa Rica’s confidence in these treaties, which were never ratified, is misplaced. The provision on which Costa Rica relies is actually a model provision common to all U.S.-Nicaragua treaties of the period, which date back to and were copied directly from the Treaty of Amity, Commerce and Navigation, of 10 July 1851, whose Article II provided: that the citizens and subjects of both countries had the freedom to let and occupy houses and warehouses “*para los objetos de su comercio*.” (CRR, pp. 4-5, para 1.10-1.11) Thus, the “*objetos de comercio*” were quite obviously the goods that they bought and sold and, logically, deposited and saved in houses and warehouses. Or does Costa Rica suggest that purposes and objectives can be stored in warehouses?

<sup>266</sup> See *ibid.* CRR, pp. 99-126: Doc. 10 (art. 6, at p. 108), Doc. 28 (para. Segundo, at p.123).

nineteenth century; they are not “objectives” or “purposes.” Costa Rica cannot present even a single document to support a different conclusion.

3.89. Costa Rica enlarges her *Reply* with a second table on the terms used to refer to articles of trade, goods or things in nineteenth century documents<sup>267</sup>. This is even less helpful to her cause than the first table. The second table only demonstrates the richness of the language used when referring, within the ambit of commercial traffic, to *mercancías*, *mercaderías*, *artículos*, *cosas*, *productos*, *bienes*, *frutos*, *efectos*, *materiales*, *géneros*, *producciones*, *manufacturas* and, of course, *objetos*, which are translated into English as merchandise, articles, things, products, goods, wares, effects, stock, items, materials, manufacture, and objects. It is curious, and worthy of notice, that only when Costa Rica herself provides the English translation of the term “*objetos*” -- in four cases (numbers 2, 13, 17 and 22) -- does it turn out to be “objects,” while in the other three cases included in her list, where the translation of “*objetos*” is provided by an independent, contemporaneous source, the English word chosen is “things” (number 23), “goods” (number 25) or “articles” (number 26). Nicaragua’s conclusion is thereby further reinforced; in the nineteenth century “*objetos de comercio*” could only be tangible goods<sup>268</sup>.

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<sup>267</sup> See “Table 2: Terms to refer to articles of trade, goods, things, etc. in 19<sup>th</sup> Century documents”. CRR, pp. 127-151.

<sup>268</sup> See Letter from Neil Johnstone, Director of the Language Services and Documentation Division of the WTO to Alicia Martín, Permanente Representative of the Republic of Nicaragua before the Office of the United Nations, 12 October 2006. NR, Vol. II, Annex 63 (stating “although the Organization has not found documents in its possession in which the expression ‘objetos de comercio’ appears, the Division can nevertheless indicate English expressions, such as ‘articles of trade’ and ‘wares’, which have been translated into Spanish as ‘objetos de comercio’ (for instance, in documents WT/DS/236/R, WT/DS/257R and WT/DS/257ABR).”).

## **Section II. The Treaty Does Not Empower Costa Rica To Perform Passenger Or Other Services, Nor Does It Have An Evolutionary Character**

### **A. THE EVIDENCE CONCERNING PASSENGER TRAFFIC**

3.90. The fact the parties intended to limit Costa Rica's navigational right to the transport of trade goods is still further confirmed by the fact that, historically, it was Nicaragua -- and only Nicaragua -- that ever authorized passenger traffic on the San Juan River. If the parties had intended to give the term "*comercio*" the broad sweep that Costa Rica now contends -- *i.e.* if they had meant also to include services such as the transport of passengers or tourists -- one would expect to see evidence in the record that Costa Rica had authorized such transportation sometime after the Treaty of 1858 and before the current dispute over tourism erupted in the 1990s. There is, however, no such evidence, which further highlights the limited nature of Costa Rica's right under Article VI.

3.91. The facts on this score are not in dispute. As stated in the *Counter-Memorial* at paragraphs 1.3.9 through 1.3.22 (concerning the pre-1858 period) and 4.1.37 to 4.1.45 (concerning the period thereafter), the transport of passengers through the San Juan -- the most lucrative business at the time the Treaty of 1858 was executed -- was authorized by Nicaragua alone. Nicaragua identified no fewer than eight conventions, treaties or contracts relating to that subject, including:

- the 1849 contract with the American Atlantic and Pacific Ship Canal Company;
- the 1851 White-Chamorro-Mayorga Canal Convention;
- the 1857 Irisarri-Stebbins Contract;
- the 1857 Cass-Irisarri Treaty;

- the 1860 Zeledón-Rosa Pérez Convention;
- the 1863 Molina -Morris contract;
- the 1877 Pellas Contract; and
- the 1887 Cardenas-Menocal Contract.

3.92. In her *Reply*, Costa Rica neither disputes nor takes issue with Nicaragua’s characterization of any of these facts. They may therefore be taken as admitted. Costa Rica confines herself to a three paragraph response contending: (1) that the Treaty of 1858 does not use express language to exclude the transport of passengers; (2) that Nicaragua was careful not to deny Costa Rica’s right to transport persons on the San Juan; and (3) Nicaragua’s exclusive exercise of the privilege of granting concessions over inter-oceanic transit “bears no relation” to Costa Rica’s rights under Article VI<sup>269</sup>. None of these arguments disproves Nicaragua’s point.

3.93. With respect to Costa Rica’s first argument, it is Nicaragua’s position that the wording of Article VI, which ties Costa Rica’s freedom of navigation to navigation with “articles of trade” does, in fact, expressly exclude passenger transportation. Even accepting Costa Rica’s (incorrect) argument that “*con objetos de comercio*” means “for purposes of trade”, the fact remains that the transport of passengers (and certainly of tourists) is beyond the limits of the term “*comercio*” as the term was understood in 1858. As demonstrated above, “*comercio*” was understood in the mid-nineteenth century to embrace only trade in goods. Contrary to Costa Rica’s assertion (at paragraph 3.76 of her *Reply*) that

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<sup>269</sup> CRR, paras. 3.76 - 3.78.

“there is nothing in the record that supports the notion that this [*i.e.*, the exclusion of passenger transport] was the intention of the parties,” the truth is very much the opposite. According to multiple Costa Rican historical sources, the intention of the parties was plainly limited to affording Costa Rica an Atlantic outlet for her export and import trade. By the admission of her own negotiator at the time, Costa Rica’s motivating “vital need” was to get her exports to the European market more quickly, not to send tourists down the river on sightseeing excursions. There is no evidence that Costa Rica sought access to the San Juan for the transport of tourists or other passengers; and there is no evidence that before or after the 1858 Treaty was executed, for at least the next 130 years, Costa Rica issued any licenses or other official authorizations of passenger services on the river.

3.94. To support her second argument (that Nicaragua “was careful” not to deny Costa Rica’s right to transport “persons and property”), the *Reply* cites Nicaragua’s treaties of friendship, commerce and navigation with the United States, France and Great Britain in 1857, 1859 and 1860, respectively. The treaties contain a substantially identical provision toward the end of each that provides that “nothing contained in this treaty shall be construed to affect the claim of the government and citizens of the Republic of Costa Rica to a free passage by the San Juan River for their persons and property to and from the ocean.”<sup>270</sup> These provisions cannot be construed as an endorsement of Costa Rica’s “right” to transport passengers on the San Juan. *First*, none of these treaties purports to or could modify the plain provisions of the Treaty of 1858. *Second*, the treaties subsequent to 1858 all appear to have imported wholesale exactly the same language from the earliest treaty as a model provision. They too

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<sup>270</sup> *E.g.*, CRR, Vol. II, Annex 10 (U.S.).

shed little light on the meaning of the Treaty of 1858. *Third*, it is noteworthy that the provisions refer to Costa Rica's "claim" not "right." This is hardly a recognition of an entitlement on the part of Costa Rica. *Fourth*, and finally, given the context of these treaties, all of which were very much trade-related treaties, it is most logical to interpret the phrase "persons and property" appearing in them as embracing Costa Rican merchants and crews together with their articles of trade, not passengers travelling down the river on sightseeing expeditions or other non-trade related missions. The fact that these treaties are Costa Rica's only "evidence" of Nicaragua's non-denial of her "right" to transport passengers on the San Juan proves only the weakness of her argument. Costa Rica is unable to present a single document, letter, note, or statement by Nicaragua -- pre- or post-dating the 1858 Treaty -- in which Nicaragua acknowledges, accepts or acquiesces in an alleged right of Costa Rica to transport or authorize the transport of passengers. All of Nicaragua's statements on the subject are to the contrary.

3.95. Costa Rica's third argument (namely, that Nicaragua's exclusive granting of concessions for inter-oceanic transit on the San Juan "bears no relation" to Costa Rica's rights under Article VI) is also flawed. The point is that the undisputed evidence shows that Nicaragua has been and is the only party granting authorizations for the transportation of passengers on the San Juan River. No evidence has been submitted by Costa Rica to show that she ever authorized the transportation of passengers (or, indeed, any other service activity that might now be associated with more modern notions of "commerce") on the San Juan at any time between 1858 and the outbreak of the current dispute in recent years. That there is no such evidence further confirms that the scope of Costa Rica's navigation rights is limited to the transport of goods.

B. THE PARTIES DID NOT GIVE THE 1858 TREATY AN EVOLUTIONARY CHARACTER

3.96. Costa Rica argues that, even if the parties in 1858 did not contemplate that “*objetos de comercio*” might include passengers and/or tourists, the Court should give the phrase an evolutionary interpretation of the notion and content of “commerce,” which now (more than a century later) includes not only goods but also services, such as tourism<sup>271</sup>. Nicaragua believes that such an assertion is void of any foundation because it finds no support in the express or implied intention of the parties, either in 1858 or subsequent thereto; nor is it possible to deduce such an understanding from the practice followed by the parties in their application of the Treaty, or to reconcile it with the object and purpose of Article VI of the Treaty, which, as shown, was to afford Costa Rica a trade route for her export and import of goods.

3.97. It bears repeating that the 1858 Treaty is a treaty of territorial limits. Such was the name given by the drafters. Such is its nature. Its contents correspond to that nature. It is not a treaty of decolonization, nor is its subject matter the protection of human rights or the environment. In a treaty concerning territorial sovereignty, the jurisprudence affirms that limitations to the State’s sovereignty, in case of doubt, shall be interpreted narrowly. This principle has already been discussed in Chapter II, at paragraphs 2.22-2.35 and 2.110-2.113.

3.98. Treaties of limits, like the 1858 Treaty, enjoy special stability, for obvious reasons: opening them to an “evolutionary” interpretation undermines the permanence of established boundaries and encourages conflicts that may result

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<sup>271</sup> See e.g., CRM paras. 4.66-4.72; CRR paras. 2.43-2.49.



from unstable borders. Courts and arbitral tribunals have been sensitive to this problem. Thus, it has been decided that a concession awarded in a State's maritime jurisdiction does not generate rights in the continental shelf, after the State has extended her maritime jurisdiction into this area, because it may not be presumed that the sovereign intended her initial concession to have an evolutionary character<sup>272</sup>. The same point is illustrated by the fact that, when a State limits the areas subject to her jurisdiction which may be the subject of dispute resolution, the limitation extends to the subsequently-claimed continental shelf<sup>273</sup>. As more fully discussed in Chapter II, at paragraphs 2.56-2.57, the common thread in these cases is that care must be taken to avoid evolutionary treaty interpretations that result in limiting or diminishing the sovereignty of a State. For all the reasons stated in this chapter, there is no room for doubt that Costa Rica's navigation right under Article VI of the Treaty of Limits is limited to navigation with articles of trade. However, since Costa Rica disputes that interpretation, any doubt that she might have succeeded in raising about the meaning of Article VI must be resolved with due regard for Nicaragua's sovereignty, and in a manner that, to the fullest extent possible, avoids diminishing it.

3.99. The conclusion is as obvious as it is inevitable. Even if Article VI of the 1858 Treaty created for Costa Rica a right of navigation "for purposes of commerce," the commercial purposes would be defined by the concept of commerce in force at the time of conclusion of the Treaty, and therefore, they would be limited to the trade of merchandise, goods, products, and articles, i.e.

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<sup>272</sup> See *Arbitral Award, Petroleum Development Ltd. v. Sheik of Abu Dhabi*, 28 Aug. 1951, *International Legal Materials*, 1951, p. 144.

<sup>273</sup> See *Judgments, Aegean Sea Continental Shelf*, 19 Dec. 1978, *ICJ Reports*, 1978, p. 32; discussed in NCM, paras. 4.3.10 - 4.3.19.

tangible things, excluding a sector, that of services, which was only much later, after the passage of more than a century, understood to come within the definition of “commerce.”

## CHAPTER IV:

### THE REASONABLENESS OF NICARAGUA'S REGULATION OF NAVIGATION ON THE SAN JUAN RIVER

4.1. Costa Rica alleges that Nicaragua has denied and breached her right to navigate on the San Juan River “*con objetos de comercio*.” Nicaragua submits, and the evidence confirms, that she has never denied or breached this right. As will be shown below, Costa Rica has submitted no evidence whatsoever that Nicaragua ever denied, limited or interfered with her navigation on the San Juan River related to the trade in goods. To the contrary, the evidence shows that Nicaragua has always respected this right. Nor has Nicaragua prevented Costa Rica from navigating on the river for purposes of tourism or passenger transport - although, by virtue of her exclusive dominion and supreme control (*sumo imperio*) over the river she has the right to prevent these services from being performed. Rather, in the exercise of her sovereign discretion, Nicaragua has expressly authorized navigation by Costa Rica for these purposes, subject to reasonable regulations specifically crafted to protect Nicaragua's legitimate sovereign interests, especially her interests in navigational safety, environmental protection, law enforcement and border security<sup>274</sup>.

4.2. Costa Rica objects to Nicaragua's exercise of her regulatory powers over navigation on the San Juan River, even though these regulations are applied without discrimination to all vessels, including Nicaraguan vessels. Costa Rica asserts that her “right of free navigation” necessarily implies that she is exempt from regulation by Nicaragua, regardless of Nicaragua's acknowledged status as sovereign over the river, and notwithstanding the reasonableness or even-

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<sup>274</sup> Nicaragua has permitted tourism by Costa Rican vessels as a gesture of good neighbourliness, but expressly reserves her rights to oppose this practice in the future.

handedness of Nicaragua's regulations. This chapter will demonstrate the lack of merit to Costa Rica's assertions, and both the right of Nicaragua to regulate navigation on the San Juan River, and the reasonableness of the regulations Nicaragua has implemented in furtherance of her legitimate sovereign interests.

### **Section I. Costa Rica's Navigation on the River is Subject to Reasonable Regulation by Nicaragua**

4.3. As demonstrated in Chapter III, the object and purpose of according Costa Rica the right of free navigation on the lower San Juan "*con objetos de comercio*" was to give her the Atlantic trade outlet that she considered so essential in the middle of the 19<sup>th</sup> century. As such, and especially given the limited scope of the term "*comercio*" prevailing at the time, it is clear that the makers of the Treaty of 1858 did not intend to convey to Costa Rica the right to navigate the river for purposes other than trade in goods.

4.4. Even if Nicaragua is wrong about this, however, it does not follow that Costa Rica has an unbridled right to navigate the San Juan for all commercial purposes such as transit of passengers or tourists, without having to submit to regulations of any kind. Nicaragua has demonstrated in the *Counter-Memorial* and again in Chapter II of this *Rejoinder*, that the mere presence of the term "free" in Article VI of the Treaty of 1858 cannot bear the heavy load Costa Rica attempts to place on it<sup>275</sup>. In particular, given the Treaty's express recognition of Nicaragua's "exclusive dominion and supreme control (*sumo imperio*)" over the river, she must retain the power to impose reasonable regulations that are necessary to protect her legitimate sovereign interests in the San Juan.

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<sup>275</sup> See NCM, paras. 4.1.4 - 4.1.48.

4.5. Not only is there nothing inconsistent between this sensible conclusion and the use of the term “free” in Article VI, it actually follows inevitably from the fact that this *same article* leaves to Nicaragua -- and Nicaragua alone -- the “exclusive dominion and supreme control (*sumo imperio*)” over the waters of the San Juan. If Costa Rica were correct that Nicaragua is barred from exerting any regulatory control of any kind over Costa Rican commercial traffic, the effect would be to create a lawless zone in which Costa Rican commercial vessels could operate with impunity. Taken to its logical conclusion, for example, Costa Rica’s argument would dictate that Nicaraguan authorities would have no choice but to stand idly by even as a Costa Rican commercial ship polluted the river and wantonly flouted Nicaraguan environmental laws designed to protect the exquisite natural beauty and endangered aquatic species of the San Juan (about which more will be said below). Such a patently absurd result cannot stand.

4.6. The law, fortunately, is otherwise. As demonstrated in Chapter II, Section I, at paragraphs 2.58-2.81, a right of free navigation on the river or lakes of another State does not deprive the sovereign of its inherent authority to regulate that navigation in conformity with its own legitimate interests, provided such regulation is reasonable, fair, and non-discriminatory. As shown below, Nicaragua’s regulation of navigation on the San Juan River meets that test.

## **Section II. The Evidence Regarding Costa Rica’s Exercise of her Right of Navigation “*Con Objetos de Comercio*,” and Nicaragua’s Non-Interference with that Right**

4.7. Costa Rica’s written pleadings -- both her *Memorial* and her *Reply* -- are remarkable for how little they say about her actual navigation on the river “*con objetos de comercio*” between 1858 and the early 1990s. This can hardly be an oversight. To the contrary, it is reflective of the evidence that: for the first 130

years after the Treaty of Limits was executed there was very little Costa Rican commercial navigation on the river; it was all local in nature; and it consisted entirely of trade in goods between Costa Rican riparian hamlets and the interior of the country, and to a lesser extent between those hamlets and the Nicaraguan town of San Juan del Norte, located at the mouth of the San Juan River.

4.8. As explained above, at paragraphs 3.21-3.31, for at least 20 years prior to the 1858 Treaty, Costa Rica sought access to the San Juan as a trade route for the coffee and other products she was exporting to Europe in the mid-nineteenth century. She coveted the San Juan route as a faster, lower-cost alternative to the shipment of her products from her Pacific Coast ports around Cape Horn and then across the Atlantic -- a route that was both prohibitively time-consuming and extraordinarily expensive. Costa Rica continually sought to secure as a matter of highest national priority a trade route that consisted of land transport from the central coffee-growing region to the Sarapiquí River, from there by boat to the San Juan River, down the San Juan to the Nicaraguan coastal port at San Juan del Norte, and from there across the Atlantic.

4.9. Navigation on the San Juan required Nicaragua's acquiescence, of course, and this Costa Rica repeatedly failed to obtain, until the 1858 Treaty was negotiated. Article VI of the Treaty responded directly to Costa Rica's need for the San Juan to serve as an outlet for her trade along the so-called "Sarapiquí route" (depicted in Sketch Map 1, following paragraph 3.31). Article VI did so by providing expressly for a "right of free navigation ... *con objetos de comercio* either with Nicaragua or with the interior of Costa Rica, through the San Carlos river, the Sarapiquí, or any other proceeding from the portion of the bank of the San Juan river, which is hereby declared to belong to Costa Rica."

4.10. Costa Rica's commercial navigation rights on the San Juan lost their importance shortly after the Treaty was executed. The reasons are set forth above, at paragraphs 3.53-3.58, especially the construction of the first trans-isthmian railroad in Panama, the construction of Costa Rica's own railroad to her Atlantic Coast and the development of a major port there, and the diversion of the flow of the San Juan River upstream from San Juan del Norte to the Colorado River, closing off access to both the port and the sea to all but the smallest vessels. The result was: after 1860, when she closed her customs post on the Sarapiquí, Costa Rica abandoned any attempt to make significant commercial use of the river.

4.11. There is nothing in Costa Rica's written pleadings that contradicts any of these historical facts. In particular, Costa Rica presents no evidence that, after the 1858 Treaty was executed, she ever used the San Juan River to carry on any international trade, other than a small amount of trade with Nicaragua. There is no evidence of trade between Costa Rica and any country other than Nicaragua, let alone any country across the Atlantic, using the San Juan River. Indeed, Costa Rica has not described a single voyage on the San Juan destined for European or other Atlantic ports, has provided no data on exports (or imports) via the San Juan, and has presented no customs data reflecting commercial transit on the San Juan. Instead, what the evidence shows is that Costa Rica closed down her customs posts on the Sarapiquí River and along the San Juan long ago. Undisputed testimony establishes that Costa Rica has not maintained any customs posts anywhere along the San Juan, the Sarapiquí or San Carlos Rivers for at least the past 40 years.<sup>276</sup> These facts explain why Costa Rica has never employed vessels of her revenue service to protect any of her commercial navigation on the

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<sup>276</sup> See Affidavit of William Aburto Espinoza, 8 March 2008 (hereinafter "Aburto Affidavit"), para. 3. NR, Vol. II, Annex 65; *see also* Affidavit of Rigoberto Acevedo Ledezma, 7 March 2008 (hereinafter "Acevedo Affidavit"), para. 3. NR, Vol. II, Annex 66.

San Juan, as discussed more fully below in Chapter V. Simply put, since the anticipated commercial navigation on the river never materialized, and what little took place was not even sufficient to require the existence of customs posts, it was hardly of such character or volume as to necessitate protection by revenue service vessels.

4.12. Although Costa Rica has not used the San Juan as she initially envisioned -- to carry her coffee and other products to European markets -- her vessels have, in fact, navigated the river continually over the past 150 years “*con objetos de comercio*.” The evidence shows that this form of navigation -- which was the only commercial navigation by Costa Rican vessels between 1858 and the 1990s - - consisted almost exclusively of local traffic, carrying foods and household goods between the interior of Costa Rica and her riparian communities on the right bank of the San Juan, and between those communities and San Juan del Norte. Costa Rica does not dispute this by presenting any evidence to the contrary. Eyewitness testimony confirms the nature of her navigation on the San Juan “*con objetos de comercio*” between the 1960s and the present. According to Edén Atanasio Pastora, who lived and worked in Costa Rica along the San Juan from the mid-1960s to the late 1970s:

“During this period there was very little commercial traffic along the San Juan River. There was almost no trade between San Juan del Norte, which was the only Nicaraguan town along the entire length of the river, with the Costa Rican side....In the 1960s and 1970s there was some trade in goods between Puerto Viejo de Sarapiquí and Barra del Colorado [both in Costa Rica], which necessarily included transport along a portion of the San Juan River, but this was small and infrequent, and consisted only of some basic foods and other supplies. There were no customs posts anywhere along the river, and no international trade at all....The principal and most frequent use of the river by Costa Ricans during this entire period,



from the 1960s to the 1980s, was by the local population that lived in the small settlements in Costa Rica's territory. They navigated the river in their small boats as part of their daily lives."<sup>277</sup>

4.13. The testimony of William Aburto Espinoza, a commercial boatman on the river in the 1960s and 1970s, is to the same effect:

"During the 1960s, I worked on the river transporting fuel and sometimes commercial goods between communities located on the river. My river shipment business ended in the 1970s due to the onset of the war in Nicaragua. While I was working on the river, there were a few Costa Ricans and Nicaraguans who navigated the river like myself to transport goods from one community to another. None of these boatmen used the river for shipments outside the local river communities. The materials being transported on the river in the 1960s were mostly fuel, bananas, coconut oil, and wood, all from the same areas....During this time, there was very little activity on the river. I would roughly estimate that there were 150 families living along the entire bank of the San Juan River, including a small community with a school located at Sarapiquí....During the twelve hour trip between San Juan del Norte and El Castillo, I would normally see one or two boats on the river. Most of the boats I saw were small boats belonging to the local neighbors, who lived in Costa Rican territory, navigating short distances in their private boats for personal reasons."<sup>278</sup>

4.14. The low volume of local commercial and personal traffic on the San Juan during the 1960s and 1970s, according to the witnesses, came to a virtual halt between 1977 and 1990 as a result, first, of the Nicaraguan Revolution (in the late

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<sup>277</sup> Affidavit of Edén Atanasio Pastora, 10 March 2008 (hereinafter "Pastora Affidavit"), para. 6. NR, Vol. II, Annex 75.

<sup>278</sup> Affidavit of William Aburto Espinoza, 8 March 2008 (hereinafter "Aburto Affidavit"), paras. 2, 4. NR, Vol. II, Annex 65.

1970s) and second, the Counter-Revolution (during the 1980s), when the San Juan was at the heart of a combat zone. According to Mr. Pastora, who was a military leader of the Nicaraguan Revolution that overthrew the dictatorship of General Anastasio Somoza Debayle in the 1970s, and then, after 1982, a military leader of the counter-revolutionary forces opposed to the new Nicaraguan government, navigation on the San Juan:

“...was reduced to a minimum during the height of the war years, 1977 to 1979 and 1982 to 1986, because of the extreme risk of going out on a river that was the center of a war zone, where every boat was a potential target of either the ARDE [counter-revolutionary] forces or the Sandinistas if it was suspected of belonging to or assisting the other side.”<sup>279</sup>

4.15. According to Nicaraguan Army Colonel Bosco Centeno Aróstegui, who served as Commander to the revolutionary government’s armed forces along the San Juan between July and December 1979, and again from 1982 to 1991:

“For some time, after the triumph of the revolutionary forces and my arrival as Commander in July 1979, the region remained insecure. During that period, there was some commercial navigation on the river, but not very much. There was no international trade, only local trade between settlements on the river...There were no customs posts on the Costa Rican side of the river....The local traders who transported these goods, both Nicaraguans and Costa Ricans, operated their small boats freely along the river. There were no tourist excursions at the time....By 1982, when I returned to the region as Commander of the Southern Military Detachment, it had become a war zone again. Counter-revolutionary forces (“*contras*”) had organized in Northern Costa Rica, along the right bank of the San Juan River, and they made frequent attacks and forays across it. The river was unsafe for navigation for the

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<sup>279</sup> Pastora Affidavit, para. 6. NR, Vol. II, Annex 75.

rest of the 1980's, until the fighting ended in 1990 and the counter-revolutionary forces were fully demobilized in 1991. The *contras* fired at all our vessels that navigated the river and tried to sink them, and we did the same to all vessels that we believed were theirs or were bringing them supplies.”<sup>280</sup>

4.16. Accordingly:

“If there were any local trade, it would have been very minimal, given the great danger to which the boatmen were exposed if they were mistaken for an enemy by the contending military forces. There was definitely no trade with San Juan del Norte, which was isolated and incapable of obtaining supplies. As a result, the entire population abandoned the town...”<sup>281</sup>

Costa Rican boatmen, whose witness statements have been supplied by Costa Rica and annexed to the *Reply*, agree that the combat brought on by the Nicaraguan Revolution and Counter-Revolution made navigation on the San Juan extremely dangerous, and reduced commercial and personal use of the river to a bare minimum<sup>282</sup>.

4.17. Costa Rican commercial navigation on the river returned to normal, such as it was, after peace was restored to Nicaragua and the San Juan River in the early 1990s. Normal meant, as it was before the two wars, that is, strictly local trade between Costa Rican riparian communities, and between those communities and the interior of Costa Rica. There was still no international trade carried out on the river -- not even trade between Costa Rica and Nicaragua. According to

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<sup>280</sup> Affidavit of Lieutenant Colonel Juan Bosco Centeno Arostegui, 9 March 2008 (hereinafter “Centeno Affidavit”), para. 4. NR, Vol. II, Annex 69.

<sup>281</sup> *Ibid.*

<sup>282</sup> See Affidavit of Marvin Hay González, 28 January 2006. CRM, Annexes, Vol. IV, Annex 91; see also Affidavits of Armando Perla Pérez, 28 January 2006: CRM, Annexes, Vol. IV, Annex 92; Windel Hodgson Hodgson, 28 January 2006. CRM, Annexes, Vol. IV, Annex 93; José Granados Montoya, 29 January 2006. CRM, Annexes, Vol. IV, Annex 94; Wilton Hodgson Hodgson, 1 February 2006. CRM, Annexes, Vol. IV, Annex 96.

Brigadier General Denis Membreño Rivas, military commander of the San Juan zone between February 1992 and December 1995:

“The town of San Juan del Norte, at the mouth of the San Juan River, had been abandoned by its population during the 1980’s, and remained unpopulated during my entire tenure. There were no other Nicaraguan settlements on the left bank opposite Costa Rica because the entire area is part of the Indio Maíz Biological Reserve, where human settlement is prohibited in order to preserve that natural environment and the rich biological diversity that exists there...

[Thus,] the only trade that was carried out on that part of the river was on the portion between the Sarapiquí River and the Colorado River, which was used infrequently by Costa Rican boatmen in small boats transporting supplies from Puerto Viejo de Sarapiquí in Costa Rica, down the Sarapiquí River to the San Juan, and then east along the San Juan River as far as the Colorado River (a distance of approximately 24 km.), where they reentered and navigated Costa Rican waters until their destination at Barra del Colorado on Costa Rica’s Atlantic Coast. These were mainly engaged in the delivery of supplies to the small hotels that were springing up in the area to service Costa Rica’s then-nascent tourism industry in the region...The right of Costa Rican vessels to transport goods along this portion of the San Juan River was fully respected.”<sup>283</sup>

4.18. By 1996, San Juan del Norte on the Nicaraguan coast had become repopulated, but only with a fraction of its former population, and some trade between that town and Costa Rican riparian communities has taken place. Otherwise, Costa Rican commercial traffic on the river remained limited to the exchange of goods between Costa Rican hamlets, and between them and Puerto Viejo de Sarapiquí.

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<sup>283</sup> Affidavit of Brigadier General Denis Membreño Rivas, 10 March 2008 (hereinafter “Membreño Affidavit”), paras. 3-4. NR, Vol. II, Annex 73.

4.19. The evidence on this point is undisputed: According to Nicaragua's regional military commander from January 1996 to October 1997, Brigadier General Cesar Ovidio Largaespada Pallavicini:

"There was very little trade traffic on the river. The new residents of San Juan del Norte engaged in some minor commerce with Barra del Colorado, using the river, and there were occasional deliveries of basic supplies from Puerto Viejo de Sarapiquí to Barra del Colorado. But this kind of commercial traffic, carried on by small boats, was very infrequent. There was no truly international trade of any kind. There were no customs posts. There was a small number of boatmen, Nicaraguan and Costa Rica, engaged in this commercial navigation."<sup>284</sup>

4.20. This situation continued during the period from October 1997 to June 2000, when the senior Nicaraguan military officer for the San Juan region was Brigadier General Francisco Orlando Talavera Siles:

"There is a very insignificant amount of river traffic dedicated to trade in goods between communities near the river....I recall that there was some small amount of trade between San Juan del Norte and Barra del Colorado, mainly in the transport and sale of shellfish. There was also a small amount of local trade between Puerto Viejo de Sarapiquí and a few of the communities on Costa Rican territory. This trade, or what there was of it, proceeded without interference."<sup>285</sup>

There is nothing in Costa Rica's evidence that contradicts this testimony.

4.21. Commercial navigation on the San Juan River, as described above, has remained the same, in terms of its local nature and low volume, to the present

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<sup>284</sup> Affidavit of Brigadier General Cesar Ovidio Largaespada Pallavicini, 9 March 2008 (hereinafter "Largaespada Affidavit"), para. 7. NR, Vol. II, Annex 72.

<sup>285</sup> Affidavit of Francisco Orlando Talavera Siles, 19 May 2008 (hereinafter "Talavera Affidavit"), para. 7. NR, Vol. II, Annex 78.

day. As testified by local boatman Rigoberto Acevedo Ledezma, who has been transporting goods in his own vessel between Puerto Viejo de Sarapiquí and San Juan del Norte for the past 10 years:

“My business involves transporting basic food supplies from Puerto Viejo to several small shops and restaurants located in San Juan...On the return, I rarely transport goods on the same route, as there is little commerce out of San Juan del Norte, except for an occasional delivery of coconuts to Puerto Viejo...During my trips, I have not seen many boats that transport merchandise. In the stretch between Puerto Viejo and San Juan...only I am dedicated to transporting goods. Until one year ago, there were two more Costa Rican boatmen who travelled this same route. Another two Nicaraguans cover the area between San Juan...and El Castillo, transporting products of basic necessity. Also, for the last ten years three boatmen have been navigating, two of whom are Costa Rican and one who is Nicaraguan, using the San Juan River to transport shellfish from San Juan...to Puerto Lindo, Costa Rica.”<sup>286</sup>

4.22. Mr. Acevedo concludes, “I am not aware of any occasions when any of the Costa Rican boatmen who navigate the river taking goods either to Nicaragua or Costa Rica have been prevented from completing their trip by Nicaraguan authorities posted along their routes”<sup>287</sup>. Nor, apparently, is Costa Rica aware of any occasions when her commercial boatmen have been prevented by Nicaraguan authorities from completing their deliveries. Neither the *Memorial* nor the *Reply* identifies a single example.

4.23. Nicaragua affirms that she has never prevented a Costa Rican vessel, navigating the San Juan River “*con objetos de comercio*” from entering the river, or from completing its voyage on the river. There is nothing to the contrary in Costa Rica’s written pleadings, including the annexes. Nicaragua has never

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<sup>286</sup> Acevedo Affidavit, *op cit.*, paras. 1-2. NR, Vol. II, Annex 66.

<sup>287</sup> *Ibid.*, para. 4.

prevented a Costa Rican vessel from entering the river or navigating on it for purposes of international trade, which was the navigation right secured by Costa Rica 150 years ago in Article VI of the Treaty of Limits. Nor has Nicaragua ever prevented a Costa Rican vessel from entering or navigating on the river for purposes of local trade, either within Costa Rica, or between Costa Rica and Nicaragua. Again, Costa Rica presents no evidence to the contrary. It is true that the *Reply* includes a section that bears the subheading: “Breaches of Costa Rica’s Right of Navigation ‘for purposes of commerce’”, at paragraphs 4.25 to 4.49. But the text of that section only underscores Nicaragua’s point: that Costa Rica has no evidence of any interference by Nicaragua with her right to navigate “*con objetos de comercio*.” The incidents described by Costa Rica plainly do not involve navigation “*con objetos de comercio*,” regardless of whether Nicaragua’s translation (“with articles of trade”) or Costa Rica’s (“for purposes of commerce”) is accepted. Rather, they all involve navigation by Costa Rican *public* vessels for *non-commercial* purposes, in particular law enforcement and the delivery of social services to riparian communities by Costa Rican governmental agencies. None of these governmental activities constitutes navigation “*con objetos de comercio*,” and none is the subject of the navigation right afforded to Costa Rica under the 1858 Treaty, as will be further discussed in Chapter V of this *Rejoinder*.

4.24. What this case is about, therefore, is not Nicaragua’s denial of Costa Rica’s commercial navigation rights under the 1858 Treaty, or her prevention or interference with the exercise of those rights, but Nicaragua’s efforts to regulate navigation on the river, both by Nicaraguan and Costa Rican vessels, to which the regulations are equally and non-discriminatorily applicable. There is no dispute about the content of these regulations. Both Nicaragua and Costa Rica agree

about what they are and what they provide. What is disputed is Nicaragua's right to enforce them.

4.25. The parties agree that Nicaragua requires all vessels -- including Nicaraguan vessels -- navigating on the San Juan River to: (i) report to the nearest Nicaraguan military post upon entering the river and register the names of passengers and crew members; (ii) undergo a safety inspection and obtain a departure clearance certificate showing that the vessel is seaworthy; (iii) report to other Nicaraguan military posts passed during the voyage, including the last such post before exiting the river; (iv) navigate only during daylight hours, except in cases of emergency; and (v) depending on the size and configuration of the vessel, hoist a Nicaraguan flag as a gesture of respect for Nicaragua's sovereignty over the territory<sup>288</sup>.

4.26. It has already been demonstrated in Chapter II, Section I, that Nicaragua, which has "exclusive dominion and supreme control (*sumo imperio*)" over the San Juan, is empowered to regulate Costa Rica's navigation on the river, provided such regulation is reasonable, non-discriminatory, and in furtherance of legitimate sovereign interests. In the section that follows, it will be further demonstrated that the regulations described above fully satisfy this standard, and in particular that they are necessary measures to further Nicaragua's legitimate interests in environmental protection, crime prevention, navigational safety, and border security. Thus, to the extent that Costa Rica has exercised her right to navigate on

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<sup>288</sup> See CRM, paras. 1.06, 3.39 and CRR, paras. 3.99, 4.05-4.06; see also Membreño Affidavit, para. 4. NR, Vol. II, Annex 73; Largaespada Affidavit, para. 7. NR, Vol. II, Annex 72; Talavera Affidavit, para. 6. NR, Vol. II, Annex 78; Affidavit of Colonel Ricardo Sánchez Méndez, 9 March 2008 (hereinafter "Sánchez Affidavit"), para. 7. NR, Vol. II, Annex 77; Army of Nicaragua, "Action Plan for Issuance of Departure Clearance Certificates in the San Juan River" (hereinafter "Action Plan"), 5 July 2001, Art. 6. NR, Vol. II, Annex 48.



the river “*con objetos de comercio*,” Nicaragua has fully respected that right, has never denied it or prevented its exercise, and has done no more than apply in an even-handed manner such regulations as are reasonable and necessary for the furtherance of her legitimate sovereign interests.

4.27. Costa Rica claims that, under her definition of navigation “*con objetos de comercio*,” she has a right to navigate on the San Juan not only for the commercial transport of goods, but also for the purpose of performing commercial services, including tourist excursions. There is no need to repeat here the legal arguments and evidence already presented in the *Counter-Memorial* and in Chapter III of this *Rejoinder*, which demonstrate that the Treaty of Limits confers no right upon Costa Rica to perform tourist, passenger transport or other services unrelated to the commercial transport of goods. But it is worth pointing out that, in practice, Costa Rica never claimed a right to conduct tourist excursions on the San Juan River until the early 1990s, more than 130 years after the 1858 Treaty was executed. To be sure, the *Memorial* and the *Reply* refer to four isolated instances in 1982 (which still was more than 120 years after execution of the Treaty), but there are no other tourist excursions mentioned by Costa Rica before the early 1990s. It will be recalled that between 1982 and 1990 the San Juan River was in the midst of a war zone, and no traffic on the river was safe. Because the counter-revolutionary forces were based on the Costa Rican bank of the river, and innocent commercial traffic had all but disappeared, the Nicaraguan Army stopped and searched all unfamiliar vessels as a security measure. This included the four incidents in 1982 involving privately-operated tourist boats mentioned in Costa Rica’s pleadings. As acknowledged by Colonel

Centeno, the Nicaraguan Army's regional commander at the time: "We encountered a few tourism excursions in 1982, but not thereafter."<sup>289</sup>

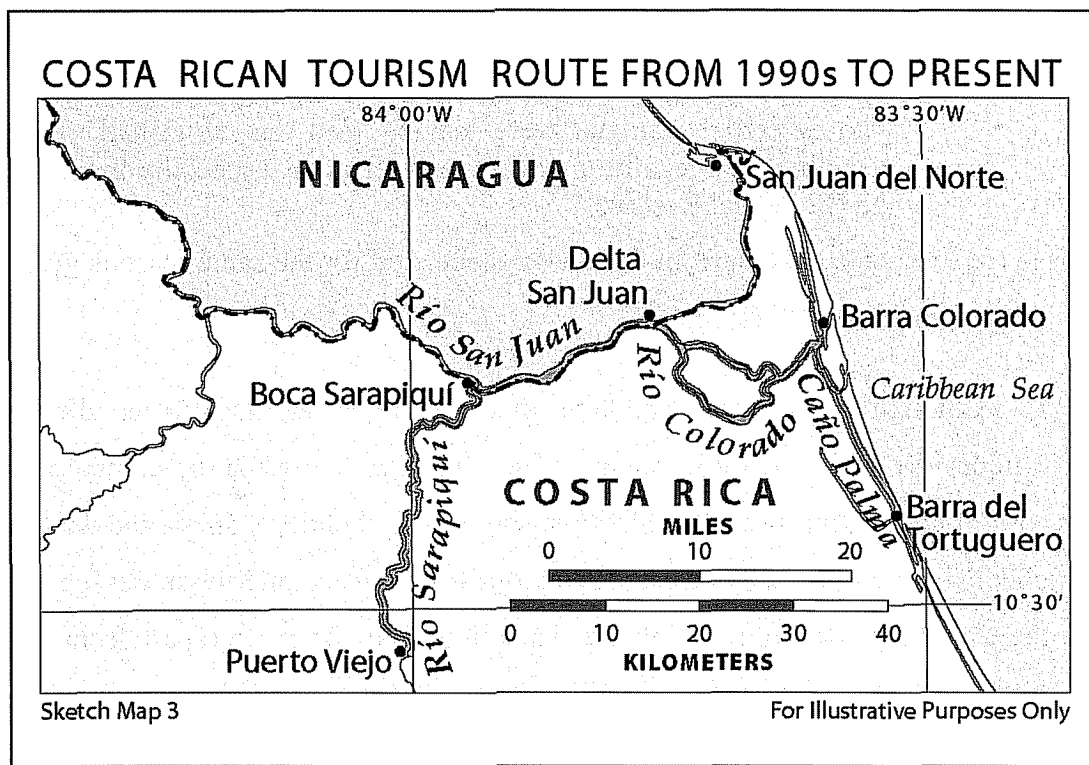
4.28. Costa Rica provides no evidence on when, after peace was restored in Nicaragua in the early 1990s, her tourist boats began operating on the San Juan, or how frequently they ran, or how many tourists they carried. It therefore falls to Nicaragua to supply this information, in the interest of historical accuracy. While Nicaragua cannot pinpoint the exact date that Costa Rican vessels began carrying tourists to and along the San Juan, the evidence shows that these activities commenced in earnest at some time between February 1992 and December 1995, when Nicaragua's regional military commander was Brigadier General Denis Membreño Rivas:

"During my tenure as Chief of the Military Detachment, there was a significant increase in the frequency of navigation of the lower part of the San Juan River by vessels carrying tourists. Some of the vessels were owned and operated by Nicaraguans, but the vast majority of them were Costa Rican. The principal route was from Puerto Viejo de Sarapiquí in Costa Rica down the Sarapiquí River to the San Juan River, then east along the San Juan River to the location known as Delta, where the Colorado River begins, and then down the Colorado (in Costa Rican waters) to Barra del Colorado or Tortuguero on the Costa Rican coast....Near the beginning of my tenure, no more than 10 tourists per month were transported along this route, one way or the other. However, by the time I left the Detachment at the end of 1995, the number increased to between approximately 200 and 700 tourists per month, depending on the season."<sup>290</sup>

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<sup>289</sup> Centeno Affidavit, para. 4. NR, Vol. II, Annex 69.

<sup>290</sup> Membreño Affidavit, para. 6. NR, Vol. II, Annex 73.



4.29. This large increase in traffic along the river raised several concerns for Nicaragua. As explained by Brigadier General Membreño:

“First, as a sovereign State, Nicaragua needed to assure the safety and security of all transportation in its waters, including transportation by foreign vessels carrying foreign citizens. Second, Nicaragua had a need to assure that the fragile ecology of the Indio Maíz Biological Reserve and the San Juan River were protected. To accomplish these objectives, Nicaragua not only required all tourist boats (including those owned and operated by Nicaraguans) to register at the closest military post to their point of entry of the river, and to undergo a safety inspection and obtain a departure clearance certificate; it also required all passengers and crews to carry valid passports, and all passengers to purchase tourist cards for US\$ 5 per passenger and to pass through Nicaraguan immigration on entering and exiting Nicaragua. These were the same requirements applied to all foreign citizens upon entering

Nicaragua at any of its border posts....Nicaragua required that all vessels report to the nearest military post when they left the San Juan River, as well as when they entered it. This was to assure that the full complement of passengers who entered Nicaragua were leaving, and that none had disembarked illegally in Nicaraguan territory, especially in the Biological Reserve.”<sup>291</sup>

These requirements have been in force ever since, and for the same reasons given by Brigadier General Membreño<sup>292</sup>.

4.30. Although Costa Rica complains that Nicaragua has denied her alleged right under the 1858 Treaty to navigate the San Juan River for the commercial purpose of conducting tourist excursions, she fails to identify a single incident in which Nicaragua prevented a Costa Rican tourist boat from entering or navigating on the San Juan, or from completing its journey on the river (apart from the wartime security measures carried out in 1982). There is no evidence, other than from 1982, that Nicaragua ever detained a Costa Rican tourist vessel, denied its entry on the San Juan, or prevented it from navigating on the river. And Nicaragua affirms that, although she has a right to prevent Costa Rican vessels from engaging in tourist excursions on the river -- since Costa Rica has no right to navigate on the river for such purposes -- she has never done so.

4.31. Consequently, and once again, this case is not about Nicaragua’s denial of Costa Rica’s alleged navigation rights under the 1858 Treaty; it is a case concerning Nicaragua’s efforts to regulate navigation (Nicaraguan as well as Costa Rican) in a reasonable manner and in furtherance of legitimate sovereign interests. The regulations that Nicaragua imposed on Costa Rican (and

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<sup>291</sup> *Ibid.*, para. 7.

<sup>292</sup> See Largaespada Affidavit, paras. 9-10. NR, Vol. II, Annex 72; *see also* Talavera Affidavit, para 6. NR, Vol. II, Annex 78; Sánchez Affidavit, para. 7. NR, Vol. II, Annex 77.

Nicaraguan) tourist vessels are identified above, in paragraph 4.25. More will be said about these regulations and the justifications for them in the following section of this chapter.

4.32. Before proceeding to that discussion, however, two points bear mention. *First*, as indicated above, the regulations about which Costa Rica now complains have been in effect since at least the time of Brigadier General Membreño's tenure as Nicaragua's regional military commander, that is, since some time prior to December 1995. This date is significant in light of Costa Rica's repeated assertions that Nicaragua did not begin to violate her rights under the 1858 Treaty in a systematic manner until 1998 (and more particularly, until July 1998)<sup>293</sup>. Costa Rica does not explain how the same Nicaraguan regulations that were continuously in effect since prior to December 1995 *did not* constitute violations of her Treaty rights before July 1998, but somehow *became* Treaty violations thereafter. Costa Rica's silence on this point exposes a fundamental flaw in her case: she offers no serious argument against the lawfulness and reasonableness of the measures Nicaragua has taken to regulate, in a non-discriminatory manner, navigation on the San Juan River.

4.33. *Second*, although Costa Rica alleges that, as a result of Nicaragua's regulatory practices there has been a sharp drop in Costa Rican tourism along the San Juan, and grave economic harm to her tourism industry, she offers no data to support these allegations. Nowhere does Costa Rica provide any evidence on the number or frequency of tourism excursions, or the number of tourists -- either before, during or after Nicaragua's regulations went into effect. On this ground alone, the claim that Nicaragua's regulations have unreasonably imposed a

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<sup>293</sup> See, *inter alia*, CRM, paras. 3.02, 3.21-3.29, 4.104-4.106; see also, CRR, paras. 3.23, 3.87, 3.91, 3.100, 3.141, 4.01, 4.50.

burdensome limitation on Costa Rica's exercise of her navigation rights must be rejected. But there is more. The table below was compiled from registration forms maintained at Nicaragua's Sarapiquí border post, which is the principal point of entry for Costa Rican tourist vessels traversing the San Juan from west to east, and the principal point of exit for these vessels travelling in the opposite direction. As such, it is the Nicaraguan border post where virtually all Costa Rican tourist vessels report, and register how many tourists they are carrying, as well as their names and countries of origin. The table shows that Costa Rican tourism along the San Juan River actually *increased* after 1998, when Nicaragua supposedly began violating Costa Rica's Treaty rights in a systematic way, and that it remained at healthy, elevated levels through the end of 2004, the last full year before the present conflict erupted and these proceedings were commenced (excluding 2001, for which no records were available). These figures demonstrate that there is no merit to Costa Rica's unsupported allegation that Nicaragua's regulations have caused a reduction in her tourism activities on the San Juan, much less a harm to her tourism industry.

<b>Table 1. Sarapiquí Border Post Tourism Registry (1997-2004)<sup>294</sup></b>								
	1997	1998	1999	2000	2001	2002	2003	2004
USA	230	230	121	576		868	1177	976
GERMANY	176	111	49	110		182	139	125
FRANCE	5	12	7	41		105	214	231
COSTA RICA	39	112	162	270		414	336	144
SPAIN	14	99	2	275		133	168	103
CANADA	21	24	14	148		101	133	121
ITALY	6	5	3	33		49	144	118
ENGLAND	19	58	24	99		184	357	418
ALL OTHERS	93	60	80	291		369	612	354
<b>Registered TOTAL</b>	<b>603</b>	<b>711</b>	<b>462</b>	<b>1,843</b>	<b>N/A</b>	<b>2,405</b>	<b>3,280</b>	<b>2,590</b>

<sup>294</sup> See Affidavit of Martín Antonio Jarquín López, 4 June 2008, para. 5. NR, Vol. II, Annex 71.

### Section III. The Reasonableness of Nicaragua's Regulations and the Important Interests That They Serve

4.34. The regulations which Costa Rica now claims violate her right to navigate the San Juan freely are all necessary to protect Nicaragua's legitimate sovereign interests. Costa Rica complains about six categories of regulations: (1) the requirement to stop at Nicaraguan posts to register; (2) the requirement to obtain a departure clearance certificate; (3) the prohibition on navigation at night; (4) the prohibition on certain fishing activities; (5) the requirement to undergo immigration processing; and (6) the requirement to fly the Nicaraguan flag. In the following sections of this chapter, Nicaragua will show that each of these requirements is tailored to protect one or more (indeed, in most cases, more) of Nicaragua's sovereign interests in (a) environmental protection, (b) control and prevention of crime, (c) navigational safety, and (d) border protection. It cannot be denied that these are all legitimate and important national interests. Nor can it be shown that any of Nicaragua's regulations imposes an impediment to Costa Rican navigation. At worst, they constitute *de minimis* inconveniences whose reasonableness and necessity more than balance out these minor intrusions.

#### A. ENVIRONMENTAL PROTECTION

4.35. Nicaragua has an impressive wealth of biodiversity consisting of hundreds of species of flora and fauna which thrive in ecosystems throughout the country. The area including and surrounding the San Juan River is especially rich, and Nicaragua has invested considerable efforts in crafting and enforcing the laws and regulations necessary to protect and conserve these delicate ecological areas.

### *1. Protected Areas*

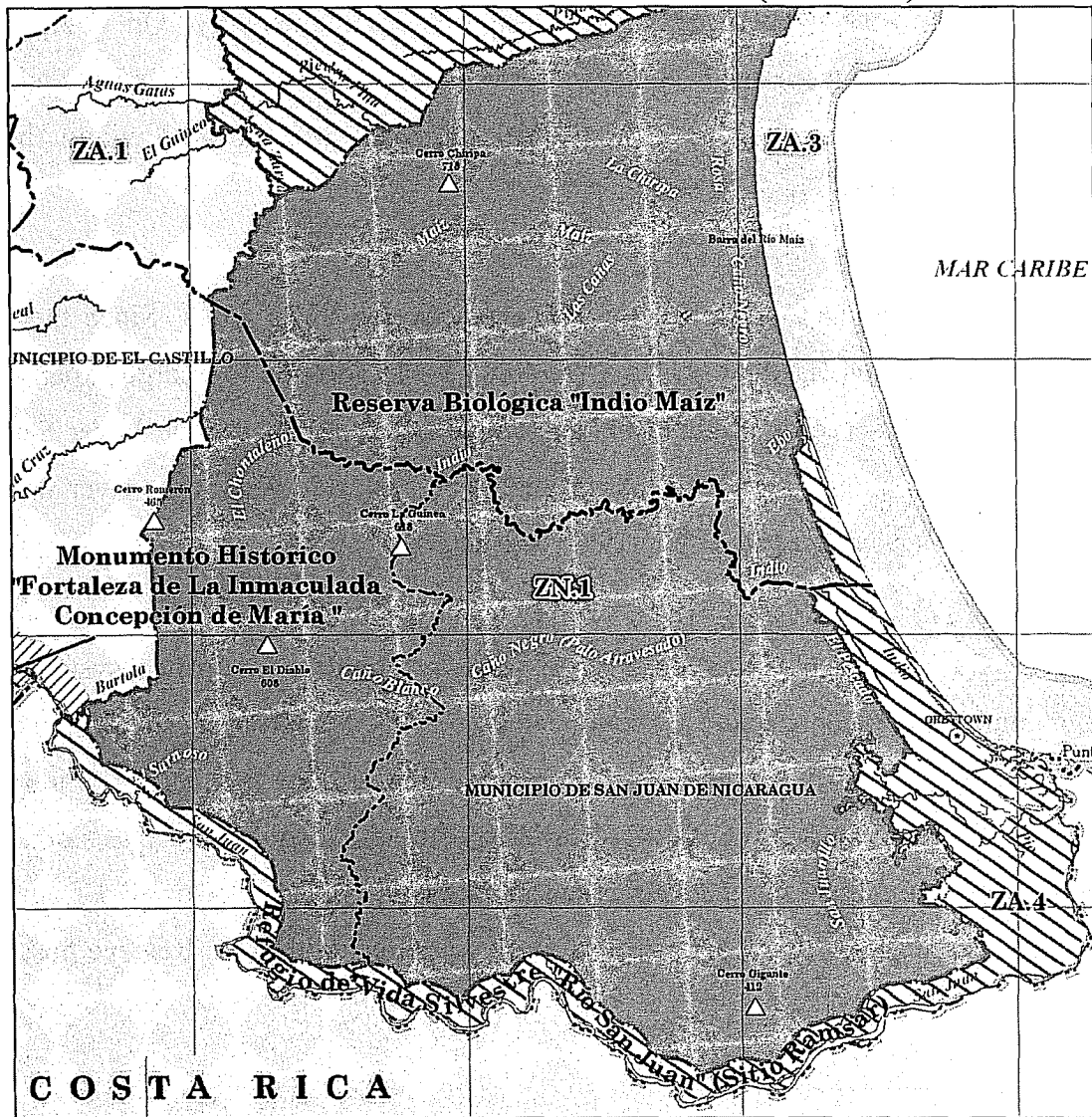
4.36. There are three Nicaraguan nature preserves on or near the San Juan River: (i) the Indio Maíz Biological Reserve, bordering the Nicaraguan side of the river; (ii) the San Juan River Wildlife Refuge, consisting of the river itself and a two-kilometre strip abutting the Nicaraguan bank<sup>295</sup>; and (iii) the San Juan River - Nicaragua Biosphere Reserve, which is affiliated with UNESCO's Man and Biosphere project and encompasses the other reserves.

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<sup>295</sup> See Nicaragua, Decree 66-99, Art. 3.5. NCM, Vol. II, Annex 61.



THE INDIO MAÍZ BIOLOGICAL RESERVE (DARK GREEN) AND THE  
SAN JUAN RIVER WILDLIFE REFUGE (YELLOW)



Sketch Map 4

For illustrative purposes only

(a) *The Indio Maíz Biological Reserve and San Juan River wildlife refuge*

4.37. Southeastern Nicaragua is particularly rich environmentally. On 17 April 1990, the Government of Nicaragua created the San Juan River Indio Maíz Biological Reserve, along with three other protected areas located within the greater southeast region of Nicaragua<sup>296</sup>.

4.38. The original footprint of this Reserve covered 435.5 km<sup>2</sup>. Since then, Nicaragua has increased its size to 3,157 km<sup>2</sup><sup>297</sup>. In addition to a large expanse of land, the Reserve as originally created also included most of the lower San Juan River extending to the Caribbean Sea. The protected part of the river was designated as a separate reserve in 1999, as discussed below.

4.39. The Indio Maíz Reserve is comprised of a complex variety of ecosystems, including humid tropical forests, continental wetlands, mangroves, estuaries, and salt marshes<sup>298</sup>. These ecosystems support a remarkable number of animal species, including hundreds of different bird species and mammals such as sloths, wild boars, pumas, pacas, manatees, and monkeys, as well as poison dart frogs, snakes, crocodiles, turtles, and iguanas<sup>299</sup>. It is estimated that the Reserve hosts

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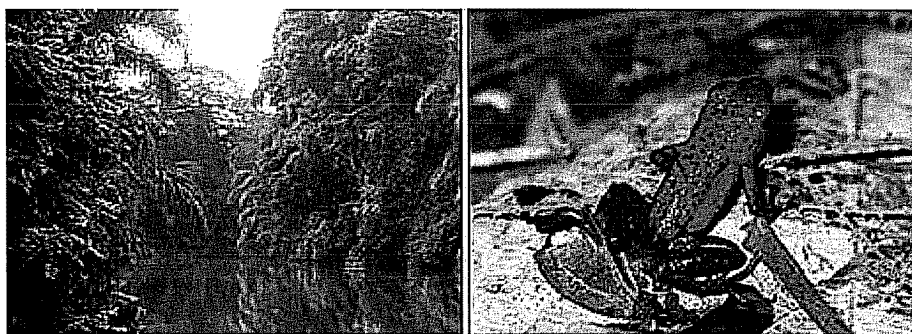
<sup>296</sup> See Nicaragua, Executive Decree 527. NCM, Vol. II, Annex 58. The same decree which designated the reserves also established a National Commission to manage and develop the protected areas of the Southeast of Nicaragua.

<sup>297</sup> See MARENA, *Southeastern Nicaragua Biosphere Reserve: Strategic Program 2008* (hereinafter “Strategic Program 2008”). NR, Vol. II, Annex 47.

<sup>298</sup> See *ibid.*; see also Meyrat, Alan. *The Biological Stretch of Southeast Nicaragua: Important Space for the Conservation of Nature*. MARENA-ARAUCARIA, 2006 (hereinafter “The Biological Stretch”), 2006. NR, Vol. II, Annex 41.

<sup>299</sup> See Affidavit of Benedicto Adam Borges Requesnes, 26 May 2008 (hereinafter “Borges Affidavit”), para. 5. NR, Vol. II, Annex 67.

221 species of bird<sup>300</sup>, 65 mammal species<sup>301</sup>, 34 amphibian species, 55 reptiles, and 57 species of insect<sup>302</sup>. Many of these animals, which can be sold on the black market for substantial sums, are attractive targets for poachers.



*Photographs above: on the left, wetlands of the Indio Maíz Biological Reserve; on the right, a Poison Dart Frog. The San Juan River Wildlife Refuge*

4.40. In May 1999, Nicaragua created the Southeastern Biosphere Reserve of Nicaragua, which includes seven protected areas<sup>303</sup>. One of these protected areas is the San Juan River Wildlife Refuge, which was carved out of the Indio Maíz Reserve. This conservation area encompasses the lower San Juan River from its junction with the Bartola River to the Caribbean Sea, covering the entire portion of the San Juan where the left and right banks belong, respectively, to Nicaragua and Costa Rica. The San Juan River Wildlife Refuge also includes a two-kilometre strip of land extending north from the river's left (Nicaraguan) bank to the southern edge of the Indio Maíz Reserve<sup>304</sup>.

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<sup>300</sup> See MARENA, *Indio Maíz Management Plan: 2005-2010 Period* (hereinafter "Indio Maíz Management Plan"), 9 May 2006. NR, Vol. II, Annex 42.

<sup>301</sup> *Ibid.*

<sup>302</sup> *Ibid.*

<sup>303</sup> See Nicaragua, Decree 66-99, Art. 2. NCM, Vol. II, Annex 60.

<sup>304</sup> *Ibid.*, Art. 3.7.

4.41. In 2001, the San Juan River Wildlife Refuge was designated as a wetland of international importance by Nicaragua under the Convention on Wetlands of International Importance (the Ramsar Convention)<sup>305</sup>. As a party to the Convention, Nicaragua agreed to the international standards of conservation and environmental management set forth therein. The protection of the San Juan thus became an internationally recognized and monitored priority. According to UNESCO, the San Juan River Wildlife Refuge and the adjoining Indio Maíz Reserve form part of “one of the two most extensive biological nuclei of the Mesoamerican Biological Corridor”<sup>306</sup>.

4.42. The San Juan River Wildlife Refuge encompasses a variety of wetlands, including estuaries and shallow marine waters, coastal freshwater lagoons, and inter-tidal marshes, as well as permanent lakes, rivers, and pools. These wetlands support a large diversity of bird, fish, crustacean, and mammal (both aquatic and terrestrial) species. Scientific expeditions have identified 303 bird species, 26 mammals, 15 reptiles, 3 amphibians, and 61 insects, in addition to 7 species of marine crustaceans, 13 marine fish species and 10 fresh water fish species<sup>307</sup>. Many of these animal species are threatened with extinction. Indeed, there are no less than 46 endangered species inhabiting the San Juan River Wildlife Refuge, including the exceptionally rare manatee<sup>308</sup>.

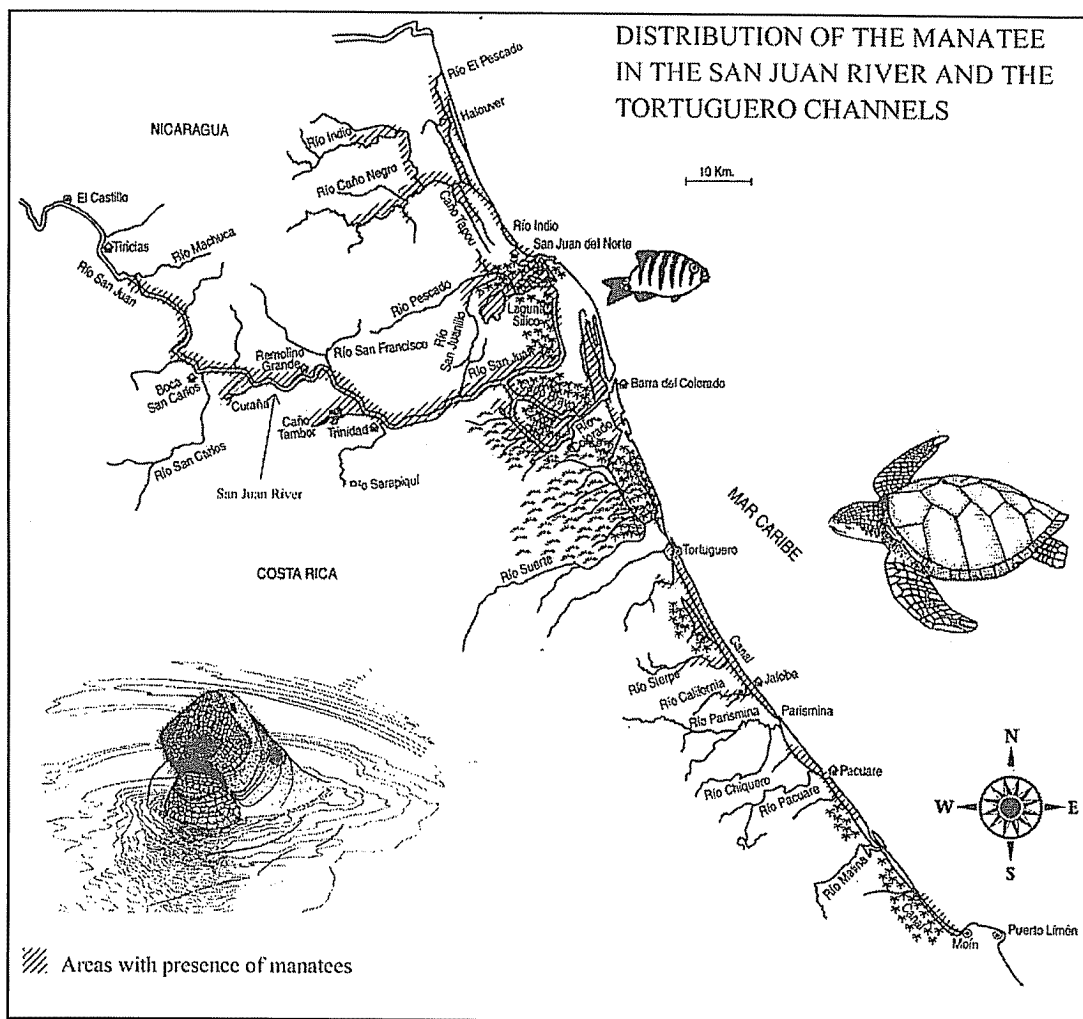
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<sup>305</sup> See “Convention on wetlands of international importance especially as waterfowl habitat,” concluded at Ramsar, Iran on 2 Feb. 1971. (United Nations, *Treaty Series*, Vol. 996, Reg. No. 14583, 17 Feb. 1976.)

<sup>306</sup> “The Annotated Ramsar List: Nicaragua”. NR, Vol. II, Annex 44.

<sup>307</sup> See MARENA, *The San Juan River Wildlife Refuge Management Plan* (hereinafter “SJR Wildlife Refuge Management Plan”), 2005, p. 37. NR, Vol. II, Annex 40; *see also ibid.*, pp. 119-128 (Annex 1 of *ibid.*) for a table of the numerous animal species found in the San Juan River Wildlife Refuge.

<sup>308</sup> *See ibid.*, p. 39.



4.43. In addition to these animals, the San Juan River Wildlife Refuge conserves a variety of plants, including valuable trees, of which the red mangrove (*Rhizophora mangle*) and the yolillal (*Raphia taedigera*) are of particular

<sup>309</sup> Jiménez Pérez, Ignacio. *The Manatees of the San Juan River and the Tortuguero Channels: Ecology and Conservation*. Managua. ARAUCARIA, 2000, p. 33, (hereinafter “The Manatees of the San Juan River”). NR, Vol. II, Annex 31.

importance. The full extent of the vast ecological wealth contained in the Refuge and the adjacent Indio Maíz Reserve remains to be discovered.

(b) *The San Juan River - Nicaragua Biosphere Reserve*

4.44. In July 2003, UNESCO's Man and the Biosphere Programme designated the San Juan River Wildlife Refuge and the Indio Maíz Biological Reserve as part of the greater international biosphere reserve entitled the "San Juan River - Nicaragua Biosphere Reserve"<sup>310</sup>. This internationally recognized and supported biosphere covers 18,340 km<sup>2</sup>, a full 14 percent of Nicaragua's national territory (the equivalent of half of the Netherlands)<sup>311</sup>. The Biosphere Reserve covers a wide variety of ecosystems, including tropical humid forests and wetlands, tidal marshes, coastal lagoons and estuaries, all of which are important shelters for rare or threatened animals and plant resources of the Meso-American tropics. In total, the Biosphere Reserve includes 19 natural ecosystems and is inhabited by 555 species, including 27 amphibians, 388 birds, and 60 mammals<sup>312</sup>.

4.45. This comprehensive reserve system is built around several nucleus zones<sup>313</sup>. One of the principal zones is the Indio Maíz Biological Reserve. According to UNESCO, "the vast size of the biosphere reserve, in addition to its proximity to neighbouring Costa Rican protected areas, and as part of the Mesoamerican Biological Corridor, guarantee an adequate area for preserving genetic diversity, free mobility of species, breeding and maintenance of major

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<sup>310</sup> UNESCO MAB Biosphere Program Certificate, 15 Sept. 2003. NR, Vol. II, Annex 39.

<sup>311</sup> See "Indio Maíz Declared World Biosphere Reserve", (*La Prensa*, 10 July 2003). NR, Vol. II, Annex 24.

<sup>312</sup> See *The Biological Stretch*, *op. cit.*, p. 9 and 21: NR, Vol. II, Annex 41.

<sup>313</sup> See *Strategic Program 2008*, *op. cit.* NR, Vol. II, Annex 48.

species such as the jaguar or American tiger (*Felis onca*), the tapir (*Tapirus biardii*) and the red and green parrot (*Psittacidae*)”<sup>314</sup>.

## 2. *Regional and International Environmental Commitments*

4.46. Participation in the UNESCO Biosphere Program and the Ramsar Convention are only some of Nicaragua’s international and regional commitments to protect and effectively manage the environment within and around the San Juan River. In 1977, Nicaragua ratified the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)<sup>315</sup>. The Convention obligates Nicaragua to regulate strictly the trade of threatened species found in her territory. Several of the species Nicaragua committed to protect are found in the San Juan River Biosphere Reserve including at least 42 bird, 36 mammal, 8 amphibian, and 18 reptile species<sup>316</sup>.

4.47. In 1992, Nicaragua, together with five other Central American countries, including Costa Rica, signed the Convention for the Conservation of Biodiversity and Protection of the Priority Wildlife Areas in Central America<sup>317</sup>. The State parties emphasized that “the creation, management and strengthening of Protected Areas play a relevant role in ensuring sustainable development, reproduction of

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<sup>314</sup> See “Biosphere Reserve Information: Nicaragua: Río San Juan,” UNESCO – MAB Biosphere Reserves Directory. NR, Vol. II, Annex 45.

<sup>315</sup> See Nicaragua, Agreement No. 5, 23 April 1977. NR, Vol. II, Annex 51; see also “List of Contracting Parties”, Website of *Convention on International Trade in Endangered Species of Wild Fauna and Flora*. Available at: <http://www.cites.org/eng/disc/parties/chronolo.shtml>.

<sup>316</sup> See Indio Maíz Management Plan, *op. cit.*, p. 58. NR, Vol. II, Annex 42; see also “CITES-listed animals: Nicaragua,” *UNEP-WCMC Species Database: CITES-Listed Species*. Available at: [http://www.unep-wcmc.org/isdb/CITES/Taxonomy/country\\_list.cfm/isdb/CITES/Taxonomy/country\\_list.cfm?displaylanguage=eng&Country=NI&submit=Go](http://www.unep-wcmc.org/isdb/CITES/Taxonomy/country_list.cfm/isdb/CITES/Taxonomy/country_list.cfm?displaylanguage=eng&Country=NI&submit=Go).

<sup>317</sup> See Convention for the Conservation of Biodiversity and Protection of the Priority Wildlife Areas in Central America, 5 June 1992. NR, Vol. II, Annex 2.

essential ecological processes and rural development”<sup>318</sup>. Both Nicaragua and Costa Rica also recognized that the “conservation of biodiversity in border habitats or bodies of water requires the will of all and external cooperation, regional and global, in addition to the efforts developed by our nations...”<sup>319</sup>. As such, both States obligated themselves to “ensure the adoption of measures that contribute to the conservation of natural habitats and their populations of natural species”<sup>320</sup>.

4.48. These agreements, of course, mean that Nicaragua is required to protect the environment in and surrounding the San Juan River not merely as a matter of municipal law but as a matter of international obligation as well. Indeed, under the agreements Costa Rica is obligated to protect the San Juan River and its environment from her side of the river. Nicaragua places a high priority on meeting these obligations. Costa Rica, apparently, does not. While Nicaragua has protected her entire side of the river by prohibiting human habitation and economic exploitation. Costa Rica has not. Very little remains of the vast forests on the right bank that once mirrored those on the left. Costa Rica has permitted the levelling of these fragile areas, and the destruction of their ecosystems to make way for large cattle ranches and grazing areas. Sketch Map 6 produced by Nicaragua’s Ministry of Environment and Natural Resources, shows the areas adjacent to the San Juan River protected, respectively, by Nicaragua (to the north) and Costa Rica (to the south). While the entire Nicaraguan area north of the river is protected (as indicated by dark green or yellow-lined areas), there is relatively little protection on the south side.

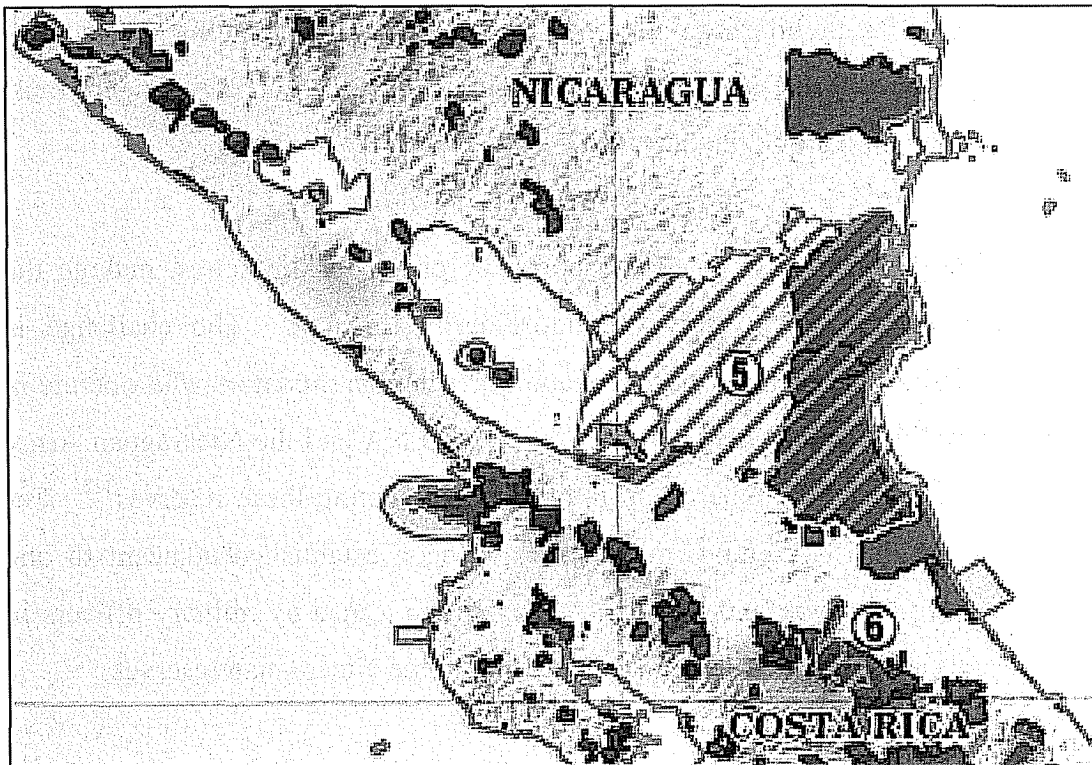
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<sup>318</sup> *Ibid.*, Preamble.

<sup>319</sup> *Ibid.*, Art. 3.

<sup>320</sup> *Ibid.*, Art 13(c).





Sketch Map 6

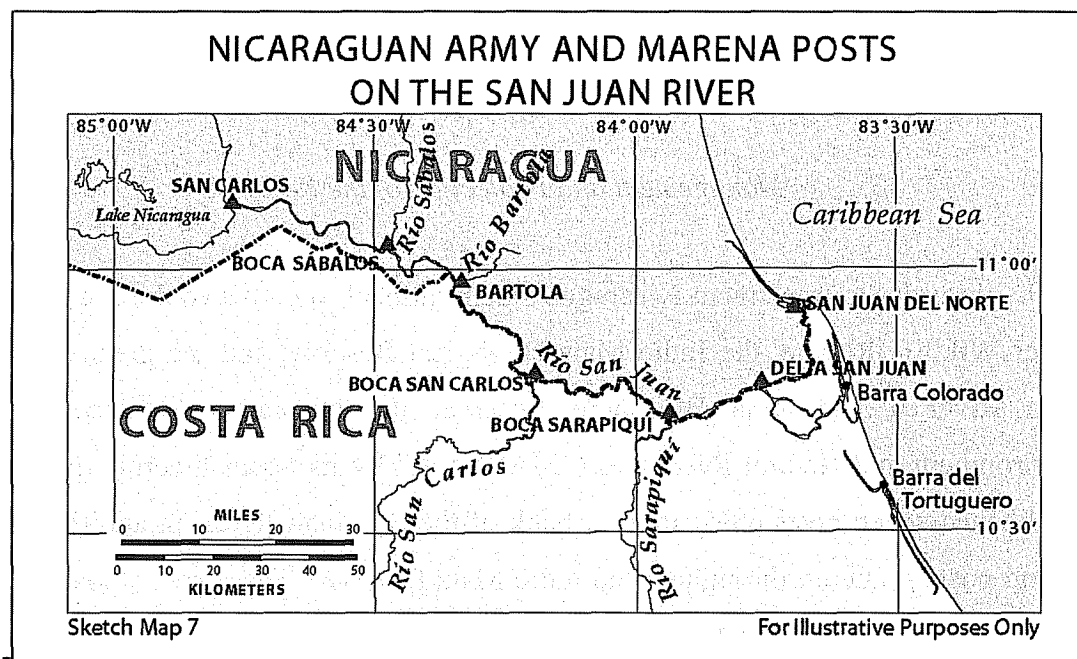
For illustrative purposes only

### 3. *Management and Protection of the Reserves*

4.49. In order to implement Nicaragua's commitment to conserve the San Juan River Wildlife Refuge, the Indio Maíz Biological Reserve, and the greater San Juan River - Nicaragua Biosphere Reserve, the Nicaraguan Ministry of Environment and Natural Resources ("MARENA," by its Spanish acronym) has established seven posts along the left bank of the San Juan River, in addition to inland posts scattered throughout the Indio Maíz Reserve. These seven posts are located at San Carlos, Sábalos, Bartola, Boca de San Carlos, Sarapiquí, Delta, and San Juan de Nicaragua, the last four of which lie directly across the river from Costa Rican territory. Each post is manned by two rangers, who have

responsibility for monitoring and controlling the areas surrounding that post<sup>321</sup>. In order to manage the region's natural resources, the MARENA rangers must monitor navigation along the San Juan.

4.50. The distance between the posts can be up to 40 kilometres, making the task of monitoring the reserves extraordinarily difficult. The challenge is compounded by the fact that poachers and other human predators who operate in the area are frequently armed. As a result, MARENA and the Nicaraguan Army have joined efforts to cooperate in the task of protecting these reserves<sup>322</sup>. For this reason MARENA and Army posts have been established adjacent to one another along the river, and MARENA rangers are joined by military officers in their patrols on the river and the adjoining land in the Nicaraguan reserves.



<sup>321</sup> See Borges Affidavit, para 6. NR, Vol. II, Annex 67.

<sup>322</sup> See Inter-Institutional Convention for Environmental Conservation and the Sustainable Use of Natural Resources Signed Between the Ministry of the Environment and Natural Resources and the Sandinista People's Army, 29 March 1995. NR, Vol. II, Annex 3.

#### 4. *Illegal Logging*

4.51. Illegal logging has been a constant problem both in the Indio Maíz Biological Reserve and in the San Juan River Wildlife Refuge. Both reserves are home to a wide variety of rare tree species, many of which are commercially prized for their aesthetics and durability. The rosewood tree (*Dalbergia retusa*), for instance, can be sold in the United States for up to US\$ 40 per kilogram<sup>323</sup>. The caoba (*Swietenia macrophylla*) and cedro real (*Cedrela odorata*) -- two different species of mahogany -- the laurel (*Cordia alliodora*), the guanacaste (*Enterolobium shomburkii*), and the roble macuelizo (*Tabebuia rosea*) are also all in high demand, especially in Costa Rica, for the construction of fine furniture<sup>324</sup>.

4.52. Apart from their natural beauty, these and other sought-after trees are critical to maintaining the delicate ecological balance of the reserves. The almendro tree (*Dipteryx oleifera*), for example, provides refuge and food for green macaws, the population of which has declined precipitously due to increased logging in both Costa Rica and, by illegal logging, Nicaragua<sup>325</sup>.

4.53. The biggest threat to Nicaragua's reserves comes from the Costa Rican side of the river. Residents of Costa Rican settlements frequently cross the river, enter the reserves, cut down protected trees and return to Costa Rica to sell the wood<sup>326</sup>. They come to Nicaragua for the wood because it can no longer be found -- at least not in abundant quantities -- on the Costa Rican bank. While the land to the north of the river, within Nicaragua, remains heavily forested, the land to

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<sup>323</sup> See The Biological Stretch, *op. cit.*, p. 30. NR, Vol. II, Annex 41.

<sup>324</sup> *Ibid.*

<sup>325</sup> See MARENA Ministerial Resolution 029-2006, para. IX. NR, Vol. II, Annex 57.

<sup>326</sup> See Borges Affidavit, para 7. NR, Vol. II, Annex 67.

the south in Costa Rica has largely been cleared by Costa Rica's logging industry, increased human habitation, and the establishment of numerous cattle ranches. As stated in a recent international tourist guide book:

“You’ll notice evidence of logging in the area, especially at the point where the Sarapiquí flows into the Río San Juan -- the lumber industry has long had *carte blanche* in this area, due to the non-enforcement of existing anti-logging laws. The Nicaraguan side of the Río San Juan, part of the country’s huge Indio Maíz Reserve, looks altogether wilder than its southern neighbor, with thick primary rainforest creeping right to the edge of the bank. Partly because of logging, and the residual destruction of its banks, the Río San Juan is silting up, have even shallow bottomed lanchas get stuck in the once consistently deep river.”<sup>327</sup>

4.54. The Nicaraguan Army maintains records of poachers caught cutting trees or transporting logs from the protected areas. Some of these incidents, as contemporaneously recorded by the Army, are described in Annex 74. To cite an example, in one day alone -- 26 May 1997 -- 5,000 board feet of wood were cut and removed from Nicaragua’s reserves, and transported across the river to Costa Rica<sup>328</sup>.

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<sup>327</sup> McNeil, Jean. *The Rough Guide to Costa Rica*, Fourth Edition, 2005, p. 171. NR, Vol. II, Annex 34.

<sup>328</sup> See Affidavit of Lieutenant Colonel Walner Abraham Molina Pérez, 26 May 2008 (hereinafter “Molina Affidavit”), Annex 1 to Affidavit. NR, Vol. II, Annex 74.



*Photograph Above: Aerial view of the San Juan River from the Nicaraguan side. The forested land in the foreground is Nicaraguan territory within the Indio Maíz Biological Reserve. The cleared land in the background is Costa Rican territory.*



*Photographs Above: Costa Rican residents found taking freshly cut planks of wood into Costa Rica on the San Juan River.*

4.55. Illegal logging along the San Juan River is not a recent phenomenon, but has long been a serious problem. The evidence shows that Costa Rica has recognized this since as far back as 1869. On 28 April of that year, Costa Rica enacted a decree which, in its first article, prohibited the shipment through the San Juan River of lumber and other resources on her side of the river<sup>329</sup>.

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<sup>329</sup> See Reply of Costa Rica, *op. cit.*, pp. 201-2. NR, Vol. II, Annex 6. See also, Chap. II, Sec. III above.

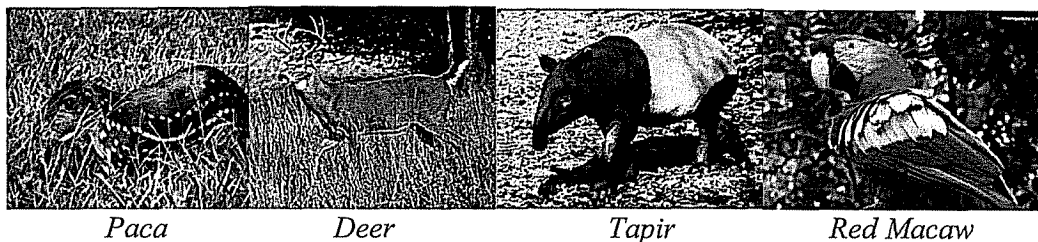
Unfortunately for Costa Rica, her efforts over the years to prevent illegal logging on her bank of the San Juan have not been sufficient, as evidenced by the fact that most of the once-forested land has been cleared. Especially in view of this, Nicaragua submits that she has every right to take reasonable measures to prevent the same thing from happening on her side. By designating the river itself and the entire length of its left bank an environmentally protected area, Nicaragua has been able to accomplish (thus far) what Costa Rica has not; until now, she has managed to preserve her forests, and the plant and animal species that inhabit them. But prevention of deforestation and protection of the environment are constant challenges, and require perpetual vigilance. No State should be more aware than Costa Rica of the risks and consequences of deforestation by illegal loggers and human settlers, since she has suffered the loss of her own forests at their hands. If any State should understand the need for Nicaragua's environmental regulations, it is Costa Rica.

## 5. *Illegal Hunting and Fishing*

4.56. Trees are not the only natural resource illegally extracted from the Nicaraguan reserves along the San Juan River, or from the river itself. Poachers, mostly originating from Costa Rican territory, illegally enter the reserves seeking other valuable plants and, especially, animals which are taken either for their meat or for sale as pets. Nicaraguan Army records include numerous apprehensions of poachers engaged in illegal hunting activities. Examples are provided in Annex 67. Local hunters have trained their sights especially on mammals like white tailed deer (*Odocoileus virginianus*), tapirs (*Tapirus bairdii*), pacas (*Agouti paca*), white lipped pecarries (*Tayassu pecari*), and collared

peccaries (*Tayassu tajacu*)<sup>330</sup>. Marine turtles, iguanas, crocodiles and caimans are also frequent targets of poachers along the river.

4.57. An unfortunate but common weekend practice for some inhabitants of Costa Rica's riparian communities is to cross the river with hunting dogs to capture pacas, deer, sahinós, pavones, monkeys, parrots, macaws, or guatusas, as well as other species that are on the verge of extinction<sup>331</sup>. Pacas and macaws have been sold on the Costa Rican market and hunted almost to extinction<sup>332</sup>.



4.58. Illegal fishing in the protected waters of the San Juan River is also common. Among the many fish species which live in the Refuge, several use the river as a migration route to reach Lake Nicaragua or Lake Caño Negro in Costa Rica where they procreate<sup>333</sup>. The more notable of these include the bull shark (*Carcharhinus leucas*), the tarpon (*Tarpon atlanticus*), the fat snook (*Centropomus parallelus*), and the tropical gar (*Centropomus parallelus*)<sup>334</sup>. As a result of illicit fishing in the San Juan River Wildlife Refuge, the populations of

<sup>330</sup> See "Costa Ricans Damage Flora in the San Juan River", (*La Prensa*, 13 June 1991). NR, Vol. II, Annex 15; see also The Manatees of the San Juan River, *op. cit.*, p. 51. NR, Vol. II, Annex 32.

<sup>331</sup> See *ibid.*; see also Borges Affidavit, para 9. NR, Vol. II, Annex 67.

<sup>332</sup> See "Costa Ricans Damage Flora in the San Juan River". NR, Vol. II, Annex 15.

<sup>333</sup> See The Biological Stretch, *op. cit.*, pp. 24-5. NR, Vol. II, Annex 41.

<sup>334</sup> See MARENA, "Species Under Threat of Extinction -- Biosphere Reserves: Indio Maiz and BOSAWAS" (hereinafter "MARENA Endangered Species List"). NR, Vol. II, Annex 46.

all these fish have significantly declined<sup>335</sup>. Some, like the shark, are close to extinction<sup>336</sup>.

4.59. The river also hosts an array of shellfish species including the Caribbean Spiny Lobster (*Panulirus argus*)<sup>337</sup> and the large Big Claw River Shrimp (*Macrobrachium carcinus*)<sup>338</sup> and four species of Caribbean Prawn (*Penaeus spp.*)<sup>339</sup>. Costa Rican riparian residents illegally place traps in the water to capture these protected species in bulk for commercial sale<sup>340</sup>. Nicaraguan Army records reflect numerous incidents of illegal fishing or shrimping activities in or on the river. *See* Annex 74. For example, in one day, in a single location in the River Refuge, Army and MARENA personnel found and seized as many as 85 shrimp traps<sup>341</sup>.

## 6. *Illegal Occupation of Protected Land*

4.60. With some frequency, families large and small, seeking land and dwelling space have crossed the river from Costa Rica in an effort to clear and settle on protected land in the San Juan River Wildlife Refuge and Indio Maíz Reserve. When detected, these incidents are duly recorded by the Nicaraguan Army. Annex 75 provides some examples, extracted from the Army's records. In 1996, for instance, in one night 72 people from Costa Rica occupied territory within the

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<sup>335</sup> *See* The Biological Stretch, *op. cit.*, p. 25. NR, Vol. II, Annex 41.

<sup>336</sup> *See* MARENA Endangered Species List, *op. cit.*, NR, Vol. II, Annex 46.

<sup>337</sup> *See* Indio Maíz Management Plan, *op. cit.*, p. 55. NR, Vol. II, Annex 42; *see also* SJR Wildlife Refuge Management Plan, *op. cit.*, p. 59. NR, Vol. II, Annex 40.

<sup>338</sup> *See* The Biological Stretch, *op. cit.*, p. 25. NR, Vol. II, Annex 41.

<sup>339</sup> *See* SJR Wildlife Refuge Management Plan, *op. cit.*, p. 59. NR, Vol. II, Annex 40.

<sup>340</sup> *See* Borges Affidavit, para 8. NR, Vol. II, Annex 67.

<sup>341</sup> *See* Molina Affidavit, Annex 1 to Affidavit. NR Vol. II, Annex 74.



Indio Maíz Biological Reserve, 5 kilometres from the Boca Sarapiquí border post<sup>342</sup>. Similar events have occurred repeatedly over the last decade. In 2006, 19 Costa Rican residents were found clearing land for occupation in the Reserve and prosecuted<sup>343</sup>.

## 7. *Nicaragua's Regulations Are Necessary To Protect the Environment*

### (a) *The Requirement To Stop and Register*

4.61. The regulations about which Costa Rica now complains are necessary to protect the environment and combat the aforementioned illegal activities in and around the San Juan River Wildlife Refuge. The requirement to stop and report at Nicaraguan military posts upon entry and exit is an obvious example. These very minimal and non-intrusive requirements, pursuant to which individuals must merely state their names and identify any passengers and cargo they are carrying, are crucial to monitoring activities on the river. This reporting provides Nicaraguan authorities with information on who enters the River Refuge, and in what areas, in order to ensure that the river is being used only for lawful purposes. In particular, the reporting allows Nicaragua to assure that all persons (including Nicaraguans) who enter the protected area also leave it, since no one is allowed to remain. As explained by a former Commander of Nicaragua's Southern Military Detachment:

“When the vessel completed the San Juan River portion of its excursion, it stopped again at the Nicaraguan military post located at that point, at Delta, to register the tourists' departure and to assure that everyone who entered Nicaragua was exiting, and that

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<sup>342</sup> See *ibid.*

<sup>343</sup> See Public Prosecutor's Office of San Carlos, Río San Juan Province, “Criminal Complaint No. 000/06” (hereinafter “Criminal Complaint”), 21 December 2006. NR, Vol. II, Annex 43.

none of them had been left behind in Nicaraguan territory. This was necessary as a security measure to assure that there were no unauthorized entries into the protected area of the Indio Maíz Biological Reserve.”<sup>344</sup>

(b) *The Requirement To Obtain a Departure Clearance Certificate*

4.62. The requirement to obtain a departure clearance certificate serves a related function, and is crucial to protecting the river and surrounding reserves. To obtain a certificate, boatmen using the San Juan must permit an inspection of their vessels for purposes of, *inter alia*, ensuring that they are not carrying any plants or animals taken from Nicaragua’s protected areas, including the river itself. The inspection also serves to assure that the vessel is not leaking or otherwise discharging fuel or other environmentally harmful substances into the river.

4.63. Costa Rica imposes similar requirements on vessels entering her rivers from the San Juan; they must stop at Costa Rican border posts to obtain a Costa Rican departure clearance certificate. Yet Costa Rica complains about her vessels having to stop at Nicaragua’s border posts for the same purpose. Costa Rica alleges that Nicaragua’s regulations violate her “related rights” under Article VI of the 1858 Treaty “to land indiscriminately on either side of the river, at the portion thereof where the navigation is common.” To be precise, Costa Rica does not claim that Nicaragua has violated her right “to land” on the Nicaraguan side of the river, but she argues that the right “to land” necessarily implies a right “not to land,” and that this implied and “related” right is the one that Nicaragua has violated by obliging Costa Rican vessels “to land” at the border posts.

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<sup>344</sup> Largaespada Affidavit, para 9. NR, Vol. II, Annex 72.

4.64. Besides the fact that Nicaragua's registration and departure clearance regulations are justifiable and reasonable exercises of her sovereignty over the river, it is far from clear that the right "to land" on the Nicaraguan side of the river has as a necessary corollary the right "not to land" on that bank. There is nothing in the 1858 Treaty that would prohibit Nicaragua from establishing border controls and check points, or from obliging Costa Rican vessels to stop there, to protect her legitimate sovereign interests. Nicaragua is sovereign in her own territory, and can, in this capacity, establish such limitations on activities conducted within her territory as are reasonable and protective of her legitimate sovereign interests. As has been established, the regulations here under discussion are fully justified by Nicaragua's interests in protecting the fragile and unique natural environment and, as discussed below, her interests in prevention of crime, navigational safety and security of the border. The regulations violate no rights – "related" or otherwise – of Costa Rica.

(c) *The Prohibition of Navigation at Night*

4.65. Navigation is prohibited on the San Juan after dark<sup>345</sup>. This applies to everyone, Nicaraguans as well as Costa Ricans. Beyond the obvious safety and security objectives achieved by this regulation (discussed below), it is also necessary for environmental protection. As testified by Nicaragua's military commanders, who are responsible for law enforcement and environmental protection on the river: "[I]t is during the night, when detection is most difficult, that the protected flora and fauna of the Indio Maíz Biological Reserve and the San Juan River are most vulnerable to poaching."<sup>346</sup> "[M]ost criminal activity

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<sup>345</sup> See Action Plan, Art. 7. NR, Vol. II, Annex 48.

<sup>346</sup> Membreno Affidavit, para. 9. NR, Vol. II, Annex 73.

and environmental depredation (including hunting and fishing for protected species in the Indio Maíz Biological Reserve and the San Juan River) took place at night.”<sup>347</sup> Almost all incidents of illegal occupation of land inside the protected areas have also occurred at night, with individuals using the cover of darkness to move in and clear the trees around their camp as secretly and as quickly as possible<sup>348</sup>.

4.66. The prohibition on navigation at night cannot, of course, stop all environmental depredation within the San Juan River Wildlife Refuge and the Indio Maíz Reserve, but it makes such illegal activity more difficult, since any boat observed on the river at night prompts immediate attention and investigation.

*(d) The Prohibition of Certain Fishing Activities*

4.67. As discussed above, populations of certain fish, crustaceans, and aquatic mammals have dropped significantly over time due to the growth in human settlement on Costa Rica’s side of the river, and the increased fishing in the San Juan River that has come with it. In order to conserve the fish and other animals which live in or migrate through the river, MARENA has prohibited commercial fishing or shrimping in the river, while allowing subsistence fishing by local Costa Rican residents, provided that they fish from the Costa Rican bank of the river<sup>349</sup>. Fishing from *within* the San Juan River Wildlife Refuge, whether on

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<sup>347</sup> Sánchez Affidavit, para. 6. NR, Vol. II, Annex 77.

<sup>348</sup> See Criminal Complaint, NR, Vol. II, Annex 43 (“On the seventeenth of December of two thousand and six, in the hours of the night, a group of persons originating from the sister Republic of Costa Rica entered our national territory through the sector of La Penca, armed with machetes, shovels, hoes, rakes, rope, hammocks, plastic or other articles or tools that were used by the accused...”).

<sup>349</sup> See Largaespada Affidavit, para. 10. NR, Vol. II, Annex 72; see also Membreño Affidavit, para. 8. NR, Vol. II, Annex 73; see also Borges Affidavit, para. 8. NR, Vol. II, Annex 67.

boats in the river or from the Nicaraguan shore is strictly prohibited<sup>350</sup>. The prohibition applies to everyone, including Nicaraguans. In the past, MARENA allowed some fishing in the refuge, but the regulations were tightened when it became clear that MARENA's tolerance was being abused by boatmen fishing commercially, and/or using fishing as a false cover for illegally entering the Indio Maíz Reserve<sup>351</sup>. By permitting local residents to fish for subsistence purposes from Costa Rica's bank of the river, while prohibiting all other forms of fishing in the river, Nicaragua has endeavoured to achieve a reasonable balance between environmental protection (in this case, protection of endangered fish, aquatic mammal, and crustacean species) and local human needs. In doing so, Nicaragua surely has not violated any rights of Costa Rica or her nationals.

4.68. In her *Memorial*, Costa Rica claims a "customary right to fish in its waters for subsistence purposes for residents living on the Costa Rican bank of the San Juan"<sup>352</sup>. Nicaragua denies that such a right exists. Costa Rica certainly has not established its existence. It cannot be found in the Treaty of Limits or the Cleveland Award. Indeed there is neither an express or even a logical connection between this claimed right and the "right of free navigation...*con objetos de comercio*," that is included in the 1858 Treaty of Limits, and upon which the *Application* in this case is based. In fact, there is no mention of any kind – explicit or implicit – of alleged fishing rights anywhere in the *Application*. In her *Reply*, Costa Rica makes no attempt to relate the so-called "customary right to fish" to the *Application*, to the Treaty of Limits, or to any navigational, or other

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<sup>350</sup> See Membreño Affidavit, para 8. NR, Vol. II, Annex 73 ("The only exceptions are two specifically designated sport fishing zones, one at San Juan del Norte and one on the upper portion of the river where both banks belong to Nicaragua, where licensed sport fishing under strict limitations is permitted during certain periods of the year").

<sup>351</sup> See Borges Affidavit, para 8. NR, Vol. II, Annex 67.

<sup>352</sup> CRM, para. 4.118 (3).

rights thereunder. It is certainly not necessary to rule on Costa Rica's belated claim to customary fishing rights in order to decide the question of whether Costa Rica's navigation right has been violated. In these circumstances, Nicaragua considers that Costa Rica's attempt to expand her *Application* to cover an alleged "customary right to fish" is inadmissible under Article 40 of the Statute and Article 38, paragraph 2, of the Rules of Court. It is therefore only in the alternative that Nicaragua has answered Costa Rica's allegations concerning a "customary right to fish." It is difficult to understand what "customary rights" Costa Rica is referring to. There is no record of native population settlements in the area and none that were present in 1858. As that time there were no significant population centres or even known settlements along the river. This need to fish for subsistence, is new and due to the establishment of settlements on the Costa Rican bank of the river during the last decades. The novelty of this need is probably what caused Costa Rica to exclude this claim from her *Application*.

#### B. CONTROL AND PREVENTION OF CRIME

4.69. Illegal trafficking of drugs and arms on the San Juan is a problem. Nicaraguan military personnel are vigilant in their efforts to deter and prevent these activities, and have periodically captured smugglers using the river to transport their illicit cargoes<sup>353</sup>. A partial list of criminal apprehensions by the Nicaraguan Army on the San Juan River is set forth in Annex 74 to this *Rejoinder*.

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<sup>353</sup> See Molina Affidavit, Annex 1 to Affidavit. NR, Vol. II, Annex 74.

4.70. In addition to the need to control illicit drug and arms trafficking, the Nicaraguan military monitors traffic on the river to guard against all-too-common crimes like theft and assault along the river. There have been instances in which tourists visiting the area have been kidnapped. On 1 January 1996, for example, a group of German tourists was robbed by a gang of masked and heavily armed individuals, who then kidnapped two women seven kilometres from Boca San Carlos, where both Nicaragua and Costa Rica maintain security posts across the river from one and another<sup>354</sup>.

### *1. The Requirement To Stop and Register*

4.71. Nicaragua has required individuals travelling the river to stop and report themselves since before the 1960s. This requirement applies to everyone who navigates on the river -- including Nicaraguans. To this day, it remains a fundamental element of Nicaraguan law enforcement efforts in the area. The requirement to stop and report at Nicaraguan military posts has an obvious deterrent effect on criminal activities of all kinds. Indeed, it is quite telling that Costa Rica herself has also deemed it necessary and appropriate to implement this same requirement on her own rivers connected to the San Juan since at least the 1960s<sup>355</sup>. The requirement to stop and register is particularly important to the prevention and detection of criminal activity due to the geography of the river. It winds its way through remote, heavily vegetated (on the Nicaraguan side), sparsely populated (on the Costa Rican side) territory for more than 220 km. Nicaragua's Army posts are spread out from one another, leaving vast stretches of the river far removed from law enforcement officials. Only by keeping track of

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<sup>354</sup> See "Tourist and Guide Kidnapped", (*La Nación*, 3 January 1996). NR, Vol. II, Annex 16.

<sup>355</sup> See Aburto Affidavit, para 3. NR, Vol. II, Annex 65.

vessels as they enter and leave the river can Nicaraguan authorities effectively monitor them to assure they do not engage in unlawful activities.

2. *The Requirement To Obtain a Departure Clearance Certificate*

4.72. The need for each boat -- regardless of nationality -- to secure a departure clearance certificate also ensures that the individuals navigating on the river are not carrying illicit cargo. To obtain a certificate, a vessel must be inspected, *inter alia*, to assure it is not transporting prohibited items. Nicaragua established the requirement to secure a departure clearance certificate at least fifty years ago. Costa Rica has had a similar requirement for navigation on her rivers -- tributaries of the San Juan -- for at least forty years (as shown by her own evidence)<sup>356</sup>.

4.73. As stated by Captain Mario García López, responsible for supervising several of the Nicaraguan Army's monitoring posts along the San Juan River:

“[B]oats are required to obtain Nicaraguan departure clearance certificates before they may navigate on the San Juan River. This includes boats operated by Nicaraguans....All boats must also identify their passengers and any cargo that they are carrying. This is a security measure designed to ensure that there is no illegal trafficking of persons or goods on the river, and to ensure that no one who enters and exits the river has entered the Indio Maíz Biological Reserve, located on the northern bank of the river's course, where access is not allowed.”<sup>357</sup>

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<sup>356</sup> See “Departure Clearance Certificate” issued by the Costa Rican Revenue Guard. CRR, Vol. II, Annex 65(b); see also Aburto Affidavit, para 3. NR, Vol. II, Annex 66; see also Membreno Affidavit, para 4. NR, Vol. II, Annex 73.

<sup>357</sup> See Affidavit of Captain Mario García López, 9 March 2008 (hereinafter “García Affidavit”), para. 4. NR, Vol. II, Annex 70.



4.74. The measure does not materially burden commercial boatmen who use the river. As attested by a boatman who transports commercial goods on the river on a weekly basis, "I am not aware of any occasions when any of the Costa Rican boatmen who navigate the river taking goods either to Nicaragua or Costa Rica have been prevented from completing their trip, by Nicaraguan authorities posted along their routes."<sup>358</sup> Nor does the departure clearance certificate impose hardships on local Costa Rican residents. Nicaragua provides departure clearance certificates to local residents -- i.e. Costa Ricans who live on the right bank of the river -- as a courtesy and at no cost. These certificates are valid for one month, and are permanently renewable, without need for inspection of the local resident's vessel.<sup>359</sup>

4.75. Despite her pretensions to the contrary in these proceedings, Costa Rica has expressly agreed that, for law enforcement purposes, and especially to combat drug trafficking, Nicaragua should enforce her requirement that all vessels navigating on the San Juan obtain a departure clearance certificate, and report their presence at all Nicaraguan Army posts passed during the voyage. This agreement is reflected in the Final Minutes of the Fourth Binational Nicaragua-Costa Rica Meeting, held on 12 and 13 May 1997<sup>360</sup>. The Final Minutes, which were signed by Foreign Minister Emilio Alvarez Montalván of Nicaragua and Foreign Minister Fernando Naranjo Villalobos of Costa Rica, cover a variety of matters agreed to at the Meeting. On the subject of Drug Trafficking, the Final Minutes reflect the following agreement:

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<sup>358</sup> Acevedo Affidavit, para. 4. NR, Vol. II, Annex 66; *see also* NR, para. 4.89.

<sup>359</sup> *See* Sánchez Affidavit, para. 6. NR, Vol. II, Annex 77; *see also* Membreño Affidavit, para. 5. NR, Vol. II, Annex 73; Largaespada Affidavit, para. 8. NR, Vol. II, Annex 72; García Affidavit, paras. 6-7. NR, Vol. II, Annex 70; Talavera Affidavit, para. 8. NR, Vol. II, Annex 78.

<sup>360</sup> Final Minutes from the IV Nicaragua-Costa Rica Binational Meeting. NR, Vol. II, Annex 4.

“Regarding the problem raised by the Costa Rican delegation about the existence of places that require the presence of authorities competent on this subject, it was agreed that Nicaragua will carry out efforts directed toward establishing posts in specific locations, to broaden the coverage in the fight against this crime.

(...)

In relation to the flow of vessels it was considered necessary that these boats navigate duly registered by the posts that issue the corresponding certificates of navigation, as applicable, the posts of San Juan del Norte, San Carlos and Sarapiquí.”<sup>361</sup>

4.76. Having recognized and accepted the necessity of these Nicaraguan regulations, and having agreed to their enforcement in 1997, Costa Rica’s sudden change of heart -- and newfound theory that they constitute a violation of her rights under the 1858 Treaty -- are indefensible and should be disregarded.

### 3. *The Prohibition of Navigation at Night*

4.77. Much like poachers who use darkness to their advantage, traffickers in arms, drugs, and human beings also prefer the cover of night when it is easier to navigate the river without detection. By prohibiting nighttime navigation, Nicaragua is able to better prevent these illicit activities. Customary traffic by local residents, commercial boatmen, or tourist boats normally occurs during daytime hours. As stated by a local resident who was a commercial boatman on the river in the 1960s and continues to use the river today: “It was rare for a boat to navigate at night. Local residents and other boatmen made their trips during

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<sup>361</sup> *Ibid* (emphasis added).

the day, and only used the river at night in cases of emergency.”<sup>362</sup> Nicaragua continues to permit navigation at night in cases of emergency.<sup>363</sup>

### C. NAVIGATIONAL SAFETY

4.78. As dominion and supreme control (*sumo imperio*) over the San Juan River are entrusted to one State -- Nicaragua -- it is she who bears responsibility for ensuring the safety of navigation on the river.

4.79. The river poses a wide array of hazards, including the many, shifting sandbars that characterize its lower reaches, the presence of fallen trees throughout its course, and alligators that lurk in its waters. As one might expect, the boats that travel the river are in various states of repair, and some are not in a condition to operate safely. Accidents, drownings and even animal attacks are not uncommon. Navigation at night is particularly dangerous<sup>364</sup>.

#### 1. *The Requirement to Stop and Register*

4.80. The requirement to stop and register at Nicaraguan posts ensures that all passengers are accounted for on each leg of the journey on the San Juan. Costa Rica’s statement that the Nicaraguan Army officers at the post require school children passing the post to stop and report daily is true<sup>365</sup>. In addition to the

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<sup>362</sup> Aburto Affidavit, para. 5. NR, Vol. II, Annex 65.

<sup>363</sup> See Membreño Affidavit, para. 9. NR, Vol. II, 73; see also Largaespada Affidavit, para. 8. NR, Vol. II, Annex 72.

<sup>364</sup> See Talavera Affidavit, para. 8. NR, Vol. II, Annex 78; see also Membreño Affidavit, para. 9. NR, Vol. II, Annex 73.

<sup>365</sup> See CRR, para. 4.48.

possibility of children (or anybody else) falling overboard and drowning, several children have been attacked by crocodiles in the San Juan and its adjoining inlets. Within the past year, a 4-year-old boy and a 13-year-old boy were killed by crocodiles<sup>366</sup>. The river is especially hazardous for children, who sometimes pilot their own small craft, and Nicaraguan officials are particularly vigilant in protecting them against the fate of those who have already lost their lives on the river.

## 2. *The Requirement To Obtain a Departure Clearance Certificate*

4.81. The requirement to obtain a departure clearance certificate helps ensure that the boats navigating the river are seaworthy and capable of safe operation. As previously stated, the vessels used on the San Juan River are in various states of repair -- and disrepair. As testified by Captain Mario Garcia Lopez, all boats are required to stop at the Nicaraguan post at their point of entry onto the San Juan River. "The departure clearance certificate certifies that the boat has been inspected, and that it meets all Nicaraguan safety requirements for navigation on the river"<sup>367</sup>. To secure a departure clearance certificate, boat owners must present operators' licenses and relevant information about the vessel. These minimal steps are reasonable and necessary to make traffic on the San Juan as safe as possible, which is Nicaragua's sovereign right and responsibility.

4.82. Searches of vessels, which are carried out as part of the departure clearance process, also serve the interests of safety. As testified by Colonel

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<sup>366</sup> See "Crocodile Devours Child in the Indio River", (*La Prensa*, 10 April 2007). NR, Vol. II, Annex 25; see also "Crocodile kills 13-year old boy who was bathing in the river", (*La Nación*, 5 May 2007). NR, Vol. II, Annex 26.

<sup>367</sup> García Affidavit, para. 4. NR, Vol. II, Annex 70.

Ricardo Sánchez, a former Commander of the Southern Military Detachment: “For safety reasons, all tourist boats (including those operated by Nicaragua from El Castillo or San Juan del Norte) had to stop at the army post closest to their point of entry onto the river and submit to a safety inspection, which included a determination that the vessel was not carrying any weapons, explosives or other flammable materials.”<sup>368</sup> The treatment is the same for Nicaraguans as well as Costa Ricans<sup>369</sup>.

### 3. *The Prohibition of Navigation at Night*

4.83. As discussed, navigation of the river can be dangerous; navigation at night is much more so. As anyone personally familiar with the river can attest, once the sun sets darkness envelopes the river very quickly. At best, the unaided eye can see ahead only a few metres making it nearly impossible to detect the many obstacles on the river<sup>370</sup>. Very few of the boats on the river have navigation lights, which means not only that they cannot see the water in front of them but also that other boats cannot see them, increasing risks of nighttime collision<sup>371</sup>. Nocturnal navigation is particularly dangerous in the dry season, when the waters of the river are shallow, and sand bars make much of the river close to impassable. If one cannot see the movement of the current, it is extremely difficult to find the navigable paths in the water and avoid the sand bars.

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<sup>368</sup> Sánchez Affidavit, para 7. NR, Vol. II, Annex 77.

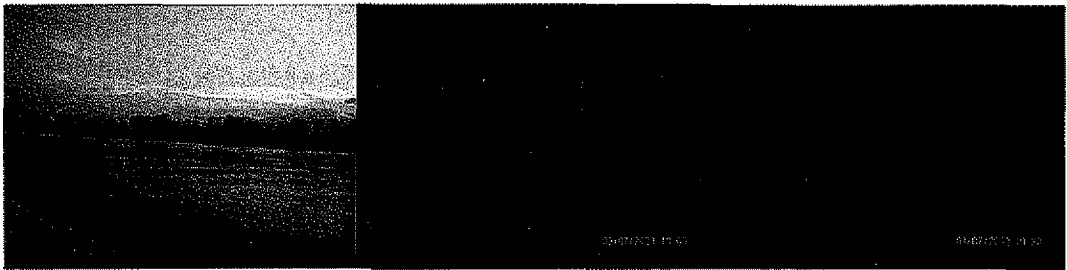
<sup>369</sup> See Membreño Affidavit, para 9. NR, Vol. II, Annex 73; see also Acevedo Affidavit, para 3. NR, Vol. II, Annex 66.

<sup>370</sup> See Largaespada Affidavit, para. 8. NR, Vol. II, Annex 72; see also Membreño Affidavit, para. 9. NR, Vol. II, Annex 73.

<sup>371</sup> *Ibid.*

4.84. The point is emphasized by Brigadier General Membreño, Commander of the Southern Military Detachment between 1992 and 1995:

“[N]avigation is not permitted after dark. This prohibition applies to everyone, Nicaraguans included. The river is treacherous to navigate at night, since there are no lights, and fallen logs and sand bars, invisible in the dark, are prevalent, as are crocodiles. By longstanding custom nighttime navigation of the river has not been practiced, except in emergency situations. Nicaragua authorizes such emergency use of the river at night. Otherwise, it is prohibited mainly for safety reasons.”<sup>372</sup>



*Photographs Above: The photographs above were taken on the San Juan River at 5:40, 6:06, and 6:20 in March, 2008.*

4.85. Nowhere in her written pleadings does Costa Rica deny that navigation on the San Juan River is difficult and dangerous, and even more dangerous at night. In fact, Costa Rica has long recognized that navigation on the river is fraught with risks. As she explained to President Cleveland in 1887: “...it is well known that the navigation of the San Juan River encounters many obstacles, not only on account of the shallowness at certain places, but also owing to its rapids and other dangers”<sup>373</sup>. The natural “obstacles” cited by Costa Rica – shallowness and rapids, both rendering the river impassable in places – have not disappeared in the past 120 years. Nor have the crocodiles. Nor has the darkness that descends at

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<sup>372</sup> See Largaespada Affidavit, para. 8. NR, Vol. II, Annex 72; see also Membreño Affidavit, para. 9. NR, Vol. II, Annex 73.

<sup>373</sup> Argument of Costa Rica, *op. cit.*, pp. 160-161. NR, Vol. II, Annex 5.

night become any more penetrable. These facts are well known to Costa Rica, making it disingenuous for her to challenge Nicaragua's promotion of navigational safety, and the protection of human lives, by prohibiting navigation on the river after dark, except in emergencies.

#### D. BORDER PROTECTION AND SECURITY

4.86. It is undisputed that the San Juan River is part of Nicaragua's sovereign territory. To enter the river from Costa Rica is to cross an international border and enter Nicaragua herself. As does every sovereign State, Nicaragua maintains certain requirements to regulate entry into her territory.

##### 1. *Immigration Controls*

4.87. Nicaraguan immigration officials at the border posts along the San Juan River follow the same procedures that are followed at all other border entry points. Just as all non-nationals are required to obtain a tourist card when entering Nicaragua at the Managua International Airport, or at other points of entry, so too when they enter Nicaragua via the San Juan. Contrary to Costa Rica's assertions that this policy began only in the mid-1990s, it was actually established as early as 1979, if not earlier, under Decree No. 161<sup>374</sup>. The decree required all foreign travellers to secure a special tourist card when entering Nicaraguan territory. The cost of the tourist card has varied over time. The current cost is US\$ 5<sup>375</sup>. The requirement is the same for all non-Nicaraguan

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<sup>374</sup> See Nicaragua, Decree No. 161, 14 Nov. 1979. NR, Vol. II, Annex 52.

<sup>375</sup> See Nicaragua, Law No. 495: General Tourism Law, 2 July 2004, Art. 21(e). NR, Vol. II, Annex 55; *see also* Nicaragua, Register No. 3743. NR, Vol. II, Annex 53.

nationals, regardless of their country of origin. Many States impose similar requirements, or charge higher fees<sup>376</sup>.

4.88. Nicaragua makes an exception for residents of Costa Rican riparian communities, who are treated like Nicaraguans insofar as their navigation on the San Juan is concerned<sup>377</sup>. In fact, as testified by Franklin Ponce Ortiz, Immigration Dispatch Inspector for San Juan River Province: “[I]mmigration authorities on the river do not regulate the local residents. River residents, for their own safety and for the security of the territory, are simply required to register with the military officials when they pass a military post”<sup>378</sup>. According to Army Captain Mario García López, Chief of the Second Border Sector of the San Juan River:

“Nicaragua does not require the Costa Rican residents along the river to have their boats inspected, or to pay a fee for a departure clearance certificate, or to register with Nicaraguan immigration, or to have a consular visa when they navigate on the San Juan River. If a resident passes a military post, he is required to simply notify the post of his passage. All local residents are provided a courtesy departure certificate for their regular use of the river, which is valid for one month and is permanently renewable.”<sup>379</sup>

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<sup>376</sup> See, e.g., United States Department of State, “Fees for Visa Services,” available at: [http://travel.state.gov/visa/temp/types/types\\_1263.html](http://travel.state.gov/visa/temp/types/types_1263.html); see also Dutch Ministry of Foreign Affairs, “Applying for a visa,” available at: [http://www.minbuza.nl/en/welcome/comingtoNL\\_visas\\_x\\_consular\\_services/applying\\_for\\_a\\_visa.html](http://www.minbuza.nl/en/welcome/comingtoNL_visas_x_consular_services/applying_for_a_visa.html); see also Ministry of Foreign Relations of Colombia, “Procedural information for visas,” available at: <http://www.cancilleria.gov.co/WebContentManager/webapp/display.jsp?sid=22501&pid=16936&Op=1>; see also Ministry of Foreign Relations of the Republic of El Salvador, “Types of Visas CA4,” available at [http://www.rree.gob.sv/sitio/sitioweb/rree.nsf/pages/svisas\\_tiposca4](http://www.rree.gob.sv/sitio/sitioweb/rree.nsf/pages/svisas_tiposca4).

<sup>377</sup> See Talavera Affidavit, para. 8. NR, Vol. II, Annex 78; see also García Affidavit, para. 4. NR, Vol. II, Annex 70, see also Membrefío Affidavit, para 9. NR, Vol. II, Annex 73.

<sup>378</sup> Affidavit of Franklin Ponce Ortiz, 7 March 2008 (hereinafter “Ponce Affidavit”), para. 4. NR, Vol. II, Annex 76.

<sup>379</sup> García Affidavit, para. 6. NR, Vol. II, Annex 70.



4.89. Likewise, Nicaragua presently exempts from her immigration regulations and procedures the Costa Rican merchants who regularly use the river to transport goods from one community to another, since they are also local residents who are exempt from immigration requirements on that basis. During the last ten years, there have been approximately four Costa Rican boatmen regularly transporting goods on the river<sup>380</sup>. One transports and sells boat fuel from Puerto Viejo de Sarapiquí to local boat operators. Another owns a small “mom and pop” grocery store in La Tigra, on the Costa Rican bank, and uses the river to resupply his wares<sup>381</sup>. There are two other Costa Rican boatmen who ship shellfish from San Juan del Norte, Nicaragua to Puerto Lindo, Costa Rica<sup>382</sup>. None of these Costa Rican commercial boatmen is required to secure a tourist card, to obtain a Nicaraguan visa, or to pay for a departure clearance certificate<sup>383</sup>.

4.90. In addition to the tourist cards, which Nicaragua requires of all non-nationals (except as indicated above), entry into Nicaragua also requires a valid visa, depending on the country of origin. Local Costa Rican residents and commercial boatmen are exempt from the visa requirement, as well as the tourist card requirement. Notably, the entry visa requirement affects very few of the foreign tourists who enter Nicaragua via the San Juan River, including the tourists who enter in Costa Rican tourism boats. Nicaragua requires entry visas for the

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<sup>380</sup> See Acevedo Affidavit, para 2. NR, Vol. II, Annex 66; *see also* García Affidavit, para. 3. NR, Vol. II, Annex 70.

<sup>381</sup> See García Affidavit, para. 7. NR, Vol. II, Annex 70.

<sup>382</sup> See Acevedo Affidavit, para 2. NR, Vol. II, Annex 66.

<sup>383</sup> See García Affidavit, para. 4. NR, Vol. II, Annex 70.

nationals of only a very small number of States who frequent the river<sup>384</sup>. As testified by Colonel Sánchez, who commanded the Southern Military Detachment from 2002 to 2007: “Very rarely were [tourists] required to show a Nicaraguan visa, because Nicaragua does not require tourists from North America, member countries of the European Union, Canada or Australia to obtain visas, and almost all of the tourists on these vessels were from those countries, with very few exceptions.”<sup>385</sup> Costa Rica has not demonstrated that the tourist card or visa requirements have discouraged tourists from coming to the San Juan. Indeed, she has provided no evidence whatsoever to support this claim. Nicaragua’s evidence thoroughly refutes it. As shown earlier in at paragraph 4.33 and the accompanying table, Costa Rican tourism to the San Juan actually experienced a substantial growth between 1998 and 2004, while these Nicaraguan immigration measures were in effect. Thus, in contrast to the unsupported claims made by Costa Rica that Nicaragua’s immigration requirements have “practically destroyed” tourism to the San Juan<sup>386</sup>, tourism on Costa Rican vessels has quite obviously continued to flourish.

4.91. With the exception of residents of local settlements and commercial boatmen, Nicaragua requires Costa Rican nationals to have an entry visa to enter Nicaragua. The requirement that non-local Costa Ricans have a consular visa to enter Nicaragua is based on reciprocity. Costa Rica requires an entry visa from all Nicaraguan travellers entering Costa Rica.

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<sup>384</sup> See Nicaragua, Decree No. 57-2005, 31 August 2005. NR, Vol. II, Annex 56. Decree No. 57-2005 delineated three immigration categories. The majority of States whose nationals visit Nicaragua are listed under Category A.

<sup>385</sup> Sánchez Affidavit, para. 7. NR, Vol. II, Annex 77.

<sup>386</sup> CRR, para. 4.12(iii).

## 2. *The Requirement To Fly the Nicaraguan Flag*

4.92. Nicaragua has required certain larger vessels to fly the Nicaraguan flag while navigating on the San Juan River. The requirement has only been applied to those vessels that have masts or turrets at the stern<sup>387</sup>. This excludes local residents and commercial traders who generally travel in small wooden *pangas* (simple rudimentary boats, generally with a single outboard motor) which lack the means to display flags. According to Colonel Ricardo Sanchez, a former military Commander for the region: “In practice, this meant only that the Costa Rican tour boats kept a Nicaraguan flag on board, and hoisted it during the time they were on the San Juan”<sup>388</sup>. The inconvenience imposed on Costa Rican boats is therefore trivial. The requirement is known by all boat operators who use the river, and has never impeded navigation. Costa Rica has not identified a single incident in which Nicaraguan authorities prevented a Costa Rican vessel from navigation on the San Juan because of failure or refusal to display a Nicaraguan flag.

4.93. The requirement to fly her flag during navigation on her waters, including the San Juan, is an attribute of Nicaragua’s sovereignty, and is a matter of international custom and practice. Nicaragua permits foreign vessels to fly their flags of registry while navigating on the San Juan, as well as the Nicaraguan flag. Thus, Costa Rican vessels may and do fly the Costa Rican flag, as well as that of Nicaragua. Flying the latter is a gesture of respect for the sovereignty of the host State. Nicaragua finds it disturbing that Costa Rica’s objects to this reasonable and non-burdensome requirement. It is emblematic of Costa Rica’s repeated

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<sup>387</sup> See Action Plan, *op. cit.*, Art. 6. NR, Vol. II, Annex 48,

<sup>388</sup> Sánchez Affidavit, para. 7. NR, Vol. II, Annex 77.

efforts, since 1998, to expand her “rights” on the San Juan at Nicaragua’s expense. Particularly troubling are Costa Rican attempts, through her government-supported tourism promotion efforts, to depict the San Juan River as part of Costa Rica. In 1999, for example, the Nicaraguan Minister of Tourism protested that a Costa Rican travel agency was promoting its San Juan River tours with a map depicting the river as belonging to Costa Rica<sup>389</sup>.

4.94. Costa Rica’s *Application* makes no reference to Nicaragua’s requirement that all foreign vessels fly the Nicaraguan flag (as well as their own) while navigating on the San Juan. The *Application* makes no claim that this is a violation of her rights, let alone of her right of navigation under the Treaty of Limits. Rather, the claim post-dates the *Application*, and is styled by the Applicant State as a form of harassment that Nicaragua invented to punish Costa Rica for bringing this case to the Court. Nicaragua rejects this suggestion, as well as Costa Rica’s implication of bad faith on her part. In fact, Nicaragua’s flag requirement has deep historic roots, of which Costa Rica cannot help but be aware. In her pleadings to President Cleveland in 1887, Costa Rica referred approvingly to a note of protest that Nicaragua sent to the Government of the United States of America in Washington, dated 7 October 1863. In this note, Nicaragua protested that the flag of the United States had been used while navigating on the San Juan, declaring that: “Nicaragua does not feel disposed to consent that any other flag, *except her own and that of Costa Rica*, as a bordering state, should float in the navigation of her interior waters”<sup>390</sup>. As Costa Rica’s

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<sup>389</sup> See “Another Costa Rican Map ‘Takes the River’”, (*El Nuevo Diario*, 26 August 1999). NR, Vol. II, Annex 23; see also Letter from Eduardo Montealegre, Foreign Minister of Nicaragua, to Lorenzo Guerrero, Director of the Nicaraguan Institute of Tourism, 1 September 1999 and Email from Alfredo Ferreti Lugo, Secretary General of the Nicaraguan Institute of Tourism, to Caño Blanco Marina, 13 September 1999. NR, Vol. II, Annex 14.

<sup>390</sup> Argument of Costa Rica, *op. cit.*, p. 251. NR, Vol. II, Annex 5 (emphasis added).

own pleadings to the Arbitrator acknowledge, since at least 1863, shortly after the Treaty of Limits was executed, Nicaragua has considered it inherent in her sovereign rights over her own “interior waters,” including the San Juan River, to decide whose flag may fly on vessels navigating in those waters, and she has carefully indicated that hers *together with* Costa Rica’s (not that of Costa Rica alone) could be flown over the San Juan.

4.95. Costa Rica contends in the *Reply* that the comparison in the *Counter-Memorial* between the rules of the law of the sea and those governing river navigation is “extravagant”<sup>391</sup>. But why so? To the contrary, it is both reasonable and appropriate to assimilate navigation on a river, over which a State is acknowledged to have exclusive dominion and supreme control (*sumo imperio*), with internal waters or territorial seas. As the Court recalled in its 1986 *Judgment* in *Nicaragua v. United States of America*:

“The basic legal concepts of State sovereignty in customary international law, expressed in, inter alia, Article 2, paragraph 1, of the United Nations Charter, extends to the internal waters and territorial sea of every State and to the air space about its territory. [...T]he 1944 Chicago Convention on International Civil Aviation ... in conjunction with the 1958 Geneva Convention on the Territorial Sea, further specifies that the sovereignty of the coastal State extends to the territorial sea and to the air space above it, as does the United Nations Convention on the Law of the Sea adopted on 10 December 1982. The Court has no doubt that these prescriptions of treaty-law merely respond to firmly established and longstanding tenets of customary international law.”<sup>392</sup>

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<sup>391</sup> CRR, p. 81, para. 3.107.

<sup>392</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, merits, judgment of 27 June 1986, *ICJ Reports* 1986, p. 111, para. 212.

Clearly the same holds true regarding rivers in which a riparian has exclusive jurisdiction and sovereignty – as is the case of Nicaragua and the San Juan, as explicitly provided in Article VI of the 1858 Treaty of Limits.

4.96. In sum, by requesting foreign States – including Costa Rica – to fly her own flag, together with theirs, Nicaragua is merely exercising her sovereignty over the river, without by any means impeding navigation. Nicaragua's flag requirement violates no rights of Costa Rica.

### **Conclusion**

4.97. Each and every one of the regulations with which Costa Rica takes issue is expressly designed and implemented to protect Nicaragua's legitimate sovereign interests. They have also been crafted to avoid imposing any significant or unreasonable burdens on Costa Rica or her nationals; and in fact, no material burdens have been imposed. The regulations protect not only Nicaragua but also the people who enter the river expecting a safe journey, the local residents who desire a secure neighbourhood, and the members of the international community who place great value on conserving the river's rich biological diversity for future generations. As shown:

- a. The requirement that all persons navigating on the river report to Nicaraguan border posts is a reasonable measure to protect the environment, prevent criminal activity, and ensure navigational safety;
- b. The requirement that all vessels obtain a departure clearance certificate is also a reasonable measure to protect the environment, prevent criminal activity and secure navigational safety;

- c. The prohibition of navigation at night (except in emergencies) is a reasonable measure to protect the environment, prevent criminal activity, and secure navigational safety;
- d. The prohibition on fishing from boats on the river is a reasonable measure to protect the environment;
- e. The requirement that persons entering the river undergo immigration processing is a reasonable measure to protect Nicaragua's borders and her sovereignty; and
- f. The requirement that vessels of a certain size fly the Nicaraguan flag - as well as their flag of registry -- is a reasonable measure to manifest and protect Nicaragua's sovereignty over the river.

4.98. Nicaragua takes her obligation to safeguard the river, its users and residents, and its environment seriously and has designed her regulations to meet this responsibility. That Costa Rica wishes to sidestep these regulations because she finds them somehow inconvenient, or inconsistent with her own pretensions to extend her "rights" over the river, is clear. However, Costa Rica's desire to exempt herself from these basic environmental, security, safety and border protection measures cannot diminish Nicaragua's right, as the exclusive sovereign power, to reasonably regulate navigation on the San Juan River.

## CHAPTER V:

### COSTA RICA'S ALLEGED RIGHTS OF PROTECTION, CUSTODY AND DEFENCE OF THE SAN JUAN RIVER

#### Introduction

5.1. Through the vehicle of this case, Costa Rica seeks to expand her rights under the 1858 Treaty, as interpreted in the 1888 Cleveland Award, to an extent that would negate Nicaragua's "exclusive dominion and supreme control (*sumo imperio*) over the waters of the San Juan river" for all practical purposes<sup>393</sup>. Her *Reply* provides further proof of Costa Rica's refusal to accept that this waterway is wholly within Nicaraguan territory, and therefore under Nicaragua's sovereignty.

5.2. Thus, Costa Rica continues to base rights on the shifting sands of non-binding documents and inapposite cases, and to conjure rights from provisions of the 1858 Treaty and the Cleveland Award that grant no such rights at all.

5.3. By claiming this broad array of rights on the San Juan River, Costa Rica effectively claims shared sovereignty over the river. Since a direct and open claim to this effect would be precluded by the 1858 Treaty<sup>394</sup>, Costa Rica seeks to attain her objective through a multiplicity of lesser, yet still quite significant, claims – a "death by a thousand cuts" strategy that she evidently believes will enable her to attain her goal.

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<sup>393</sup> "Costa Rica-Nicaragua Treaty of Limits (Cañas-Jerez), 15 April 1858", in *Argument on the Question of the Validity of the Treaty of Limits between Costa Rica and Nicaragua*, Washington: Gibson Bros., 1887, Document No. 1, Article VI (hereinafter "1858 Treaty (English version submitted to President Cleveland by Costa Rica)"). CRM, Vol. II, Annex 7(b), p. 50.

<sup>394</sup> *See ibid.*



5.4. She should not be permitted to do so. Giving effect to Costa Rica's claimed rights of protection, custody and defence would render entirely illusory the *quid pro quo* embodied in the 1858 Treaty, which as shown in Chapter II, Section I, legitimized the annexation by Costa Rica in 1824 of the large district of Nicoya (Guanacaste) in return for recognition of Nicaragua's exclusive sovereignty over the San Juan River. More fundamentally, validation of these claims would negate Nicaragua's sovereignty over the river, treating it as if the boundary followed the median line rather than the right bank. The injustice of such a result is obvious, but Costa Rica nevertheless continues to seek it, or its functional equivalent.

5.5. This chapter will show that, as to the scope of the rights claimed by Costa Rica to use the San Juan River, the *Reply* fails to rebut Nicaragua's *Counter-Memorial*. In particular, it will be shown that Costa Rica has no right to perform police functions on the San Juan River, or to navigate the river with vessels of her public security forces except to the limited extent recognized in the Cleveland Award: with vessels of her revenue service, when (and only when) such navigation is necessary to protect her right to navigate "*con objetos de comercio*." The chapter will also demonstrate that Costa Rica has never sought to exercise this right, and that, in any event, Nicaragua has never denied or breached it.

## **Section I. The Scope of Costa Rica's Alleged Rights**

### **A. COSTA RICA'S ALLEGED RIGHTS HAVE NO BASIS IN WHAT SHE CHARACTERIZES AS THE "APPLICABLE LAW"**

5.6. Costa Rica recites a litany of authorities under the heading, "Applicable Law" -- the same sources she referred to in her *Memorial* in this regard -- in her effort to establish "public rights of protection, custody and defence." These

sources are no more availing for Costa Rica than they were when first cited; Costa Rica fails to refute Nicaragua's challenges to them.

*1. Article IV of the Treaty of Limits*

5.7. Costa Rica first alleges that her "public rights of protection, custody and defence are established in Article IV of the Treaty of Limits," and that "[t]hese rights have implications for Costa Rica's navigation on the San Juan"<sup>395</sup>. That Article -- whose actual text, perhaps understandably, Costa Rica does not quote in the *Reply* to substantiate the above contentions -- for the most part lays down obligations, not "rights" as they are characterized by Costa Rica. It provides as follows:

"Article IV.

The Bay of San Juan del Norte, as well as the Salinas Bay, shall be common to both Republics, and, therefore, both the advantages of their use and the obligation to contribute to their defence shall also be common. Costa Rica shall be bound, as far as the portion of the banks of the San Juan river which correspond to it is concerned, to contribute to its custody in the same way as the two Republics shall contribute to the defence of the river in case of external aggression; and this they shall do with all the efficiency within their reach."<sup>396</sup>

5.8. Article IV is straightforward. It begins by addressing the bays at the Atlantic (Caribbean) and Pacific ends of the border between the two countries. It

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<sup>395</sup> CRR, para. 3.79.

<sup>396</sup> 1858 Treaty (English translation submitted to President Cleveland by Costa Rica), Article IV. CRM, Vol. II, Annex 7(b), p. 49.

provides that since both bays are “common” to the two States,<sup>397</sup> each has rights (“advantages of their use”) and duties (“the obligation to contribute to their defence”) in respect of the bays. The Article then goes on to address the portion of the San Juan River where the right bank forms the boundary. It provides that Costa Rica has two obligations regarding this portion of the river. First, she has an obligation to contribute to the custody of the river “as far as the portion of the banks of the San Juan river which correspond to it is concerned.”<sup>398</sup> Second, she has an obligation, with Nicaragua, to “contribute to the defence of the river in case of external aggression.”

5.9. Costa Rica seeks to make these very limited rights and obligations the basis of greatly expanded rights of navigation on the San Juan River with vessels of her public security forces. As made clear in the *Counter-Memorial*<sup>399</sup>, such rights would be incompatible not only with Nicaragua’s sovereignty over the San Juan, but also with President Cleveland’s decision that Costa Rica has no right to navigate on the river with vessels of war, and that only vessels of Costa Rica’s revenue service may use the river, and only then when necessary to protect the right to navigate “*con objetos de comercio*.”

5.10. Contrary to Costa Rica’s inflated contentions, the ordinary meaning of the terms of Article IV, in their context and in the light of the Treaty’s main object and purpose (the establishment of a boundary), is that while Costa Rica may

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<sup>397</sup> The question is presently not at issue before the Court, but the extent of the “common” nature of the Bay of San Juan was limited by the Cleveland Award and it was left in the delimitation executed by the Alexander Awards totally within Nicaraguan territory. The other “common” Bay of Salinas was partially delimited by the Alexander Awards. When the term “common” bays is used in these pleadings by Nicaragua, it is in this special sense.

<sup>398</sup> 1858 Treaty (English translation submitted to President Cleveland by Costa Rica), Article IV. CRM, Vol. II, Annex 7(b), p. 49.

<sup>399</sup> See NCM, paras. 4.2.28-4.2.35.

defend the two bays using vessels -- since “the advantages of their use and the obligation to contribute to their defence [are] common” and the Bay of San Juan in 1858 was accessible by sea -- she may discharge her obligations to contribute to the river’s custody (“*guarda*”) and defence only from her own banks, and only “in case of external aggression.”

5.11. As noted in the *Counter-Memorial*<sup>400</sup>, this interpretation is confirmed by the second report of Assistant Secretary of State George L. Rives, to whom President Cleveland delegated the task of preparing a draft of his arbitral award. In a passage set forth in the *Counter-Memorial*, a portion of which is worth repeating here, Rives said of Article IV of the treaty:

“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. . . . 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.”<sup>401</sup> (Emphasis in original)

5.12. This interpretation of the relevant portion of Article IV would seem to be the only one possible in light of (a) Nicaragua’s exclusive sovereignty over the river under the 1858 Treaty, (b) the prohibition of navigation on the river by Costa Rican warships under the Cleveland Award, and (c) the restriction of navigation by Costa Rican revenue vessels (which are not defence vessels) to

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<sup>400</sup> See NCM, para. 4.2.31.

<sup>401</sup> Report of George L. Rives (Second) (hereinafter “Rives Report”), pp. 211-212 of original handwritten version. NCM, Vol. II, Annex 71, p. 251.

circumstances related to and connected with, or necessary to the protection of, navigation “*con objetos de comercio*,” also under the Cleveland Award.

5.13. Costa Rica, however, does not respond to Rives’ analysis directly, confining herself to the statement that “‘within its reach’ does not necessarily correspond to ‘from its shore’. It could equally well mean that each State shall act with maximum efficiency.”<sup>402</sup> Costa Rica explains neither the implications of such an interpretation nor how the interpretation can be squared with the contemporaneous one made by Rives, as a neutral third party tasked with proposing a resolution of the dispute, or with President Cleveland’s outright rejection of her pretension to navigate on the San Juan with military vessels.

5.14. Therefore, contrary to Costa Rica’s contention, Article IV of the Treaty of Limits has no “implications for Costa Rica’s navigation on the San Juan.”

## 2. *Article VI of the Treaty of Limits*

5.15. After making the contention regarding Article IV of the Treaty of Limits discussed above, Costa Rica states in her *Reply*: “Moreover, Article VI establishes a perpetual right of free navigation for Costa Rica, *which of course includes navigation with public vessels*. This was recognized by the Second Article of the Cleveland Award . . . .”<sup>403</sup>

5.16. It is true that Article VI provides that “the Republic of Costa Rica shall have the perpetual right of free navigation” on the San Juan River. But what is

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<sup>402</sup> CRR, para. 3.93.

<sup>403</sup> CRR, para. 3.79 (emphasis added).

inconvenient for Costa Rica is that Article VI says nothing about public vessels. Instead, it refers only to free navigation “*con objetos de comercio*”: “*pero la República de Costa-Rica tendrá en dichas aguas, los derechos perpetuos de libre navegación, . . . con objetos de comercio . . .* (but the Republic of Costa Rica shall have perpetual rights, in the said waters; of free navigation ... for the purposes of commerce)”<sup>404</sup>

5.17. Rights of free navigation with articles of trade (or even for purposes of commerce, as per Costa Rica’s translation) are not exercised by Costa Rican public vessels, either today or in the mid-nineteenth century<sup>405</sup>. Perhaps realizing this, Costa Rica seeks refuge, not in Article VI itself, but in the Cleveland Award.

5.18. Costa Rica relies in this connection on the *Second* paragraph of the Cleveland Award. But she satisfies herself with merely quoting that paragraph, and adding that the paragraph “recognised” that a “right of free navigation for Costa Rica . . . of course includes navigation with public vessels”<sup>406</sup>. How the *Second* paragraph of the Cleveland Award<sup>407</sup> recognizes a right of “navigation with public vessels,” or what kinds of public vessels other than those of the revenue service that are specifically mentioned, Costa Rica does not explain. This contention therefore remains an unsupported allegation.

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<sup>404</sup> Costa Rica-Nicaragua Treaty of Limits (Jerez-Cañías), 15 April 1858, in *Colección de las Leyes, Decretos y Ordenes expedidos por los Supremos Poderes Legislativo y Ejecutivo de Costa Rica en el año de 1858* (hereinafter “1858 Treaty (original Spanish version)”), Tomo XV., 1871, Article VI. CRM, Vol. II, Annex 7(a), pp. 41-42.

<sup>405</sup> See NCM, para. 4.2.8.

<sup>406</sup> CRR, para. 3.79.

<sup>407</sup> Quoted in *ibid.*

5.19. And it is an allegation that is especially unsupportable in light of the question that Costa Rica put to President Cleveland at the arbitration, and his response to it. After quoting Article VI of the Treaty, Costa Rica asked President Cleveland: “Does this mean that Costa Rica cannot under any circumstances navigate with public vessels in the said waters, whether said vessel is properly a man-of-war, or simply a revenue cutter, or any other vessel intended to prevent smuggling, or to carry orders to the authorities of the bordering districts, or for any other purpose not exactly within the meaning of transportation of merchandise?”<sup>408</sup> President Cleveland’s response was to recognize *no* general right of Costa Rica to navigate with her public vessels on the San Juan River; instead he recognized only a right to navigate with vessels of the Costa Rican “revenue service,” and only then as necessary for the “protection” of navigation “for purposes of commerce”. This language plainly excluded the uses of the river identified by Costa Rica in her question to the Arbitrator, such as “to carry orders to the authorities of the bordering districts” or even “to prevent smuggling,” since the revenue service vessels that President Cleveland permitted to navigate on the river had to be “related to and connected with her enjoyment of the ‘purposes of commerce.’”

5.20. Any other navigation rights accorded to Costa Rican public vessels, including vessels of her police or border security forces, would be inconsistent with Nicaragua’s entitlement -- under the Cleveland Award -- to exclusive dominion and supreme control (*sumo imperio*) over the river. This was recognized by President Cleveland, and it explains why he limited the use of the river by Costa Rican public vessels to those of the revenue service engaged in the protection of her right under Article VI of the 1858 Treaty to navigate “*con*

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<sup>408</sup> Argument of Costa Rica, *op. cit.*, p. 155. NR, Vol. II, Annex 5 (emphasis added).

*objetos de comercio.*” Nevertheless, Costa Rica now asks the Court to adjudge and declare that Nicaragua has: “the obligation to allow Costa Rican official vessels the right to navigate the San Juan, including for purposes of re-supply and exchange of personnel of the border posts along the right bank of the River with their official equipment, including service arms and ammunition, and for the purposes of protection as established in the relevant instruments, and in particular article 2 of the Cleveland Award.”<sup>409</sup> Costa Rica hopes the Court will not notice that she made virtually the same request of President Cleveland 130 years ago, and that he rejected it.

### 3. *Other Documents Invoked by Costa Rica*

5.21. Costa Rica expands her argument beyond the 1858 Treaty and the Cleveland Award, and invokes a number of other sources she alleges to be part of the “applicable law”<sup>410</sup>. This is curious in light of the parties’ agreement that the scope of Costa Rica’s navigational rights must be determined by reference to the Treaty of 1858 and the 1888 Cleveland Award. At paragraph 1.18 of the *Reply*, for example, Costa Rica correctly states that “the parties agree that Costa Rica’s navigational rights are defined by the 1858 Treaty and the 1888 Cleveland Award.” The point is significant because even as Costa Rica admits that the scope of her navigation rights is defined by the Treaty of 1858 and the Cleveland Award, she consistently seeks to expand those rights beyond the obvious limitations those instruments establish.

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<sup>409</sup> CRM, Submissions, 2(g).

<sup>410</sup> These sources are discussed in NCM, paras. 3.2.1-3.2.14.



5.22. To this end, Costa Rica invokes three additional instruments, calling them “relevant” without saying how they are relevant, or apposite, to the present case<sup>411</sup>. Costa Rica in fact refers to only one of them -- the Cuadra-Lizano Joint Communiqué of 30 July 1998<sup>412</sup>, discussed in Chapter II, Section II, and again below at paragraphs 5.94-5.99 -- in attempting to answer Nicaragua’s arguments. These instruments were all shown to be unhelpful to Costa Rica’s case in the *Counter-Memorial*<sup>413</sup> and again in Chapter II, Section II, of this *Rejoinder*; the *Reply* fails to breathe any life into them.

B. COSTA RICA’S RESPONSE TO THE ANALYSIS IN THE *COUNTER-MEMORIAL* IS  
NO ANSWER TO NICARAGUA’S ARGUMENTS

5.23. Costa Rica attempts to answer Nicaragua’s analysis of why she lacks “public rights of protection, custody and defence” of the kind she asserts<sup>414</sup>. These attempts will be shown to be ineffective in the following paragraphs.

5.24. Costa Rica asserts four reasons that she contends “militate in favour of a right of navigation on the San Juan by Costa Rican public vessels carrying police with normal arms.”<sup>415</sup> These “reasons” constitute assertions that Costa Rica, for the most part, makes no attempt to substantiate.

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<sup>411</sup> See CRR, para. 3.81.

<sup>412</sup> See “Ministry of Defence of Nicaragua – Ministry of Government, Police and Public Security of Costa Rica, Joint Communiqué (Cuadra-Lizano), Managua, 30 July 1998” (hereinafter “Cuadra-Lizano Communiqué”). CRM, Vol. II, Annex 28.

<sup>413</sup> See NCM, paras. 3.2.1-3.2.14.

<sup>414</sup> See CRR, paras. 3.86-3.94.

<sup>415</sup> CRR, para. 3.86.

5.25. “The first [of the reasons cited by Costa Rica] is that the re-supply of posts is covered by the right of free navigation for purposes of commerce in Article VI of the 1858 Treaty.”<sup>416</sup> One would expect that such a remarkable assertion -- and it would be remarkable even if “*con objetos de comercio*” were properly translated as “for purposes of commerce” -- would then be explained and documented. But it is not. Instead, Costa Rica simply refers to her *Memorial*, which itself fails to show any logical or treaty-supported linkage between the “right of free navigation for purposes of commerce” on the one hand, and the “re-supply of [police] posts” on the other. Certainly, President Cleveland found no such linkage.

5.26. Without further explanation, the *Reply* proceeds directly to the second reason. “The second [reason] is that navigation under Article VI of the 1858 Treaty cannot be effectively protected without the use of such boats.”<sup>417</sup> Why not? Costa Rica never explains why protection of her right under Article VI -- the right to navigate “*con objetos de comercio*” -- requires the presence on the river of vessels of her police or other public forces, apart from those of her revenue service, whose use of the river President Cleveland expressly authorized, but only when necessary to protect Costa Rica’s right to navigate “*con objetos de comercio*.” By expressly limiting Costa Rica’s use of the river to vessels of the revenue service, he necessarily excluded use by other public vessels, especially for purposes other than commerce. Finally on this point, it might be wondered why and from whom “navigation under Article VI of the 1858 Treaty” -- i.e., navigation “*con objetos de comercio*” -- would require protection. Costa Rica does not clarify this point, but presumably she does not mean such navigation

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<sup>416</sup> *Idem*.

<sup>417</sup> *Ibid*.

would require protection from Nicaragua. In any event, it is Nicaragua, as the exclusive sovereign over the river, that has both the right and responsibility to provide police protection of navigation on the river.

5.27. Costa Rica's third reason is "for the defence of the common border and the common bays under Article IV of the Treaty"<sup>418</sup>. This argument has already been shown to be without merit<sup>419</sup>. In addition, Article IV itself specifically makes separate provision for each of the two sectors -- the bays and "the banks of the San Juan river." As has been demonstrated<sup>420</sup>, Costa Rica may discharge her obligations to "protect" the San Juan River -- i.e., to contribute to the river's custody ("*guarda*") and defence -- only from her own banks, and only "in case of external aggression"<sup>421</sup>.

5.28. The fourth reason given by Costa Rica for a "right of navigation on the San Juan by Costa Rican public vessels carrying police with normal arms" is that "it would be impossible, without adequate re-supplying of the border posts, to prevent or deter unlawful activities in the (land) border area (smuggling, trafficking in persons). It would also be impossible to fulfil official acts such as police investigations in a timely manner."<sup>422</sup>

5.29. Even assuming everything Costa Rica asserts in the above-quoted language is true, which is not proven (indeed, Costa Rica submits no proof

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<sup>418</sup> CRR, para. 3.86.

<sup>419</sup> See NR, paras. 5.8-5.14.

<sup>420</sup> See *ibid.*

<sup>421</sup> 1858 Treaty (English translation submitted to President Cleveland by Costa Rica), Article IV. CRM, Vol. II, Annex 7(b), p. 49.

<sup>422</sup> CRR, para. 3.86.

whatsoever in support of this assertion), it would hardly constitute a legal justification for entering Nicaragua's sovereign territory and utilizing that territory to perform functions that should be performed on Costa Rican territory. This reason is part of the theme of Costa Rica's case: needs (even on land, and even though unproven) create rights (on the river). Obviously, they do not.

5.30. Moreover, the evidence shows that there is not even a need for Costa Rica to re-supply her border posts via the San Juan River. On the contrary, there is incontestable proof -- found in Costa Rica's own Annexes, as will be described below -- that she is able to re-supply her border posts along the right bank of the San Juan by land, and in fact does so. According to the Nicaraguan Army officer responsible for the San Juan River Province, "the Costa Rican Civil Guard usually re-supplies its posts by land, for which purpose they have feeder roads"<sup>423</sup>. Further, "he has even observed that a highway is being built in their territory, running parallel to the San Juan River"<sup>424</sup>. In fact, the roads to Costa Rica's border posts are depicted on Costa Rican maps, including the one shown in paragraph 5.98. Thus it seems clear that there is not even a need, let alone a right, for Costa Rica to re-supply her border posts via the river.

5.31. Costa Rica makes much fuss about Nicaragua's Presidential Decree No. 65-2005 of 28 September 2005, citing a press report of October 1, 2005, which she says has "aggravated" the "situation"<sup>425</sup>. Costa Rica reproduces several of the operative paragraphs of the decree, which is entitled "The Government of Nicaragua will not allow Armed Navigation of Foreign Forces in Nicaraguan

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<sup>423</sup> Affidavit of Colonel Ricardo Sánchez Méndez, 7 December 2006. NCM, Annex 91, p. 322.

<sup>424</sup> *Ibid.*

<sup>425</sup> CRR, para. 3.87.

Territorial Waters”<sup>426</sup>. Not surprisingly, Costa Rica omits the preambular paragraphs of this decree entirely. These paragraphs explain the motives for the decree, including the following:

“IV

After the time limit fixed in the Declaration of Alajuela, of September 26, 2002 expired, Costa Rican authorities have resumed an intense campaign along with statements made by some officials, with the claim of carrying out armed navigation in Nicaragua’s San Juan River.

V

Any claim from foreign forces to carry out armed navigation in Nicaraguan sovereign waters constitutes – in itself – a threat to the country’s internal and external peace and safety and lessens the essential interests of its safety.

(...)

VII

The public claim to use the Nicaraguan sovereign waters of the San Juan River for the passing of armed personnel, relief, transportation of weapons, ammunition and any other foreign military or police activity, without an express authorization, constitutes an intolerable challenge to the sovereign attributions of dominion and sovereign jurisdiction that Nicaragua has over its waters along its whole length.

(...)

X

Article III (Sovereignty) Clause 2 of the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and Other Related Materials of November 13, 1997, reads: “A State Party shall not undertake in the territory of another State Party the exercise of jurisdiction and performance of

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<sup>426</sup> CRR, para. 3.88.

functions which are exclusively reserved to the authorities of that other State Party by its domestic law.”<sup>427</sup>

5.32. The decree, therefore, is a perfectly appropriate statement of the obvious: that a State will defend itself against unauthorized incursions by armed personnel of other States.

5.33. Costa Rica’s characterization of it calls for the following remarks: *First*, Costa Rica gives no substantiation other than a single press account for her assertion that a “firing order” was issued<sup>428</sup>. Such serious allegations should be substantiated by official sources, not by sensational press accounts. *Second*, the expression “firing order,” while it might sell newspapers, is inappropriately inflammatory when used in a pleading before the Court. It, in effect, suggests that Nicaraguan officers were authorized to “shoot on sight” when, in fact, by its own terms, the press account in question describes the “order” as “Intercept,

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<sup>427</sup> Nicaraguan Presidential Decree No. 65-2005 of 28 September 2005, Official Gazette No. 188 of September 29, 2005. CRR, Vol. II, Annex 69.

<sup>428</sup> See “Army guards the river”, (*La Prensa*, 1 October 2005). CRM, Annexes, Vol. V, Annex 182, p. 743

(Original Spanish: “...Interceptar, capturar o abrir fuego es la orden que recibió ayer la patrulla nicaragüense de vigilancia del río San Juan, en caso de avistar una embarcación con guardia ticos armados.

Enarbolando la Bandera de Nicaragua, azul y blanco, la lancha del Ejército Nacional recibió ayer la voz de zarpe del coronel Ricardo Sánchez, jefe del destacamento sur, para cumplir la misión de proteger la soberanía del río San Juan. La nave reforzó los puestos militares nicaragüenses ubicados en El Castillo, Bartola, Boca de San Carlos, Sarapiquí, Delta y San Juan de Nicaragua.

El capitán Justo José González, jefe de sector fronterizo y de la patrulla de vigilancia en el río, partió al mediodía del viernes junto a un contingente armado y los pertrechos necesarios para cumplir su misión.

El coronel Sánchez dijo que la medida no afectará la vida cotidiana de los colonos ni de los turistas.

‘Inspeccionaremos que se cumpla con el derecho al zarpe y en caso de las embarcaciones costarricenses que ingresan por el río a actividades comerciales y traen turistas, no hay problema, lo que no toleraremos es que la guardia tica ingrese armada’, advirtió el jefe militar.”).

capture or open fire,” clearly treating the latter as a last resort – but one that would be open to any State if armed forces from another State entered its territory without authorization and refused to lay down their arms or leave. *Third*, again by its own terms, the press account relied upon by Costa Rica contains the following quotation from Colonel Ricardo Sánchez of the Nicaraguan Army: “there is no problem if Costa Rican boats navigate in the river, for commercial purposes [the original Spanish expression is not given], or if they bring tourists. But, we will not tolerate that Costa Rican guard enters armed”<sup>429</sup>. In an affidavit given on 7 December 2006, Colonel Sánchez, Chief of the Southern Military Detachment, which had the responsibility to provide security along the San Juan River, states that Costa Rican vessels carrying tourists were indeed permitted to navigate on the San Juan River provided they complied with the applicable Nicaraguan regulatory requirements<sup>430</sup>. Colonel Sanchez further states that “since he has held [his] position, the Costa Rican Civil Guard has not navigated the San Juan de Nicaragua River, nor has he received any permission request to engage in this activity”<sup>431</sup>. *Fourth*, the preamble of the Presidential Decree refers to the fact that “Costa Rican authorities have resumed an intense campaign along with statements made by some officials, with the claim of carrying out armed navigation in Nicaragua’s San Juan River.” Examples of these provocative statements by senior Costa Rican officials are provided below, at paragraphs 5.89-5.91. Given that such armed navigation is not permitted by the 1858 Treaty or the Cleveland Award and that it has been expressly prohibited by Nicaragua, it is only natural in view of Nicaragua’s uncontested sovereignty over the river to regard the unauthorized entry into Nicaraguan territory by armed forces of

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<sup>429</sup> *Ibid.*

<sup>430</sup> See Affidavit of Colonel Ricardo Sánchez Méndez, 7 December 2006. NCM, Vol. II, Annex 91, pp. 321-2.

<sup>431</sup> *Ibid.*

another State as a threat to Nicaraguan territorial integrity and security. Any State would respond as Nicaragua did to such threats to its sovereignty. *Fifth*, after quoting the operative paragraphs of the decree, Costa Rica makes bold to contend that: “This order also amounts to a violation of Article IX of the Cañas-Jérez Treaty, according to which neither Costa Rica nor Nicaragua ‘shall be allowed to commit any act of hostility against the other, whether in the port of San Juan del Norte, or on the San Juan river, or the Lake of Nicaragua’”<sup>432</sup>.

5.34. It is of course Costa Rica that would be “commit[ting] [an] act of hostility against” Nicaragua by entering her territory under arms, not the other way around. It is therefore Costa Rica that would be in violation of Article IX by engaging in armed navigation on the San Juan, not Nicaragua for defending her territory. And this suggests a *sixth* and final observation: Putting the situation in the light most favourable to Costa Rica, there was clearly a serious dispute regarding Costa Rica’s armed navigation on the San Juan River. Why, then, would Costa Rica invite conflict by stating she would do just that?

5.35. Costa Rica next returns to navigation by vessels of the revenue service. She states:

“It may be recalled that under the Second Article of the Cleveland Award navigation by vessels of the Revenue Service is explicitly permitted:

‘as may be related to and connected with [Costa Rica’s] enjoyment of the ‘purposes of commerce’ accorded to her in [Article VI of the 1858 Treaty], or as may be necessary to the protection of said enjoyment.’ (Emphasis added [by Costa Rica].)

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<sup>432</sup> CRR, para. 3.88.



The last part of the phrase clearly points to defence matters. The Central American Court of Justice supported this reading when it pointed out that in the zone of common navigation, merchantmen as well as public revenue vessels have a free course over the River and free access to both banks.”<sup>433</sup>

5.36. It has already been pointed out, in Chapter II, Section II, that the decision of the Central American Court of Justice has no precedential value in the present case, as the Court there was dealing with a different issue<sup>434</sup>. But even if that case were relevant, the Central American Court’s decision will not support Costa Rica’s assertion. That Court did not read the Second Article of the Cleveland Award as conferring rights as to “defence matters.” To the contrary, it understood the Award as permitting use of the river, in Costa Rica’s own words, by “merchantmen” as well as “public revenue vessels”: in other words, vessels engaged in navigation “*con objetos de comercio*” or engaged, as necessary, in the protection of such navigation. This is no more than what President Cleveland decided in 1888. As explained in the *Counter-Memorial*<sup>435</sup>, all of the available evidence points to President Cleveland’s determination to restrict navigation on the San Juan by Costa Rican revenue vessels to the protection of navigation “*con objetos de comercio*,” not to a willingness, on his part, to permit their use for “defence” or related purposes. An examination of the *travaux préparatoires* of the Award, including the Rives report, confirms this conclusion.

5.37. President Cleveland explicitly placed two conditions on Costa Rica regarding navigation by any of her revenue vessels on the San Juan River: *First*,

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<sup>433</sup> CRR, para. 3.89 (footnote omitted).

<sup>434</sup> See NR, paras. 2.124-2.128.

<sup>435</sup> See, e.g., NCM, paras. 3.1.46-3.1.57; 4.2.26-4.2.27.

the vessels must be “related to and connected with her enjoyment of the ‘purposes of commerce’ accorded to her in [Article VI of the 1858 Treaty]”; or *second*, such navigation must be “necessary to the protection of said enjoyment”<sup>436</sup>. Costa Rica, in the passage from her *Reply* quoted above, focuses upon the second condition. Insight into what the Arbitrator intended by this condition is provided in the second part of the report prepared by Assistant Secretary of State Rives, to whom President Cleveland delegated the task of drafting his arbitral award. These portions of Rives’ second report were not in any way questioned by the Arbitrator; indeed, they appear to have guided President Cleveland’s findings.

5.38. Rives first summarized Costa Rica’s arguments regarding navigation on the San Juan with warships. In these arguments, Costa Rica: drew an analogy to ports of free entry and asserted that they were considered to be accessible to foreign men-of-war; contended that “by the usage of nations navigation of territorial waters by foreign public vessels can only be forbidden by express stipulation...;”<sup>437</sup> and further contended that Article IV of the 1858 Treaty, requiring that both States “contribute to the defence of the river in case of external aggression,” meant that she “must be permitted to maintain her vessels on the San Juan in order to guard and defend it with all the efficiency within her reach”<sup>438</sup>. These arguments have particular resonance today, one hundred years later, since they are similar to those Costa Rica makes in this case.

5.39. Rives responded bluntly to Costa Rica’s contentions concerning navigation on the San Juan River by her “public vessels”:

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<sup>436</sup> Cleveland Award, *op. cit.*, para. *Second*. CRM, Vol. II, Annex 16.

<sup>437</sup> *Ibid.*

<sup>438</sup> Rives Report, *op. cit.*, p. 56 of original handwritten version. NCM, Vol. II, Annex 71, p. 253 (emphasis added).

“Some of these arguments may be dismissed at once.

The prohibition of acts of hostility on the river, cannot be construed as conferring on Costa Rica a right to maintain upon its waters public vessels in time of peace. The implication, instead would seem to be the other way.

The right of Nicaraguan vessels to land freely on the Costa Rican side confers no right on Costa Rica to maintain a river police. She has undoubtedly the right to establish Custom Houses along the River and to maintain a force of revenue officers. But this force need not necessarily patrol the river in boats. 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.”<sup>439</sup>

5.40. Thus, even navigation by public vessels of Costa Rica’s revenue and customs service is not ordinarily necessary to protect her navigational rights on the river. As Rives found, customs enforcement on a river as narrow and sparsely trafficked as the San Juan can just as effectively be performed from land. Rives’ obvious reluctance to find in the Treaty a right of navigation for Costa Rican public vessels is not surprising in light of another passage in the second part of his report, in which he emphasizes the consequences of Nicaraguan sovereignty over the San Juan River. The passage reads as follows:

“It must not be forgotten that the sovereignty and jurisdiction of Nicaragua extend over all the waters of the San Juan. In the unusual and forcible language of the Treaty, she possesses exclusively the dominion and supreme control of these waters. Costa Rica is bounded not by the thalweg, or the middle of the stream, but by its right bank. Any vessel navigating the river is, therefore, within

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<sup>439</sup> *Ibid.*, pp. 56-57 of original handwritten version (emphasis added).

Nicaraguan territory; and on Nicaragua falls exclusively the duty of policing the stream.”<sup>440</sup>

5.41. This passage highlights the difficulty, in view of Nicaragua’s exclusive sovereignty over the river, of finding rights in Costa Rica to navigate on the San Juan with public vessels of her security forces. It also shows that the official to whom President Cleveland delegated authority to prepare a recommended award concluded that the Treaty compelled the conclusion that Nicaragua “exclusively” had the right, and duty, to police the stream.

5.42. In light of the foregoing, only the rare circumstances would make navigation on the river by Costa Rican revenue service vessels “necessary to the protection of [the] enjoyment [of Costa Rica’s rights of navigation ‘*con objetos de comercio*’].” As Rives wrote, Costa Rica was perfectly capable of enforcing her customs laws from her own territory, and if doing so from the Nicaraguan river was not necessary at the time of the Cleveland Award it would seem even less necessary today.

5.43. Costa Rica’s argument in 1888, regarding Article IV of the 1858 Treaty of Limits, also sounds remarkably similar to her argument today. Costa Rica’s prior argument is worth quoting at length because it so closely parallels the content and tenor of her current presentation:

“All that I have said in this portion of my work in explanation of the facts and law which relate to the subject might be erroneous, badly brought, irrelevant, and absolutely inadmissible on general principles, and, nevertheless, it would be true that Costa Rica can navigate with men-of-war and other Government vessels on the

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<sup>440</sup> *Ibid.*, p. 58 of original handwritten version (emphasis added).

waters of the San Juan river. It is Nicaragua herself who has solemnly granted that right by an article of that very same treaty which she alleges to be doubtful or capable of different interpretation.

‘Costa Rica shall also be bound,’ says the second part of Article IV of the treaty, ‘owing to the portion of the right bank of the San Juan river, which belongs to it, ... to co-operate in its custody; and the two Republics shall equally concur in its defence in case of foreign aggressions; and this will be done by them with all the efficiency that may be within their reach.’

It can be seen by these phrases, as plainly and transparently as they can be, that Costa Rica has not only the right but the duty, or to follow exactly the language of the treaty, the “obligation,” not only of watching, guarding, and defending its own river bank, but of contributing to the custody and defence of the other bank belonging to Nicaragua.

...

Let it not be said that the authority to navigate with men-of-war is only confined to the special case of foreign aggression. The treaty does not refer to this case exclusively, but speaks also of guard or custody, which means watching, vigilance, and other things of permanent character and necessarily previous to actual defence. This, especially in a river, cannot be improvised at the very same instant that trouble arises; since, in order that it may be possible and efficient, a perfect knowledge of the locality, which cannot be acquired except by navigating the same river, is absolutely indispensable.”<sup>441</sup>

5.44. Rives found Costa Rica’s Article IV argument unpersuasive:

“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*. [Emphasis in original.] If under the terms of the Treaty, Costa Rica is not permitted to maintain vessels of war on the River she cannot

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<sup>441</sup> Argument of Costa Rica, *op. cit.*, pp. 159-160. NR, Vol. II, Annex 5.

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.*"<sup>442</sup>

5.45. Nothing in the *Second* paragraph of President Cleveland's award is contrary to any of the quoted passages from the Rives report. Indeed, all indications are that the Arbitrator based his findings on Rives' analysis. Thus, when President Cleveland states that Costa Rica may navigate on the San Juan with such revenue vessels "as may be *necessary* to the protection of said enjoyment," he is best understood as incorporating the concept of "necessity" articulated by Rives. As Rives wrote, while it might be "convenient" for Costa Rican revenue officers to ply the San Juan in revenue vessels to prevent smuggling, they "need not *necessarily* patrol the river in boats." Patrolling on the river "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"<sup>443</sup>.

5.46. The conclusion is unmistakable: when President Cleveland rejected Costa Rica's alleged right to navigate with ships of war, he necessarily also rejected the rationales Costa Rica had offered to support that would-be right, including Article IV of the 1858 Treaty and the need to "guard" the river. Insofar as Costa Rica has repeatedly accepted the Cleveland Award as binding -- a position expressly reiterated in both the *Memorial* and *Reply* -- she cannot now be heard to argue that President Cleveland's disposition of her arguments constitutes anything less

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<sup>442</sup> Rives Report, *op. cit.*, pp. 56-58 of original handwritten version. NCM, Vol. II, Annex 71, p. 253-254 (emphasis added).

<sup>443</sup> *Ibid.*, p. 57 of original handwritten version (emphasis added).

than *res judicata*. Indeed, it is telling that Costa Rica has admitted that “the President correctly gauged the scope of Costa Rica’s right [to navigate with public vessels]”<sup>444</sup>. Accordingly, this Court cannot but follow President Cleveland’s lead and reject Costa Rica’s claim that she has either the right or the obligation to patrol the San Juan River with police boats performing security-related functions.

5.47. This conclusion is borne out by Costa Rica’s actual customs enforcement practices over the last 150 years since the Treaty of Limits was executed. As will be shown below, Costa Rica *has failed to submit any evidence* that her revenue service or other customs enforcement vessels *ever* navigated on the San Juan River for the purpose of protecting her enjoyment of the right to navigate “*con objetos de comercio*.” To the contrary, the evidence shows that Costa Rica’s customs enforcement activities over the last century and a half have been carried out on land, or on rivers exclusively within Costa Rican territory (*i.e.* the Sarapiquí, the San Carlos, and the Colorado Rivers).

5.48. This background renders implausible Costa Rica’s next contention: that President Cleveland “ruled that Costa Rica’s public vessels were entitled to their own, specific treaty right to navigate on the River”<sup>445</sup>. Costa Rica seeks to support this contention in two ways: *first*, by quoting paragraph *Second* of the Cleveland Award; and *second*, curiously, by referring to the fact that President Cleveland rejected Rives’ proposal of a broad right of navigation on the river for Costa Rican public vessels. These bases of Costa Rica’s argument will be examined in turn.

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<sup>444</sup> CRR, para. 3.90.

<sup>445</sup> *Ibid.*

5.49. *First*, merely referring yet again to the *Second* paragraph of the Cleveland Award does not assist Costa Rica. The most obvious problem the paragraph poses for Costa Rica has just been noted: all of the evidence -- including President Cleveland's having banned navigation by Costa Rican warships, and his disposition to restrict navigation by Costa Rican revenue vessels to circumstances when it is necessary to protect her right of navigation "*con objetos de comercio*" - - points in the direction of *no* navigation by Costa Rican public vessels, not the opposite.

5.50. *Second*, as even Costa Rica recognizes<sup>446</sup>, President Cleveland rejected the broad right of navigation "with vessels of war or of the revenue service" proposed by George Rives. Rives' proposal was based on a theory similar to the position advocated by Costa Rica in the arbitration: assimilation of a right of public vessels to navigate on the San Juan River to the general right to navigate with public vessels in the waters of a State's territorial sea. Costa Rica seeks to turn President Cleveland's rejection of this proposal to her advantage, arguing that rather than restricting her navigation rights, the Arbitrator was actually enlarging them:

"President Cleveland . . . consider[ed] that Costa Rica held more than simply a 'privilege' enjoyed by everybody. This is why he ruled that Costa Rica's public vessels were entitled to their own, specific treaty right to navigate on the River."<sup>447</sup>

5.51. The effect of Costa Rica's argument is that she professes to consider that the explicit controls placed on her public vessels by President Cleveland (no warships; revenue service vessels may use the river only to protect navigation

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<sup>446</sup> *See ibid.*

<sup>447</sup> *Ibid.*



*“con objetos de comercio”*) are preferable to the broad latitude accorded those vessels under the Rives proposal. That is, she asks the Court to view this limiting decision by President Cleveland in a light favourable to her. But, the effect of President Cleveland’s action is precisely the contrary. In rejecting Rives’ proposal regarding “vessels of war or the revenue service,” President Cleveland demonstrated clearly his determination to respect Nicaragua’s sovereignty over the San Juan River by prohibiting the use of the San Juan by Costa Rican public vessels, with only one exception: revenue service vessels engaged in protection of the right to navigate *“con objetos de comercio.”*

5.52. With respect to President Cleveland’s language, it is telling that he chose a form of words that makes clear that Costa Rica’s right of navigation on the San Juan with revenue vessels is derivative of and entirely dependent on navigation *“con objetos de comercio”* under Article VI of the 1858 Treaty. It is not a free-standing right. Thus, Costa Rican public vessels are only permitted on the river to the extent their presence “may be related to and connected with” or “necessary to the protection of” her “enjoyment of the ‘purposes of commerce’ accorded to her” in Article VI. By necessary inference, Costa Rican revenue service and other public vessels are *not* permitted on the San Juan for any other reason.

## **Section II. Evidence of the Parties’ Subsequent Practice**

5.53. Costa Rica attempts to support her claim to a broad right to navigate the San Juan with public vessels carrying police with normal arms by invoking what she calls the “solid practice” supporting that claim. The fallacy of this assertion will be exposed in detail in the following sections of this chapter. As the Court will read, Costa Rica’s arguments not only find no support in the record, they are expressly refuted by that State’s own evidence. Before turning to that point,

however, Nicaragua will first address elements of the historical record that show why there was and is no practice to buttress Costa Rica's case. In short, the evidence available is conspicuous in its sparseness precisely because, until Costa Rica's policy change in 1998, both parties always understood that Costa Rica had no right to navigate the San Juan with public vessels.

#### A. THE SOTO-CARAZO TREATY OF 26 JULY 1887

5.54. The parties agreed to submit their dispute concerning the validity and interpretation of the Treaty of 1858 to arbitration by President Cleveland by treaty dated 24 December 1886<sup>448</sup>. But the agreement to submit their dispute to arbitration did not put an end to their efforts to settle the case extra-judicially. To the contrary, they continued to negotiate between themselves in an effort to arrive at a mutually acceptable resolution. Those efforts yielded a treaty dated 26 July 1887 which affirmed the validity of the Treaty of 1858, resolved points of disputed interpretation arising from that treaty, and created new rights. The 1887 Soto-Carazo Treaty was promptly ratified by formal act of the Constitutional Congress of Costa Rica on 9 August 1887, just 14 days after its execution. It was ultimately rejected by Nicaragua, however, which decided to maintain her objections to the Treaty of 1858 and press forward with the arbitration.

5.55. Although the 1887 treaty never came into force, it does contain a provision bearing directly on the issues now before the Court. Nicaragua, of course, recognizes that the 1887 treaty does not have the force of law. Nonetheless, to the extent that it was ratified by the Costa Rican Congress (in just two weeks, no less), it constitutes probative evidence as to how Costa Rica

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<sup>448</sup> See NCM, para. 4.

contemporaneously understood her right (or non-right) to navigate the San Juan with public vessels under the Treaty of 1858, especially to the extent that her contemporaneous understanding contradicts the position she now takes in this litigation<sup>449</sup>.

5.56. Article VI of the Soto-Carazo Treaty addresses the issues of disputed interpretation of the Treaty of 1858, and provides that “[t]he aspects of questionable interpretation of the Treaty of 15 of April 1858 that have been presented to date are resolved in the following terms”<sup>450</sup> therein stated. One of the issues so resolved concerned Costa Rica’s right to navigate on the San Juan with public vessels. According to paragraph 3 of Article VI:

“The right, granted to Costa Rica, of navigation for [*objetos de comercio*] in the San Juan River, from its mouth to three English miles before Castillo Viejo, *does not include navigation with war or fiscal vessels exercising jurisdiction.*”<sup>451</sup>

5.57. Thus, as of 1887, just 29 years after the conclusion of the 1858 Treaty and on the eve of the Cleveland Arbitration, Costa Rica recognized that she had no right to navigate on the San Juan with public vessels exercising jurisdiction. It is unlikely that President Cleveland would have been unaware of this Treaty that would have put an end to his arbitration. As Arbitrator he could not have failed to note that the Treaty had been fully acceptable to one of the parties, and the thinking behind his Award would have taken this into consideration.

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<sup>449</sup> See *Case concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Judgment of 27 June 1986, Merits, paras. 64-73.

<sup>450</sup> CRM, Vol. II, Annex 15, p. 90.

<sup>451</sup> *Ibid* (emphasis added).

5.58. This interpretation, of course, flows naturally from the plain text of Article VI of the Treaty of 1858 which gives Nicaragua “*exclusive* dominion and supreme control (*sumo imperio*)” over the San Juan River. Indeed, the significance of the word “exclusive” in Article VI should not be overlooked. In English as well as Spanish, its meaning is both simple and indisputable. According to *Webster’s College Dictionary*, it means “not admitting of something else”; “omitting from consideration or account”; “limited to that which is designated”; “shutting out all others from a part or share”<sup>452</sup>. The dictionary of the Spanish Royal Academy is to the same effect. “*Exclusivo*” means “*que excluye o tiene fuerza y virtud para excluir*”; “*único, solo, excluyendo a cualquier otro* (that which excludes or has the power or right to exclude; unique, only, excluding any other)”<sup>453</sup>. Costa Rica herself has always recognized that Nicaragua alone enjoys sovereignty over the river<sup>454</sup>. The acceptance of any Costa Rican jurisdiction on or over the San Juan River would therefore be inconsistent with the plain terms of Article VI of the Treaty of 1858 -- exactly as Costa Rica recognized when she ratified the 1887 Soto-Carazo Treaty and thereafter.

5.59. It is for this reason that President Cleveland took such evident pains to circumscribe Costa Rica’s right to navigate the San Juan with vessels of the revenue service. By anchoring them in, and making them attendant to, Costa Rica’s right to navigate “*con objetos de comercio*” under Article VI, he ensured that this narrow exception to Nicaragua’s otherwise exclusive sovereignty was kept within proper bounds.

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<sup>452</sup> *Random House Webster’s Unabridged Dictionary*, Second Edition, 1998.

<sup>453</sup> Royal Spanish Academy, *Dictionary of the Spanish Language*, Twenty-second Edition, Available at: <http://www.rae.es/>.

<sup>454</sup> See CRR, para. 2.69; See also, CRM, Vol. III, Annex 80.

5.60. The soundness of President Cleveland's ruling, and the logic of his rejection of Costa Rica's arguments, were well captured at the time by one of Costa Rica's most prominent jurists, Ricardo Jiménez Oreamuno, who served as President of Costa Rica on three separate occasions. Writing about the Award just after it was issued in 1888, he explained it as follows:

*"Las Novedades* [a Spanish language newspaper] of New York criticizes the award because it does not give us the right to navigate in the San Juan with vessels of war. The criticism, I would say, is unfounded. The emphasis with which article 6 of the treaty consigns that Nicaragua shall have the *dominion and sovereignty* over the waters of the river manifests a desire to establish a difference between the rights that were agreed that Nicaragua and Costa Rica would have in those waters. Now, if merchant ships and vessels of war of both Republics navigate freely and indistinctly on the river; where is it manifested, what practical effect does the solemn declaration have that the dominion and sovereignty over the waters corresponding to Nicaragua? The rest of that article corroborates this meaning. It was considered that that absolute affirmation would take away from Costa Rica all use, all enjoyment of the river, and as that was not the intention, the exception was put immediately thereafter, which stipulated that Costa Rica would have in said waters perpetual rights of free navigation, with 'objects of trade.' *If the exception does not also appear in the article in favor of vessels of war, the inference is logical: it was not thought that Costa Rica had that right.* The argument that is gleaned from article 4, regarding the obligation that Costa Rica has to contribute to the defence of the river in case of foreign aggression, was perceived as much less than conclusive. Costa Rica shall contribute to that defence when the foreseen hypothesis occurs. In the meantime, in time of peace, without the most remote risk of hostilities, to pretend that our vessels of war navigate to contribute to a defence that no attack provokes is to get to the subtleness with which the Nicaraguans examined the treaty. Costa Rica, by virtue of article 4, was obligated to defend the San Juan as an ally of Nicaragua; and, when has it been seen that an ally, by being an ally, pretends to have the right, without there being a war, to

transit with troops through the allied territory, navigate its internal waters with vessels of war or station fleets in its ports?”<sup>455</sup>

5.61. Nicaragua is content to adopt the words of President Jiménez Oreamuno as her own. Costa Rica has not the right of navigation of the San Juan River with any public vessels, including police vessels, performing defence or other security-related functions. Just as Nicaragua previously showed<sup>456</sup>, the only exception to this rule arises in the event of foreign aggression as mentioned in Article IV of the Treaty of 1858, in which case Costa Rica may (at Nicaragua’s request) contribute to the defence of the river. There has, however, never been any such foreign aggression, and Costa Rica.

5.62. It may be seen from the foregoing that Costa Rica has failed to offer a persuasive response to Nicaragua’s showing, in the *Counter-Memorial*, that the Applicant State lacks “public rights of protection, custody and defence” of the San Juan River. These alleged rights find no basis in the 1858 Treaty as interpreted in the 1888 Cleveland Award, which together constitute the applicable law in this case. To be sure, the Cleveland Award recognizes a limited right of Costa Rica to navigate the San Juan River with vessels of her revenue service. Nicaragua has always recognized that right. However, as will be shown below, Costa Rica has presented no evidence that she ever sought to exercise it -- that is, she has offered no evidence that she ever sought to use the San Juan River to protect navigation “*con objetos de comercio*.” Nor has Costa Rica presented evidence that Nicaragua ever denied or prevented her exercise of this right.

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<sup>455</sup> Ricardo Jiménez Oreamuno, *His Thoughts*, 1980, p. 55. NR, Vol. II, Annex 32 (emphasis added).

<sup>456</sup> See NCM, paras. 4.2.28-4.2.36; 5.2.1-5.2.12.

B. COSTA RICAN PUBLIC VESSELS HAVE NEVER ATTEMPTED TO PROTECT NAVIGATION “*CON OBJETOS DE COMERCIO*” OR HAD THE NEED TO DO SO

5.63. Nicaragua agrees that Costa Rica has a right under Article VI of the 1858 Treaty of Limits, as interpreted by paragraph *Second* of the Cleveland Award, to navigate on the San Juan 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 for the protection of said enjoyment”<sup>457</sup>.

5.64. However, there is no evidence that Costa Rica ever exercised this right, or that Nicaragua interfered with it. At no place in her *Memorial*, or in her *Reply*, or in any of the 317 annexes to her pleadings, does Costa Rica cite even a single example of navigation on the San Juan River by a vessel of her revenue service related to, or connected with, or necessary for the protection of her enjoyment of the “purposes of commerce.” Nor does Costa Rica offer evidence that Nicaragua prevented or otherwise interfered with the navigation of any such vessel. This is a rather remarkable omission from Costa Rica’s pleadings, and it cannot have been an oversight. It must mean that Costa Rica has no such evidence to offer.

5.65. This conclusion is reinforced by the evidence on navigation by her public vessels that Costa Rica does submit. This evidence, consisting of a handful of contemporaneous documents from 1892, 1894-1909, 1915, 1968, 1991-1992 and 1994-1998, as well as affidavits from current and former police officers, shows that navigation on the San Juan River by Costa Rican public vessels has been infrequent and for very limited purposes, and that it has never been related to,

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<sup>457</sup> Cleveland Award, *op. cit.*, para. *Second*. CRM, Vol. II, Annex 16, p. 98.

connected with, or for the purpose of protecting commerce. Rather, Costa Rica's evidence demonstrates that on the relatively rare occasions when her public vessels have navigated on the San Juan River they have done so for one of three purposes: (1) to bring supplies or replacement personnel to police posts in Costa Rica; (2) to carry out certain law enforcement activities; or (3) to deliver medical or other social services to riparian communities. None of these actual uses of the river is related to, connected with, or necessary to protect Costa Rica's enjoyment of the "purposes of commerce," and therefore none of them is encompassed within the right afforded to Costa Rican revenue service vessels under paragraph *Second* of the Cleveland Award. That explains why Costa Rica regularly sought and obtained prior authorization from Nicaragua before navigating on the river with her public vessels for each of these purposes. On occasion, as Costa Rica's evidence shows and Nicaragua does not deny, Nicaragua refused to authorize the requested navigation. But Nicaragua's refusal cannot constitute a violation of Costa Rica's rights because Costa Rican public vessels have no right to navigate on the river when the navigation is not related to, connected with, or to protect Costa Rica's enjoyment of navigation "*con objetos de comercio*."

5.66. As demonstrated above, the San Juan River stopped serving as an outlet for Costa Rica's foreign trade soon after the Treaty of Limits was executed in 1858. For the reasons explained in Chapter III, at paragraphs 3.53-3.58, the route from central Costa Rica to Puerto Viejo de Sarapiquí by land, and then down the Sarapiquí River to the San Juan River and from there to the sea, and was soon abandoned in favor of other routes to the Atlantic, especially after the railroad was put into operation between Central Costa Rica and Puerto Limón on her Caribbean coast in the last quarter of the nineteenth century. Costa Rica's commerce on the San Juan River was strictly local, consisting of nothing more than trade in basic goods and groceries between the Costa Rican interior and the



few and sparsely populated riparian communities that existed on the right bank of the San Juan, and between those communities and the Nicaraguan town of San Juan del Norte. As shown in Chapter III, nothing has changed in this regard for the past century and a half. Trade on the San Juan River has remained strictly local, and of low volume, carried on in small, privately-owned boats operated by sole proprietors without crews<sup>458</sup>.

5.67. This explains why Costa Rica has never employed revenue service vessels on the San Juan River to protect her enjoyment of commerce there. The trans-Atlantic trade via the San Juan River envisioned in the mid-19<sup>th</sup> century, and which Costa Rica sought to safeguard by insisting that her commercial navigation rights be recognized in the 1858 Treaty, never materialized. That was the commerce that Costa Rica intended to protect with her revenue service vessels, not the local trade between small communities along the San Juan River that has actually taken place. This trade has been so localized that for much of the last 150 years Costa Rica has treated it as internal, and has had no customs posts through which goods entering Costa Rican waters from the San Juan have had to pass. During those periods when customs posts were maintained, Costa Rican authorities required vessels to stop for processing only after they entered Costa Rican waters, that is, after they left the San Juan and entered the Sarapiquí, the San Carlos or the Colorado Rivers. They conducted no customs enforcement activities on the San Juan itself.

5.68. Costa Rica's contemporaneous documentary evidence reflects no navigation by Costa Rican revenue service or other fiscal or customs vessels on the San Juan. Nor does it reflect any customs enforcement by Costa Rican

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<sup>458</sup> See NR, paras. 4.12-4.22

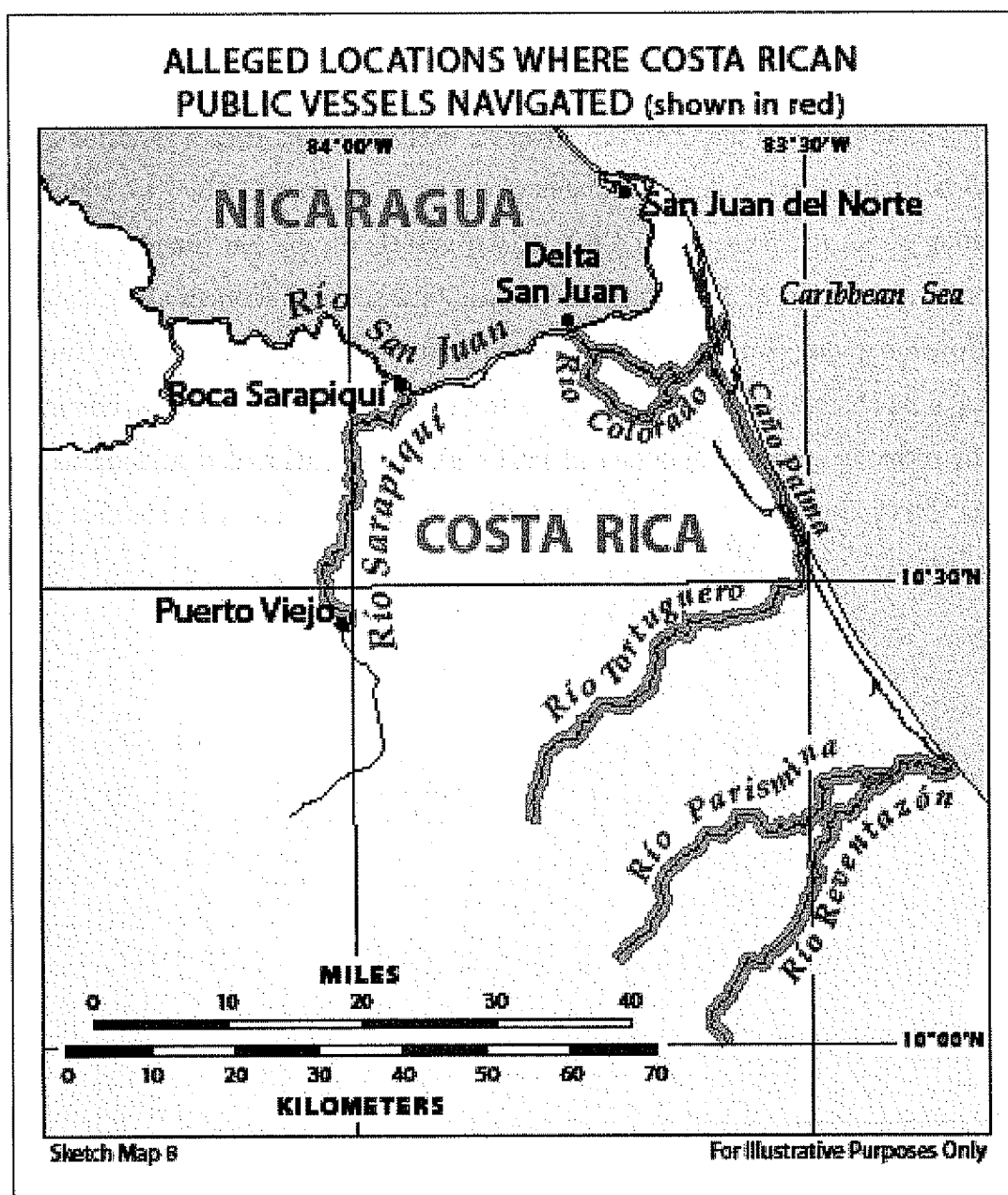
vessels on the San Juan. Costa Rica admits that she had no Revenue Guard at all until 1886 (28 years after the Treaty of Limits was executed), and even then that it was established on the Colorado River<sup>459</sup>. Belying Costa Rica's assertions, the reports of the local Guard commanders covering the period 1894 to 1909 say nothing about the presence of Costa Rican vessels on the San Juan<sup>460</sup>. To the contrary, the report of 31 March 1894 states: "The security services along the San Carlos, Sarapiquí, Tortuguero, Revantazón, and Parsimina Rivers and the Pereira and Palma channels all in Costa Rica, as shown below in Sketch Map 8, continues uninterrupted; the less important channels are also safeguarded as long as the other duties allow it"<sup>461</sup>. The San Juan River is conspicuous by its absence from this list.

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<sup>459</sup> See CRM, para. 2.31.

<sup>460</sup> See "Report of the Commander of the Post Río Colorado-Colonia Irazú to the General Inspector of the Treasury, 31 March 1894". CRM, Annexes, Vol. VI, Annex 211; *see also* "Report of Rafael Cruz, Commander of the Post Río Colorado, to the General inspector of the Treasury, Note No. 89, 10 March 1895". CRM, Annexes, Vol. VI, Annex 212; "Report of the Sub-Inspector to the Treasury of Colorado to the General Inspector of the Treasury, 24 November 1908". CRM, Annexes, Vol. VI, Annex 215; "Report of the Sub-Inspector to the Treasury of Barra del Colorado to the General Inspector of the Treasury, 7 December 1909". CRM, Annexes, Vol. VI, Annex 216.

<sup>461</sup> "Report of the Commander of the Post Río Colorado-Colonia Irazú to the General Inspector of the Treasury, 31 March 1894". CRM, Annexes, Vol. VI, Annex 211.



5.69. The report of 10 March 1895 describes the areas of coverage of two Guard posts on the bank of the Colorado River, and two on the Costa Rican bank

of the San Juan River<sup>462</sup>. All of the areas mentioned are in Costa Rica. The areas covered by the two posts on the San Juan, at the mouths of the Sarapiquí and San Carlos Rivers, extend from those posts *upriver*, that is, inside Costa Rican waters. The listed coverage does not include the San Juan. The same report describes the seizure of “three boats carrying imported goods from San Juan del Norte, that attempted to go unnoticed by the guards in order to avoid the payment of export rights...”<sup>463</sup>. The description of the event (the only customs seizure mentioned in the report) makes it plain that it occurred upon the boats’ entry into Costa Rican waters. Equally unhelpful to Costa Rica is the report of 7 December 1909 which was presumably submitted because of the statement that “I ordered, up to the Sarapiquí Guard Post, to conduct a general home search of the neighbors on the margins of the San Juan River at the beginning of this month with the purpose of finding out whether any revolutionaries had taken refuge there”<sup>464</sup>. Quite obviously, a “general home search” could only be undertaken on land. There is no mention or reason to assume that navigation on the San Juan River was attendant to this activity.

5.70. Citing these very reports, Costa Rica argues in her *Memorial* that “[u]ndoubtedly these fiscal guards used the San Juan to perform their duties”<sup>465</sup>. To the contrary, the reports themselves make no mention of any navigation on the San Juan River, and leave no reason to presume that it occurred. All of the Costa Rican posts mentioned in the reports were accessible by river transport from

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<sup>462</sup> See “Report of Rafael Cruz, Commander of the Post Río Colorado, to the General inspector of the Treasury, Note No. 89, 10 March 1895”. CRM, Annexes, Vol. VI, Annex 212.

<sup>463</sup> *Ibid.*, p. 865.

<sup>464</sup> “Report of the Sub-Inspector to the Treasury of Barra del Colorado to the General Inspector of the Treasury, 7 December 1909”. CRM, Annexes, Vol. VI, Annex 216.

<sup>465</sup> CRM, para. 4.89.

within Costa Rica, without the need to transit the San Juan River. And all of the mentioned riparian communities were accessible to the Costa Rican Guards without traversing the San Juan River.

5.71. Costa Rica's evidence jumps from 1909 to 1915, with the presentation of two reports from the customs inspector at Rosalía, a Costa Rican town located on the San Carlos River, upstream from its mouth, which is at the San Juan River. These reports describe activities is entirely inside Costa Rica, between Rosalía and Boca San Carlos<sup>466</sup>. There is no mention of any activity on the San Juan.

5.72. The next jump in Costa Rica's evidence is from 1915 to 1968, a distance of 53 years for which she provides no evidence of her activities. Costa Rica presents three 1968 reports from a Revenue Guard inspector at Boca San Carlos<sup>467</sup>. None of them mentions any navigation on the San Juan River, let alone navigation related or connected to enjoyment of the "purposes of commerce." The report of 26 July 1968 is typical. It says "I am sending a complaint filed in this office by Mr. Pablo Lozano, regarding Ipecac located in the place named INFIERNITO, by the San Juan River"<sup>468</sup>. This is a reference to a tiny riparian hamlet on the Costa Rican bank of the river. It is accessible by land from Boca

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<sup>466</sup> See "Note from Commandant of the Rosalía Revenue Guard to the Deputy Inspector of the Treasury, 20 October 1915". CRR, Vol. II, Annex 31; *see also* "Note from Commandant of the Rosalía Revenue Guard to the Deputy Inspector of the Treasury, 18 December 1915". CRR, Vol. II, Annex 32.

<sup>467</sup> See "Note from Sub Inspector of the Revenue Guard in Boca de San Carlos to Lieutenant Lopez of the General Inspectorate of the Treasury, 26 July 1968". CRR, Vol. II, Annex 33; *see also* "Note from Sub Inspector of the Revenue Guard in Boca de San Carlos to Lieutenant Lopez of the General Inspectorate of the Treasury, 29 July 1968". CRR, Vol. II, Annex 34; "Note from Revenue Guard of Boca de San Carlos to Chief of Personnel of the General Inspectorate of the Treasury, 5 August 1968". CRR, Vol. II, Annex 35.

<sup>468</sup> "Note from Sub Inspector of the Revenue Guard in Boca de San Carlos to Lieutenant Lopez of the General Inspectorate of the Treasury, 26 July 1968". CRR, Vol. II, Annex 33.

San Carlos. There is no indication in the report of any use of the San Juan River to get there, or if there were, what relevance it would have, since the matter did not involve commerce on the river. The same could be said for the report of 29 July 1968, which mentions only that the inspector went “to the place called Poco Sol, by the San Juan River, in order to verify the felling of trees...”<sup>469</sup>. Again, there is no mention of navigation on the San Juan River, and the event had no apparent relation to commerce on the river.

5.73. Finally, Costa Rica jumps another 23 years, from 1968 to 1991, and presents three reports from the Chief of Police at Puerto Viejo de Sarapiquí dated, respectively August 1991, April 1992 and May 1992<sup>470</sup>. None of these reports refers to any specific activities carried out on the San Juan River, let alone activities related to, connected with, or to protect the enjoyment of navigation “*con objetos de comercio*.” There is no mention of any customs enforcement, because there was no customs activity; the customs post that had formerly been at Puerto Viejo de Sarapiquí had been removed decades earlier. The May 1992 report states that: “On Thursday, 21 May 1992, we patrolled on the San Juan River up to Islas Morgan and to the mouth of San Juan del Norte, and everything was normal”<sup>471</sup>. This is the first and only mention of any patrolling activity by Costa Rica on the San Juan River between 1858 and 1992, and there is no

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<sup>469</sup> “Note from Sub Inspector of the Revenue Guard in Boca de San Carlos to Lieutenant Lopez of the General Inspectorate of the Treasury, 29 July 1968”. CRR, Vol. II, Annex 34.

<sup>470</sup> See “Costa Rican Police Major, Francisco Cordoba Cordoba, to Costa Rican Minister of Public Security, Luis Fishman Z., Note No. C.D. 0666-91, 19 August 1991”. CRR, Vol. II, Annex 36; see also “Costa Rican Police Major and Chief of the Post, Francisco Cordoba Cordoba, to Costa Rican Director of the Civil Guard, Lieutenant Colonel Guillermo Sáenz, Note No. C.D.O. 81-92, 29 April 1992”. CRR, Vol. II, Annex 37; see also “Costa Rican Chief of Post, Major Francisco Cordoba Cordoba, to Costa Rican Director of the Civil Guard, Lieutenant Colonel Guillermo Sáenz, Note No. C.A. 372-92, 25 May 1992”. CRR, Vol. II, Annex 38.

<sup>471</sup> “Costa Rican Chief of Post, Major Francisco Cordoba Cordoba, to Costa Rican Director of the Civil Guard, Lieutenant Colonel Guillermo Sáenz, Note No. C.A. 372-92, 25 May 1992”. CRR, Vol. II, Annex 38.

explanation as to the purpose of the activity. There is no indication of any relation to, or connection with, the enjoyment of the “purposes of commerce.”

5.74. That is all the evidence Costa Rica presents, in her two pleadings and related Annexes, on her use of revenue or other fiscal vessels to “protect” her enjoyment of navigational commerce on the San Juan. By the 1970s, Costa Rica had removed her customs inspection facilities from the right bank of the San Juan, as well as from Puerto Viejo de Sarapiquí and Rosalía. Thereafter, there was no customs enforcement with respect to any goods emanating from the Costa Rican riparian communities on the San Juan, or from San Juan del Norte. That situation has persisted to the present day. This is confirmed by the affidavit testimony, attached hereto, of each of the five Nicaraguan Army commanders who have been directly responsible for maintaining security on the San Juan between 1979 and 2006<sup>472</sup>. The commanders all testify that the only Costa Rican commerce on the river has been local, that it has never been threatened or endangered, that Costa Rica has never dispatched public vessels to the San Juan for the purpose of “protecting” this commerce, that Costa Rica has not maintained any customs posts on her side of the river or required goods entering Costa Rica from the San Juan to pass through any customs inspection, and that Costa Rica has never carried out or attempted to carry out any customs enforcement activity on the river<sup>473</sup>. The following conclusions must therefore be drawn: (1) Costa Rica has not demonstrated that she has ever employed revenue service vessels, or other public vessels, on the San Juan River for the purpose of protecting her right

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<sup>472</sup> See Talavera Affidavit, NR, Vol. II, Annex 78; *see also* Sánchez Affidavit, NR, Vol. II, Annex 77; *see also* Largaespada Affidavit, NR, Vol. II, Annex 72; *see also* Membreño Affidavit, NR, Vol. II, Annex 73; *see also* Centeno Affidavit NR, Vol. II, Annex 69.

<sup>473</sup> See Talavera Affidavit, paras. 8-10. NR, Vol. II, Annex 78; *see also* Sánchez Affidavit, , paras. 4 & 6-7. NR, Vol. II, Annex 77; *see also* Largaespada Affidavit, paras. 3 & 7-9. NR, Vol. II, Annex 72; Membreño Affidavit, paras. 4-6 & 9-10. NR, Vol. II, Annex 73; Centeno Affidavit, para. 4. NR, Vol. II, Annex 69.

of navigation “*con objetos de comercio*” on the river; and (2) Costa Rica has not demonstrated that Nicaragua has ever violated the right referred to in paragraph *Second* of the Cleveland Award.

5.75. While Costa Rica has never sent her revenue or other public vessels onto the San Juan River for the purpose of protecting navigational commerce, she has sent public vessels onto the river for three other purposes since 1858, as indicated above: to bring supplies and replacement personnel to police posts; to carry out occasional law enforcement activities; and to provide social services to riparian communities. These actual uses of the river by Costa Rica, and the responses of Nicaraguan authorities in granting or denying permission for them, are discussed in turn below.

#### C. SUPPLYING AND BRINGING REPLACEMENT PERSONNEL TO POLICE POSTS

5.76. As explained above, Costa Rica does not have a *right* to use the San Juan River for the purpose of bringing supplies or replacement personnel to her police posts. This purpose is far removed from navigation *con objetos de comercio* or navigation with vessels of the revenue service to protect the right to navigate for the “purposes of commerce.” As such, it is not a right emanating from the 1858 Treaty or the Cleveland Award. Since there is no right, Costa Rica’s use of the river for this purpose has always been subject to Nicaragua’s discretion.

5.77. Costa Rica claims that her security forces have habitually navigated on the river to supply and bring replacement troops to police posts, and that they have done so without obtaining prior authorization from Nicaragua<sup>474</sup>. But the

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<sup>474</sup> See CRR, paras. 3.91-3.95, 4.50, 4.70-4.73.



evidence Costa Rica offers does not support this claim. In fact, Costa Rica's documentary evidence on this supposed practice covers only a four-year period, between 1994 and 1998. Costa Rica presents no documentary evidence that the practice existed during the first 136 years after the Treaty of Limits was executed, between 1858 and 1994; and she admits that she stopped navigating on the river for the purpose of supplying her police posts in mid-1998 and never resumed this activity<sup>475</sup>.

1. *Costa Rica's Evidence Regarding the Supply of Border Posts*

5.78. The documentation supplied by Costa Rica concerning her uses of the San Juan River during the period 1994-1998 consists of a single report, dated 18 December 1998, which was prepared by the Commander of the police post at Boca Sarapiquí, Major Hugo Espinoza Rodríguez of the *Guardia Civil*<sup>476</sup>. The 23-page report helpfully presents a year-by-year account of navigation on the San Juan by Costa Rican public vessels. Citing this report, Costa Rica claims that: "A register of Costa Rica's police navigation shows that between August and December 1994 there were 33 return journeys on the River to Barra del Colorado, 107 during 1995, 126 in 1997 and five in June 1998. The register also shows that Costa Rica's police navigated the San Juan in the direction of Boca San Carlos twice in February 1995, 18 times in 1996, 40 times in 1997 and 23 times between January and June 1998"<sup>477</sup>. This is incorrect. The figures mentioned by Costa Rica cannot have been derived from Annex 227, or from any other document

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<sup>475</sup> See CRM, paras. 5.105, 5.109-5.135; see also CRR, paras. 4.50-4.52.

<sup>476</sup> See First Commandant, Mayor Hugo Espinoza, Sarapiquí Atlantic Command, to General Director of the Border Police, Colonel Max Cayetano Vega, Note 3054-98, P.F.S, 18 December 1998. CRM, Annexes, Vol. VI, Annex 227.

<sup>477</sup> CRM, para. 4.105.

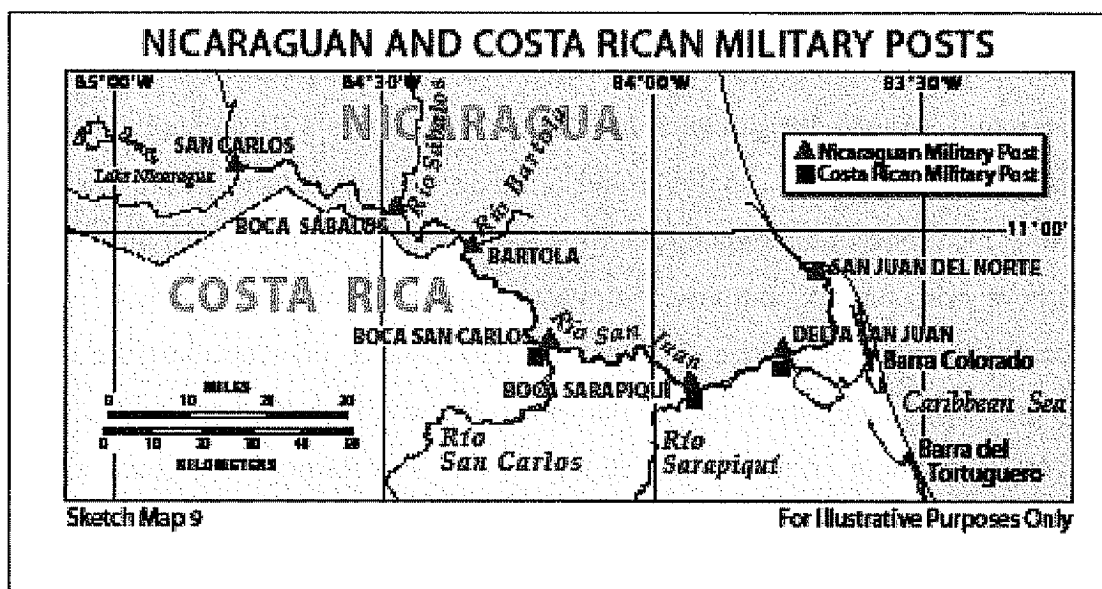
attached to Costa Rica's pleadings. The report itself identifies only nine journeys on the river, in total, during 1994, 26 in 1995, 23 in 1996, none in 1997 and two in 1998. But more important than the number of journeys is their purpose. A close reading of this detailed account of the actual uses of the San Juan River by Costa Rican public authorities reveals that there was not a single episode of customs or tax law enforcement, not a single episode of protection of commerce on the river, and not a single report of threats or danger to such commerce. The document shows that Costa Rica simply did not use the river in any manner related to, connected with, or to protect the right of navigation "*con objetos de comercio*." Instead, the principal use of the river by Costa Rican public vessels was for the purpose of supplying and bringing replacements to police posts at various locations on the right bank of the San Juan. By far, the largest number of journeys was for this purpose. Apparently, not all of these journeys were specifically reported. The section covering 1997, which does not describe what voyages were made, says that: "no relevant events were recorded on the San Juan River. Everything went normal during this period, besides for some small operations related to undocumented Nicaraguan immigrants who came into the national territory. The regular border staff relief changes were made normally while navigating the San Juan River"<sup>478</sup>.

5.79. The report does not state whether Costa Rican authorities obtained, or did not obtain, permission from their Nicaraguan counterparts to navigate on the river prior to undertaking their "regular border staff relief changes." Nor does the report state what conditions Nicaragua imposed. It is completely silent on these subjects. It merely states in several places that "no anomalies were reported, but

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<sup>478</sup> "First Commandant, Mayor Hugo Espinoza, Sarapiquí Atlantic Command, to General Director of Border Police, Colonel Max Cayetano Vega, Note 3054-98, P.F.S., 18 December 1998". CRM, Annexes, Vol. VI, Annex 227, p. 962.

only activities related to the relief of personnel”<sup>479</sup> (1994), or that “[e]verything went normal and only carrying out the regular staff relief changes were made at the border posts”<sup>480</sup> (1996), or that “regular border staff relief changes were made normally while navigating the San Juan River” (1997)<sup>481</sup>. Costa Rica supplied no documentary evidence to demonstrate what the “normal” practice was, with respect to her use of the river to bring supplies and relief staff to her border posts, during this period.



5.80. The evidence is supplied by the Nicaraguan Army commanders who were directly responsible for security on the San Juan River between 1994 and 1998, and who issued authorizations to Costa Rica’s *Guardia Civil* to navigate on the river to conduct their supply and relief operations. According to this evidence, the *Guardia Civil* routinely requested and obtained prior authorization from the

<sup>479</sup> *Ibid.*

<sup>480</sup> *Ibid.*

<sup>481</sup> *Ibid.*

Nicaraguan authorities before sending its vessels on missions to supply the Costa Rican border posts. As testified by Brigadier General Denis Membreño Rivas, who commanded Nicaragua's Southern Military Detachment from February 1992 to December 1995:

"During this period, I was requested by a *Guardia Civil* Commander at the border post at Los Chiles, Costa Rica, to authorize the *Guardia Civil* to navigate in their own vessels along the San Juan between their post at Boca de Sarapiquí and their posts at Delta (where the Colorado River begins) and Barra del Colorado to bring supplies and replacement personnel to those posts. The Costa Rican Commander explained that it would facilitate these supply and replacement operations if the *Guardia Civil* could do it by river, because the roads were not very good. I gave my permission for this practice. Prior to each of these operations, which occurred approximately once every month during my tenure at the Detachment, a *Guardia Civil* officer requested authorization to make the journey. I gave the authorization, and communicated it by radio to the Nicaraguan military post at Boca de Sarapiquí. The *Guardia Civil* vessel then reported to that post as it began its journey, and reported to the Nicaraguan post at Delta when it left Nicaraguan waters. At all times while navigating on the San Juan, the Costa Rican officers were prohibited from bearing arms; they were required to carry their arms on the floor of the boat. At some point, I began to require that a Nicaraguan soldier board the vessel at Boca de Sarapiquí and accompany it during its journey through the Nicaraguan river; he disembarked at Delta, when the vessel entered the Colorado River. Similarly, whenever a Nicaraguan Army vessel entered Costa Rican waters, either to attend meetings with *Guardia Civil* officers or as part of a joint operation, we were required by the Costa Ricans to request permission before entering their territory, and to place our arms on the floor of the vessel. We considered this a normal practice in deference to the State that exercises sovereignty over the waters."<sup>482</sup>

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<sup>482</sup> Membreño Affidavit, para 10. NR, Vol. II, Annex 73.

5.81. The Costa Rican report of 18 December 1998 confirms that this practice was mutual. There are several examples mentioned in that report: on 23 September 1994 a Nicaraguan Army vessel at Boca de Sarapiquí “requested permission to enter the Costa Rican territory through inland waterway with the purpose of attending a meeting at the Atlantic Command. Colonel Walter Monge Rodríguez, First Commander of the Unit is notified thereof and he himself authorizes this Unit to enter our territory without arms”<sup>483</sup>, on 1 January 1995, a similar request was made and the Costa Rican commander “granted the authorization...and stated that they were authorized to enter that jurisdiction provided that they did not bear any arms”<sup>484</sup>, similar requests were made and authorizations given, subject to the requirement that the Nicaraguan Army vessel carry no arms while in Costa Rican waters, on 10 August 1995 and 26 March 1996<sup>485</sup>.

2. *Costa Rica’s Change in Policy in May-July 1998, and Nicaragua’s Response*

5.82. The practice continued under Brigadier General Membreno’s successor as Commander of Nicaragua’s Southern Military Detachment, Brigadier General Cesar Ovidio Largaespada Pallavicini, who held this position from January 1996 to October 1997. As testified by Brigadier General Largaespada:

“Relations between the Nicaraguan and Costa Rican security personnel stationed along the San Juan River were

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<sup>483</sup> CRM, Annexes, Vol. VI, Annex 227, p. 944.

<sup>484</sup> *Ibid.*, p. 947.

<sup>485</sup> *See ibid.*, pp. 953, 959.

generally excellent during the time I served as Chief of the Military Detachment. Periodically, the Nicaraguan post commanders would meet with their Costa Rican counterparts, either at the Nicaraguan or the Costa Rican post, and exchange information on criminal activity.

... My headquarters also authorized the Guardia Civil to navigate on the river, in their own vessels, for the purpose of bringing supplies to their posts at Boca San Carlos, Boca de Sarapiquí and Delta. These trips were made on average once every month. The procedure was as follows: the Guardia Civil requested authorization to make a particular trip for the purpose of bringing supplies to particular posts on a particular date; authorization would be given by Nicaragua, and the Guardia Civil vessel would begin its journey by reporting to the Nicaraguan post across the river; a Nicaraguan sergeant would board the vessel and would accompany them on their itinerary on the San Juan River; the Guardia Civil personnel were not permitted to travel armed, so their rifles were placed on the floor of the vessel and the Nicaraguan sergeant made sure that they stayed there while the vessel was in Nicaraguan waters.”<sup>486</sup>

5.83. Costa Rica has submitted affidavits from several of her *Guardia Civil* officers who participated in these supply and relief missions on the San Juan River, for the purpose of supporting her claim that the *Guardia Civil* regularly navigated on the river with their arms and without permission from Nicaragua. But even these affidavits corroborate the testimony of Generals Membreño and Largaespada by stating that “from around nineteen ninety-four and thereafter, the Nicaraguan Army asked one of the members of the [*Guardia Civil*] to disembark leaving their arms on the vessel in order to inform or communicate the navigation to the Army authorities. Later...the Nicaraguan Army determined that the vessel

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<sup>486</sup> Largaespada Affidavit, paras. 4-5. NR, Vol. II, Annex 72.

coming from Costa Rica had to be accompanied during the navigation...”<sup>487</sup> The *Guardia Civil* officers acknowledge that the Nicaraguan authorities were always notified in advance of any voyage by a Costa Rican public vessel, although they attempt to downplay the significance of this by claiming it was “out of courtesy and as a measure of mutual security”<sup>488</sup> or “for coordination purposes”<sup>489</sup>.

5.84. The normal practice of Costa Rican requests and Nicaraguan authorizations continued into 1998, under Brigadier General Largaespada’s successor as Commander of the Southern Military Detachment, Brigadier General Francisco Orlando Talavera Siles, who exercised responsibility for security over the San Juan River from October 1997 until June 2000. Between January and May 1998, the normal practice continued without incident. That is, the *Guardia Civil* requested authorization from the Nicaraguan Army prior to each voyage of one of its vessels to supply and relieve staff at its posts along the river, and the Nicaraguan Army granted this authorization, subject to the requirement that the Costa Rican vessel report at the Nicaraguan military posts upon entering and exiting the San Juan, and that the *Guardia Civil* officers navigate unarmed<sup>490</sup>. This state of normalcy is confirmed by the 18 December 1998 report of the *Guardia Civil* commander at Boca Sarapiquí: “From January 98 through May 98,

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<sup>487</sup> Affidavit of First Lieutenant Daniel Soto Montero (Guardia Civil of Costa Rica), 27 January 2006. CRM, Annexes, Vol. IV, Annex 89, p. 480.

<sup>488</sup> Affidavit of Sergeant Carlos Luis Alvarado Sánchez (Guardia Civil of Costa Rica), 27 January 2006. CRM, Annexes, Vol. IV, Annex 88, p. 476.

<sup>489</sup> Affidavit of Daniel Soto Montero. CRM, Annexes, Vol. IV, Annex 89, p. 479.

<sup>490</sup> See Talavera Affidavit, para. 3. NR, Vol. II, Annex 78.

the book of minutes comprehensive of two hundred pages does not record any irregularities or events on the San Juan River during these months”<sup>491</sup>.

5.85. The *Memorial* itself recognizes that prior to July 1998 there were no Nicaraguan violations of Costa Rica’s rights “of a systematic or permanent character”<sup>492</sup>. “By contrast in the period after July 1998, Nicaragua adopted a policy involving systematic and permanent violations of Costa Rica’s rights, which continue to the present day”<sup>493</sup>. It is important, therefore, to examine the events that occurred in the middle of 1998, which gave rise to Costa Rica’s claims in this case.

5.86. We begin with Costa Rica’s own contemporaneous account of these events, as described in the 18 December 1998 report from the Costa Rican commander at Boca Sarapiquí<sup>494</sup>. The account starts on 1 June 1998, with the report of a complaint from Colonel (now Brigadier General) Talavera, the Commander of Nicaragua’s Southern Military Detachment, about recent incidents in which *Guardia Civil* vessels had detained Nicaraguan citizens navigating on the San Juan, on the suspicion that they were planning to enter Costa Rica illegally: “Colonel Talavera of the [Nicaraguan Army] complained that no one navigating the San Juan River should be detained, since according to Colonel Talavera, some days ago some officers from Delta Zero [a *Guardia Civil* post] had forced some persons to get off the boat. That every time personnel from the

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<sup>491</sup> CRM, Annexes, Vol. VI, Annex 227, p. 962.

<sup>492</sup> CRM, para. 3.01.

<sup>493</sup> *Ibid.*, para. 3.02.

<sup>494</sup> See “First Commandant, Mayor Hugo Espinoza to General Director of the Border Police,” 18 December 1998. CRM, Annexes, Vol. VI, Annex 227.



Atlantic Command [of the *Guardia Civil*] navigate the San Juan River, they must place the arms on the floor of the vessel.”<sup>495</sup>

5.87. The seizure and detention of Nicaraguan citizens navigating on the San Juan by the *Guardia Civil*, about which Colonel Talavera complained, reflected the implementation by the *Guardia Civil* of a new Costa Rican government policy, adopted in May 1998 by the incoming administration of President Miguel Angel Rodríguez. Prior thereto, Costa Rica had not detained or attempted to detain Nicaraguan citizens on the San Juan. Indeed, prior to the coming to power of President Rodríguez, *Guardia Civil* vessels had complied with all the conditions established by the Nicaraguan Army, including the requirement that they navigate unarmed and accompanied by Nicaraguan soldiers. However, on 8 May 1998, the same day that President Rodríguez took his oath of office, his newly-appointed Minister of Public Security, Juan Rafael Lizano, announced that Costa Rica was adopting a much more aggressive policy on the San Juan River to confront immigration from Nicaragua. As reported in the Costa Rican press: “The Minister...revealed that the row began because the former Government had permitted the presence of [Nicaraguan] military escorts on the Costa Rican boats, a situation he prohibited upon assuming the responsibility for the security of the country on 8 May.”<sup>496</sup>

5.88. Consistent with the changed policy of the newly-installed Costa Rican government, the *Guardia Civil* ignored the conditions imposed by Nicaragua,

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<sup>495</sup> *Ibid.*, p. 963.

<sup>496</sup> “Country Firm in Meeting with Nicaraguans”, (*La Nación*, 29 July 1998). NR, Vol. II, Annex 19 (Original Spanish: “El Ministro reveló además que el lío nació porque el Gobierno anterior permitió la presencia de custodios militares en las lanchas ticas, situación que él prohibió al asumir la seguridad del país el 8 de mayo.”).

which it had previously accepted, and began to send its vessels onto the river armed and unaccompanied by Nicaraguan soldiers, and for the purpose of intercepting and detaining Nicaraguans thought to be bound illegally for Costa Rica. According to the Costa Rican report of 18 December 1998, under the heading "Capture of Undocumented Persons at the Border": "On 14-06-98, at 14:00 hours, Jorge Padilla from Post Delta # 13 at Boca Tapada, Pital, San Carlos reported that he kept four undocumented Nicaraguan citizens and they were transported to the Immigration Office of San Carlos at 16:02 hours"<sup>497</sup>.

5.89. According to the same Costa Rican report, similar incidents occurred on 17 June, 20 June, 23 June and 24 June, with the *Guardia Civil* continuing to implement Costa Rica's aggressive new policy of detaining Nicaraguans on the San Juan River on the simple suspicion that they were attempting to enter Costa Rica illegally; once intercepted on the river, the Nicaraguans were arrested by the *Guardia Civil* and brought to the Costa Rican side for prosecution<sup>498</sup>. In response to these actions, which Nicaragua considered unprecedented and a violation of her sovereignty, Brigadier General Talavera arranged to meet personally with the regional commander of the *Guardia Civil*, Colonel Walter Navarro Romero, at the latter's headquarters in Los Chiles, Costa Rica. The meeting was scheduled for 25 June, but although Brigadier General Talavera arrived at the appointed time and location, his Costa Rican counterpart did not, and no meeting took place<sup>499</sup>. When the two senior officers subsequently met, Brigadier General Talavera protested Costa Rica's actions on the San Juan, and

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<sup>497</sup> CRM, Annexes, Vol. VI, Annex 227, p. 963.

<sup>498</sup> See "Costa Rican Guards Point Guns at Nicaraguan Boaters", (*La Prensa*, 30 July 1998). NR, Vol. II, Annex 20; see also "Nicaraguans Denounce Costa Rican Harassment on National Territory", (*La Prensa*, 2 Aug. 1998). NR, Vol. II, Annex 21.

<sup>499</sup> See Talavera Affidavit, para 4. NR, Vol. II, Annex 78.

reminded Colonel Navarro that Costa Rica was not authorized to interfere with Nicaraguans navigating on the river, or to carry or use arms while on the river<sup>500</sup>. Colonel Navarro responded: “[I]f the Army of Nicaragua was not going to stop Nicaraguans from using the river to enter Costa Rica illegally, then the *Guardia Civil* would do it,”<sup>501</sup>. Colonel Navarro’s position was fully consistent with that of the new Costa Rican government in San José. As stated by then Foreign Minister Ricardo Rojas: “Surveillance by Costa Rica is necessary in that zone because there is a lot of illegal immigration, smuggling and other anomalies, which make it necessary to guard that southern part of the river.”<sup>502</sup> From Nicaragua’s perspective, Costa Rica was asserting, for the first time in 140 years since the Treaty of Limits was signed, a new “right” to navigate on the San Juan River with public vessels for the purpose of law enforcement -- wholly unrelated to navigation “*con objetos de comercio*” -- an attribute of sovereignty vested in Nicaragua, whose dominion and supreme control (*sumo imperio*) over the river had been recognized as “exclusive” in the 1858 Treaty and ever since. The “last straw,” as far as Nicaragua was concerned, occurred on 7 July, when two *Guardia Civil* vessels ran down and stopped a Nicaraguan passenger boat as it navigated past the Costa Rican post at La Cureña. When the Costa Rican officers attempted to board the Nicaraguan boat and conduct a search they discovered that the passengers included the Nicaraguan Minister of Tourism, and several army officers<sup>503</sup>.

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<sup>500</sup> See Talavera Affidavit, para 4. NR, Vol. II, Annex 78.

<sup>501</sup> *Ibid.*

<sup>502</sup> “Aleman Rejects Arbitration”, (*La Prensa*, 25 July 1998). NR, Vol. II, Annex 18 (Emphasis added) (Original Spanish: “La vigilancia por parte de Costa Rica se debe a que por esa vía se presenta mucha inmigración ilegal, contrabandos y otros anomalías, que hacen necesaria la custodia de la parte sur del río.”).

<sup>503</sup> See Talavera Affidavit, para 4. NR, Vol. II, Annex 77.

5.90. Following these actions by the *Guardia Civil* and statements by senior Costa Rican authorities, Nicaragua decided not to authorize further navigation on the San Juan by the *Guardia Civil*. Nicaragua's decision was communicated to the *Guardia Civil* by Brigadier General Talavera, through his lieutenant, on 14 July 1998<sup>504</sup>. This is reflected in the Costa Rican post commander's report of 18 December 1998: "On 14-06-98 [sic], at 16:10 hours, Sergeant William Herrera from Post Delta # 7, Costa Rica, informed that at the post appeared First Lieutenant Renato Ríos-Cárdenas, Chief of the Post of the Nicaraguan Army at Delta Costa Rica [sic]. He informed that, as instructed by Lieutenant Colonel Orlando Talavera, Commander of the South Detachment of the [Nicaraguan Army], the passage of any Costa Rican authority vessels was restricted as of that date through the San Juan River."<sup>505</sup> Costa Rica acknowledges in her *Memorial* that 14 July 1998 (not 14 June 1998, as erroneously recorded in her Annex 227) was the date on which Brigadier General Talavera's message was delivered<sup>506</sup>. On the same day, Costa Rica retaliated by imposing similar restrictions on Nicaraguan Army vessels seeking entry into Costa Rican waters, according to the contemporaneous Costa Rican report: "at 18:10 hours, Major Hugo Espinoza-Rodríguez informed...that, as of that time and date, entrance of any officer of the [Nicaraguan Army] or of any Nicaraguan police officer into Costa Rican territory was prohibited."<sup>507</sup>

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<sup>504</sup> See "Border Row with Nicaraguans", (*La Nación*, 16 Jul. 1998). NR, Vol. II, Annex 17; see also Talavera Affidavit, para 5. NR, Vol. II, Annex 78.

<sup>505</sup> "Note of the Intendent [sic] Commander in Sservice [sic] of Atlantic Command, Sarapiquí, Daniel Soto Montero, to Costa Rican Foreign Ministry, 14 February 2006". CRM, Annexes, Vol. VI, Annex 240, p. 1049.

<sup>506</sup> See CRM, para 5.110.

<sup>507</sup> CRM, Annexes, Vol. VI, Annex 227, p. 964.

5.91. Nicaragua's account of the facts is not materially different from that provided by Costa Rica. Brigadier General Talavera has confirmed that in June 1998 the *Guardia Civil* began to detain Nicaraguan citizens who were navigating on the San Juan and suspected of planning to enter Costa Rica illegally<sup>508</sup>. Upon learning of these unauthorized activities by the *Guardia Civil*, which he considered an affront to Nicaragua's sovereignty, he protested to the Costa Rican authorities, and insisted that they stop detaining Nicaraguans and refrain from carrying or using firearms while on the river. When the *Guardia Civil* disregarded his instructions and continued to arrest Nicaraguans on the San Juan, he advised them that they were no longer authorized to navigate on the river. Costa Rica retaliated by forbidding Nicaraguan Army vessels from entering Costa Rican waters. As Brigadier General Talavera testified:

“...[U]ntil June 1998 ... vessels of the Costa Rican *Guardia Civil*, without authorization from my headquarters, began to intercept Nicaraguan vessels carrying Nicaraguan passengers in Nicaraguan waters, based on the suspicion that they were planning to enter Costa Rica illegally. The *Guardia Civil* forced the Nicaraguan vessels to land on Costa Rican territory, where all the passengers were immediately arrested. I again protested these unauthorized and unlawful violations of Nicaragua's sovereignty to Colonel Navarro, explaining that Nicaragua could not tolerate the *Guardia Civil* entering Nicaraguan waters to arrest Nicaraguan citizens in their own country, especially without having violated any law, and that they were not found to have an illegal status in our territory. I communicated to him that he and his forces were forbidden from detaining Nicaraguans on the San Juan River, and I reminded him that Costa Rican security personnel were prohibited from transporting, carrying, or using arms on the San Juan river. Colonel Navarro responded that if the Army of Nicaragua was not going to stop Nicaraguans from using the river to enter Costa Rica illegally, then the *Guardia*

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<sup>508</sup> See Talavera Affidavit, para. 4. NR, Vol. II, Annex 78.

*Civil* would do it. As a result of that incident, and Colonel Navarro's refusal to discontinue the *Guardia Civil*'s forcible detention of Nicaraguans, I ratified my order prohibiting the *Guardia Civil* from navigating on the river. Costa Rica responded by prohibiting any Nicaraguan army or police officer from entering Costa Rican territory, including Costa Rican rivers, and declaring that if any such person were found on Costa Rican soil or waters he would be detained."<sup>509</sup>

### 3. *Diplomatic Efforts To Restore the Status Quo Ante*

5.92. Diplomatic efforts to resolve the dispute quickly ensued. The Chief of Staff of the Nicaraguan Army, General Javier Carrión, was sent by Nicaragua's President to meet with the Costa Rican Minister of Public Security and senior *Guardia Civil* commanders<sup>510</sup>. General Carrión offered to resume authorizing the *Guardia Civil* to navigate on the river to bring supplies and relief staff to its riparian police posts, based on the same conditions that had always applied, namely: that requests for authorization would be made prior to each voyage, that the *Guardia Civil* vessels would stop and report at the Nicaraguan Army posts upon entering and exiting the San Juan, and that they would travel unarmed, with weapons stored on the floor of the vessel<sup>511</sup>. Costa Rica rejected the offer and no agreement was reached<sup>512</sup>.

5.93. By this time, public sentiment in Nicaragua was aroused, and pressure was building for the Government to stand firm against Costa Rica's pretensions with respect to the San Juan. Nevertheless, diplomatic activity continued, and on

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<sup>509</sup> *Ibid.*

<sup>510</sup> See Carrión Affidavit, para. 10. NR, Vol. II, Annex 68.

<sup>511</sup> *Ibid.*

<sup>512</sup> *Ibid.*

30 July 1998, the Nicaraguan Minister of Defence, Jaime Cuadra, and the Costa Rican Minister of Public Security, Juan Rafael Lizano, issued a joint communiqué announcing that:

“1. The crew of the vessels of the Public Force of Costa Rica that carry out relief of police and the supply of the border posts located on the right bank of the San Juan River will navigate along the aforementioned river *after having given the required notice* carrying only their normal arms, and *the Nicaraguan authorities may accompany the Costa Rican vessels making this journey* along the San Juan River in their own separate means of transportation. Should the Nicaraguan vessel not accompany the Costa Rican vessels, the latter may carry out their rounds in keeping with the corresponding border post reports as indicated in this agreement.

2. The Costa Rican authorities must report to the Nicaraguan posts throughout their journey along the San Juan River.”<sup>513</sup>

5.94. The Cuadra-Lizano Communiqué, as it came to be called, was never implemented. Had it been, it would have authorized the *Guardia Civil* to resume navigating on the San Juan River for the purpose of bringing supplies and relief staff to Costa Rica’s police posts along the river, subject, as before, to prior notification and reporting at all Nicaraguan Army posts en route. In contrast to the prior authorizations issued by Nicaragua, however, this one would have enabled the *Guardia Civil* officers to carry “their normal arms,” and would have provided for Nicaraguan Army accompaniment in a separate vessel. Implementation proved impossible because reaction to the communiqué in Nicaragua was hostile. Public opinion was overwhelmingly against it, as were the Nicaraguan President and Congress, who denounced it as a violation of the Nicaraguan Constitution, which forbids the transit of foreign military or security

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<sup>513</sup> Cuadra-Lizano Communiqué, *op. cit.* CRM, Vol. II, Annex 28, p. 195 (emphasis added).

forces through Nicaraguan territory, even for humanitarian purposes, absent an Act of Congress<sup>514</sup>. On 18 August 1998, after due consideration, the Nicaraguan Congress formally rejected the communiqué, leaving it without legal effect<sup>515</sup>. The following day, 19 August 1998, Costa Rica retaliated by announcing that it would prohibit any navigation by the Nicaraguan Army on the Colorado River, which connects the San Juan River to the sea<sup>516</sup>.

5.95. These mutual prohibitions have remained in effect ever since. As stated in Costa Rica's December 1998 report of activities on the river: "no relevant events were reported during the months of August and September of 1998, except for the fact that passage of Costa Rican authorities through the San Juan River remained prohibited. For this reason, border staff relief changes at the major posts were made by land using police cars"<sup>517</sup>. As of October 1998: "no activity was recorded on the San Juan River, all being normal, conducting the border staff relief by land, in our land vehicles without any special occurrences"<sup>518</sup>.

5.96. In July 2000, a high-level delegation from Costa Rica's Ministry of Public Security travelled to Nicaragua to reopen a dialogue on this matter with General Carrión, then the Nicaraguan Army Commander, and his staff. Representing Costa Rica were her new Minister of Public Security, Rogelio Ramos Martínez

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<sup>514</sup> See Political Constitution of Nicaragua of 1987, Art. 92 provides: "The passage or stationing of foreign military vessels, airplanes and machinery for humanitarian purposes may be authorized, so long as these are requested by the Government of the Republic and ratified by the National Assembly". NR, Vol. II, Annex 54.

<sup>515</sup> See 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. NCM, Vol. II, Annex 66.

<sup>516</sup> See "Costa Rica Retaliates", (*La Prensa*, 15 August 1998). NR, Vol. II, Annex 22.

<sup>517</sup> CRM, Annexes, Vol. VI, Annex 227, p. 964.

<sup>518</sup> *Ibid.*



(who had replaced Juan Rafael Lizano), Colonel Walter Navarro Romero, and Colonel Carlos Alvarado Valverde, International Legal Advisor to the Ministry. According to a contemporaneous Aide-Memoire of the meeting -- a meeting which Costa Rica fails to mention in both her *Memorial* and her *Reply* -- Minister Ramos proposed the reestablishment of the previous conditions, stating that “We understand your situation in prohibiting navigation on the San Juan River, it is an issue that goes beyond your control due to the level reached by the events. I hope that you also understand our situation and our urgent need to supply and relieve border post personnel”<sup>519</sup>. Colonel Alvarado, the Ministry’s International Legal Advisor, recalled that under the prior arrangements “the police navigated with their M-16 weapons stored on the bottom of the vessels (this is not armed navigation but rather navigation with arms), with prior permission from the Nicaraguan Army, which also verified the personnel and the contents of the vessel at each [Nicaraguan] post that the boat passed...”<sup>520</sup> General Carrión agreed that Nicaragua had expeditiously issued in “a fraternal spirit” verbal permits and authorizations “for navigation on the river to supply and relieve the personnel assigned to your country’s border posts at Sarapiquí and El Delta...”<sup>521</sup> But he also recalled that “[t]he abuse of such permission led us to prohibit navigation over the San Juan River, when you began to patrol the river to intercept illegal immigration and demand rights claimed by Minister Lizano, but which our Highest Authority has stated that you do not have”<sup>522</sup>. General Carrión stated that he was prepared to work with his Costa Rican counterparts to find a solution to their problem, but that this could only be accomplished formally

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<sup>519</sup> Aide-Memoire: Meeting between the Commander-in-Chief of the Nicaraguan Army and the Minister of Public Security of Costa Rica, 21 July 2000. Carrión Affidavit, Annex I to the Affidavit. NR, Vol. II, Annex 68.

<sup>520</sup> *Ibid.*

<sup>521</sup> *Ibid.*

<sup>522</sup> *Ibid.*

through an Act of Congress, because of constitutional requirements in Nicaragua. “[T]oday,” he said, “the only viable way” is for the National Assembly to promulgate a law “that will allow for the permanent supply and relief of your border post forces.”<sup>523</sup>

5.97. The law was never enacted. Strained bilateral relations with Costa Rica, principally caused by Costa Rica’s aggressive efforts to extend her rights over the river beginning in May 1998, contributed to a political climate in Managua that was not conducive to approval of the necessary legislation. As a consequence, the prohibition on navigation on the San Juan River by the *Guardia Civil* remains in force. Nicaragua maintains that she is entitled to prohibit Costa Rica from using the river to supply and bring relief staff to her riparian border posts, because Nicaragua enjoys exclusive sovereignty over the river, and Costa Rica has no right -- under the 1858 Treaty of Limits or the Cleveland Award -- to navigate on the river for this purpose, which is not related to, connected with, or to protect the right of navigation “*con objetos de comercio*.”

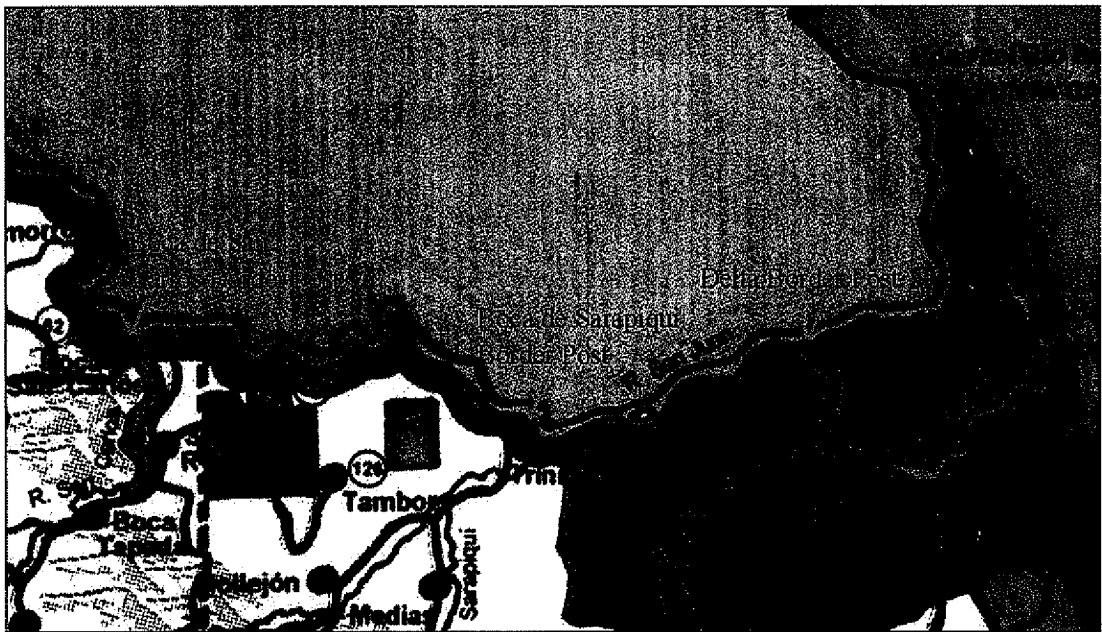
5.98. Even if, *arguendo*, Costa Rica could be said to have a right to navigate on the river for supply and staff relief purposes – a proposition Nicaragua vigorously opposes – the conditions Nicaragua imposed during the period 1994-1998, when she authorized Costa Rica to use the river for such purposes, were a reasonable exercise of Nicaragua’s sovereign power over the river. The inconvenience caused to Costa Rica by compliance with these conditions was negligible. Costa Rica herself acknowledges that her rights were not materially violated by the system that was in place prior to July 1998<sup>524</sup>. Even thereafter, when Nicaragua

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<sup>523</sup> *Ibid.*

<sup>524</sup> See CRM, para 5.112.

refused to grant the *Guardia Civil* further authorizations to use the river, the inconvenience to Costa Rica has been minimal. New roadways, and even landing strips for aircrafts, make supply and staff relief operations by land practical and convenient. As Costa Rica's own evidence shows, since the prohibition was ordered in 1998, the *Guardia Civil* has continued to bring supplies and relief staff to its posts along the San Juan River by land, as well as by internal Costa Rican watercourses<sup>525</sup>. Roadways, whose construction began prior to 1998, now connect to all of the Costa Rican border and police posts, and facilitate supply and staff relief operations. Sketch Map 10 is an enlargement of the relevant section of a Costa Rican roadmap produced by Ecomapas S.A., a Costa Rican firm. It shows, in brown lines, the roads connected to Costa Rica's three border posts on the San Juan, at Boca San Carlos, Boca Sarapiquí, and Delta. (The complete map has been deposited with the Court.)



*Sketch Map 10: Roads to Costa Rican Military Posts (road depicted in brown; full map submitted to the Court)*

<sup>525</sup> See CRM, Annexes, Vol. VI, Annex 227.

5.99. The litany of ills imagined by Costa Rica as a result of her alleged inability to supply her riparian posts via the San Juan -- increased crime, drug and arms trafficking, and illegal immigration -- have not come to pass. Costa Rica has submitted no evidence of a growth in any of these activities resulting from her reliance on land transport, rather than river transport, to supply her posts on the San Juan River.

#### 4. *The Practice Prior to the 1990s*

5.100. While the evidence is clear and uncontested that Costa Rica has not supplied or brought relief staff to her border posts via the San Juan since July 1998, there is a dispute over when the practice of supplying these posts via the river began. As indicated, Costa Rica's documentary evidence shows that the practice was in effect as of 1994<sup>526</sup>. Nicaragua's evidence, consisting of the testimony of the military commanders of the Southern Military Detachment, dates the beginning of the practice to some point in Brigadier General Membreño's tenure as commander, which began in February 1992. The only other documentary evidence recording the use of the river to supply Costa Rican border or security posts is a report dated 9 March 1892 -- 100 years earlier -- from the captain of the Costa Rican vessel *Adela*, reflecting his request to the Nicaraguan commander at Castillo Viejo for permission to traverse the portion of the San Juan above Castillo Viejo, where both banks belong to Nicaragua, for the purpose of navigating to the Río Frío and into Costa Rica to bring supplies and staff relief to the post at Torrón Colorado<sup>527</sup>. The *Adela* incident has already been addressed

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<sup>526</sup> See CRM, Annexes, Vol. VI, Annex 227.

<sup>527</sup> See "Report of Ciro A. Navarro, Assistant to the Inspectorate, to the General Inspector of the Treasury, 9 March 1892." CRM, Annexes, Vol. VI, Annex 209.

at length by Costa Rica<sup>528</sup> and by Nicaragua<sup>529</sup>, and it is also addressed in the Appendix of this *Rejoinder*. Its mention here is simply to point out, for the sake of completeness, that it involved Costa Rica's navigation on the river for the purpose of supplying and bringing staff relief to a security post, and that, as described in paragraphs 4.2.19-4.2.22 of the *Counter-Memorial*, the Costa Rican security personnel felt it necessary to hide their weapons while traversing the San Juan. But whatever the interpretation of this event, it would still be a single incident, and there is no documentary evidence, until 1994, of any regular practice in regard to the supply of Costa Rican border or police posts. There is no evidence of any kind, documentary or testimonial, regarding Costa Rica's use of the San Juan to supply or bring staff relief to her security posts between 1892 and the 1960s.

5.101. With respect to the practice between the 1960s and the early 1990s, Nicaragua has submitted affidavits from Edén Atanasio Pastora, a former revolutionary (and later counterrevolutionary) commander who lived in Costa Rica near the San Juan River in the 1960s and 1970s, and who conducted military operations against successive Nicaraguan governments from that region in the 1970s and 1980s<sup>530</sup>, and from Colonel Juan Bosco Centeno Aróstegui, who commanded Nicaraguan government forces along the San Juan River from July to December 1979, and from January 1982 to June 1991<sup>531</sup>. According to Mr. Pastora, during the 1960s and 1970s, the Nicaraguan Government, under the Somoza dictatorship, maintained tense relations with Costa Rica (which it always suspected of extending sympathy and support to its opponents), and did not

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<sup>528</sup> See CRM, paras. 4.85-4.87; CRR para. 1.15.

<sup>529</sup> See NCM, paras. 4.2.19-4.2.22.

<sup>530</sup> See Pastora Affidavit. NR, Vol. II, Annex 75.

<sup>531</sup> See Centeno Affidavit. NR, Vol. II, Annex 69.

permit Costa Rican security forces to navigate on the San Juan River. Although the Somoza dictatorship was overthrown in July 1979 as the result of a popular revolution, and the revolutionary government was friendlier to Costa Rica, dissatisfaction with the new government soon led to a counterrevolution, part of which was led by Mr. Pastora from bases in Costa Rica along the San Juan River. The river became a major zone of combat in the conflict that engulfed Nicaragua during the 1980s. As a result of the fighting, transit on the river was extremely dangerous, and Costa Rican security vessels avoided it<sup>532</sup>. Costa Rica's witnesses agree. As testified by Costa Rican police officer Daniel Soto Montero, whose affidavit is annexed to the *Reply*: "due to the armed conflict that existed in Nicaragua at that time, the Costa Rican police did not navigate the San Juan River for security reasons as the river was within the war area"<sup>533</sup>. The war ended in 1990. However, for the first few years thereafter, as testified by Colonel Centeno, Costa Rica's police posts along the right bank of the San Juan "were supplied, and the policemen were periodically relieved, either by river transport from within Costa Rica (via the San Carlos River or the Sarapiquí River) or by road. These police posts were not supplied or relieved by traversing the San Juan River"<sup>534</sup>. Costa Rica's police officers testify otherwise. They state that Costa Rica police vessels began navigating the river in 1990 or 1991, without restrictions imposed by Nicaragua. Nicaragua stands by the testimony of Mr. Pastora and Colonel Centeno, and by the account of events given by Colonel Alvarado, the International Legal Advisor to the Costa Rican Ministry of Public Security, in his meeting with General Carrión, the Nicaraguan Army Commander, in July 2000. As recorded in the contemporaneous Aide-Memoire concerning that

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<sup>532</sup> See Pastora Affidavit, para. 6. NR, Vol. II, Annex 75.

<sup>533</sup> Affidavit of Daniel Soto Montero, Deed No. 151-1, 27 January 2006. CRM, Annexes, Vol. IV, Annex 89, p. 479.

<sup>534</sup> Centeno Affidavit, para 4. NR, Vol. II, Annex 69.

meeting, Colonel Alvarado acknowledged, before 1998, the *Guardia Civil* “navigated with their M-16 weapons stored on the bottom of the vessels ... with prior permission from the Nicaraguan Army, which also verified the personnel and contents of the vessel at each post that the boat passed”<sup>535</sup>. However, even if the affidavits submitted by Costa Rica were taken at face value, they would not, in light of the testimonial evidence covering the period prior to 1990, and the documentary and testimonial evidence covering the period from 1994 to the present, supply the basis for a conclusion that Costa Rica had established a right to navigate freely on the San Juan with her police vessels, or that Nicaragua acceded to such a right.

#### D. CONDUCTING LAW ENFORCEMENT ACTIVITIES

5.102. Costa Rica claims in these proceedings that she has a right to carry out law enforcement activities on the San Juan River, and to navigate on the river for the purpose of conducting law enforcement activities on the Costa Rican bank of the river. Again, this so-called right is not encompassed within the right to navigate on the river “*con objetos de comercio*”, or the right to navigate with revenue service vessels related to, connected with, or to protect the enjoyment of navigation “*con objetos de comercio*.” The evidentiary record, as well as the language of the 1858 Treaty of Limits and the Cleveland Award, belie the existence of such a right. The evidence shows that, on those extremely rare occasions when Costa Rican security personnel carried out law enforcement activities on the San Juan, it was always pursuant to express authorization from Nicaragua.

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<sup>535</sup> Carrión Affidavit, Annex 1 to the Affidavit. NR, Vol. II, Annex 68.

5.103. Costa Rica has submitted only three documents that mention law enforcement activities by her security personnel on the river. The first of these documents is dated 31 October 1892, and is a report from the Chief of the Guard at the Colorado River to the General Inspector of the Treasury. He states that:

“I would also like to communicate that during a meeting I had with the Customs Manager of Nicaragua aboard the steamer, he gave me the authority to seize all contraband and criminals who put up a resistance along the coasts of Nicaragua. He granted me this power with the authority of his government under the condition that I would allow them to enter Infiernito [in Costa Rican territory] to seize the contraband crossing toward “Castillo” so they could protect themselves; that he would set up a guard in the Colorado bifurcation and in the Nicaraguan coast for mutual protection while pursuing smugglers and criminals, since this was the only way to guarantee protection for honest farmers and settlers who come to take possession of these coasts.”<sup>536</sup>

5.104. Quite obviously, the source of the Costa Rican Guard’s authority to conduct the contemplated law enforcement activities in Nicaragua’s waters was the specific and limited grant conferred by the Nicaraguan Customs Manager on behalf of the government. It should also be noted that the permission granted by Nicaragua was part of a reciprocal agreement, including authorization for Nicaragua to act within Costa Rican territory, for joint law enforcement activities. If the 1858 Treaty or the Cleveland Award had empowered Costa Rican security forces to conduct law enforcement activities on the San Juan River, the grant of authority from the Nicaraguan Customs Manager would have been unnecessary.

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<sup>536</sup> Report of the Chief of the Guard [*resguardo*] of Colorado, Juan Francisco Zeledón, to the General Inspector of the Treasury of 31 October 1892. CRM, Annexes, Vol. VI, Annex 210.



5.105. The second document submitted by Costa Rica relating to her alleged right to conduct law enforcement activities on the river is the “Joint Communiqué Issued by the Army of the Republic of Nicaragua and the Ministry of Public Security of the Republic of Costa Rica” (the so-called Cuadra-Castro Communiqué), dated 8 September 1995<sup>537</sup>. The 103-year gap between the first two documents submitted by Costa Rica on this subject is revealing in itself: Costa Rica has failed to submit any documentary evidence that she carried out law enforcement activities on the San Juan River between 1892 and 1995. Notwithstanding the passage of more than a century, there is a consistency between the two documents. Like the 1892 document, the 1995 Joint Communiqué pertains to joint law enforcement activities on the river by Nicaraguan and Costa Rican security forces, and describes an express grant of law enforcement authority by Nicaragua to Costa Rica. The purposes of the document are stated in its first two operative paragraphs:

“FIRST: In the interests of strengthening the National Security, sovereignty and independence of our countries, the Nicaraguan Army and the Costa Rican Public Force will 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, thereby joining forces in the battle against the illegal trafficking of persons, vehicles, contraband of any nature and joint operations, following the exchange of information and planning carried out by both parties.

SECOND: As of this moment, the chiefs of the border units of both countries will coordinate and cooperate more closely in planning and carrying out joint parallel patrolling along our countries’ common border, exchanging operative information of the common entities involved, with respect to all activities affecting the stability of the terrestrial and aerial border zone related to drug trafficking, arms

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<sup>537</sup> See “Joint Communiqué Issued by the Army of the Republic of Nicaragua and the Ministry of Public Security of the Republic of Costa Rica, 8 September 1995”. CRM, Vol. II, Annex 27.

trafficking, smuggling, rustling, naval piracy, illegal trafficking of persons and the presence and/or passage of criminal gangs.”<sup>538</sup>

5.106. Once again, Costa Rica’s ability to conduct law enforcement activities on the San Juan River emanated from an express grant of authority by Nicaragua, as part of an agreement to engage in joint law enforcement. It did not emanate from the 1858 Treaty or the Cleveland Award. The Cuadra-Castro Communiqué formalized the joint law enforcement patrols that were already being conducted by the Nicaraguan Army and the Costa Rican *Guardia Civil*. The existence of the practice is shown in the third and final document submitted by Costa Rica related to law enforcement activities, which is the report of 18 December 1998 prepared by the Costa Rican Guard Commander at Boca de Sarapiquí, which has already been discussed above<sup>539</sup>. The report includes an entry for 14 June 1995 under the heading “Delegation of the Command and the Sandinista Popular Army Patrolling Operation.” It describes a “joint patrolling operation in coordination with the Sandinista Army in Cureña area”<sup>540</sup>. A similar note, for 27 June 1995, describes a voyage “to the place known as Banderas in Costa Rica...in coordination with the Sandinista Popular Army with the purpose of patrolling the area, navigating on the San Juan River”<sup>541</sup>. A notation for 29 February 1996, captioned “Cooperation of the Atlantic Command with the Sandinista Army Tracking and Capture,” describes the *Guardia Civil*’s response to the Nicaraguan Army’s request “to send a patrol unit to the river...in order to cooperate with the [Army] with the capturing of the [Nicaraguan] soldiers [who had deserted their posts] in the area of el Jobo, Delta Costa Rica, located within Costa Rican

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<sup>538</sup> *Ibid.*

<sup>539</sup> See CRM, Annexes, Vol. VI, Annex 227.

<sup>540</sup> *Ibid.*, p. 950.

<sup>541</sup> *Ibid.*, p. 951.

jurisdiction.”<sup>542</sup> Significantly, the 18 December 1998 report, which covers the period between 1994 and 1998, does not identify a single, specific law enforcement activity undertaken on the San Juan River by Costa Rican security forces other than those conducted jointly with the Nicaraguan Army – except for the arrest and detention of suspected illegal immigrants from Nicaragua in June and July 1998, discussed above, which Nicaragua vigorously protested, and which led Nicaragua to terminate the authorization she had previously given to the *Guardia Civil* to navigate on the San Juan River.

5.107. Apart from these documents, the *Memorial* cites two affidavits supplied by *Guardia Civil* officers. These affidavits, as discussed above, refer mainly to Costa Rica’s use of the river to supply and bring relief staff to her border posts. They identify no specific law enforcement activities carried out on the San Juan River by Costa Rica alone. The only specific event mentioned involved joint action with the Nicaraguan Army. As testified by *Guardia Civil* officer Daniel Soto Montero: “the Atlantic Command conducted joint operations with the Nicaraguan Army during those years. Such was the case of the kidnapping of a German tourist and a Swiss tourist guide in Boca Tapada de San Carlos, and the kidnapping of a Dutch couple in Altamira. Both events occurred in nineteen ninety-six”<sup>543</sup>.

5.108. The conclusion to be drawn is that Costa Rica has no independent right to navigate on the San Juan River for the purpose of conducting law enforcement activities, and that Costa Rica may only navigate on the river to conduct law

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<sup>542</sup> *Ibid.*, p. 957.

<sup>543</sup> Affidavit of Daniel Soto Montero, 27 January 2006. CRM, Annexes, Vol. VI, Annex 89.

enforcement activities when she has the express authorization of Nicaragua to do so.

E. PROVIDING SOCIAL SERVICES TO RIPARIAN COMMUNITIES

5.109. Nicaragua does not prohibit Costa Rica from navigating on the San Juan River, with her public vessels, for the purpose of providing medical and other social services to the residents of riparian communities on Costa Rica's side of the river. Nor is it Nicaragua's policy to discourage the delivery of such services via the San Juan River. All that Nicaragua requires is that the vessels using the river for this purpose register their passengers and crew with the Nicaraguan authorities at points of entry and exit on the San Juan River. Passengers and crew must also comply with Nicaraguan immigration requirements, including the possession of a valid passport and, depending on country of origin, a Nicaraguan visa. These are not unreasonable conditions, and in any event, Nicaragua is free to impose them because there is no right afforded to Costa Rica under the 1858 Treaty of Limits or the Cleveland Award to navigate on the San Juan with public vessels for the purpose of providing social services to riparian communities. This has nothing to do with navigating the river "*con objetos de comercio*", or navigating it in a manner related to, connected with, or for protecting navigation for "purposes of commerce."

5.110. As testified by Brigadier General Largaespada, who commanded the Southern Military Detachment between January 1996 and October 1997:

"On certain occasions, other Costa Rican officials – not belonging to the *Guardia Civil* – requested permission to navigate the San Juan River, among them, officials from the Social Security Agency of Costa Rica and the Ministry of Education. This was also the case for non-governmental organizations, like the Costa Rican Red Cross, which

brought medicines to the local river communities, or transported the sick. These vessels followed the same procedure as in the case of the *Guardia Civil*: permission to navigate was requested in advance; authorization was given; the vessel reported to the Nicaraguan border posts and registered the passengers and crew; and it was allowed to navigate. As a courtesy, no departure clearance certificates were required and no fees were charged.”<sup>544</sup>

5.111. Costa Rica has produced no evidence to contradict Brigadier General Largaespada’s description of Nicaragua’s reasonable and lawful treatment of Costa Rica’s use of the river to deliver public services. In fact, Costa Rica’s evidence corroborates Brigadier General Largaespada’s account. As attested by Costa Rica’s witness Gabriela Mazariegos Zamora, a medical doctor for the Costa Rican National Health System who provided medical services to La Cureña, located on the right bank of the San Juan, which she reached by navigating on the river: “That in her personal experience, she visited La Cureña on four occasions, departing from Boca San Carlos. She states that, at the beginning of each journey, they were forced [translation note: this is Costa Rica’s translation of the Spanish word “*obligados*” which, in Nicaragua’s view should be translated as the less contentious “obligated” or “required”] to stop at the border with Nicaragua where they had to report to the army of that country, a requirement that they always complied with but for which they were never charged any fees. They had to report themselves again on their way back from La Cureña to Boca San Carlos”<sup>545</sup>. To the same effect are the statements from other Costa Rican witnesses: “She states that doctors and officials from the Costa Rican Social Security Institution have always navigated the San Juan River in order to travel to

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<sup>544</sup> Largaespada Affidavit, para. 6. NR, Vol. II, Annex 72.

<sup>545</sup> Affidavit of Ana Gabriela Mazariegos Zamora, 14 February 2006. CRM, Annexes, Vol. IV, Annex 98.

the towns of Boca Cureña and Chorreras, given that there are no adequate roads to these towns. She points out that the Nicaraguans did not charge for this navigation, although they did have to report to the Nicaraguan post”<sup>546</sup>; “That, according to her duties, she personally made health care visits to the towns of Boca Cureña and Chorreras, travelling there via the San Juan River. She states that the Nicaraguan Army did not charge for this navigation, although they were required to report to that post.”<sup>547</sup>

5.112. Costa Rica complains that, after she initiated this case, her health care and other social service providers were prevented from navigating on the San Juan, and were unable to continue delivering their services to the Costa Rican communities on the right bank of the river. However, her evidence in support of this claim consists principally of affidavits from various Costa Rican government workers attesting to difficulties they allege to have encountered in securing visas from Nicaraguan consular authorities that would permit them to enter Nicaraguan territory. Although Costa Rica devotes four pages of her *Reply* to a painstaking account of Dr. Thais Ching’s efforts to obtain a Nicaraguan visa so that she could navigate on the San Juan, the undisputed fact is: she received one<sup>548</sup>. Costa Rica herself acknowledges that the difficulties experienced by Dr. Ching were not typical: “On other occasions, however, the Nicaraguan authorities have responded quite quickly to Costa Rican requests for permission to navigate.”<sup>549</sup> Costa Rica asserts that there were no problems in securing authorization for her social service providers to navigate on the San Juan “until May 2006,” which was eight months

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<sup>546</sup> Affidavit of Kattia Patricia Corrales Barboza, 16 February 2006. CRM, Annexes, Vol. IV, Annex 99.

<sup>547</sup> Affidavit of Sandra Díaz Alvarado, 16 February 2006. CRM, Annexes, Vol. IV, Annex 100.

<sup>548</sup> See NCM, paras. 6.2.14-6.2.15.

<sup>549</sup> CRR, para. 4.36.

after this case was filed<sup>550</sup>. Dr. Ching's request for a visa was made in June and granted in July of 2006. By May 2007, Costa Rica admits, her government workers were securing Nicaraguan visas more expeditiously. "For example" says the *Reply* "on 22 May 2007 the Coordinator of the Northern Regional Office of the Costa Rican Ombudsman's Office, Ms. Laura Navarro...request[ed] 'authorization' for IMAS [Costa Rica's Joint Institute for Social Assistance] officials who would be participating in a regional Environment and Health Fair that was to be held by the high school of Boca San Carlos, and who intended to take the opportunity to visit poor families in the communities of Boca San Carlos and La Cureña."<sup>551</sup> Nicaragua provided the requested visas on 25 May, that is, within three days<sup>552</sup>. No problems in obtaining Nicaraguan visas to travel on the San Juan at any time thereafter are identified in the *Reply*, which was filed on 15 January 2008.

## Conclusion

5.113. The conclusion is inescapable that Nicaragua has not violated Costa Rica's rights respecting use of the San Juan River by Costa Rican public vessels. Neither the 1858 Treaty of Limits nor the Cleveland Award provides Costa Rica with a right to navigate on the San Juan with her public vessels. Accordingly, she has no such right, since the parties are agreed that Costa Rica enjoys only such rights of navigation as are provided in the Treaty of Limits and the Cleveland Award. While those instruments establish that Costa Rica may have a *duty* to send her public vessels to the defence of the river in case of external attack, when requested by Nicaragua, she has not the *right* to place vessels of her security

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<sup>550</sup> CRR, para. 4.30.

<sup>551</sup> CRR, para. 4.36.

<sup>552</sup> CRR, para. 4.37.

forces on the river absent such circumstances, and it is undisputed that these circumstances have never presented themselves; in these proceedings Costa Rica does not allege that the river has ever been attacked, or that Nicaragua has prevented her vessels from coming to its defence.

5.114. The only navigation right that the controlling legal instruments provide to Costa Rican public vessels is the right accorded by Article *Second* of the Cleveland Award to vessels of Costa Rica's revenue service to navigate on the river when such navigation is related to or necessary to protect her right to navigate "*con objetos de comercio*." Even vessels of the revenue service have no general right of navigation on the river. Their right to navigate is expressly limited to circumstances in which their navigation is necessary to the protection of the right under Article VI of the Treaty of Limits to navigate "*con objetos de comercio*." No navigation rights are provided to vessels of the revenue service in any *other* circumstances, and no navigation rights are provided to other public vessels in *any* circumstances.

5.115. The evidence shows that Nicaragua has never violated, abridged or interfered with Costa Rica's right to have vessels of her revenue service use the San Juan River to protect her right to navigate "*con objetos de comercio*." In the first place, Costa Rica has produced no evidence to show that she ever exercised this right, or attempted to exercise it. To the contrary, the evidence shows that Costa Rica has had no need to send her revenue service vessels onto the San Juan, and has not done so, because the kind of commerce that has been carried out on the San Juan after 1858 is merely a local trade in goods, of small volume, and not the kind of international trade that was anticipated when the Treaty was negotiated and executed, which might have required the use of revenue service vessels for its protection. More directly to the point, Costa Rica has introduced



no evidence whatsoever to show that Nicaragua prevented her from exercising her right to navigate with vessels of her revenue service at any time, let alone for the purpose of protecting her right to navigate “*con objetos de comercio*.” In fact, there is no such evidence because Nicaragua never interfered with the exercise of this right.

5.116. The evidence shows that, in the 150 years since the Treaty of Limits was executed, Costa Rican public vessels have navigated on the San Juan River for only three purposes -- and never to protect the right to navigate “*con objetos de comercio*.” These three purposes are: (1) to resupply and bring replacement personnel to Costa Rican border posts accessible by the river (as well as by land); (2) to engage in joint law enforcement operations with Nicaraguan security personnel; and (3) to deliver social services to riparian communities on the right bank of the river. None of these uses of the river has involved vessels of the revenue service, and none has been for the purpose of protecting navigation “*con objetos de comercio*.” This is undisputed. The upshot is, none is sanctioned by the Treaty of Limits or the Cleveland Award, and therefore, none of these uses of the river by Costa Rican public vessels is the subject of any navigation right provided by the either of the two legal instruments that both parties regard as controlling in these proceedings.

5.117. The evidence shows that, on each and every occasion when Costa Rican public vessels navigated on the San Juan for one of these three purposes, the navigation was not in the exercise of a right claimed by Costa Rica, but a consequence of the express prior authorization given by Nicaragua in response to Costa Rica’s request for Nicaragua’s permission to navigate on the river. Nicaragua’s granting of this permission in the exercise of her discretion, and the conditions that Nicaragua placed on the permitted navigation, as well as Costa

Rica's acceptance of and compliance with these conditions, provide further proof that, apart from vessels of Costa Rica's revenue service engaged in the protection of navigation "*con objetos de comercio*," no other Costa Rican public vessels enjoy a right to navigate on the river. Accordingly, the conditions that Nicaragua has placed on Costa Rica's use of the river with her public vessels to resupply border posts, or to deliver social services to riparian communities, cannot constitute violations of Costa Rica's "right" to engage in these activities with her public vessels because she has none.

5.118. The evidence shows that there was only one, very brief series of embarkations by Costa Rican public vessels undertaken without express prior authorization by Nicaragua. These occurred in June and July 1998 when Costa Rica abruptly changed her longstanding policy and practice, and sent the *Guardia Civil* and its vessels onto the San Juan to engage in armed interdiction and detention of Nicaraguan boats and passengers thought to be immigrating illegally into Costa Rica. Nicaragua's response was immediate and firm. She instructed the *Guardia Civil* to stop conducting law enforcement activities unilaterally in Nicaragua's sovereign territory, and especially to stop detaining Nicaraguan nationals and their vessels in Nicaraguan waters. When the *Guardia Civil* refused to do so, under instructions from the new government in San José, Nicaragua prohibited all further navigation on the river by *Guardia Civil* vessels. The *Guardia Civil* has not navigated on the river since then. These facts, which are undisputed, further support Nicaragua's conclusion that Costa Rica has no right under the Treaty of Limits or the Cleveland Award to navigate on the San Juan River with her public vessels for law enforcement purposes, absent express prior authorization from Nicaragua.

5.119. Finally, even if, hypothetically speaking, Costa Rican public vessels (other than vessels of her revenue service engaged in protecting navigation “*con objetos de comercio*”) were to enjoy a right under the two controlling legal instruments to navigate on the river, the conditions imposed by Nicaragua would not violate Costa Rica’s “right” because they constitute reasonable exercises of Nicaragua’s sovereign authority to regulate navigation in her waters in defence of her legitimate national interests. Indeed, for more than five years, following the conflict in Nicaragua and after normal navigation in the river was reestablished, and under the governments of two successive Costa Rican Presidents, Costa Rica accepted without objection and fully complied with Nicaragua’s requirements that she: request prior authorization from Nicaragua before using the river with vessels of her *Guardia Civil*; stop for registration and inspection at Nicaraguan army posts along the route; deposit the weapons carried by her security personnel on the floor of the vessel while transiting the San Juan; and allow a Nicaraguan soldier to accompany the vessel while in Nicaraguan waters. The reasonableness of these conditions is self-evident, given Nicaragua’s interests in protecting her sovereignty against the armed presence in her territory of foreign military or security forces, as well as her interests in environmental protection, law enforcement, navigational safety and border security (described in Chapter IV).

5.120. The reasonableness of Nicaragua’s conditions on navigation by *Guardia Civil* vessels was certainly evident to the *Guardia Civil*, which accepted and complied with them until the middle of 1998, when a newly-elected Costa Rican President completely reversed prior policy. And their reasonableness was again apparent to Costa Rica in July 2000, when she expressed to Nicaragua’s Army Commander a willingness to return to the pre-1998 conditions.

5.121. For all of these reasons, Costa Rica has failed to demonstrate that Nicaragua has violated her alleged rights of protection, custody and defence of the San Juan River.

## CHAPTER VI:

### REMEDIES

6.1. In Chapter V of her *Reply*, Costa Rica discusses her claimed remedies in the present case, as well as Nicaragua's request for a Declaration on her rights from the Court. The present chapter answers this part of Costa Rica's argument. However, since the Declaration requested by Nicaragua cannot be separated from Costa Rica's own request for a "[d]eclaration of violations of Nicaragua's obligations"<sup>553</sup>, they will be dealt with together in Section I of the chapter, before turning to other Costa Rica's alleged "entitlements" in Section II.

#### Section I. The "Declarations" Requested by the Parties

6.2. In the list of remedies sought in her *Memorial*, Costa Rica mentions first a "Declaration of violations of Nicaragua's obligations"<sup>554</sup>. This request is formally made and detailed at length in paragraph 2 of Costa Rica's Submissions in both her *Memorial*<sup>555</sup> and her *Reply*<sup>556</sup>, even though she does not discuss in the latter Nicaragua's denial of violations<sup>557</sup>. There is no need for Nicaragua to say more about this matter; suffice it to recall that, absent any breach of her obligations by Nicaragua, there can be no question of reparation in general or of a declaration by the Court on these alleged violations in particular<sup>558</sup>.

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<sup>553</sup> CRM, para. 6.02-6.03.

<sup>554</sup> *Ibid.*

<sup>555</sup> CRM, p. 147.

<sup>556</sup> CRR, p. 211.

<sup>557</sup> See NCM, pp. 239-241, paras. 7.1.2-7.1.4, 4.1.18-4.1.36, 4.1.46, 4.2.36, 6.2.3-6.2.16, 5.1.1-5.1.20, and 5.2.2-5.2.11.

<sup>558</sup> Nor, of course, of "cessation" of those alleged breaches.

6.3. For her part, in her *Counter-Memorial*, Nicaragua has requested the Court to make a formal Declaration in its Judgment on the extent and limits of Costa Rica's right of navigation on the San Juan River<sup>559</sup> in order to put an end to the Applicant's global strategy of expanding her rights under the 1858 Treaty of Limits at Nicaragua's expense. As could be expected, Costa Rica asks the Court to reject that request, in line with her claim for an unlimited right of navigation on the river. However, both requests show that the parties agree at least that such a Declaration would be in accordance with the Court's Statute and function<sup>560</sup>.

6.4. Costa Rica describes Nicaragua's request for a Declaration as a "counter-claim" and tries to cast doubt on its admissibility, although without openly challenging it<sup>561</sup>. In fact, Nicaragua has avoided formally advancing her request as a "counter-claim" for two main reasons:

- *First*, she envisages her request not as an autonomous claim but as a pure alternative to the *content* of the declaration requested by Costa Rica herself, i.e., as the consequence of the necessary rejection of the Applicant's submission; and

- *Second*, Nicaragua would be satisfied with such a Declaration being made anywhere in the Judgment, whether in the *dispositif* itself, or in the motives (reasoning). The important issue is that the Court make clear the extent and the limits of Costa Rica's right of navigation "with articles of trade" (*con objetos de*

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<sup>559</sup> NCM, para. 7.2.1-7.2.6.

<sup>560</sup> For formal recognitions of this possibility, see CRM, para. 6.02; NCM, para. 7.2.3; and CRR, para. 5.02.

<sup>561</sup> Cf. CRR, p. 204, fn. 585.

*comercio*) on the San Juan River with the hope to avoid misunderstandings and new crises in the future.

6.5. This being said, even were the Court to consider that this request amounts to a counter-claim, it would be admissible under Article 80 of the Rules (as amended on 1 February 2001). It has been made in the *Counter-Memorial* in paragraph 7.2.6, in which Nicaragua formally requested “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.”

6.6. In her Submissions, Nicaragua also requested the Court, “to make a formal declaration on the issues raised by Nicaragua in Section 2 of Chapter 7,” and this request “comes within the jurisdiction of the Court and is directly connected with the subject-matter of the claim” of Costa Rica.

6.7. Costa Rica does not challenge this connection, except in regard to point (v), which, she alleges, “is without merit and without incidence for the present case”<sup>562</sup>. This is not so. First, as described in the *Application* and confirmed in Costa Rica’s *Memorial*: “The present proceedings (...) concern breaches by Nicaragua of Costa Rica’s rights of navigation and related rights in respect of the San Juan River”<sup>563</sup>. Second, the dredging of the San Juan is in direct connection to navigation on the river, because it is a measure that is required to restore the lower reaches of the river to navigability. Third, the ensuing discussion, by Costa Rica herself, confirms that this request has a direct bearing on the rights she claims. She cites an extract of the Cleveland Award according to which works of improvement may be executed by Nicaragua “provided such works of improvement do not result (...) in the destruction or serious impairment of the navigation of the said river or any of its branches at any point where Costa Rica is entitled to navigate the same”<sup>564</sup>. In fact, rather than destroy or impair navigation on the lower San Juan (where Costa Rica enjoys a right of navigation) the dredging of the river would only improve and enhance it.

6.8. The problems posed by the deviation of the waters of the San Juan to the Colorado are long-standing. This variation or change in the water flow occurred

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<sup>562</sup> CRR, para. 5.31.

<sup>563</sup> CRM, para. 1.01.

<sup>564</sup> CRR, para. 5.31, quoting the Cleveland Award. CRM, Vol. II, Annex 16.



very soon after the Treaty of Limits came into force on 15 April 1858. In certain Nicaraguan circles, it has always seemed remarkable that shortly after the Colorado River (a branch of the San Juan) was ceded to Costa Rica in 1858 it started to carry the waters that before flowed out to sea through the Nicaraguan branch that was supposed to be the main branch of the river.

6.9. In a note from the Nicaraguan Ministry of Foreign Relations to the Minister of Foreign Relations of Costa Rica dated 13 December 1859, that is, barely a year and a half after the 15 April 1858 Treaty, Nicaragua states that:

“The attention of the government of Nicaragua has been forcibly called to the condition of the port of San Juan del Norte, which has been filled up and almost rendered useless on account of the sand which has accumulated in it ever since its waters have abundantly flowed into the channel of the Colorado river; and such a state of things must also demand the attention of Costa Rica, because the interest of the latter in this subject is not less felt, since by existing treaties she has the right of navigation and free import from there.”<sup>565</sup>

6.10. Costa Rica herself acknowledged in her Argument to President Cleveland that the Nicaraguan branch of the San Juan suffered a loss of water flow to the Costa Rican branch (the Colorado):

“The geographical point named in 1858, the mouth of the San Juan river, has not changed its position, although it may be that the volume of waters emptied through it into the ocean is now less than in 1858, and although it may be also that the waters of the Colorado river have increased or found new outlets through the Caño de Animas or any other opening.”<sup>566</sup>

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<sup>565</sup> Argument of Costa Rica, *op. cit.*, p. 233. NR, Vol. II, Annex 6.

<sup>566</sup> *Ibid.*

6.11. General Alexander in his first Award of 30 September 1897, in describing the Bay of San Juan pointed out, “The peculiarities of this bay, to be noted, is that the river brings down very little water during the annual dry season. When that happens, *particularly of late years...* a man might cross dry-shod.”<sup>567</sup>

6.12. This fact is made more explicit by the Report to the Inspector General of the Costa Rican Treasury of 16 March 1906: “During the summer, all the water from the San Juan River follows the course of the Colorado, left almost completely dry the first...”<sup>568</sup>

6.13. As indicated above, this question is squarely before the Court: it is a matter of greater import to navigation on the river than the simple question of regulation of that navigation that appears to concern Costa Rica; put simply, without sufficient water to navigate, any discussion of navigation rights is entirely academic. Furthermore, Nicaragua’s right to make improvements to the river is a matter that was addressed in the Cleveland Award: Costa Rica “*can not prevent* the Republic of Nicaragua from executing at her own expense and within her own territory such works of improvement, provided such works of improvement do not result...*in the destruction or serious impairment of the navigation* of the said river or any of its branches at any point where Costa Rica is entitled to navigate the same.”<sup>569</sup> These improvements refer to any actions taken by Nicaragua “to keep

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<sup>567</sup> CRM, Vol. II, Annex 18 at p. 531 (emphasis added).

<sup>568</sup> CRM, Vol. VI Annex 214 at p. 878.

<sup>569</sup> *Ibid.*, para. 7 (emphasis added).

the navigation of the river or port free and unembarrassed, or to improve it for the common benefit.”<sup>570</sup>

6.14. And, “The boundary line between the Republics of Costa Rica and Nicaragua, on the Atlantic side, begins at the extremity of Punta de Castilla at the mouth of the San Juan de Nicaragua River, *as they both existed on the 15<sup>th</sup> day of April, 1858.*”<sup>571</sup>

6.15. Based on the Cleveland Award there is no question that Nicaragua has the right to bring the river and its mouth to the state they were in on the date of the 1858 Treaty. Far from destroying or seriously impairing navigation on the river, Nicaragua’s restoration of the water flow that existed in 1858 would only -- to use President Cleveland’s words -- “improve it for the common benefit”<sup>572</sup>. Furthermore, Nicaragua does not need Costa Rica’s permission to proceed with these works. As President Cleveland decided, Costa Rica “can not prevent the Republic of Nicaragua from executing at her own expense and within her own territory any works of improvement...”<sup>573</sup> Costa Rica has only a right to an indemnification if the damages or impairments mentioned by President Cleveland occur.

6.16. Nicaragua is not asking the Court for any indication as to the amount of water that Nicaragua has the right to recover. The request is simply for a Declaration that Nicaragua has this right in general. If dredging works are begun

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<sup>570</sup> *Ibid.*, para. 4.

<sup>571</sup> Cleveland Award, *op. cit.*, para 1. CRM, Vol. II, Annex 16 (emphasis added).

<sup>572</sup> *Ibid.*

<sup>573</sup> *Ibid.*

it will be Costa Rica's task of proving the occurrence of any damages that -- it might be added -- are not offset by the benefits obtained.

6.17. In respect to the four other items included in the Declaration requested by Nicaragua, some remarks must be briefly made:

- Concerning the right of Nicaraguan authorities to issue regulations for navigation (and landing) in the San Juan, in particular related to matters of environmental protection, control and prevention of crime, navigational safety and border protection and security, and the correlative duty of Costa Rica to comply with them, Nicaragua has shown in Chapter IV that her regulations are a necessary consequence and a reasonable exercise of her sovereignty over the bed and the waters of the river<sup>574</sup>, the environment and safety of which she has both a right and a duty to protect<sup>575</sup>;
- The obligation for Costa Rica to pay “for any special services provided by Nicaragua in the use of the San Juan” by no means “contradict[s] the perpetual right of free navigation”<sup>576</sup>; these are two separate matters: the navigation on the river is free provided it is “with articles of trade” (*con objetos de comercio*) but by no means does it imply that Nicaragua is restrained from charging fees for such services as safety inspections (departure clearance certificates) or immigration processing (tourist cards)<sup>577</sup>;

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<sup>574</sup> See NR, Chap. II, Sec. I, paras. 2.66-2.81 and especially 2.74.

<sup>575</sup> See NR, paras. 4.35-4.68.

<sup>576</sup> CRR, para. 5.28.

<sup>577</sup> See above, paras. 4.86-4.91.

- The same reasoning applies to point (iii) – regarding reasonable charges for modern improvements to navigation of the river. Nicaragua does not put into question the Cleveland Award which decided that “[t]he Republic of Costa Rica is not bound to concur with the Republic of Nicaragua in the expenses necessary” for the improvement of the river<sup>578</sup>; but this is a different issue. If, for example, Nicaragua, without infringing the rights of Costa Rica to free navigation with articles of trade, would decide to build on her own territory a canal parallel to the river, it is quite clear that the Treaty does not confer on Costa Rica a right of free use of such a canal – even if her navigation were with articles of trade;
- Lastly, Costa Rica asserts that by requesting a Declaration by the Court that “revenue service boats may only be used during and with special reference to actual transit of the merchandise authorized by Treaty”<sup>579</sup>, Nicaragua attempts “to limit Costa Rica’s free right of navigation, and its right of navigation with revenue service vessels expressly recognised in the Cleveland Award.”<sup>580</sup> As shown above<sup>581</sup>, this is not an attempt by Nicaragua to limit a right belonging to Costa Rica; it simply reflects the express words of the Cleveland Award itself:

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<sup>578</sup> Cleveland Award, *op. cit.*, para 4. CRM, Vol. II, Annex 16 (emphasis added).

<sup>579</sup> CRR, para. 5.30 (quoting NCM, para. 7.2.6 (footnote omitted)).

<sup>580</sup> *Ibid.*

<sup>581</sup> See paras. 2.129-2.150.

“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.”<sup>582</sup>

6.18. Furthermore, as indicated above in Chapter V, there is no evidence that Costa Rica has ever navigated the San Juan River with revenue service vessels or that she has ever requested permission to do so and been denied or hindered in her exercise by Nicaragua.

6.19. As a consequence, Nicaragua fully persists in her request and formally requests the Court to make the Declaration the text of which is reproduced in paragraph 6.5 above.

## **Section II. Costa Rica’s Further Contentions Regarding Remedies**

6.20. As for the rest, Costa Rica’s *Reply* focuses on three points:

- “Nicaragua’s claim that Costa Rica seeks to exercise diplomatic protection”;
- “Assurances and guarantees of non-repetition”; and
- “Compensation”.

Nicaragua will briefly answer each of these points in turn.

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<sup>582</sup> Cleveland Award, *op. cit.*, para. *Second*. CRM, Vol. II, Annex 16 (emphasis added).

## A. THE ISSUE OF DIPLOMATIC PROTECTION

6.21. In her *Counter-Memorial*, Nicaragua noted that the claims made by Costa Rica “concerning the ‘obligation’ which would be incumbent upon Nicaragua ‘to permit riparians of the Costa Rican bank to fish in the River for subsistence purposes’ and, more generally, her claims for compensation for the losses and expenses incurred by Costa Rican citizens, ... could only be made as a matter of diplomatic protection, the conditions for which are not fulfilled in the present case”<sup>583</sup>. This defect is more particularly apparent in relation to the Costa Rican claims rebutted in Chapter IV of the present *Rejoinder*.

6.22. First and foremost, it must be noted in respect of these claims that the alleged “rights” thus “protected” are not mentioned in the *Application* and are only artificially “related” to the navigation rights which are the only subject-matter of said *Application*. Consequently, the claims are inadmissible and the Court should dismiss them on this ground. Only in the alternative would the question of whether the conditions for the exercise of diplomatic protection are met even arise.

### 1. *Absence of Relation with the Application*

6.23. A first remark is in order: in spite of the impression the Applicant tries to give by calling them “Related rights”, the claims are not admissible; they are not part of the *Application* which does not mention any of them and clearly limits the case to rights related to navigation (under the 1858 Treaty of Limits).

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<sup>583</sup> NCM, para. 7.1.10.

6.24. Indeed, in the 2005 *Application*, a list of the “rights of Costa Rica on the San Juan River” has been put forward including:

- “(a) the perpetual right of free navigation for commercial purposes of Costa Rican boats and their passengers;
- (b) the right for boats of Costa Rica to touch at any part of the banks of the river where the navigation is common, without paying any dues except such as may be established by agreement between the two Governments;
- (c) the right to navigate the river in accordance with Article Second of the Cleveland Award;
- (d) the right to navigate the San Juan River in official boats for supply purposes, exchange of personnel of the border posts along the right bank of the river with their official equipment, including the necessary arms and ammunitions, and for the purposes of protection, as established in the pertinent instruments ;
- (e) the right not to have navigation on the river obstructed or impaired at any point where Costa Rica is entitled to navigate.”

All said “rights” are clearly rights which, in one way or another, have *prima facie* a direct connection with navigation, as such.

6.25. New “other related rights”, which allegedly “arise from the same treaty or from other international binding instruments and which also have consequences relative to the navigation of the San Juan”<sup>584</sup> appeared in the *Memorial*. Costa Rica includes in these new “other related rights” “a customary right to fish on its waters for subsistence purposes for residents living on the Costa Rican bank of the San Juan.”<sup>585</sup> Such a formulation clearly shows that there is no connection whatsoever between the allegedly breached obligation and the “freedom of

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<sup>584</sup> CRM, para. 4.118.

<sup>585</sup> CRM, para. 4.118(3).



navigation with articles of trade” stemming from 1858 Treaty of Limits. In the *Reply*, there is not even an attempt to relate this “customary right to fish” to navigation.

6.26. In the same way, Costa Rica tries to broaden the scope of the dispute by adding “the right of Costa Rican vessels to carry their own flag”<sup>586</sup> and the “right ... of not having to fly the Nicaraguan flag”<sup>587</sup> with the understanding that they constitute rights “‘related’ to the right of free navigation.”<sup>588</sup>

6.27. It might be true, as Costa Rica submits, that “it is up to Costa Rica, and not to Nicaragua, to formulate its claims.”<sup>589</sup> However, this is to be done in the *Application*, an essential point that has been ignored by the Applicant in this case. As the Permanent Court put it as early as 1933:

“it is the Application which sets out the subject of the dispute, and the Case, though it may elucidate the terms of the Application, must not go beyond the limits of the claim as set out therein.”<sup>590</sup>

6.28. This is nevertheless, without any doubt, what Costa Rica does in her overall strategy to widen the object of the dispute far beyond the scope of her *Application*, which was only related to the 1858 Treaty and the rights therein contained. There is no logical or legal connection between the “customary right to fish” and the 1858 Treaty – since it is, as alleged by Costa Rica, a customary right

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<sup>586</sup> CRM, para. 4.10.

<sup>587</sup> CRR, para. 3.98.

<sup>588</sup> CRR, para. 3.97.

<sup>589</sup> CRR, para. 3.111.

<sup>590</sup> PCIJ, 1933, Series A/B, *Case concerning the Administration of the Prince von Pless* (Preliminary Objection), p. 14.

and not a treaty right stemming from this instrument – or to free navigation. And in the same vein, the alleged right to fly the Costa Rican flag has nothing to do with the 1858 Treaty – which does not mention this issue at all – or to free navigation.

6.29. Nicaragua does not dispute the right of Costa Rica to amend and to supplement her submissions in the proceedings, even if Costa Rica did not expressly reserve her rights on this possibility in its *Application*. This right is nevertheless not unlimited. As the Court stated recently in the *Territorial and Maritime Dispute between Nicaragua and Honduras* case:

“[T]he mere fact that a claim is new is not in itself decisive for the issue of admissibility. In order to determine whether a new claim introduced during the course of the proceedings is admissible the Court will need to consider whether, ‘although formally a new claim, the claim in question can be considered as included in the original claim in substance’ (*Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Preliminary Objections, Judgment*, I.C.J. Reports 1992, pp. 265–266, para. 65). For this purpose, to find that the new claim, as a matter of substance, has been included in the original claim, it is not sufficient that there should be links between them of a general nature. Moreover,

‘[a]n additional claim must have been implicit in the application (*Temple of Preah Vihear*, Merits, Judgment, I.C.J. Reports 1962, p. 36) or must arise ‘directly out of the question which is the subject-matter of that Application’ (*Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, Merits, I.C.J. Reports 1974, p. 203, para. 72)’ (*Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Preliminary Objections, Judgment*, I.C.J. Reports 1992, p. 266, para. 67).”<sup>591</sup>

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<sup>591</sup> *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, ICJ Reports 2008, para. 110.

6.30. The “customary fishing rights” and the “right to fly the Costa Rican flag” in particular have neither been included in the 2005 *Application*, nor are they implicit in the *Application* which clearly focused only on navigational and (truly) related rights, *i.e.*, rights related to navigation. In addition, they clearly do not arise “directly out of the question which is the subject-matter of that *Application*”<sup>592</sup>, *i.e.*, the alleged breach of Costa Rica’s right to free navigation. It is indeed not necessary to rule on the alleged existence, or the alleged violation, of any customary right to fish or on any right to fly one flag or another, in order to determine if the right of “free navigation” has been violated.

6.31. Under these circumstances, the issues concerning the “related” rights of fishing and of flying the Costa Rican flag are inadmissible under Article 40 of the Statute and Article 38, paragraph 2, of the Rules of Court.

## 2. *Non-Exhaustion of Domestic Remedies*

6.32. In her *Reply*, Costa Rica embarks on a lengthy discussion of the relations between treaty claims and diplomatic protection claims, in respect to these so-called “related rights”<sup>593</sup>. Her main argument is that “Costa Rica’s rights of navigation are not claimed as a matter of diplomatic protection but as treaty rights belonging to Costa Rica”<sup>594</sup> and that “[i]n any event, even if Costa Rica’s claim for compensation for losses caused to Costa Rica for charges, visas and permits required by Nicaragua for Costa Rican vessels and Costa Rican citizens could be

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<sup>592</sup> *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, Merits, Judgment, ICJ Reports 1974, p. 203, para. 72.

<sup>593</sup> CRR, paras. 5.04-5.09.

<sup>594</sup> *Ibid.*, para. 5.05.

characterised as a diplomatic protection claim, that claim is incidental to Costa Rica's claim for her own treaty rights. The dominant claim is Costa Rica's claim for her own navigation rights pursuant to the Treaty of Limits."<sup>595</sup>

6.33. This precisely is a fundamental difference with the case concerning *Avena and other Mexican Nationals*, which is the exclusive basis for the reasoning of Costa Rica. As made crystal clear by the Court in the passage of its *Judgment* of 31 March 2004 quoted by Costa Rica<sup>596</sup>, the basis of the Court's decision in that case is to be found in the very "special circumstances of interdependence of the rights of the State and of individual rights", since Article 36, paragraph 1, of the 1963 Vienna Convention on Consular Relations creates rights not only for the Applicant State but also for the national concerned<sup>597</sup>. In the present case, the 1858 Treaty of Limits clearly creates no international right whatsoever for any individual.

6.34. The solution of the *Judgment* in *Avena* cannot, therefore, be transposed in the present case where the alleged rights of the Applicant State and of the individuals concerned are different in nature: they stem from the Treaty for Costa Rica; for the individuals, they can only rise to the surface at the international level after the allegedly injured parties have exhausted national remedies. Far from being inter-connected and interdependent, the respective rights of Costa Rica and her nationals are clearly distinct. One can easily imagine a violation of the 1858 Treaty having no bearing on Costa Rican nationals, whereas this cannot be the case concerning the right of consular notification. A claim for monetary

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<sup>595</sup> *Ibid.*, para. 5.07.

<sup>596</sup> See CRR, para. 5.08.

<sup>597</sup> *ICJ Reports* 2004, p. 36, para. 40; see also *Judgment* of 2001, *LaGrand*, *ICJ Reports* 2001, p. 494, para. 77.

compensation for the injuries suffered by the individuals can consequently not arise until legal remedies are exhausted. As the Court stated in the *Interhandel* case, “the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic system”<sup>598</sup>. The International Law Commission has stated that “it is only if these [local] remedies fail that the result sought by the international obligation will become definitively unattainable by reason of the act of the State.”<sup>599</sup>

6.35. It should also be noted that in the present case, *if* breaches of her obligations could be attributed to Nicaragua (*quod non*), the harm caused would, apparently, have been caused mainly to non-Costa Rican nationals through the charges for “tourist cards” and “immigration fees”<sup>600</sup> or by the requirement of visas<sup>601</sup>. In her *Reply*, Costa Rica goes as far as to allege that “Nicaragua’s unlawful restrictions and hindrances to Costa Rica’s use of the San Juan River have caused considerable harm ... to the inhabitants themselves, many of them Nicaraguan nationals.”<sup>602</sup> Costa Rica certainly can not act on behalf of Nicaraguan or other non-Costa Rican nationals supposedly prejudiced by Nicaragua’s allegedly wrongful acts.

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<sup>598</sup> *Interhandel (Switzerland v. United States of America)*, Judgment, Preliminary objections, ICJ Reports 1959, p. 27.

<sup>599</sup> ILC Yearbook 1977, Vol. II, 2<sup>nd</sup> Part, p. 30, para. 2) of the Commentary of Draft Article 22 on State Responsibility.

<sup>600</sup> CRR, para. 4.09.

<sup>601</sup> CRR, para. 4.12.

<sup>602</sup> CRR, paras. 4.03; *see also* 4.26 and 4.33.

## B. ASSURANCES AND GUARANTEES OF NON-REPETITION

6.36. In her *Reply*, Costa Rica insists on her request for assurances and guarantees of non-repetition<sup>603</sup>. According to the Applicant such a request would be justified by “Nicaragua’s continuing denial of the very existence of Costa Rica’s rights. This is precisely”, she adds, “the situation in which assurances and guarantees of non-repetition are required...”<sup>604</sup> With all due respect, this is absurd. Following this line of reasoning would mean that assurances and guarantees of non-repetition are due in all cases brought before the Court. By definition, *every* case implies that there exists a dispute between the parties, that is, according to the well-known definition by the Permanent Court, consistently applied by the Court, “a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons”<sup>605</sup>; and, a dispute exists when “the claim of one party is positively opposed by the other”<sup>606</sup>. As a matter of definition any dispute before this Court necessarily implies that one of the parties denies, or interprets differently, the rights invoked by the other. Consequently, this would mean that each and every case requires that the Court order assurances and guarantees of non-repetition.

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<sup>603</sup> CRR, para. 5.10-5.15.

<sup>604</sup> CRR, para. 5.12.

<sup>605</sup> PCIJ, Judgment of 30 August 1924, *Mavrommatis Palestine Concessions*, Series A, No. 2, p. 11; see also e.g.: 8 October 2007, *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*, par. 130.

<sup>606</sup> ICJ, Judgment, 21 December 1962, *South West Africa, Preliminary Objections*, ICJ Reports 1962, p. 328; see also, e.g.: 3 December 2006, *Armed Activities on the Territory of the Congo (New Application : 2002) (Democratic Republic of the Congo v. Rwanda)*, p. 40, par. 90, or 13 December 2007, *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *Preliminary Objections*, para. 41.

6.37. It is the view of Nicaragua that this is not, and must not be, so. The Court's Judgments are compulsory, and when States consent to the Court's jurisdiction, they accept that the Judgment will be "final and without appeal" in the words of Article 60 of the Statute. If and when, as in the present case, the requested assurances and guarantees would add nothing to the compulsory nature of the Judgment, it is not tenable that "the circumstances (...) require"<sup>607</sup> that such a request be satisfied. It can add nothing to the obligations of the States appearing in Court and accepting its jurisdiction, as in the present case. As Nicaragua has recalled in her *Counter-Memorial*, the Court has frequently declared that "it 'neither can nor should contemplate' the possibility that its Judgments would not be implemented by the Parties"<sup>608</sup>. Costa Rica's request runs against this presumption.

6.38. The jurisprudence invoked by the Applicant must be checked against this fundamental consideration. In light of it, it will be apparent that:

- In *LaGrand* and *Avena*, the *Judgments* limited themselves to take note of the assurances given by the Respondent State<sup>609</sup>, which, in fact, added something to the usual consequences of the responsibility of the State as decided in a Judgment;

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<sup>607</sup> See Article 30 (b) of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts.

<sup>608</sup> NCM, para. 7.1.13. See e.g.: PCIJ, Judgment, 17 August 1923, *S.S. Wimbledon*, Series A, No. 1, p. 32; 18 September 1928, Series A, No. 17, *Factory at Chorzów (Claims for Indemnity) (Merits)*, Series A, No. 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.

<sup>609</sup> See Judgments of 27 June 2001, *LaGrand*, ICJ Reports 2001, para. 124 and par. 128 (6); and 31 March 2004, *Avena and Other Mexican Nationals*, ICJ Reports 2004, para. 150 and para. 153 (10).

- In the *Genocide* case, the Court did not “direct that the Respondent provide guarantees and assurances of non-repetition in relation to the established breaches of the obligations to prevent and punish genocide”<sup>610</sup>; while the Court recognized that “the Respondent failed to comply both with its obligation to prevent and its obligation to punish genocide deriving from the Convention, and that its international responsibility is thereby engaged,”<sup>611</sup> and while the breach was continuing at the time of the Judgment, the Court considered “that the declaration [by which it gave an appropriate satisfaction to the Applicant] is sufficient as regards the Respondent’s continuing duty of punishment, and therefore does not consider that this is a case in which a direction for guarantees of non-repetition would be appropriate”<sup>612</sup>; indeed, the guarantees and assurances required could, in the circumstances, have added nothing to the Court’s decision; and
- In the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, the Court, without including any decision on that matter in the *dispositif* of its *Judgment*, considered that,
 

“if a State assumes an obligation in an international agreement to respect the sovereignty and territorial integrity of the other States parties to that agreement (an obligation which exists also under general international law) and a commitment to co-operate with them in order to

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<sup>610</sup> Judgment of 26 February 2007, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina v. Serbia and Montenegro)*, Merits, para. 466.

<sup>611</sup> *Ibid.*, para. 450.

<sup>612</sup> *Ibid.*, para. 466.



fulfil such obligation, this expresses a clear legally binding undertaking that it will not repeat any wrongful acts. In the Court's view, the commitments assumed by Uganda under the Tripartite Agreement must be regarded as meeting the DRC's request for specific guarantees and assurances of non-repetition. The Court expects and demands that the Parties will respect and adhere to their obligations under that Agreement and under general international law.”<sup>613</sup>

6.39. It goes without saying that what holds true for commitments taken in a treaty is *a fortiori* true for obligations ensuing from a Court's Judgment. In the present case, by no stretch of the imagination can the Court direct the Respondent to give any assurance or guarantee of non-repetition which could go beyond what the Court itself could decide by way of satisfaction or of a declaratory Judgment. The present situation is very similar to that prevailing in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria* where the Court stated that it:

“cannot envisage a situation where either Party, after withdrawing its military and police Forces and administration from the other's territory, would fail to respect the territorial sovereignty of that Party.”<sup>614</sup>

6.40. This remark also applies to Costa Rica's request that two Nicaraguan decrees “and all other relevant measures be abrogated”<sup>615</sup>. Not only is this request abusively vague (what are the “other measures” in question?), but also it goes far beyond the “inherent limitations on the exercise of the judicial function

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<sup>613</sup> Judgment of 19 December 2005, *ICJ Reports* 2005, para. 257.

<sup>614</sup> Judgment of 10 October 2002, *Merits, ICJ Reports*, para. 318.

<sup>615</sup> CRR, para. 5.15.

which the Court, as a court of justice, can never ignore.”<sup>616</sup> Among those limitations, the most fundamental is the one which prompts the Court to refrain from issuing orders to sovereign States<sup>617</sup>.

### C. COMPENSATION

6.41. In paragraph 6.15 of her *Memorial*, Costa Rica makes a series of entirely unsubstantiated claims for compensation, which she simply reiterates in paragraph 5.15 of her *Reply*, also without any attempt to substantiate them. For her part, Nicaragua noted in her *Counter-Memorial* that the Court could not accede to such cavalier claims since the Applicant had only made “very broad assertions as to the [injuries] allegedly endured and [given] no indication whatsoever as to the cause of those damages.”<sup>618</sup>

6.42. In the *Reply*, Costa Rica explains that “[i]n fact Costa Rica’s *Memorial* contains detailed specification first of Costa Rica’s rights, then of Nicaragua’s violations of those rights”<sup>619</sup>. This begs the question – which is not, for the purpose of the present chapter, related to the alleged breaches committed by Nicaragua, but which relates to the losses allegedly suffered by Costa Rica. And,

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<sup>616</sup> ICJ, Judgment, 2 December 1963, *Northern Cameroons, Preliminary Objections*, ICJ Reports 1963, p. 29.

<sup>617</sup> See e.g.: PCIJ, 1925, *Mavrommatis Jerusalem Concessions*, Series A, No. 5, p. 50; ICJ, Judgments, 13 June 1951, *Haya de la Torre*, ICJ Reports 1951, p. 79; 27 June 2001, *LaGrand*, ICJ Reports 2001, para. 128 (7); 31 March 2004, *Avena and Other Mexican Nationals*, ICJ Reports 2004, para. 31; 14 February 2002, *Arrest Warrant of 11 April 2000*, ICJ Reports 2002, para. 76.

<sup>618</sup> NCM, para. 7.1.7 (footnote omitted).

<sup>619</sup> CRR, para. 5.17; see also para. 5.22 (ii).

in this respect, it is certainly not enough to simply refer, as the Applicant does<sup>620</sup>, to the list given, without any explanation, in one paragraph of the *Reply*.

6.43. Contrary to what Costa Rica seems to think (or purports to understand), Nicaragua, by no means challenges, as a matter of principle, the possibility of requesting the Court to determine in a later stage of the proceedings the amount of compensation due for damages resulting from internationally wrongful acts when the responsibility of the Respondent has been duly decided in a first Judgment. As was made extremely clear in the *Counter-Memorial*: “the form and amount of compensation can be reserved for a subsequent phase of the proceedings”<sup>621</sup>. But Nicaragua also firmly maintains that “this does not mean that the Claimant in a case before the Court can simply contend that it has endured 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.”<sup>622</sup>

6.44. Curiously, Costa Rica tries to take advantage of the decision of the Court in the *Fisheries Jurisdiction* case<sup>623</sup>. All artificial quibbles aside, the important part of this *Judgment* is one that Costa Rica seems to attribute not to the Court, but to Nicaragua<sup>624</sup>. This sleight of hand is understandable since the Court’s

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<sup>620</sup> *Ibid.*: “Where Costa Rica has requested compensation – to be assessed in a separate phase of these proceedings – it has specified the particular category of loss, whether in the form of charges, expenses and costs directly resulting from Nicaragua’s internationally wrongful acts”; the corresponding footnote (557) simply indicates: “CRM, para. 6.15”; *see also* CRR, para. 5.22 (ii) and fn. 577.

<sup>621</sup> NCM, para. 7.1.5.

<sup>622</sup> *Idem.* 7.1.5.

<sup>623</sup> *See* CRR, paras. 5.19 and 5.21-5.22.

<sup>624</sup> *Cf.* CRR, para. 5.21: “But it [NICARAGUA] argues that the Court ‘is prevented from making an all-embracing finding of liability which would cover matters as to which it has only limited

position is decisive on the question: “In these circumstances, the Court 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”<sup>625</sup>. In other words, when the Court, for one reason or another<sup>626</sup>, has only “limited information and slender evidence” on the alleged damages, it cannot make a general finding of liability (or responsibility) as Costa Rica is requesting. Moreover, it must be noted that, in the *Fisheries Jurisdiction* case, Germany had offered much more evidence on the damages for which compensation was required than the list in paragraphs 6.15 of the *Counter-Memorial* and 5.16 of the *Reply*, which is repeatedly invoked by Costa Rica as specifying the losses it has allegedly suffered and their relation to Nicaragua’s alleged internationally wrongful acts<sup>627</sup>.

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information and slender evidence”. The corresponding footnote (570) is prudently more honest: “NCM, para. 7.1.7, citing ICJ 1974, p. 204 (para. 76)”.

<sup>625</sup> ICJ, Judgment, 25 July 1974, *Fisheries Jurisdiction Case (Germany v. Iceland)*, ICJ Reports 1974, para. 76.

<sup>626</sup> In the 1974 case, the main relevant circumstance was the fact that the Applicant state had not submitted a claim for payment of a certain amount of money as compensation and the Court deemed it inappropriate to request further evidence (*ibid.*). In the present case, the Applicant itself refuses to provide the Court with such evidence.

<sup>627</sup> See CRM, paras. 5.16-5.17 and 5.22 (ii). The whole text of both paragraphs (which are identical) reads as follows: “compensation should include, *inter alia*:

- (a) the loss caused to Costa Rican vessels arising from the so-called ‘departure clearance certificate’ imposed on Costa Rican vessels navigating the San Juan River;
- (b) the loss caused to Costa Rica for the charge of tourism cards, transit permits and immigration fees imposed on Costa Rican vessels navigating the San Juan River ;
- (c) the loss caused to Costa Rica for the charge of a consular visa to any Costa Rican citizen seeking to navigate the San Juan River;
- (d) the losses caused to Costa Rica for the further expenses incurred by Costa Rican citizens, the consequential losses in their activities, as well as all other material and moral damage suffered by them;

6.45. The position of the Court in the *Fisheries Jurisdiction* case and the conclusions which can be drawn from it are amply confirmed by the case-law which Costa Rica mentions in paragraphs 5.20 and 5.23 of her *Reply* and which deserves closer scrutiny. In chronological order, those decisions are:

- In the case of the *Factory at Chorzów*, the Permanent Court declared that the Polish Government was “under an obligation to pay, as reparation to the German Government, a compensation corresponding to the damage sustained by the [German Companies Oberschlesische Stickstoffwerke and Bayerische Stickstoffwerke] as a result of “Poland’s unlawful attitude”, and the Court accepted to reserve “the fixing of the amount of this compensation for a future judgment”<sup>628</sup>. But before making this decision, the Court carefully ascertained “whether these Companies have in fact suffered damage as a consequence of that attitude”<sup>629</sup>. On the principle of the Polish responsibility, the Court laid down “the guiding principles according to which the amount of compensation due may be determined”,<sup>630</sup> and it “discarded for want of evidence, indemnity for [another] damage alleged by the Bayerische” on the following basis:

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(e) the expenses and costs incurred by Costa Rica as a result of Nicaragua’s violations causing Costa Rica to be unable to resupply the police posts along the Costa Rican bank through the San Juan River;

(f) interest at prevailing rates from the time the claim arose until payment of the judgment; and

(g) such other relief as the Court may deem appropriate”.

<sup>628</sup> PCIJ, Judgment, 13 September 1928, *The Factory at Chorzów, Claim for Indemnity, Merits*, Series A, No. 17, pp. 63-64.

<sup>629</sup> *Ibid.*, p. 30; see the ensuing detailed discussion, pp. 30-34.

<sup>630</sup> *Ibid.*, p. 46.

“The Court must however observe that it has not before it the data necessary to enable it to decide as to the existence and the extent of damage resulting from alleged competition of the Chorzów factory with the Bayerische factories; the Court is not even in a position to say for certain whether the methods of the Bayerische have been or are still being employed at Chorzów, nor whether the products of that factory are to be found in the markets in which the Bayerische sells or might sell products from its own factories. In these circumstances, the Court can only observe that the damage alleged to have resulted from competition is insufficiently proved.”<sup>631</sup>

- In the *Corfu Channel* case, “[t]he Albanian Government [had] not yet stated which items, if any, of the various sums claimed it contests, and the United Kingdom Government [had] not submitted its evidence with regard to them [t]he Court therefore [considered] that further proceedings on this subject [were] necessary”<sup>632</sup>; and in the *Hostages* case, where “the form and amount of [the] reparation” could not be determined at the date of the initial *Judgment*<sup>633</sup>, the existence and consistency of the damage were open to doubt.
- In both the *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, and that *Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), it is apparent that at least “a certain amount of

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<sup>631</sup> *Ibid.*, pp. 56-57.

<sup>632</sup> 9 April 1949, *Merits*, *Rec.* 1949, p. 26; see also, Judgment, 15 December 1949, *Corfu Channel*, *Compensation*, *Rec.* 1949, p. 245.

<sup>633</sup> ICJ, 24 May 1980, Judgment, 1980, *United States Diplomatic and Consular Staff in Tehran*, *ICJ Reports* 1980, para. 90.

evidence” of the alleged injury had been provided during the phase of determination of responsibility.”<sup>634</sup>

6.46. Notwithstanding the particular circumstances of each case, it clearly appears that Costa Rica has not complied with her duty to offer an “amount of evidence” of the injury allegedly sustained and of its causal relation with the alleged internationally wrongful acts of Nicaragua, sufficient to allow the Court to appreciate the seriousness of her claim for reparation. *Mutatis mutandis*, the now firmly established *Oil Platforms* jurisprudence can be used as a guideline: “the Court cannot limit itself to noting that one of the Parties maintains that such a dispute [damages] exists, and the other denies it. It must ascertain whether the violations of the Treaty of 1955 [of 1858] pleaded by Iran [Costa Rica] do or do not fall within the provisions of the Treaty [are the cause of the alleged damages] and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain [compensation is due]...”<sup>635</sup>. Similarly, in the present case, it fell to Costa Rica to establish the reality of the damages she complains of and a “sufficiency of subject-matter connection”<sup>636</sup> between the alleged wrongful acts on the one hand and these alleged damages. She has not fulfilled this duty.

6.47. Like the cases concerning the course of boundaries between States; where the Court avoids expressing its views on the respective responsibilities of the parties, in the present case the Court will no doubt avoid mixing the legal issues

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<sup>634</sup> See Judgments of 27 June 1984, *Military and Paramilitary Activities in and against Nicaragua, Merits*, ICJ Reports 1986, para. 284; and 19 December 2005, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, ICJ Reports 2005, paras. 259-261.

<sup>635</sup> ICJ, Judgment, 12 December 1996, *Oil Platforms, Preliminary Objection*, ICJ Reports 1996, p. 810, para. 17.

<sup>636</sup> Judge Dame Rosalyn Higgins, Separate Opinion, *ibid.*, p. 854.

concerning the régime of the border with that of the alleged responsibility of one or the other party. In the *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria*, the Court declined to “seek to ascertain whether and to what extent Nigeria’s responsibility to Cameroon has been engaged as a result” of the occupation of the Bakassi Peninsula<sup>637</sup>. Similarly, in the present case, the Declarations requested by the parties as to the régime in question will be sufficient answers to their respective concerns.

6.48. These remarks are made, as are all the comments in the present section, for the sole sake of the legal discussion and with the purpose of answering exhaustively all the arguments made by Costa Rica in her *Reply*. The fundamental position of Nicaragua is and remains that Nicaragua has not violated any of the obligations incumbent on her under the 1858 Treaty of Limits as interpreted by the Cleveland Award of 1888. To the contrary, it is Costa Rica that has seriously infringed Nicaragua’s sovereignty over the San Juan River. And this is why Nicaragua has requested a formal Declaration by the Court.

6.49. Costa Rica is right to note, in the Introduction of her *Reply*, that the reservations included at the end of Nicaragua’s *Counter-Memorial*<sup>638</sup> are not (and are not purported to be) counter-claims<sup>639</sup>. Although the rights therein reserved and the breaches of the 1858 Treaty by Costa Rica mentioned in Nicaragua’s reservations are not directly the object of the present case, they are clearly part of the general background. With these reservations Nicaragua wishes to make clear that there are more issues concerning the rights of navigation on the San Juan

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<sup>637</sup> Judgment of 10 October 2002, *Merits*, ICJ Reports, p. 452, para. 319.

<sup>638</sup> See NCM, p. 251.

<sup>639</sup> See CRR, para. 1.17.



River and its outlets than are reflected in the claims brought by Costa Rica and are presently before the Court. With this in mind, Nicaragua expressly reaffirms her right 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 Colorado River.”<sup>640</sup>

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<sup>640</sup> NCM, p. 251, para. 3.

## SUBMISSIONS

On the basis of the facts and legal considerations set forth in the *Counter-Memorial* and the *Rejoinder*, the Court is requested:

To adjudge and declare that the requests of Costa Rica in her *Memorial* and *Reply* are rejected in general, and in particular, on the following bases:

- (a) Either because there is no breach of the provisions of the Treaty of Limits of 15 April 1858 or any other international obligation of Nicaragua.
- (b) Or, as appropriate, because the obligation breach of which is alleged, is not an obligation under the provisions of the Treaty of Limits of 15 April 1858 or under general international law.

Moreover, the Court is also requested to make a formal Declaration on the issues raised by Nicaragua in Section II of Chapter VII of her *Counter-Memorial* and reiterated in Chapter VI, Section I, of her *Rejoinder*.

CARLOS JOSÉ ARGUELLO GÓMEZ  
**Agent of the Republic of Nicaragua**

15 July 2008

## APPENDIX

i. Costa Rica has attached to her *Reply* an Appendix entitled “*Some Historical Issues*.” Most of the issues in this Appendix are not relevant to the questions that are before the Court. Those that have any relevance have been dealt with in the text of this *Rejoinder*. Nonetheless, simply to set the record straight Nicaragua attaches this Appendix to her *Rejoinder*.

### Section I. The San Juan River

ii. The subjects addressed in this section and the section that follows -- regarding the issue of Nicoya -- are historical rather than juridical in nature, because the Treaty of Limits, the Cleveland Award and the awards of General Alexander have established the boundary between Nicaragua and Costa Rica, rendering the difficult task of interpreting colonial documents or colonial and post-colonial *effectivités* unnecessary.

iii. Regarding the first of these historical issues, Costa Rica states that during the colonial period -- that is, before independence -- the San Juan River did not belong exclusively to either of the provinces.

iv. In order to demonstrate the above, Costa Rica states<sup>641</sup> that Nicaragua claims<sup>642</sup> that the Royal Charter of 1573 establishes that the mouths of the Desaguadero belong to Nicaragua, but that paragraph 5 of this Charter stipulates that the concession granted to Diego de Artieda begins: “on the northern part

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<sup>641</sup> CR, A 05.

<sup>642</sup> NCM, paras. 1.2.11 and 1.2.3.

from the mouths of the Desaguadero.”<sup>643</sup> The following phrases of the *Reply* are confusing: first it states that the mouths of the Desaguadero are included in the concession, then that they are not. Subsequently, Costa Rica states that paragraph 12 of the Charter adds “*ques a las partes de Nicaragua*,” and that this addition must be translated as “that is to the parts of Nicaragua” and not as translated by Nicaragua: “that belongs to Nicaragua”<sup>644</sup>.

v. The more complete text of Paragraph 12 of the Royal Charter stipulates that the territory of Costa Rica would extend “... on the northern part, from the mouths of the Desaguadero, that belongs to Nicaragua (*ques a las partes de Nicaragua*), all across the land, to the Province of Veragua.” The correct translation of this is not the literal translation of the old Spanish text. In any case, “*partes de Nicaragua*” does not mean “parts of Nicaragua” but it is another usage of the term “*partido de Nicaragua*” which was the way these territories were identified: *partes* or *partidos*. The phrase “*ques a*” can only truly be translated as that “belongs to”. If this difference of opinion were relevant to the case it could be easily resolved by an expert opinion such as the one Nicaragua provides in this *Rejoinder* on the pertinent phrase “*con objetos de comercio*”. But in any case, any person who has read *Don Quijote* would have no difficulty understanding that Nicaragua’s translation is correct.

vi. Costa Rica adds<sup>645</sup> that in any case, the Royal Charter of 1573 does not establish any change in possession of the entire course of the river or any significant change of the borders, or any modification of the rights of navigation and fishing awarded by the Royal Charter of 1540 and the Order of 1561.

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<sup>643</sup> Royal Charter to Diego Artieda. NCM, Vol. II, Annex 86, p. 302.

<sup>644</sup> CRR, p. 214, fn. 606..

<sup>645</sup> CR, A 09.

vii. Apart from the above, Costa Rica cites<sup>646</sup> a document to which no prior reference has been made: a Royal Charter of 1576, in which authorization is granted to Diego López to conquer and populate the Province of Lataguzgalpa, which includes the land “from the mouth of El Desaguadero to the north up to Cape Camaron.” According to Costa Rica<sup>647</sup>, this demonstrates that the territory of Nicaragua did not reach the mouths of the Desaguadero. Such importance is assigned to this aspect that a map is attached after page 216 of the *Reply*.

viii. The reality is that Diego López never proceeded with the conquest and population of Lataguzgalpa, because he was unable to find partners who would facilitate the money required to cover the implied costs, as occurred on many other occasions. The result was that Lataguzgalpa did not even begin to exist.

ix. In spite of the above, according to Costa Rica<sup>648</sup> the territory north of the San Juan was left to the Province of Lataguzgalpa and Costa Rica continued with the same limits established by the Royal Charter of 1540 and corrected by the Royal Charter of 1541 and the Order of 1561.

x. Costa Rica maintains<sup>649</sup> that this situation continued in the eighteenth century and that this is confirmed by the report by Luís Díez Navarro to the Captain General of Guatemala in 1744, which states that Costa Rica’s jurisdiction is “from the north, from the mouth of the San Juan river until the Shield of Veraguas at the Kingdom of Tierra Firme,” and by the Costa Rican Constitution of 1825, which indicates the “mouth of the San Juan River” as the northern

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<sup>646</sup> CR, A 10.

<sup>647</sup> CR, A 11.

<sup>648</sup> CR, A 12.

<sup>649</sup> CR, A 13.

border<sup>650</sup>. Clearly, Costa Rica gives an inclusive character to the word “from” in English and “*desde*” in Spanish, which is contrary to common usage.

xi. The paragraphs above attempt to provide a bit of order in a confusing account of colonial records that seeks to make one forget the fact that the Royal Charters only set borders in a conditional manner. That is, limits were set so that the concession holder could exercise conquest and colonization within them. However, if these acts were not carried out, the limits disappeared. This is completely different from the borders set by Royal Orders (*Reales Cédulas*), which marked provinces to be created or that were already established.

xii. With respect to the Royal Charter of 1573, however, upon which Nicaragua supported her right over the San Juan River, it is important to note the opinion of the Costa Rican Academy of History — so important that, although it is cited in footnote 29 on page 20 of the *Counter-Memorial*, it is reproduced here: “...it would not be until 1573, with the Royal Charter granted to Artieda and Chirinos, that a significant change occurred with the respect to the limits. This latter date would also fix the limits that would reign during the entire colonial regime”<sup>651</sup>

xiii. Apart from the documents cited, the geographical reality indisputably points to the fact that the San Juan River could only have been part of Nicaragua in the colonial period. Thus, there are no Costa Rican cities that abut the San Juan and would have needed its waters for navigation. The river was almost exclusively used for commercial traffic between the Nicaraguan cities on Lake Nicaragua, particularly the city of Granada, that handled most of the commercial

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<sup>650</sup> CR, A 14.

<sup>651</sup> *Historia del centenario de la entrada de Cavallón a Costa Rica (1561- 1961)*, 1961. p. 45. See NCM, para. 1.2.11.

traffic to and from Spain and the Caribbean. The fort of San Carlos defending the San Juan River is and has always been in undisputed Nicaraguan territory. There was absolutely no reason why the Spanish authorities would even have considered giving the jurisdiction of this waterway to Costa Rica whose main cities had no access to the river.

## **Section II. The Matter of Nicoya**

xiv. Nicoya was a territory that, during the colonial era, formed part of Nicaragua. Its limit with Costa Rica was the El Salto River.

xv. Costa Rica states<sup>652</sup> that Nicaragua claims that Nicoya was annexed unilaterally by Costa Rica, exploiting the conflict in which Nicaragua was involved in 1824, and that legally it remained a part of Nicaragua when the border treaty negotiations of 1858 began. According to Costa Rica, these two statements lack any foundation.

xvi. In support of her thesis, Costa Rica alleges<sup>653</sup> that Nicoya participated together with Costa Rica in the election of deputies to Spanish courts in 1813 and 1820; that Nicoya decided to join Costa Rica in a plebiscite in 1824, which was ratified by the Central American Federal Congress in 1825; and that Nicaragua did not include Nicoya as part of her territory in her 1825 Constitution.

xvii. With respect to the above, it is important to observe that Nicoya's participation in the election of deputies was due to the fact that, without said participation, Costa Rica would have been deprived of the right to participate in the courts because she would not have had the required number of inhabitants. In

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<sup>652</sup> CR, A 15.

<sup>653</sup> CR, A 17-18.

addition, this participation was only for the sake of the elections and did not constitute an annexation.

xviii. In relation to the plebiscites, it must be noted that the plebiscite itself is an acknowledgment and the clearest proof that this district (*partido*) was part of Nicaragua. All the former colonial possessions of the Spanish Crown, including Costa Rica and Nicaragua, have accepted the principle of *uti possidetis iuris* in the settlement of territorial questions. Whenever this principle has been violated or ignored, there have been serious and lasting consequences. The principle was accepted precisely to avoid situations like that provoked by the Costa Rican annexation of parts of the territory of Nicaragua.

xix. The date of Independence of Nicaragua and Costa Rica is 15 September 1821 and the first plebiscite took place in 1824. This plebiscite was held at a time when Nicaragua was divided and in the midst of a civil war, with opposing governments in León and Granada. In addition, the lack of credibility of plebiscites held in territories under foreign occupation and without impartial oversight is well known. The truth is that a few landowners in Nicoya decided to break away from Nicaragua to have more control over their properties.

xx. Finally, it is true that the Nicaraguan Constitution of 1825 did not include Nicoya on the list of administrative areas. But the same is true of the Costa Rican Constitution of the same year. In fact the Costa Rican Constitution gives a geographic description of her territory and does not divide it abstractly in administrative areas with undefined territory as does Nicaragua's. The Costa Rican Constitution states: "Article 2. The State's territory will extend, for now, from west to east, from the Salto River, which divides it from that of Nicaragua..."<sup>654</sup>. The Salto River was precisely the limit of Costa Rica with

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<sup>654</sup> Fundamental Law of the State of Costa Rica. CRM, Vol. VI, Annex 193.



Nicoya. The Constitution of Nicaragua stipulated in Article II that, “The territory of the State embraces the districts of Nicaragua, Granada, Managua, Masaya, Segovia, Subtiava, and El Realejo.” The most that can be said of the Nicaraguan Constitution is that Nicoya is not mentioned by name, as, for example, Matagalpa or Bluefields were not mentioned by name, as for example Matagalpa or Bluefields were also not mentioned by name, but not that it was excluded as the Costa Rican Constitution most certainly excluded Nicoya.

xxi. With respect to the claim that the annexation of Nicoya was ratified by the Federal Congress, what the *Reply* fails to mention is that the Resolution of this Congress was provisional in nature. The annexation was accepted in the wording of the Resolution, “For the time being, and until the demarcation of the territory provided by Art. VII of the Constitution is made...”<sup>655</sup> What was stipulated in Article VII of the Federal Constitution was: “The demarcation of the territory of the States will be made by a Constitutional law with presence of the necessary data.” However, the Federation ended in 1838 without having passed this law. Therefore, the annexation remained provisional in nature until the Treaty of 1858 put an end to this question.

xxii. In the *Reply*, one clearly sees the intention to deny that the recognition of Nicaragua’s sovereignty over the San Juan River was the *quid pro quo* for recognition of Costa Rica’s sovereignty in Nicoya, but rather that the sovereignty over the San Juan was balanced with Costa Rica’s right to free navigation<sup>656</sup>. With this argument, the intent is to give a higher value to free navigation, making it appear as the only thing received by Costa Rica, since she already held sovereignty over Nicoya. However, this argument seems to contradict the prior

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<sup>655</sup> Decree of the Federal Congress of Central America, 9 Dec. 1825. CRR Vol. II, Annex 5.

<sup>656</sup> CR, A 21.

paragraph<sup>657</sup>, in which it is stated that the Treaty of Limits was intimately linked with the Costa Rica – Félix Belly Nicaragua Canal Agreement of 1 May, 1858 (two weeks after the treaty). This agreement established that the two countries would be co-sovereigns over the canal and, therefore, have the right to navigation. In this way, confusion is generated between the right to navigation on the river and that of a hypothetical canal.

xxiii. The details of that agreement are irrelevant since it was not ratified. But apart from this fact the context in which it was signed should not be lost. The treaty came about from the intrigues of a French adventurer who passed himself off as a confidential agent of his government, attempting to exploit the state of mind of a Nicaraguan president whose country had recently been the victim of William Walker's filibusterer invasion and remained fearful of new invasions. The adventurer presented the apparent opportunity to obtain not only the construction of the desired inter-oceanic canal but also the protection of France and other European countries against the threat of new filibusterer invasions. Only months before, Nicaragua had signed the Cass-Irisarri Treaty and, in the United States, there was a refusal to commit to stopping an attack by new invasion forces from that country to Nicaragua.

xxiv. Faced with this situation, the Nicaraguan president enthusiastically accepted the proposals of the French adventurer, and Costa Rica took advantage of this acceptance. However, there were no practical effects, as the French government discovered the abuses carried out in its name, and the treaty was never ratified.

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<sup>657</sup> CR, A 20.

xxv. In the final paragraph of Section B<sup>658</sup>, it is stated that Costa Rica has not attempted to conquer and annex any Nicaraguan territory. If this statement had not been made in the *Reply*, it would not have been appropriate to recall that, during the first filibusterer invasion, Costa Rica, with the desire to appropriate the inter-oceanic transit route by force, had occupied military posts along the San Juan River. On 14 October 1857, she sent an ultimatum to the Nicaraguan commander to surrender the fort at San Carlos, situated at the beginning of the San Juan River on Lake Nicaragua. This was considered by Nicaragua to be a declaration of war, as reflected in a decree dated 19 October 1857.<sup>659</sup>

xxvi. This effort by Costa Rica to conquer and annex Nicaraguan territory provoked the reaction of the United States. Thus, Nicaragua cited in her *Counter-Memorial* the note sent by the United States Secretary of State to his Minister in Nicaragua in which he expresses concern that Costa Rica pretends “to appropriate to itself portions of the Territory of Nicaragua.”<sup>660</sup>

#### A. THE COSTA RICAN CONSTITUTIONS OF 1825 AND 1841

xxvii. Costa Rica claimed in her Memorial that the limits set in its Constitution of 1825 were equivalent to those set in the Decree of Bases and Guarantees of 1841<sup>661</sup>, whereas in truth the rights based on *uti possidetis iuris* were respected in 1825, and in 1841, this principle was violated.

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<sup>658</sup> CR, A 22.

<sup>659</sup> See NCM, para. 1.2.43.

<sup>660</sup> Note from Lewis Case, Secretary of State of the U.S., to William Carey Jones, Special Agent of the U.S. to Central America. NCM, Vol. II, Annex 37.

<sup>661</sup> See CRM, para. 2.13.

xxviii. The *Reply*<sup>662</sup> states that Nicaragua attached a Map No. 3 to her *Counter-Memorial* with the intention of showing the border pursuant to the Costa Rican Constitution of 1825. However, Costa Rica maintains<sup>663</sup> that this map shows the start of the line at the mouth of the Colorado River, not at that of the San Juan, and the line ends at the Tempisque River, not at the Salto River. Costa Rica further claims that the Constitution does not establish a straight line between the mouth of the San Juan and the Salto River.

xxix. First of all, it must be pointed out: that the Colorado River is really a mouth of the San Juan River, and it was not until the Cleveland Award in 1888 when it was decided that this was not the border; that the name of El Salto was later changed to Tempisque; and that when the Constitution stipulates the start and end points of the border but does not indicate the line between them, it is logical that said line be a straight line. Map No. 3 is an illustration of the situation as understood contemporaneously. It is taken from a set of maps prepared under the direction of Mr. Ephraim Squier who was appointed Chargé d'affaires of the United States to Central America in 1849 and wrote extensively about the area.

xxx. With respect to the non-inclusion of Nicoya in the Constitution of 1825, Costa Rica states that the Constitution was issued eleven months before the decree of annexation, for which reason it includes the expression "for now." Costa Rica fails to note, however, that this decree was provisional in nature, as indicated above in paragraph xxi. As a result, Nicoya did not belong to Costa Rica until after the 1858 Treaty and should not have been included in the Costa Rican decree of 1841, just as it had not been included in the 1825 Constitution.

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<sup>662</sup> CR, A 23.

<sup>663</sup> CR, A 24.

## B. NEGOTIATIONS FOR THE INTER-OCEANIC CANAL

xxxi. Costa Rica states<sup>664</sup> that Nicaragua claims to have acted alone in the canal and transit contracts on the San Juan River, and that Costa Rica's pretension of having participated alone or jointly in canal treaties has no historical or documentary basis<sup>665</sup>.

xxxii. With respect to the above, it must be noted that the Award of President Cleveland decided that: "The Treaty of Limits of the 15<sup>th</sup> day of April, one thousand eight hundred and fifty eight, does not give the Republic of Costa Rica the right to be a party to grants that Nicaragua may make for inter-oceanic canals..."<sup>666</sup> Furthermore, if Costa Rica has no right to be a party, then Nicaragua, as the exclusive holder of this right, may grant to any other country including Costa Rica said right.

xxxiii. This is what occurred with the Montealegre-Jiménez Treaty of 1869, in which Nicaragua granted Costa Rica the right to participate in the Ayón-Chevalier Treaty, which was not ratified. Another treaty cited by Costa Rica<sup>667</sup> is the one signed by the two countries with Félix Belly, referred to in paragraphs xxii-xiv above, and which also was not ratified.

xxxiv. The only navigation contract cited by Costa Rica<sup>668</sup> is one that was signed on 14 June, 1857, a few weeks after the end of the first filibusterer invasion, when Nicaragua had not yet recovered control of the San Juan River transit route.

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<sup>664</sup> CR, A 29.

<sup>665</sup> See NCM, paras. 1.3.13 and 1.2.48-49.

<sup>666</sup> Cleveland Award, *op. cit.*, para. 11. CRM, Vol. II, Annex 16.

<sup>667</sup> CR, A 30.

<sup>668</sup> CR, A 32.

Moreover, as explained above, Costa Rica herself had taken over control of the San Juan route and even threatened to take by force the Nicaraguan garrison stationed in the fort of San Carlos on the San Juan River. All of which led to a Declaration of War by Nicaragua against Costa Rican in Decree No. 139 of 19 October 1857.<sup>669</sup> This single contract only with irony could be considered to have established a right of Costa Rica on canal matters

xxxv. Costa Rica also claims<sup>670</sup> that several treaties signed by Nicaragua, including the Cass-Irrisarri Treaty with the United States in 1857, state that these treaties “shall not be construed to affect the claims of the government of Costa Rica to a free passage by the San Juan River for their persons and property to and from the ocean.” The truth is that all of these treaties recognize only the existence of a Costa Rican claim, and not a right. Also, they were prior to the Cleveland Award, which interpreted the clause of the 1858 Treaty regarding Nicaragua’s exclusive right to enter into San Juan River canal treaties.

### **Section III. Costa Rican Navigation on the San Juan River as of 1888**

xxxvi. This section of the Appendix of the *Reply* attempts to demonstrate that, after 1888, Costa Rica has continued navigation on revenue service cutters and other public vessels, contrary to what has been affirmed by Nicaragua in her Counter *Memorial*.<sup>671</sup>

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<sup>669</sup> See Decree No. 139, 19 Oct. 1857. NCM, Vol. II, Annex 57, p. 203

<sup>670</sup> CR, A 31.

<sup>671</sup> See NCM, para. 4.2.17.

xxxvii. The material contained in this section has been addressed in the text of this *Rejoinder* in Chapter V. With one exception, this Appendix will not revisit the cases that have already been dealt with in other sections.

xxxviii. This exception is the incident of the *Adela*, which is also dealt with in Chapter V above. The *Adela* incident provides, clear proof that Costa Rica as recently after the 1888 Cleveland Award as 1892 was aware that her boats could not navigate with weapons anywhere on the San Juan River. Furthermore, the incident is a clear confession by Costa Rica of a violation she committed against the treaty and Cleveland Award. In fact, this incident brought up by Costa Rica supports the case of Nicaragua.

xxxix. Costa Rica states (A 35 and CRM 4.85-6) that the *Adela* left the San Carlos River and travelled up the San Juan River with a Commander of the Inspectorate General of Revenue and eight guards, seeking to establish a post at Terrón Colorado on the banks of the Frío River. In the words of the Inspector General himself in the report sent to his superiors he states:

xl. “Before entering the waters under exclusive dominium of Nicaragua, I did hide in Costa Rican territory the arms and ammunitions that I carried for that post, and thus the guards having been disarmed I left them on board of said steamboat while at a place called ‘El Ticho’ and I went before them to ‘Castillo Viejo’ with the intention of requesting, as I did, permission from the commander of that fortress to cross the San Juan River with the aforementioned weapons...”<sup>672</sup>

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<sup>672</sup> Report of Ciro A. Navarro, Assistant to the Inspectorate, to the General Inspector of the Treasury, 9 March 1892. CRM, Vol. VI, Annex 209.

xli. The results of his request were 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.”

xlii. Costa Rica states that Nicaragua has presented this incident as a demonstration that Costa Rica does not have the right to navigate the San Juan with weapons<sup>673</sup> but that this is a false interpretation of events<sup>674</sup>, and she has provided a map that shows the course of the *Adela*. The map does not clarify the commander’s reason for concealing the weapons in Costa Rican territory before going to request permission. It is logical to assume, however, that the reason was so that the Nicaraguan commander at El Castillo would not know that the Costa Rican vessels had navigated with weapons in the part of the river where she has the right to navigate with “*objetos de comercio*”. The fact that she was deliberately doing this without the knowledge of Nicaragua does not prove she was doing so based on any rights; it proves the opposite.

xliii. The Inspector left the boat “before entering the waters under exclusive dominium of Nicaragua”. Therefore the boat with the weapons was moored on that part of the river where Costa Rica has rights of navigation. Nonetheless, the inspector took the weapons out of the boat and hid them on Costa Rican soil. Why was this necessary if the boat with the weapons was moored in that part of the river where she had rights of navigation?

xliv. After the Nicaraguan head of the garrison found out that the *Adela* was carrying weapons, he immediately went to the place where the boat was moored and searched it. That is, he searched the Costa Rican steamboat while on that part of the river where Costa Rica has rights of navigation. This search was obviously

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<sup>673</sup> See NCM, paras. 4.2.2.-4.2.21.

<sup>674</sup> See CRR, para. 1.15.



anticipated and that is why the Costa Rican captain had hidden the weapons, which only points to the fact that they knew they were not allowed to navigate with weapons.

xlvi. The *Adela* incident only confirms Nicaragua's position that she has always exercised control over the waters of the San Juan River and that Costa Rica has never navigated the river openly with weapons. That she may have done so secretly is another matter; but those surreptitious actions are not proof of rights.

### Conclusion

xlvii. The rights of navigation and passage granted to Costa Rica by the Royal Charter of 1541 were not in effect at the time of independence.

xlviii. Nicoya was annexed provisionally to Costa Rica in 1825, and this annexation continued provisionally until the 1858 Treaty of Limits.

xlix. Recognition of her sovereignty over Nicoya constituted part of the *quid pro quo* that Costa Rica received in acknowledging Nicaragua's sovereignty over the San Juan River.

l. The Costa Rican Constitution of 1825 is in accordance with the *uti possidetis iuris* of 1821 and contradicts that of 1841, which includes Nicoya.

ii. Costa Rica cannot participate in canal contracts, unless Nicaragua grants her this right.

iii. Costa Rica has the right to navigation on the San Juan River only in the limited manner granted under the Jerez-Cañas Treaty and Cleveland Award.

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