

**INTERNATIONAL COURT OF JUSTICE**

**DISPUTE CONCERNING  
NAVIGATIONAL AND RELATED RIGHTS**

**COSTA RICA v. NICARAGUA**

**REPLY OF COSTA RICA**



**VOLUME 1**

**15 January 2008**

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## Chapter 1

### Introduction

#### A. Introductory Comments

1.01 This Reply is filed in accordance with the Court's Order of 9 October 2007.

1.02 These proceedings concern breaches by Nicaragua of Costa Rica's perpetual right of free navigation and related rights in respect of the San Juan River. These rights are set out in a series of treaties and decisions commencing with the Treaty of Limits of 15 April 1858 ("the Treaty of Limits") and also result from customary international law.<sup>1</sup> Since the 1990s Nicaragua has imposed and maintained severe restrictions on the navigation of Costa Rican vessels and their passengers on the San Juan. Since Costa Rica commenced these proceedings, Nicaragua has tightened existing restrictions and imposed new restrictions which in combination tend to deny the substance of Costa Rica's rights entirely.

1.03 In contrast to Nicaragua's breaches, Costa Rica has scrupulously met its obligations in respect of the San Juan, and in particular has continued to fulfil its obligation to allow Nicaraguan boats to freely land on the Costa Rican bank of the River.<sup>2</sup> In addition, and contrary to Nicaragua's unsubstantiated assertions that Costa Rica has refused to engage in dialogue with Nicaragua on certain issues, Costa Rica has actively sought to settle this dispute in a manner consistent with respect for the rights clearly accorded to Costa Rica under the relevant instruments and decisions. These proceedings were brought as a last resort in order to have an authoritative and lasting settlement of Costa Rica's rights under the relevant instruments.<sup>3</sup>

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1 CRM, Annexes, Vol. 2, Annex 7.

2 This is acknowledged in evidence presented by Nicaragua itself: see NCM, Vol. II, Annex 91, Affidavit by Colonel Ricardo Sánchez, Point Five.

3 CRM, Chapter 3, para. 3.49.

## B. Nicaragua's Counter-Memorial

1.04 In its Counter-Memorial presented to the Court on 29 May 2007, Nicaragua asserts that “the issues raised by Costa Rica have already been settled by the 1858 Treaty and the 1888 Cleveland Award”.<sup>4</sup> It is true that Costa Rica’s *rights* over the San Juan are settled by the 1858 Treaty, the Cleveland Award and the other decisions, agreements and rules which Costa Rica has invoked in its Memorial. But unfortunately those rights are not being respected by Nicaragua – either because it denies their existence (as with the right of free navigation for purposes of commerce) or it denies the facts – of which, nonetheless, there is ample evidence. The issues raised by Costa Rica arise through this strategy of denial by Nicaragua, of which its Counter-Memorial is only the most recent instance.

1.05 Nicaragua’s Counter-Memorial contains a range of contradictions, misrepresentations and mistranslations of documents.

1.06 For example, Nicaragua argues that the phrase “*con objetos de comercio*” in Article VI of the 1858 Treaty ought to be interpreted as “with articles of trade.”<sup>5</sup> However it later implies that “*con objetos de comercio*” means “for purposes of commerce”: it states that “the right of free navigation [in Article VI of the 1858 Treaty] is articulated in the form of a careful statement of purposes”<sup>6</sup> and cites with approval President Cleveland’s Award which stipulates that Costa Rica has a right of “free navigation ... *for the purposes of commerce*.”<sup>7</sup>

1.07 Other contradictions emerge from consideration of the arguments presented in the Counter-Memorial as a whole. For example, on the applicable law Nicaragua states that Costa Rica’s arguments “stand or fall with the interpretation of [the 1858 Treaty] and the subsequent Cleveland Award”<sup>8</sup> and that the 1858 Treaty and the 1888 Cleveland Award “make up the Applicable Legal Regime on the San Juan.”<sup>9</sup> It criticises Costa Rica for seeking to rely

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4 NCM, Introduction, para. 4.

5 See, for example, NCM, para. 1.3.24; NCM, Introduction, para. 20.

6 See NCM, para. 2.1.51.

7 See NCM, para. 2.1.62.

8 NCM, Introduction, para. 19.

9 NCM, para. 1.3.46.

on legal principles which go beyond or are independent of those bilateral instruments.<sup>10</sup> However, Nicaragua also claims that principles of general international law apply “so far as they do not contradict the relevant provisions contained in the 1858 Treaty as interpreted by the 1888 Cleveland Award.”<sup>11</sup> Nicaragua relies on many other treaties for different purposes, including as an aid to interpret the 1858 Treaty.<sup>12</sup> It argues that treaties signed between 1858 and 1888 clarify the meaning of “*objetos de comercio*” as “articles of trade” and not “purposes of commerce.”<sup>13</sup> In some instances Nicaragua relies on the text of unratified treaties without drawing the Court’s attention to the fact that those treaties are unratified: for example, it states that the Alvarez-Zambrana Treaty of 5 February 1883 “establishes the obligation ‘to fly, in addition to one’s own, the national flag of the State that exercises sovereignty’” without noting that it was not ratified.<sup>14</sup>

1.08 In some instances Nicaragua misrepresents the content of documents produced in the Annexes to Costa Rica’s Memorial. For example, when it cites the Carazo-Soto Treaty of 26 July 1887, NCM quotes from Article 6.3 as follows “[t]he right granted to Costa Rica to navigate with articles of trade on the San Juan River...” It references CRM Annex 15.<sup>15</sup> The English translation there produced by Costa Rica states “[t]he right, granted to Costa Rica, of navigation for purposes of commerce [*objetos de comercio*] in the San Juan River...”<sup>16</sup>

1.09 Nicaragua misrepresents the language used by President Cleveland in the 1888 Award. It states:

“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>17</sup>

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10 NCM, Reservations, p. 251.

11 NCM, para. 3.3.10.

12 For example, it relies on the unratified 1857 Juárez-Cañas Treaty to establish the purpose of the 1858 Treaty (NCM, paras. 1.2.39-1.2.40) and on various agreements as *travaux préparatoires* to the 1858 Treaty (NCM, paras. 1.3.1-1.3.3).

13 NCM, para. 1.3.32-1.3.35.

14 NCM, para. 1.3.33 (NCM Annex 9). On the relevance of general international law to this dispute, see Chapter 2 of this Reply.

15 NCM, para. 3.1.43.

16 See CRM, Annexes, Vol 2, Annex 15.

17 NCM, para. 3.1.54.



The original English version of the relevant part of Cleveland's Award clearly provides for a right of navigation for vessels of the revenue service "as may be related to and connected with [Costa Rica's] enjoyment of the 'purposes of commerce' ..." <sup>18</sup> No doubt Nicaragua wants President Cleveland to have used the term "articles of trade" but that is not what President Cleveland wrote. <sup>19</sup>

1.10 Nicaragua's Counter-Memorial also contains inaccurate statements about the meaning of the term "*objetos*" in Spanish. For example, Nicaragua states that it is "entirely beyond the normal and usual use of the Spanish language to speak of the [plural] *objetos* ... when referring to its purposes, aims or objectives." <sup>20</sup> In fact several contemporary treaties, including treaties to which Nicaragua was a signatory, use the plural "*objetos*" when referring to purposes. Two examples include the US-Nicaragua Treaty of Friendship, Commerce and Navigation (Lamar-Zeledón) of 16 March 1859 and the US-Nicaragua Treaty of Friendship, Commerce and Navigation (Ayon-Dickinson) of 21 June 1867. Article II of the Lamar-Zeledón Treaty uses the phrase "*para los objetos de su comercio*," the English version of which states "for the purposes of their commerce." <sup>21</sup> Similarly, Article II of the Ayon-Dickinson Treaty uses the phrase in Spanish "*para objetos de su comercio*" which is reflected in the English "for the purpose of their commerce." <sup>22</sup> The use of the plural "*objetos*" to mean purposes pre-dates the 1858 Treaty. For example, Article II of the Costa Rica-US Treaty of Friendship, Commerce and Navigation (Molina-Webster) of 10 July 1851 uses the phrase "*para los objetos de su comercio*" to mean "for the purposes of their commerce." <sup>23</sup>

18 See CRM, Annexes, Vol 2, Annex 16. A similar misquotation is made of the Carazo-Soto Treaty (CRM, Annexes, Vol 2, Annex 15) in NCM, para. 3.1.43.

19 As to the meaning of "*con objetos de comercio*", see below, paragraphs 3.39-3.78.

20 NCM, para. 4.1.27.

21 United States-Nicaragua, Treaty of Friendship, Commerce and Navigation (Lamar-Zeledón), Managua, 16 March 1859. The Spanish version is from US National Archives, Washington DC, Unperfected Treaty Series X-2; the English version is from CL Wiktor, *Unperfected Treaties of the USA*, Volume II, 1856-1882, pp. 157-166: CRR Annexes, Vol 2, Annex 13.

22 United States-Nicaragua, Treaty of Friendship, Commerce and Navigation (Ayon-Dickinson), Managua, 21 June 1867. Both the English and Spanish official versions are reproduced in GP Sander, *The Statutes at Large, Treaties and Proclamations of the United States of America from December 1867 to March 1869, Volume XV*, pp. 549-562: CRR Annexes, Vol 2, Annex 17.

23 Costa Rica-United States, Treaty of Friendship, Commerce and Navigation (Molina-Webster), Washington, 10 July 1851. The Spanish version is from *Colección de los Tratados Internacionales Celebrados por la Republica de Costa Rica*, Vol. I, pp. 65-72; and the English version is reproduced in *Report of the Isthmian Canal Commission 1899-1901*, pp. 417-410: CRR, Annexes, Vol 2, Annex 9.

1.11 Nicaragua's Counter-Memorial contains inaccurate translations of key documents. For example, Nicaragua presents an English translation of Article II of the US-Nicaragua Treaty of Friendship, Commerce and Navigation (Cass-Irisarri) of 16 November 1857, which provides in part for reciprocal rights "to hire and occupy houses and warehouses for commerce".<sup>24</sup> The Spanish version produced by Nicaragua, for which no source is listed but which appears to be from a *Gaceta* from El Salvador, reads "*asi como alquilar y ocupar casas y almacenes para objeto de su comercio*."<sup>25</sup> The original Spanish text reads "*asi como alquilar y ocupar casas y almacenes para objetos de comercio*"<sup>26</sup> and the original English text refers to reciprocal rights "also, to hire and occupy houses and warehouses for the purpose of their commerce."<sup>27</sup> Nicaragua's omission of the full phrase "for the purpose of their commerce" in its English translation renders its translation inaccurate and misleading. This example shows again that the plural "*objetos*" can be used to mean "purpose" in English.

1.12 Nicaragua presents an inaccurate translation of Article XX of the Cass-Irisarri Treaty which misrepresents the way in which both Nicaragua and the United States understood the scope of Costa Rica's navigational rights on the River. Nicaragua's translation of Article XX reads as follows:

"Article XX. It is understood that nothing in this treaty shall adversely affect the *desires* of the Government of the Republic of Costa Rica and its people to free navigation in the San Juan River of its persons and goods to the Atlantic Ocean and vice versa."<sup>28</sup> (Emphasis added.)

The authentic English text of Article XX provides:

"Article XX: It is understood 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>29</sup> (Emphasis added.)

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24 See NCM, Vol II, Annex 5.

25 See NCM, Original Documents Deposited Within the Registry, Part I, Annex 5.

26 United States-Nicaragua Treaty of Friendship, Commerce and Navigation (Cass-Irisarri), 16 November 1857. The original Spanish is reproduced from US National Archives, Washington DC, Unperfected Treaty Series W-2: CRR, Annexes, Vol 2, Annex 10.

27 The English version is reproduced in CL Wiktor, *Unperfected Treaties of the USA*, Volume II, 1856-1882, pp. 135-143: CRR, Annexes, Vol 2, Annex 10.

28 NCM, Vol II, Annex 5.

29 CRR, Vol 2, Annexes, Annex 10.

The authentic English text, using the term “claim”, is consistent with the original Spanish which refers to “*pretensión*.” By substituting the English “desires” for “claim” Nicaragua evidently seeks to provide a weaker representation of Costa Rica’s navigational rights. It is also clear from the authentic English version that it was understood by both Nicaragua and the United States that Costa Rica’s navigational rights included navigation by the Costa Rican Government (with public vessels) and by its citizens and was inclusive of the right to transport persons as well as property.

1.13 Nicaragua presents an inaccurate translation of a 2001 Judgment of the Costa Rican Constitutional Chamber in order to give the impression that Costa Rica’s own court denied that Costa Rica holds a right to navigate on the San Juan for the purpose of re-supplying border posts. It represents the Court as having stated that “Costa Rica holds the perpetual right to use its lower *banks* for commercial, revenue and security purposes,”<sup>30</sup> but a correct translation of the Spanish used in the judgment is: “Costa Rica holds the perpetual right to use its lower *course* for commercial, revenue and security purposes.”<sup>31</sup> The Costa Rican Constitutional Chamber did not deny that Costa Rica holds a right to navigation on the River.

1.14 Nicaragua accuses Costa Rica of producing inaccurate translations of certain documents.<sup>32</sup> This allegation is not specified and it is not supported. Costa Rica expressly denies that it has misrepresented documents to the Court and it stands by the accuracy of the translations of documents it has presented.

1.15 Nicaragua’s misrepresentations go beyond the mistranslation of important documents and even include the misrepresentation of historical events, the facts of which were explained in Costa Rica’s Memorial. For example, Costa Rica described the occasion on which the Costa Rican steamer *Adela*, on a journey to install the Guards at the fiscal post at Terrón Colorado, Los Chiles, stopped before it entered that part of the San Juan in which Costa Rica has no treaty right of navigation. It had navigated on the San Juan from the mouth of the San Carlos River to three miles below Castillo Viejo before it stopped and left its arms and ammunition on the Costa Rican bank. The Commander then travelled

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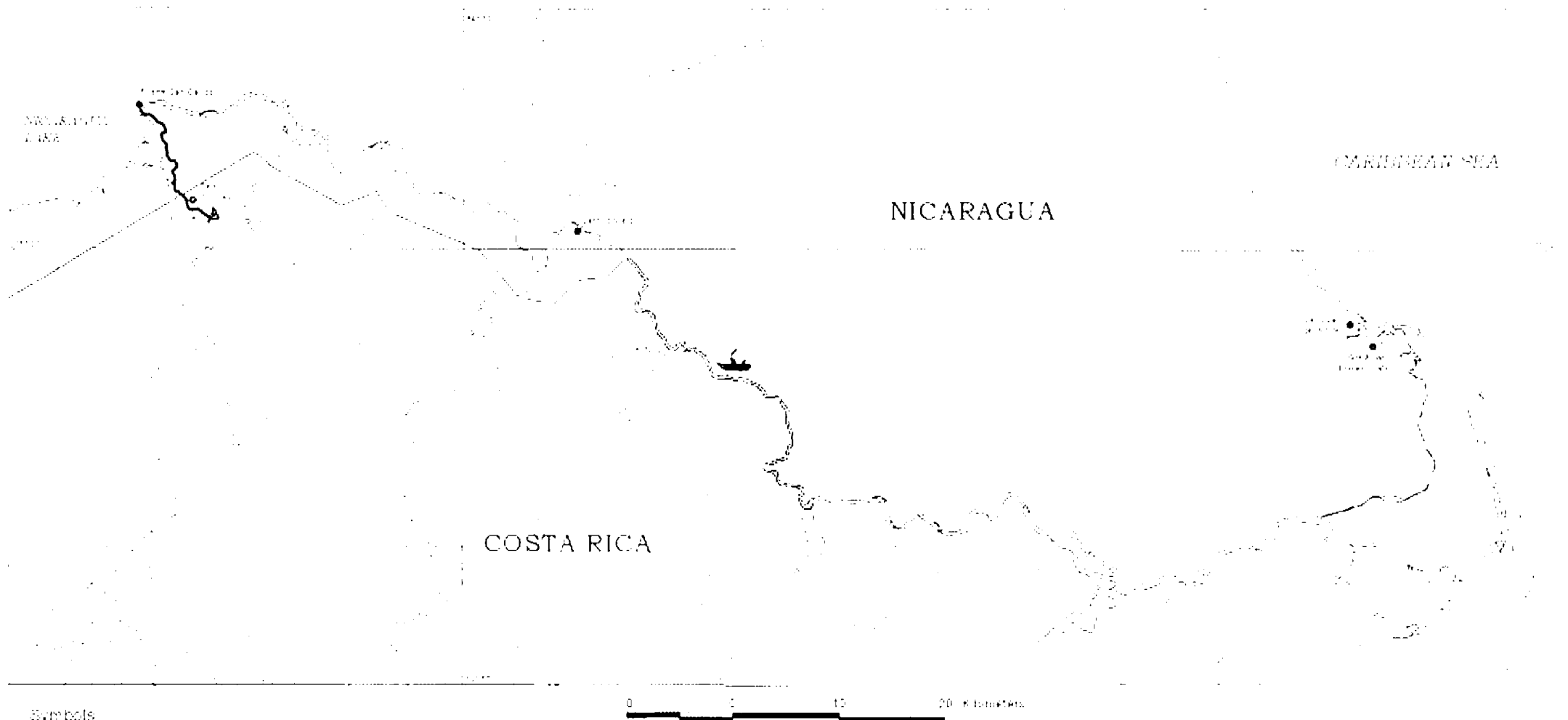
30 NCM, Vol II, Annex 66.

31 See discussion in this Reply, paragraphs 3.151-3.154.

32 NCM, Introduction, para. 20.

Sketch map 1

# NAVIGATION OF THE "ADELA" STEAMER, MARCH 1892



## Symbols

- Puerto
- Puerto principal
- Ruta principal
- Ruta secundaria

to the Nicaraguan post at Castillo Viejo to request permission to continue navigating with arms in that part of the San Juan in which Costa Rica had no treaty right of navigation, on its way to Los Chiles, which is on the Costa Rican side of the border near the source of the San Juan in the Lake of Nicaragua. That permission having been denied, the Costa Rican Commander was obliged to transport the arms and ammunition by land.<sup>33</sup> Nicaragua argues this incident shows that Costa Rica did not have a right to navigate on the San Juan with arms.<sup>34</sup> The materials cited by Costa Rica clearly indicate that the *Adela* had *already* navigated with arms on the River to the point three miles below Castillo Viejo without any need to obtain permission from Nicaragua. Permission was sought to navigate in the upper San Juan, outside of that part of the watercourse in which Costa Rica has a treaty right of navigation. Sketch Map 1 opposite clearly marks the journey of the *Adela* and demonstrates that Nicaragua has misrepresented this incident.

1.16 Nicaragua purports to make two “reservations.” First, if the Court determines Costa Rica’s claims on legal principles beyond those found in the relevant bilateral agreements, Nicaragua reserves its right to claim that the Colorado River is an international waterway subject to the provisions of general international law for international watercourses not subject to a special treaty regime.<sup>35</sup> Second, Nicaragua “makes express reservation of her rights to bring claims against Costa Rica” for ecological damage done to the waters of the San Juan and the diversion of its traditional water flow into “agricultural, industrial and other uses in Costa Rican territory and into the water flow of the Colorado River”.<sup>36</sup>

1.17 These “reservations” are of course not counter-claims. Nicaragua’s right to bring a counter-claim expired with the filing of NCM.<sup>37</sup> Nor do these “reservations” relate to or arise from any relief sought by Costa Rica. The

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33 CRM, paras. 4.85-4.87.

34 NCM, paras. 4.2.19-4.2.21.

35 See NCM, Reservations, p. 251, para. 2.

36 See NCM, Reservations, p. 251, para. 3.

37 See Rules, Article 80(2). Quite apart from the requirement of timeliness, Article 80 requires a counter-claim to be “directly connected with the subject-matter of the claim of the other party”: see Article 80(1). Nicaragua’s “reservations”, even if they had been timely presented as counter-claims, would not have satisfied this requirement.

“reservations,” apart from being devoid of merit, are without incidence for the present case.

### C. Key Issues

1.18 On the one hand, a few points of agreement between the parties can be identified. For example, the parties agree that Costa Rica’s navigational rights are defined by the 1858 Treaty of Limits and the 1888 Cleveland Award.<sup>38</sup>

1.19 On the other hand, clear points of disagreement emerge from the Counter-Memorial. For example, Nicaragua argues that its sovereignty over waters of the River is a reason for a narrow interpretation of Costa Rica’s navigational and related rights.<sup>39</sup> On the contrary, the 1858 Treaty conditions Nicaragua’s dominion and sovereign jurisdiction over the waters of the River upon Costa Rica’s perpetual rights of free navigation.<sup>40</sup> The grant of sovereignty to Nicaragua in Article VI of the Treaty of Limits is immediately qualified by Costa Rica’s perpetual right of free navigation.<sup>41</sup>

1.20 The parties also disagree as to the relevance of other instruments and documents, including the 1916 Judgment of the Central American Court of Justice, as well as to the relevance of general international law. Nicaragua argues that the 1916 Judgment is “of limited relevance in the present case” and that it did not “further specify the rights recognized by the relevant instruments.”<sup>42</sup> In Costa Rica’s view, its rights of use of the River “were further specified (with the force of *res judicata*)” by the Central American Court of Justice in its 1916 Judgment.<sup>43</sup> The Central American Court necessarily had to pronounce on Costa Rica’s rights of navigation on the San Juan since these were affected by the Bryan-Chamorro Convention. The Court there found that Costa Rica possess “for purposes of commerce, permanent rights of free navigation ... and the right for her vessels to moor at all points along either bank, exempt from the imposition of any charges, in that part of the stream in which navigation

38 See NCM, Introduction, paras. 18-19. See also CRM, para. 4.01.

39 NCM, paras. 2.1.9, 2.1.48-2.1.50, 2.1.52.

40 CRM, para. 4.06.

41 See CRM, para. 4.06.

42 NCM, para. 3.2.6.

43 CRM, para. 1.04. See also CRM, paras. 2.42-2.49.

is common.”<sup>44</sup> Costa Rica’s position on the relevance of the 1916 Judgment is clearly stated in its Memorial and is addressed further in Chapter 2 of this Reply.<sup>45</sup>

1.21 A significant point of disagreement results from Nicaragua’s attempt to relitigate in these proceedings issues which have been decided by Cleveland’s Award of 1888. In particular, Nicaragua seeks to limit President Cleveland’s decision to the extent that it affirms Costa Rica’s right to navigate with vessels of the revenue service.<sup>46</sup> Consistently with the terms of Cleveland’s Award, Costa Rica’s position is that it has a right of navigation for vessels of the revenue service: (1) when related to and connected with the enjoyment of the “purposes of commerce” and (2) as necessary for the protection of its enjoyment of that right of navigation.<sup>47</sup>

1.22 Various points of disagreement about the historical background have also emerged: these points are addressed in detail in the Appendix to this Reply. Nicaragua claims that the mouths of the San Juan River belonged to the province of Nicaragua from 1573 to 1821.<sup>48</sup> However, as is demonstrated in this Reply, the 1573 Charter relied upon by Nicaragua is internally inconsistent and in any event does not support the contention that the River belonged to Nicaragua exclusively. Instead the evidence supports Costa Rica’s position that the San Juan River did not exclusively belong to any of the provinces during the colonial period.<sup>49</sup> In addition, Nicaragua’s suggestion that Costa Rica annexed “Partido de Nicoya” unilaterally is without basis: by plebiscite on 25 July 1824, the people of Nicoya decided to join Costa Rica, a decision later acknowledged by the Federal Congress of Central America,<sup>50</sup> and affirmed by the people of Nicoya no less than seven times between 1826 and 1854.

1.23 Nicaragua also argues that Costa Rica disregarded the principle of *uti possidetis iuris*, particularly on account of the incorporation of Nicoya into

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44 CRM, Annexes, Vol 2, Annex 2.

45 CRM, para. 1.04. See also CRM, paras. 2.42-49; this Reply, paragraphs 2.08-2.18, esp. paragraph 2.10.

46 See NCM, paras. 3.1.1-3.1.10 and 3.1.19-3.1.24.

47 See CRM, paras. 4.78-4.79; see below, paragraphs 3.79-3.95.

48 NCM, paras. 1.2.2-1.2.3, 1.2.11. See also NCM, para. 1.2.38.

49 See below, Appendix, paragraphs A.02-A.14.

50 See below, Appendix, paragraphs A.15-A.22.

its territory.<sup>51</sup> This is a misrepresentation. Nicoya was an administrative unit whose inhabitants decided through a plebiscite their incorporation into Costa Rica after the independence of Central America. This was nothing exceptional in Hispanic America. Several subordinate administrative dependencies decided to leave the administrative divisions they belonged to, these moves resulting in the dismemberment of some of the latter. There were, both in Central and South America, situations of merger of a former colonial subdivision with a State having constituted a different colonial unit in the past, as well as situations of creation of a new State from subdivisions within a Vice-Royalty or a Captaincy-General, leading to the latter's fragmentation. Chiapas, Ecuador, Paraguay and Uruguay are some examples. What is essential when applying the principle of *uti possidetis* is the respect of the territorial limits existing at the time of independence: it was out of the question to alter the territorial limits of Nicoya when incorporating it into Costa Rica. Equally, the principle of *uti possidetis iuris* does not mean that the situation existing at the time of independence must be considered as immutable. Territorial changes are always possible, provided that they occur in conformity with international law. As mentioned above, the incorporation of Nicoya into Costa Rica was recognised by the Congress of the newly independent Federal Republic of Central America, which included both Costa Rica and Nicaragua, and it was affirmed by the people of Nicoya on seven separate occasions.<sup>52</sup> For all these reasons, Nicaragua's allegation of an illegal annexation of Nicoya by Costa Rica is groundless. The same can be said of Nicaragua's assertion that the Constitutions of Costa Rica of 1825 and 1841 are contradictory, the former recognising the boundaries in accordance with the principle of *uti possidetis iuris* and the latter disregarding it.<sup>53</sup> The reference to the borders set in the 1825 and 1841 Constitutions are consistent, as is demonstrated in the Appendix to this Reply.<sup>54</sup>

1.24 Nicaragua contends that there is no historical or documentary support for Costa Rica's claim that it participated solely or jointly with Nicaragua in canalization or transit contracts in respect of the San Juan.<sup>55</sup> But Costa Rica

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51 NCM, para. 1.2.4.

52 See below, Appendix, paragraphs A.15-A.22.

53 NCM, paras. 1.2.19-1.2.23.

54 See below, Appendix, paragraphs A.23-A.28. See also CRM, paras. 2.12-2.14.

55 NCM, para. 1.2.38.



was involved in various canal contracts and treaties, an assertion supported by documents presented by Costa Rica and even by documents presented by Nicaragua itself.<sup>56</sup> For example, Costa Rica was party to the Costa Rica-Nicaragua-F Belly Convention relative to the Concession of an Inter-Oceanic Canal on 1 May 1858.<sup>57</sup> Costa Rica's participation in various canal contracts and treaties is discussed in the Appendix to this Reply.<sup>58</sup>

1.25 A further point of disagreement can be identified in relation to Costa Rica's right to navigate with revenue service vessels as affirmed in the Cleveland Award. Nicaragua argues that there is no right of free navigation for Costa Rican public vessels and that Costa Rica's right to navigate with vessels of the revenue service is "only to the extent necessary to the exercise of [the right] to navigate with articles of trade (*con objetos de comercio*)."<sup>59</sup> It claims that the practice of the United States in the 19th century with regard to the "revenue cutters" is of "no present relevance."<sup>60</sup> On the contrary, Costa Rica's position, in accordance with the terms of the Cleveland Award, is that it has a right of navigation for public vessels. The Cleveland Award provided that Costa Rica has a right of navigation for "such vessels of the Revenue Service as may be related to and connected with [Costa Rica's] enjoyment of the 'purposes of commerce' accorded to her in said article, or as may be necessary to the protection of said enjoyment."<sup>61</sup> Costa Rica's right to navigate with vessels of the revenue service is addressed in more detail in Chapter 3 of this Reply.<sup>62</sup> In particular the practice relating to revenue cutters is relevant. Contemporary practice regarding revenue cutters in the mid-to-late 19th century would have been very familiar to President Cleveland and his advisors, and illuminates what they must be taken to have intended in drawing a distinction between men-of-war and revenue cutters.<sup>63</sup>

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56 See below, Appendix, paragraphs A.23-A.28

57 See CRM, Annexes, Vol 2, Annex 8.

58 See below, Appendix, paragraphs A.29-A.32.

59 NCM, Subsection 3, p. 110. See also NCM, paras. 3.1.27-3.1.31 and paras. 4.2.4-4.2.6.

60 NCM, para. 4.2.12.

61 Cleveland Award, Second Point: CRM, Annexes, Vol 2, Annex 16, cited in CRM, para. 4.83. See generally CRM, paras. 4.73-4.96.

62 This Reply, paragraphs 3.79-3.95.

63 CRM, paras. 4.81-82. Nicaragua in fact uses the same practice in the same way: see NCM, para. 4.2.12.

1.26 Nicaragua contends that there is no support for a Costa Rican right to safeguard and defend the lower San Juan. It argues that any Costa Rican obligation to safeguard the San Juan would only arise in the event of external aggression, would have to be carried out together with Nicaragua and would have to be performed from the Costa Rican bank of the River, not from boats on the water.<sup>64</sup> Costa Rica's position, in accordance with the text of Article IV of the 1858 Treaty, is that Costa Rica has three sets of rights and obligations: (1) defence of the common bay; (2) safeguarding of the San Juan; and (3) defence of the River in case of aggression. As the language of Article IV demonstrates, only the third of these rights and obligations is conditioned on aggression. These rights and obligations are permanent.<sup>65</sup> Costa Rica's public rights of protection and defence are addressed in more detail in Chapter 3 of this Reply.<sup>66</sup>

#### D. The Issues for the Court

1.27 The issue before the Court is the scope of Costa Rica's perpetual right of free navigation and related rights in respect of the San Juan River and violation of those rights by Nicaragua. As was emphasised in its Memorial, Costa Rica is seeking the cessation of all Nicaraguan conduct which prevents the free and full exercise and enjoyment of the rights that Costa Rica possesses on the San Juan, or which prevents Costa Rica from fulfilling its responsibilities to safeguard and protect the River under Article IV of the Treaty of Limits, Article 2 of the 1956 Agreement and otherwise.<sup>67</sup>

1.28 This Reply consists of five further Chapters as follows:

**Chapter 2** sets out the general international rules relevant to this dispute, in particular those relating to international waterways and concerning the interpretation of treaties.

**Chapter 3** addresses the scope of Costa Rica's substantive rights, rebutting Nicaragua's interpretation of them. Two tables appended to Chapter 3 demonstrates that Costa Rica's interpretation is correct.

**Table 1** shows the use of the term "*objetos*" as meaning "purposes" in 19th century documents and **Table 2** sets out the terms used to refer

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<sup>64</sup> NCM, para. 4.2.35.

<sup>65</sup> CRM, para. 4.99.

<sup>66</sup> This Reply, paragraphs 3.79-3.95.

<sup>67</sup> See CRM, para. 1.08.

to “articles of trade”, “goods”, “things” and similar concepts in 19th century documents.

**Chapter 4** responds to Nicaragua’s claims that it has not breached Costa Rica’s navigational and related rights and demonstrates that Nicaragua’s breaches of those rights are continuing.

**Chapter 5** responds to NCM’s arguments in respect of remedies, demonstrating first that Costa Rica is entitled to the remedies it has claimed and second that Nicaragua’s request for a declaration as to the scope of Costa Rica’s rights is unfounded, as is Nicaragua’s request for a declaration that it is entitled to dredge the San Juan.

1.29 An **Appendix** to this Reply addresses relevant historical issues disputed by Nicaragua.

1.30 Annexed to this Reply is one volume of documentary annexes (Annexes 1-72). A list of annexes is provided at the end of this volume.<sup>68</sup>

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68 For reasons of space, the English translations of certain documents only are included in the Annexes; the Spanish versions are included in Complete Copies of Certain Annexes submitted to the Court.

## Chapter 2

### General International Law Relevant to the Dispute

#### A. Introduction

2.01 In order to place the particular rules related to Costa Rica navigational and related rights in the context of general international law, the present Chapter will deal with the general international rules related to international waterways and those concerning the interpretation of treaties. It consists of two substantive sections. **Section B** explains why, contrary to the position of Nicaragua in its Counter-Memorial, the San Juan is a boundary and international river. **Section C** addresses the applicable principles of interpretation. In particular, this Section demonstrates that Nicaragua's focus on its sovereignty over the waters of the River and its underestimation of Costa Rica's rights of navigation, protection and defence of the River are without foundation. Conclusions on the general international law relevant to this dispute are drawn in **Section D**.

#### B. The San Juan as an International River

##### (1) Nicaragua's Position

2.02 In its Counter-Memorial, Nicaragua asserts that "[t]he San Juan is of course not an international River since it flows entirely within one country and besides is subject to a special Treaty Regime."<sup>69</sup> Under that regime, the respondent State has "granted" certain rights to Costa Rica in matters of navigation and of defence. These rights are limited, however, as sovereignty over the waters of the River lies with Nicaragua. The latter retains the exclusive right to carry passengers on the River and Costa Rica must exercise its navigation rights "by reference to the legitimate interests of [Nicaragua]";<sup>70</sup> as to the defence of the watercourse, Costa Rica's rights (and obligations) are confined to its bank of the River.

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69 NCM, para. 4.1.29.

70 NCM, para. 2.1.50.

2.03 The instrument effecting the “grant” referred to in the preceding paragraph is the Cañas-Jérez Treaty of 15 April 1858. For Nicaragua, that Treaty is a territorial settlement; it does not establish a watercourse regime. This is why general international law cannot be relied on (although even Nicaragua actually does so<sup>71</sup>).

2.04 Nicaragua asserts that Costa Rica, by its actions, claims and arguments, seeks to turn a simple territorial settlement into an international regime amounting to shared jurisdiction over the watercourse.<sup>72</sup>

2.05 Nicaragua admits that the subject-matter of the dispute is governed by the Cañas-Jérez Treaty of 1858 and the 1888 Cleveland Award.<sup>73</sup> But for Nicaragua the relevance of the Cleveland Award is diminished as “with respect to navigation with articles of trade Costa Rica can have no greater rights under the Award than she has under the Treaty itself.”<sup>74</sup> Nicaragua contends that the 1916 Judgment of the Central American Court of Justice<sup>75</sup> and the 1956 Agreement<sup>76</sup> are of minimal relevance. It also seeks to undermine the relevance of the Cuadra-Lizano Joint Communiqué of 30 July 1998<sup>77</sup> by emphasising that Nicaragua unilaterally declared it null and void<sup>78</sup> – a declaration Costa Rica rejected.

2.06 Nicaragua then attempts to give the relevant instruments a meaning which restricts the scope of Costa Rica’s rights in navigation and defence matters, in accordance with Nicaragua’s own arguments about the limited character of Costa Rica’s rights and the unlimited character of its rights of sovereignty.

2.07 In this Chapter Costa Rica analyses these assertions, examining the following points in turn: applicable law; the San Juan as a boundary river, and the San Juan as a river endowed with an international regime. Specific issues of interpretation are dealt with in Chapter 3.

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71 NCM, paras. 2.1.54-2.1.57; 2.1.59-2.1.61 and 2.1.63-2.1.64.

72 NCM, para. 3.1.28.

73 CRM, Annexes, Vol 2, Annex 16.

74 NCM, para. 4.2.1.

75 CRM, Annexes, Vol 2, Annex 21.

76 CRM, Annexes, Vol 2, Annex 24.

77 CRM, Annexes, Vol 2, Annex 28.

78 NCM, paras. 3.2.4-3.2.14.

## (2) The Applicable Law

2.08 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. However, Nicaragua's acceptance of the Cleveland Award appears to be conditioned on that Award's conformity with Nicaragua's own interpretation of the 1858 Treaty.<sup>79</sup>

2.09 This view cannot be accepted. The 1888 Award interprets the relevant provisions of the 1858 Treaty. It has the force of *res judicata*. It authoritatively determines the meaning of Articles IV and VI of the Cañas-Jérez Treaty. By its agreement, given in advance, to accept the Award, Nicaragua accepted President Cleveland's interpretation of the Treaty: its attempt now to undermine it by reference to an unduly restrictive interpretation of the 1858 Treaty must be rejected.

2.10 Nicaragua also argues that the 1916 Judgment of the Central American Court of Justice is without incidence for the present dispute. It views the Judgment as a ruling limited to the issue of whether the Bryan-Chamorro Convention for the construction of an inter-oceanic canal, concluded between the United States and Nicaragua on 5 August 1914 without consulting Costa Rica,<sup>80</sup> was in contravention of Article VIII of the Cañas-Jérez Treaty. According to Nicaragua it merely restated what was said by the 1858 Treaty as interpreted by the Cleveland Award.<sup>81</sup> That is not correct, as is shown by the passages of the 1916 Judgment cited in Costa Rica's Memorial.<sup>82</sup> To the Central American Court, the "ownership" exercised by Nicaragua over the San Juan "is neither absolute or unlimited": Costa Rica is established "in the full enjoyment of practical ownership of a large part of the San Juan River without prejudice to the full ownership reserved to Nicaragua as sovereign over the territory". Further, "the limitation of the presence of Costa Rica's ships devoted to revenue and defensive purposes" in no way detracts from Costa Rica's

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79 NCM, para. 4.2.1.

80 CRM, Annexes, Vol 2, Annex 20.

81 NCM, para. 3.2.6.

82 CRM, paras. 2.46-2.48.

“practical” ownership; Costa Rica possesses “the contractual right of perpetual navigation ... accompanied by the full privilege of transit and commerce,” whereas “Nicaragua is impressed with the duty not to interfere with navigation, but, on the contrary, to keep the course of the river open.”<sup>83</sup> How can one assert that these findings are irrelevant, especially given the stark contrast between the actual situation today and that which ought to prevail as determined by the Central American Court?

2.11 The Fournier-Sevilla Agreement concluded on 9 January 1956<sup>84</sup> pursuant to Article IV of the 1949 Pact of Amity<sup>85</sup> is dismissed by Nicaragua as a mere repetition of the terms of the 1858 Treaty and the 1888 Award.<sup>86</sup> Again this is not correct. In Article 1 of the 1956 Agreement the parties undertake to facilitate and expedite transit through the River; in Article 2, they agree to cooperate to safeguard their common border. 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 Rica’s border posts. Perhaps Nicaragua does not wish to be reminded of this Agreement and the events preceding its conclusion?<sup>87</sup>

2.12 Another relevant text is the Cuadra-Castro Joint Communiqué of 8 September 1995 which refers to far-reaching cooperation for the joint or parallel surveillance of the common border.<sup>88</sup> That such cooperation would not be possible without the assistance of Costa Rican public vessels is evident; that such patrolling effectively took place is demonstrated by the evidence produced by Costa Rica.<sup>89</sup>

2.13 Finally there is the Cuadra-Lizano Joint Communiqué of 30 July 1998,<sup>90</sup> which confirms the right of Costa Rican police officers to navigate on the San

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83 CRM, Annexes, Vol 2, Annex 21, at pp. 219, 220 and 222.

84 CRM, Annexes, Vol 2, Annex 24.

85 CRM, Annexes, Vol 2, Annex 23.

86 NCM, para. 3.2.5.

87 CRM, para. 2.52.

88 CRM, Annexes, Vol 2, Annex 27.

89 CRM, para. 4.105 & note 246. See also this Reply, Appendix, paragraphs A.33-A.44.

90 CRM, Annexes, Vol 2, Annex 28.

Juan, without, as Nicaraguan Minister Cuadra said,<sup>91</sup> detracting from Nicaragua's sovereignty. Nicaragua objects that this agreement was made by authorities not vested with treaty-making power and that it could be "harmful to the national sovereignty of [Nicaragua] clearly established in the Jérez-Cañas Treaty, the Cleveland Award and consecrated in [Nicaragua's] Political Constitution."<sup>92</sup> For these reasons, Nicaragua unilaterally declared the instrument null and void, an act rejected by Costa Rica.<sup>93</sup>

2.14 There are, in conclusion, a series of texts relevant to the issue at hand: the 1858 Treaty, the 1888 Award, the 1916 Judgment and various instruments such as the Sevilla-Fournier Agreement (1956), the Cuadra-Castro (1995) and Cuadra-Lizano (1998) Joint Communiqués. All these texts are connected with the San Juan as a boundary river.

2.15 In addition, customary international law is also relevant to adjudication of the present dispute and to the interpretation of the relevant treaty provisions. Regarding navigation – and contrary to what applies to Costa Rica's related rights, as will be explained<sup>94</sup> – 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.

2.16 The reference made in the Nicaraguan Counter-Memorial to the *Faber* case and to a doctrinal comment<sup>95</sup> therefore is of little relevance. Two observations may nevertheless be made. The first is that *Faber* pertains to navigation under the flag of a non-riparian State. The second relates to a comment made by a writer on that case, invoked by Nicaragua. In its original text, that passage reads:

"La sentence arbitrale en 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 latino-américaine, qui fait dépendre la navigation de la volonté de l'Etat riverain ou des Etats riverains. Cette conception semble du reste l'emporter sur la thèse subsidiaire qui fut

91 CRM, para. 4.116; CRM, Annexes, Vol 2, Annex 28.

92 NCM, para. 3.2.12.

93 CRM, para. 3.31. Cf. also CRM, Annexes, Vol. 3, Annex 50.

94 See below, paragraphs 3.109-3.121.

95 NCM, para. 4.1.14.



développée par le surabitre *Duffield* et qui consistait à limiter la libre navigation aux trajets sans transbordement vers la mer ou en provenance de celle-ci.

La doctrine, quant à elle, semble à peu près unanime: en Amérique latine, il n'existe pas de liberté de navigation en l'absence de concession unilatérale ou de disposition conventionnelle...<sup>96</sup> (Words omitted by Nicaragua in italics.)

2.17 In NCM, that passage runs as follows:

“La sentence arbitrale en l'affaire *Faber* met en relief l'opposition entre la doctrine de la libre navigation, création de l'Europe du XIXe siècle, et la conception latino-américaine, qui fait dépendre la navigation de la volonté de l'Etat riverain ou des Etats riverain[s]. Cette conception... consistait à limiter la libre navigation aux trajets sans transbordement vers la mer ou en provenance de celle-ci.

La doctrine, quant à elle, semble à peu près unanime: en Amérique latine, il n'existe pas de liberté de navigation en l'absence de concession unilatérale ou de disposition conventionnelle.”<sup>97</sup>

2.18 The way in which this text is presented in NCM is typical of Nicaragua's method of “editing” quotations. The truncated version suggests that the German-Venezuelan Claims Commission headed by Umpire Duffield had asserted, in *Faber*, that the Latin-American conception of navigation on international watercourses was that such navigation depended on the will of the riparian States, but also that that conception tended towards limiting navigation by other States to transit to and from the sea without transshipment. According to its own version of the text, Nicaragua comments (i) that there is not in Latin America, on the international level, any right of navigation for foreign ships, but also (ii) that such a right does exist, but only in respect of navigation to and from the sea without transshipment.<sup>98</sup> These two assertions are contradictory. The full citation shows that what the Umpire had in mind was an alternative: either there was, internationally, no right to navigate at all; or, if there was such a right, it was limited to access to and from the sea without transshipment. Thus Duffield left the question of the existence of a right of navigation open. In any event, the *Faber* case cannot serve as a precedent as it concerned a successive rather than a contiguous watercourse. What is more, the watercourse system in issue

96 L. Caflisch, “Règles générales du droit des cours d'eau internationaux”, (1989) 219 *Recueil des cours de l'Académie de droit international de La Haye* 9, 125.

97 NCM, para. 4.1.14.

98 NCM, paras. 4.1.14-4.1.15.

– the Catatumbo/Zulia – was not an international river with a boundary running along the bank of one of the riparian States.

### (3) The San Juan as a Boundary River

#### (a) The nature of the boundary in the Lower San Juan Area

2.19 In its Counter-Memorial, Nicaragua contends that “[t]he San Juan is not a border river but an integral and indivisible part of the Republic of Nicaragua and thus runs along its whole course within Nicaraguan territory.”<sup>99</sup> Pursuing the argument, it points out that the upper part of the watercourse lies entirely in Nicaraguan territory while, regarding the lower course between Punta de Castilla and a point three miles below Castillo Viejo, the boundary separating Nicaragua from Costa Rica runs on the right – Costa Rican – bank of the River.<sup>100</sup>

2.20 From the geographical viewpoint this description is correct. From Lake Nicaragua down to a point three miles below Castillo Viejo, the San Juan is part of Nicaraguan territory, the border consisting of straight lines roughly parallel to the south bank of the San Juan. Below that point the limit follows the Costa Rican bank of the watercourse. From a macro-geographical viewpoint, the San Juan, on its upper course, forms a successive river; from the point below Castillo Viejo to Punta de Castilla, it is a contiguous river forming the boundary between the two States.

2.21 Thus the boundary runs along the right bank of the River belonging to Costa Rica. This is what causes Nicaragua to speak of a watercourse which “is not a border river” but an “integral” and “indivisible” part of Nicaragua’s territory.<sup>101</sup> But its position is untenable. The banks are part and parcel of the River. Without banks defining it, there would be no watercourse. This is why those who have studied the subject consider borders running on riverbanks to be *river* boundaries, as they also do in the cases of condominium rivers and waterways divided by *thalweg* or median or other lines, running on water.<sup>102</sup>

<sup>99</sup> NCM, para. 1.1.4.

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.*

<sup>102</sup> See, among others, L. Bouchez, “The Fixing of Boundaries in International River Boundary Rivers”, (1963) 12 *International and Comparative Law Quarterly* 789; F. Schröter, “Les systèmes de délimitation dans les fleuves internationaux”, 1992) 38 *Annuaire français de droit international*

All these types of limits, including those placed on riverbanks, are river boundaries. They must be distinguished from boundaries drawn *by reference* to waterways, which remain land boundaries. A good example is provided by the boundary separating Senegal from The Gambia which, according to the Agreement between Great Britain and France of 10 August 1889, runs parallel to the Gambia River at a distance of ten kilometres.<sup>103</sup> The same technique had previously been used, according to one author, in a 1555 arbitration between the Swiss cantons of Schaffhouse and Zurich in relation to the Rhine and its bridges,<sup>104</sup> as it was in the 1858 Cañas-Jérez Treaty for the *upper* part of the San Juan.

2.22 It may not always be easy to distinguish between boundaries *on a riverbank* (river boundaries) and boundaries drawn *by reference* to rivers. There is the old and well-known instance of the Treaty of Andrinople between Turkey and Russia of 14 September 1829, Article III of which placed the border on the Turkish bank of the Danube but also prescribed that the Turkish shore was to remain uninhabited “for a distance of two hours from the river” – whatever that may mean.<sup>105</sup> At first glance, this border may appear to be one drawn *by reference* to a river. This is not the case, however: the border was established on the Turkish bank and therefore was a *river* boundary. The prohibition to settle the Turkish territory within a certain distance from that bank was based on security reasons and had no impact on the boundary itself, nor on its characterisation as a river boundary. Other difficulties arise when the boundary runs, not along the water-mark but at a specified distance from it, for instance landward of a towing path along the watercourse.<sup>106</sup>

2.23 There can be no doubt as to the present situation however: the boundary drawn by the Cañas-Jérez Treaty follows the average water-line of the right bank of the San Juan and is therefore, unquestionably, a *river* boundary. Nothing

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948; C. Rühland, “Grenzwässer”, in H.J. Schlochauer (ed.), *Wörterbuch des Völkerrechts*, Vol. 1 (Berlin: De Gruyter, 1960), 705, 705-6. See also K.H. Kaikobad, *The Shatt-al-Arab Boundary Question: A Legal Reappraisal* (Oxford: Clarendon Press, 1988).

103 172 CTS 185.

104 Schröter, 954 n.185.

105 80 CTS 83.

106 On this question see P. Guggenheim (ed.), *Répertoire suisse de droit international 1914-1939*, (Bâle: Helbing & Lichtenhahn, 1975), Vol II No. 5-24.

could be clearer to everybody – except to Nicaragua, which blithely asserts that “the river does not, of course, constitute the border, which lies on the right, or Costa Rican, bank in this sector.”<sup>107</sup> Why does the respondent State insist that that border is a *land* boundary and that, consequently, the whole San Juan is a domestic watercourse? One can only surmise that this is meant to stress the absolute character of Nicaragua’s sovereignty over all the River’s waters, the limited scope of the rights of navigation attributed to Costa Rica in 1858, the “grant” of certain navigation privileges to Costa Rica *ex gratia*, and the virtual dependence of those rights and the attendant privileges on Nicaragua’s will. All this is not very relevant, however, since the lower San Juan has been shown to be a *boundary river*.

## (b) The practice of establishing boundaries on riverbanks

2.24 In earlier times treaties fixing boundaries on riverbanks were relatively frequent.<sup>108</sup> They occurred mainly in Africa,<sup>109</sup> but also in Europe<sup>110</sup> and in the Americas.<sup>111</sup> The best known shoreline limits in Asia are that drawn along the Amur river separating Russia from China, and the line dividing Iran from Iraq on the Shatt-el-Arab.<sup>112</sup> Often these instruments offered “compensation” to the

107 NCM, para. 4.2.20.

108 See in particular Bouchez, 791-2; Schröter, 952-7.

109 Articles I(2) and III(1) of the Anglo-French Protocol, 10 August 1889 (San Pedro, Tendo, Gambia/Senegal): I. Brownlie, *African Boundaries*, (London: C. Hurst, 1979), 215; Article 1 of the Agreement on British and French Possessions to the North and the East of Sierra Leone, 21 January 1895: G.F. De Martens, 23 *Nouveau Recueil Général de Traités*, 2nd Series, 3 (Great Skarcies or Kolenté); Delimitation Agreement between France and Liberia, 13 January 1911, 213 CTS 2 (for a series of rivers on the boundary between Liberia and Côte d’Ivoire), confirmed in 1961: see Brownlie, 369; Articles 7 and 8 of the Protocol of 1 July 1912 between Great Britain and France on the Definitive Demarcation of the Frontier between French Guinea and Sierra Leone, 216 CTS 217.

110 In Europe, this technique seems to have been a Franco-Swiss specialty: Article 1 of the Treaty of Cession and Boundaries between Switzerland and France, 16 March 1816: 65 CTS 447 (Foron); Convention between Switzerland and France for the Definition of the Frontier between Mont Dolent and Lac Léman, 10 June 1891: 175 CTS 169 (Morge, Eau Noire, Barberine); Articles I, II and V of the Convention between France and the Bishop of Bâle, 20 June 1780: 47 CTS 331 (Doubs). See also F. Schröter, *Les frontières de la Suisse: questions choisies* (Geneva: Schulthess Médias Juridiques, 2007), 208-223. Another European case to be mentioned is the River Netze, see Article II of the Treaty between Poland and Russia, 18 September 1773: 45 CTS 243; Bouchez, 801.

111 See Article 8 of the Treaty of Peace, 10 August 1797 between France and Portugal, which concerns the South-American river Vincent Pinson: 54 CTS 141; the Arbitral Award of 23 January 1933, following the Arbitration Treaty between Honduras and Guatemala, 16 July 1930, 137 LNTS 258 (Tinto, Motagua); and, naturally, the Cañas-Jérez Treaty of 1858: CRM, Annexes, Vol 2, Annex 7.

112 Article 2 of the Treaty between Afghanistan and Britain for the Establishment of Neighbourly Relations, 22 November 1921: 14 LNTS 67 (Kabul river); Article 2 of the Frontier Treaty between the Netherlands and Britain, 26 March 1928: 108 LNTS 331 (the Odong river in Borneo). Regard-

States on whose banks the boundaries ran.<sup>113</sup> Generally speaking such borders, in view of their “inequality”, do not last very long, provoke quarrels and are replaced by boundaries on the watercourse.

2.25 An author has identified several reasons that have prompted States to draw boundaries on riverbanks.<sup>114</sup> In the case of the Foron, for instance, the boundary dividing France from Switzerland was drawn on the Swiss shore because many of the concessions for the operation of mills in the area were localised on the French side.<sup>115</sup> Another motivation could be the instability of the river-bed, as was the case of the Morge, also located at the French-Swiss border, a torrent that brusquely swells or decreases, without warning, often changing course but staying within its banks; a shoreline limit was thought to offer the most practical solution. Finally, there is the political inequality of the parties which may make it possible for one of them to appropriate the whole waterway<sup>116</sup> – a situation which prompted Paul de Lapradelle to describe the shoreline border as “the imperialists’ river boundary par excellence” (“*limite*

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ing the Amur river, see Article I of the Treaty of Peking, 2/14 November 1860 between Russia and China (123 CTS 125), to which a map had been annexed showing the boundary to be on the Chinese bank. In 1992 the issue was apparently been settled in favour of the *thalweg*: see Schröter (1992) 956 n.54. The Shatt-el-Arab separates Iran from Iraq. The Treaty of Erzerum, 19 May 1847, 101 CTS 85 fixed the boundary on the Persian bank. Article 2 of the Boundary Treaty, 4 July 1937, 190 LNTS 241 moved it to the *thalweg*. The 1937 Treaty was denounced by Iran in 1969. On 3 June 1975, the Treaty Concerning the State Frontier was concluded between Iran and Iraq: 1017 UNTS 55. This instrument was in turn denounced when Iran invaded Iraq. At the end of the war, which lasted for eight years, the peace negotiations stalled precisely on this point. The issue was finally settled on the basis of a letter addressed by Tarek Aziz to the Secretary-General of the United Nations on 14 August 1990. See C.R. Symmons, “L’Echange de lettres de 1990 entre l’Irak et l’Iran: un règlement définitif du différend et du conflit?”, (1990) 36 *Annuaire français de droit international* 229, 244-6.

113 See the following previously cited agreements: Convention of 20 June 1780 regarding the Doubs (right for the Bishop of Bâle to float wood); Treaty of 22 November 1921 regarding the Kabul river (right to navigate and to draw water for domestic and irrigation purposes); Treaty of Erzerum of 19 May 1847 on the Shatt-el-Arab (“fullness of rights of navigation” from the mouth to the point of encounter of the boundaries of Turkey and Persia”); and the Agreement of 1 July 1912 on the Sierra Leone boundary referred to in CRM, para. 4.127.

114 See, e.g., Article 8 of the Treaty of Cession and Boundaries, 16 March 1816, between Switzerland and Sardinia, which places in the middle of the Rhône river a limit which had hitherto followed the Swiss bank: see Schröter (1992) 956. Another example cited by Schröter is the *Procès-verbal* of 25 June 1903 on the Boundary Rivers Separating Liberia from Sierra Leone (Brownlie, 383); by the Convention of 21 January 1911 (*ibid*, 386), the boundaries on the three watercourses were moved from their shores to the *thalweg*. And by the Boundary Treaty of 4 July 1937 the boundary on the Shatt-el-Arab was transposed from the Persian bank to the *thalweg*.

115 Schröter (2007), 210 (citing Ch. Rousseau).

116 Bouchez, 791.

*fluviale impérialiste par excellence*").<sup>117</sup> Limits on the shore are not simply relics of the colonial past, however, since the technique was used by European nations, notably France and Switzerland.

2.26 In the instant case, political reasons were involved, as were the circumstances prevailing in and around 1858. The two States could be considered as partly dependent on two competing major powers: Nicaragua on the United States, Costa Rica on the British Empire. It was the wish of these powers to be able to negotiate and build the planned canal with the permission of one rather than two “local countries”; and this could be achieved by attributing the existing waterway to one of them. Some *quid pro quo* had, however, to be offered to the other – Costa Rica – which was accorded free navigation and a share in the River’s management and protection; moreover Nicaragua was obliged at least to inform and consult Costa Rica regarding canal projects<sup>118</sup> – a duty it neglected when, on 5 August 1914, it concluded the Bryan-Chamorro Treaty with the United States.<sup>119</sup>

2.27 The shared interest of Costa Rica and Nicaragua in the building of an inter-oceanic canal can be seen from other contemporaneous documents, which indicate that the 1858 Treaty was entered into with both States having in mind that a better arrangement would be put in place once the canal was built, an arrangement for joint sovereignty in the waters of the River and equal rights of navigation. It also indicates that Costa Rica’s perpetual right of free navigation was an important factor in the bargain eventually agreed in the 1858 Treaty and not, as Nicaragua suggests,<sup>120</sup> merely incidental to the determination of the boundary. The successful conclusion of the 1858 Treaty, which was signed in San José on 15 April 1858 with ratifications exchanged in Rivas on 26 April 1858, was intimately connected with the canalization Convention between Nicaragua, Costa Rica and Félix Belly, signed on 1 May 1858 in Rivas.<sup>121</sup>

117 *La frontière* (Paris, Editions internationales, 1928), 187.

118 Article VIII of the Cañas-Jérez Treaty: CRM, Annexes, Vol 2, Annex 7.

119 CRM, Annexes, Vol 2, Annex 20.

120 See NCM, para. 1.2.6.

121 Nicaragua-Costa Rica-F Belly, Convention relative to the Concession for an Inter-oceanic Canal by the River San Juan and the Lake of Nicaragua, (Mora-Martínez-Belly), Rivas, 1 May 1858: CRM, Annexes, Vol 2, Annex 8. Additional articles are included in CRR, Annexes, Vol 2, Annex 12. The complete Convention is produced in CRM, Complete Copies of Certain Annexes, Vol 1, Annex 8.

Article 4 of the Nicaragua-Costa Rica-Belly Convention expressly provided that the boundary between Costa Rica and Nicaragua would be the canal. It stated:

“Dans le cas où le tracé partant de l’embouchure de la Sapoa sur le lac de Nicaragua, et aboutissant à la baie de Salinas sur le Pacifique, serait reconnu praticable par les ingénieurs, ce tracé sera choisi de préférence par la Compagnie pour aboutir du lac de Nicaragua au Pacifique, et par le fait même, le canal deviendra dans toute sa longueur la limite définitive des États de Nicaragua et de Costa-Rica. Dans le cas contraire, cette limite restera ce qu’elle est aujourd’hui, sauf règlement ultérieur.”<sup>122</sup>

Although this Convention never came into force, and the canal has never materialised, it goes some way to explaining the *quid pro quo* of the 1858 Treaty and explains that Costa Rica’s perpetual right of free navigation was an important factor in the negotiation of the boundary between the two States.<sup>123</sup> It also gives an indication of the context and considerations which led the parties to indicate the boundary on the bank of the River.

2.28 It remains to examine the medium- and long-term consequences of drawing international river boundaries on the shore of one of the riparian States. As pointed out by Bouchez:

“[t]he great injustice of this type of boundary in comparison with the first-mentioned one [the river as a *condominium*] is that one of the border States is excluded from the use and exploitation of the river; for this reason, the delimitation of one of the banks as the boundary line for rivers has not often been applied in this century.”<sup>124</sup>

2.29 The establishment of a boundary on the shoreline may be accompanied by the concession of “compensatory” rights. In the case of non-navigable watercourses, they may consist of fishing privileges, as for instance in Article 8 of the Agreement of 1 July 1912 on the Boundary between Guinea and Sierra Leone.<sup>125</sup> Such rights can also result, as is the case here, from local customs based on long-established practice.

122 CRR, Annexes, Vol 2, Annex 12, Article 4. See also Article 25 and discussion in this Reply, Appendix, paragraphs A.15-A.22.

123 This is consistent with the account of Félix Belly, who was present for negotiations of both the 1858 Treaty and the canalization Convention: see F. Belly, *A Travers L’Amérique Centrale: le Nicaragua et le Canal Interocéanique*, Tome Second (Paris: Librairie de la Suisse Romande, 1867), 150-165, esp. 152-5. Pages 150-165 are included as CRR, Annexes, Vol 2, Annex 66. See further discussion in this Reply, Appendix, paragraphs A.15-A.22.

124 Bouchez, 792.

125 Protocol of 1 July 1912 between Great Britain and France on the Definitive Demarcation of the Frontier between French Guinea and Sierra Leone, 216 CTS 217.

2.30 The effect of placing an international boundary on the shore of a *navigable* river may be particularly dramatic, and it may prove necessary – unless there is a clear customary rule allowing for free navigation by all countries, or at least all riparian States – to grant the co-riparian a right of free navigation for ships flying their own flag, especially if the watercourse is an important means of communication, as is the case here. This is even truer if, as in the present instance, the State on whose shore the boundary is located participates in the protection of the River and of its navigation. A largely formal right of navigation such as that advocated by Nicaragua is, in practice, no right at all. On the contrary, the “perpetual right of free navigation” enjoyed by Costa Rica must be interpreted so as to be meaningful, and not be appreciated exclusively by, and in the interests of, the neighbour exercising sovereignty over the River’s waters. This must be accomplished in a way which renders the other State’s rights effective and allows it to discharge its obligations: *ut res magis valeat quam pereat*. The reference to “free” navigation provides support for this position.<sup>126</sup>

2.31 Limits on the shore cannot be considered “good” boundaries because they tend to generate conflict rather than to promote peaceful coexistence. The fates of the Shatt-el-Arab and of the Amur River bear out this point. Sooner or later shoreline borders are apt to be replaced by *thalweg* or median lines.<sup>127</sup> The changes in the borders of the two rivers have been described already.<sup>128</sup>

2.32 Despite these drawbacks, Costa Rica, mindful of the importance of maintaining peaceful relations with all countries, especially its neighbours, has never sought a revision of the Cañas-Jérez Treaty but has limited itself to asking for what it was entitled to under that Treaty, no more and no less. Costa Rica can make do with the Treaty as it is, provided it is interpreted fairly and objectively. What it cannot accept is Nicaragua’s insistence on being allowed to give the “perpetual right of free navigation” stipulated by the Treaty the meaning that best serves Nicaragua’s own interest, subordinating Costa Rica’s

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126 See below, paragraphs 3.08-3.35.

127 See this Reply, paragraphs 2.24-2.25 above.

128 See this Reply, paragraphs 2.25 above.



right to Nicaragua's sovereignty over the waters of the River. "Sovereignty" is not boundless, especially if it is limited by treaty.

2.33 To conclude, since the border on the San Juan is placed on the Costa Rican shore of the watercourse, the latter is a *boundary river*. By way of compensation for its disadvantaged position, Costa Rica is granted a "perpetual right of free navigation" on the lower course of the San Juan on the basis of Article VI of the Cañas-Jérez Treaty. To be of any use to Costa Rica, the scope of that right must be determined fairly and objectively – as was done by President Cleveland himself and by the Central American Court of Justice. That determination must take account of the handicap suffered by Costa Rica on account of the boundary's location on its bank of the River.

#### **(4) The San Juan as an International River**

##### **(a) Elements traditionally associated with International Watercourses**

2.34 "The San Juan is of course not an international River since it flows entirely within one country and besides is subject to a special Treaty Regime."<sup>129</sup> This passage, cited earlier, runs through the Nicaraguan argumentation like a *Leitmotiv*. That, on account of the boundary being located on the Costa Rican bank, the San Juan is a boundary river has already been demonstrated. But the proposition that the River is not an international watercourse because it is the object of a special (international) treaty regime is entirely novel. By the same token – because they are governed by treaties – the Nile, the Paraná and the Mekong, too, would not be international rivers.

2.35 According to Costa Rica,<sup>130</sup> 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.

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129 NCM, para. 4.1.29.

130 CRM, Appendix A, paras. A.8, A.18.

**(b) Consequences of the San Juan River's characterisation as an international boundary river**

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.<sup>131</sup> 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 respects correspond to those invoked by Nicaragua in the present controversy.

2.39 This is true for the assertion that the 1858 Treaty and the perpetual right of free navigation stipulated by its Article VI must be interpreted bearing in mind the “legitimate interests” of Nicaragua.<sup>132</sup> This argument is premised on the assumption that the Cañas-Jérez Treaty emphasises Nicaragua’s sovereignty over the waters of the San Juan, Costa Rica’s right to navigate being but a minor element the definition and exercise of which must be subservient to Nicaragua’s sovereignty. This line of argument would reduce Costa Rica’s perpetual right of free navigation to little more than an empty shell. The truth is, of course, that the provisions of the 1858 Treaty are to be interpreted in the interests not of one but both parties. This is what is meant by “fair” and “objective” interpretation.

**(c) Conclusions**

2.40 Contrary to the views of the respondent State, the San Juan is a boundary river subject to an international treaty regime attributing a “perpetual right of

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131 On this point, cf. also NCM, para. 2.1.12.

132 NCM, para. 2.1.50.

free navigation” to Costa Rica. Consequently the rules of general international law apply, especially those governing the interpretation of treaties.

### **C. The Applicable Principles of Interpretation**

2.41 In its Counter-Memorial, Nicaragua makes a considerable effort to show that the object and purpose of the Treaty of Limits “was to settle a long-standing dispute concerning title to territory”.<sup>133</sup> For Nicaragua, “[t]he main focus was thus the determination of boundaries and not the creation of a regime of fluvial navigation for the States of the region.”<sup>134</sup> The purpose of this effort is to minimise the scope of the right of navigation over the San Juan, a right recognised to Costa Rica at the same time of the grant of sovereignty over the River’s waters and as a condition or limitation to that grant of sovereignty.

2.42 This section will rebut the Nicaraguan presentation, as well as its misuse of the general principles of interpretation. It will show that Nicaragua’s interpretation of the object and purpose of the Treaty of Limits does not correspond to reality, that the way in which Nicaragua portrays the relevant rules of interpretation and application of treaties is not accurate and that, even if Nicaragua’s position was correct, the result would be the same, i.e. Article VI of the Treaty of Limits refers to “purposes of commerce,” not “articles of trade,” and the Second Article of the Cleveland Award clearly recognises Costa Rica’s right to navigate with public armed vessels (provided that they are not vessels of war) for the exercise or the protection of navigation for purposes of commerce.

#### **(1) All principles of interpretation confirm Costa Rica’s views**

2.43 Nicaragua refers to the relevance of intertemporal law in the present case, mixing up this concept with that of contemporary interpretation of treaties, i.e. that a treaty must be interpreted taking into account the rules and the context prevailing at the time of its conclusion.<sup>135</sup>

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133 NCM, para. 2.1.1.

134 NCM, para. 2.1.9.

135 NCM, para. 2.1.13.

2.44 The notion of intertemporal law was authoritatively explained by Max Huber as sole arbitrator in the *Isle of Palmas* case. In the terms of the arbitral award:

“As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of 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.”<sup>136</sup>

2.45 The relevance of the second rule of the intertemporal law (“the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law”) must be stressed here. There is no doubt that the “continued manifestation” of the perpetual right of free navigation for purposes of commerce attributed to Costa Rica in 1858 is in conformity with the conditions of contemporary international law. This right, conventionally recognised to Costa Rica in 1858, is not in contradiction with the evolution of general international law regarding the right of navigation of riparian States in international waterways; in addition this same general international law must be taken into account when interpreting the “continued manifestation” of Costa Rica’s right.

2.46 To the extent of the interpretation of the relevant clause of the Treaty of Limits through time, Nicaragua admitted that what is “*objetos de comercio*” today is included in the rights conferred on Costa Rica by the Treaty of Limits in 1858. Certainly, Nicaragua contends that “*objetos de comercio*” only means merchandise or goods, but the fact remains that Nicaragua has accepted the interpretation of this phrase as not being limited to what were “*objetos de comercio*” exclusively at the time of the conclusion of the Treaty.<sup>137</sup> Hence, the parties agree that all “*objetos de comercio*” as they exist today, are included within Costa Rica’s perpetual right of free navigation.

2.47 As a matter of logic as well as law, the same criteria that Nicaragua applies to Article VI of the Treaty of Limits must be applied to the Second

136 *Isle of Palmas Case*, Arbitral Award of 4 April 1928, Vol. II *UNRIIAA*, p. 845.

137 “It would be unreasonable to seek a limitation to only the products concerned in 1858.”: NCM, para. 4.3.24; see also NCM, para. 4.3.23.

Article of the Cleveland Award. Consequently, what are considered today as vessels of the Revenue Service enjoy the same right as it was recognised by the interpretation given by President Cleveland to the Treaty of Limits in 1888.

2.48 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.<sup>138</sup> 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.<sup>139</sup> 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.”

2.49 The extraordinary emphasis put by Nicaragua on what is considered as “supplementary means of interpretation” in Article 32 of the Vienna Convention of the Law of Treaties, as though they were rather the main means of interpretation, indicates that Nicaragua is well aware that the general rule of interpretation contained in Article 31 inexorably leads to the recognition of the Costa Rican rights that are being violated by Nicaragua. Furthermore, as will be demonstrated below, the application of Article 32 confirms the interpretation given to the Treaty of Limits by Costa Rica.

2.50 The first principle of interpretation is that of good faith. In view of the fact that Nicaragua itself explicitly interpreted for more than a century “*con objetos de comercio*” as meaning “for purposes of commerce”, it is clear that pretending today, as Nicaragua does, that the phrase refers only to the transport of merchandise does not correspond to a good faith interpretation.

2.51 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

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138 NCM, para. 2.1.12.

139 See the quotations at NCM, paras. 2.1.16 and 2.1.17.

the 1969 Vienna Convention, “the words are to be interpreted according to their natural and ordinary meaning in the context in which they occur.”<sup>140</sup>

2.52 The ordinary meaning of the phrase “*con objetos de comercio*” in its context (both “internal” and “external”) is the one the parties have explicitly admitted for more than a century: “for purposes of commerce.” Nicaragua’s interpretation of this phrase as meaning “with articles of trade” does not correspond to the ordinary way to refer to merchandise. The internal context (other articles of the same treaty) indisputably shows that “*objetos*” was used as “purposes”.<sup>141</sup> So does the external context, i.e. other relevant treaties concluded by the parties referring to Costa Rica’s navigation, such as the Treaties concluded by Nicaragua with the United States in 1857, with France in 1859 and with Great Britain in 1860, all of them clearly stipulating that Costa Rica’s Government and citizens enjoy free passage through the San Juan, which passage included both “*persons and property*”, not exclusively “articles of trade.”<sup>142</sup>

2.53 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.<sup>143</sup> Some of these attempts ended up in the signature of treaties, although they were not ratified and consequently never entered into force.<sup>144</sup> But they are not *travaux préparatoires*. 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.

140 *Case Concerning the Temple of Preah Vihear (Cambodia v Thailand)*, Preliminary Objections, Judgment of 26 May 1961, ICJ Reports 1961 p. 17 at p.32.

141 See Article VIII of the Treaty of Limits: CRM, Annexes, Vol 2, Annex 7.

142 United States-Nicaragua Treaty of Friendship, Commerce and Navigation (Cass-Irisarri), 16 November 1857, Article XX (CRR, Annexes, Vol 2, Annex 10); France-Nicaragua Treaty of Friendship, Commerce and Navigation (Sartiges-Maximo Jerez), 11 April 1859, Article XXXIII (CRR, Annexes, Vol 2, Annex 14); Great Britain-Nicaragua, Treaty of Friendship, Commerce and Navigation (Lennox Wyke-Zeledon), 11 February 1860, Article XXVI (CRR, Annexes, Vol 2, Annex 15).

143 NCM, para. 1.3.1.

144 Wrongly, Nicaragua affirmed that “None [of these treaties] were *valid*” (emphasis added, NCM, para. 1.3.1).

2.54 This may be illustrated by the reliance placed by Nicaragua on Article V of the Cañas-Juarez Treaty of 6 July 1857<sup>145</sup> which preceded the 1858 Cañas-Jérez Treaty and was not ratified by Costa Rica.<sup>146</sup> The 1857 Treaty referred to “*artículos de comercio*”, whereas Article VI of the 1858 Treaty uses the expression “*objetos de comercio*”. To Nicaragua this supports the thesis that “*objetos*”, like the term “*artículos*” used in 1857, refers to “commodities” rather than “purposes”.<sup>147</sup> This can be turned around to establish the exact opposite: “*artículos*” was replaced by “*objetos*” because Costa Rica, dissatisfied with a narrow right in matters of trade, insisted on the broader term. This demonstrates that reliance on the text of prior and unratified treaties is hazardous. If anything can be said at all, it is 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. Moreover, Article V of the Treaty of 1857 contained both a reference to navigation (without any particular qualification) *and* a reference to transport of “*artículos de comercio*.” This distinction between *navigation* and *transport* of “*artículos de comercio*” shows that navigation was not confined to the transport of commodities; rather Costa Rica had a general right of navigation *plus* the right to transport articles of trade. This invalidates Nicaragua equation of *transport* of “*artículos de comercio*” (1857) with *navigation* “*con objetos de comercio*” (1858).

2.55 Subsequent practice and agreements between the parties also confirm that the phrase “*con objetos de comercio*” means “for purposes of commerce”. During the arbitral proceedings leading to the Cleveland Award, there was agreement by the parties in translating that phrase as “for purposes of commerce”. This amounts to a subsequent agreement within the meaning of Article 31(3)(a) of the Vienna Convention on the Law of Treaties. As recalled in this Reply, the transport of persons, mail and goods in general from the Atlantic to the interior of Costa Rica during the period largely used the San Juan.<sup>148</sup> The 1956 Agreement, while referring to the facilitation and expedition of traffic in the San Juan, also confirms the natural interpretation of Article VI of the Treaty of Limits as being “for the purposes of commerce”.

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145 CRM, Annexes, Vol 2, Annex 5.

146 NCM, para. 4.3.9.

147 NCM, para. 4.3.19.

148 CRM, paras. 4.58-4.72; see also this Reply, paragraphs 3.76-3.78.

2.56 Taken together, the principle of good faith interpretation, the antecedents of the 1858 Treaty of Limits and subsequent practice all show that “*con objetos de comercio*” must be interpreted as “for purposes of commerce” and hence cannot be read as being confined to navigation “with articles of trade.” As will be seen below, the ordinary meaning of the relevant words in their context yields this result.<sup>149</sup>

**(2) Nicaragua’s focus on sovereignty and its invocation of a restrictive interpretation of the right of free navigation**

2.57 Nicaragua acknowledges that Costa Rica’s right of free navigation is a qualification of Nicaragua’s “*dominio y sumo imperio*” over the waters of the San Juan River.<sup>150</sup> Nicaragua states:

“The right of free navigation appears as a *qualification of the sovereignty of Nicaragua* and is introduced by the term ‘pero’ (but). Thus a particular right of Costa Rica is presented as a qualification of the general grant of rights (in the form of title (*dominio*) and sovereignty (‘*sumo imperio*’) to Nicaragua.”<sup>151</sup> (Emphasis added.)

2.58 This admission is revealing, since it confirms that it is Nicaragua’s “*dominio y sumo imperio*” which is limited by Costa Rica’s perpetual right of free navigation, and not the opposite, as Nicaragua later attempts to argue by claiming a regulatory power over Costa Rican navigation on the San Juan River. Nicaragua tries to justify such purported regulatory powers over Costa Rican navigation by reference to (a) political and legal considerations and (b) safety of navigation.<sup>152</sup> None of these arguments, however, follow from the 1858 Treaty of Limits or the Cleveland Award that interprets it. As Nicaragua acknowledges, the rights and obligations of the parties in the present case are governed, first and foremost, by the 1858 Treaty of Limits.<sup>153</sup>

2.59 Nicaragua argues that since the perpetual right of free navigation for purposes of commerce is a limitation to the sovereignty of Nicaragua over the waters of the San Juan, the Costa Rican right must be interpreted restrictively.<sup>154</sup>

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149 This Reply, paragraphs 3.39-3.78.

150 See NCM, para. 2.1.48.

151 NCM, para. 2.1.48.

152 NCM, para. 2.1.50.

153 See NCM, para. 3.1.1.

154 See, for example, NCM, para. 2.1.51.



But such a “restrictive interpretation” does not correspond to any existing rule of treaty interpretation. Case-law cited by Nicaragua itself insists that a so-called restrictive interpretation can only be invoked in cases of doubt. There is no such doubt here. Since Nicaragua produced accommodating truncated quotations, it is worth recalling them in full.

2.60 Nicaragua cites *The Wimbledon* but unavailingly. For the Permanent Court:

“Whether the German Government is bound by virtue of a servitude or by virtue of a contractual obligation undertaken towards the Powers entitled to benefit by the terms of the Treaty of Versailles, to allow free access to the Kiel Canal in time of war as in time of peace to the vessels of all nations, *the fact remains that Germany has to submit to an important limitation of the exercise of the sovereign rights which no one disputes that she possesses over the Kiel Canal.* This fact constitutes a sufficient reason for restrictive interpretation, in case of doubt, of the clause which produces such a limitation. But *the Court feels obliged to stop at the point where the so-called restrictive interpretation would be contrary to the plain terms of the article and would destroy what has been clearly granted.*”<sup>155</sup> (Emphasis added. Nicaragua omitted the final sentence of this quotation.)

2.61 In the present case Nicaragua presents itself as in a situation akin to that of Germany in the *Wimbledon* case. No one disputes its sovereignty over the waters of the San Juan. But the fact remains that Nicaragua agreed to submit to an important limitation of the exercise of its sovereign rights over those waters. The “so-called restrictive interpretation” (as the Permanent Court referred to it) Nicaragua invokes today is “contrary to the plain terms of the article [VI of the Treaty of Limits] and would destroy what has been clearly granted” to Costa Rica by it as a condition on and concomitantly to the attribution of Nicaragua’s sovereignty over the River.

2.62 Nicaragua’s position on “restrictive interpretation” can also be compared to that adopted by Turkey in the *Mosul* case:

“This argument [of the Turkish Government] appears to rest on the following principle: if the wording of a treaty provision is not clear, in choosing between several admissible interpretations, the one which involves the minimum of obligations for the Parties should be adopted. This principle may be admitted to be sound. In the present case,

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155 *The S.S. “Wimbledon”*, PCIJ Reports, Series A No. 1, 17 August 1923, pp. 24-25, partially quoted in NCM, para. 3.3.8.

however, the argument is valueless, because, in the Court's opinion, the wording of Article 3 is clear."<sup>156</sup>

2.63 The situation depicted by the Permanent Court in the *Mosul* case is transposable here. The argument of the restrictive interpretation of the rights and obligations of the parties has no value, because the wording of Article VI of the Treaty of Limits is clear: it attributes to Costa Rica a perpetual right to free navigation for purposes of commerce.

2.64 The Permanent Court also shed light on the issue of "restrictive interpretation" in the *River Oder* case in a manner relevant to the present dispute:

"Nor can the Court, on the other hand, accept the Polish Government's contention that, the text being doubtful, the solution should be adopted which imposes the least restriction on the freedom of States. This argument, though sound in itself, must be employed only with the greatest caution. To rely upon it, it is not sufficient that the purely grammatical analysis of a text should not lead to definite results; there are many other methods of interpretation, in particular, reference is properly had to the principles underlying the matter to which the text refers; it will be only when, in spite of all pertinent considerations, the intention of the Parties still remains doubtful, that interpretation should be adopted which is most favourable to the freedom of States."<sup>157</sup>

2.65 Hence the "so-called restrictive interpretation", assuming such a principle to exist, would only be applied if "in spite of all pertinent considerations", i.e. the application of the other relevant methods of interpretation depicted in Articles 31 and 32 of the Vienna Convention of 1969, the result would still remain doubtful. Nicaragua has not demonstrated that this is the case.

2.66 In truth, there is no room for any *principle* of restrictive interpretation: the issue is one of context. The present Court has clearly indicated the way in which a word must be interpreted either in a wide or in a restrictive way, by stating that "[t]he word obtains its meaning from the context in which is used. If the context requires a meaning which connotes a wide choice, it must be construed accordingly, just as it must be given a restrictive meaning if the

156 *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne*, PCIJ Reports, Series B No. 12, 21 November 1925, p. 25.

157 *Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder*, PCIJ Reports, Series A No. 23, 10 September 1929, p. 26.

context in which it is used so requires.”<sup>158</sup> In the present case, the context pleads for an interpretation giving effect to the ordinary meaning of “*con objetos de comercio*”, that is an interpretation including transport of both persons and goods.

**(3) Costa Rica’s right of navigation on the San Juan was simultaneous with the establishment of Nicaraguan sovereignty over the waters of the River**

2.67 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.<sup>159</sup> 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 8<sup>th</sup> 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>160</sup>

2.68 Nicaragua mentions previous bilateral treaties signed in order to settle unresolved questions but never ratified. These unratified treaties are part of the history leading to the conclusion of the Treaty of Limits in 1858, but Nicaragua’s presentation of them is misleading. Nicaragua mentions the Marcoleta-Molina Treaty of 1854, which “clearly recognizes that the River San Juan is entirely within Nicaragua.”<sup>161</sup> But that Treaty contained a provision stating that “both parties agree that the border *should be*” the San Juan. This is no way to declare a purported pre-existing sovereignty over the River, as Nicaragua claims. The Treaty contained another provision by which “Costa Rican citizens shall have the power to freely come in and out through the port of San Juan with their ships and goods and navigate, except by steamboat, on the river bearing the same

158 *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion*, I.C.J. Reports 1960, p. 150 at p. 158.

159 See discussion above, this Reply, paragraph 2.27 and below, Appendix, paragraphs A.15-A.22.

160 NCM, Vol II, Annex 70; also see NCM, para. 2.1.24.

161 NCM, para. 2.1.27.

name...”<sup>162</sup> Clearly, the 1854 Treaty acknowledged a right of navigation on the San Juan including both persons and goods: Nicaragua fails to mention it. The unratified Marcoleta-Molina Treaty is consistent with Costa Rica’s claim that the *quid pro quo* of the 1858 Treaty balanced Nicaragua’s sovereignty in the waters of the River against Costa Rica’s perpetual right of free navigation.<sup>163</sup>

2.69 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.

2.70 Nicaragua’s picture of a sovereign State granting a limited right to its neighbour is contradicted by the clear wording of Article VI of the Treaty of Limits, which uses the future form of the verbs dealing *both* with sovereignty and navigation:

“The Republic of Nicaragua *shall have* [*tendrá*] exclusively the dominion and sovereign jurisdiction over the waters of the San Juan river from its origin in the Lake to its mouth in the Atlantic; but the Republic of Costa Rica *shall have* [*tendrá*] the perpetual right of free navigation on the said waters, between the said mouth and the point, three English miles distant from Castillo Viejo, said navigation being 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 portion of the bank of the San Juan river, which is hereby declared to belong to Costa Rica. The vessels of both countries *shall have* the power to land indiscriminately on either side of the river at the portion thereof where the navigation is common; and no charges of any kind, or duties, *shall be* collected unless when levied by mutual consent of both Governments.”<sup>164</sup> (Emphasis added.)

2.71 Nicaragua’s insistence on the Treaty as being one “of Limits” adds nothing to the interpretation of Article VI. The fact that a boundary treaty

162 Article 4 of the 1854 Treaty: see NCM, Vol II, Annex 4.

163 See discussion above, paragraph 2.27 and below, Appendix, paragraphs A.15-A.22.

164 CRM, Annexes, Vol 2, Annex 7(b).

also contains a particular territorial regime, in this case with regard to fluvial navigation, is normal and in no way means that preference must be given to one interpretation or another. The *Kasikili/Sedudu Island* case is illustrative. While discussing “to what extent the object and purpose of the treaty can clarify the meaning to be given to its terms”, the Court noted that the Treaty, although delimiting spheres of influence, was considered by the parties as determining the boundary between them: “The Court notes that navigation appears to have been a factor in the choice of the contracting powers in delimiting their spheres of influence.”<sup>165</sup> The point here is not to compare the situation in Africa and in Central America in the 19th century, nor to distinguish between delimitations of colonies by European countries and delimitations of territories made by newly independent States such as Costa Rica and Nicaragua.<sup>166</sup> What is relevant here is the fact that navigation is an important element of delimitation when the delimitation concerns navigational waterways.

2.72 Moreover, Nicaragua completely overlooks the fact that the San Juan del Norte Bay is, according to Article IV of the Treaty of Limits, a common bay, that is to say, a *condominium* – or rather a *coimperium*<sup>167</sup> – and that the San Juan River is the only means of access to it by Costa Rica. This element is part of the internal context that must be taken into consideration when interpreting Article VI with regard to the scope of Costa Rica’s navigational rights.<sup>168</sup>

2.73 The concomitant granting of both Nicaraguan sovereignty over the waters and Costa Rica’s right of navigation in the area where Costa Rica is riparian, as well as the internal context of the Treaty of Limits, preclude Nicaragua from privileging its own sovereignty to the detriment of Costa Rican rights.

165 *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, ICJ Reports 1999, p. 1045, at p. 1073 (para. 44).

166 Cf. NCM, para. 5.1.9.

167 Cf. *Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, ICJ Reports 1992, p. 351, at pp. 597-598 (para. 399).

168 San Juan del Norte Bay is shown in CRM, Sketch Map 5, after p. 8.

## D. Conclusions

2.74 For these reasons, it may be concluded that:

- (1) The San Juan is a boundary river governed by an international treaty regime attributing to Costa Rica a perpetual right of free navigation for purposes of commerce.
- (2) Nicaraguan sovereignty over the waters of the River is limited by that treaty regime.
- (3) Nicaragua's entire case rests upon its novel interpretation of the phrase "*con objetos de comercio*" in Article VI of the 1858 Treaty of Limits as meaning "with articles of trade." If this interpretation is wrong, as indeed it is, the entire Nicaraguan case fails.
- (4) The parties agree that what are "*objetos de comercio*" today are included within Costa Rica's perpetual right of free navigation.
- (5) The same criterion applies to the Second Article of the Cleveland Award of 1888: what must be considered as vessels performing revenue service activities today are entitled to navigate the San Juan as established by that Award.
- (6) Nicaragua's sovereignty over the waters of the San Juan cannot be used to restrict or limit the scope and exercise of the perpetual right of free navigation recognised by the Treaty of Limits at the same time as sovereignty over the river was granted to Nicaragua.
- (7) In the interpretation of the relevant articles which are at the core of the present case, there is no basis for departing from the customary rules of the interpretation of treaties, as codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.

## Chapter 3

### The Scope of Costa Rica's Substantive Rights

#### A. Introduction

3.01 Nicaragua accuses Costa Rica of coming to the Court “seeking to obtain by adjudication what she has been unable to achieve through negotiations, that is, a revision of the 1858 Cañas-Jérez Treaty and of the Cleveland Award”.<sup>169</sup> This is not the case. Costa Rica is simply seeking strict respect for its rights as established by the 1858 Treaty and declared by the Cleveland Award. It has never sought, nor even suggested, the revision of the Treaty of Limits or the Cleveland Award through negotiation. Quite the contrary: it was Nicaragua who first challenged the validity of the Treaty and then tried to modify its scope, either through the adoption of a new treaty or by way of its breaches based on fanciful interpretations.

3.02 A key element for the settlement of the present dispute is the scope of the expression “*con objetos de comercio*” embodied in Article VI of the Treaty of Limits. In its Memorial, Costa Rica demonstrated that this expression means “for purposes of commerce”.<sup>170</sup> In its Counter-Memorial, Nicaragua persists in its novel interpretation of this formula as encompassing navigation only “with articles of trade”, a view advanced for the first time in 1994 and contradicted by Nicaragua’s own previous translations, interpretations, understanding and practice – as well as by the ordinary meaning of the phrase in its context.<sup>171</sup>

3.03 A second crucial element for this dispute is the scope of the navigational rights recognised to Costa Rica by the Cleveland Award in its Second Article, interpreting Article VI of the Treaty of Limits. The Award recognises the right to navigate with revenue service vessels – i.e. public armed vessels other than warships – navigating in connection with the enjoyment of purposes of commerce and as necessary for the protection of the exercise of that right of navigation. In its Memorial, Costa Rica also demonstrated that this right was

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<sup>169</sup> NCM, para. 4.1.4.

<sup>170</sup> CRM, paras. 4.17-4.72.

<sup>171</sup> See CRM, para. 3.17. See also above, paragraphs 1.04-1.14.

exercised by public vessels – and that its exercise is now wrongfully prevented by Nicaragua.<sup>172</sup> Contrary to the unequivocal text of the Cleveland Award and to what Nicaragua itself contended in the arbitration proceedings, Nicaragua pretends today that President Cleveland recognised navigation by vessels of the Costa Rican revenue service only in conjunction with navigation “with articles of trade”, the right in question not involving, in any event, “armed navigation”.<sup>173</sup>

3.04 The present Chapter will focus on the extent of Costa Rica’s rights under the applicable law, rebutting Nicaragua’s interpretation of those rights. The following sections deal specifically with the scope of the perpetual right of free navigation (**Section B**), the key issue of the interpretation of the phrase “*con objetos de comercio*” (**Section C**) and the rights of navigation related to protection, custody and defence stemming from the Treaty of Limits as recognised by the Cleveland Award (**Section D**). **Section E** analyses Costa Rica’s related rights, showing that the Nicaraguan requirement of flags for navigation, the denial to the residents of the Costa Rican bank of a customary right to fish for subsistence purposes, as well as denial of the right to land on the Nicaraguan bank where navigation is common, are unfounded; it also deals with the existence of an autonomous obligation to expedite and facilitate traffic in the San Juan, as established by the 1956 Agreement and now denied by Nicaragua. The Chapter ends with a rebuttal of the Nicaraguan argument of a purported “border courtesy” practice (**Section F**). Conclusions are drawn in **Section G**. Two tables are appended to this Chapter which show that Costa Rica’s interpretation of the relevant instrument is correct: a table with the use of the term “*objetos*” as meaning “purposes” in 19th century documents (**Table 1**) and a table of terms used to refer to “articles of trade” in 19th century documents (**Table 2**).

## B. A Perpetual Right of Free Navigation

3.05 In its Memorial, Costa Rica asserted that “[t]he adjective ‘free’ implies that navigation, i.e. movement of persons or goods along the River, shall be

172 CRM, paras. 4.73-4.96. See also CRM, paras. 5.109-5.136 and CRM, Appendix B.

173 NCM, sections 3.1. and 4.2.



unqualified and unconditional.”<sup>174</sup> A subsection of Nicaragua’s Counter-Memorial is entitled “A right of *free* navigation, yes, but with *articles of trade*”.<sup>175</sup> Nicaragua’s purpose is to present Costa Rica’s rights as “a narrowly-defined right of navigation by Costa Rica with articles of trade.”<sup>176</sup> Again notwithstanding the term or the matter under discussion, in this particular case the term “free”, Nicaragua’s entire case rests upon its novel interpretation of the phrase “*con objetos de comercio*” as meaning “with articles of trade”.

3.06 This Section will rebut Nicaragua’s narrow interpretation of what is clearly established by treaty as a *perpetual* right of *free* navigation. Section C addresses the meaning and scope of “*objetos de comercio*”.

### **(1) Costa Rica’s right is *perpetual***

3.07 In its Memorial, Costa Rica showed that the adjective “perpetual” refers to the temporal dimension of its right of navigation and entails a permanent, continuous, uninterrupted and enduring right.<sup>177</sup> Nicaragua’s Counter-Memorial does not respond to this analysis. Nicaragua’s silence suggests that it accepts the scope given to the term by Costa Rica. Indeed, the only occasion where Nicaragua refers to the term “perpetual” is in the context of its analysis of the unratified 1857 Cañas-Juarez Treaty, when it states – incorrectly – that this Treaty “was a reaffirmation that Costa Rica accepted to be excluded *perpetually*, from the right to transport passengers” (emphasis added).<sup>178</sup>

### **(2) Costa Rica’s perpetual right of navigation is *free***

3.08 Nicaragua does not challenge the definitions of “free” given in Costa Rica’s Memorial and the fact that “any limitation imposed upon navigation that by right is ‘free’ constitutes a denial of that right.”<sup>179</sup> What Nicaragua argues is that this should only be true with regard to navigation with “articles of trade”.<sup>180</sup>

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174 CRM, para. 4.08.

175 NCM, sub-section A of section 4.1, paras. 4.1.8-4.1.15.

176 NCM, para. 4.1.5, a).

177 CRM, para. 4.07.

178 NCM, para. 1.2.40.

179 CRM, para. 4.08; NCM, para. 4.1.10.

180 NCM, para. 4.1.10.

3.09 In the course of its argument, quoting out of context a decision of the Costa Rican Supreme Court relating to the meaning of “freedom of commerce” in the Constitution, Nicaragua’s Counter-Memorial argues that “the word ‘free’ does not necessarily connote an absolute and unrestricted right.”<sup>181</sup> The comparison is futile: the Supreme Court was analysing the right of individuals to freedom of trade and not Costa Rica’s right to free navigation pursuant to the 1858 Treaty and other relevant decisions and instruments. Any constitutional right conferred on an individual is exercised within the realm of internal law and is subject to any limitations and regulations stipulated by that law. Costa Rica’s right of free navigation is exercised on the basis of international law and does not permit Nicaragua to establish any kind of “limitation or regulation” on Costa Rica’s right, particularly in a context where Costa Rica’s right of free navigation is a condition for Nicaraguan sovereignty over the waters of the River.<sup>182</sup> The situation is very different from that of a constitutional right granted to an individual, which is inevitably subject to limitation and regulation, as the Costa Rican Supreme Court stated.<sup>183</sup> In the context of the present case, there are two simultaneous rights or competences whose holders are both independent States. To use Nicaraguan own words, sovereignty is not “absolute” in this context – it is “subject to limitations” established by treaty: the perpetual right of freedom of navigation by Costa Rica for purposes of commerce.

3.10 Nicaragua makes great efforts to deny the relevance of the concept of “freedom of navigation” as discussed by the Permanent Court in the *Oscar Chinn* case, and the treatment of the same concept in the ILA’s Helsinki Rules on the Uses of the Waters of International Rivers.<sup>184</sup> This is again a replay of its argument that the only kind of navigation recognised by the Treaty of Limits is navigation “with articles of trade”.<sup>185</sup> The definitions of “freedom of navigation” in *Oscar Chinn* and the Helsinki Rules are, according to Nicaragua, “subject to derogation by a *lex specialis*, in this case, the 1858 Treaty”.<sup>186</sup> The fact is that instruments and case law describing what is “freedom of navigation” according

181 NCM, fn 271, referring to NCM, Vol II, Annex 64.

182 See above, paragraphs 2.67.2.73.

183 NCM, Vol II, Annex 64.

184 NCM, paras. 4.1.11, 4.1.15.

185 “Costa Rica enjoys the rights of ‘free navigation’ identified, but only as to boats carrying articles of trade”: NCM, para. 4.1.12.

186 NCM, para. 4.1.12.

to general international law can provide a useful tool for the interpretation of the terms “free” and “navigation” used in Article VI.

3.11 Nicaragua accepts that Costa Rica’s right of navigation is “unqualified and unconditional” to the full extent of that right as established in Article VI: on its own novel interpretation as navigation with “articles of trade”. It is important to emphasise that Nicaragua accepts that Costa Rica has freedom of navigation to the full extent of that right – what it disputes is only the scope of the phrase “*objetos de comercio*”.<sup>187</sup>

3.12 Despite this acceptance, Nicaragua’s Counter-Memorial requests a declaration by the Court that Costa Rica has to comply with the regulations for navigation, to pay any “special services” provided by Nicaragua on the San Juan and to comply with “all reasonable charges for modern improvements in the navigation of the river with respect to its situation in 1858.”<sup>188</sup> In this instance, Nicaragua does not even make its classical distinction of navigation of vessels carrying “articles of trade” and other kinds of navigation. In Nicaragua’s view, all these requirements are compatible with a right of navigation that is “free” and “perpetual”. As has been shown and is also developed in Chapter 4, which addresses Nicaragua’s breaches, this claim has no foundation.<sup>189</sup>

3.13 On the basis of its sovereignty over the waters of the San Juan, Nicaragua claims that it is permitted to regulate navigation on the River; including Costa Rican navigation in accordance with Article VI of the Treaty of Limits. Nicaragua’s Counter-Memorial argues: “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>190</sup>

3.14 But Nicaragua has no right to interfere with Costa Rica’s perpetual right of free navigation and in practice its attempt to impose regulations on Costa Rican navigation amounts to an effective denial of Costa Rica’s right. This right as granted is not subject to any other condition than the geographical scope

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187 This Reply, paragraphs 2.43-2.56; see also paragraphs 3.39-3.78.

188 NCM, para. 7.2.6.

189 This Reply, paragraphs 4.05-4.49.

190 NCM, para. 2.1.52.

specified in Article VI of the Treaty of Limits, which is not disputed by either party.

3.15 International practice and case law abundantly demonstrate the impermissibility of derogation of rights stemming from treaties through national legislation. As acknowledged by the Permanent Court, a national regulation which is intended to be applied on an equal basis to all persons concerned cannot derogate from particular rights recognised at the international level to a particular community.<sup>191</sup>

3.16 Even Nicaragua's quotation of the General Claims Commission decision in *James H. McMahon (U.S.A.) v. United Mexican States*, which contains some debatable assertions as to the state of general international law, affirms what Nicaragua seems to deny today:

"What extension this right of exercise of the police power may have, as confronted with the principle of free navigation, is a matter as yet not defined by theory or precedent. It is reasonable to think, however, that the right of local jurisdiction shall not be exercised in such a manner as to render nugatory the innocent passage through the waters of the river, particularly if it be established by treaty."<sup>192</sup>

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.<sup>193</sup> Again it is worth quoting the relevant paragraph of this arbitral award in its entirety:

"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*. Regulations which are (1) appropriate or necessary for the protection and preservation of such fisheries, or (2) desirable or necessary on grounds of public order and morals without unnecessarily interfering with the fishery itself, and in both cases equitable and fair as between local and American fishermen, and not so framed as to give unfairly an advantage to the former over the latter class, are not inconsistent with the obligation to execute the Treaty in good faith, are therefore reasonable and not in violation of the Treaty."<sup>194</sup> (Emphasis added.)

191 See *Minority Schools in Albania*, Advisory Opinion of 6 April 1935, PCIJ Reports, Series A/B No. 64, p.3.

192 NCM, para. 2.1.60.

193 NCM, para. 2.1.63.

194 *Award of the Tribunal of Arbitration in Question Relating to the North Atlantic Coast Fisheries*, The Hague, 7 September 1910, 11 UNRIAA 172, 189.

3.18 This Award carefully insists on the need not to violate the rights of private citizens established by the relevant treaty. But there are important differences between the situation dealt with in the 1910 Arbitral Award and the present case. First, in the present case what is at stake is *a right recognised to a State*, since the holder of the perpetual right of free navigation is Costa Rica itself. Second, in the 1910 Arbitral Award the object of the dispute was fisheries, thus it involved a limited resource subject to exhaustion. In the present case, what is at stake is navigation, an activity which is not destructive of any natural resource. No regulation is necessary with regard to Costa Rica's right of free navigation.

3.19 The 1858 Treaty of Limits does not establish any limitations on the exercise of Costa Rica's rights, nor was it stipulated that Nicaragua would exercise jurisdictional powers over Costa Rican navigation. The Cleveland Award confirmed the point that any powers of jurisdiction over Costa Rican navigation would be exercised by Costa Rica, by expressly providing that Article VI of the Treaty of Limits permitted vessels of the revenue service to protect Costa Rica's enjoyment of its right of navigation for purposes of commerce.<sup>195</sup> President Cleveland clearly understood that the object and purpose of the Treaty was that Nicaragua would be entitled to the waters of the River, but Costa Rica would have an autonomous, undisturbed, perpetual right of free navigation on the River, a right that Nicaragua could not interfere with. This view was also endorsed by the 1916 Judgment of the Central American Court of Justice.<sup>196</sup>

3.20 Nicaragua's current position is even more remarkable when it is compared with its own assertions presented to President Cleveland in its pleadings. In particular when referring to Point Eight of Nicaragua's "Points of Doubtful Interpretation", Nicaragua then acknowledged the character and scope of the Costa Rican rights. When Nicaragua presented the reasons why Costa Rica should not be allowed to navigate with vessels of war or the revenue service, it stated that:

"The navigation of a river *for commercial purposes* does not draw with it the menace that the appearance on its waters of vessels of war must necessarily imply. What need has Costa Rica of war vessels in the light of Article IX of the Treaty? *Even if war*

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195 CRM, Annexes, Vol 2, Annex 16.

196 CRM, Annexes, Vol 2, Annex 21; see also below, paragraphs 3.33-3.34.

*is flagrant, her commerce on this river could not be interfered with.*"<sup>197</sup> (Emphasis added.)

3.21 Nicaragua further stated:

*"It is claimed such navigation is needed to protect commerce. Against whom is such protection needed? Certainly not against Nicaragua, for that cannot be interfered with, even in case of actual hostilities."*<sup>198</sup> (Emphasis added.)

3.22 President Cleveland held that while Costa Rica could not navigate the River with war vessels, which it has now not possessed for many decades, it was entitled to navigate with vessels of the revenue service, since it was clear that Costa Rican navigation on the River needed to be supervised; such supervision would be exercised by Costa Rica alone, and not by Nicaragua.

3.23 As is the case with Nicaragua's other arguments in these proceedings, no evidence has been produced by Nicaragua demonstrating how and when, after the 1858 Treaty of Limits came into force, it exercised regulatory powers with respect to Costa Rican navigation. Nicaragua has only relied on the breaches it has committed after the dispute erupted in 1998 to support its arguments; but these breaches bear no relation to the regulatory powers it now argues it possesses.

3.24 Nicaragua argues that it must have the power to regulate Costa Rican traffic in order to ensure that the conditions set forth in the Treaty of Limits are observed.<sup>199</sup> It is curious that this is the first time such an argument has been advanced by Nicaragua.<sup>200</sup> Such regulatory powers sought by Nicaragua do not stem from any of the applicable instruments: not from the Treaty of Limits nor the Cleveland Award and not from the 1916 Judgment of the Central America Court of Justice or the 1956 Agreement.

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

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197 CRM, Annexes, Vol 6, Annex 208.

198 *Ibid.*

199 NCM, para. 2.1.52.

200 NCM, para. 2.1.53.

relation to innocent passage or innocent use,<sup>201</sup> 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.

3.26 Nicaragua cites three types of regulations that it claims would be compatible with the principle of free navigation: (a) the right to monitor the character of the vessel exercising the right of free navigation; (b) the application of regulations for the maintenance of conditions of safe navigation; and (c) the implementation of measures reasonably necessary for the security of Nicaragua and the safety of riparians.<sup>202</sup> In fact the evidence presented by Costa Rica demonstrates that Nicaragua's breaches bear no relation whatever to any regulations of this kind. But in any event, the legal framework governing Costa Rican navigation on the San Juan does not entitle Nicaragua to impose such regulations upon Costa Rica.

3.27 With regard to the safety requirements Costa Rican vessels are apparently obliged to comply with, Nicaragua does not refer to any specific requirements. The affidavits of two Costa Rican boatmen, who until recently navigated the San Juan for decades, reveal that they have never been informed or notified of any such requirements of "safe navigation".<sup>203</sup>

3.28 As to the implementation of measures reasonably necessary for the security of Nicaragua and the safety of riparians, such measures need to be implemented in a way that does not hinder Costa Rica's right of free navigation. As has been stated by Colonel Ricardo Sanchez, Nicaragua has many army posts along the San Juan River, posts fully armed with personnel who are able to safeguard Nicaragua's security.<sup>204</sup> It is not reasonable that such safeguarding is accomplished by forcing all Costa Rican vessels to stop at every military post, to be searched for no apparent reason and to be required to obtain authorisation

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201 See NCM, paras. 2.1.54, 2.1.56.

202 See NCM, para. 2.1.58.

203 See Affidavit of Carlos Lao Jarquín, 28 July 2007: CRR Annexes, Vol 2, Annex 51; Affidavit by Jorge Manuel Lao Jarquín, 28 July 2007: CRR Annexes, Vol 2, Annex 52.

204 NCM, Vol II, Annex 91.

in advance to navigate, in addition to the payment of the various charges and compliance with other requirements established by Nicaragua.

3.29 Furthermore, as recalled by Nicaragua before President Cleveland, Article IX of the Treaty of Limits places a limitation on both countries not to use the River for hostilities against the other. Costa Rica has shown full respect for this obligation. Nicaragua's plea that it must impose security measures on Costa Rica's navigation is a mere pretext.

3.30 It should be noted that Nicaragua does not cite any of its domestic laws which impose requirements on vessels transiting internal waters, nor has it ever officially informed Costa Rica of any such requirements. Furthermore, it acknowledges that such requirements are imposed only on Costa Rican vessels. The affidavit by Colonel Ricardo Sanchez indicates some of the regulations it is said Nicaragua now imposes on Costa Rican vessels.<sup>205</sup> Through this affidavit, Nicaragua accepted that Nicaraguan vessels are free to moor on the Costa Rican banks and carry out their business without any impediments.<sup>206</sup> The rights to land on the bank of the River and for commerce that Costa Rica recognises that Nicaragua holds, in accordance with the 1858 Treaty of Limits, are rights which are reciprocal. While Costa Rica fulfils its obligations under the 1858 and 1956 Treaties, allowing full liberty to Nicaraguan vessels to carry on their commerce on the Costa Rican bank, as is acknowledged by Nicaragua, on the other hand Nicaragua has imposed illegal restrictions on Costa Rica's rights with the purpose of making Costa Rican navigation and the enjoyment of other related rights impracticable.<sup>207</sup>

3.31 By way of these "regulatory powers", Nicaragua seeks to impose its own interpretation, on a case by case basis, of whether a Costa Rican vessel may or may not navigate on the River, a policy that Nicaragua does not even apply to vessels navigating in innocent passage as recognised by international law. This policy results in illegal searches, payment of illegal taxes, the harassment of passengers including children travelling to school, requirements of illegal

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205 *Ibid.*

206 *Ibid.*

207 Cf. NCM, para. 7.2.5.



permits for transit and other restrictions detailed in Costa Rica's Memorial and further in this Reply.

3.32 As Costa Rica's rights of navigation are established in categorical terms by treaty, any restrictions placed upon such rights can only be agreed by treaty. In this context it is pertinent to recall a paragraph from the General Claims Commission cited by Nicaragua. The Commission stated:

"What extension this right of exercise of police power may have, as confronted with the principle of free navigation, is a matter as yet not defined by theory or precedent. It is reasonable to think, however, that the right of local jurisdiction shall not be exercised in such a manner as to render nugatory the innocent passage through the waters of the river, particularly if it be established by treaty."<sup>208</sup>

Thus, even in the event of innocent passage, local jurisdiction cannot be exercised in such a way as to render nugatory that innocent passage.

3.33 The 1916 Judgment of the Central American Court of Justice reaffirmed Costa Rican rights and addressed the jurisdictional issue in the following terms:

"...Costa Rica possesses in the San Juan River, for purposes of commerce, permanent rights of free navigation from its outlet as far up as three miles below Castillo Viejo, and the right for her vessels to moor at all points along either bank, exempt from the imposition of any charges, in that part of the stream in which navigation is common. It is clear, therefore, that the ownership which the Republic of Nicaragua exercises in the San Juan River is neither absolute or unlimited; it is necessarily restricted by the rights of free navigation, and their attendant rights, so clearly adjudicated to Costa Rica – the more so if it is considered that such rights, exercised for revenue and defensive purposes, are, according to the opinion of statesmen, usually confounded in their development with the sovereign powers of the *imperium*; such a concession is equivalent to a real right of use, perpetual and unalterable, that establishes the Republic of Costa Rica in the full enjoyment of practical ownership of a large part of the San Juan River without prejudice to the full ownership reserved to Nicaragua as sovereign over the territory.

By virtue of the decisions contained in the Cleveland Award, and what is held therein relating to the territorial boundaries, the following points are evident:

... The proposition that the rights of navigation on the San Juan River that were confirmed in Costa Rica do not extend to vessels of war, but simply to vessels devoted to revenue and defensive purposes – an interpretation that in no way detracts from the doctrine set forth concerning the practical ownership pertaining in great part to Costa Rica over the San Juan River because navigation with vessels of war, aside

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208 NCM, para. 2.1.60

from constituting a cause for disquiet, would imply a function appropriate to territorial sovereignty.”<sup>209</sup>

### 3.34 The Court went on to state:

“Costa Rica possesses undisputed title to the right bank of the river, to the land situated within her jurisdictional limits; she has joint ownership in the ports of San Juan del Norte and in Salinas Bay; she possesses the contractual right of perpetual navigation in the river, beginning at a point three miles below Castillo Viejo, accompanied by the full privilege of transit and commerce, and Nicaragua is impressed with the duty not to interfere with navigation, but, on the contrary, to keep the course of the river open; Costa Rica enjoys also the right to moor her vessels on both banks throughout the entire zone in which navigation is common, and the rights involved in guarding and defense ‘with all means within her reach.’”<sup>210</sup>

3.35 To summarise, the alleged “regulatory rights” asserted by Nicaragua have no basis in the instruments and seek to interfere with Costa Rica’s perpetual right to free navigation, and ultimately to render it nugatory. The instruments cited by Costa Rica, including the 1916 Judgment of the Central American Court of Justice, reaffirm that Costa Rica is not subject to Nicaragua’s authorisations, limitations or regulations imposed as a precondition to the exercise of the perpetual right of free navigation. Further, the actions carried out by Nicaragua against Costa Rica’s navigation bear no relation to the exercise of any alleged right of regulation.

### (3) Costa Rica’s right of navigation is not “imperfect”

3.36 Nicaragua gives the impression that Costa Rica’s right established in Article VI of the Treaty of Limits is an “imperfect right”. It 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 by it, and can only be effectually secured by mutual convention regulating the mode of its exercise.”<sup>211</sup> (Emphasis added.)

209 See CRM, Annexes, Vol 2, Annex 21, pp. 219-220.

210 CRM, Annexes, Vol 2, Annex 21, p. 222.

211 Quoted in NCM, para. 2.1.54.

### 3.37 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.*”<sup>212</sup> (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 commercial purposes”, which is precisely the case of the San Juan River.

3.38 The terminology employed in the Treaty is not that of an “imperfect right”. The Treaty does not contain anything granting to Nicaragua any power of limitation or regulation of Costa Rica’s right. Nor is Costa Rica’s right subject to any limitation, as was the case in other treaties related to freedom of navigation.<sup>213</sup> This is a “perfect” right vested by treaty.

### C. “*Con objetos de comercio*”

3.39 In its Counter-Memorial, Nicaragua claims that:

“...in some cases, these documents filed by Costa Rica are accompanied by inaccurate translations of the text or certain parts of the text that had previously not been disputed and hence little interest was placed on its correct translation.... The most salient of these inaccuracies of translation is that of the phrase used to describe the type of navigation rights granted to Costa Rica in the San Juan River. Thus the phrase ‘con objetos de comercio’ contained in the Treaty of Limits of 1858 is loosely translated as ‘with purposes of commerce’ and not its accurate meaning of ‘with objects of commerce’ or ‘with articles of trade.’”<sup>214</sup>

3.40 This same argument, i.e. that “*con objetos de comercio*” should be correctly understood as “with articles of trade”, is repeated again and again throughout Nicaragua’s Counter-Memorial in an attempt to exclude the transportation of passengers and to justify the unlawful restrictions on Costa Rican navigation implemented by Nicaragua.

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212 NCM, para. 2.1.55.

213 See CRM, para. 4.09.

214 NCM, Introduction, para. 20. As to Nicaragua’s unsubstantiated assertion that Costa Rica has presented inaccurate translations, see above, paragraph 1.14.

**(1) “*Con objetos de comercio*” means “for purposes of commerce”**

3.41 Nicaragua’s argument not only contradicts the natural interpretation of the text but it is also contrary to its own translation and its previous public position for almost 150 years. The English version of the 1858 Treaty of Limits presented by Nicaragua to President Cleveland in 1887 translated “*con objetos de comercio*” as “for the purposes of commerce”. Nicaragua’s English version of Article VI of the 1858 Treaty of Limits states:

“...but the Republic of Costa Rica shall have perpetual rights, in the said waters, of free navigation from the river’s mouth to three English miles below Castillo Viejo *for the purposes of commerce*, whether with Nicaragua or the interior of Costa Rica, by way of the rivers San Carlos or Sarapiquí or any other route proceeding from the tract on the shores of San Juan that may be established as belonging to this Republic.”<sup>215</sup> (Emphasis added.)

3.42 This English version of Article VI of the 1858 Treaty of Limits is very similar to the English version presented by Costa Rica:

“...but the República of Costa Rica shall have the perpetual right of free navigation on the said waters, between the said mouth and the point, three English miles distant from Castillo Viejo, said navigation being *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 portion of the bank of the San Juan river, which is hereby declared to belong to Costa Rica.”<sup>216</sup> (Emphasis added.)

3.43 Not only did Nicaragua translate “*con objetos de comercio*” as “for the purposes of commerce” in the English version of the 1858 Treaty of Limits it presented to President Cleveland, but Nicaragua *only* submitted English versions of its documents to Cleveland. In a Note dated 31 October 1887 addressed to Nicaragua’s Minister Horacio Guzmán, the US Secretary of State T.F. Bayard acknowledged receipt of Nicaragua’s arguments and documents and inquired if these were to be considered as originals. Bayard’s note was in the following terms:

“I have the honor to acknowledge the receipt of the original and duplicate copies of the case of the Republic of Nicaragua under the Arbitration Treaty of December 24, 1886, which were left by you at this Department on the 27<sup>th</sup> instant, unaccompanied by any formal note of transmission.... As the case of Nicaragua is presented in the English language, I have the honor to inquire whether, in that form, it is regarded by your Government as the original, or whether it is intended to be accompanied by a Spanish

215 CRM, Annexes, Vol 2, Annex 7(c).

216 CRM, Annexes, Vol 2, Annex 7(b).

original and to be regarded as a translation and of collateral force and effect therewith. In the latter alternative, it would be requisite for you to admit the correctness and authenticity of the English text, upon which the arbitrator must necessarily depend for his understanding of the issues before him.”<sup>217</sup>

3.44 Minister Guzmán responded by Note of 1 November 1887, stating:

“I have the honor to acknowledge the receipt of your communication of the 31<sup>st</sup> ultimo, acknowledging, on behalf of the President, the receipt of the original and duplicate copies of the Case of the Republic of Nicaragua, and inquiring, as it is presented in the English language, whether in the form it is regarded by my Government as the original, or whether it is intended to be accompanied by a Spanish original and to be regarded as a translation and of collateral force and effect therewith.

I have the honor to reply that the copy marked ‘original’ was intended to be and is the original copy of the presentation of the Case of Nicaragua, and the English language was adopted as being the language of the Arbitrator, the purpose being to relieve the Arbitrator from the responsibility of a translation from the Spanish to the English language; and, therefore, all papers and communications relating to this Case, that it may be necessary for me to present for the consideration and use of the Arbitrator, will be in the English language.”<sup>218</sup>

3.45 It is clear then Nicaragua had always understood that the term “*con objetos de comercio*” in the 1858 Treaty of Limits meant “for purposes of commerce”.

3.46 The fact that Costa Rica’s navigation on the San Juan River was “for the purposes of commerce” was also quite clear to the Assistant Secretary of State, George L. Rives, to whom President Cleveland delegated the task of studying the pleadings of Costa Rica and Nicaragua and of preparing the draft Award. In the first part of his Report Rives stated as follows:

“The Treaty further provides that...Nicaragua shall have, exclusively, dominion and supreme control of the waters of the San Juan, --Costa Rica having the right of free navigation *for the purposes of commerce* in that part of the River on which she is bounded.”<sup>219</sup> (Emphasis added.)

3.47 In the second part of Rives’ Report the same understanding of the true extent of Costa Rica’s commercial navigational rights was clearly stated:

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217 Secretary of State of the United States, T.F. Bayard, to Nicaraguan Envoy Extraordinary and Minister Plenipotentiary, Horacio Guzmán, 31 October 1887: CRR, Annexes, Vol 2, Annex 29.

218 Nicaraguan Envoy Extraordinary and Minister Plenipotentiary, Horacio Guzmán, to Secretary of State of the United States, T.F. Bayard, 1 November 1887: CRR, Annexes, Vol 2, Annex 30.

219 NCM, Vol II, Annex 70. This Report is also quoted in NCM, para. 2.1.22.

“Leaving out of sight, for the present, the fact that Costa Rica owns one bank of the San Juan, and regarding it solely as a Nicaraguan river, we may first enquire whether the right of *free commercial navigation* granted to Costa Rica necessarily involves the right of navigation by her vessels of war.”<sup>220</sup> (Emphasis added.)

3.48 Other extracts from Rives’ Report reinforce the correct understanding of Costa Rica’s navigational rights:

“4. Nicaragua consented, by Article IV, that the Bay of San Juan, which always belonged to her and over which she exercised exclusive jurisdiction, should be common to both Republics; and by Article VI she consented also that Costa Rica should have, in the waters of the River, from its mouth on the Atlantic up to three English miles before reaching Castillo Viejo, the *perpetual right of free navigation for purposes of commerce*. Is Costa Rica bound to concur with Nicaragua in the expense necessary to prevent the Bay from being obstructed, to keep the navigation of the River and port free and unembarrassed, and to improve it for the common benefit?”<sup>221</sup>

The Report continues:

“The River lies wholly within the borders of Nicaragua. Costa Rica, possessing one bank for a portion of its course, has only what may be described as an easement or servitude in its waters. Under the Treaty, she has *the right of navigation for purposes of commerce*, and, by implication, such other ordinary riparian rights as may be enjoyed without affecting the sovereign rights of Nicaragua.”<sup>222</sup> (Emphasis added.)

3.49 In the first paragraph quoted above, Rives transcribed the English version submitted by Nicaragua of “Point 4 of Doubtful Interpretation” which it had presented to Costa Rica and which constituted the basis for Cleveland’s Award.<sup>223</sup> Nicaragua itself referred once again to Costa Rica’s “perpetual right of free navigation for purposes of commerce”.

3.50 In the second paragraph quoted above, Rives proceeded to analyse in his own words the situation as he understood it. Rives clearly referred once again to Costa Rica’s “right of navigation for purposes of commerce”. Furthermore, Rives referred to Costa Rica’s “easement or servitude” in the waters of the San Juan River to describe the legal status of Costa Rica’s perpetual right of free commercial navigation on the San Juan River. Indeed, Costa Rica’s right of

220 NCM, Original Documents deposited within the Registry, Part III, Annex 71, pp. 212-213.

221 NCM, Original Documents deposited within the Registry, Part III, Annex 71, p. 231.

222 NCM, Original Documents deposited within the Registry, Part III, Annex 71, p. 233.

223 The English version of this Note from Fernando Guzmán to Costa Rica’s Foreign Minister dated 22 June 1887 was presented by Costa Rica: CRM, Annexes, Vol 3, Annex 36.

free navigation for purposes of commerce does in fact constitute a limitation to Nicaragua's sovereignty over the San Juan akin to that of a perpetual "servitude" in domestic law.

3.51 Nicaragua always understood that the term "*con objetos de comercio*" meant "for purposes of commerce". It should also be remembered that the 1858 Treaty of Limits uses the term "*objetos*" as purposes not only in its Article VI, which establishes Costa Rica's navigational rights, but also in Article VIII:

"Si los contratos de canalizacion ó de tránsito celebrados antes de tener el Gobierno de Nicaragua conocimiento de este convenio, llegasen á quedar insubsistentes por cualquier causa, Nicaragua se compromete á no concluir otro sobre los expresados *objetos*..."<sup>224</sup> (Emphasis added.)

3.52 Costa Rica's English version of Article VIII of the 1858 Treaty of Limits presented to Cleveland is as follows:

"If the contracts of canalization or for transit entered into by the Government of Nicaragua previous to its being informed of the conclusion of this treaty should happen to be invalidated for any reason whatever, Nicaragua binds herself not to enter into any other arrangement for the aforesaid *purposes*..."<sup>225</sup> (Emphasis added.)

3.53 Nicaragua's English version of the same Article submitted to Cleveland reads as follows:

"If the contracts for a canal or a transit made before Nicaragua's knowledge of this agreement should become incapable of duration through whatever cause, Nicaragua binds herself not to conclude any other for the said *objects*..."<sup>226</sup> (Emphasis added.)

3.54 Clearly "objects" is used by Nicaragua as meaning "purposes," not "articles". This contradicts Nicaragua's present interpretation as developed in its Counter-Memorial:

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

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224 CRM, Annexes, Vol 2, Annex 7.

225 CRM, Annexes, Vol 2, Annex 7(b).

226 CRM, Annexes, Vol 2, Annex 7(c).

things, goods, merchandise and matters dealt with by a science or treaties, if used in the plural.”<sup>227</sup>

In other words, Nicaragua is claiming today that any time the word “*objetos*” appears in the plural it should always be interpreted as meaning “things” and never as “purposes”, whereas in its official translation of the 1858 Treaty of Limits it interpreted “*objetos*” exactly in that manner – and correctly so.<sup>228</sup>

3.55 . The fallacy of Nicaragua’s arguments can be demonstrated by reference to instruments contemporary to the 1858 Treaty of Limits. For example, the Treaty of Friendship, Commerce and Navigation between United States and Nicaragua (Cass-Irisarri) of 16 November 1857, presented by Nicaragua in its Counter-Memorial, states in its Article II:

“Habr   rec  proca libertad de comercio entre todos los territorios de la Rep  blica de Nicaragua, y los territorios de los Estados Unidos. Los ciudadanos de los dos pa  ses, respectivamente, tendr  n plena libertad de llegar franca y seguramente, con sus buques y cargamentos,    todos los lugares, puertos y r  os en los territorios mencionados,    los cuales se permita,    se permitiere llegar    otros extranjeros, entrar en los mismos, y permanecer y residir en cualquiera parte de ellos, respectivamente, as   como alquilar y ocupar casas y almacenes *para objetos de comercio*; en general, los comerciantes y traficantes de cada naci  n, respectivamente, gozar  n de la m  s completa protecci  n y seguridad para su comercio, sujetos siempre    las leyes y estatutos de los dos pa  ses respectivamente...”<sup>229</sup> (Emphasis added.)

In this unratified Treaty the phrase “*objetos de comercio*” was presented in the plural, in a similar manner as the 1858 Treaty of Limits. Since both Spanish and English were the authentic languages of the 1857 Treaty, the English version is of interest. The official English version of this Article of the Cass-Irisarri Treaty reads as follows:

“There shall be, between all the territories of the United States and the territories of the Republic of Nicaragua, a reciprocal freedom of commerce. The subjects and citizens of the two countries, respectively, shall have full liberty, freely and securely, to come, with their ships and cargoes, to all places, ports, and rivers, in the territories aforesaid, to which other foreigners are, or may be, permitted to come, to enter into the same, and to remain and reside in any part thereof, respectively; also, to hire and occupy houses and warehouses *for the purpose of their commerce*; and generally the merchants and traders of each nation, respectively, shall enjoy the most complete protection and

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227 NCM, para. 4.1.27.

228 See above, paragraphs 1.09-1.12.

229 NCM, Vol II, Annex 5.



security for their commerce, subject always to the laws and statutes of the two countries respectively...”<sup>230</sup> (Emphasis added.)

3.56 Thus for both the United States and Nicaragua the term “*con objetos de comercio*” was understood as meaning “for the purpose of their commerce”. Surprisingly, instead of presenting the original authentic English version of the Cass-Irisarri Treaty, Nicaragua produced its own translation which simply refers to “...houses and warehouses for commerce”, expediently modifying the official English wording of “...houses and warehouses for *the purpose of their commerce*”.<sup>231</sup> Nicaragua preferred to “summarise” this phrase instead of engaging in a translation of “*para objetos de comercio*”. This is effectively an unannounced alteration of a document.

3.57 The United States-Nicaragua Treaty of Friendship, Commerce and Navigation (Lamar-Zeledón) was signed on 16 March 1859 and replaced the Cass-Irisarri Treaty. Using similar wording to the Cass-Irisarri Treaty, the 1859 Lamar-Zeledón Treaty provided in its Article II of the original authentic Spanish version:

“Habrá recíproca libertad de comercio entre todos los territorios de la República de Nicaragua y los territorios de los Estados Unidos. Los ciudadanos de los dos países, respectivamente, tendrán plena libertad de llegar franca y seguramente, con sus buques y cargamentos á todos los lugares, puertos y ríos en los territorios mencionados, á los cuales se permita, ó se permitiere llegar á otros extranjeros; de entrar en los mismos, y permanecer y residir en cualquier parte de ellos, respectivamente; así como alquilar y ocupar casas y almacenes *para los objetos de su comercio*; y en general los comerciantes y traficantes de cada Nación, respectivamente, gozarán de la más completa protección y seguridad para su comercio, sujetos siempre á las leyes y estatutos de los dos países respectivamente...”<sup>232</sup> (Emphasis added.)

3.58 The original authentic English version of this Article reads as follows:

“There shall be between all the territories of the United States and the territories of the Republic of Nicaragua a reciprocal freedom of commerce. The subjects and citizens of the two countries, respectively, shall have full liberty freely and securely to come with their ships and cargoes to all places, ports, and rivers in the territories aforesaid to which other foreigners are or may be permitted to come, to enter into the same, and to remain and reside in any part thereof, respectively; also to hire and occupy houses and warehouses *for the purposes of their commerce*; and generally the merchants and

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230 CRR, Annexes, Vol 2, Annex 10.

231 NCM, Vol II, Annex 5.

232 CRR, Annexes, Vol 2, Annex 13.

traders of each nation, respectively, shall enjoy the most complete protection and security for their commerce, subject always to the laws and statutes of the two countries respectively...”<sup>233</sup> (Emphasis added.)

3.59 As can be seen, the wording of the Lamar-Zeledón Treaty is practically the same as that of the Cass-Irisarri Treaty. In the authentic English version the phrase “*para los objetos de comercio*” was expressed as “for the purposes of their commerce”. Nicaragua argues that “*objetos*” in the plural was not rendered as “purposes”; but the fact is that in the wording of other treaties contemporary to the 1858 Treaty of Limits it was a common practice – indeed, a Nicaraguan practice – to employ the word “*objetos*” as meaning “purposes”, both in the singular as well as in the plural. These contemporary treaties deal with matters closely related to Costa Rica’s right of navigation as established by the Treaty of Limits.

3.60 **Table 1**, appended to this Chapter, provides 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”. **Table 2**, also appended, shows how contemporary treaties, contracts and other instruments refer to goods, merchandise or commodities. Taken together the Tables show that Nicaragua’s novel interpretation of “*objetos de comercio*” as meaning “articles of trade” is devoid of any justification.<sup>234</sup>

3.61 Further, it is so clear that “*objetos de comercio*” means “purposes of commerce” that on different occasions Nicaragua stated it this way in its own Counter-Memorial, thereby contradicting the most important argument presented by it. For example, Nicaragua wrote:

“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 recognized in Article VI.”<sup>235</sup> (Emphasis added.)

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233 CRR, Annexes, Vol 2, Annex 13.

234 See below, paragraph 3.71 for further discussion of the Tables.

235 NCM, para. 2.1.51.

Not only did Nicaragua correctly translate “*objetos de comercio*” as “purposes of commerce”, but it clearly and expressly acknowledged that Costa Rica’s “right of free navigation is articulated in the form of a careful statement of purposes”.<sup>236</sup> These purposes are no other than “commercial” and “fiscal,” as Nicaragua described them in two official reports signed by its Minister of Foreign Affairs and published in 1954 and 1974 under the title “*Situación jurídica del Río San Juan*”.<sup>237</sup>

3.62 Elsewhere in its Counter-Memorial, Nicaragua writes:

“In the present case, in the absence of a median line boundary, it is clear that Costa Rica cannot be accorded a general police power over the Río San Juan. In the Award of President Cleveland, as Arbitrator, the question of the right of navigation of vessels of war was resolved not by recourse to a generalized ‘right of free navigation’ but to the conditions of navigation specified in the Treaty: that is to say the right of ‘free navigation... *for the purposes of commerce.*’ (Article VI)...”<sup>238</sup> (Emphasis added.)

3.63 At least Nicaragua is consistent in its practice of “improving” the original wording and meaning of Spanish documents and of “correcting” documents submitted to the Court by Costa Rica. Its distortions are not accidental. Another example is the quotation of the Carazo-Soto Treaty signed by Costa Rica and Nicaragua on 26 July 1887. Nicaragua wrote the following:

“Article 6.3 of this agreement provided that ‘[t]he right granted to Costa Rica to navigate *with articles of trade* on the San Juan River, from its mouth up to 3 English miles below Castillo Viejo, does not comprise the right to navigate with vessels of war or vessels of the revenue service exercising jurisdiction’.”<sup>239</sup> (Emphasis added.)

The passage quoted is referenced to “CRM, Vol 2, Annex 15, Carazo-Soto Treaty”. Thus Nicaragua represents that the English version Costa Rica submitted to the Court used the term “with articles of trade”. In fact the English version submitted by Costa Rica reads as follows:

“3° The right, granted to Costa Rica, of navigation *for purposes of commerce [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>240</sup> (Emphasis added.)

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236 NCM, para. 2.1.51.

237 CRM, Annexes, Vol 6, Annexes 219 and 222.

238 NCM, para. 2.1.62.

239 NCM, para. 3.1.43.

240 CRM, Annexes, Vol 2, Annex 15.

3.64 As if these instances were not enough, Nicaragua alters the wording of yet another significant document. Its Counter-Memorial states:

“The language in paragraph *Second* of the Cleveland Award is especially worthy of close attention since the arbitrator substituted it entirely for the proposal made by George Rives for that part of the Award. For President Cleveland, the only navigation by Costa Rican vessels of the revenue service that was permitted by the treaty was that which is ‘related to and connected with’ the right to navigate with *articles of trade*. As if to avoid any possible misunderstanding, the arbitrator requires that navigation with revenue vessels be both (a) ‘related to’ and (b) ‘connected with’ navigation with *articles of trade*. He thus underscores the inextricable connection between public revenue vessels and private boats carrying *articles of trade*: the two go together, but only if the former are ‘related to and connected with’ the latter.”<sup>241</sup> (Emphasis added.)

In the paragraph transcribed above, Nicaragua modified the original English wording of the 1888 Cleveland Award, which reads as follows:

“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>242</sup> (Emphasis added.)

The Cleveland Award unmistakably uses the correct phrase “purposes of commerce”. In fact, Nicaragua stopped the quotation of this Article of the Cleveland Award just before the reference to the purposes of commerce, in order to replace it by “articles of trade”. This is disingenuous.

3.65 Nicaragua argues that the meaning of navigation “*con objetos de comercio*” was not submitted to President Cleveland as one of the matters of “dubious interpretation” of the Treaty of Limits and hence was not addressed in his Award.<sup>243</sup> This is true. The reason is that both parties agreed on the content of the phrase, as shown by their identical translations. Nicaragua only began to advance a narrower meaning – “with articles of trade” – a century later.

3.66 Both parties and the Arbitrator, while dealing with Article VI of the Treaty of Limits, treated the expression “*con objetos de comercio*” as meaning

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241 NCM, para. 3.1.54.

242 CRM, Annexes, Vol 2, Annex 16.

243 NCM, para. 3.1.1.

“for the purposes of commerce”.<sup>244</sup> The way Nicaragua presents the situation deserves to be recalled in full:

“Thus the Cleveland Award sheds no direct light on the meaning of the phrase, ‘*con objetos de comercio*’. Indeed, if the content and scope of Costa Rica’s right to navigate ‘*con objetos de comercio*’ had been at issue, it seems certain that the parties would have paid more attention to the translation of the original Spanish words in their pleadings, as would President Cleveland in his Award. Yet from all that appears, they paid no attention at all to this phrase. Indeed, the translations of the 1858 Treaty prepared by both parties for the Cleveland Arbitration were identical on this point (‘for the purposes of commerce’). President Cleveland, for his part, was careful not to prejudice in any way the meaning of the Spanish text, as shown by his enclosing the English translation of the phrase in quotation marks in the *Second* paragraph of his Award. It is thus the 1858 Treaty, not the Cleveland Award, that is controlling on the question of the nature and scope of Costa Rica’s right to navigate in Nicaraguan territory, on the San Juan River, ‘*con objetos de comercio*.’”<sup>245</sup> (Emphasis added; references omitted.)

3.67 Nicaragua acknowledges that it raised all the “points of dubious interpretation” to be clarified by the Arbitrator and that it did not raise the issue that forms one of the questions of the present dispute before the Court. Nicaragua also recognises its own translation of “*con objetos de comercio*” in Article VI was unambiguous: “for the purposes of commerce”.<sup>246</sup> It is not possible to claim that Nicaragua considered that “with the purposes of commerce” meant “with articles of trade”.

3.68 Nicaragua suggests that President Cleveland enclosed the expression “for purposes of commerce” in inverted commas in order not to prejudice the meaning of the phrase.<sup>247</sup> This imaginative essay is not substantiated by any evidence. President Cleveland used the inverted commas simply because he was quoting the words of Article VI, as translated by the parties.

3.69 Nicaragua also claims that the fact that Rives did not put the Spanish text after “for the purposes of commerce” in his Report is of significance. Nicaragua concludes that “Mr. Rives did not believe that this phrase was in any way germane to the dispute before the arbitrator.”<sup>248</sup> It is true that the

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244 CRM, para. 4.22.

245 NCM, para. 3.1.7.

246 CRM, Annexes, Vol 2, Annex 7(c).

247 Also in NCM, para. 3.1.24.

248 NCM, para. 3.1.26.

meaning of “*con objetos de comercio*” was not in dispute. But this does not help Nicaragua. If its present interpretation had been conceived of at the time, either by itself or by Rives, this would have carried decisive weight in favour of excluding Costa Rican navigation with vessels of war or with armed vessels of its Revenue Service.

3.70 Until the present dispute broke out, Nicaragua had consistently accepted that “*con objetos de comercio*” means “for purposes of commerce”. In its Memorial Costa Rica presented copies of three important official statements by Nicaragua to show this:

- (i) A letter dated 27 July 1897 from the Secretary to the Diet of the Mayor Republic of Central America, of which Nicaragua was part, to the Minister of Foreign Affairs of Costa Rica, in which it is stated that: “Costa Rica [tiene] únicamente el derecho de libre navegación para *finés de comercio* desde su desembocadura en el Atlántico hasta tres millas inglesas antes de llegar al *Castillo Viejo*.”  
Translation by Costa Rica: “Costa Rica only has the right to free navigation for purposes of commerce [*para fines de comercio*] from the mouth in the Atlantic up to three English miles before reaching Castillo Viejo.”<sup>249</sup> (Emphasis added.)
- (ii) An official publication of the Ministry of Foreign Affairs of Nicaragua of 1954 under the signature of the Minister of Foreign Affairs, Oscar Sevilla Sacasa, which stated that: “Costa Rica, solo tiene derecho de navegación, exclusivamente *con fines de comercio y fiscales*, en la parte del río comprendida entre la desembocadura en el Atlántico y punto situado tres millas inglesas antes de llegar al Castillo Viejo.”  
Translation by Costa Rica: “Costa Rica only has the right of navigation, exclusively, for commercial and fiscal purposes [*con fines de comercio y fiscales*], at the part of the river between the mouth of the Atlantic up to within three English miles of Castillo Viejo.”<sup>250</sup> (Emphasis added.)
- (iii) Another official publication of the Ministry of Foreign Affairs of Nicaragua under the signature of the Minister of Foreign Affairs presented in 1974, which repeated the same text as the 1954 edition, qualifying the

249 CRM, Annexes, Vol 3, Annex 37.

250 República de Nicaragua, Ministerio de Relaciones Exteriores, *Situación Jurídica del Río San Juan* (Managua, 1954): CRM, Annexes, Vol 6, Annex 219.

navigational rights of Costa Rica as being “for commercial and fiscal purposes”.<sup>251</sup>

Nicaragua does not respond to any of these documents.

3.71 Finally, it should be noted that whenever the intention was to refer to merchandise or “articles of trade”, the term “*objetos*” was not often used. Table 2 appended to this Chapter demonstrates that in an overwhelming number of cases, terms such as “*artículos*”, “*mercancías*”, “*productos*”, “*cosas*”, “*efectos*” and “*bienes*” were used to refer to “articles”, “merchandise”, “products” etc. In the exceptional case where “*objetos*” is used to mean “objects” or “things”, it is quite clear from the context that the word has that meaning. For example, in item 2 of Table 2 (a canal contract), the term “*objetos*” is used to refer to “objects” in the following context:

“...para el establecimiento ó la erección de casas, almacenes, diques, nuelles, estaciones, ó cualesquiera otros objetos útiles que tengan relación con las obras del canal.”

This is translated as:

“...for establishing or building houses, warehouses, dikes, docks, stations or any other useful objects that may have relation with the canal works.”<sup>252</sup>

Another example is the use of “*objetos*” in an extradition treaty to mean “objects”:

“Cuando haya lugar á la extradición, todos los objetos aprehendidos, que tengan relación con el delito...”

translated as:

“When the extradition proceeds, all objects seized that have any relation to the crime...”<sup>253</sup>

3.72 Another element of the internal context of the 1858 Treaty of Limits which is relevant to the interpretation of “*con objetos de comercio*” is found in the same Article VI. The fact that this Article refers a few words later to the area as being that “where the navigation is common” is also significant. The adjective employed to qualify both Nicaraguan and Costa Rican navigation

251 República de Nicaragua, Ministerio de Relaciones Exteriores, *Situación Jurídica del Río San Juan* (Managua, 1974): CRM, Annexes, Vol 6, Annex 222.

252 See item 2 of Table 2, below. This is similar to the uses of “*objetos*” in items 13 and 17 of Table 2.

253 See item 21 of Table 2, below; and see item 22 for a similar use of “*objetos*”.

is “common”. This is not a wording that corresponds to a navigation which, for Costa Rican vessels, is limited to merchandise (“articles of trade”). The wording suggests that navigation by both countries is similar in scope.

3.73 To summarise, despite the extraordinary efforts of Nicaragua to create confusion, the inescapable conclusion is that this phrase was always understood to mean “for purposes of commerce”.

## **(2) The scope of the term “comercio” in the Treaty of Limits**

3.74 In its Counter-Memorial, Nicaragua focuses exclusively in the term “*objetos*”. It is just *en passant* that Nicaragua contends that:

“the reference to *commerce* in Article VI of the Jerez-Cañas Treaty comprised in 1858, and still comprises today, traffic in commodities and not services unrelated to said traffic. This is particularly the case when the words ‘with articles of’ are added to ‘commerce.’”<sup>254</sup>

Nicaragua seems to agree with Costa Rica that the term “commerce” encompasses more than merely “trade”, but Nicaragua does not attempt either to justify its assertion that “commerce” is limited to “traffic in commodities” nor to rebut the meaning of the word “commerce” as encompassing transportation of persons and goods as well as communication.<sup>255</sup>

3.75 Without any explanation, Nicaragua’s Counter-Memorial states that if the parties would have wished to establish a broad right of navigation “for purposes of commerce”, they would have used the phrase “*sous le rapport de commerce*” employed in the Congress of Vienna.<sup>256</sup> This is disingenuous. “*Con objetos de comercio*” is an equivalent form in Spanish of the quoted phrase in French, as explained in Costa Rica’s Memorial.<sup>257</sup>

## **(3) Navigation “con objetos de comercio” includes transport of persons**

3.76 In its effort to deprive the notion of “freedom of navigation” described by the Permanent Court in the *Oscar Chinn* case of any relevance to the present

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254 NCM, para. 4.3.19.

255 CRM, paras. 4.42-4.72.

256 NCM, para. 4.1.29.

257 CRM, para. 4.43.



dispute, Nicaragua contends that the Treaty of Limits excluded the transport of passengers:

“Further evidence of the latter is the Permanent Court’s inclusion in its broad definition of ‘freedom of navigation’ the freedom ‘to transport... passengers’ – something that would never have been agreed to by a Nicaraguan Government well aware that the most lucrative use of the River for Nicaragua was the transport of passengers, as attested by the contracts for this purpose detailed in Chapter 1, Section 3 above, and ever mindful of the need to have exclusive authority over the transport of passengers on the San Juan in order to conclude agreements relating to the prospective inter-oceanic route.”<sup>258</sup>

Nicaragua’s argument that the transport of passengers was “carefully excluded from the right of navigation with articles of trade recognised by Article VI of the Jerez-Cañas Treaty” does not resist serious analysis. If the intention of the parties had been to exclude the transport of passengers, they would certainly have used express language to achieve that result – and not a phrase such as “*con objetos de comercio*”, which is a positive, not a negative, phrase, containing words of extension not limitation. The normal way to “carefully exclude” transport of passengers would have been to state exactly this: “with the exception of transport of passengers” or to precisely identify which of the purposes of commerce were allowed, to the exclusion of the other. Another way would have been to exclude a particular method or mode of transport, as in the unratified Marcoleta-Molina Treaty of 1854, which expressly excluded navigation by steamboat.<sup>259</sup> There is nothing in the record that supports the notion that this was the intention of the parties, or even that of the Nicaraguan negotiator. Nicaragua’s assertion is not sustained by any evidence.<sup>260</sup>

3.77 The argument advanced by Nicaragua is that transport of passengers was “by far” “[t]he most lucrative business at the time of the signing of the Treaty of 1858”,<sup>261</sup> that Nicaragua had the right to grant concessions for the transit and the construction of a canal and that it did so, in a way that was recognised by Costa Rica in Articles VII and VIII of the Treaty of Limits.<sup>262</sup> But none of these assertions show that Costa Rica’s right of free navigation – which normally includes transport of persons and goods – was limited so as to exclude

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258 NCM, para. 4.1.11.

259 NCM, Vol II, Annex 4.

260 See NCM, para. 4.1.37.

261 NCM, para. 4.1.37

262 NCM, para. 4.1.38.

transport of persons. Nicaragua itself was careful not to appear to deny Costa Rica's right to transport "persons and property" in the treaties it concluded with the countries to whose companies it granted or envisaged granting concessions – the United States in 1857, France in 1859 and Great Britain in 1860.<sup>263</sup>

3.78 Furthermore all the examples of concessions mentioned by Nicaragua concerned *inter-oceanic* transit of passengers as well as "articles of trade" in general.<sup>264</sup> Obviously, this inter-oceanic transit bears no relation to Costa Rica's right of free navigation as established by Article VI of the Treaty of Limits. Hence, Nicaragua's suggestion of the "careful exclusion" of the right to transport passengers in Article VI of the 1858 Treaty of Limits is without any basis.

#### **D. Public Rights of Protection, Custody and Defence**

##### **(1) Applicable Law**

3.79 Costa Rica's public rights of protection, custody and defence are established in Article IV of the Treaty of Limits. These rights have implications for Costa Rica's navigation on the San Juan. Moreover, Article VI establishes a perpetual right of free navigation for Costa Rica, which of course includes navigation with public vessels. This was recognised by the Second Article of the Cleveland Award, which provides:

"The Republic of Costa Rica under said treaty and the stipulations contained in the sixth article thereof, has not the right of navigation of the river San Juan with vessels of war; but she may navigate said river with such vessels of the revenue service as may be related to and connected with her enjoyment of the 'purposes of commerce' accorded to her in said article, or as may be necessary to the protection of said enjoyment."<sup>265</sup>

3.80 In its decision of 30 September 1916, the Central American Court of Justice found that:

"Costa Rica, for example, cannot ply that stream with war vessels as, of course, Nicaragua can do; but, on the other hand, those rights are greater than those of a mere co-owner (*copropietario*) because the Costa Rica vessels, as well merchantmen as revenue cutters, in the zone in which navigation is common, have a free course over the

263 CRR, Annexes, Annexes 10, 14 and 15. See discussion in this Reply, paragraph 2.52 above.

264 NCM, paras. 4.1.42-4.1.45.

265 CRM, Annexes, Vol 2, Annex 16.

whole river, throughout its length and breadth, and free access, exempt from imposts, to any point on the Nicaraguan shore.”<sup>266</sup>

3.81 Other relevant conventional rules are Articles 1 and 2 of the Fournier-Sevilla Agreement of 9 January 1956,<sup>267</sup> which is based on Article IV of the Pact of Amity of 21 February 1949 (Sevilla-Esquivel),<sup>268</sup> the Cuadra-Castro Communiqué of 8 September 1995<sup>269</sup> and the Cuadra-Lizano Joint Communiqué of 30 July 1998, which provides for navigation by Costa Rican public vessels subject to notice and conditions: Costa Rican agents may only carry their normal arms, and the Nicaraguan authorities may accompany these vessels which, during their journey, must report to the Nicaraguan border posts.<sup>270</sup>

## (2) Nicaragua’s position

3.82 According to Nicaragua, the duty (and right) to contribute to the *safeguarding* (*guarda*) of the San Juan River, stipulated in Article IV of the 1858 Treaty, can only be exercised by Costa Rica from its shores. It relies on the manner in which G.L. Rives prepared the draft of the Cleveland Award. According to Rives, the expression “within their reach” had to be interpreted in its geographical sense (which would have limited Costa Rica’s duties).<sup>271</sup> Nicaragua further argues that when he amended Rives’s draft award, President Cleveland limited Costa Rica’s right of navigation with public vessels to navigation connected to purposes of commerce.<sup>272</sup>

3.83 Nicaragua points out that Costa Rica also bases its right to *re-supply* its border posts on its shore via the San Juan River on the duty (and right) laid down in Article IV of the 1858 Treaty. For Nicaragua, the performance of that duty cannot, however, go beyond the River’s right bank because the Cleveland Award did not recognise a Costa Rican right to sail warships in the sector of

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266 CRM, Annexes, Vol 2, Annex 21.

267 CRM, Annexes, Vol 2, Annex 24.

268 CRM, Annexes, Vol 2, Annex 23.

269 CRM, Annexes, Vol 2, Annex 27.

270 CRM, Annexes, Vol 2, Annex 28. See, in particular, points 3(1) and 3(2).

271 NCM, para. 4.2.31.

272 NCM, para. 4.2.15.

common navigation of the San Juan, and because Nicaragua has sovereignty over the waters of the River.<sup>273</sup>

3.84 Nicaragua stresses that even according to the Cuadra-Lizano Joint Communiqué, the right claimed by Costa Rica was conditional.<sup>274</sup> Moreover, when in June and August 2000 the two Presidents exchanged views about a possible revival of the Joint Communiqué, the President of Costa Rica referred to the latter as establishing a *modus operandi* rather than a “right” or recognition of a “general practice”.<sup>275</sup> This shows, according to Nicaragua, that there was neither binding practice nor established custom, but only “pure tolerance”.<sup>276</sup> In the presidential correspondence of 2000, Nicaragua advocated a mechanism of authorisation whereas Costa Rica proposed a system of notification – both positions showing that no right existed.<sup>277</sup>

3.85 Moreover, according to Nicaragua, there is no need to use the river for resupply of border posts: Costa Rica disposes of the necessary infrastructure and means (roads, tracks, airstrips, helicopters) to do so without using the River.<sup>278</sup> Nicaragua notes that Costa Rica seems to have succeeded in re-supplying its border posts until the end of the three-year moratorium established in Point 3 of the Alajuela Declaration of 26 September 2002.<sup>279</sup> During that time, Costa Rica abstained from raising the re-supply issue, which shows: (i) that Costa Rica itself is not convinced of the existence of a right to re-supply; and (ii) that there were other ways of re-supplying the border posts.<sup>280</sup> The mere fact that resupply may have become more onerous is irrelevant.<sup>281</sup>

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273 NCM, para. 5.2.2.

274 NCM, para. 5.2.4.

275 NCM, para. 5.2.6.

276 NCM, para. 5.2.7.

277 NCM, para. 5.2.8.

278 NCM, para. 5.2.9.

279 CRM, Annexes, Vol 2, Annex 29.

280 CRM, para. 5.2.10.

281 CRM, para. 5.2.12.

### (3) Costa Rica's position

3.86 As explained in Costa Rica's Memorial,<sup>282</sup> four reasons militate in favour of a right of navigation on the San Juan by Costa Rican public vessels carrying police with normal arms. The first 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. The second is that navigation under Article VI of the 1858 Treaty cannot be effectively protected without the use of such boats. The same obtains for the defence of the common border and the common bays under Article IV of the Treaty.<sup>283</sup> Fourthly, 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.

3.87 The re-supplying of border posts *via* the San Juan was prohibited by Nicaragua on 14 July 1998. It was re-established briefly two weeks later on the basis of the Cuadra-Lizano Joint Communiqué, which was subsequently unilaterally repudiated by Nicaragua.<sup>284</sup> The situation has been aggravated by Nicaragua's firing order reported on 1 October 2005, two days after the filing of Costa Rica's Application before this Court on 29 September 2005.<sup>285</sup>

3.88 This "firing order" was confirmed in a Nicaraguan Presidential Decree entitled "The Government of Nicaragua will not allow Armed Navigation of Foreign Forces in Nicaraguan Territorial Waters", approved on 28 September 2005 and published the following day. It states:

"Article 1. – The Government of the Republic of Nicaragua will not allow armed navigation of foreign forces in national waters, as it is a flagrant violation of national sovereignty, the Political Constitution, and the law.

Article 2. – The Nicaraguan Army is ordered to immediately increase its presence and permanent surveillance at the San Juan River in order to prevent, with all the means provided to it by national legislation, the transit of armed personnel, the relief and the transportation of weapons, ammunition and supplies, by foreign forces, as well as any other activity related to the illicit trafficking of arms in all of its aspects.

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282 CRM, paras. 4.93, 4.100, 4.109, 5.114, 5.121 and 5.122.

283 As the "common" Bay of San Juan has been silted up, it is practically inaccessible from the sea. To contribute to its defence, Costa Rica has no other choice but to proceed *via* the lower San Juan River.

284 CRM, paras. 5.130-5.134. See also above, paragraph 2.12.

285 CRM, paras. 5.136.

Article 3. – The Ministry of the Interior, through the National Police Department, is ordered to proceed immediately to confiscate all the arms that are seized and take the offenders before the Nicaraguan Courts of Justice so they can be tried with the full severity of the law for the crimes they may have committed.”<sup>286</sup>

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.”

3.89 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.)

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>287</sup>

3.90 Nicaragua argues that when modifying Rives’ draft award, President Cleveland restricted Costa Rica’s right to navigate with public vessels to navigation connected with the purposes of commerce.<sup>288</sup> A careful perusal of the Rives draft<sup>289</sup> shows, however, that the President correctly gauged the scope of Costa Rica’s right. In its original version, Rives’ draft had pointed out that Costa Rica’s privileges were the same as those of any other nation in time of peace. In his Second Report of 2 March 1888, Rives explained those “privileges” as follows:

“Except in the case of the Dardanelles, it is understood that civilized nations, at the present day, impose no restrictions upon the friendly visits of foreign men of war in time of peace; and this general usage may be said to constitute an imperfect right entitling such vessels to claim hospitality.”<sup>290</sup>

286 Nicaraguan Presidential Decree No. 65-2005 of 28 September 2005, Nicaraguan Official Gazette No. 188 of 29 September 1995: CRR, Annexes, Vol. 2, Annex 69.

287 For the precise wording, see above paragraph 3.80.

288 NCM, para. 4.1.15.

289 NCM, Vol II, Annex 72, pp. 258-259.

290 NCM, Original Documents deposited within the Registry, Part II, Annex 71, p. 217.

Thus Rives' proposal was simply that Costa Rica's public vessels should receive the treatment extended to those of any other nation – no more, no less.

Accordingly, he suggested the following text to the President:

"Second. The Republic of Costa Rica has the same privileges of navigating the River San Juan with vessels of war or of the revenue service as civilized nations usually accord in their territorial waters to the public vessels of friendly powers in time of peace; but no other or greater privileges."<sup>291</sup>

President Cleveland disagreed, considering 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. His decision was couched in the following terms:

"*Second.* 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>292</sup>

3.91 This would by itself be sufficient to prove a right of revenue vessels to navigate on the San Juan, a right which Nicaragua, after a long period of uncontested and peaceful exercise, suddenly prohibited in 1998.<sup>293</sup> The solid practice supporting Costa Rica's claim is attested to in a number of affidavits annexed to the Memorial.<sup>294</sup> There are also letters addressed by the Costa Rican Border Police of Sarapiquí to the Minister of Public Security in 1991, by the Costa Rican Atlantic Border Police, Sarapiquí, to the Director of the Costa Rican Civil Guard in 1992, and by the Border Police, Sarapiquí, to that Director, also in 1992.<sup>295</sup> These letters offer an insight into the daily lives, worries and difficulties of forces entrusted with guarding the border. One of the complaints

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291 NCM, Vol II, Annex 72.

292 CRM, Annexes, Vol 2, Annex 16; see also NCM, Vol II, Annex 72.

293 Nicaraguan Presidential Decree No. 65 of 2995 of 28 September 2005, Nicaraguan Official Gazette No. 188 of 29 September 2005: CRR, Annexes, Vol 2, Annex 69; "Neighbours from the San Juan plea for help", *Al Día*, San José, 14 May 2007: CRR, Annexes, Vol 2, Annex 59.

294 CRM, Annexes, Vol 4, Annexes 88, 90, 94 and 103.

295 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, Annexes, Vol 2, Annex 36; Costa Rican Police Major and Chief of 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, Annexes, Vol 2, Annex 37; 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. 372-12, 25 May 1992: CRR, Annexes, Vol 2, Annex 38.

voiced related to the need for more boats and fuel. It would certainly not have been made if, at that time, the boats in question had been unable to circulate on the San Juan River. Indeed, as shown in Sketch Map 3 opposite page 177 of this Reply, many of the communities covered by the area of jurisdiction of the Costa Rican Atlantic Border Police in Sarapiquí, such as Palo Seco, Cureña, Isla Morgan, Cureñita, Remolino Grande, Remolinito, Caño Tambor, Caño Copalchí, Boca Las Marías, Boca La Tigra, etc., lie on the Costa Rican bank of the San Juan River. In the years covered by the above correspondence there was a steady presence of Costa Rican public vessels on the San Juan.<sup>296</sup> The evidence summarised above reveals a uniform and clear pattern based on texts that are equally clear.

3.92 Nicaragua suggests that Costa Rica's own conduct is to the contrary. According to Nicaragua, Costa Rica accepted in the 1998 Cuadra-Lizano Joint Communiqué that passage by public vessels would be subjected to conditions and to a regime of notification. But a State endowed with a right is entitled to negotiate the modalities of its exercise without thereby jeopardising its existence. Moreover Costa Rica was prepared to accept a mechanism of notification, as opposed to one of authorisation, which would have destroyed the right. In fact, Nicaragua's argument demonstrates the opposite of what was intended. By proposing a system of notification and rejecting one of authorisation, Costa Rica indicated that it had a *right*, which it was unwilling to forego.

3.93 According to another Nicaraguan argument, Costa Rica's rights in the area covered by Article IV of the Cañas-Jérez Treaty can only be exercised "from its shore".<sup>297</sup> This is not borne out by the relevant texts. Article IV of the 1858 Treaty speaks of the obligation of custody (*guarda*) "with all the efficiency within [the Contracting States'] reach". Concerning Costa Rica, "within its reach" does not necessarily correspond to "from its shore". It could equally well mean that each State shall act with maximum efficiency.

3.94 A final Nicaraguan argument about re-supply of Costa Rican border posts is that there is not only no right for Costa Rica but also no need. In the face of

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296 See discussion in this Reply, Appendix, paragraphs A.33-A.44 and CRR, Annexes, Vol 2, Annexes 36, 37 and 38.

297 NCM, paras. 4.2.31-4.2.32.



all evidence, Nicaragua contends that Costa Rica has all the necessary facilities to re-supply its border posts along the San Juan River. In fact those posts *were* supplied from 1998-2005, when the moratorium set by the Declaration of Alajuela of 2002 expired.<sup>298</sup> This calls for the following observations:

- (i) It is simply not true – and constant repetition does not make it any more true – that Costa Rica disposes of the necessary facilities to re-supply its border posts by land and by air. For the lack of such facilities the station of La Cureña had to be closed,<sup>299</sup> while other posts, deprived of local navigation, are now operating at a lower level of efficiency.
- (ii) If Costa Rica has not actively pursued the matter of the re-supplying of the boundary posts between 2002 and 2005, this is not because it did not believe in its claim or because re-supplying *via* the river was not necessary or useful. It was because it wished to minimise the – very real – risk of confrontation and escalation.
- (iii) In any event, the rights granted to Costa Rica by the Treaty of Limits are unconditional and perpetual. They are not dependent on need, use or the non-availability of alternative means.

#### **(4) Conclusion**

3.95 Under the relevant treaty and other texts Costa Rica is entitled to navigate with public vessels manned with police agents carrying normal arms on the part of the San Juan open to common navigation, in order to protect its freedom of navigation and to enable it to safeguard the River and to defend the boundary areas as well as the common bay of San Juan del Norte, located in the east of the common boundary. This right is confirmed by a practice the consistency of which was broken by Nicaragua as recently as 1998. Its existence is not dependent on the need to exercise it, although that need does exist in the present case.

### **E. Related Rights**

3.96 Although Nicaragua assumes that Costa Rica can have no rights except those expressed in the 1858 Treaty, in fact President Cleveland refers in his Award

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298 CRM, Annexes, Vol 2, Annex 29.

299 The post of La Cureña was located on the top of a hill surrounded by tropical rain forest. It is difficult or impossible to land any helicopters there. Access by land is also most difficult in the absence of good roads.

to related rights in stating that navigation “may be related to and connected with [Costa Rica’s] enjoyment of the ‘purposes of commerce’”.<sup>300</sup> Costa Rica has identified four related rights that are being breached by Nicaragua.

**(1) Flags**

**(a) Flag issues as “related rights”**

3.97 Article VI of the 1858 Treaty grants Costa Rica the “perpetual right of free navigation”. A corollary is the right of Costa Rican vessels to fly their own flag. This is a right “related” to the right of free navigation.

3.98 Another “related” right is that of not having to fly the Nicaraguan flag. As will be shown, even a failure to comply with domestic legislation calling for the display of the Nicaraguan flag – if it exists – will not allow the territorial State to suspend the right of navigation granted to a foreign State.

**(b) Nicaragua’s position**

3.99 In its Counter-Memorial, Nicaragua points out that in the territorial sea foreign vessels authorised to navigate in it “should” carry the flag of the host State and that “such is the case of the San Juan River”. This, it adds, derives “not only from international courtesy, but from international practice”. It refers to its own diplomatic correspondence, cited by Costa Rica.<sup>301</sup> Indeed, in a Note of 3 August 2001, the Nicaraguan Foreign Minister wrote that, in the area of maritime navigation, foreign ships entering sovereign waters (territorial sea, archipelagic waters, internal waters and, possibly, straits) fly the flag of the host State, which has to be placed at a higher level than the flag of their own State.<sup>302</sup> This is characterised as “international custom and courtesy”.<sup>303</sup> If the host State’s flag is not raised by a vessel, Nicaragua continues, passage will be refused as a consequence of Nicaragua’s sovereignty over the waters of the River.<sup>304</sup>

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300 CRM, Annexes, Vol 2, Annex 16.

301 NCM, para. 5.3.2.

302 CRM, Annexes, Vol 3, Annex 72.

303 NCM, para. 5.3.3.

304 NCM, paras. 5.3.3 and 5.3.4.

**(c) Costa Rica's position**

3.100 The hoisting of the Nicaraguan flag was never required in the past. That requirement was suddenly imposed in August/September 1998; at the same time, Costa Rican flags were banned. Costa Rica protested and the practice ceased. After the present Application was filed in October 2005, it re-appeared in the form of a requirement that every Costa Rican boat had to fly the Nicaraguan flag.<sup>305</sup> This occasioned considerable dismay on the Costa Rican bank of the River.<sup>306</sup> Statements by the Mayor of San Carlos and by José Moreno Rojas report that the inhabitants of the border region were unsettled over the new measure and that they were not able “to acquire flags from the neighboring country in the area where they live.”<sup>307</sup>

3.101 In a letter of 20 October 2005 the Foreign Minister of Costa Rica requested the withdrawal of the measure.<sup>308</sup> On 9 November of the same year, the Nicaraguan Minister of Foreign Affairs refused to comply.<sup>309</sup>

3.102 The requirement of flying the Nicaraguan flag, formulated in 1998 and re-introduced in 2005, has survived to this day, as is shown by witness statements joined to Costa Rica's Memorial<sup>310</sup> as well as by two affidavits accompanying the present Reply. On 29 July 2007, Víctor Julio Vargas Hernández, a Costa Rican official, testified not only that Nicaragua maintains the requirement of flying its flag when navigating on the San Juan but that it requires “the flying only of the Nicaraguan flag on Costa Rican vessels.” In the same affidavit Leonel Morales Chacon confirmed that the flag requirement persists.<sup>311</sup> The current Nicaraguan position is in contrast to a note addressed in 1868 by the Nicaraguan Minister to the United States to Secretary of State Seward and related to the vessels of the Central American Transit Company. In that note it was explained that only Nicaragua and Costa Rica could fly their flags on the San Juan River.<sup>312</sup>

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305 CRM, para. 5.87.

306 CRM, Annexes, Vol 3, Annex 72.

307 CRM, Annexes, Vol 4, Annex 108; CRM, Annexes, Vol 6, Annex 235.

308 CRM, Annexes, Vol 3, Annex 81.

309 CRM, Annexes, Vol 3, Annex 82.

310 CRM, Vol. 4, Annexes 84-87, 91, 95, 101 and 108.

311 Affidavit of Víctor Julio Vargas Hernández, Marleny Royas Vargas, Mario Sala Jiménez and Leonel Morales Chacón, 28 July 2007: CRR, Annexes, Vol 2, Annex 54.

312 CRM, para. 4.10 and CRM, Annexes, Vol 6, Annex 207, p. 108.

(d) **Analysis**

3.103 Considering the timing of their introduction and re-introduction, it seems that the measures described above are retaliatory in character and are meant to irritate and discourage the inhabitants of the Costa Rican bank of the San Juan. They seek to make a poor and defenceless population bear the brunt of disagreements between the two Governments.

3.104 Nicaragua's main contention is that ships navigating in foreign maritime waters are required to fly their own flag as well as, on a higher level, that of the receiving State. According to Nicaragua, the same rule applies to river navigation, especially in situations such as the present. These arguments are fragile. A quick perusal of two classic texts on the law of the sea shows that there is no rule of international law in the sense advocated by Nicaragua.<sup>313</sup> Possibly such rules could be found in some of the "laws and regulations" enacted by coastal States under Article 21 of the 1982 United Nations Convention on the Law of the Sea to govern innocent passage. But contraventions of such rules do not authorise refusal of innocent passage by the coastal State. Indeed, what matters for that State is not so much the display of the flag of the receiving State, but the identity and therefore the national flag of the vessel.

3.105 That much also applies to river navigation. The State exercising sovereignty over the river's waters will mainly be interested in which foreign ships are actually sailing on the river and, therefore, their nationality and flag, rather than in making these ships carry the local flag.<sup>314</sup> If the analogy between maritime and fluvial navigation suggested by Nicaragua were to be pursued, one might say that in both these areas it is the foreign ship's national flag that must be shown and not that of the receiving State, although there may be local legislation providing for the latter. So far no Nicaraguan legislation on this issue has been shown to exist. Even if it did exist, non-compliance with such legislation cannot possibly entail the refusal of rights of navigation secured by treaty and described as perpetual. Indeed perhaps the leading monograph on river navigation fails even to *mention* the issue, which is merely ceremonial.<sup>315</sup>

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313 C.J. Colombos, *The International Law of the Sea*, 6<sup>th</sup> rev. ed. (London: Longmans Green, 1967); L. Lucchini & M. Voelckel, *Droit de la mer*, Vol. II (Paris: Pedone, 1996).

314 Colombos, 166-7 (§170).

315 B. Vitanyi, *The International Regime of River Navigation*, (Alphen a.d.R.: Sijthoff & Noordhoff,

3.106 What Nicaragua has to say about flags is, in fact, a simple assertion with no supporting evidence, based on an amalgamation of precepts of fluvial and maritime navigation which is justified by nothing and alternately characterised as custom or courtesy. It cannot be both.

3.107 Prior to the recent measures taken by Nicaragua, Costa Rican vessels had for over a century freely used the area of common navigation of the San Juan. But Nicaragua sees no inconsistency between its former attitude and the present one. The more than secular tolerance shown by Nicaragua is not, in its view, relevant in international law; at the same time, Nicaragua extravagantly assimilates the rules of the law of the sea with those governing river navigation.

3.108 By contrast in 1868, in diplomatic correspondence with a third party – the United States – Nicaragua refused to the latter the right to sail ships under the American flag in the area of common navigation of the San Juan, explaining that Costa Rica, as a riparian, was the only State having the right to do so, besides Nicaragua. Nothing was said, at that time about any obligation to fly the Nicaraguan flag as well, nor about any hierarchy among flags.<sup>316</sup>

## **(2) Fisheries**

### **(a) Fisheries as a “related right”**

3.109 Costa Rica’s Application to the Court refers to breaches of the perpetual right of free navigation and “related rights”.<sup>317</sup> The customary right to subsistence fishing in the San Juan River is a “related right”.<sup>318</sup> In its Counter-Memorial Nicaragua points out that the alleged right does not derive from the Cañas-Jérez Treaty of 1858, from the 1888 Award or the 1916 judgment.<sup>319</sup>

3.110 Nicaragua suggests that the only rights Costa Rica claims are those related to the 1858 Treaty or to texts connected with it and nothing beyond.<sup>320</sup>

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316 CRM, para. 4.10 and CRM, Annexes, Vol 6, Annex 207.

317 CRM, para. 1.01.

318 CRM, para. 5.187.

319 NCM, paras. 5.1.2-5.1.4.

320 NCM, para. 5.1.4.

Rights to fish are not, however, alleged to derive from the Treaty but from customary law the roots of which are found in the Royal Ordinance of 29 November 1540.<sup>321</sup> This leads Nicaragua to argue that Costa Rica contradicts itself.

3.111 The answer to be given is twofold. First it is up to Costa Rica, and not to Nicaragua, to formulate its claims. Second the right of the inhabitants of the Costa Rican shore to engage in subsistence fishing on the San Juan is “related” to the 1858 Treaty in that Nicaragua contends that that Treaty, by attributing to it the sovereignty over the waters of the River and granting Costa Rica only a perpetual right of free navigation, superseded other pre-existing rights such as any right to fish.<sup>322</sup> The latter issue is clearly connected with the Treaty.

**(b) The existing practice and its character**

3.112 Regarding the substance of the fisheries claim, Nicaragua asserts that it has never prevented, does not prevent and never will prevent subsistence fishing by residents of the Costa Rican shore.<sup>323</sup> Costa Rica takes note of this commitment. Unfortunately the affidavits presented in Costa Rica’s Memorial show that Nicaragua *did* and *does* in fact prevent persons residing on the Costa Rican bank from engaging in subsistence fishing, and evidence annexed to this Reply confirm that the prohibition is ongoing.<sup>324</sup>

3.113 Nicaragua characterises these statements as “a handful” of testimonials,<sup>325</sup> but they are supported by further statements annexed to this Reply.<sup>326</sup> The collection of further statements is both difficult and unnecessary: difficult because potential witnesses are reluctant to come forth for fear of reprisals on the part of Nicaraguan authorities; unnecessary because Costa Rica is not required to duplicate testimonies that are clear, consistent and uncontradicted,

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321 CRM, Annexes, Vol 2, Annex 1.

322 NCM, para. 5.1.13.

323 NCM, para. 5.1.15.

324 CRM, Annexes, Vol 4, Annexes 106, 107, 108 and 109; Víctor Julio Vargas Hernández, Marleny Rojas Vargas, Mario Salas Jiménez and Leonel Morales Chacón, 29 July 2007: CRR, Annexes, Vol 2, Annex 54.

325 NCM, para. 5.1.8.

326 Víctor Julio Vargas Hernández, Marleny Rojas Vargas, Mario Salas Jiménez and Leonel Morales Chacón, 29 July 2007: CRR, Annexes, Vol 2, Annex 54.

all the more since Nicaragua has admitted that, albeit “as a matter of courtesy and convenience” it has “usually tolerated a limited use of the San Juan for non-commercial fishing by Costa Rican riparians”.<sup>327</sup>

3.114 Taken together, the evidence yields the following conclusions: (i) riparians have been fishing in the San Juan without problems for many years; (ii) they have done so for subsistence purposes; and (iii) despite its emphatic denials,<sup>328</sup> Nicaragua has, since the filing of the Application by Costa Rica, prevented subsistence fishing by Costa Rican riparians. This is why, though appreciating Nicaragua’s promise not to obstruct such fishing in the future, Costa Rica respectfully asks the Court to declare that there exists a right of subsistence fishing in the San Juan River.

3.115 Nicaragua contends that its tolerance of fishing from the Costa Rican bank must not be viewed as a right but as a token of courtesy and tolerance and that Costa Rica has not succeeded in establishing the existence of a uniform practice having legal effect.<sup>329</sup> Moreover, whatever may have been the situation in the distant past has been erased by the 1858 Treaty’s silence on the matter of fishing coupled with the attribution to Nicaragua of sovereignty over the waters of the San Juan. In its Counter-Memorial, Nicaragua makes light of the arguments of Costa Rica which had, in its Memorial, drawn attention to similar issues in Africa.<sup>330</sup> Finally, much is made<sup>331</sup> of a Charter of 1573<sup>332</sup> which allegedly ended whatever fishing rights may have been conceded in the preceding Charter of 29 November 1540.<sup>333</sup>

3.116 The first argument is over-familiar: a practice which may have been followed from time immemorial – an important trace of which is found in the 1540 Charter – is said by Nicaragua to be based on nothing but goodwill and

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327 NCM, para. 5.1.6.

328 NCM, paras. 5.1.14-5.1.16.

329 NCM, para. 5.1.6.

330 NCM, para. 5.1.9; cf CRM, paras. 4.124-4.127.

331 NCM, para. 5.1.12.

332 NCM, Vol. II, Annex 86.

333 CRM, Annexes, Vol. 2, Annex 1.

tolerance. As to Nicaragua's argument that the 1573 Charter superseded that of 1540, the former said nothing at all about fishing.<sup>334</sup>

3.117 The pattern of practice described above having been followed for so long one may safely assume that, unless the opposite can be shown conclusively, it has taken on a patina of custom. In situations such as the present, had it wished to prevent the formation of a local custom, Nicaragua could and should have made it clear long ago that it accepted Costa Rican subsistence fishing only as a matter of tolerance. Instead Nicaragua continued its practice of tolerance after the conclusion of the Cañas-Jérez Treaty in 1858 and until very recent times. It did so quite independently of that Treaty and of the sovereignty over the River's waters conferred on it.

3.118 Nicaragua contends that the fisheries practice invoked by Costa Rica lacks uniformity. The testimonies submitted by Costa Rica are, however, consistent. With one exception, they emanate from persons who have long lived in the area and who until recently have fished in the River without Nicaraguan interference.

3.119 The way in which Nicaragua brushes off Costa Rica's arguments about the subsistence fishing rights of African border populations<sup>335</sup> shows a thorough misunderstanding of Costa Rica's position: the idea is not to establish the existence of a general customary right to subsistence fishing for the population of a State whose bank forms a boundary but to demonstrate that it often happens, in such situations, that local populations are given access to the river's fisheries either on a conventional or a customary basis.<sup>336</sup>

### **(c) Conclusion**

3.120 There has been, from time immemorial, a practice allowing the inhabitants of the Costa Rican bank of the San Juan to fish in that River for subsistence purposes. This practice survived the Treaty of 1858.

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334 See this Reply, paragraph 3.110 and Appendix, paragraph A.09.

335 NCM, paras. 5.1.9-5.1.11.

336 CRM, paras. 4.124-4.127.



3.121 The disagreement between the parties may be summarised in two points:

- (i) Nicaragua claims not to be preventing Costa Rican riparians from fishing, but in fact there have been instances where they have been prevented from subsistence fishing; it promises to continue to allow the riparians to do so and while Costa Rica takes note of that promise, Costa Rica maintains that Nicaragua has recently prevented such fishing.<sup>337</sup>
- (ii) According to Costa Rica, its riparian population enjoys a customary right to engage in subsistence fishing, a claim resisted by Nicaragua which argues that no such custom has emerged and that the existing practice is one based on goodwill and toleration.

### (3) Landing Rights

3.122 In addition to attributing the sovereignty over the waters of the San Juan to Nicaragua and a perpetual right of free navigation to Costa Rica, Article VI of the 1858 Treaty provides:

“[t]he vessels of both countries shall have the power to land indiscriminately on either side of the river, at the portion thereof where the navigation is common; and no charges of any kind, or duties, shall be collected unless when levied by mutual consent of both governments.”

3.123 Costa Rica’s right was confirmed by the 1916 Judgment of the Central American Court of Justice:

“Costa Rica possesses in the San Juan River, for purposes of commerce, permanent rights of free navigation from its outlet as far up as three miles below Castillo Viejo, and the right for her vessels to moor at all points along either bank, exempt from the imposition of any charges, in that part of the stream in which navigation is common.”<sup>338</sup>

3.124 Nicaragua does not contest the existence of Costa Rica’s right to land on the Nicaraguan bank<sup>339</sup> which is clearly “related” to the rights of navigation on the River. Its main comments are: (i) that the right in question entails the correlative duty to conform to the local State’s regulations on health and security matters,<sup>340</sup> (ii) that it only operates in the framework of what Nicaragua means

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337 This Reply, paragraphs 4.56-4.61.

338 CRM, Annexes, Vol 2, Annex 21, p. 219.

339 NCM, para. 4.1.47.

340 NCM, para. 4.1.48.

by navigation for “purposes of commerce”, namely, “articles of trade”;<sup>341</sup> and (iii) that mooring on the opposite river bank does not include a right of trading: “The Treaty of 1858 was not a free trade agreement.”<sup>342</sup>

3.125 The main problem here lies not with the right to land on the opposite bank as such but with the reduced scope attributed to it on account of Nicaragua’s interpretation of Costa Rica’s right of navigation (navigation “with articles of trade” instead of “for purposes of commerce”), an interpretation refuted earlier in this Chapter.<sup>343</sup>

3.126 Regarding the purported obligation to conform to local regulations in health and security matters, all depends on the scope of such regulations and on their application. They must be conceived and applied reasonably, so as not to erode the right to land nor the right to navigate “for purposes of commerce”.

3.127 It is true that the 1858 Treaty was not intended to be a free trade agreement. Assuming, however – *quod non* – that the right of navigation enjoyed by Costa Rica is indeed limited to “articles of trade” and assuming also that landing on the opposite shore does not encompass a right to engage in trade on that shore, the result would be that the “perpetual right to free navigation” attributed to Costa Rica is reduced to “navigation for purposes of trading with other Costa Ricans.” This, in itself, shows that Nicaragua’s position is completely unreasonable.

3.128 It may be concluded that, as a “related” matter, the right to land on the Nicaraguan bank must be appreciated in the framework of the interpretation given in this Chapter of Costa Rica’s perpetual right of free navigation: it cannot be viewed as a purely technical right excluding activities related to commerce. Furthermore, the health and security regulations enacted by Nicaragua must be reasonable, so as not to deprive Costa Rica’s rights of all meaning.

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341 NCM, para. 4.1.47.

342 NCM, para. 4.1.48.

343 See above, paragraphs 3.39-3.78.

#### (4) Facilitation of traffic

3.129 In December 1948, with the support of Nicaragua, Costa Rican rebels stirred up a civil war and attempted to overthrow the Costa Rican Government. Costa Rica solicited the assistance of the Inter-American system, under whose auspices the Pact of Amity of 21 February 1949 was concluded.<sup>344</sup> In that instrument, the two States agreed to settle their disputes peacefully by applying the Pact of Bogotá.

3.130 A second attempt to overthrow the Costa Rican Government was undertaken in 1955 by the same rebel faction, supported once more by Nicaragua. Again, the parties ended up before the Council of the Organization of American States which brokered the Agreement of 9 January 1956.<sup>345</sup> That Agreement was intended to “maintain the close friendship as befits two fraternal and neighbouring peoples, and to avoid in future any dispute which may disrupt their fraternal relations...”<sup>346</sup>

3.131 Pursuant to Article I – signifying the importance given to this matter in the 1956 Agreement – the parties “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”. One of these activities is singled out by Article I, namely, that of facilitating and expediting 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”. In particular, the parties undertake to “facilitate those transport services which may be provided to the territory of one Party by enterprises which are nationals of the other.”

3.132 Article II of the Agreement calls for border surveillance and the prevention of the illegal entry of weapons or armed groups from the territory of one Party into that of the other. Articles III and IV require each Party to prevent, on its territory, participation in subversive undertakings against the other Party, while Article IV deals with the application of Articles I to III and V

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344 CRM, Annexes, Vol 2, Annex 24.

345 CRM, Annexes, Vol 2, Annex 24. For a short historical description, see CRM, paras. 2.51-2.52.

346 See CRM, Annexes, Vol 2, Annex 24, Preamble.

to X of the Havana Convention Concerning the Duties and Rights of States in the Event of Civil Strife of 20 February 1928.<sup>347</sup>

3.133 Nicaragua expresses the view that the 1956 Agreement is not germane to the issue as it focused on ending civil strife and preventing future insurrectionary activities, and that it contained no obligations beyond those resulting from the 1858 Treaty and the Cleveland Award. As the latter texts only provide for a right of navigation “*con objetos de comercio*” meaning, according to Nicaragua, “with articles of trade”, the duty to facilitate and expedite traffic on the San Juan River, stipulated in Article I of the 1956 Agreement, only operated within that framework. This being so there is nothing to facilitate or expedite.<sup>348</sup>

3.134 If this were true Article I, placed at the head of the operative provisions of the Agreement, would be bereft of meaning, which cannot be presumed, given the importance of the 1956 Agreement and the circumstances of its conclusion. Costa Rica has always interpreted “*con objetos de comercio*” as meaning “for purposes of commerce”.<sup>349</sup> This interpretation, which was accepted by Nicaragua for a long time, gives full meaning to Article I of the 1956 Agreement: there is a perpetual right of *free* navigation which the parties, in Article I, undertake to render more effective. This is an obligation, squarely placed in the centre of the Agreement rather than in its preamble or somewhere on its periphery. By practically nullifying Costa Rica’s perpetual right of free navigation as from the mid-1990s, Nicaragua has disregarded the duty to facilitate and expedite traffic on the San Juan River.

3.135 To this one may add that, under Article I of the 1956 Agreement, the parties have also accepted to facilitate transport services offered by enterprises belonging to nationals of one State through the territory of the other. On account of the conditions prevailing in the border area, this effectively means transport services offered by Costa Rican operators on the San Juan, which Nicaragua considers its territory. Accordingly, by entering into the 1956 Agreement Nicaragua recognised what it now contests: that Costa Rica’s perpetual right

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347 134 LNTS 45.

348 NCM, paras. 6.2.1-6.2.10.

349 See above, paragraphs 3.39-3.78.

of free navigation encompasses the transportation of persons, including tourists.<sup>350</sup>

## F. The issue of “Border Courtesy”

### (1) What is meant by “Border Courtesy”?

3.136 In its Counter-Memorial, in relation to the practice followed in matters of navigation and defence, Nicaragua devotes some attention to what it calls “border courtesy”, that is, behaviour motivated not by the idea of fulfilling a legal duty but by the wish to be a good neighbour. Other expressions used by Nicaragua, such as “toleration” and “*ex gratia* concessions”, carry a similar meaning. When making reference to such behaviour on its part, Nicaragua seeks to convey that this behaviour was not inspired by any sense of legal duty and was not, therefore, legally relevant for the interpretation of the 1858 Treaty and of the 1888 Award. A variation of this line of argument is the assertion that certain agreements entered into by the two States, such as the Cuadra-Lizano Joint Communiqué of 8 September 1995, have no normative value, or that they are null and void.<sup>351</sup>

### (2) Nicaragua’s strategy of denial

3.137 Nicaragua’s strategy, as outlined in its Counter-Memorial, is to profess a wish to cooperate with its neighbours, particularly Costa Rica, to extend courtesies to them, and to apply principles of good neighbourliness.<sup>352</sup> It claims to follow these policies, “because she is convinced they are principled and right, not out of any sense of legal obligation”,<sup>353</sup> and regrets that Costa Rica has repaid these kindnesses by “engaging in patterns of conduct designed to enlarge her existing rights or even to establish new ones”. In addition, speaking of matters such as sports, tourism, defence, customs, migration and illegal trafficking, Nicaragua points out:

“it is possible to establish mechanisms of border cooperation through an agreement... Nicaragua has always been and continues to be willing to negotiate and implement these types of agreements as has already been done in the past.”<sup>354</sup>

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350 NCM, paras. 4.1.37-4.1.43.

351 NCM, paras. 3.2.8 and 3.2.12.

352 NCM, paras. 6.1.1-6.1.2.

353 NCM, para. 6.1.1.

354 NCM, para. 4.3.7.

This passage may, incidentally, reveal a contradictory attitude: on the one hand, Nicaragua advocates the conclusion of agreements to organise border cooperation while, on the other, it denies relevance or validity to most existing agreements. It may be observed that if Nicaragua's attitude really existed, the present dispute would not have arisen, or would have been resolved by agreement.

3.138 In fact Nicaragua aims at establishing a virtual monopoly of navigation for its own benefit, reducing Costa Rica's perpetual right of free navigation to a privilege the content of which would be determined, essentially, by Nicaragua itself. This is to be achieved partly by a narrow interpretation of the right of navigation, partly by asserting that activities and situations acquiesced in over time by Nicaragua had resulted from forbearance on the part of a country which, being the territorial sovereign, can do whatever it pleases, and partly by issuing threats.

3.139 Nicaragua accuses Costa Rica of behaving as if the boundary between them were located, not on the Costa Rican bank of the San Juan but in the middle of the River.<sup>355</sup> What Costa Rica is attempting is a "crude revision" of the 1858 Treaty<sup>356</sup> through claims characterised as abusive.<sup>357</sup> To Nicaragua, Costa Rica has constantly claimed new navigation rights:

"through a practice of abusing permission to navigate ... or establishing a pattern of requesting and receiving permission to navigate, then doing so without permission, claiming justification in the 1858 Treaty and Cleveland Award."<sup>358</sup>

Nicaragua has responded to this by "enforcing her laws," whereupon Costa Rica has accused Nicaragua of violating the Treaty and the 1888 Award.<sup>359</sup> According to Nicaragua, this is the way in which Costa Rica has proceeded regarding the alleged right of public vessels to re-supply border posts and also in relation to sporting activities and tourism.<sup>360</sup>

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355 NCM, para. 4.1.5.

356 NCM, para. 4.3.8.

357 NCM, para. 4.3.20.

358 NCM, para. 6.2.17.

359 NCM, paras. 6.1.3, 6.2.17 and 6.1.28.

360 NCM, para. 4.3.27.

3.140 This description misrepresents the Costa Rican claim. Nicaragua has a long tradition of eroding Costa Rica's rights of navigation and protection by incessantly narrowing their scope and by attempting to make these rights subservient to its own discretion. Practices relating to the rights attributed to Costa Rica by the 1858 Treaty, as supplemented by the 1888 Award, are given no status as treaty or customary law, or as practice subsequent to the 1858 Treaty and the Cleveland Award.

### **(3) Analysis of some arrangements and practices**

#### **(a) The right of navigating public armed vessels**

3.141 As pointed out in Costa Rica's Memorial,<sup>361</sup> Costa Rican armed revenue vessels navigated in the lower part of the river without any objection from Nicaragua, as is shown by the "Adela" incident and by other subsequent practice.<sup>362</sup> This state of affairs, which continued until 1998, is characterised as a pure "border courtesy" by Nicaragua, after a practice stretching over more than one hundred years based on the Treaty of Limits, the 1888 Award and the 1916 judgment. In the latter the Central American Court of Justice referred to: "[t]he proposition that the rights of navigation on the San Juan River that were confirmed in Costa Rica do not extend to vessels of war, but simply to vessels devoted to revenue and defensive purposes - an interpretation that in no way detracts from the doctrine set forth concerning the practical ownership pertaining in great part to Costa Rica over the

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361 CRM, para. 4.85.

362 CRM, paras. 4.85-4.86. See also this Reply, paragraphs 1.15 and Appendix, paragraphs A.33-A.44. See also Note from Commandant of the Rosalía Revenue Guard to the Deputy Inspector of the Treasury, 20 October 1915: CRR, Annexes, Vol 2, Annex 31; Note from Commandant of the Rosalía Revenue Guard to the Deputy Inspector of the Treasury, 18 December 1915: CRR, Annexes, Vol 2, Annex 32; 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, Annexes, Vol 2, Annex 33; 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, Annexes, Vol 2, Annex 34; Note from the Revenue Guard of Boca de San Carlos to Chief of Personnel of the General Inspectorate of the Treasury, 5 August 1968: CRR, Annexes, Vol 2, Annex 35; 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, Annexes, Vol 2, Annex 36; Costa Rican Police Major and Chief of 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, Annexes, Vol 2, Annex 37; and 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, Annexes, Vol 2, Annex 38. Further evidence of Costa Rican official navigation is annexed to this Reply in the form of a "departure clearance certificate" issued by Costa Rican authorities, as explained in CRM, para. 5.07: "Departure Clearance Certificate" issued by the Costa Rican Revenue Guard in Boca del río Sarapiquí to a Costa Rican Park Ranger, 15 June 1968: CRR, Annexes, Vol 2, Annex 679b).

San Juan River because navigation with vessels of war, aside from constituting a cause for disquiet, would imply a function appropriate to territorial sovereignty.”<sup>363</sup>

3.142 The interpretation yielded by that practice and confirmed by a decision of an international tribunal is dismissed by Nicaragua, which sees it as a mere “courtesy” within a framework of cooperation and neighbourliness.<sup>364</sup> In 1998 Nicaragua banned armed public vessels from the San Juan, arguing that their presence was not authorised under the 1858 Treaty and conveniently forgetting that the Second Article of the Cleveland Award, which has force of *res judicata* for the two States, confirms Costa Rica’s right to:

“navigate [the 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 [Article VI], or as may be necessary to the protection of said enjoyment.”<sup>365</sup>

3.143 Nicaragua subsequently advocated a solution by proposing a system of permits granted on a temporary basis. Costa Rica proposed a system of notification which would have left intact Costa Rica’s right to navigate while dealing with Nicaragua’s security concerns. This compromise was not, however, acceptable to Nicaragua, which insisted on a system of authorisation.<sup>366</sup>

3.144 Evidently Nicaragua was no longer willing to conform to the instruments and texts of 1858, 1888 and 1916. But Nicaragua’s attempt to modify the interpretation previously given to those instruments and texts cannot have ended more than a century of concordant practice, transforming rights regularly exercised to privileges on mere goodwill.

#### **(b) The Cuadra-Castro Joint Communiqué of 8 September 1995**

3.145 The 1995 Cuadra-Castro Joint Communiqué is an agreement between the Nicaraguan Army and the Ministry of Public Security of Costa Rica to coordinate operations in the border areas of the two States “thereby joining forces in the battle against the illegal trafficking of persons, vehicles, contraband

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363 CRM, para. 4.92; CRM, Annexes, Vol 2, Annex 21.

364 NCM, paras. 6.1.5-6.1.23.

365 CRM, Annexes, Vol 2, Annex 16, p. 98.

366 NCM, paras. 6.1.16-6.1.20. See CRM, Annexes, Vol 3, Annexes 64, 65 and 66.



of any nature and joint operations...”<sup>367</sup> As Nicaragua notes, the Communiqué is not specifically related to the border at the San Juan.<sup>368</sup> But one can scarcely say, as Nicaragua does, that the Communiqué lacked normative content since it provided for cooperation in the border regions of the two States; nor can it be asserted that it did not apply to the common navigation area of the San Juan River.

**(c) The Cuadra-Lizano Joint Communiqué of 30 July 1998**

3.146 In the Cuadra-Lizano Joint Communiqué of 30 July 1998 the Minister of Defence of Nicaragua and Costa Rica’s Minister of Government, Police and Public Security express their respect for Nicaraguan sovereignty over the waters of the San Juan and for Costa Rica’s rights of navigation. The text allows Costa Rican armed public vessels to navigate on the River to relieve and re-supply boundary posts on the Costa Rican side, provided that notice has been given and that the Costa Rican agents in those vessels only carry their normal arms. Nicaraguan authorities may accompany them on their journey, and movements must be reported to the Nicaraguan border posts along the way.

3.147 This Communiqué has the characteristics of a legally binding text.<sup>369</sup> Moreover, it takes into account the interests of both sides: Costa Rica is allowed to re-supply boundary posts which are difficult to access or inaccessible on land or by air, while Nicaragua is fully informed of such activities. Nicaragua’s excuse for jettisoning this instrument is that it is “certainly not ...self-executing”,<sup>370</sup> the other is that it was “legally null and void and non-existent”, in particular because it was signed by persons lacking treaty-making power and because it was found, “after due analysis, ... that it could infringe the national sovereignty of Nicaragua.”<sup>371</sup> The declaration of nullity made by the Foreign Minister of Nicaragua was rejected by the Costa Rican Foreign Minister on 12 August 1998.<sup>372</sup>

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367 CRM, Annexes, Vol 2, Annex 27, Point 1.

368 NCM, para. 6.1.8.

369 NCM, para. 3.2.11.

370 NCM, para. 3.2.11.

371 NCM, para. 3.2.12.

372 CRM, para. 3.31 and CRM, Annexes, Vol 3, Annex 50.

3.148 This recital shows the inflexibility of Nicaragua's views on sovereignty. Nothing can grow next to it: Costa Rica's perpetual right of free navigation is regarded as nothing but an empty shell. Wherever an agreement supporting Costa Rica's claims appears, Nicaragua either declares it void or considers it as being deprived of normative content.

**(d) Presidential Letters exchanged on 28 and 29 June 2000**

3.149 On 28 June 2000, the President of Costa Rica suggested to his Nicaraguan counterpart the revival of the regime applied prior to 1998 to the navigation of Costa Rican public vessels on the San Juan, namely, that Costa Rican vessels would *inform* the Nicaraguan authorities. The President of Nicaragua indicated his willingness to resume cooperation, provided that *authorisation* would have to be sought for every voyage and that navigation by such vessels would neither imply the exercise of jurisdiction on the river nor adversely affect Nicaragua's territorial sovereignty. This exchange was nugatory – but it now prompts Nicaragua to conclude: (i) that its President had made it clear that the arrangement prior to 1998 applied as only a *modus operandi*; (ii) that it had been assented to *ex gratia*; and (iii) that the President's Costa Rican colleague had accepted this view.<sup>373</sup> This cannot, of course, be true since the President of Costa Rica, who would have agreed to a system of information, refused to accept one of authorisation.

3.150 While referring to the exchange of notes between the Presidents of Costa Rica and Nicaragua that took place in June 2000, Nicaragua's Counter-Memorial quotes part of the Conclusion of Resolution 2001-08239 dated 14 August 2001, of Costa Rica's Constitutional Chamber. Nicaragua first suggests that:

"...the President of Costa Rica accepted in his note of 28 June 2000 that Costa Rica did not have a right to navigate on the San Juan with 'police and their police equipment' without informing 'Nicaraguan authorities...each time they patrol the San Juan.' ....it is clear from the 29 June 2000 note of the President of Nicaragua that Costa Rica had no right to navigate on the San Juan for the purpose of provisioning border posts but that Nicaragua was willing to consider allowing Costa Rican police authorities to travel on the lower San Juan for purpose of provisioning the posts on that part of the river so long as they were given permission in each case by the Nicaraguan authorities."<sup>374</sup>

373 NCM, paras. 6.1.18-6.1.19. See also CRM, paras. 3.38-3.39.

374 NCM, para 6.1.19

3.151 Nicaragua's Counter-Memorial goes on to explain that the exchange of notes between the two Presidents was submitted to the "Fourth Constitutional Court"<sup>375</sup> which indicated that it found nothing in President Rodríguez's note of 28 June which "ran counter to Costa Rica's position." Nicaragua's Counter-Memorial quotes the judgment as follows:

"VIII – Conclusion. On the basis of the foregoing arguments, this Court concludes that the diplomatic note sent by the President of the Republic of Costa Rica on 28 June 2000 to the President of Nicaragua, is not unconstitutional, and consequently declares the present action [of unconstitutionality] without basis, dismissing it from the Court."<sup>376</sup>

3.152 Nicaragua seeks to represent that Costa Rica's own courts have denied that Costa Rica has a right to navigate on the San Juan for the purpose of supplying border posts. Of course this is not true. A careful reading of Resolution 2001-08239 of 14 August 2001 shows the opposite: that Costa Rica has a right to free navigation on the San Juan. The Court held:

"It is not contradictory, inasmuch as the said instruments provide that Nicaragua has complete sovereignty and authority over the San Juan River, *while Costa Rica holds the perpetual right to use its lower banks for commercial, revenue and security purposes*. The referenced note states only that the Government of Costa Rica shall inform its peer in Nicaragua each time its police force must navigate on the San Juan River with law enforcement equipment. It is worth noting that in the note at issue, *the said navigation is not subject to obtaining a permit, but to—as was stated—simple communication*, which is entirely in keeping with the terms of the instruments governing the matter. The possibility for navigation by other types of Costa Rican boats is not limited in any way whatsoever either, and there is no waiver of any other rights held by Costa Rica in respect of the lower banks of the San Juan River."<sup>377</sup> (emphasis added)

3.153 It was after this consideration that Costa Rica's Constitutional Chamber declared that the note was not unconstitutional. Thus, it can be clearly observed that the Chamber correctly understood the contents of President Rodríguez's note of 28 June 2000 vis-à-vis the extent of Costa Rica's navigational rights.

3.154 It may be noted that once again Nicaragua presents an inaccurate English translation, in this case of Resolution 2001-08239 of 14 August 2001 of Costa Rica's Constitutional Chamber which distorts the true extent of Costa Rica's

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375 Although Nicaragua referred to this as the "Fourth Constitutional Court", it is formally referred to as the "Constitutional Chamber" and informally referred to as the "Fourth Chamber" or "*Sala Cuarta*."

376 NCM, para. 6.1.19.

377 NCM, Vol II, Annex 66, p. 236.

rights on the San Juan. Nicaragua's English version of the Resolution stated that "Costa Rica holds the perpetual right to use its lower *banks* for commercial, revenue and security purposes" (emphasis added).<sup>378</sup> However, the original Spanish text uses the following wording: "*Costa Rica detenta sobre el cauce bajo de aquel, un derecho perpetuo de uso para fines comerciales, fiscales y de seguridad*" (emphasis added).<sup>379</sup> "Cauce" is to be translated as "course," not as "bank". Thus the correct English translation provides: "Costa Rica holds the perpetual right to use its lower course for commercial, revenue and security purposes."

**(e) The requests for permission to navigate made in 2006**

3.155 On 19 June 2006, the Costa Rican Institute of Social Security requested permission to navigate on the San Juan in order to provide health care services to local communities. So did a Christian association which intended to carry out missionary work in some of those communities. The requests were accepted by way of "special" authorisations granted by the Nicaraguan authorities. In the event of breaches of Nicaraguan laws, the permits could be cancelled; and the Nicaraguan authorities could carry out routine inspections on the vessels. The grant of these authorisations was explained as a "gesture of friendship, good neighbourhood and courtesy of good faith [*sic*]". This explanation is indicative of Nicaragua's attitude in the matter, namely that, when the use of the waters of the San Juan is not specifically authorised by the 1858 Treaty and the Cleveland Award, there must be an authorisation. Nicaragua adds that Costa Rica accepted that state of affairs.<sup>380</sup>

3.156 These arguments are easily dismissed. First, the requests in question were made in June 2006, that is, nine months after the filing of the Costa Rican Application on 29 September 2005; they cannot, therefore, be taken into account. Second, one of the requesting entities was a private entity whose views or actions cannot be imputed to the State of Costa Rica. Third, regarding the first entity and its preoccupation with public health, there was simply no other way to perform its vital duties, as is explained in Dr. Thais Ching's Affidavit

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378 NCM, Vol II, Annex 66.

379 NCM, Original Documents deposited within the Registry, Part III, Annex 66.

380 NCM, paras. 6.2.12-6.2.16.

annexed to the present Reply.<sup>381</sup> This is discussed in more detail in Chapter 4.<sup>382</sup>

## G. Conclusions

3.157 The following conclusions may be drawn as to the substance of the rights relied on by Costa Rica:

- (1) A good faith interpretation, the ordinary meaning of the terms in their context –both internal and external – taking into account the object and purpose of the Treaty of Limits leads to the inexorable conclusion that the phrase “*con objetos de comercio*” means “for purposes of commerce” and not “with objects of trade”.
- (2) Subsequent agreements, subsequent practice and relevant rules of international law applicable to the dispute confirm this interpretation, as do the antecedents of the 1858 Treaty and the circumstances of its conclusion. The expressed and real intention of the parties – to which Nicaragua claims to attribute significance – was to include transport of “persons and property” and not exclusively merchandise.
- (3) Costa Rica is entitled to navigate with public vessels manned by Costa Rican officials carrying their normal arms on that part of the San Juan where navigation is common, in exercise of its right of communication through the San Juan and in order to protect its freedom of navigation, to safeguard the River, to defend the boundary areas as well as the common Bay of San Juan del Norte.

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381 Affidavit of Thais Ching Zamora, 8 August 2007: CRR, Annexes, Vol 2, Annex 55. In her testimony, Dr. Ching declares that “her job is not to make considerations of a legal character and that, given the imperative need to provide urgent services to the populations in order to safeguard the health and the lives of people, particularly of children and other social groups in risk in the area of the San Juan river, she wrote under the terms demanded by the Ambassador [of Nicaragua], all done as a result of the urgent state of necessity, given the ... imminent sanitary risks”. In this connection, one notes with interest that, in a letter addressed to Lic. Baldelomar, Cónsul of Nicaragua in Ciudad Quesada, Dr. Ching states that 50 per cent of the people taken care of by her Institute in the area of Puerto Viejo de Sarapiquí are from Nicaragua. This means that to provide health care to Nicaraguans in Costa Rican territory, the Costa Rican authorities have to request Nicaragua’s permission. See Director, Costa Rican Social Security Fund, Health Area Puerto Viejo de Sarapiquí, Dr. Thais Ching Zamora, to First Cónsul, Nicaraguan Consulate, Ciudad Quesada, Licenciado Mario Rivas Baldelomar, Note No. 346-2006, 14 June 2006: CRR, Annexes, Vol 2, Annex 44.

382 See below, paragraphs 4.26-4.30.

- (4) Costa Rican vessels exercising the right of navigation are entitled to hoist the Costa Rican flag and cannot be obliged to hoist the Nicaraguan flag as a condition for that exercise.
- (5) There is a consistent practice – recognised by Nicaragua – allowing the inhabitants of the right bank of the San Juan to fish for subsistence purposes, which has created a customary right to fish for these purposes.
- (6) The conventional right to land on the Nicaraguan bank cannot be restricted by regulations which effectively deny the right of any practical effect.
- (7) The 1956 Agreement imposes an autonomous obligation on Nicaragua to facilitate and to expedite traffic on the San Juan River.
- (8) Any attempt by Nicaragua to deny Costa Rica's rights by considering them as subject to a simple "border courtesy" dependent on the goodwill of Nicaragua has no basis and must be rejected.

**Table 1**  
**Use of the term “*objetos*” as meaning “purposes” in 19th Century documents**

Document	Reference	Description in Spanish	Description in English
1 Costa Rica-León Treaty (Montealegre-Solis), León, 9 September 1823	NCM Annex 2 English translation by Nicaragua	Artículo 2: “Que siendo el principal <u>objeto</u> de estos tratados la alianza y justa correspondencia....”.	Article 2: “That the main <u>object</u> of these treaties being an alliance and reciprocity...”
2 Decree of the Central American Federation Congress regarding an inter Oceanic Canal through Nicaragua, Guatemala, 16 June 1825	CRR Annex 4 Source: <i>Compilación de Leyes no insertas en las Colecciones Oficiales, formada por el Lic Don Cleto González Víquez</i> , Tomo 1 (San José), pp. 411-413 English translation by Costa Rica	“Que por varias casas y compañías de comercio extranjerass, se han hecho diferentes propuestas al Gobierno Supremo con el <u>objeto</u> de abrir un canal de navegación entre los dos mares Pacífico y Atlántico...”  Artículo 4: “El Gobierno deberá también contribuir a su más pronta y fácil ejecución; permitiendo el corte de maderas necesarias para la obra; auxiliando los reconocimientos, nivelaciones y demás operaciones que hayan de practicarse, haciendo franquear los planos y mapas relativos <u>al objeto</u> ; y cooperando a su logro por todos los medios que no se opongan a la justicia ni al interés general, o al particular de los ciudadanos.”	“That several foreign trade houses and companies have made different proposals to the Supreme Government with the <u>purpose</u> of opening a navigational channel between both the Pacific and Atlantic oceans...”  Article 4: “The Government shall also contribute to its fastest and easiest execution, allowing the felling of the woods necessary for the task; facilitating the surveys, levelling and other operations that should be practiced; clearing the plans and maps relating to <u>this purpose</u> ; and cooperating for its achievement through any means that are not opposed to the justice nor the general interest, or that particular of the citizens.”

Document	Reference	Description in Spanish	Description in English
3 Contract Between Nicaragua and the American Atlantic and Pacific Ship-Canal Company (Zepeda-Juarez-White), León, 27 August 1849	<p>NCM Annex 14 (Preamble, Articles 18, 27 and Concluding Provision)</p> <p>English translation by Nicaragua</p> <p>CRR Annex 6 (Article 37)</p> <p>No translation of Article 37 having been provided by Nicaragua, English translation of Article 37 by Costa Rica. Source: NCM Annex 14.</p>	<p>Preamble: “El Director Supremo del Estado de Nicaragua y la “Compañía AMERICANA DEL CANAL MARÍTIMO ATLANTICO PACÍFICO”... deseando arreglar los términos de un contrato que facilite el tránsito por el istmo de Nicaragua, desde el Océano Atlántico al Pacífico, por medio de un canal marítimo, ó por un ferro-carril; han nombrado comisionados, por parte del Director Supremo del Estado de Nicaragua, á los Señores Licenciados Hermenegildo Zepeda y Gregorio Juarez, y por parte de la expresada Compañía al Sr. L. White, con plenos poderes para formar y concluir un contrato para los referidos <u>objetos</u>, cuyos comisionados, habiendo canjeado sus poderes, han ajustado y firmado los artículos siguientes.</p> <p>Artículo 18: “...Y al propio tiempo, con el <u>objeto</u> de llamar por esta ruta la más extensa concurrencia de los negocios...”</p> <p>Artículo 27: “El Estado de Nicaragua, con el <u>objeto</u> de facilitar la colonización de las tierras contiguas al rio de San Juan...”</p>	<p>Preamble: “The Supreme Director of the State of Nicaragua and the Atlantic-Pacific Maritime Canalization American Company... being desirous of concluding the terms of a contract that facilitates transit through the isthmus of Nicaragua, from the Atlantic to the Pacific Ocean, through a maritime canal or railroad, have resolved for that purpose to appoint Commissioners, to wit: The Supreme Director of the State of Nicaragua, Licentiates Hermenegildo Zepeda and Gregorio Juarez, and the aforementioned Company, Mr. David L. White, conferring upon them full powers to conclude and sign a contract for the aforesaid <u>purpose</u>, who, after exchanging their power, have agreed upon the following articles...”</p> <p>Article 18: “...At the same time, with the <u>objective</u> of drawing the broadest business to this route...”</p> <p>Article 27: “The State of Nicaragua, with the <u>objective</u> of facilitating the colonization of the land next to the San Juan River...”</p>



Document	Reference	Description in Spanish	Description in English
		<p>Artículo 37: “Queda finalmente estipulado que este contrato, y los derechos y privilegios que confiere se tendrán por inajenables por los individuos que componen la Compañía nominada en el presente y sus socios; y que en ningún tiempo deberán transferirse ó asignarse en el todo ó en parte á cualquiera otra Compañía, y de ningún modo depender, ni tener coherencia con ninguna, sean los que fuesen sus <u>objetos</u>.”</p> <p>Concluding provision: “El precedente contrato habiendo sido debidamente ratificado por la Lejislatura del Estado de Nicaragua; ahora por esta razón yo David L. White como Comisionado por parte de la Compañía americana del canal marítimo Atlántico Pacífico, investido de plenos poderes que se me confirieron con este <u>objeto</u>...</p>	<p>Article 37: “It is finally stipulated that this contract, as well as the rights and privileges it confers, will be considered as inalienable by the individuals that comprise the Company mentioned herewith and their partners, and that at no time shall they be transferred or assigned wholly or in part to any other Company, and in no way depend or be connected to any, whatever might be their <u>purposes</u>.”</p> <p>Concluding provision: “The present contract having been duly ratified by the Legislature of the State of Nicaragua, now, for this reason, I, David L. White, Commissioner on behalf of the U.S. company Atlantic Pacific Maritime Canal Company, vested with full powers conferred upon me by the parties for this <u>purpose</u>...”</p>

Document	Reference	Description in Spanish	Description in English
4 United States-Nicaragua, General Treaty of Amity, Navigation, and Commerce, (Squier-Zepeda), Leon, 3 September 1849	CRR Annex 7 (Articles XXVI, XXXIII, XXXIV and XXXV)  Source: <i>Unperfected Treaties of the United States of America 1776-1976, Vol 1 1776-1855</i> , pp. 280-302  Both the Spanish and English documents are authentic.	Artículo XXVI: “Siempre que una de las partes contratantes estuviere empeñada en guerra con otro estado, ningún ciudadano de la otra parte contratante aceptará comisión o patente de corso para el <u>objeto</u> de auxiliar ó cooperar hostilmente con el dicho enemigo contra la mencionada parte que este en guerra, bajo la pena de ser tratado como pirata.”	Article XXVI: “Whenever one of the contracting parties shall be engaged in war with another state, no citizen of the other contracting party shall accept a commission or letter marque for the <u>purpose</u> of assisting or co-operating hostilely with the said enemy against the said parties so at war, under the pain of being treated as a pirate.”
		Artículo XXXIII: “Los dichos consules tendrán facultad para requerir el ancilio de las autoridades locales para la prision, detencion, y custodia de los desertores de buques, publicos o particulares, de su respectivo pais; y con este <u>objeto</u> se dirigirán a los tribunales, jueces y empleados competentes...”	Article XXXIII: “The said consuls shall have power to require the assistance of the authorities of the country for the arrest, detention, and custody of deserters from the public and private vessels of their country; and for that <u>purpose</u> they shall address themselves to the courts, judges, and officers competent...”
		Artículo XXXIV: “...Con el <u>objeto</u> de proteger mas eficazmente su comercio y navegación...”	Article XXXIV: “For the <u>purpose</u> of more effectually protecting their commerce and navigation...”

Document	Reference	Description in Spanish	Description in English
		<p>Artículo XXXV: "... y se estipula también que todo producto, manufacturas, mercancías ú otras propiedades de licito comercio, pertenecientes a ciudadanos de los estados Unidos, que pasen de un océano al otro en ambas direcciones, con <u>objeto</u> de exportacion a países extranjeros, no serán sujetos a derechos de importación o exportacion; ó que si ciudadanos de dichos estados habiendo introducido al estado de Nicaragua productos, manufacturas y mercancías con el <u>objeto</u> de venderlas ó cambiarlas"</p>	<p>Article XXXV: "...And it is also stipulated, that all lawful produce, manufactures, merchandise, or other property belonging to citizens of the United States passing from one ocean to the other, in either direction, for the <u>purpose</u> of exportation to foreign countries, shall not be subject to any import or export duties whatsoever ; or if any citizens of the United States, having introduced such produce, manufactures, or merchandise into the State of Nicaragua, <u>for</u> sale or exchange..."</p>
<p>5 United States-Great Britain, Convention Concerning a Ship Canal Connecting the Atlantic and Pacific Oceans (Clayton-Bulwer), Washington, 19 April 1850 (in force 4 July 1850)</p>	<p>CRR Annex 8 (Preamble, Articles III and VIII)</p> <p>Sources:</p> <p>Spanish version: MM Peralta, <i>El Canal Interoceánico de Nicaragua y Costa Rica en 1620 y en 1887</i> (Bruselas: Imprenta de Ad. Mertens, 1887), pp. 68-71</p> <p>English version: 104 CTS 41</p>	<p>Preamble: "SU MAJESTAD BRITANICA y los Estados Unidos de América deseando consolidar las relaciones de amistad que tan felizmente subsisten entre ellos, estableciendo y fijando en un convenio sus miras é intenciones referentes á cualesquiera medios de comunicación por canal navegable que pueda construirse entre los océanos Atlántico y Pacífico por la vía del río San</p>	<p>Preamble: "The United States of America and HER BRITANNIC MAJESTY, being desirous of consolidating the relations of amity which so happily subsist between them, by setting forth and fixing in a Convention, their views and intentions which reference to any means of communication by Ship Canal, which may be constructed between the Atlantic and Pacific Oceans, by the</p>

Document	Reference	Description in Spanish	Description in English
		Juan de Nicaragua y cualquiera ó ámbos de los lagos de Nicaragua ó Managua, á un puerto ó lugar del océano Pacífico; Su Majestad Británica ha conferido plenos poderes al Muy Honorable Sir Henry Lytton Bulwer... y el Presidente de los Estados Unidos á John M. Clayton, Secretario de Estado de los Estados Unidos, con el <u>objeto</u> expresado...”	way of the River San Juan de Nicaragua and either or both of the Lakes of Nicaragua or Managua, to any port or place on the Pacific Ocean,- -The President of the United States has conferred full powers on John M. Clayton, Secretary of State of the United States; and HER BRITANNIC MAJESTY on the Right Honourable Sir Henry Lytton Bulwer....for the aforesaid <u>purpose</u> ...”
		Artículo III: “...las personas empleadas en construirlo y su propiedad usada o que se use con tal <u>objeto</u> serán protegidas...”	Article III: “...the persons employed in making the said Canal and their property used, or to be used, for that <u>object</u> , shall be protected...”
		Artículo VIII: “Los Gobiernos de la Gran Bretaña y de los Estados Unidos, queriendo al celebrar esta convención, no solamente realizar un <u>objeto</u> particular...”	Article VIII: “The Governments of the United States and Great Britain having not only desired in entering into this Convention, to accomplish a particular <u>object</u> ...”

Document	Reference	Description in Spanish	Description in English
6 Costa Rica-United States Treaty of Friendship, Commerce and Navigation (Molina-Webster), Washington, 10 July 1851	<p>CRR Annex 9 (Preamble, Articles II and XII)</p> <p>Spanish version: <i>Colección de los Tratados Internacionales Celebrados por la Republica de Costa Rica</i> (San José: Tipografía Nacional), 1893, Vol. I, pp. 65-72</p> <p>English version: <i>Report of the Isthmian Canal Commission 1899-1901</i> (Washington: Government Printing Office, 1904) pp. 417-420</p>	<p>Preamble: “Habiendotráfico comercial establecido, hace algún tiempo, entre la República de Costa Rica y los Estados Unidos, ha parecido conveniente para la seguridad como también el fomento de sus mutuos intereses, y para la conservación de la buena inteligencia entre la mencionada República y los Estados Unidos, que las relaciones que ahora existen entre ambas Partes, sean reconocidas y confirmadas formalmente por medio de un tratado de amistad, comercio y navegación. Con este <u>objeto</u> han sido nombrados los respectivos Plenipotenciarios...”</p> <p>Artículo II: “...Los ciudadanos y súbditos de los dos países, respectivamente, tendrán libertad para... alquilar y ocupar casas y almacenes <u>para los objetos de su comercio...</u>”</p> <p>Artículo XII: “...No serán inquietados, molestados ni perturbados en manera alguna, en razón de su creencia religiosa, ni en los ejercicios propios de su religión ya dentro de sus casas particulares, en los lugares de culto destinados para aquel <u>objeto...</u>”</p>	<p>Preamble: “Commercial intercourse having been for some time established between the United States and the Republic of Costarica, it seems good for the security as well as the encouragement of such commercial intercourse, and for the maintenance of good understanding between the United States and the said republic, that the relations now subsisting between them, should be regularly acknowledged and confirmed by the signature of a Treaty of Amity, Commerce and Navigation. For this <u>purpose</u> they have named their respective Plenipotentiaries...”</p> <p>Article II: “...The subjects and citizens of the two countries shall have liberty freely and securely to.... hire and occupy and occupy houses and ware houses <u>for the purpose of their commerce...</u>”</p> <p>Article XII: “...They shall not be disturbed, molested or annoyed in any manner on account of their religious belief, nor in the proper exercise of their religion, either within their own private houses or in the places of worship destined for that <u>purpose...</u>”</p>

Document	Reference	Description in Spanish	Description in English
7 Chamorro-Mayorga-White Convention, Granada, 14 August 1851	NCM Annex 3 English translation by Nicaragua	Artículo 1: "...con el único <u>objeto</u> de facilitar la construcción del canal marítimo..."	Article 1: "...for the sole <u>purpose</u> of facilitating the construction of a maritime canal..."
		Artículo 3: "La compañía nuevamente creada procederá á ejecutar y á cumplir aquellos <u>objetos</u> de su competencia (...) Todos aquellos actos ú <u>objetos</u> que puedan constituir una infracción de los derechos..."	Article 3: "The newly created Company will proceed to execute and comply with those <u>objectives</u> under its competence (...) All those acts or <u>objects</u> that may infringe the rights of..."
		Artículo 5: "...proceder á todo aquello que sea mas conveniente para el estricto cumplimiento del <u>objeto</u> de su instituto en la parte que le corresponda..."	Article 5: "...carry out whatever is more convenient for the strict compliance of the company <u>objective</u> as indicated..."
		Artículo 6: "...y adoptará todas las providencias necesarias para el cumplimiento del <u>objeto</u> expresado en...."	Article 6: "...will determine and approve all the necessary resolutions leading to the achievement of the <u>objective</u> set forth in..."
		Artículo 7: "Todas las propiedades, cosas, acciones, derechos, créditos y electos de la nueva compañía sesan libres de cualquiera especie de carga, ó impuesto durante el tiempo de la concesion ... para la construcción del canal marítimo y demas <u>objetos</u> ."	Article 7: "All properties, objects, shares, rights, credits and effects of the new Company will be free of all charges or duties for the duration of the concession ....regarding the building of the maritime canal and other <u>objects</u> ."

Document	Reference	Description in Spanish	Description in English
8 Irisarri-Stebbins Contract, New York, 19 June 1857	NCM Annex 15 English translation by Nicaragua	Artículo 2: "...Y con el <u>objeto</u> de averiguar..."  Artículo 3: "...Como el <u>objeto y la intención</u> de este artículo..."	Article 2: "...And for the <u>purpose</u> of accurately ascertaining..."  Article 3: "...Given that the <u>purpose and intent</u> of this article..."
9 United States-Nicaragua Treaty of Friendship, Commerce and Navigation (Cass-Irisarri), Washington DC, 16 November 1857	NCM Annex 5 (inaccurate English version) CRR Annex 10 (Articles II and XVI) Sources: English version: CL Wiktor, <i>Unperfected Treaties of the USA,</i> <i>Volume II 1856-1882</i> , pp. 135-143 Spanish version: US National Archives, Washington DC, Unperfected Treaty Series W-2	Artículo II: "Habrá recíproca libertad de comercio entre todos los territorios de la República de Nicaragua, y los territorios de los Estados Unidos. Los ciudadanos de los dos países, respectivamente, tendrán plena libertad de llegar franca y seguramente, con sus buques y cargamentos, á todos los lugares, puertos y ríos en los territorios mencionados, á los cuales se permita, ó se permitiere llegar á otros extranjeros, entrar en los mismos, y permanecer y residir en cualquiera parte de ellos, respectivamente, así como alquilar y ocupar casas y almacenes <u>para objetos de comercio</u> ; en general, los comerciantes y traficantes de cada nación, respectivamente, gozarán de la más completa protección y seguridad para su comercio, sujetos siempre á las leyes y estatutos de los dos países respectivamente...."	Article II: "There shall be, between all the territories of the United States and the territories of the Republic of Nicaragua, a reciprocal freedom of commerce. The subjects and citizens of the two countries, respectively, shall have full liberty, freely and securely, to come, with their ships and cargoes, to all places, ports, and rivers, in the territories aforesaid, to which other foreigners are, or may be, permitted to come, to enter into the same, and to remain and reside in any part thereof, respectively; also, to hire and occupy houses and warehouses <u>for the purpose of their commerce</u> ; and generally the merchants and traders of each nation, respectively, shall enjoy the most complete protection and security for their commerce, subject always to the laws and statutes of the two countries respectively...."

Document	Reference	Description in Spanish	Description in English
		Artículo XVI: "...si fuese necesario en cualquier tiempo emplear fuerza militar para la seguridad y protección de las personas y propiedades que pasen por cualquiera de las vías mencionadas, empleará la fuerza necesaria con tal <u>objeto</u> ...puede emplear tal fuerza para este <u>objeto</u> , con exclusión de cualquier otro..."	Article XVI: "...should it become necessary at any time to employ military force for the security and protection of persons and property passing over any of the routes aforesaid, it will employ the requisite force for that <u>purpose</u> ...employ such force, for this and for no other <u>purpose</u> ..."
10 Costa Rica-Nicaragua, Treaty of Limits (Cañas-Jérez), San José, 15 April 1858	CRM Annex 7	Artículo 6 (Original Spanish version):  "...pero la República de Costa Rica tendrá en dichas aguas, los derechos perpetuos de libre navegacion, desde la espresada desembocadura hasta tres millas inglesas ántes de llegar al Castillo Viejo, <u>con objetos de comercio</u> , ya sea con Nicaragua ó al interior de Costa Rica, por los rios de San Carlos ó Sarapiquí, ó cualquiera otra via procedente de la parte que en la ribera del San Juan se establece corresponder á esta República..."	Article VI (Costa Rican translation submitted to Cleveland):  "...but the Republic of Costa Rica shall have the perpetual right of free navigation on the said waters, between the said mouth and the point, three English miles distant from Castillo Viejo, said navigation being <u>for the purposes of commerce</u> 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..."



Document	Reference	Description in Spanish	Description in English
			<p>Article VI (Nicaraguan translation submitted to Cleveland):</p> <p>“...but the Republic of Costa Rica shall have perpetual rights, in the said waters, of free navigation from the river’s mouth to three English miles below Castillo Viejo <u>for the purposes of commerce</u>, whether with Nicaragua or the interior of Costa Rica, by way of the rivers San Carlos or Sarapiquí or any other route proceeding from the tract on the shores of San Juan that may be established as belonging to this Republic...”</p>
		<p>Artículo VIII (original Spanish version):</p> <p>“Si los contratos de canalización o de tránsito celebrados antes de tener el Gobierno de Nicaragua, conocimiento de este convenio, llegasen a quedar insubsistentes por cualquier causa, Nicaragua se compromete a no concluir otro sobre los expresados <u>objetos....</u>”</p>	<p>Article VIII (Costa Rican translation submitted to Cleveland):</p> <p>“If the contracts of canalization or transit entered into by the Government of Nicaragua previous to its being informed of the conclusion of this treaty should happen to be invalidated for any reason whatever, Nicaragua binds herself not to enter into any other arrangement for the aforesaid <u>purposes...</u>”</p>

Document	Reference	Description in Spanish	Description in English
			Article VIII (Nicaraguan translation submitted to Cleveland):  “If the contracts for a canal or a transit made before Nicaragua’s knowledge of this agreement should become incapable of duration through whatever cause, Nicaragua binds herself not to conclude any other for the said <u>objects</u> ...”
11 Costa Rica-Nicaragua Treaty of Peace, Friendship, Alliance and Commerce (Mora-Martínez), Rivas, 30 April 1858	CRR Annex 11 (Preamble)  Source: JM Bonilla, <i>Colección de Tratados Internacionales</i> (Managua: Tipografía Internacional, 1909)  English translation by Costa Rica	Preamble: “Nos, Juan Rafael Mora, Presidente de la República de Costa Rica, y Tomás Martínez, Presidente de la República de Nicaragua... deseosos de cimentar, bajo bases sólidas de justicia y reciprocidad, relaciones de vecindad, de amistad, de alianza y de comercio, que consoliden los sentimientos de fraternidad... hemos creído muy provechoso á los respectivos pueblos concluir un Tratado que asegure el logro de tan importantes <u>objetos</u> ...”	Preamble: “We, Juan Rafael Mora, President of the Republic of Costa Rica, and Tomás Martínez, President of the Republic of Nicaragua... willing to establish, over solid bases of justice and reciprocity, relations of neighbourliness, friendship, alliance and commerce, that consolidate the sentiments of fraternity...have considered of benefit to our respective peoples to conclude a Treaty that assures the achievement of such important <u>purposes</u> ...”

Document	Reference	Description in Spanish	Description in English
12 United States-Nicaragua Treaty of Friendship, Commerce and Navigation (Lamar-Zeledón), Managua, 16 March 1859	CRR, Annex 13 (Preamble, Article II)  English version: CL Wiktor, <i>Unperfected Treaties of the USA, Volume II 1856-1882</i> , pp. 157-166  Spanish version: US National Archives, Washington DC, Unperfected Treaty Series X-2	Preamble: “Los infraescritos Pedro Zeledón , Secretario de Relaciones Exteriores de la República de Nicaragua y Mirabeau B. Lamar, Ministro Residente de los Estados Unidos de América cerca de la misma República, <u>con el objeto de</u> que sean mantenidas las amistosas relaciones entre sus respectivos países...”  Artículo II: “Habrá recíproca libertad de comercio entre todos los territorios de la República de Nicaragua y los territorios de los Estados Unidos. Los ciudadanos de los dos países, respectivamente, tendrán plena libertad de llegar franca y seguramente, con sus buques y cargamentos á todos los lugares, puertos y ríos en los territorios mencionados, á los cuales se permita, ó se permitiere llegar á otros extranjeros; de entrar en los mismos, y permanecer y residir en cualquier parte de ellos, respectivamente; así como alquilar y ocupar casas y almacenes <u>para los objetos de su comercio</u> ; y en general los comerciantes y traficantes de cada Nación, respectivamente, gozarán de la más completa protección y seguridad para su comercio, sujetos siempre á las leyes y estatutos de los dos países respectivamente....”	Preamble: “The undersigned, Mirabeau B. Lamar, minister resident of the United States of America to the republic of Nicaragua, and Pedro Zeledón, secretary of foreign relations of said republic, <u>in order that</u> the most friendly relations may be maintained between their respective countries....”  Article II: “There shall be between all the territories of the United States and the territories of the Republic of Nicaragua a reciprocal freedom of commerce. The subjects and citizens of the two countries, respectively, shall have full liberty freely and securely to come with their ships and cargoes to all places, ports, and rivers in the territories aforesaid to which other foreigners are or may be permitted to come, to enter into the same, and to remain and reside in any part thereof, respectively; also to hire and occupy houses and warehouses <u>for the purposes of their commerce</u> ; and generally the merchants and traders of each nation, respectively, shall enjoy the most complete protection and security for their commerce, subject always to the laws and statutes of the two countries respectively...”

Document	Reference	Description in Spanish	Description in English
13 Great Britain-Nicaragua, Treaty of Friendship, Commerce and Navigation (Lennox Wyke-Zeledon), Managua, 11 February 1860	CRR Annex 15 (Preamble, Article XVII)  Source: 121 CTS 364  Both the Spanish and English versions are authentic.	Preamble: “Su Majestad la Reina del Reino Unidos de la Gran bretaña é Irlanda, y la República de Nicaragua, deseosas de mantener y mejorar las relaciones de buena inteligencia que felizmente existen entre ellas, y de promover el comercio entre sus respectivos subditos y ciudadanos, han juzgado conveniente concluir un Tratado de Amistad, Comercio y Navegación, y <u>con ese objeto</u> nombrado como sus Plenipotenciarios, a saber...”  Artículo XVII: “...ó en las capilla ó lugares de adoración designados con ese <u>objeto</u> ,...”	Preamble: “Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, and the Republic of Nicaragua, being desirous to maintain and improve the relations of good understanding which happily subsist between them, and to promote the commercial intercourse between their respective subjects and citizens, have deemed it expedient to conclude a Treaty of Friendship, Commerce, and Navigation, and have for <u>that purpose</u> named as their respective Plenipotentiaries, that is to say...”  Article XVII: “...or in the chapels or places of worship appointed for that <u>purpose</u> , ...
14 Zeledón-Rosa Contract, Managua, 30 December 1860	NCM Annex 17  Articles I and V English translation by Nicaragua.  As no English translation of Articles VII and XVII was provided by Nicaragua, English translation by Costa Rica.	Artículo I: “...lleven a cumplido efecto los <u>objetos</u> del presente contrato...”  Artículo V: “Siendo, como es, el <u>objeto</u> esencial del presente contrato...”  Artículo VII: “...durante la continuación del presente contrato, y para los <u>objetos</u> del mismo...”  Artículo XVII: “Con el <u>objeto</u> de favorecer la ejecución y el buen éxito de...”	Article I: “...they may carry out the <u>objectives</u> of the present contract...”  Article V: “The essential <u>object</u> of the present contract being as it is...”  Article VII: “...during the continuation of this contract and for its <u>object</u> ...”  Article XVII: “With the <u>purpose</u> of favouring the execution and good success of...”

Document	Reference	Description in Spanish	Description in English
15 Nicaragua-Central American Transit Company Inter-Oceanic Transit Contract (Molina-Morris), Washington, 10 November 1863	NCM Annex 18  CRR Annex 16 (Articles VII and XIX)  An inaccurate English translation of Article VII having been provided by Nicaragua, Costa Rica has provided an English translation. Source: NCM Annex 18	Artículo VII: "...limitándose espresamente dicho privilegio esclusivo de navegación a los <u>objetos</u> de la sola vía de Tránsito Interoceánico por el presente concedida..."          Artículo XIX: "El Gobierno garantiza a la Compañía que en la ejecución de las obras que por el presente toma sobre sí, cuyas obras son uno de los principales <u>objetos</u> de este contrato..."	Article VII: "...being said exclusive privilege of navigation expressly limited to the sole inter-oceanic transit route granted hereunder..." [Translation by Nicaragua]          Article VII: "...being said exclusive privilege of navigation expressly limited to the <u>purposes</u> of the sole inter-oceanic transit route granted hereunder..." [Translation by Costa Rica]          Article XIX: "The Government guarantees the Company that in the execution of the works that it herewith accepts, which works are one of the main <u>purposes</u> of this contract..."
16 United States-Nicaragua Treaty of Friendship, Commerce and Navigation (Ayon-Dickinson), Managua, 21 June 1867	CRR, Annex 17 (Preamble, Articles II, IX and XVI)	Preamble: "La República de Nicaragua y los Estados Unidos de América, deseando conservar y mejorar la buena inteligencia y amigables relaciones	Preamble: "The United States of America and the republic of Nicaragua desiring to maintain and to improve the good understanding and the

Document	Reference	Description in Spanish	Description in English
	<p>Source: GP Sanger, <i>The Statutes at Large, Treaties and Proclamations of the United States of America from December 1867, to March 1869, Vol XV</i> (Boston: Little, Brown, and Co., 1869), pp. 549-562</p> <p>Both the Spanish and English versions are authentic.</p>	<p>que ahora felismente existen entre ellos, promover el comercio de sus ciudadanos y hacer algunos arreglos recíprocos respecto de la comunicación entre los oceanos Atlantico y Pacifico por el Rio San Juan, y cada uno ó ambos, los Lagos de Nicaragua ó de Managua, ó por cualquiera otra ruta al traves del territorio de Nicaragua; con tal <u>objeto</u> han convenido en concluir un tratado de....”</p>	<p>friendly relations which now happily exist between them, to promote the commerce of their citizens, and to make some mutual arrangement with respect to a communication between the Atlantic and Pacific oceans, by the river San Juan, and either or both the lakes of Nicaragua and Managua, or by any other route through the territories of Nicaragua, have agreed for this <u>purpose</u> to conclude a treaty of....”</p>
		<p>Artículo II: “Los ciudadanos de los dos países...tendrán plena libertad de ....alquilar y ocupar casas y almacenes <u>para objetos de su comercio...</u>”</p>	<p>Article II: “...The subjects and citizens of the two countries...are, or may be, permitted to ... to hire and occupy houses and warehouses <u>for the purpose of their commerce...</u>”</p>
		<p>Artículo IX: “...Ni será tomada la propiedad de ninguno de ellos, de cualquiera especie, para ningun <u>objeto</u> publico...”</p>	<p>Article IX: “...Nor shall the property of either, of any kind, be taken for any public <u>object...</u>”</p>

Document	Reference	Description in Spanish	Description in English
		Artículo XVI: “La republica de Nicaragua conviene en que si en cualquier tiempo fuese necesario emplear fuerzas militares para la seguridad y protección de las personas y propiedades que pasan sobre cualquiera de las antedichas rutas, empleara la fuerza requerida para tal proposito; pero si dejase de hacerlo por cualquiera de las antedichas rutas, empleara la fuerza requerida para tal proposito, pero si dejase de hacerlo por cualquier causa, el gobierno de los Estados Unidos puede...emplear tal fuerza, para este, y no para otro <u>objeto</u> ...”	Article XVI: “The republic of Nicaragua agrees that, should it become necessary at any time to employ military forces for the security and protection of persons and property passing over any of the routes aforesaid, it will employ the requisite force for that purpose; but upon failure to do this from any cause whatever, the government of the United States may...employ such force for this and no other <u>purpose</u> ...”
17 Costa Rica-Nicaragua, Preliminary Convention on a Scientific Survey (Volio-Zelaya), San José, 13 July 1868	CRM Annex 9 NCM Annex 6 Article 1 English translation by both Costa Rica and Nicaragua. Article 2 English translation by Nicaragua.	Artículo 1: “Se practicará un reconocimiento científico del río Colorado y del San Juan...con el <u>objeto</u> de examinar...”	Costa Rican translation: Article 1: “A scientific analysis of the Colorado and San Juan rivers shall be performed...for the <u>purpose</u> of examining...”  Nicaraguan translation: Article I: “A scientific survey will be carried out in the Colorado and San Juan rivers...with the <u>objective</u> of determining...”

Document	Reference	Description in Spanish	Description in English
18 Costa Rica-Nicaragua, Treaty of Peace and Friendship (Volio-Zelaya), San José, 30 July 1868	CRR Annex 18 (Preamble)  Spanish version: JM Bonilla, <i>Colección de Tratados Internacionales</i> (Managua: Tipografía Internacional, 1909)  English version: 137 CTS 478-482	Artículo 2: “La comisión levantará los planos y presupuestos necesarios, y hará extensivo su informe á todos los demás puntos que juzgue convenientes al <u>objeto</u> de su importante misión...”  Preamble: “La República de Nicaragua, por una parte, y la de Costa Rica por otra, animadas del deseo de estrechar y perpetuar las relaciones de amistad en que felizmente se encuentran, han resuelto celebrar un Tratado que produzca tales efectos. Con este <u>objeto</u> ...”	Article 2: “The Commission will draw up the necessary plans and budgets and will extend its report to any other points it may deem convenient <u>so as to</u> accomplish its important mission...”  Preamble: “The Republic of Nicaragua on the one side and the Republic of Costa Rica on the other, animated by the desire to render close and permanent the friendly relations at present existing between them, have resolved to conclude a Treaty to that effect. For this <u>purpose</u> ...”
19 Costa Rica-Nicaragua, Treaty of Commerce (Volio-Zelaya), San José, 14 August 1868	CRM Annex 10  English translation by Costa Rica.	“Creyendo conveniente los Gobiernos de las Repúblicas de Nicaragua y Costa Rica, para el fomento de sus mútuos intereses, destruir los obstáculos que impiden el ensanche y progreso del comercio de ambas Naciones; y convencidos de que un Tratado mercantil, que asegure ventajas recíprocas, es el medio de hacer más estrechas é íntimas las relaciones fraternales entre ambos pueblos, han conferido con este <u>objeto</u> sus Plenos Poderes...”	“The Governments of the Republics of Costa Rica and Nicaragua, deeming it convenient for the impulse of their mutual interests to destroy the obstacles that impede the widening and progress of the trade of both nations, and being convinced that a commercial treaty that assures reciprocal advantages is the way to tighten and to make even more intimate the fraternal relations between both peoples, have with this <u>objective</u> granted full powers...”



Document	Reference	Description in Spanish	Description in English
20 Costa Rica-Nicaragua, Treaty for the excavation of an Inter-oceanic Canal (Jiménez-Montealegre) San Jose, 18 June 1869	CRM Annex 13 (Article 1) NCM Annex 8 (Articles 1, 2, 3, 12, 43, 44 and 45) CRR Annex 19 (Articles 15, 19 and 23) Article 12 English translation by Nicaragua Articles 15, 19 and 23: As Nicaragua did not provide an English translation, English translation from (1870-1871) LXI <i>BFSP</i> 1144-1151	Artículo 12: "...La República de Costa Rica podrá abrir esos caminos aún en territorio de Nicaragua y navegar los ríos pertenecientes al mismo territorio con el <u>objeto</u> de dar salida...."  Artículo 15: "Se prohíbe al concesionario introducir al territorio de la República, cualquiera mercancía, con el <u>objeto</u> de venderla ó cambiarla...."  Artículo 19: "...uno ó más buques de guerra al puerto en que sean necesarios con el <u>objeto</u> de proteger las personas y propiedades..."  Artículo 23: "El concesionario podrá establecer carreteras, caminos de hierro de servicio, y canales de la misma naturaleza, con el <u>objeto</u> especial de la construcción del canal marítimo..."	Article XII: "...The Republic of Costa Rica may open such roads even in Nicaraguan territory and navigate on the rivers in that territory, for the <u>purpose</u> of transporting..."  Article XV: "The contractor is prohibited from importing into the territory of the Republic, any merchandise for the <u>purpose</u> of sale or barter..."  Article XIX: "...one or more ships of war to the port where they may be required for the <u>purpose</u> of protecting the persons and property..."  Article XXIII: "The contractor may lay down roads, railways for service, and canals of the same nature, for the special <u>purpose</u> of constructing the maritime canal..."

Document	Reference	Description in Spanish	Description in English
21 Costa Rica-Nicaragua, Treaty of Limits (Navas-Castro), San José, 19 January 1884	NCM Annex 10 English translation by Nicaragua	Artículo VII: “En general, los derechos que Costa Rica adquiriera por este Tratado, no embarazan de ninguna manera la libre acción de Nicaragua, para celebrar nuevas contratas con el <u>objeto</u> de canalizar el Istmo...”	Article VII: “In general, the rights acquired by Costa Rica by virtue of this Treaty do not restrict in any way the freedom of Nicaragua to enter into new contracts for the <u>purpose</u> of building the Isthmus canal...”
22 Costa Rica-Nicaragua, Canalization Convention (Navas-Castro), San José, 19 January 1884	CRR Annex 21 (Preamble) Source: JM Bonilla, <i>Colección de Tratados Internacionales</i> (Managua: Tipografía Internacional, 1909), pp. 403-405 English translation by Costa Rica	Preamble: “CONSIDERANDO: Que la construcción del Canal Interoceánico por Nicaragua es de interés general para Centro América y especialmente para ambos países, animadas del deseo de facilitar la pronta realización de la obra, han resuelto celebrar una Convención con tal <u>objeto</u> .”	Preamble: “CONSIDERING: That the construction of the Inter-oceanic Canal through Nicaragua is of general interest for Central America, and in particular for both countries, moved by the desire to facilitate the prompt accomplishment of the task, have decided to celebrate a Convention for such <u>purpose</u> .”
23 Costa Rica-Nicaragua, Treaty of Peace, Friendship, Commerce and Extradition (Navas-Castro), San José, 19 January 1884	CRR Annex 22 (Preamble) Source: JM Bonilla, <i>Colección de Tratados Internacionales</i> (Managua: Tipografía Internacional, 1909), pp. 455-466 English translation by Costa Rica	Preamble: “El Presidente de la República de Nicaragua y el Presidente de la República de Costa Rica, deseosos de estrechar tanto como es posible las relaciones de ambos países, y de servir á sus comunes intereses, por medio de un Tratado de Paz, Amistad, Comercio y Extradición, han convenido en abrir negociaciones para este <u>objeto</u> ...”	Preamble: “The President of the Republic of Nicaragua and the President of the Republic of Costa Rica, desirous of strengthening as much as possible the relations between both countries and to serve to their common interests by means of a Friendship, Trade, and Extradition Treaty, have agreed to start negotiations towards this <u>purpose</u> ...”

Document	Reference	Description in Spanish	Description in English
24 United States of America-Nicaragua, Treaty providing for the construction of an Inter-Oceanic Canal across the territory of Nicaragua (Frelinghuysen-Zavala), Washington, 1 December 1884	<p>CRR Annex 23 (Preamble, Articles IV, V, VIII and XIII)</p> <p>Sources:</p> <p>English version: <i>Report of the Isthmian Canal Commission, 1899-1901</i>, Appendix L, pp. 359-363</p> <p>Spanish version: <i>Memoria de la Secretaría de Relaciones Exteriores y Carteras Anexas de la República de Costa Rica</i> (San José: Imprenta Nacional, 1884-1885)</p>	<p>Preamble: “Los Estados Unidos de América y la República de Nicaragua...han decidido construir un canal con este <u>objeto</u>...”</p> <p>Artículo IV: “Con el <u>objeto</u> de llevar a cabo este convenio...” (...) para los depósitos de aguas, diques, muelles, arsenales, accesorios de las esclusas, faros, señales, almacenes, talleres, edificios y para cualesquiera otros objetos necesarios...”</p> <p>Artículo V: “La obra será declarada de utilidad pública y para el <u>objeto</u> de construir y llevar a cabo el canal...”</p> <p>Artículo VIII: “...siendo el <u>objeto</u> de este convenio que dichos buques, sus cargamentos...”</p> <p>Artículo XIII: “...por cuanto el <u>objeto</u> de este convenio es....”</p>	<p>Preamble: “The United States of America and the Republic of Nicaragua...have agreed for this <u>purpose</u> to build a canal...”</p> <p>Article IV: “For the <u>purpose</u> of carrying out this agreement...for reservoirs, dykes, piers, docks, spaces about locks, for lights, beacons, storehouses, machine shops, buildings, and for whatever other thing necessary...”</p> <p>Article V: “The work shall be declared one of public utility, and for the <u>purposes</u> of building and operating the canal...”</p> <p>Article VIII: “...being the <u>intent</u> of this agreement that vessels, their cargoes...”</p> <p>Article XIII: “...it being the <u>intent</u> of this agreement...”</p>

Document	Reference	Description in Spanish	Description in English
25 Costa Rica-Nicaragua Treaty of Peace, Commerce and Extradition (Esquivel-Chamorro), San José, 9 October 1885	CRR Annex 24 (Preamble)  Source: JM Bonilla, <i>Colección de Tratados Internacionales</i> (Managua: Tipografía Internacional, 1909)  English translation by Costa Rica	Preamble: “El Presidente de la República de Nicaragua y el Presidente de la República de Costa Rica, deseosos de estrechar tanto como sea posible las relaciones de ambos países y de servir a sus comunes intereses por medio de un Tratado, de Paz, Amistad, Comercio y Extradición, han convenido en abrir negociaciones para este <u>objeto</u> ...”	Preamble: “The President of the Republic of Nicaragua and the President of the Republic of Costa Rica, desirous of strengthening as much as possible the relations between both countries and to serve to their common interests by means of a Peace, Friendship, Commerce, and Extradition Treaty, have agreed to start negotiations towards this <u>purpose</u> ...”
26 Contract between the Government of the Republic of Nicaragua and the Nicaragua Canal Association of New York for the opening of an inter-oceanic canal (Cárdenas-Menocal), Managua, 23 March 1887	NCM Annex 20 (Articles 6 and 46)  CRR Annex 25 (Articles 7, 13, 16 and 30)  Articles 6 and 46: English translation by Nicaragua  Articles 7, 13, 16 and 30: English translation from <i>Report of the Isthmian Canal Commission 1899-1901</i> (Washington: Government Printing Office, 1904), pp. 389-400	Artículo 6: “...Nicaragua procurará obtener de la Potencias que garanticen la neutralidad, que en las convenciones que se celebren con tal <u>objeto</u> , se comprometan á garantizar también una zona de tierra paralela al Canal...”	Article VI: “...Nicaragua will endeavors (sic) to obtain from the powers that are to guarantee the neutrally (sic) that in the treaties that shall be made for that <u>purpose</u> they shall agree also to guarantee zone of lands parallel to the canal ...”

Document	Reference	Description in Spanish	Description in English
		<p>Artículo 7: “La presente convención, con todas sus cargas y ventajas, será <u>objeto</u> de una Compañía de ejecución, conforme a los artículos 1º y 10 y siguientes....”</p>	<p>Article VII: “This present agreement, with all its charges and advantages, shall be the <u>object</u> of a company of execution in agreement with Articles I, X and those following thereafter....”</p>
		<p>Artículo 13: “...Bien entendido que esta obligación no compromete de ningún modo á la Compañía á poner ni a conservar en estado navegable para pequeñas embarcaciones, la parte baja del río que esas exclusas tengan por <u>objeto</u> poner en comunicación con el Canal.”</p>	<p>Article XIII: “...It is understood that this duty does not in any manner compel the company to place or maintain, in navigable condition for small craft, the lower part of the river which these locks may be <u>intended to</u> place in communication with the canal.</p>
		<p>Artículo 16: “... Podrá escoger con tal <u>objeto</u>, en las costas de los dos océanos, dentro del territorio de Nicaragua, las localidades que los estudios hechos hayan señalado como preferibles.”</p>	<p>Article XVI: “...It may, for this <u>purpose</u>, select on the coasts of the two oceans, within the territory of Nicaragua, the localities which the surveys made indicate as preferable.</p>

Document	Reference	Description in Spanish	Description in English
		<p>Artículo 30: “La Compañía no podrá introducir al territorio de la República, mercancías con el <u>objeto</u> de traficar con ellas, si no fuere pagando los derechos de aduana establecidos por ley....”</p>	<p>Article XXX: “The company shall not import merchandise into the territory of the Republic, for the <u>purpose</u> of trafficking, without paying the import duties established by law....”</p>
		<p>Artículo 46: “...Y se estipula igualmente que la Compañía se obliga a pagar al Gobierno de la República todo cuanto de aquí en adelante invierta, en cualquier concepto, con el <u>objeto</u> de mejorar la navegación del Río y puerto de San Juan del Norte....”</p>	<p>Article XLVI: “It is also stipulated that the company binds itself to pay government (sic) of the republic all it may from now on expend in any way <u>for</u> the improvement of the navigation of the river and the port of San Juan del Norte...”</p>
27 · Costa Rica-Nicaragua, Convention (Soto-Carazo), Managua, 26 July 1887	CRM Annex 15 English translation by Costa Rica	<p>Artículo II: “Para hacer navegable el río San Juan en toda estación del año, el Gobierno de Costa Rica consiente en que se tomen del río Colorado las aguas que se necesiten, para echarlas en aquel río, y en que se practiquen con tal <u>objeto</u> las obras convenientes.”</p>	<p>Article II: “In order to make the San Juan River navigable all year round, the Government of Costa Rica agrees that the waters required for this be taken from the Colorado River, in order to deposit them in the former and that the appropriate works be carried out for this <u>purpose</u>.</p>

Document	Reference	Description in Spanish	Description in English
28 Cleveland Award upon the validity of the Treaty of Limits of 1858 between Costa Rica and Nicaragua, Washington DC, 22 March 1888	CRM Annex 16 CRR Annex 26 (Second Article and Third Article point 5)  Original award is in English; Spanish version : <i>Memoria Anual de la Secretaría de Relaciones Exteriores y Carteras Anexas 1888</i> (San José: Imprenta Nacional, 1888)	Segundo: “La República de Costa Rica, no tiene según dicho Tratado, y conforme a las estipulaciones de su artículo sexto, el derecho de navegar el río San Juan con buques de guerra; pero puede hacerlo con embarcaciones del servicio fiscal, según corresponda y tenga què ver con el goce de los “ <u>objetos</u> de comercio”, que se le reconoce por dicho artículo, o como se necesite para la protección de dicho goce.”  “V.- La República de Costa Rica no está obligada a contribuir en proporción alguna a los gastos que la República de Nicaragua tenga que hacer para cualquiera de los <u>objetos</u> arriba mencionados.”	“ <i>Second.</i> 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 “ <u>purposes</u> of commerce” accorded to her in said article, or as may be necessary to the protection of said enjoyment.”  “5. The Republic of Costa Rica is not bound to contribute any proportion of the expenses that may be incurred by the Republic of Nicaragua for any of the <u>purposes</u> above mentioned.”

Document	Reference	Description in Spanish	Description in English
29 Contract between the Government of the Republic of Costa Rica and the Nicaragua Canal Association for the opening of an inter-oceanic canal (Pérez-Menocal), San José, 31 July 1888	CRR Annex 27 (Preamble, Articles VI, VII, XXVI and XLV)  Spanish version: Archivo Nacional de Costa Rica  English version: AR Colquhoun, <i>The Key of the Pacific: The Nicaragua Canal</i> (Westminster: Archibald Constable & Co., 1895), pp. 386-407	Preamble: "...autorizado especialmente por ... para celebrar ad-referendum el presente contrato...y ..... autorizado también para el dicho <u>objeto</u> , ..."  Artículo VI: "... Costa Rica procurará obtener de las Potencias que garanticen la neutralidad, el que en las convenciones que se celebren con tal <u>objeto</u> , se comprometan también a garantizar con el mismo carácter una zona de tierra paralela al Canal...."  Artículo VII: "La presente concesión sólo será transmisible á la Compañía ó Compañías que se organicen con el <u>objeto</u> de construir ó explotar el Canal...Se invitará a todas las naciones para la formación del capital necesario á esta Empresa, y con tal <u>objeto</u> será bastante la publicación de un anuncio durante veinte días consecutivos...."	Preamble: "...especially authorized by ....to celebrate ad referendum the present contract...and ...with full powers from it, and also authorized for this <u>purpose</u> ..."  Article VI: "...Costa Rica shall endeavour to obtain from the powers that are to guarantee the neutrality, that in the treaties to be made for that <u>purpose</u> , they shall also bind themselves to guarantee the same conditions to a zone of land parallel to the canal..."  Article VII: "The present concession shall be transferable only to such company or companies as may be organized for the <u>purpose</u> of constructing or operating the canal... The people of all nations shall be invited to contribute the necessary capital to the enterprise, and it shall be sufficient for the fulfillment of this <u>requirement</u> to publish an advertisement for twenty consecutive days..."



Document	Reference	Description in Spanish	Description in English
30 Costa Rica-Nicaragua, Treaty of Limits (Guerra-Castro), Managua, 23 December 1890	NCM Annex 12 English translation by Nicaragua	Artículo XXVI: “La Asociación no podrá introducir en el territorio de la República mercancías con el <u>objeto</u> de traficar con ellas, sino fuere pagando los derechos de aduana establecidos por ley...”	Article XXVI: “The association cannot import merchandise into the territory of the Republic for the <u>purposes</u> of trafficking with it without paying the custom duties established by law...”
		Artículo XLV: “...Las acciones á que se refiere este artículo se entregarán al Agente que nombre el Gobierno con este <u>objeto</u> , tan pronto como la compañía esté lista para emitir los certificados de su capital.”	Article XLV: “...The shares to which this Article refers shall be delivered to the agent appointed by the government for this <u>purpose</u> as soon as the company may be ready to issue certificates of its capital.”
		Artículo VI: “...El expresado derecho de uso tiene por <u>objeto</u> el transporte, embarque y desembarque de toda clase de mercaderías, sin restricción ninguna, la construcción de ferrocarriles y muelles; la fundación de oficinas, establecimientos comerciales y casas de habitación, las cuales, así como las personas que habiten dicha faja de terreno, estarán sometidos á la jurisdicción y leyes de Costa Rica. ...”	Article VI: “...The <u>purpose</u> of the aforesaid right of use is to transport, load and unload all kinds of merchandise, without restriction, build railways and wharves; establish offices, commercial stores and residential houses, which shall be subject, as well as the persons who inhabit this tract of land, to the jurisdiction and laws of Costa Rica. ...”

Document	Reference	Description in Spanish	Description in English
31 Costa Rica-Nicaragua, Delimitation Convention (Pacheco-Matus), San Salvador, 27 March 1896	CRM Annex 17 English translation: 182 CTS 359 Spanish version: National Archive, San José	Artículo 1: “Los Gobiernos contratantes se obligan a nombrar cada uno una Comisión compuesta de dos ingenieros o agrimensores con el <u>objeto</u> de trazar y amojonar debidamente la línea divisoria entre las Repúblicas de Nicaragua y Costa Rica....”	Article I: “The contracting Governments bind themselves to each name a commission composed of two engineers or surveyors for the <u>purpose</u> of properly tracing and marking the boundary line between the Republics of Costa Rica and Nicaragua...”

**Table 2**  
**Terms used to refer to articles of trade, goods, things, etc. in 19th Century documents**

Document	Reference	Description in Spanish	Description in English
1 Instructions for Francisco Oreamuno to negotiate a treaty with Nicaragua, San José, 26 July 1838	NCM Annex 87  English translation by Nicaragua	Artículo 17: “Estipulará la libertad de Costa Rica de navegar por el río de San Juan y la libertad de los derechos de exportación por el mismo río de sus <u>frutos</u> , puesto que tiene habilitado en su territorio el río de Sarapiquí, cuyas aguas aumentan el caudal del río San Juan. Si fuese necesario comprenderá en esta estipulación la prohibición de introducir <u>efectos</u> o <u>mercancías</u> extranjeras a Costa Rica por aquella vía, en caso de no poderse conseguir que las introducciones se hagan registradas para pagar los derechos en las aduanas de este Estado: y puede convenirse en una quinta, cuarta y tercera parte del rendimiento líquido anual a favor de Nicaragua, siempre que las exportaciones se hagan libremente.”	Article 17: “He will set down Costa Rica’s freedom to navigate on the San Juan River and its freedom from export duties on its <u>fruits</u> leaving through the same river, since its territory contains the Sarapiquí River, the water of which increases the San Juan River flow. If necessary, this covenant shall include the prohibition of introducing foreign <u>goods</u> or <u>merchandise</u> to Costa Rica through the same waterway, in case entered goods could not be registered to pay duties at this State customs: and fifth, fourth, or third of the annual liquid returns in favor of Nicaragua may be agreed upon, provided exports are done freely”
2 Contract Between Nicaragua and the American Atlantic and Pacific Ship-Canal Company (Zepeda-Juarez-White), León, 27 August 1849	NCM Annex 14  CRR Annex 6 (Articles 12, 14 and 21)  English translation of Articles 17, 18 and 36 by Nicaragua.  As Nicaragua did not provide an English translation of Articles 12, 14 and 21, English translation by Costa Rica. Source: NCM Annex 14	Artículo 12: “...el Estado , por el presente, da á la Compañía el derecho de tomar y hacer uso de las porciones de terrenos baldíos que necesite para el establecimiento ó la erección de casas, almacenes, diques, muelles, estaciones, ó cualesquiera otros <u>objetos</u> útiles que tengan relación con las obras del canal.”  Artículo 14: “Todos los <u>artículos</u> que la Compañía necesite, tanto para los reconocimientos, exploración y construcción, como para el uso de las obras del canal, como máquinas, instrumentos, herramientas etc. y cualesquiera otros materiales necesarios...Pero la Compañía no tendrá derecho	Article 12: “...the State, through the present, grants the Company the right to take and use the portions of the empty lots that it may need for establishing or building houses, warehouses, dikes, docks, stations or any other useful <u>objects</u> that may have relation with the canal works”  Article 14: “All the <u>articles</u> that the Company may need, for the surveys, exploration and construction, as well as for the use of the canal works such as machinery, instruments, tools, etc. and any other materials needed...But the Company will not have

Document	Reference	Description in Spanish	Description in English
		de introducir dentro del territorio del Estado ningunos <u>jéneros</u> , <u>mercancías</u> ó cualesquiera otros <u>artículos</u> para vender ó cambiar, sin pagar los derechos establecidos por la ley; y asimismo, les es prohibido importar cualesquiera <u>artículos</u> , ó <u>materiales</u> que estuvieren estancados ó prohibidos por el Estado...”	the right to introduce within the State’s territory any <u>goods</u> , <u>merchandise</u> or any other <u>articles</u> to sell or trade without paying the taxes established by law, and likewise, it is forbidden to import any <u>articles</u> or <u>materials</u> which may be the State’s monopoly or forbidden by the State...”
		Artículo 17: “La Compañía conviene en transportar por el canal los pasajeros, y los <u>efectos</u> , <u>mercancías</u> y <u>materiales</u> de toda descripción que se le confien...”	Article 17: “The Company agrees to transport through the Canal all passengers, stock, <u>merchandise</u> and <u>materials</u> of any description that are entrusted to it...”
		Artículo 18: “La Compañía establecerá una tarifa de derechos ó impuestos (fees or tolls) para el transporte de todo pasajero, <u>jéneros</u> , <u>mercancías</u> y <u>propiedad</u> de toda descripción...”	Article 18: “The Company shall establish fees or tolls for the transport of passengers, <u>goods</u> , <u>merchandise</u> and <u>property</u> of any description...”
		Artículo 21: “Por el presente, el Estado estipula, que todos los buques y vapores de la Compañía, como también todos los <u>jéneros</u> , <u>mercancías</u> , <u>artículos</u> <u>manufacturados</u> , ú otra propiedad cualquiera...”	Article 21: “By the present, the State stipulates that all the Company’s vessels and steamers, as well as the <u>goods</u> , <u>merchandise</u> , <u>manufactured articles</u> or any other property...”
		Artículo 36: “Queda expresamente estipulado por el Estado de Nicaragua que será permitido á los buques, <u>productos</u> , <u>artículos</u> <u>manufacturados</u> , y á los ciudadanos de todas las naciones...”	Article 36: “It is expressly stipulated by the State of Nicaragua that all vessels, <u>products</u> , <u>manufactured goods</u> and citizens of all nationalities...”

Document	Reference	Description in Spanish	Description in English
3 United States-Nicaragua, General Treaty of Amity, Navigation, and Commerce (Squier-Zepeda), León, 3 September 1849	CRR, Annex 7 (Articles IV, V, VI, VII, VIII and XXXV)  Source: CL Wiktor, <i>Unperfected Treaties of the United States of America 1776-1976, Vol 1 1776-1855</i> , pp. 280-302  Both the Spanish and English versions are authentic.	<p>Artículo IV: “Igualmente conviene una y otra en que cualquiera especie de <u>producciones, manufacturas ó mercaderías</u> extranjeras que puedan ser en cualquier tiempo legalmente importadas en la republica de Nicaragua en sus propios buques, puedan ser también importadas en buques de los Estados Unidos...”</p> <p>Artículo V: No se impondran otros ó mas altos derechos sobre la importación en la republica de Nicaragua de cualquiera <u>articulos del producto natural ó manufacturado</u> de los estados Unidos, y no se impondrá otros ó mas altos derechos sobre la importación en los Estados Unidos de cualesquiera <u>articulos del producto natural ó manufacturado</u> de la republica de Nicaragua, que los que se exijan ó exijieren por iguales <u>articulos del producto natural o manufacturado</u> de cualquier otro pais extranjero; ni se impendran otros ó mas altos derechos ó gravámenes en ninguno de los dos paises sobre la esportacion de cualesquiera <u>articulos</u> para la republica de nicaragua, ó para los Estados Unidos respectivamente, que los que deban exigirse por la exportación de iguales <u>articulos</u> para cualquiera otro pais extranjero; ni se establecera prohibición alguna respecto a la importación á exportacion de cualesquiera <u>articulos</u> del producto natural ó manufacturado de los territorios de la republica de Nicaragua para los de los Estados Unidos.....”</p>	<p>Article IV: “They likewise agree, that whatever kind of <u>produce, manufacture, or merchandise</u> of any foreign country can be, from time to time, lawfully imported into the United States in their own vessels, may also be imported in vessels of the republic of Nicaragua...”</p> <p>Article V: “No higher other duties shall be imposed on the importation into the United States of any <u>articles the produce or manufacture</u> of the republic of Nicaragua, and no higher or other duties shall be imposed on the importation into the republic of Nicaragua of any <u>articles the produce or manufactures</u> of the United States, than are or shall be payable on the like <u>articles</u> being the <u>produce or manufactures</u> on any other foreign country; nor shall any higher or other duties or charges be imposed, in either of the two countries, on the exportation of any <u>articles</u> to the United States, or to the republic of Nicaragua, respectively, than such as are payable on the exportation of the like <u>articles</u> to any other foreign country; nor shall any prohibition be imposed on the exportation or importation of any <u>articles</u> the produce or manufactures of the United States, or of the republic of Nicaragua...”</p>

Document	Reference	Description in Spanish	Description in English
		<p>Artículo VI: "... las estipulaciones contenidas en ellos son aplicables en toda su estencion á los buques de Nicaragua y sus <u>cargamentos</u> que arriben á los puertos de los Estados Unidos, y recíprocamente á los buques de los Estados Unidos y sus <u>cargamentos</u> que arriben á los puertos de Nicaragua;....."</p> <p>Artículo VII: "....con respecto a las consignaciones, y ventas por mayor ó menor de sus <u>efectos</u> y <u>mercaderías</u>, como con respecto á la carga, descarga y despacho de sus buque, ú otro negocios...</p> <p>Artículo VIII: "Los ciudadanos de una y otra de las partes contratantes no podrán ser embargados ó detenidos con sus embarcaciones, tripulaciones, <u>mercaderías</u> y <u>efectos comerciales</u> de su pertenencia, para ninguna expedición militar, ni para usos publicos ó particulares, cualesquiera que sean, sin conceder a los interesados una justa y suficiente indemnización."</p> <p>Artículo XXXV: "...y se estipula tambien que todo <u>producto</u>, <u>manufacturas</u>, <u>mercancías</u> ú otras <u>propiedades</u> de licito comercio, pertenecientes á ciudadanos de los Estados Unidos que pasen de un oceano al otro en ambas direcciones, con objeto de exportacion á paises extranjeros, no estarán sujetos á derechos de importacion ó exportacion.... habiendo introducido al estado de Nicaragua <u>productos</u>, <u>manufacturas</u> y <u>mercancías</u> con el objeto de venderlas...</p>	<p>Article VI: "... the stipulations contained in the three preceding articles are, to their full extent, applicable to the vessels of the United States and their <u>cargoes</u> arriving in the ports of Nicaragua, and 'reciprocally to the vessels of the said republic of Nicaragua and their <u>cargoes</u> arriving in the ports of the United States...."</p> <p>Article VII: "... with respect to the consignments and sale of their <u>goods</u> and <u>merchandise</u>, by wholesale or retail, as with respect to the loading, unloading, and sending off their ships; ..."</p> <p>Article VIII: "The citizens of neither of the contracting parties shall be liable to any embargo nor be detained with their vessels, cargoes, <u>merchandise</u>, or <u>effects</u>, for any military expedition, nor for any public or private purpose whatever, without allowing to those interested an equitable and sufficient indemnification."</p> <p>Article XXXV: "...all lawful <u>produce</u>, <u>manufactures</u>, <u>merchandise</u>, or <u>other property</u> belonging to citizens of the United States passing from one ocean to the other, in either direction, for the purpose of exportation to foreign countries, shall not be subject to any import or export duties...having introduced such <u>produce</u>, <u>manufacture</u>, or <u>merchandise</u> into the state of Nicaragua, for sale or exchange.."</p>

Document	Reference	Description in Spanish	Description in English
4 United States-Great Britain, Convention Concerning a Ship Canal Connecting the Atlantic and Pacific Oceans (Clayton-Bulwer), Washington DC, 19 April 1850 (in force 4 July 1850)	CRM Annex 4 CRR Annex 8 (Article V)  Spanish version: MM Peralta, <i>El Canal Interoceánico de Nicaragua y Costa Rica en 1620 y en 1887</i> (Bruselas: Imprenta de Ad. Mertens, 1887)  English version: 104 CTS 41	Artículo V: "...ya imponiendo exacciones opresivas ó peajes inmoderados sobre pasajeros, buques, <u>géneros</u> , <u>mercancías</u> ú otros <u>artículos</u> ."	Article V: "...or by imposing oppressive exactions or unreasonable tolls upon passengers, vessels, <u>goods</u> , <u>merchandise</u> or other <u>articles</u> ."
5 Costa Rica-United States Treaty of Friendship, Commerce and Navigation (Molina-Webster), Washington, 10 July 1851	CRR Annex 9 (Articles IV, VI, VII and XI)  Spanish version: <i>Coleccion de los Tratados Internacionales Celebrados por la Republica de Costa Rica</i> (San José: Tipografia Nacional), 1893, Vol. I, pp. 65-72  English version: <i>Report of the Isthmian Canal Commission 1899-1901</i> (Washington: Government Printing Office, 1904) pp. 417-420	Artículo IV: "No se impondrán otros ó más altos derechos á la importación en los territorios de la República de Costa Rica, de cualesquiera <u>artículos</u> del producto natural, <u>producciones</u> ó <u>manufacturas</u> de los territorios de los Estados Unidos, ni se impondrán otros ó más altos derechos á la importación en los territorios de los Estados Unidos de cualesquiera <u>artículos</u> del producto natural, <u>producciones</u> ó <u>manufacturas</u> de la República de Costa Rica que los que se pagan ó pagaren por semejantes <u>artículos</u> cuando sean producto natural, <u>producciones</u> ó <u>manufacturas</u> de cualesquiera otro país extranjero, ni se pondrán otros ó más altos derechos ó impuestos en los territorios de cualquiera de las dos Altas Partes Contratantes á	Article IV: "No higher nor other duties shall be imposed on the importation into the territories of the United States, of any <u>article</u> being of the growth, <u>produce</u> or <u>manufacture</u> of the Republic of Costarica and no higher or other duties shall be imposed on the importation into the territories of the Republic of Costarica of any <u>articles</u> being the growth, <u>produce</u> or <u>manufacture</u> of the territories of the United States then are or shall be payable on the like <u>articles</u> , being the growth, <u>produce</u> or <u>manufacture</u> of any other foreign country; nor shall any other or higher duties or charges be imposed in the territories of either of the High Contracting Parties, on the exportation of any articles to the territories of the other, than such as are or may be payable on the exportation of the like <u>articles</u> to any other foreign country, nor shall any prohibition be imposed upon the exportation or importation of any <u>articles</u> the growth, <u>produce</u> or <u>manufacture</u> of the territories of the United States, or of the Republic of Costarica..."

Document	Reference	Description in Spanish	Description in English
		<p>la exportación de cualesquiera <u>artículos</u> para los territorios de la otra, que los que se pagan ó pagaren por la exportación de iguales <u>artículos</u> para cualquiera otro país extranjero, ni se impondrá prohibición alguna á la exportación ó importación de cualesquiera <u>artículos</u> del producto natural, <u>producciones</u> ó <u>manufacturas</u> de los territorios de la República de Costa Rica...”</p> <p>Artículo VI: “Se pagarán los mismos derechos de importación en los territorios de los Estados Unidos por las <u>artículos</u> de productos naturales, producciones y manufacturas, en buque de los Estados Unidos o Costarricenses; y los mismos derechos se pagarán por la importación en los territorios de la República de Costa Rica, de las <u>manufacturas</u>, <u>efectos</u>, y <u>producciones</u> de los territorios... Los mismos derechos pagarán, y gozarán las mismas franquicias y descuentos concedidos á la exportación para los territorios de los Estados Unidos de cualesquiera <u>artículos</u>, de los productos naturales, <u>producciones</u> ó <u>manufacturas</u> de la República de Costa Rica ...y pagarán los mismos derechos y se concederán las mismas franquicias y descuentos á la exportación para la República de Costa Rica, de cualesquiera <u>artículos</u> de productos naturales, <u>producciones</u> ó <u>manufacturas</u> de los territorios de los Estados Unidos...”</p>	<p>Article VI: “The same duties shall be paid on the importation into the territories of the Republic of Costarica, of any <u>article</u> being of the growth, produce or manufacture of the territories of the United States whether such importation shall be made in Costarican or in vessels of the United States; and the same duties shall be paid on the importation into the territories of the United States of any <u>article</u>, being the <u>growth</u>, <u>produce</u> or <u>manufacture</u> of the Republic of Costarica... The same duties shall be paid, and the same bounties and drawbacks allowed, on the exportation on the Republic of Costarica, of any <u>articles</u> being the growth, <u>produce</u> or <u>manufacture</u> of the territories of the United State...and the same duties shall be paid, and the same bounties and drawbacks allowed, on the exportation of any <u>articles</u>, being the <u>growth</u>, <u>produce</u> or <u>manufacture</u> on the Republic of Costa Rica to the territories on the United States...</p>



Document	Reference	Description in Spanish	Description in English
		Artículo VII: "...ni estarán obligados á pagarles más salario ó remuneración que la que en semejantes casos se paga por ciudadanos de los Estados Unidos; y se concederá libertad absoluta en todos los casos al comprador y vendedor para ajustar y fijar el precio de cualesquiera <u>efectos</u> , <u>mercaderías</u> y <u>géneros</u> importados y exportados de la República de Costa Rica..."	Article VII: "...nor to pay them any other salary or remuneration than such as is paid in like cases by Costarican citizens; and absolute freedom shall be allowed in all cases to the buyer and seller to bargain and fix the price of any <u>goods</u> , <u>wares</u> , or <u>merchandise</u> imported into or exported from the Republic of Costarica..."
		Artículo VIII: "Por lo que toca á la policía de los puertos á la carga y descarga de buques, la seguridad de las <u>mercancías</u> , <u>bienes</u> y <u>efectos</u> , la sucesión de las propiedades personales por testamento ó de otro modo..."	Article VIII: "In whatever relates to the police of the ports, the lading and unlading of ships, the safety of <u>merchandise</u> , <u>goods</u> and <u>effects</u> , the succession to personal estates by will or otherwise..."
		Artículo XI: "...mientras se conduzcan pacíficamente y no cometan ofensa alguna contra las leyes, y sus <u>bienes</u> y <u>efectos</u> , de cualquiera clase que sean, bien que estén bajo su propia custodia, ó confiados á individuos, ó al Estado, no estarán sujetos a embargo o secuestro, ni á ninguna carga ó imposición que la que se haga con respecto á los <u>efectos</u> ó <u>bienes</u> pertenecientes á los ciudadanos del país...."	Article XI: "... in the full enjoyment of their liberty and property as long as the behave peaceable, and commit no offence against the laws; and their <u>goods</u> and <u>effects</u> if whatever description they may be, whether in their own custody or intrusted to individuals or to the State, shall not be liable to seizure or sequestration, nor to any other charges or demands than those which may be made upon the like <u>effects</u> or <u>property</u> belonging to the native citizens of the country in which such citizens may reside..."
6 Chamorro-Mayorga-White Convention, Granada, 14 August 1851	NCM Annex 3 English translation by Nicaragua	Artículo 7: "Todas las propiedades, <u>cosas</u> , acciones, derechos, créditos y <u>efectos</u> de la nueva compañía..."	Article 7: "All properties, <u>objects</u> , shares, rights, credits, and <u>effects</u> of the new Company..."

Document	Reference	Description in Spanish	Description in English
7 Molina-Marcoleta, Preliminary Treaty, 28 January 1854 (unratified)	NCM, Annex 4 English translation by Nicaragua	Artículo 4: "...Los Ciudadanos de Costa Rica tendrán la facultad de entrar y salir libremente por el puerto de San Juan con sus buques y <u>mercaderías</u> y de navegar excepto por vapor por el río del mismo nombre y por los tributarios que se le unen por la parte del Sur y por el Lago de Nicaragua en todas direcciones, sin que pueda cobrarseles ningún impuesto ó derecho por parte de Nicaragua, salvo cuando fondeen en las calas, puertos ó parajes de que Nicaragua esta en actual posesión, ó cuando introduzcan <u>productos</u> ó <u>mercaderías</u> para el consumo de Nicaragua en cuyo caso se sujetaran á lo que dispongan las leyes de esta ultima República."	Article 4: "... Costa Rican citizens shall have the power to freely come in and out through the port of San Juan with their ships and <u>goods</u> and to navigate, except by steamboat, on the river bearing the same name and on its tributaries flowing from the South, and on Lake Nicaragua in all directions, without being subject to any Nicaraguan taxes or levies, except when they drop anchor in coves, ports, or places currently in possession by Nicaragua or when they introduce <u>products or goods</u> for consumption in Nicaragua, in which case they shall be subject to the provisions of laws of the latter."
8 Costa Rica-Nicaragua Treaty of Limits (Cañas-Juárez), Managua, 6 July 1857, unratified	CRM Annex 5 English translation by Costa Rica	Artículo 5: "La República de Costa Rica lo mismo que la de Nicaragua, usarán libremente de las aguas del Río San Juan para la navegación y transporte de <u>artículos de comercio de importación y exportación</u> , respetando las leyes de aduana, y satisfaciendo los derechos fiscales de cada una de dichas Repúblicas tiene impuestos o imponga en lo sucesivo sobre los <u>artículos</u> que se introduzcan por sus respectivas aduanas."  Artículo 7: "Los <u>productos</u> y <u>manufacturas naturales</u> de ambas Repúblicas, pueden introducirse reciprocamente libres de todo impuesto fiscal, sugetos solamente á los de propios y advitrios municipales, pero no será permitida la introduccion de <u>artículos</u> monopolizados o estancados por los dos Gobiernos en sus respectivas Repúblicas	Article 5: "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 <u>articles of trade of import and export</u> , observing customs legislation, and complying with the fiscal duties of each Republic, as well as those that will be taxed over the <u>articles</u> that will be brought in through their respective customs."  Article 7: "The original <u>products</u> and <u>manufactured articles</u> of both republics, may be mutually imported, free of tax, and will only be subjected to the own and local municipal taxes, but the import of those <u>articles</u> that have been monopolized or stagnated by both governments in their own republics, shall not be authorized."

Document	Reference	Description in Spanish	Description in English
9 United States-Nicaragua Treaty of Friendship, Commerce and Navigation (Cass-Irisarri), Washington, 16 November 1857, unratified	NCM Annex 5 CRR Annex 10 (Articles IV, VII, VIII, XV and XVII)  English version: CL Wiktor, <i>Unperfected Treaties of the USA, Volume II 1856-1882</i> , pp. 135-143  Spanish version: US National Archives, Washington DC, Unperfected Treaty Series W-2	<p>Artículo IV: “No se impondrán otros o más altos derechos sobre la importación en los territorios de la República de Nicaragua de cualquier <u>artículo</u> que sea fruto, producto natural ó manufacturado de los Estados Unidos, y no se impondrán otros, ó mas altos derechos sobre la importación en los territorios de los Estados Unidos, de cualquier <u>artículo</u> que sea fruto, producto natural o manufacturado de la República de Nicaragua, que los que se exijan ó exijieren por iguales <u>artículos</u> que sean frutos, productos naturales ó manufacturados de cualquier otro país extranjero...”</p> <p>Términos similares en el Artículo VI</p> <p>Artículo VII: “...en todos los casos se concederá absoluta libertad al comprador y al vendedor, para contratar y fijar el precio del cualquiera <u>jéneros, efectos ó mercancías</u> importadas á los Estados Unidos, ó esportadas de ellos...”</p> <p>Artículo VIII: “En todo lo que hace relación a...la seguridad de las <u>mercancías, jéneros y efectos</u>, a la sucesión de bienes muebles...”</p> <p>Artículo XV: “...En estos puertos no se impondrán...ningunos derechos de tonelada... sobre <u>efectos ó mercancías</u> pertenecientes á...”</p>	<p>Article IV: “No higher nor other duties shall be imposed on the importation into the territories of the United States of any <u>article</u> being the growth, produce, or manufacture of the Republic of Nicaragua, and no higher or other duties shall be imposed on the importation into the territories of the Republic of Nicaragua of any <u>articles</u> being the growth, produce, or manufacture of the territories of the United States than are, or shall be, payable upon the like <u>article</u> being the growth, produce, or manufacture of any other foreign country....”</p> <p>Similar wording in Article VI</p> <p>Article VII: “...absolute freedom shall be allowed in all cases to the buyer and seller to bargain and fix the price of any <u>goods, wares, or merchandise</u> imported into, or exported from, the Republic of Nicaragua...”</p> <p>Article VIII: “In whatever relates to...the safety of the <u>merchandise, goods, and effects</u>; the succession to personal states...”</p> <p>Article XV: “...At these ports no tonnage or other duties shall be imposed or levied by the Government of Nicaragua...or on any <u>effects or merchandise</u> belonging to...”</p>

Document	Reference	Description in Spanish	Description in English
		Artículo XVII: "...ó porque impongan exacciones opresivas, ó impuestos excesivos sobre las malas, pasajeros, buques, <u>efectos, productos, mercaderías, ú otros artículos</u> "	Article XVII: "...or by imposing oppressive exactions or unreasonable tolls upon mails, passengers, vessels, <u>goods, wares, merchandise, or other articles.</u> "
10 Costa Rica-Nicaragua Treaty of Peace, Friendship, Alliance and Commerce (Mora-Martínez), Rivas, 30 April 1858	CRR, Annex 11 (Articles 18, 19 and 20)  Spanish version: JM Bonilla, <i>Colección de Tratados Internacionales</i> (Managua: Tipografía Internacional, 1909)  English translation by Costa Rica	Artículo 18: "El comercio fronterizo por la vía de tierra será de libre tráfico, y ni los costarricenses en Nicaragua ni los nicaragienses en Costa Rica pagarán por la introducción de los <u>frutos</u> naturales y de propia industria..."  Artículo 19: "Se prohíbe la introducción por tierra, bajo pena de comiso, de <u>frutos y efectos</u> extranjeros de la una á la otra República....Dichos <u>efectos</u> extranjeros..."  Artículo 20: "...pero los <u>efectos y mercaderías</u> que en dichos buques se introduzcan..."	Article 18: "Land border commerce will have free traffic, and neither Costa Ricans in Nicaragua nor Nicaraguans in Costa Rica shall pay for the introduction of the natural <u>growth</u> or own manufacture..."  Article 19: "The introduction by land is forbidden, under penalty of confiscation, of the <u>foreign products</u> and <u>effects</u> of one Republic into the other...Such foreign <u>effects</u> ..."  Article 20: "...but the <u>effects</u> and <u>merchandise</u> that in said vessels are introduced..."
11 Nicaragua-Costa Rica-F Belly, Convention relative to the Concession for an Inter-oceanic Canal by the River, San Juan and the Lake of Nicaragua, (Mora-Martínez-Belly), Rivas, 1 May 1858	CRM Annex 8 (Article 1)  CRR Annex 12 (Article 14)  French version: F. Belly, <i>Carte d'étude pour le trace et le profil du Canal de Nicaragua</i> (Paris: Chez Dalmont et Doud, Éditeurs, 1858), Document II.	French original:  Artículo 14: "Par mesure spéciale, tous les bâtiments de la Compagnie concessionnaire, quel que soit leur pavillon, jouiront pendant dix ans de la franchise du passage, pourvu qu'ils ne transportent aucune <u>marchandise d'exportation.</u> "  Spanish original:  Artículo 14: "Como medida especial, todos los buques de la compañía concesionaria, cualesquiera	Article 14: "As a special provision, all the vessels of the concessionary Company, whichever may be their flags, shall enjoy during ten years transit franchises, providing they do not transport any <u>merchandise for exportation.</u> "

Document	Reference	Description in Spanish	Description in English
	Spanish version: Archives Diplomatiques, Ministere des Affaires Etrangeres, Paris, Republic of France  English translation by Costa Rica	que sean sus pabellones, gozarán durante diez años de las franquicias del tránsito, con tal que no lleven <u>mercancía alguna de exportación</u> "	
12 Great Britain- Nicaragua, Treaty of Friendship, Commerce and Navigation (Lennox Wyke- Zeledon), Managua, 11 February 1860	CRR Annex 15 (Articles IV, V, VII, XI, XVIII, XXIII)  Source: 121 CTS 364  Both the Spanish and English versions are authentic.	<p>Artículo IV: "Las partes contratantes convienen asimismo, en que cualquier clase de <u>producto</u>, <u>manufactura</u>, ó <u>mercancía</u>, que pueda ser de vez en cuando legalmente importada á los dominios Británicos ...y de la misma manera, que cualquiera clase <u>de producto</u>, <u>manufactura</u>, ó <u>mercancía</u> que de vez en cuando pueda ser legalmente importada á la República de Nicaragua...Y además convienen en que cualquiera cosa que pueda ser legalmente exportada o reexportada de un pais..."</p> <p>Artículo V: "No se impondrán otros ó mas crecidos derechos á la importación á los dominios Británicos, de cualquier <u>artículo</u> de vegetación, <u>producto</u>, ó <u>manufactura</u> de la República de Nicaragua,...que los que se pagan ó se pagaren en lo sucesivo por el mismo <u>artículo</u> ú otro semejante, del <u>producto</u> ó</p>	<p>Article IV: "The Contracting Parties likewise agree, that whatever kind of <u>produce</u>, <u>manufacture</u>, or <u>merchandize</u> can be, from time to time, lawfully imported into the British...and in like manner, that whatever kind of <u>produce</u>, <u>manufacture</u>, or <u>merchandize</u> can be from time to time lawfully imported into the Republic of Nicaragua....And they further agree, that whatever may be lawfully exported or re-exported from the one country..."</p> <p>Article V: "No higher or other duties shall be imposed on the importation into the British dominions of any <u>article</u> the growth, <u>produce</u>, or <u>manufacture</u> of the Republic of Nicaragua ...than are or shall be payable on the same or the like <u>article</u> being the</p>

Document	Reference	Description in Spanish	Description in English
		<p><u>manufactura</u> de cualquier otro pais extranjero...No se impondrá prohibición alguna a la importación á los territorios de una de las dos Partes Contratantes de cualquier <u>artículo</u> de vegetación, <u>producto</u>, ó <u>manufactura</u> de los territorios de la otra parte...ni se impondrá prohibición alguna á la exportacion de cualquier <u>artículo</u> que se haga de los territorios de cualquiera de las dos partes....”</p> <p>Artículo VII: “...y en uno y otro caso, no se impondrán ni exigirán derechos especiales en los puertos de uno y otro pais, sobre dichos buques ó sobre sus <u>cargas</u>, bien sea que esas cargas consistan en <u>productos</u> ó <u>manufacturas</u> naturales ó extranjeras.”</p> <p>Artículo XI: “...y todos los <u>géneros</u> y <u>mercancías</u> que se salven, ó sus valores, si se vendiesen, serán fielmente restituidos á los propietarios...Los <u>géneros</u> y <u>mercancías</u> que se salven e la ruina no pagarán derecho...”</p> <p>Artículo XVIII: “...y sus <u>géneros</u> y <u>efectos</u>, de cualquiera descripción que sean, ya estén en su propia custodia ó confiados á individuos ó al Estado, no estarán sujetos á embargo ó secuestro, no á otras cargas ó demandas que aquellas que se hagan sobre <u>efectos</u> o <u>propiedades</u> semejantes...”</p>	<p><u>produce</u> or <u>manufacture</u> of any other country...No prohibition shall be imposed upon the importation of any <u>article</u> the growth, <u>produce</u>, or <u>manufacture</u> of the territories of either of the two Contracting Parties into the territories of the other,...nor shall any prohibition be imposed on the exportation of any <u>article</u> from the territories of either of the two Contracting Parties...”</p> <p>Article VII: “...and, in either case, no discriminating duty shall be imposed or collected in the ports of either country on the said vessels or upon their <u>cargoes</u>, whether such <u>cargoes</u> shall consist of native or of foreign <u>produce</u> or <u>manufacture</u>.”</p> <p>Article XI: “... and all <u>goods</u> and <u>merchandize</u> which shall be saved therefrom, or the produce thereof, if sold, shall be faithfully restored to the owners...The <u>goods</u> and <u>merchandize</u> saved from the wreck shall not be subject to duties...”</p> <p>Article XVIII: “...and their <u>goods</u> and <u>effects</u>, of whatever description they may be, whether in their own custody or entrusted to individuals or to the Satate, shall not be liable to seizure or sequestration or to any other charges or demands then those which may be made upon the like <u>effects</u> or <u>property</u> belonging...”</p>

Document	Reference	Description in Spanish	Description in English
13 Nicaragua-Central American Transit Company Inter-Oceanic Transit Contract (Molina-Morris), Washington DC, 10 November 1863	NCM Annex 18	Artículo XXIII: "...ó imponiendo opresivas exacciones ó irrazonables derechos sobre las malas, pasajeros, buques, <u>géneros</u> , <u>efectos</u> , <u>mercancías</u> , <u>ú otros artículos</u> ."	Article XXIII: "...or by imposing oppressive exactions or unreasonable tolls upon mails, passengers, vessels, <u>goods</u> , <u>wares</u> , <u>merchandize</u> , or <u>other articles</u> ."
	CRR Annex 16 (Articles XVIII and XXI)	Artículo XVIII: "La Compañía podrá, sin tener obligación de pagar ningún impuesto ni derecho, introducir a la República materiales, maquinaria y cualesquiera otras <u>cosas</u> útiles y necesarias para el establecimiento....Bajo la inteligencia además de que la Compañía al introducir los <u>artículos</u> útiles, antes mencionados, a la República..."	Article XVIII: "The Company, without being obligated to pay any tax or duty, may introduce into the Republic any materials, machinery and other <u>things</u> that are useful and necessary for the establishment...with the understanding that the Company, upon introducing the aforesaid useful <u>articles</u> to the Republic..."
	English translation of Article XVIII by Nicaragua  As Nicaragua did not provide an English translation of Article XXI, English translation by Costa Rica. Source: NCM Annex 18	Artículo XXI: "El Gobierno desembarca y devuelve a la Compañía, el camino, estaciones, los muelles, vapores, resto de vapores y todos los demás <u>objetos</u> y propiedades de que la dicha Compañía..."	Article XXI: "The Government disembarks and returns to the Company the road, stations, docks, steamers, the rest of the steamers and the other <u>objects</u> and property that the said Company..."

Document	Reference	Description in Spanish	Description in English
14 United States-Nicaragua Treaty of Friendship, Commerce and Navigation (Ayon-Dickinson), Managua, 21 June 1867	CRR, Annex 17 (Articles VI, VII, VIII, XV and XVII)  Source: GP Sanger, <i>The Statutes at Large, Treaties and Proclamations of the United States of America from December 1867, to March 1869, Vol XV</i> (Boston: Little, Brown, and Co., 1869)  Both the Spanish and English versions are authentic.	<p>Artículo VI: “Se pagarán los mismos derechos por la importación á los territorios de la república de Nicaragua de cualquier <u>artículo</u> que sea <u>fruto</u>, <u>producto</u> natural ó <u>manufacturado</u> de los territorios de los Estados Unidos, ya sea que tal importación sea hecha en buques de Nicaragua ó en buques de los Estados Unidos, y se pagarán los mismos derechos por la importación en los territorios de los Estados Unidos de cualquier <u>artículos</u> que sea fruto, producto natural ó manufacturado de la república de Nicaragua....”</p> <p>Artículo VII: “...se concederá absoluta libertad al comprador y al vendedor para contratar y fijar el precio de cualesquiera <u>generos</u>, <u>efectos</u> ó <u>mercancías</u> exportadas á ó de la república de Nicaragua...”</p> <p>Artículo VIII: “En todo lo que hace relación á la policia de los puertos, á la carga y descarga de los buques, á la seguridad de <u>mercancías</u>, <u>generos</u> y <u>efectos</u>...”</p> <p>Artículo XV: “...En estos puertos no se impondran ó exijiran por el gobierno de Nicaragua, ningunos derechos de tonelage ú otros, sobre los cuques de los Estados Unidos, ó sobre <u>efectos</u> ó <u>mercancías</u> pertenecientes á ciudadanos...”</p> <p>Artículo XVII: “...que impongan exacciones opresivas ó impuestos exesivos sobre las malas, pasajeros, <u>mercancías</u> ú otros <u>artículos</u>...”</p>	<p>Article VI: “The same duties shall be paid on the importation into the territories of the republic of Nicaragua of any <u>article</u> being the <u>growth</u>, <u>produce</u>, or <u>manufacture</u> of the territories of the United States, whether such importation shall be made in Nicaraguan vessels or in the vessels of the United States; and the same duties shall be paid on the importation into the territories of the United States of any <u>articles</u> being the growth, produce, or manufacture of the republic of Nicaragua...”</p> <p>Article VII: “...absolute freedom shall be allowed in all cases to the buyer and seller to bargain and fix the price of any <u>goods</u>, <u>wares</u>, or <u>merchandise</u> imported into or exported from the republic of Nicaragua...”</p> <p>Article VIII: “In whatever relates to the police of the ports, the lading and unlading of ships, the safety of <u>merchandise</u>, <u>goods</u> and <u>effects</u>...”</p> <p>Article XV: “...At these ports no tonnage or other duties shall be imposed or levied by the government of Nicaragua on the vessels of the United States, or on any <u>effects</u> or <u>merchandise</u> belonging to citizens...”</p> <p>Article XVII: “...by imposing oppressive exactions or unreasonable tolls upon the mails, passengers, vessels, <u>goods</u>, <u>wares</u>, <u>merchandise</u>, or other <u>articles</u>...”</p>



Document	Reference	Description in Spanish	Description in English
15 Costa Rica-Nicaragua, Treaty of Commerce (Volio-Zelaya), San José, 14 August 1868	CRM Annex 10  English translation by Costa Rica	<p>Artículo I: “Habrá entre las Repúblicas de Nicaragua y Costa Rica una recíproca libertad de comercio, en todos los <u>artículos</u> no prohibidos por sus respectivas leyes. En consecuencia, los ciudadanos de cualquiera de las dos partes, podrán ir por mar y por tierra, libre y seguramente con sus buques y <u>cargamentos</u>, y entrar en los puertos, ríos y territorios habilitados de la otra; y lo mismo que los naturales, podrán hacer el comercio, por mayor ó por menor, alquilar y ocupar casas y almacenes, fijar los precios á sus <u>mercaderías</u>...”</p> <p>Artículo II: “...se declara y establece, respecto de sus particulares y propias producciones; que las importaciones y exportaciones que se hagan de uno a otro punto, ya sea por mar ó por tierra, de los <u>artículos</u> ó <u>productos</u> naturales ó industriales, propios del país que lo remite, no pagarán derechos ni impuesto de ninguna clase.”</p> <p>“§ Unico—Para evitar toda duda, lo mismo que cualquier fraude, se conviene: que los <u>efectos</u> de que habla este artículo, en su introducción al territorio ó dominios...”</p> <p>Artículo III: “Respecto al comercio y <u>artículos</u> extranjeros, ya sea en su importación ó en su exportación, por mar ó por tierra...”</p>	<p>Article I: “There shall be between the Republics of Costa Rica and Nicaragua a reciprocal freedom of trade in all the <u>goods</u> that are not prohibited by their respective laws. As a consequence, the citizens of any of the two parties may travel freely and safely by sea or by land with their ships and <u>cargo</u>, and enter through the ports, rivers and territories habilitated by the other party; the same as the nationals, they shall be able to do commerce, retail or wholesale, rent and occupy houses and warehouses, fix prices on their <u>merchandise</u>...”</p> <p>Article II: “...it 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 or land, of the <u>goods</u> or natural or industrial <u>products</u> natural to the sender’s country shall not pay rights or taxes of any kind”</p> <p>“Unique.- To avoid any doubt as well as any fraud, it is agreed: that the <u>items</u> considered in this Article, when they enter the dominion or territory...”</p> <p>Article 3: “Regarding trade and foreign <u>goods</u>, either for exporting or importing, by sea or land...”</p>

Document	Reference	Description in Spanish	Description in English
16 Costa Rica-Nicaragua Convention (Esquivel-Rivas), San José, 21 December 1868	NCM Annex 7	<p>Artículo 2: “El Gobierno de Nicaragua, por su parte, se compromete en caso de celebrar algún contrato de tránsito, sea con naturales ó extranjeros, á estipular: que las tarifas sobre fletes de <u>productos</u> ó <u>mercaderías</u> de importación ó exportación...”</p> <p>Artículo 4: “En el caso en que San Juan deje de ser un puerto franco, y que el Gobierno de Nicaragua sujete á registro ó aforo las <u>mercaderías</u> que se importen, ó los <u>productos</u> que exporten por él, quedarán libres de tales formalidades y del pago de cualesquiera derechos, las <u>mercaderías</u> y <u>productos</u> que Costa Rica importe ó exporte.”</p>	<p>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 <u>products</u> or <u>merchandise</u>...”</p> <p>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 <u>merchandise</u> which is imported or the <u>products</u> which are exported through it, the <u>merchandise</u> and <u>products</u> imported or exported by Costa Rica shall be exempt from such formalities and from the payment of any duties”</p>
17 Costa Rica-Nicaragua, Treaty for the excavation of an Inter-oceanic Canal (Jiménez-Montealegre), San José, 18 June 1869	<p>CRM Annex 13 (Article 1)</p> <p>NCM Annex 8 (Articles 1, 2, 3, 12, 43, 44, and 45)</p> <p>CRR Annex 19 (Articles 9, 14, 16, 27 and 28)</p> <p>English translation of Article 12 by Nicaragua.</p> <p>As Nicaragua did not provide an English translation of Articles 9, 14, 16, 27 and 28, English version from (1870-1871) LXI <i>BFS</i> 1144-1151</p>	<p>Artículo 9: “El concesionario tendrá el derecho de tomar, en los terrenos que pertenezcan al Estado, sin pagar por ellos ninguna indemnización ó tasa, los materiales de toda especie, como maderas, piedras, cales, puzolanas, tierras destinadas á rellenar y otros <u>objetos</u> que sean necesarios para la construcción y mantenimiento del canal” (...)</p> <p>Artículo 12: “...La República de Costa Rica podrá abrir esos caminos aún en territorio de Nicaragua y navegar los ríos pertenecientes al mismo territorio con el objeto de dar salida para el canal á los <u>productos</u> de su agricultura, de su industria y de su comercio, y de hacer sus correspondientes introducciones, sin que en ningún caso Nicaragua ponga obstáculo para la apertura de tales caminos, ni la navegación de dichos ríos y que en la desembocadura de ellos, podrá Costa Rica establecer aduanas y almacenes de depósito por cuenta del Estado...”</p>	<p>Article IX: “The contractor shall have a right to take from the lands belonging to the State the materials of all kinds, such as timber, stone, lime, puzzolana, earth for filling in, and other <u>objects</u> necessary for the construction and maintenance of the canal...”</p> <p>Article XII: “...The Republic of Costa Rica may open such roads even in Nicaragua territory and navigate on the rivers in that territory, for the purpose of transporting and introducing its agricultural, industrial and commercial <u>products</u> to the canal. Nicaragua may not impede in any way whatsoever the opening of said roads, nor the navigation of said rivers; and in the mouths of these rivers, Costa Rica may establish customs and warehouses at the expense of the State...”</p>

Document	Reference	Description in Spanish	Description in English
18 Costa Rica-Nicaragua, Treaty for the Deviation of the Waters of the Colorado River (Jiménez-Montealegre), San José, 21 June 1869	CRR Annex 20 (Articles 2 and 4)  Source: JM Bonilla, <i>Collección de Tratados Internacionales</i> (Managua: Tipografía Internacional, 1909), pp. 403-405.  English translation by Costa Rica	Artículo 14: “El concesionario podrá introducir, libres de derechos de aduana y de cualquiera tasa, todos los <u>artículos y objetos</u> que sean necesarios para el uso de la empresa...”	Article XIV: “The contractor may import free of Custom-House duty or any other tax, all <u>articles and objects</u> necessary for the use of the undertaking...”
		Artículo 16: “En cuanto á los <u>artículos</u> , cuya introducción es prohibida por la ley, el concesionario podrá llevarlos...”	Article XVI: “As for those <u>articles</u> of which the importation is prohibited by the law, the contractor may bring them in...”
		Artículo 27: “...ni podrá imponer ningún derecho de tránsito, bajo cualquiera denominación que sea, á las <u>mercancías</u> conducidas como tales en dichos navíos, ni a los pasajeros ni tripulaciones.”	Article XXVII: “...nor any transit duty, under whatsoever denomination, on the <u>merchandise</u> conveyed as such in the said ships, or on the passengers or crews.”
		Artículo 28: “Las <u>mercancías</u> que estos navíos desembarquen y entreguen al comercio del país, quedarán sujetas á los derechos establecidos por la legislación general de la República”	Article XXVIII: “The <u>merchandise</u> disembarked by those ships and delivered to the commerce of the country, shall be subject to the duties fixed by the general laws of the Republic.”
		Artículo 2: “El Gobierno de Nicaragua por su parte, se compromete...que las tarifas sobre fletes de <u>productos ó mercaderías de importación ó exportación</u> ...”	Article 2: “The Government of Nicaragua, on its part, undertakes that...the tariffs over freights of <u>products or merchandise for importation or exportation</u> ...”
		Artículo 4: “En el caso de que San Juan del Norte deje de ser un puerto franco y que el Gobierno de Nicaragua sujete á registro ó aforo las <u>mercaderías</u> que se importen ó los <u>productos</u> que se exporten por él, quedarán libres de tales formalidades y del pago de cualesquiera derechos, las <u>mercaderías</u> y	Article 4: “In the event that San Juan del Norte ceases being a free port and that the Government of Nicaragua subjects to registration or appraisal the <u>merchandise</u> that is imported or the <u>products</u> that are exported through it, they will remain free from such formalities and from the payment of whatever

Document	Reference	Description in Spanish	Description in English
		<u>productos</u> que Costa Rica importe ó exporte, sin que en ningún caso...pueda oponerse obstáculo al <u>comercio de importación y exportación</u> de Costa Rica...pues se declara que dicho <u>comercio de importación y exportación</u> de Costa Rica queda absolutamente libre de toda traba, embarazo y derecho de toda clase.”	dues the <u>merchandise</u> and <u>products</u> that Costa Rica imports or exports, without it being allowed in any case...may oppose obstacles to Costa Rica’s <u>commerce of import and export</u> ...since it is declared that said <u>commerce of import and export</u> of Costa Rica remains absolutely free of any hindrance, impediment or due of any kind.”
19 Nicaragua-F.A. Pellas Navigation Contract, Managua, 1 March 1877	NCM Annex 19  English translation by Nicaragua	Artículo 1: “El Gobierno de Nicaragua concede al señor F.A. Pellas...el privilegio exclusivo...de navegar por vapores en río de San Juan del Norte i lago de Granada i el de transportar por ellos los <u>productos</u> del país i <u>mercancías</u> destinadas al comercio interior de la República...”	Article 1: “The Government of Nicaragua grants to Mr. F.A. Pellas...the exclusive privilege...to navigate with steamboats the San Juan del Norte river and Lake Granada [lake Nicaragua] and transporting through them the <u>fruits</u> of the land as well as <u>merchandise</u> destined to the Republic’s interior...”
20 Costa Rica-Nicaragua Treaty of Limits (Alvarez-Zambrana), Granada, 5 February 1883, unratified	NCM Annex 9  English translation by Nicaragua	Artículo 4: “Costa Rica tendrá el derecho de abrir en el territorio de Nicaragua los caminos que necesite para la importación o exportación de sus <u>efectos</u> , por el Lago de Nicaragua...”	Article 4: “Costa Rica shall have the right to open in the territory of Nicaragua the necessary roads for importing and exporting its <u>effects</u> , through Lake Nicaragua...”

Document	Reference	Description in Spanish	Description in English
21 Costa Rica-Nicaragua, Treaty of Limits (Navas-Castro), San José, 19 January 1884, unratified	NCM Annex 10  English translation by Nicaragua	<p>Artículo IV: “Para el caso de que se lleve á efecto la construcción del ferrocarril indicado en la cláusula precedente, el Gobierno de Nicaragua se reserva el derecho de establecer una aduana con sus correspondientes empleados y dependencias en el punto de partida de la línea férrea, ya sea en la ribera del Lago ó en cualquiera de los ríos mencionados, destinado dicho establecimiento al registro de <u>mercancías</u> que de ó para Nicaragua se importen ó exporten...Costa Rica no cobrará derechos de aduana, ni otros impuestos nacionales ó locales por razón del tránsito de <u>mercancías</u> dentro de su territorio...”</p> <p>Artículo IX: “Costa Rica tiene el derecho de abrir en el territorio de Nicaragua los caminos que necesite para la importación o exportación de sus <u>efectos</u> por el Lago de Nicaragua y el río Colorado, río y puerto de San Juan del Norte...”</p>	<p>Article IV: “In the event of the construction of the railroad line indicated in the foregoing article, the Government of Nicaragua reserves the right to set up a customs-house, with its respective employees and offices, at the starting point of the railroad line, either on the bank of the Lake or at any of the aforementioned rivers, with the objective of registering any <u>merchandise</u> which is imported to or exported from Nicaragua ... Costa Rica shall not charge custom duties or other national or local taxes for in-transit <u>merchandise</u> in its territory...”</p> <p>Article IX: “Costa Rica shall have the right to build, within the territory of Nicaragua, the roads which are necessary to import and export its <u>effects</u> through the Lake of Nicaragua, the Colorado River, and the river and port of San Juan del Norte...”</p>
22 Costa Rica-Nicaragua, Treaty of Peace, Friendship, Commerce and Extradition (Navas-Castro), San José, 19 January 1884, unratified	CRR Annex 22 (Articles VIII, XIX, XXIX and XXXIII)  Source: JM Bonilla, <i>Collección de Tratados Internacionales</i> (Managua: Tipografía Internacional, 1909), pp. 455-466.  English translation by Costa Rica	<p>Artículo VIII: “...En cuanto á los derechos civiles, dicho goce y equiparación serán desde luego absolutos, sin reserva ni diferencia alguna, especialmente en cuanto á libertades y seguridades personales y de domicilio, á los medios de adquirir <u>bienes</u> de toda clase, poseerlos, conservarlos, transferirlos y transportarlos dentro y fuera de la República y al ejercicio del comercio y la navegación...”</p>	<p>Article VIII: “...Regarding Civil rights, their attribution and equivalence shall of course be absolute, with no reservations or differences, especially in regard to freedom and safety, both personal and domiciliary, as to the means of acquiring <u>goods</u> of any kind, possessing, keeping, transferring and transporting them inside and outside the Republic and to the practice of trade and navigation....”</p>

Document	Reference	Description in Spanish	Description in English
		<p>Artículo XIX: "...que las importaciones y exportaciones que se hagan de uno á otro punto, ya sean por mar ó por tierra, de los <u>artículos</u> ó <u>productos</u> naturales é industriales propios del país que los remite, no pagarán derechos ni impuestos de ninguna clase, sean fiscales ó locales. Para evitar toda duda, lo mismo que cualquier fraude, se conviene en que los <u>productos</u> de que habla este artículo, en su introducción al territorio ó dominios de la una parte, deberán ir acompañados de una guía expedida...en que se hará constar ser de ella el origen ó procedencia de dichos <u>productos</u>..."</p>	<p>Article XIX: "...that the imports and exports that are made from one point to the other, either by sea or land, of the <u>articles</u> or natural and industrial <u>products</u> natural to the sender's country shall not pay rights or taxes of any kind, either fiscal or local. To avoid any doubt as well as any fraud, it is agreed that the <u>products</u> referred to in this article, when they enter the territory or dominion of one of the parties, shall be accompanied by a bill of lading issued...in which the origin of said <u>products</u>..."</p>
		<p>Artículo XXIX: "Cuando haya lugar á la extradición, todos los <u>objetos</u> aprehendidos, que tengan relación con el delito y sus autores se entregarán sin perjuicio del derecho de tercero, á la República reclamante..."</p>	<p>Article XXIX: "When the extradition proceeds, all <u>objects</u> seized that have any relation to the crime and its perpetrators shall be rendered, with due respect to the rights of third parties, to the requesting Republic..."</p>
		<p>Artículo XXXIII: "Los gastos que causen el mantenimiento y transporte del individuo reclamado, y también la entrega y traslación de los <u>objetos</u>, que por tener relación con el delito deban restituirse y remitirse, serán a cargo de la República que solicite la entrega."</p>	<p>Article XXXIII: "The expenses incurred by the maintenance and transport of the requested individual, as well as the delivery and transport of the <u>objects</u> that must be sent and returned on account of their relation to the crime, shall be paid by the Republic that requests the delivery."</p>

Document	Reference	Description in Spanish	Description in English
23 United States of America-Nicaragua, Treaty providing for the construction of an Inter-Oceanic Canal across the territory of Nicaragua (Frelinghuysen-Zavala), Washington, 1 December 1888	CRR Annex 23, Article IV  Sources:  English version: <i>Report of the Isthmian Canal Commission, 1899-1901</i> , Appendix L, pp. 359-363  Spanish version: <i>Memoria de la Secretaría de Relaciones Exteriores y Carteras Anexas de la República de Costa Rica</i> (San José: Imprenta Nacional, 1884-1885)	Artículo IV: “Con el objeto de llevar a cabo este convenio...” (...) para los depósitos de aguas, diques, muelles, arsenales, accesorios de las esclusas, faros, señales, almacenes, talleres, edificios y para cualesquiera otros <u>objetos</u> necesarios...”	Article IV: “For the purpose of carrying out this agreement...for reservoirs, dykes, piers, docks, spaces about locks, for lights, beacons, storehouses, machine shops, buildings, and for whatever other <u>thing</u> necessary...”
24 Costa Rica-Nicaragua Treaty of Peace, Commerce and Extradition (Esquivel-Chamorro), San José, 9 October 1885	CRR Annex 24 (Articles VII, XVIII, XXVIII and XXXII)  Spanish version: JM Bonilla, <i>Colección de Tratados Internacionales</i> (Managua: Tipografía Internacional, 1909), pp. 489-498	Artículo VII: “...especialmente en cuanto a libertades y seguridades personales y de domicilio, a los medios de adquirir <u>bienes</u> de toda clase, poseerlos, conservarlos, transferirlos...”  Artículo XVIII: “...que las importaciones y exportaciones que se hagan de uno a otro punto, ya sean por mar o por tierra, de los <u>artículos</u> o <u>productos</u> naturales propio del país...Para evitar toda duda, los mismo que cualquier fraude, se	Article VII: “...particularly in regard to freedoms and personal and domiciliary guarantees, to the means of acquiring <u>goods</u> of any kind, to possess, preserve and transfer them ...”  Article XVIII: “...that the imports and exports made from one point to the other, either by sea or land, of the <u>articles</u> or natural <u>products</u> from the country...To avoid any doubt, as well as any fraud,

Document	Reference	Description in Spanish	Description in English
	English translation by Costa Rica	explica: que los <u>productos</u> de que habla este artículo son los de libre comercio en el país, donde se introducen y se conviene en que dichos <u>productos</u> al ser introducidos en el territorio o dominios de la una parte, deberán ir acompañados de una guía expedida por la autoridades competentes de la otra en que se hará constar ser de ella el origen o procedencia de dichos <u>productos</u> ...”	it is stated: that the <u>products</u> mentioned in this article are those of free trade in the country where they are introduced and it is agreed that said <u>products</u> , when introduced into the territory or domains of one party, shall be accompanied by a bill of lading issued by the competent authorities of the other in which the origin of said <u>products</u> from that party shall be certified...”
		Artículo XXVIII: “Cuando haya lugar a la extradición todos lo <u>objetos</u> aprehendidos que tengan relación con el delito y sus autores se entregarán...”	Article XXVIII: When the extradition proceeds, all <u>objects</u> seized that have any relation to the crime and its perpetrators shall be rendered...”
		Artículo XXXII: “Los gastos que causen el mantenimiento y traspaso del individuo reclamado, y también la entrega y traslación de los <u>objetos</u> que por tener relación...”	Article XXXII: “The expenses incurred by the maintenance and transfer of the requested individual, as well as the delivery and transport of the <u>objects</u> that by having relation...”
25 Contract between the Government of the Republic of Nicaragua and the Nicaragua Canal Association of New York for the opening of an inter-oceanic canal (Cárdenas-Menocal). Managua, 23 March 1887	NCM Annex 20 (Article 5)  CRR Annex 25 (Articles 30 and 40)  English translation of Article 5 by Nicaragua.	Artículo 5: “El Estado se compromete a no hacer ninguna concesión ulterior para la apertura de un Canal entre los dos Océanos, mientras dure el presente privilegio, y se abstendrá también durante el mismo tiempo, de hacer la concesión de un Ferrocarril que hiciera competencia al Canal para el transporte de <u>mercancías</u> , ...  Artículo 30: “La compañía no podrá introducir al territorio de la República, <u>mercancías</u> con el objeto de traficar con ella, si no fuere pagando	Article V: “The Estate (sic) binds itself not to make any subsequent concession for the opening of a canal between the two oceans during the term of the present concession, and also to abstain from granting a concession for a railroad, such as might compete with the canal for the transportation of <u>merchandise</u> ....  Article XXX: “The company shall not import <u>merchandise</u> into the territory of the Republic, for the purpose of trafficking, without paying the



Document	Reference	Description in Spanish	Description in English
	English translation of Articles 30 and 40 from <i>Report of the Isthmian Canal Commission 1899-1901</i> (Washington: Government Printing Office, 1904) pp. 389-400	los derechos de aduana establecidos por ley. Sin embargo, podrá introducir libres de derechos de aduana y de cualesquiera impuestos, los <u>artículos</u> necesarios para los trabajos de la empresa... para el trabajo de los talleres que la Compañía mantenga en actividad; pudiendo consistir dichos <u>artículos</u> en utensilios, máquinas, aparatos, carbón... Estos <u>objetos</u> podrán transitar ente cualesquiera puntos donde hayan de necesitarse durante los trabajos de apertura del Canal.... Se exceptúan de la franquicia contenida en este artículo, los <u>objetos</u> que no sean de libre comercio,”	import duties established by law. But it may import free of custom duties, and of any tax whatsoever, the <u>articles</u> needed for the works of the enterprise... for running the workshops the company may keep in operation; and such <u>articles</u> may consist of tools, machinery, apparatus, coal... These <u>articles</u> may be transported between whatever points they may be required during the works of opening of the canal... <u>Goods</u> , the commerce of which is not free, are excepted from the privileges contained in this article,”
		Artículo 40: “...Pero por las <u>mercaderías</u> que se embarquen ó desembarquen...”	Article XL: “...But all such <u>merchandise</u> as shall be loaded or discharged...”
26 Contract between the Government of the Republic of Costa Rica and the Nicaragua Canal Association for the opening of an inter-oceanic canal (Pérez-Menocal), San José, 31 July 1888	CRR Annex 27 (Articles XXVI, XXXVI, XXXVII, XXXIX and XL)  Spanish version: Archivo Nacional de Costa Rica	Artículo XXVI: “La Asociación no podrá introducir en el territorio de la República <u>mercancías</u> con el objeto de traficar con ellas, sino fuere pagando los derechos de Aduana establecidos por la ley; sin embargo, podrá introducir libre de tales derechos y de cualesquiera otros impuestos, los <u>artículos</u> necesarios para los trabajos de la Empresa...”	Article XXVI: “The Association cannot import <u>merchandise</u> into the territory of the Republic for the purposes of trafficking with it without paying the custom duties established by law, but it shall have the right to import free from custom duties and of any other imposts whatsoever, the <u>articles</u> needed for the works of the enterprise...and the said <u>articles</u> may consist of implements, machinery,

Document	Reference	Description in Spanish	Description in English
	English version: AR Colquhoun, <i>The Key of the Pacific: The Nicaragua Canal</i> (Westminster: Archibald Constable & Co., 1895) pp. 386-407	consistirán dichos <u>artículos</u> en utensilios, máquinas, aparatos... Estos <u>objetos</u> podrán transitar ente cualesquiera puntos donde haya necesidad, durante los trabajos de la construcción del Canal... Se exceptúan de la franquicia contenida en este artículo, los <u>objetos</u> que no sean de libre comercio...	apparatus... These <u>articles</u> may be transported between whatever points they may be needed the work of the construction of the canal... Those <u>articles</u> the commerce of which is not free are excepted from the privileges granted in this Article, and shall remain subject...
		Artículo XXXVI: “La Republica de Costa Rica no establecerá derecho de tonelaje, anclaje, pilotaje, faro, ó ningún otro sobre las embarcaciones de cualquiera clase que sean, ni sobre las <u>mercancías</u> , equipajes y pasajeros, que transiten por el Canal...”	Article XXXVI: “The Republic of Costa Rica shall not establish any tonnage, anchorage, pilot or lighthouse dues, or any other charges of any kind whatsoever, upon vessels of any class whatever, or upon the <u>merchandise</u> , baggage and passenger which may pass through the canal...”
		Artículo XXXVII: “A fin de asegurar la más amplia libertad de tránsito para personas y <u>propiedades</u> , habrá en cada margen del canal una zona libre... Las <u>mercancías</u> que se embarquen ó desembarquen en cualquier puerto del Canal dentro del territorio de Costa Rica...”	Article XXXVII: “For the purpose of securing the most ample liberty or the transit of persons and <u>property</u> , a free zone shall be established on each side of the canal... All <u>merchandise</u> that shall be loaded or discharged at any point of the canal within the territory of Costa Rica...”
		Artículo XXXIX: “...tendrá la Asociación el derecho de establecer y percibir por el pasaje de los buques y embarcaciones de toda clase, el de viajeros y <u>mercancías</u> á través del Canal y en las aguas y puertos de su dependencia...”	Article XXXIX: “...the said association shall have the right to establish and collect for the passage of all kinds of ships, vessels, travelers and <u>merchandise</u> through the canal...”
		Artículo XL: “...También se concede una rebaja de un cincuenta por ciento en la tarifa general á cualquier buque que comience su navegación con destino al extranjero, en cualquiera de los puertos pertenecientes á la República, y cuyo <u>cargamento</u> se componga en su totalidad de <u>productos</u> del país...”	Article XL: “...A reduction of fifty per centum of the general tariff is also granted to all vessels that begin their voyage for a foreign country at any of the ports belonging to the Republic, with a <u>cargo</u> wholly consisting of <u>products</u> of the country...”

Document	Reference	Description in Spanish	Description in English
27 Costa Rica-Nicaragua, Treaty of Limits (Guerra-Castro), Managua, 23 December 1890	NCM Annex 12 English translation by Nicaragua	<p>Artículo VI: "...y que haga difícil el embarque y desembarque de todas clase de <u>mercaderías</u>.... El expresado derecho de uso tiene por objeto el transporte, embarque y desembarque de toda clase de <u>mercaderías</u>, sin restricción ninguna, la construcción de ferrocarriles y muelles; la fundación de oficinas, establecimientos comerciales y casas de habitación, las cuales, así como las personas que habiten dicha faja de terreno, estarán sometidos á la jurisdicción y leyes de Costa Rica. ...</p> <p>Artículo VII: "Con el fin de que á Nicaragua le quede espacio suficiente de costa no rocallosa en la Bahía de Salinas, para el embarque y desembarque de toda clase de <u>mercaderías</u>..."</p>	<p>Article VI: "... and it makes it difficult to load and unload all classes of <u>merchandise</u>... The purpose of the aforesaid right of use is to transport, load and unload all kinds of <u>merchandise</u>, without restriction, build railways and wharves; establish offices, commercial stores and residential houses, which shall be subject, as well as the persons who inhabit this tract of land, to the jurisdiction and laws of Costa Rica. ...</p> <p>Article VII: "So that Nicaragua has sufficient space of non-rocky coast at Salinas Bay for loading and unloading all kinds of <u>merchandise</u>..."</p>

## Chapter 4

### Nicaragua's Breaches

#### A. Introduction

4.01 The facts of the present matter are simple. Nicaragua gradually started infringing Costa Rica's navigational rights on the San Juan during the context of the Nicaraguan Civil War (1980-1989). Although the initial restrictions on Costa Rican navigation were justified as temporary, exceptional measures to protect Nicaragua's national security in the context of an armed conflict,<sup>383</sup> and although some of the restrictions were suspended when Costa Rica protested, during the mid-1990s the situation worsened, particularly after 14 July 1998 when Nicaragua prohibited navigation by Costa Rican police.

4.02 After Costa Rica filed its Application in September 2005, Nicaragua implemented additional restrictions on Costa Rican navigation, both public and private, including visa and passport requirements and a prohibition of fishing for riparians, reaching a point where Costa Ricans are actively discouraged from using the San Juan River at all. Nicaragua has gradually increased its military presence in the border area. The Nicaraguan press reported that new military posts were opened in the area in March 2007,<sup>384</sup> against a background where Nicaraguan authorities have threatened to use force to prevent Costa Rican navigation.<sup>385</sup>

4.03 Nicaragua's unlawful restrictions and hindrances to Costa Rica's use of the San Juan River have caused considerable harm to the local inhabitants who need to use the River on a daily basis; to the boatmen who transported tourists

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383 See e.g. the note from Nicaraguan Ambassador in Costa Rica, Javier Chamorro Mora, to Costa Rican Foreign Minister, Bernd Niehaus Quesada of 12 November 1980: CRM, Annexes, Vol 3, Annex 40. See also the following press notes in CRM, Annexes, Vol 5: "Nicaragua conditions navigation on the waters of the San Juan River", (Annex 111); "Nicaraguans announce control on the San Juan", (Annex 115); "Ramirez offers gradual respect to navigation on the San Juan River" (Annex 122); and "Nicaragua guarantees freedom on the San Juan River" (Annex 121).

384 "New Army Posts in the San Juan River", *El Nuevo Diario*, Managua, 26 March 2007: CRR, Annexes, Vol 2, Annex 58.

385 See this Reply, paragraph 4.52; see also Nicaraguan Presidential Decree No. 65-2005 of 28 September 2005, Nicaraguan Official Gazette No. 188 of 29 September 2005: CRR, Annexes, Vol 2, Annex 69.

— a majority of whom have seen their businesses seriously affected; to the State institutions that formerly provided security, health care and other social services to the inhabitants; and to the inhabitants themselves, many of them Nicaraguan nationals, who have lost access to those services.

4.04 The present Chapter responds to Nicaragua's claims that it has not breached Costa Rica's navigational and related rights. It demonstrates that Nicaragua's breaches of those rights are continuing.

**Section B** deals with the breaches of Costa Rica's perpetual right of free navigation.

Subsection (1) deals with the obligation to land at the Nicaraguan bank and pay for a "departure clearance certificate." Subsection (2) examines Nicaragua's imposition of other charges, including immigration and tourist fees. Subsection (3) demonstrates that Nicaragua has required Costa Ricans and foreigners on Costa Rican vessels to carry passports and visas. Subsection (4) discusses Nicaragua's imposition of timetables on Costa Rican navigation and subsection (5) examines the searches conducted by Nicaraguan authorities to Costa Rican vessels and passengers.

**Section C** addresses the breaches of Costa Rica's right of navigation "for purposes of commerce," including navigation by Costa Rican Government officials for purposes of communication and the provision of health, social and educational services, and navigation of Costa Ricans generally in order to communicate between places on the Costa Rican bank of the River.

**Section D** deals with the breaches of Costa Rica's right of protection of commerce, safeguard, defence and re-supply of police posts, and in particular with navigation of Costa Rican police in accordance with the 1858 Treaty and the 1888 Cleveland Award.

**Section E** examines the breaches of Costa Rica's related rights, including the imposition of a requirement to fly the Nicaraguan flag, the prohibition of subsistence fishing by Costa Rican riparians, denial of the right to land on the Nicaraguan bank and Nicaragua's obligation to facilitate traffic on the River in accordance with the 1956 Agreement.

**Section F** deals with Nicaragua's plea that Costa Rica has acquiesced in Nicaragua's violations of its rights. It addresses three specific allegations: measures relating to tourism arising from the Memorandum of Understanding between the Ministers of Tourism of 5 June 1994; navigation of Costa Rican police on the River; and the allegation that

Costa Rica recognises the need to obtain permission to navigate on the San Juan.

In a concluding section (**Section G**) Costa Rica discusses Nicaragua's strategy of "militarization" of the San Juan border area in an effort to actively discourage Costa Rican navigation.

## **B. Breaches of Costa Rica's perpetual right of free navigation**

### **(1) The obligation to land at the Nicaraguan bank and payment for a "departure clearance certificate"**

4.05 In its Memorial, Costa Rica presented the following evidence:

- (i) In the early 1980s, Nicaraguan army authorities began demanding that Costa Rican vessels on the San Juan land at their posts on the Nicaraguan bank, report to the Nicaraguan authorities and pay for a "departure clearance certificate." This was required even when Costa Rican vessels were navigating from one point in Costa Rican territory to another. This practice was suspended in 1982 when Costa Rica protested,<sup>386</sup> and only occasionally occurred after the end of the Nicaraguan civil war.
- (ii) In 2001 Costa Rican riparians complained that they were being charged US\$25 per vessel for permission to navigate on the River. Costa Rica has repeatedly protested this measure,<sup>387</sup> but despite these protests the "departure clearance certificate" continues to be charged. The cost has varied between US\$25 and US\$5 and appears to vary according to the particular Nicaraguan post where it is issued. Costa Rica's Memorial annexed evidence of the imposition of a charge in the form of a "departure clearance certificate", in the form of notes of protest,<sup>388</sup>

386 Costa Rican Foreign Minister, Fernando Volio Jiménez, to Nicaraguan Chargé d'Affaires a.i to Costa Rica, Oscar Ramón Téllez, Note of 16 July 1982: CRM, Annexes, Vol 3, Annex 42.

387 Costa Rican Deputy Foreign Minister, Elayne Whyte, to Nicaraguan Foreign Minister, Francisco Xavier Aguirre Sacasa, Note of 18 April 2001: CRM, Annexes, Vol 3, Annex 70.

388 Costa Rican Deputy Foreign Minister, Elayne Whyte, to Nicaraguan Foreign Minister, Francisco Xavier Aguirre Sacasa, Note of 18 April 2001: CRM, Annexes, Vol 3, Annex 70; Costa Rican Foreign Minister, Roberto Rojas López, to Nicaraguan Foreign Minister, Francisco Xavier Aguirre Sacasa, Note of 9 May 2001: CRM, Annexes, Vol 3, Annex 71; and Costa Rican Foreign Minister, Roberto Rojas, to Nicaraguan Foreign Minister, Francisco Xavier Aguirre Sacasa, Note of 26 September 2001: CRM, Annexes, Vol 3, Annex 73.

affidavits,<sup>389</sup> press reports<sup>390</sup> and copies of several “departure clearance certificates.”<sup>391</sup>

4.06 In its Counter-Memorial, Nicaragua did not deny this evidence, nor did it present any evidence to contradict it.

4.07 Since Costa Rica submitted its Memorial, Nicaraguan authorities have continued to impose an obligation to land at the Nicaraguan bank and to pay a “departure clearance certificate.” The current cost is US\$10 per vessel for each one-way trip.<sup>392</sup>

4.08 Annexed to this Reply is further evidence of these continuing breaches, constituted by:

- (i) a receipt dated 25 October 2007 for a “departure clearance certificate” charged to a Costa Rican boatman which indicates he was charged ₡6.000 (equivalent to approximately US\$11.50);<sup>393</sup>
- (ii) new affidavits, including that of Víctor Julio Vargas Hernández, who states:

“the application of restrictions and the threats to Costa Ricans are increased or made more severe when the guards are changed on posts. To allow Costa Rican navigation sometimes they demand payment in goods, through cigarettes, liquor or food.”<sup>394</sup>

- (iii) an affidavit of Marleny Rojas Vargas referring to an incident where she was forced to land on the Nicaraguan bank:

“on one occasion a woman had a medical emergency, and urgently required some medicine, and when trying to help her, in order to obtain the medicine from the shop that sold it, in Costa Rican territory, she was forced to cross the San Juan River to request permission to make the purchase.”<sup>395</sup>

In respect of this affidavit, Sketch Map 2 opposite, demonstrates that although the witness’ house and the store where the medicine was sold

389 Affidavit of 5 May 2001: CRM, Annexes, Vol 4, Annex 83.

390 “Nicas insist on charging”, *La Nación*, San José, 8 May 2001: CRM, Annexes, Vol 5, Annex 169.

391 CRM, Annexes, Vol 6, Annexes 241(a) and (b).

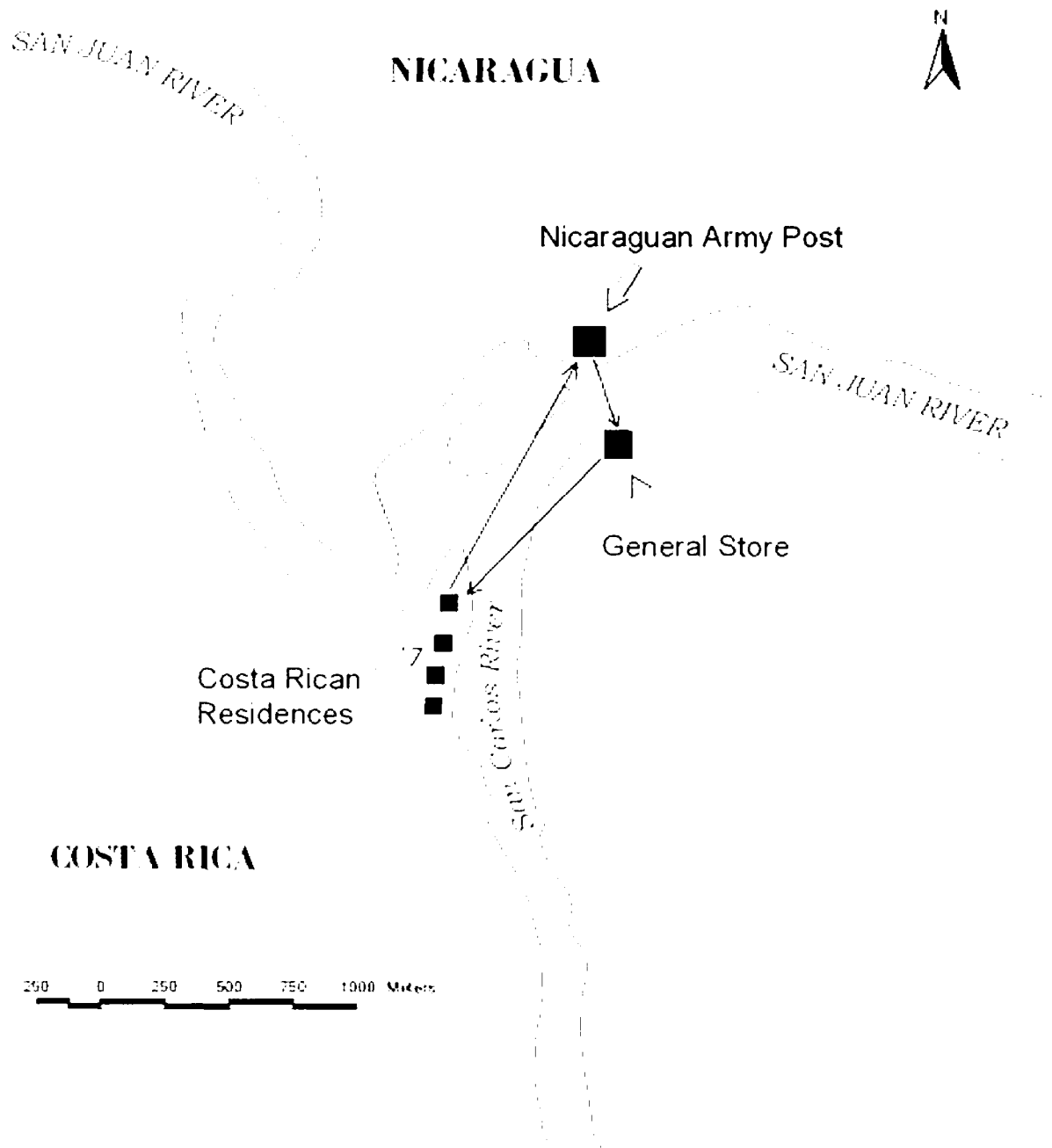
392 If payment is made in Costa Rican currency, the amount payable appears to vary according to the way in which the local Nicaraguan authorities calculate the exchange rate.

393 “Departure clearance certificate” charged to Jorge Lao, 25 October 2007: CRR, Annexes, Vol 2, Annex 71.

394 Affidavit of Víctor Julio Vargas Hernández, 29 July 2007: CRR, Annexes, Vol 2, Annex 54. For similar evidence, see also Affidavits of Leonel Morales Chacón, 30 April 2007: CRR Annexes, Vol 2, Annex 50; and Carlos Lao Jarquín, 28 July 2007: CRR Annexes, Vol 2, Annex 51.

395 Affidavit of Marleny Rojas Vargas, 29 July 2007: CRR Annexes, Vol 2, Annex 54.

Sketch map 2  
**BOCA SAN CARLOS**





were both in Costa Rican territory and only a short distance by boat, the witness was forced to cross all the way to the Nicaraguan Army Post to report and then return to Costa Rican territory to purchase the medicine.

## (2) Other charges

4.09 In its Memorial, Costa Rica presented the following evidence:

- (i) By the mid-1990s, in addition to the charge for the “departure clearance certificate,” Nicaraguan authorities charged US\$5 for a “tourist card” to every passenger on a Costa Rican vessel on the San Juan, even where the vessel was transiting from one part of Costa Rican territory to another.<sup>396</sup> Failure to pay could entail a security risk for Costa Rican passengers, since the Nicaraguan army officials were heavily armed.<sup>397</sup>
- (ii) Costa Rica protested this measure<sup>398</sup> and the Nicaraguan Foreign Minister responded that the charge would not apply to Costa Ricans but only to other passengers.<sup>399</sup> The Nicaraguan press also reported that the charge would only apply to travel beyond the area where Costa Rica has a perpetual right of free navigation.<sup>400</sup> Despite this response, the charge was not suspended and has continued to apply to all Costa Ricans and passengers on Costa Rican vessels, including riparians of the River, and to the entire area in which Costa Rica has a perpetual right of free navigation.<sup>401</sup>
- (iii) Costa Rica protested once again in May 2001.<sup>402</sup> Despite an exchange of notes by both Foreign Ministers, the US\$5 not only continued to be

396 “Conflict with the Nicaraguans due to tourism on the San Juan”, *La Nación*, San José, 5 March 1994: CRM, Annexes, Vol 5, Annex 123; “Ticos were machine-gunned at the San Juan River”, *La Nación*, San José, 8 March 1994: CRM, Annexes, Vol 5, Annex 124.

397 “\$5 to navigate on the San Juan River”, *La Nación*, San José, 10 March 1994: CRM, Annexes, Vol 5, Annex 126.

398 Costa Rican Foreign Minister, Bernd Niehaus Quesada, to Nicaraguan Ambassador in Costa Rica, Alfonso Robelo, Note of 15 March 1994: NCM, Vol II, Annex 41.

399 Nicaraguan Foreign Minister, Ernesto Leal, to Costa Rican Foreign Minister, Bernd Niehaus Quesada, Note of 17 March 1994: CRM, Annexes, Vol 3, Annex 48.

400 “Problems with Ticos solved”, *La Prensa*, Managua, 8 March 1994: CRM, Annexes, Vol 5, Annex 125.

401 See Affidavit of 5 May 2001: CRM, Annexes, Vol 4, Annex 83.

402 Costa Rican Foreign Minister, Roberto Rojas López, to Nicaraguan Foreign Minister, Francisco Xavier Aguirre Sacasa, Note of 9 May 2001: CRM, Annexes, Vol 3, Annex 71.

charged but in early 2002 an additional US\$2 was charged on grounds of “immigration fees for entering Nicaraguan territory.”<sup>403</sup> In May 2002 a further US\$2 was added, purportedly as “immigration fees for existing Nicaraguan territory.”<sup>404</sup> Thus, from May 2002 until the present time, all passengers on Costa Rican vessels are forced to pay US\$9 to navigate on the San Juan, even when the travel is between places on Costa Rican territory.

- (iv) Evidence of these charges was annexed to Costa Rica’s Memorial, including copies of the US\$5 “tourist cards” charged to Costa Ricans in 2001 and 2005;<sup>405</sup> copies of “transit permit through the border points” (another term for the US\$5 charge) paid in 2005 and 2006;<sup>406</sup> and copies of the receipts for the payment of the US\$4 “migratory service (entry and exit) paid in 2005 and 2006.”<sup>407</sup> The imposition of these charges was confirmed by numerous statements of boatmen and hotel owners describing the hardships they have endured as consequence of these charges.<sup>408</sup>

4.10 In its Counter-Memorial, Nicaragua did not deny the imposition of these charges, nor did it present any evidence to contradict the evidence presented by Costa Rica.

4.11 Since then, Nicaraguan authorities have continued to impose these charges on Costa Rican navigation. Annexed to this Reply is evidence of these continuing breaches, including

- (i) new affidavits;<sup>409</sup>

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403 “Nicas raise River charge”, *La Nación*, San José, 21 May 2002: CRM, Annexes, Vol 5, Annex 174.

404 “Nicas raise River charge”, *La Nación*, San José, 21 May 2002: CRM, Annexes, Vol 5, Annex 174.

405 CRM, Annexes, Vol 6, Annexes 242(a) and (b).

406 CRM, Annexes, Vol 6, Annexes 243(a) and (b).

407 CRM, Annexes, Vol 6, Annexes 245(a) and (b).

408 See for example the following Affidavits in CRM, Annexes, Vol 4: Carlos Lao Jarquín (Annex 84); Geovanny Navarro Garro (Annex 85); Pablo Gerardo Hernández Varela (Annex 86); Santos Martín Arrieta Flores (Annex 87); Marvin Hay-Gonzalez (Annex 91); Windel Hodgson Hodgson (Annex 93); Daniel Reese Wise (Annex 95); and Wilton Hodgson Hodgson (Annex 96).

409 See for example Affidavit of Víctor Julio Vargas Hernández, 29 July 2007: CRR, Annexes, Vol 2, Annex 54.

- (ii) an official receipt issued on 25 October 2007 to a Costa Rican boatman for US\$4 for a “Immigration Dispatch”;<sup>410</sup> and
- (iii) a receipt for US\$5 dated 25 October 2007 for a “Transit permit at border point”.<sup>411</sup>

### (3) Visas and passports

4.12 In its Memorial, Costa Rica presented the following evidence:

- (i) In response to Costa Rica instituting the present proceedings, starting in October 2005, Nicaraguan authorities required Costa Ricans, and other foreign nationals from countries that require a visa to enter Nicaragua, to carry their passports with a Nicaraguan visa while navigating on the San Juan in Costa Rican vessels.<sup>412</sup> If these requirements were not met, Costa Rican boatmen and passengers were prevented from navigating on the River.<sup>413</sup> In one incident, a Costa Rican boatman was detained for several hours for failing to carry a Nicaraguan visa.<sup>414</sup>
- (ii) The total cost of the visa is US\$25, plus expenses related to travelling to the nearest Nicaraguan Consulate, which at the time Costa Rica submitted its Memorial was in the capital city of San José.<sup>415</sup> This constitutes an additional expense to the charges described above, which brings the total to US\$34 per passenger for each trip, plus “departure clearance fees” of US\$20 per vessel.
- (iii) Costa Rica’s Memorial demonstrated that this measure has practically destroyed Costa Rican commercial transportation of tourists in the route

410 “Immigration dispatch” charged to Jorge Lao, 25 October 2007: CRR, Annexes, Vol 2, Annex 72(a)

411 “Transit permit at border point” charged to Jorge Lao, 25 October 2007; CRR, Annexes, Vol 2, Annex 72(b).

412 See for example the following press notes in CRM, Annexes, Vol 5: “Ticos will pay for a visa”, *El Nuevo Diario*, Managua, 19 October 2005 (Annex 188); “Nicaragua conditions passing of Costa Rican vessels”, *La Nación*, San José, 16 October 2005 (Annex 185); “Nicaragua demands a Visa and Passport on the River”, *La Nación*, San José, 30 October 2005 (Annex 189).

413 See for example the Affidavit of Pablo Gerardo Hernández Varela, 27 January 2006: CRM, Annexes, Vol 4, Annex 86; and Note from Mr. Jorge Lao Jarquín and Mr. Santos Arrieta Flores to Costa Rican Foreign Ministry, 22 November 2005: CRM, Annexes, Vol 6, Annex 238.

414 Note from Mr. Jorge Lao Jarquín and Mr. Santos Arrieta Flores to Costa Rican Foreign Ministry, 22 November 2005: CRM, Annexes, Vol 6, Annex 238.

415 Copies of the payment receipts for each visa, as well as of the visas themselves, are included in CRM, Annexes, Vol 6, Annex 244. See also the Affidavit of Carlos Lao Jarquín, 27 January 2006: CRM, Annexes, Vol 4, Annex 84.

between Puerto Viejo de Sarapiquí and Barra del Colorado or Tortuguero, all on Costa Rican territory.<sup>416</sup>

4.13 In its Counter-Memorial, Nicaragua has not denied any of these facts nor responded to the evidence presented.

4.14 Costa Rica annexes to this Reply evidence that revenue from the imposition of a visa requirement is to be applied to finance Nicaragua's defence before this Court, which provides further support to Costa Rica's claim that this is a retaliatory measure. According to Nicaraguan Presidential Decree No. 97-2005, published in the Official Gazette No. 237 of 7 December 2005, revenue obtained from the consular visas charged to Costa Ricans would be destined to finance the costs of Nicaragua's defence in the proceedings instituted by Costa Rica in the present case.<sup>417</sup>

4.15 Costa Rica notes that in 2006 Nicaragua opened new Consulates in Puerto Viejo de Sarapiquí, in Limón, and in Ciudad Quesada. Limón is approximately 100 kilometres from Sarapiquí and Ciudad Quesada approximately 70 kilometres. However the Consulate in Sarapiquí does not operate regularly. Costa Ricans who wish to navigate on the San Juan are therefore still forced to travel to either Limón, Ciudad Quesada or San José, any of which would require a full day's journey, taking account of waiting time at the Consulate.

4.16 Further evidence annexed to this Reply affirms that the Nicaraguan authorities continue to require the carrying of a passport and Nicaraguan visa for navigation on the San Juan to the present day. A Costa Rican boatman whose 2001 statement described the hardships he faced in consequence of Nicaragua's restrictions<sup>418</sup> stated in a recent affidavit:

"That since his last affidavit regarding the restrictions imposed by Nicaragua on Costa Rican navigation on the San Juan River, Nicaragua has imposed the obligation to carry a visa on Costa Ricans navigating the San Juan River. That this measure has harmed

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416 See for example the following Affidavits in CRM, Annexes, Vol 4: Geovanny Navarro Garro (Annex 85); Santos Martín Arrieta Flores (Annex 87); Marvin Hay-Gonzalez (Annex 91); Armando Perla Pérez (Annex 92); Windel Hodgson Hodgson (Annex 93); and Daniel Reese Wise (Annex 95).

417 Nicaraguan Presidential Decree No. 97-2005 of 2 December 2005, Nicaraguan Official Gazette No. 237 of 7 December 2005: CRR Annexes, Vol 2, Annex 70.

418 See CRM, Annexes, Volume 4, Annex 83.

him as well as all other boatmen who obtain their living from the transportation of persons and tourists from Puerto Viejo de Sarapiquí to Tortuguero and other towns located in Costa Rican territory.”<sup>419</sup>

Another Costa Rican boatman stated:

“...since the month of November of two thousand five, when the Government of Nicaragua imposed a requirement for Costa Ricans to carry a passport with a Nicaraguan visa for the navigation on the San Juan River, he has seen the activity of transportation of tourists from Puerto Viejo de Sarapiquí to Barra del Colorado and the Tortuguero Channels in Costa Rican territory very gravely affected, to the point that he is near to abandoning his business as a result of those and other restrictions that Nicaragua has imposed on Costa Rican navigation.”<sup>420</sup>

4.17 There are far-reaching consequences of these restrictions and charges for Costa Rican riparians. Since all persons are liable to comply with Nicaragua’s requirements, priests visiting to give Mass in the local communities, doctors and medical personnel travelling to provide assistance to both Costa Rican and Nicaraguan residents of the Costa Rican bank and officials from Costa Rican health and social assistance authorities are all subjected to these obligations. The consequences for the provision of health and social assistance in these areas is described in more detail below.<sup>421</sup> A press report of 14 May 2007 explained that the restrictions have resulted in a loss of these services, including the provision of Mass:

“123 days after Sandinista Daniel Ortega came to power in Nicaragua, the situation has become more stringent. Not even priests are able to say mass in the Costa Rican villages on the river margin, because they are charged \$25 (¢13 thousand) every time they pass...

It has been a year since Father Mario Chavarría, from Pital de San Carlos, last visited the Costa Rican communities on the banks of the San Juan River, because every time he visited the area he had to pay \$25 (¢13 thousand).

‘It has been a year since I last visited that area. On my last visit, an Immigration official told me I could pass, but that I would have to pay on my next visit,’ said Chavarría. More than 40 families there cannot receive mass, and on Sundays, they must leave their homes very early to hear the word of God.”<sup>422</sup>

There have also been reports that these restrictions have prevented doctors and the Red Cross from visiting these areas:

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419 Affidavit of Jorge Manuel Lao Jarquín, 28 July 2007: CRR, Annexes, Vol 2, Annex 52.

420 Affidavit of Carlos Lao Jarquín, 28 July 2007: CRR, Annexes, Vol 2, Annex 51.

421 See this Reply, paragraphs 4.26-4.41.

422 “Neighbours from the San Juan plea for help”, *Al Día*, San José, 14 May 2007: CRR, Annexes, Vol 2, Annex 59.

“Small farmers that must navigate the San Juan almost every day, and are not required to pay that fee, are not happy either. ‘There are towns by the San Juan where doctors and the Red Cross cannot go because they have to pay all that money,’ they say.”<sup>423</sup>

4.18 This situation and its impact on the local tourist and related commercial activities – on which many local families depend – was explained in a press report of 10 June 2007:

“Until a year ago, hundreds of tourists rented boats in Puerto Viejo de Sarapiquí to go to the San Juan River, and after paying \$7 at the Nicaraguan army post, they would head on to Tortuguero or Barra del Colorado... But that situation changed drastically overnight, and had immediate effects.

According to Pablo Hernández, a local boatman, ‘Tourists are now an endangered species’ in this zone.

The reason is financially simple. For the last year, Nicaragua has been charging \$25 for a visa plus another \$9 for a ‘right of passage; along the San Juan.

The results: now almost no one visits this border zone, a popular tourist destination for its incomparable natural beauty...

‘We are going bankrupt. I used to transport tourists even four times a month and now I hardly do it once a month. Nobody wants to go to the San Juan because they must pay a lot of money,’ complains Pablo Hernández.

He says the drop in tourism also affects small entrepreneurs with cabins and restaurants along the Sarapiquí River, particularly those that are closer to the San Juan River, where nobody wants to go.

‘I can assure you this town is dying ever since they started charging that US\$34. This is outrageous because you must pay to go to Costa Rican towns,’ said the owner of some of those cabins...

Only very few visitors come here, for now, and most of them turn back because they refuse to pay the US\$34 fee.”<sup>424</sup>

#### (4) Timetables

4.19 In its Memorial, Costa Rica presented the following evidence:

- (i) In 1999 Nicaraguan authorities imposed timetables on Costa Rican navigation on the River, only permitting navigation from 6am to

423 “\$34 fee marks the end of local tourism”, *La Nación*, San José, 10 June 2007: CRR, Annexes, Vol 2, Annex 60.

424 “\$34 fee marks the end of local tourism”, *La Nación*, San José, 10 June 2007: CRR, Annexes, Vol 2, Annex 60. According to the National Institute of Statistics and Surveys, the poverty line in Costa Rica for the year 2007 is set at a monthly income of 43,261 colones or approximately US\$86.50. Any income below that amount reaches the poverty level. As has been stated, in the area of the San Juan River there is a high incidence of poverty. The cost of one journey on the San Juan River for any of those residents living below the poverty line could represent more than a third of their monthly income. It is clear that poor families in need of travel on the River simply cannot afford the charges imposed by Nicaragua.

5.30pm.<sup>425</sup> Costa Rica protested this measure,<sup>426</sup> but Nicaragua continued to prohibit navigation outside of those permitted times.

- (ii) Costa Rica's Memorial annexed evidence as to the inconvenience this measure caused to Costa Ricans who need to use the River, particularly riparians who depend on the River as a means of transportation to obtain social and health services from the Costa Rican Government. These included statements of Costa Rican health authorities explaining that timetables have prevented some inhabitants of the region from travelling at night for emergency health-related matters,<sup>427</sup> as well as statements from teachers who attest that these restrictions have affected the provision of educational services.<sup>428</sup>

4.20 In its Counter-Memorial, Nicaragua did not deny that it has imposed timetables on Costa Rican navigation, nor did it present any evidence to contradict the evidence presented.

4.21 Since Costa Rica submitted its Memorial, Nicaraguan authorities have continued to impose timetables on Costa Rican navigation. Annexed to this Reply is evidence of this, including:

- (i) new affidavits testifying that timetables for Costa Rican navigation on the San Juan are still in force,<sup>429</sup> and
- (ii) a recent press note which states that Costa Rican navigation is now limited by a curfew of 5pm.<sup>430</sup>

## **(5) Searches**

4.22 In its Memorial, Costa Rica presented the following evidence:

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425 "San Juan: Calm and uneasiness", *La Nación*, San José, 4 July 1999: CRM, Annexes, Vol 5, Annex 155.

426 Costa Rican Foreign Minister, Roberto Rojas López, to Nicaraguan Foreign Minister, Francisco Xavier Aguirre Sacasa, Note No. DM-207-2001, 9 May 2001: CRM, Annexes, Vol 3, Annex 71.

427 See Affidavit by Sandra Díaz Alvarado: CRM, Annexes, Vol 4, Annex 100.

428 See Affidavit by Diane Gómez Bustos: CRM, Annexes, Vol 4, Annex 101.

429 See for example Affidavit of Víctor Julio Vargas Hernández, 29 July 2007: CRR, Annexes, Vol 2, Annex 54.

430 "Neighbours from the San Juan plea for help", *Al Día*, San José, 14 May 2007: CRR, Annexes, Vol 2, Annex 59.

- (i) In the context of the civil war in Nicaragua in the early 1980s, Nicaraguan army officials started searching Costa Rican vessels and their passengers.<sup>431</sup> At the conclusion of the war searches ceased, but they resumed sporadically in 1998 after Nicaragua prohibited navigation by Costa Rican police.<sup>432</sup>
- (ii) After Costa Rica filed the present Application, searches of Costa Rican vessels and their passengers increased and were accompanied by general harassment. Costa Rica's Memorial annexed evidence of this including an affidavit of a Costa Rican boatman stating that his passengers were regularly searched at the Nicaraguan Army Post at Boca Sarapiquí.<sup>433</sup> It also documented cases in Boca San Carlos where schoolchildren were searched,<sup>434</sup> boats and fishing implements were confiscated<sup>435</sup> and neighbours harassed by the Nicaraguan Army and Immigration authorities when they attempted to travel on the River.<sup>436</sup>

4.23 In its Counter-Memorial, Nicaragua did not deny that its authorities search Costa Rican vessels and their passengers, nor did it present any evidence to contradict the evidence presented in the Memorial.

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431 See for example Affidavits of Marvin Hay-Gonzalez, 28 January 2006; CRM, Annexes, Vol 4, Annex 91; and Armando Perla Pérez, 28 January 2006: CRM, Annexes, Vol 4, Annex 92. See also "Nicas confiscate material from journalists on the San Juan", *La Nación*, San José, 24 February 1983: CRM, Annexes, Vol 5, Annex 117; Manager of Swiss Travel Services, Emilia Gamboa, to Costa Rican Minister of Public Security, Angel Edmundo Solano, 7 June 1982: CRM, Annexes, Vol 6, Annex 223; Costa Rican Foreign Minister, Fernando Volio Jiménez, to Nicaraguan Chargé d'Affaires a.i to Costa Rica, Oscar Ramón Téllez, Note No. D.M.133-82, 8 June 1982: CRM, Annexes, Vol 3, Annex 41; Manager of Swiss Travel Services, Emilia Gamboa, to Costa Rican Deputy Foreign Minister, Ekhart Peters, 5 July 1982: CRM, Annexes, Vol 6, Annex 224; Manager of Swiss Travel Services, Emilia Gamboa, to Costa Rican Deputy Foreign Minister, Ekhart Peters, 13 July 1982: CRM, Annexes, Vol 6, Annex 225; Costa Rican Foreign Minister, Fernando Volio Jiménez, to Nicaraguan Chargé d'Affaires a.i to Costa Rica, Oscar Ramón Téllez, Note No. D.M. 126-82, 16 July 1982: CRM, Annexes, Vol 3, Annex 42; Costa Rican Foreign Minister, Fernando Volio Jiménez, to Nicaraguan Ambassador to Costa Rica, Rogelio Ramírez Mercado, Note No. D.M. 014-83, 8 March 1983: CRM, Annexes, Vol 3, Annex 47.

432 See for example "Charge for Ticos travelling on the San Juan reinstated", *El Nuevo Diario*, Managua, 7 May 2004: CRM, Annexes, Vol 5, Annex 180.

433 See Affidavit of Santos Martín Arrieta Flores, 27 January 2006: CRM, Annexes, Vol 4, Annex 87.

434 See Affidavit of Diane Gomez Bustos, 16 February 2006: CRM, Annexes, Vol 4, Annex 101.

435 See for example Affidavits by Leonel Morales Chacón: CRM, Annexes, Vol 4, Annex 106; Erick Maikol Martínez López: CRM, Annexes, Vol 4, Annex 107; and Josefa Alvarez Aragón: CRM, Annexes, Vol 4, Annex 109.

436 See Affidavits of Sandra Díaz Alvarado, 16 February 2006: CRM, Annexes, Vol 4, Annex 100; and Luis Yanan Corea Torres, 16 February 2006: CRM, Annexes, Vol 4, Annex 102.



4.24 Since the Memorial, the searches of Costa Rican vessels and passengers have continued and have indeed worsened. Costa Rica annexes the following evidence to this Reply:

- (i) A Costa Rican preacher who needed to navigate the San Juan River on 19 March 2007 on a journey starting from Puerto Viejo de Sarapiquí, accompanying a group of American missionaries who were taking school and health articles to the communities of Tambor, Remolinito and Arbolito, all on Costa Rican territory, testifies that all passengers were searched and some of their belongings seized. He stated:

“At the mandatory stop point that the Nicaraguan Army imposes at their Post at the mouth of the Sarapiquí River, the Nicaraguan military boarded the vessel to search all belongings, seizing from them photographic cameras and the passports of all the people travelling and threatening them that they would bring dogs to search if they were carrying other cameras. The seized articles were given back at their return.”<sup>437</sup>

- (ii) A boatman who previously navigated on the San Juan regularly testified that the gravity and intensity of the harassment faced by Costa Rican riparians has reached a level where most of them avoid navigation where possible. He stated:

“...due to the restrictions that the Nicaraguans began to impose on Costa Rican navigation on the San Juan River, and mainly because of the verbal abuse to which they were being subjected each time they reported themselves to the Nicaraguan Army posts, he had avoided using the river, and because of that he had not visited his farm for about six months.”<sup>438</sup>

Similarly, the following testimony was reported in a press note:

“Jarmir Aguilar, who lives in Cureña, is a tenth grader from Boca de San Carlos. She must cross the river to go to school. ‘If you are not seen on the other side, you will not have any problems,’ said the girl.”<sup>439</sup>

437 See Affidavit of Rodrigo Antonio Zamora Arroyo, 28 July 2007: CRR, Annexes, Vol 2, Annex 53.

438 See Affidavit of Leonel Morales Chacón, 30 April 2007: CRR, Annexes, Vol 2, Annex 50.

439 “Neighbours from the San Juan plea for help”, *Al Día*, San José, 14 May 2007: CRR, Annexes, Vol 2, Annex 59.

### C. Breaches of Costa Rica's right of navigation "for purposes of commerce"

4.25 In its Memorial, Costa Rica demonstrated that its right of navigation "for purposes of commerce" includes navigation by Costa Rican government officials to provide essential services (including health, education and security) to the local population – a majority of whom are Nicaraguan.<sup>440</sup> It also demonstrated that local inhabitants have a perpetual right of free navigation for the purposes of communication between the villages and towns, or any other point on the Costa Rican bank, to any place on either bank of the River where navigation is common, or to the interior of Costa Rica.<sup>441</sup> It presented evidence that Nicaragua has violated these rights, including evidence of:

- (i) Nicaragua's preventing Costa Rican judicial officials from navigating on the San Juan to carry out official duties on Costa Rican territory;<sup>442</sup>
- (ii) Nicaragua's preventing Costa Rican technicians from the Programme of the Eradication of Screwworms from navigating on the San Juan to implement the Programme in the Costa Rican border zone;<sup>443</sup>
- (iii) Nicaragua's preventing a judge, a fiscal agent, a public defender and two officials from the Judicial Investigation Organism from navigating on the San Juan en route to Fátima de Sarapiquí to investigate the death of an 11-month old child;<sup>444</sup>
- (iv) the suspension, from November 2005, of the provision of domiciliary health services from the Costa Rican Social Security Office to certain local communities, resulting in the loss of primary health services for at least 164 inhabitants of the Costa Rican bank, including at least 23 children;<sup>445</sup>

440 See CRM, paras. 4.52-4.57, esp. 4.55-4.56.

441 See CRM, para. 4.57.

442 CRM, para. 5.100. See "Nicaragua would charge visa to Costa Rican policemen", *La Nación*, San José, 6 August 1998: CRM, Annexes, Vol 5, Annex 150; "Police were not allowed to navigate", *La Nación*, San José, 28 September 2000: CRM, Annexes, Vol 5, Annex 166; and "Energetic protest against Nicaragua" *La Nación*, San José, 29 September 2000: CRM, Annexes, Vol 5, Annex 167.

443 CRM, para. 5.98. See Costa Rican Foreign Minister, Roberto Rojas López, to Nicaraguan Foreign Minister, Eduardo Montealegre, 7 September 1998: CRM, Annexes, Vol 3, Annex 52.

444 CRM, para. 5.97. See "Nicaragua would charge visa to Costa Rican policemen", *La Nación*, San José, 6 August 1998: CRM, Annexes, Vol 5, Annex 150.

445 CRM, para. 5.101. See the following correspondence: Director of the Health Area of Pital of San Carlos, Costa Rican Department of Social Security, Dr. Kattia Corrales Barboza, to Director of the Regional Management and Health Service Networks, North Huetar Region, Dr. Omar Alfaro Murillo, Note No. RHNPI-303, 7 November 2005: CRM, Annexes, Vol 6, Annex 236; Regional Director of the North Huetar Regional Medical Services, Dr. Omar Alfaro Murillo, to General Di-

- (v) the detrimental effect Nicaragua's restrictions have had on the provision of educational services in the region.<sup>446</sup>

In general restrictions imposed by Nicaragua have prevented Costa Ricans from using the River as a waterway for communication.<sup>447</sup>

4.26 After Costa Rica filed its Application in September 2005, the situation for Costa Rican officials attempting to navigate on the San Juan deteriorated. Most importantly, due to Nicaragua's restrictions, Costa Rican health officials have been unable to provide health services to the communities on the Costa Rican bank of the River. It was in these circumstances that in May 2006 Dr. Thais Ching, Director of the Social Security's Health Area of Puerto Viejo de Sarapiquí, felt compelled to approach the Nicaraguan Consulate in Sarapiquí to request collaboration from the Nicaraguan authorities. Since 10 May 2006 Nicaraguan immigration officials had been preventing Costa Rica's Social Security health personnel from using the San Juan to travel to the communities of Tambor, Fátima and San Antonio to provide health services, as had been regularly done in the past. As is evidenced in Dr. Ching's Note of 14 June 2006 addressed to the Nicaraguan Consul at Ciudad Quesada, the Consul at Sarapiquí replied that she should go instead to the Consulate in Ciudad Quesada to make the request, and that the usual requirements to navigate on Nicaraguan territory are the carrying of a passport, visa and a payment of US\$25 per person. In her Note to the Nicaraguan Consul at Ciudad Quesada, Dr. Ching complained that

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rector of Regional Management and Health Service Networks, Dr. Armando Villalobos Castañeda, Note No. DGRSSRH-2511-05, 15 November 2005: CRM, Annexes, Vol 6, Annex 237; and Head of the Nurse Department of the Health Area of Pital, Costa Rican Department of Social Security, Lic. Antonio García Pérez, to Director of the Health Area of Pital of San Carlos, Costa Rican Department of Social Security, Dr. Kattia Corrales Barboza, Note No. DAP-EA-030-2006, 9 February 2006: CRM, Annexes, Vol 6, Annex 239. See also Affidavit of Ana Gabriela Mazariegos Zamora, 14 February 2006: CRM, Annexes, Vol 4, Annex 98; Affidavit of Kattia Patricia Corrales Barboza, 16 February 2006: CRM, Annexes, Vol 4, Annex 99; and Affidavit of Sandra Díaz Alvarado, 16 February 2006: CRM, Annexes, Vol 4, Annex 100; Head of the Nursing Department of the Health Area of Pital, Costa Rican Department of Social Security, Lic. Antonio García Pérez, to Director of the Health Area of Pital of San Carlos, Costa Rican Department of Social Security, Dr. Kattia Corrales Barboza, Note No. DAP-EA-030-2006, 9 February 2006: CRM, Annexes, Vol 6, Annex 239.

446 CRM, para. 1.02. See Affidavit of Diane Gómez Bustos, 16 February 2006: CRM, Annexes, Vol 4, Annex 101.

447 CRM, para. 5.103. See, e.g., "Charge for Ticos travelling on the San Juan reinstated", *El Nuevo Diario*, Managua, 7 May 2004: CRM, Annexes, Vol 5, Annex 180; "Nicaragua conditions passing of Costa Rican vessels", *La Nación*, San José, 16 October 2005: CRM, Annexes, Vol 5, Annex 185; "Nicaragua conditions passing of Costa Rican vessels", *El Nuevo Diario*, Managua, 17 October 2005: CRM, Annexes, Vol 5, Annex 187.

the imposition of such requirements would endanger the lives of the inhabitants of those Costa Rican communities, many of them Nicaraguan:

"We are hereby bringing to your attention the situation we have been facing since May 10, 2006. The Immigration officers at the Nicaraguan border post in the San Juan River are requiring from us that in order to continue with the medical tours on the river we must count with the approval of the Nicaraguan Vice-Consul in Sarapiquí.

Therefore this Medical Office, through letter 275 – 2006, submitted a request for that permit to Mr. Duilio Hernández, Nicaragua's Vice-Consul in Sarapiquí.

In his letter CNS 014/05/06, dated May 19, 2006, Mr. Hernández writes: '...In this respect, after the necessary consultations and inquiries with the immigration post mentioned by you as well as other competent authorities, I have been informed that if the Office under your honourable charge needs to use the San Juan River of Nicaragua to provide health services to the Costa Rican communities of Tambor, Fátima, and San Antonio, you must comply with the requirements that are normally established for the duly authorized entrance of foreign persons and vessels into Nicaraguan territory. Therefore, I must inform you that this Vice-Consulate is not in charge of granting navigation permits for vessels ....' (I enclose a copy of the letter).

Later he told me by phone that the normal requirements to navigate through Nicaraguan territory are: passport, visa, and a fee of \$ 25 per person.

This measure harms the neediest people in that zone, who do not even have minimum health and education conditions and employment sources. We are talking of a total of 449 people, 123 families, 50% of which are from Nicaragua. Among these are 198 children between the ages of 0 and 9 years, 109 teenagers, 209 adults, and 23 senior citizens. This is also affecting the officers who work at the border post of the Nicaraguan Army in la Trinidad, to whom we have always provided our services whenever they have requested.

Since this is a humanitarian matter, whose main objective is to provide medical services to all the border population, regardless of their migratory, economic, or social conditions, we are asking for your good offices so that our functionaries can continue providing medical attention in that zone, as has always been done. The team in charge of this mission includes: a doctor, a nurse's aide, a pharmacy technician, a technical assistant for primary care and a network clerk."<sup>448</sup>

4.27 In its Counter-Memorial, Nicaragua used Dr. Ching's affidavit in an attempt to show that Costa Rica has always requested permission to navigate the San Juan. It stated:

"[c]onsistent with the 1858 Treaty and the Cleveland Award, Nicaragua has consistently required that those from Costa Rica obtain authorization to cross into her territory, whether on the San Juan or elsewhere. Costa Rica has repeatedly recognized this need to obtain permission."<sup>449</sup>

448 Director, Costa Rican Social Security Fund, Health Area Puerto Viejo de Sarapiquí, Dr. Thaïs Ching Zamora, to First Cónsul, Nicaraguan Consulate, Ciudad Quesada, Licenciado Mario Rivas Baldelomar, Note No. 346-2006, 14 June 2006: CRR, Annexes, Vol 2, Annex 44.

449 NCM, para. 6.2.11.

The Counter-Memorial then cites Dr. Ching's note of 19 June 2006, in which she apparently requested Nicaragua's permission to navigate the San Juan River to provide healthcare services to the communities of Tambor, Fátima and San Antonio, as purported proof of Costa Rica's "consistent" practice of requesting permission.<sup>450</sup>

4.28 The truth of the matter is that Dr. Ching was compelled by the Nicaraguan Ambassador in Costa Rica to modify her original request, in a manoeuvre devised by Nicaragua to create "evidence" to support its unfounded claim. As can be clearly seen in Dr. Ching's Note of 14 June 2006 to the Nicaraguan Consul at Ciudad Quesada extracted above, her original request was for "collaboration".<sup>451</sup> After the Nicaraguan Consul at Sarapiquí denied to assist in facilitating navigation for the health officials, she had to turn to the Nicaraguan Consul at Ciudad Quesada, who in turn made her go to the Nicaraguan Embassy in San José. There, the Nicaraguan Ambassador himself told Dr. Ching that if she wanted assistance she would have to modify her Note so that it expressly stated that she was asking for "authorization" as it is stated in her Note of 19 June 2006, which Nicaragua annexed to its Counter-Memorial.<sup>452</sup>

4.29 Dr. Ching explained these incidents in a statement given under oath on 8 August 2007. She stated:

"SECOND: She continues stating that she knows that the care activities are carried out with particular consideration at the border areas of Costa Rica, in the vicinity of the San Juan River, given the special conditions of poverty, vulnerability and distance of those communities, among other those of Tambor, Remolinito, San Antonio and Fatima, all located on the right bank of the San Juan River, in Costa Rican territory. That she knows that from time immemorial the health workers of Costa Rica have travelled to those communities by the San Juan River, as this is the only way to communicate to those places, and that during all this time, including the years two thousand and four and two thousand and five when she was in charge of that area, they were never required to request permission to conduct said navigation.

THIRD: That on ten May two thousand and six, the Nicaraguan Military informed them that from that day on the usual navigation on the San Juan River to Costa Rican health workers was prohibited and that in order for these health workers to navigate, they had to go to the Nicaraguan Consulates in Costa Rica to obtain a Nicaraguan

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450 NCM, para. 6.2.12, citing NCM, Vol II, Annex 51

451 Director, Costa Rican Social Security Fund, Health Area Puerto Viejo de Sarapiquí, Dr. Thaïs Ching Zamora, to First Cónsul, Nicaraguan Consulate, Ciudad Quesada, Licenciado Mario Rivas Baldelomar, Note No. 346-2006, 14 June 2006: CRR, Annexes, Vol 2, Annex 44.

452 NCM, Vol II, Annex 51.

visa. She states that given the vulnerability and exposure to infectious-contagious diseases of those populations, among others malaria and dengue, and the chance that there could be a sanitary crisis outbreak that could threaten the lives of many people, the Health Area decided to contact the Nicaraguan authorities in Costa Rica to find a solution. For this purpose she sent notes to Nicaragua's Vice-consul in Puerto Viejo de Sarapiquí, and later to Nicaragua's Vice-consul in Ciudad Quesada, requesting the collaboration to conduct visits to the populations adjacent to the San Juan River. She continues stating that the Nicaraguan Vice-consul in Ciudad Quesada informed her that she had to request a special permit before the Nicaraguan Embassy in Costa Rica. Accordingly, she visited the Nicaraguan Ambassador in Costa Rica at his office, to whom she requested the collaboration, in the same terms that she had done before the Vice-consuls. Whilst thinking that she would get a favourable answer given the imperative need to provide the urgent health services, nevertheless, the Ambassador told her that in order to analyze the request, she had to change the term 'Request for collaboration' to 'Request of Authorization to navigate the San Juan River,' otherwise her request would not be processed. He also informed her that her petition would be resolved by the Ministry of Foreign Affairs of Nicaragua.

FOURTH: She says that her job is not to make considerations of legal character, and that given the imperative need to provide urgent services to the populations in order to safeguard the health and the lives of people, particularly of children and other social groups in risk in the area of the San Juan River, she wrote the note under the terms demanded by the Ambassador, all done as a result of the urgent state of necessity, given the aforesaid imminent sanitary risks."<sup>453</sup>

4.30 Dr. Ching's testimony and note demonstrate that Costa Rican health authorities did in fact navigate without restrictions in the past and that it was not until May 2006 that Nicaragua began to demand permits for such navigation. It describes how Nicaraguan consular and diplomatic authorities manipulated her desperate situation to produce the "evidence" later used in Nicaragua's Counter-Memorial.

4.31 Other Costa Rican Government institutions have also suffered because of Nicaragua's recent restrictions. Such is the case of the Ministry of Health, whose officials from the Sarapiquí Sector Health Area and the Program for Nutrition Centres used to navigate on the San Juan River twice a month to provide services in basic health care as well as to deliver food, education and other services to the communities on the San Juan border zone. Since the middle of 2006 their navigation has been impeded by Nicaragua, generating great concern because of the importance of these services for the inhabitants of the border communities. This situation prompted Costa Rica's Foreign Minister

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453 Affidavit by Dr. Thaïs Ching Zamora, 8 August 2007: CRR, Annexes, Vol 2, Annex 55.

to write a note to the Nicaraguan Minister of Foreign Affairs on 14 August 2006 in which, appealing to humanitarian reasons, he urged Nicaragua to lift those restrictions. The note stated:

“Because of this, Excellency, aside from the positions of our countries with respect to the subject of Costa Rican navigation on the San Juan River, my Government respectfully urges the Illustrious Government of Nicaragua to eliminate the restrictions imposed for the navigation of Costa Rican authorities of the Ministry of Health in that river, so that the integrity and health of the people of that zone will not be affected, who in their majority belong to very poor families. My Government trusts that Your Excellency and the Illustrious Government of Nicaragua understand the human significance of this situation, and will agree to take the necessary steps to solve it.”<sup>454</sup>

4.32 As can be seen, Costa Rica was careful to indicate that such request was made “aside from the positions of our countries with respect to the subject of Costa Rican navigation on the San Juan River,” not only to be consistent with its previous statements about the issues in dispute before this Court but also to give Nicaragua an opportunity to resolve the situation on humanitarian grounds without its position in respect of this dispute being affected. Nicaragua did not respond to this note and the restrictions on Costa Rican navigation remain in force to the present day.

4.33 The lack of medical services to those border communities clearly raises the risk of sanitary outbreaks. For example, a recent outbreak of leptospirosis on Nicaraguan territory — resulting in nine persons dead and some 1500 infected — caused concern for Costa Rican health authorities, particularly in the northern border zone.<sup>455</sup>

4.34 Another Costa Rican Government institution whose work has been gravely affected by Nicaraguan restrictions on the San Juan is the Joint Institute for Social Assistance (IMAS), which in the past navigated on the San Juan River to reach poor families living on the Costa Rican bank — many of whom are of Nicaraguan origin — in order to bring financial aid so that their children can have access to education. In light of Nicaragua’s restrictions, local personnel of the IMAS have been placed in the position of having to request permission on

454 Costa Rican Foreign Minister, Bruno Stagno Ugarte, to Nicaraguan Foreign Minister, Norman Caldera Cardenal, Note No. DM-254-06 of 14 August 2006: CRR, Annexes, Vol 2, Annex 45.

455 “Health Authorities Watch the Northern Border for Leptospirosis” *La Nación*, San José, 30 October 2007: CRR, Annexes, Vol 2, Annex 62.

the terms dictated by Nicaraguan authorities. On 14 August 2007 Mr. Marvin Chavez Thomas, Regional Manager of the IMAS in San Carlos, sent a Note to the Nicaraguan Consul in Ciudad Quesada, Mr. José Reinaldo Rodríguez Lindo, requesting permission for the IMAS personnel to navigate the San Juan River in order to provide financial assistance so that children in those communities could attend lessons at the Boca San Carlos high school. As he explained in his Note, due to heavy rains in the area, the roads were destroyed and the only way to reach the area was using the River.<sup>456</sup>

4.35 Mr. Chavez made the following statement in an affidavit annexed to this Reply:

“...in the region that his Institute operates, the Costa Rican communities along the bank of the San Juan River are among the poorest and most vulnerable in the country, particularly because of the high number of Nicaraguan families resident there who have children born in Costa Rica, which make up the majority of the population in said area, which IMAS assists. ...before the year two thousand six, IMAS personnel visited those communities using the San Juan River without requesting for permission. However... the Nicaraguan authorities have been requiring that Costa Rican officials request permission in order to visit and aid those communities... ...Given the urgent need for IMAS to provide economic support to poor people in those communities, and in particular to support the children in those communities financially, so they can receive basic primary and secondary education, IMAS was placed in a position where it needed to request the authorization demanded by the Nicaraguan authorities to navigate the river, as there is no other means to reach those communities.”<sup>457</sup>

4.36 Mr. Chavez indicates in his affidavit that he did not receive a reply from the Nicaraguan authorities.<sup>458</sup> On other occasions, however, the Nicaraguan authorities have responded quite quickly to Costa Rican requests for permission to navigate. For example on 22 May 2007 the Coordinator of the Northern Regional Office of the Costa Rican Ombudsman’s Office, Ms. Laura Navarro, was also compelled to send a note to the Nicaraguan Consul in Ciudad Quesada, Mr. Mario Rivas, to request “authorization” for IMAS 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. Ms.

456 IMAS Regional Manager in San Carlos, Marvin Chavez Thomas, to Nicaraguan Consulate at Ciudad Quesada, José Reinaldo Rodríguez Lindo, Note GRHN-188-08-07, 14 August 2007: CRR, Annexes, Vol 2, Annex 49.

457 Affidavit by Marvin Chavez Thomas, 5 November 2007: CRR, Annexes, Vol 2, Annex 56.

458 Affidavit by Marvin Chavez Thomas, 5 November 2007: CRR, Annexes, Vol 2, Annex 56.



Navarro's request indicated that for these purposes the IMAS personnel needed to navigate on the San Juan on May 25, 26, and 27.<sup>459</sup>

4.37 Nicaragua responded to Ms. Navarro on 25 May 2007 in a note signed by Mr. Emilio Rappaccioli Pasos, Minister Counsellor at Nicaragua's Embassy in San José. The relevant parts of Mr. Rappaccioli's note read as follows:

"After this Embassy consulted with the Nicaraguan Ministry of Foreign Affairs, we extend a special authorisation to navigate the San Juan of Nicaragua River for the aforementioned purposes and it cannot be used for any other purposes or places different from the aforesaid ones, or in violation of Nicaragua's full sovereignty over the River.

This permit is a gesture of friendship, good neighbour policy, and good faith courtesy and it cannot be used in any other way or with purposes which are harmful to Nicaragua in any way or circumstance.

This permit will be valid only for the 25<sup>th</sup>, 26<sup>th</sup> and 27<sup>th</sup> of May, 2007."<sup>460</sup>

4.38 It can be observed that, according to Nicaragua's response, the IMAS personnel could only visit the Costa Rican communities of Boca San Carlos and La Cureña, and only on the days indicated in the Note. In other words, the capacity of Costa Rican authorities to visit their own country in the places and at a time of their choosing is being limited by Nicaragua. It is revealing that Nicaragua's "permit" is described as "a gesture of friendship, good neighbour policy and good faith courtesy," rather than in accordance with Costa Rica's perpetual right of free navigation on the San Juan River. Finally, according to Nicaragua, each time Costa Rican officials must use the San Juan River to discharge their missions, they must obtain "special authorization" from the Nicaraguan Foreign Ministry in Managua and cannot be authorised by any other, more accessible Nicaraguan official.

4.39 Mr. Rappaccioli's note was accompanied by a document issued by the Nicaraguan Embassy in San José, entitled "Authorization for Navigation," which stipulated that:

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459 Coordinator of the Northern Regional Office of the Ombudsman's Office, Licda. Laura Navarro Rodríguez, to Consul of Nicaragua at Ciudad Quesada, Mario Rivas, Note No. DHR-RN-051-2007, 22 May 2007: CRR, Annexes, Vol 2, Annex 46.

460 Nicaraguan Minister Counsellor, Emilio Rappaccioli, to Coordinator of the Northern Regional Office of the Ombudsman's Office, Licda. Laura Navarro Rodríguez, Note No. ENCR/NF/EN/133/2007, 25 May 2007: CRR, Annexes, Vol 2, Annex 47.

“Nicaraguan authorities have the Right to cancel this permit in case of a violation of the laws of the Republic of Nicaragua. Also, the bearers of this permit should undergo routine checks from the corresponding authorities.”<sup>461</sup>

4.40 As can be seen, Nicaragua once again took the opportunity to establish new and unilateral conditions for Costa Rican navigation on the River, in an attempt to profit as much as possible from Ms. Navarro’s request for “authorization” for navigation. It is clear that this request was only made in the context of recent Nicaraguan restrictions on Costa Rican navigation and the urgent need of Costa Rica’s health and social assistance authorities to provide assistance to residents of the border zone. This is confirmed in an affidavit of Ms. Laura Navarro:

“...as a result of the recent prohibition imposed by Nicaragua upon Costa Rican public workers to continue navigating the San Juan River, some institutions in charge of social security and the improvement of the living conditions of the inhabitants are no longer visiting some of the communities located on the Costa Rican bank of the San Juan River, given that navigation on the river is the only means to reach them. As a result of the danger that those communities face because they have no access to those services, a Health and Environmental Fair was planned, to take place in the area of Boca de San Carlos, including a visit to some of those communities. In order to secure the access of the Costa Rican workers to those isolated communities, and as a result of Nicaragua’s demands for the request of permits, a request to the Nicaraguan Consulate on twenty two May two thousand and seven was made, so that the workers from the Joint Institute for Social Assistance could take financial assistance to the families living in the communities in the area of Cureña, at the Costa Rican bank of said river. ...on twenty five May two thousand and seven she received an authorization from the Nicaraguan Embassy in Costa Rica, and not by the Consul, to whom she had originally sent the request. Despite having received the authorization, the trip was suspended due to weather conditions in the zone.”<sup>462</sup>

4.41 The experiences of Costa Rica Government officials described above show that before the middle of 2006, Nicaragua did not require those officials to request permission to navigate on the River. They also indicate that Nicaragua has shown no consideration at all for the lives or well-being of the residents of the area, including the numerous Nicaraguans who benefit from Costa Rican health and social services; but that it has attempted to use these situations to

461 Nicaraguan Embassy in Costa Rica, “Authorization to navigate”, given to the Ombudsman’s Office and the Ministry of Health Personnel, 25 May 2007: CRR, Annexes, Vol 2, Annex 48

462 Affidavit by Laura Navarro Rodríguez, 6 November 2007: CRR, Annexes, Vol 2, Annex 57.

its own advantage, and in particular to obtain evidence which it has presented before this Court.

4.42 Since the Memorial, the situation has also deteriorated for Costa Rican boatmen and riparians seeking to exercise Costa Rica's perpetual right of free navigation for communication purposes. Currently they are at the mercy of the will and mood of the Nicaraguan military and immigration officials who control the San Juan River and who feel they have the power to dictate rules and restrictions as they please. For example a group of missionaries who needed to navigate on the River starting from Puerto Viejo de Sarapiquí on 19 March 2007 to distribute school and health articles to the communities of Tambor, Remolinito and Arbolito, all on Costa Rican territory, were prevented by the military from visiting Arbolito. The missionary Rodrigo Antonio Zamora Arroyo affirmed under oath the following:

"That in his condition as preacher of a Christian organization, he carries out charity activities for children of poor communities along the border area of Costa Rica, specifically in the towns of Tambor, Remolinito and Arbolito, the first two on the right bank of the San Juan River. The town of Arbolito is located at the bank of the Sarapiquí River, also in Costa Rican Territory.

SECOND: That on nineteen March two thousand and seven, he accompanied a group of missionaries taking with them school and health articles to the communities of Tambor and Remolinito. At the mandatory stop point that the Nicaraguan Army imposes at their Post at the mouth of the Sarapiquí River, the Nicaraguan military boarded the vessel to search all belongings, seizing from them photographic cameras and the passports of all the people travelling and threatening them that they would bring dogs to search if they were carrying other cameras. The seized articles were given back at their return. Additionally, they only allowed them to visit the town of Remolinito, and prohibited them from visiting the town of Tambor, which is also in Costa Rican territory."<sup>463</sup>

As can be seen once again, the Nicaraguan authorities consider that they have the power to limit Costa Rican navigation as they please, in this case preventing the missionaries from visiting one particular town in Costa Rican territory.

4.43 The case of this preacher was also used by Nicaragua in its Counter-Memorial to attempt to prove Costa Rica's "regular and consistent practice" of requesting permission to navigate the San Juan.<sup>464</sup> As was the case for Dr. Ching,<sup>465</sup> the truth is that this missionary had no choice but to request

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463 Affidavit of Rodrigo Antonio Zamora Arroyo, 28 July 2007: CRR, Annexes, Vol 2, Annex 53.

464 NCM, para. 6.2.13, citing NCM, Vol II, Annex 53.

465 See above, paragraphs 4.26-4.30.

permission on the terms dictated by the Nicaraguan authorities. Evidently this purported request of “authorization” does not demonstrate a “regular and consistent practice” of requesting permission: it is an isolated case that occurred in the context of increased Nicaraguan restrictions after Costa Rica filed its Application. It is clear evidence of the retaliatory measures Nicaragua has taken against those Costa Ricans who wish to navigate on the San Juan River for the purposes of communication, as well as of the dire straits that these people find themselves when they seek to carry out their duties.

4.44 Not only do the Nicaraguan authorities in the border area consider that they have the power to limit navigation by Costa Ricans by restricting the Costa Rican territory they can visit while navigating on the San Juan; they have also limited the amount of time they can stay on Costa Rican territory. Mr. Jorge Lao Jarquín, a Costa Rican boatman, described the following incident:

“...on the thirty first of June of two thousand and six, when he was transporting missionaries carrying with them schooling material and health articles for the children of Remolinito, in Costa Rican territory, the Nicaraguan Military located in Boca de Sarapiquí ordered them that they could only stay for two hours in said town.”<sup>466</sup>

4.45 That Costa Ricans are subject to the arbitrary wishes of the Nicaraguan authorities stationed at the Army and Immigration posts along the San Juan River is a fact. Costa Rica’s Memorial included numerous affidavits and press reports to this effect. Nicaragua has not denied any of the incidents described in Costa Rica’s Memorial.

4.46 The hardships currently faced by Costa Rican riparians were confirmed in an affidavit given on 28 July 2007.<sup>467</sup> One witness stated the following:

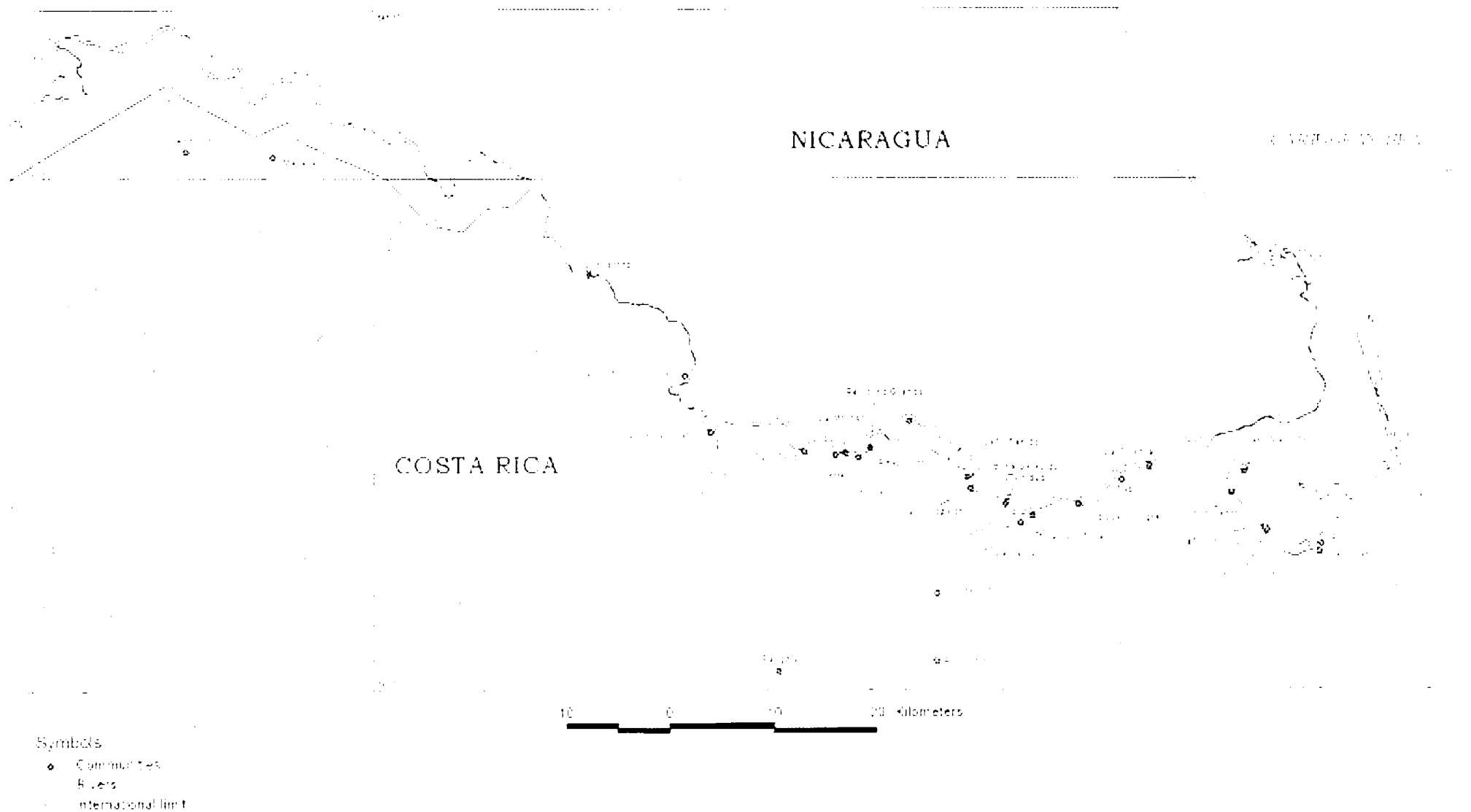
“...until today, the Nicaraguan authorities at the San Juan River post in this area continue to impose restrictions on Costa Rican free navigation on the San Juan River, to wit: the flying only of the Nicaraguan flag on Costa Rican vessels to be able to navigate the River; the payment of taxes, particularly for those Costa Ricans who do not live in the zone; all children travelling to school must report like all other Costa Ricans travelling through the River; the imposition of timetables only on Costa Rican vessels; search and inspections of private property; the prohibition on some Costa Rican riparians to

466 Affidavit of Jorge Manuel Lao Jarquín, 28 July 2007: CRR, Annexes, Vol 2, Annex 52.

467 Affidavit of Víctor Julio Vargas Hernández, Marleny Rojas Vargas, Mario Salas Jiménez and Leonel Morales Chacón, 29 July 2007: CRR, Annexes, Vol 2, Annex 54.

Sketch map 3

**COSTA RICAN COMMUNITIES CONNECTED BY THE SAN JUAN RIVER**



navigate the river for having given opinions to the national press, and the seizure of artisanal fishing implements, including boats. He continues stating that said authorities continue to impose a prohibition on artisanal fishing for consumption on Costa Rican riparians. He also says that the application of restrictions and the threats to Costa Ricans are increased or made more severe when the guards are changed on posts. To allow Costa Rican navigation sometimes they demand payment in goods, through cigarettes, liquor or food.”<sup>468</sup>

4.47 Another witness gave the following declaration:

“...on the occasion of a press report by national media about the situation of Costa Rican navigation on the San Juan River, personnel of the Nicaraguan Army came into Costa Rican territory to tell the media they could not take photographs from Costa Rican territory. He continues stating that in the same media report he was interviewed, and he described the restrictions suffered by the Costa Ricans on the River. The day after the interview, the officer in charge of the Army post in the area sent him a message telling him that he had to go to the Nicaraguan post to speak to him about the interview he had given, to which he refused. Ever since then he has feared navigating the River as a result of the reprisals that could be taken against him.”<sup>469</sup>

4.48 A schoolteacher in the Costa Rican town of Boca de San Carlos narrated some incidents regarding the situation faced by the schoolchildren in the region, that are symptomatic of the daily harassment the riparians must endure. The schoolteacher declared that:

“...because of her occupation the Nicaraguan military constantly demands that she submit lists bearing the names of the children students who must navigate the River in order to attend the High School, all of whom live in towns located in Costa Rican territory. In total there are sixteen children who must travel the River daily. She states that she knows that at the end of the year two thousand and six, the children were stopped by the Nicaraguan Military, who gave them a lecture for about an hour.”<sup>470</sup>

4.49 A Costa Rican riparian resident in the town of Boca San Carlos, who in the past regularly used the San Juan River to reach his farm in the region known as San Antonio de Cutris (see Sketch Map 3 opposite), described in an affidavit the following incident which occurred in April 2007:

“That since the year one thousand nine hundred seventy nine he owns a cattle farm in the region of San Antonio de Cutris de San Carlos, which is located towards the west of Boca de San Carlos, where he resides, in which he also grows some crops. Due to the lack of any roads that connect those communities he had always used the San Juan River as communication waterway between his farm and Boca San Carlos. ...

468 Affidavit of Víctor Julio Vargas Hernández, 29 July 2007: CRR, Annexes, Vol 2, Annex 54.

469 Affidavit of Mario Salas Jiménez, 29 July 2007: CRR, Annexes, Vol 2, Annex 54.

470 Affidavit of Marleny Rojas Vargas, 29 July 2007: CRR, Annexes, Vol 2, Annex 54.

before Costa Rica presented the case against Nicaragua he used to travel almost once a week to his farm, for which he took his boat, reported to the Army and MARENA post in Boca San Carlos, and went to San Antonio. ...due to the restrictions that the Nicaraguans began to impose on Costa Rican navigation on the San Juan River, and mainly because of the verbal abuse to which they were being subjected each time they reported themselves to the Nicaraguan Army posts, he had avoided using the river, and because of that he had not visited his farm for about six months. However, on twenty-four April of this year he had to go to his farm to take some calves, for which he went to the Army post to report himself. He says that to his surprise he was informed that that day he could not be granted the authorization to navigate, and that he should come back in two days, that is, on Thursday twenty-six. He returned that day and again was refused the authorization to navigate, without being given any explanation, as a result he deemed it prudent not to insist on the subject, and thus he had to return to his residence without being able neither to go to his farm nor to transfer his cattle. ...he knows of other cases of neighbours who also have had problems transporting their cattle through the San Juan River.<sup>471</sup>

As described in this statement, Costa Rican riparians are at the mercy of the Nicaraguan authorities who control the San Juan River. In this case the Nicaraguan authorities simply denied this cattle farmer the right to use the River for his commercial activities without giving any explanation.

#### **D. Breaches of Costa Rica's right of protection of commerce, safeguard, defence and re-supply of border posts**

4.50 In its Memorial, Costa Rica demonstrated that its perpetual right of free navigation includes navigation with official vessels and armed personnel in order to protect its commercial navigation, in accordance with the 1858 Treaty as interpreted by the Cleveland Award and affirmed by the 1916 Judgment.<sup>472</sup> It presented evidence that Nicaragua unilaterally prohibited navigation by Costa Rican police vessels on 14 July 1998.<sup>473</sup> Prior to that date, Costa Rican police had regularly navigated on the San Juan River, in uniform and carrying their normal arms, and had even carried out joint operations with the Nicaraguan Army.<sup>474</sup> The Memorial also referred to statements given by the Nicaragua

471 Affidavit of Leonel Morales Chacón, 30 April 2007: CRR, Annexes, Vol 2, Annex 50.

472 CRM, para. 4.96.

473 See Note of the Intendent Commander in service of Atlantic Command, Sarapiquí, Daniel Soto Montero, to Costa Rican Foreign Ministry, 14 February 2006: CRM, Annexes, Vol 6, Annex 240. See also "Border dispute with Nicaraguans", *La Nación*, San José, 16 July 1998: CRM, Annexes, Vol 5, Annex 131; and "Aleman: Ticos out", *El Nuevo Diario*, Managua, 17 July 1998: CRM, Annexes, Vol 5, Annex 132.

474 See the following Affidavits in CRM, Annexes, Vol 4: Carlos Luis Alvarado Sánchez (Annex 88); Daniel Soto Montero (Annex 89); Luis Angel Girón Angulo (Annex 90); José Granados Montoya (Annex 94); Ruben Lao Hernández (Annex 103); and Victor Julio Vargas Hernández (Annex 105).

President in October 2005, threatening to use force in order to prevent Costa Rican police from navigating on the River.<sup>475</sup>

4.51 This prohibition is still in force and has caused many problems for the Costa Rican police, for whom the tasks of supplying and relieving their police posts and visiting the local communities to provide security have become extremely difficult. In 1999 the Costa Rican police post in La Cureña, on the right bank of the San Juan, had to be closed because of the impossibility of access by land and Nicaragua's prevention of access by the River. Costa Rica's Memorial demonstrated how the Costa Rican inhabitants of the San Juan border region have seen their security greatly weakened and have repeatedly voiced those concerns.<sup>476</sup> The nation's security has also been weakened since the capacity of the Costa Rican police to combat trans-border crimes such as drug and arms trafficking has suffered.<sup>477</sup>

4.52 Annexed to this Reply is further evidence that Nicaragua continues to prevent Costa Rican police from navigating on the San Juan with their normal arms. In fact Nicaragua has authorised its Army officials to detain Costa Rican armed personnel. A Nicaraguan Presidential Decree entitled "The Government of Nicaragua will not allow Armed Navigation of Foreign Forces in Nicaraguan Territorial Waters," was approved on 28 September 2005 and published the following day. It states:

"Article 1. – The Government of the Republic of Nicaragua will not allow armed navigation of foreign forces in national waters, as it is a flagrant violation of national sovereignty, the Political Constitution, and the law.

Article 2. – The Nicaraguan Army is ordered to immediately increase its presence and permanent surveillance at the San Juan River in order to prevent, with all the means provided to it by national legislation, the transit of armed personnel, the relief and the transportation of weapons, ammunition and supplies, by foreign forces, as well as any other activity related to the illicit trafficking of arms in all of its aspects.

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475 See CRM, para. 5.136.

476 See "Intense arms control", *La Nación*, San José, 25 September 2000: CRM, Annexes, Vol 5, Annex 165; "Neighbours in the San Juan River feel defenceless", *La Nación*, San José, 22 June 2002; CRM, Annexes, Vol 5, Annex 177; "San Juan: Calm and uneasiness", *La Nación*, San José, 4 July 1999: CRM, Annexes, Vol 5, Annex 155; and "San Juan spices up relationship with Nicaraguans", *La Nación*, San José, 10 July 2000: CRM, Annexes, Vol 5, Annex 164.

477 "Vessels investigated", *La Nación*, San José, 17 January 1999: CRM, Annexes, Vol 5, Annex 154; "The Northern Border: An open door for drug dealers", *La Nación*, San José, 13 June 2005: CRM, Annexes, Vol 5, Annex 181; and "Intense arms control", *La Nación*, San José, 25 September 2000: CRM, Annexes, Vol 5, Annex 165.



Article 3. – The Ministry of the Interior, through the National Police Department, is ordered to proceed immediately to confiscate all the arms that are seized and take the offenders before the Nicaraguan Courts of Justice so they can be tried with the full severity of the law for the crimes they may have committed.”<sup>478</sup>

## E. Breaches of Costa Rica’s related rights

### (1) Flags

4.53 In its Memorial, Costa Rica presented the following evidence:

- (i) After Nicaragua prohibited Costa Rican police navigation in July 1998, Nicaraguan authorities began forcing Costa Rican boatman to carry the Nicaraguan flag in order to navigate on the River.<sup>479</sup> Costa Rica protested this measure<sup>480</sup> and, after an exchange of diplomatic notes, the restriction was no longer implemented.
- (ii) In October 2005, after Costa Rica filed its Application in the present case, Nicaraguan authorities again required Costa Rican vessels to carry a Nicaraguan flag.<sup>481</sup> Costa Rica’s Memorial annexed numerous statements of Costa Rican boatmen and riparians describing this measure and the problems it caused.<sup>482</sup>

4.54 In its Counter-Memorial, Nicaragua does not deny that it requires Costa Rican vessels to fly a Nicaraguan flag in the San Juan. Instead it asserts a right

478 Nicaraguan Presidential Decree No. 65-2005 of 28 September 2005, published Nicaraguan Official Gazette No. 188 of 29 September 2005: CRR, Annexes, Vol 2, Annex 69.

479 See “Nicaraguan hostility worsens”, *La Nación*, San José, 4 August 1998: CRM, Annexes, Vol 5, Annex 147; “Commerce decreases along the border”, *La Nación*, San José, 27 September 1998: CRM, Annexes, Vol 5, Annex 152. See also the Affidavit of 5 May 2001: CRM, Annexes, Vol 4, Annex 83 and the Affidavit of Santos Martín Arrieta Flores, 27 January 2006: CRM, Annexes, Vol 4, Annex 87.

480 Costa Rican Foreign Minister, Roberto Rojas López, to Nicaraguan Foreign Minister, Francisco Xavier Aguirre Sacasa, Note No. DM-207-2001, 9 May 2001: CRM, Annexes, Vol 3, Annex 71.

481 See the following press notes: “Nicaragua conditions passing of Costa Rican vessels”, *La Nación*, San José, 16 October 2005: CRM, Annexes, Vol 5, Annex 185; “Costa Rican vessels will bear the Nicaraguan flag”, *La Prensa de Nicaragua*, Managua, 17 October. 2005: CRM, Annexes, Vol 5, Annex 186; “Nicaragua conditions passing of Costa Rican vessels”, *El Nuevo Diario*, Managua, 17 October 2005: CRM, Annexes, Vol 5, Annex 187; and “Costa Rican Foreign Affairs Minister seeks dialogue regarding visas and flags”, *El Nuevo Diario*, 1 November 2005: CRM, Annexes, Vol 5, Annex 190. See also note from Municipal Mayor of San Carlos, Costa Rica, Lic. Alfredo Córdoba Soro, to Director of Foreign Policy, Costa Rican Foreign Ministry, Lic. José Joaquín Chaverri Sievert, Note No. AM-1315-2005, 18 October 2005: CRM, Annexes, Vol 6, Annex 235. See also Affidavit of José Moreno Rojas, 16 July 2006: CRM, Annexes, Vol 4, Annex 108.

482 See the following affidavits in CRM, Annexes, Vol 4: Carlos Lao Jarquín (Annex 84); Geovanny Navarro Garro (Annex 85); Pablo Gerardo Hernández Varela (Annex 86); Santos Martín Arrieta Flores (Annex 87); Marvin Hay-Gonzalez (Annex 91); Daniel Reese Wise (Annex 95); Diane Gómez Bustos (Annex 101); and José Moreno Rojas (Annex 108).

to impose such a requirement – although it does so without any supporting evidence, and in the face of more than a century of Costa Rican navigation on the River without flying the Nicaraguan flag. There is no international obligation to fly the flag of the territorial State when exercising a conventionally guaranteed perpetual right of free navigation in an international watercourse unless the contrary is expressly provided for in the relevant convention.<sup>483</sup>

4.55 New affidavits annexed to this Reply confirm the Nicaraguan authorities continue to require Costa Rican vessels to fly the Nicaraguan flag.<sup>484</sup>

## **(2) Fisheries**

4.56 In its Memorial, Costa Rica presented evidence that after Costa Rica filed the present Application in September 2005 Nicaraguan authorities began to prevent Costa Rican riparians from their traditional practice of fishing for subsistence purposes. Costa Rica's Memorial annexed numerous affidavits proving this fact and describing the difficulties experienced by Costa Rican riparians as a result of this measure.<sup>485</sup>

4.57 Despite the evidence presented by Costa Rica, Nicaragua claims in its Counter-Memorial that it has not prevented fishing by Costa Ricans for subsistence purposes, stating:

“Nicaragua wishes to make quite clear that notwithstanding its rights over the San Juan River, it has never ordered the prevention of fishing for subsistence purposes by Costa Rican riparians... What Nicaragua does not accept is that she has prevented fishing for subsistence purposes even for the short period involved since the instituting of these proceedings in September 2005”<sup>486</sup>

Nicaragua's Counter-Memorial does not contain any evidence in support of its claim, nor does it contain any evidence contradicting that provided by Costa Rica. But Nicaragua does not deny the existence of a practice of subsistence fishing by Costa Rican riparians. Nicaragua's actions amount to a violation

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483 See this Reply, paragraphs 3.104-3.108.

484 See Affidavits of Leonel Morales Chacón, 30 April 2007: CRR, Annexes, Vol 2, Annex 50; and of Víctor Julio Vargas Hernández, 29 July 2007: CRR, Annexes, Vol 2, Annex 54.

485 See the following Affidavits in CRM, Annexes, Vol 4: Victor Julio Vargas Hernández (Annex 105); Leonel Morales Chacón (Annex 106); Erick Maikol Martínez López (Annex 107); José Moreno Rojas (Annex 108); and Josefa Alvarez Aragón (Annex 109).

486 NCM, para. 5.1.1.15.

of a locally-applicable customary rule of international law which has caused significant prejudice on the Costa Rican bank of the River.<sup>487</sup>

4.58 Annexed to this Reply is further evidence that Costa Rican riparians are being prevented from subsistence fishing by Nicaraguan authorities.<sup>488</sup> This evidence includes:

- (i) An affidavit of 29 July 2007 of Victor Julio Vargas Hernandez, Marleny Rojas Vargas, Mario Salas Jiménez and Leonel Morales Chacón confirms that the prohibition on fishing is still in force and that Nicaraguan authorities continue their practice of seizing fishing implements and boats.<sup>489</sup> One of the witnesses states:

“...the restrictions and prohibition imposed by Nicaragua to Costa Rican riparians of the River to fish for their basic consumption continues to date, under the threat of detention and seizure of their fishing implements and boats.”<sup>490</sup>

- (ii) A press note of 14 May 2007 affirms Nicaragua’s prohibition of subsistence fishing and explains some of its consequences:

“We could go fishing before, but not now. If we get caught, they confiscate our boats and we could even be sent to jail in San Carlos de Nicaragua,” added Cerdas.

He is the oldest inhabitant in Cureña, a community with more than 40 families that survive on the banks of the San Juan.

Last Friday, Cerdas commented that before they could sell a cow or a pig on the Nicaraguan side, but now it has been prohibited.

‘Nicaraguan military boats travel up and down the river once or twice a week, precisely to stop fishing or illegal navigation in the river.

Adrián Lizano, who has been residing in Cureña for the last eight months, grows yams for a living. ‘Things are difficult when fishing is not allowed,’ he said.”<sup>491</sup>

### (3) Landing rights

4.59 In its Memorial, Costa Rica demonstrated that it has a right to land at any part of the Nicaraguan bank of the River where navigation is common, a

487 See this Reply, paragraphs 3.109-3.121.

488 See this Reply, paragraphs 3.109-3.121.

489 Affidavit of Víctor Julio Vargas Hernández, Marleny Rojas Vargas, Mario Salas Jiménez and Leonel Morales Chacón, 29 July 2007: CRR, Annexes, Vol 2, Annex 54.

490 Affidavit by Leonel Morales Chacón, 29 July 2007: CRR, Annexes, Vol 2, Annex 54.

491 “Neighbours from the San Juan plea for help”, *Al Día*, San José, 14 May 2007: CRR, Annexes, Vol 2, Annex 59.

right which implies the right to stop or not to stop. This is inconsistent with an obligation to stop in order to pay charges and to undergo searches.<sup>492</sup>

4.60 In its Counter-Memorial, Nicaragua expressly states that it recognises the right of Costa Rican vessels to land at any part of the Nicaraguan bank where navigation is common,<sup>493</sup> but it argues that this right “can only be used for the enjoyment of Costa Rica’s right to navigate with articles of trade...”<sup>494</sup> It also argues that “[t]he right to land does not entail freedom to trade anywhere along the route.”<sup>495</sup>

4.61 Costa Rica demonstrated in chapter 3 above that the phrase “*con objetos de comercio*” means “for purposes of commerce” and not “with articles of trade”.<sup>496</sup> Even if “*con objetos de comercio*” is interpreted as a general limitation on Costa Rica’s perpetual right of free navigation, this does not confer a right on Nicaragua to restrict Costa Rica’s right to land on the Nicaraguan bank.<sup>497</sup> The evidence presented in this Reply shows that Nicaragua continues to require Costa Ricans to land on the Nicaraguan bank and pay charges.<sup>498</sup>

#### **(4) Facilitation of traffic on the River**

4.62 In its Memorial, Costa Rica demonstrated that Article I of the 1956 Agreement provided a duty to facilitate and expedite traffic on the River, a duty which Nicaragua clearly violates by doing everything it can to prevent Costa Rican traffic on the San Juan.<sup>499</sup>

4.63 In its Counter-Memorial, Nicaragua claims that the 1956 Agreement contains no obligations beyond those which result from the 1858 Treaty and the Cleveland Award; since Costa Rica only has a right of navigation “*con*

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492 CRM, para. 5.138. See also CRM, paras. 4.119-4.120.

493 NCM, para. 4.1.47.

494 *Ibid.*

495 NCM, para. 4.1.48.

496 See this Reply, paragraphs 3.39-3.78.

497 See discussion in this Reply, paragraphs 3.122-3.128.

498 See this Reply, paragraphs 4.05-4.11.

499 CRM, paras. 5.139-140.

*objetos de comercio*” – meaning “with articles of trade” – any duty in the 1956 Agreement is limited to navigation “with articles of trade.”<sup>500</sup>

4.64 Costa Rica has shown that this interpretation is incorrect. The evidence contained in this Reply demonstrates that Nicaragua continues to impede and prevent Costa Rican navigation on the River.<sup>501</sup>

## **F. Nicaragua’s plea of acquiescence**

4.65 In its Counter-Memorial, Nicaragua attempted to show that Costa Rica acquiesced in the restrictions to its navigation on the San Juan. But Nicaragua misrepresents and distorts the facts. It offers only limited examples of private conduct and of recent requests made under constraint. Costa Rica itself has never acquiesced in Nicaraguan restrictions to its rights on the San Juan.

### **(1) Measures relating to tourism arising from the Memorandum of Understanding of 5 June 1994**

4.66 Nicaragua’s Counter Memorial argues that the Memorandum of Understanding signed on 5 June 1994 by the Costa Rican and Nicaraguan Ministers of Tourism constitutes a concession from Costa Rica that Nicaragua has the right to adopt measures applicable to tourism on the San Juan River. It states:

“The Memorandum of Understanding ... literally states that Costa Rica must purchase tourists cards from Nicaragua. The language used is clear and leaves no doubt regarding ‘the obligation [Costa Rica has] to [purchase tourist cards]’ and to register Costa Rican tourist businesses.”<sup>502</sup>

4.67 The document Nicaragua refers to is referenced as “CRM Annex 26(3)(b)”. Its quotation of that document misrepresents the document, adding words that are neither in the original document in Spanish nor the correct translation in English. The original Spanish text reads:

“3.- Los Ministros, concientes de la situación existente en la zona, acuerdan buscar e implementar todos los mecanismos a su alcance para facilitar el desarrollo de la actividad turística, por ello convienen en:

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500 NCM, paras. 6.2.1-6.2.10.

501 This Reply, paragraphs 4.05-4.24.

502 NCM, para. 1.3.41.

A.- Realizar un registro detallado de cada compañía turística que opere en la zona, de los navíos utilizados y sus siglas de registro, y comunicarlo al otro país.

B.- Desarrollar, dentro de los próximos treinta días, los mecanismos necesarios para que puedan entregarle tarjetas de turismo a las empresas pre-registradas, quienes tendrán la obligación de comprarlas, llenarlas correctamente y entregarlas a las autoridades correspondientes. Los Ministros procurarán que la misma tarjeta de turismo le sirva al turista para múltiples entradas y salidas durante los treinta días de su validez, así mismo, que el pasaporte no sea el único documento válido de identificación para los turistas.”<sup>503</sup>

4.68 As can be seen, the text does not contain any provision which obliges Costa Rica, or Costa Rican tourist operators, to purchase tourist cards from Nicaragua. Nor is there any obligation for Costa Rican tourist operators to register in Nicaragua. To the contrary, in the context of an intention to develop “joint sustainable tourism”, and of express language that both Ministers would endeavour to ensure the tourist cards fulfilled certain conditions, the Agreement was that tourist operators would register and buy tourist cards from the authorities of their respective countries – i.e. that Costa Rican tourist operators would register and purchase tourist cards from Costa Rican authorities. Furthermore, both Ministers agreed to inform the other of the registration information. The Agreement contains no obligation for Costa Rican vessels or tourist operators to register with Nicaraguan authorities. It does not, as Nicaragua suggests, constitute a concession from Costa Rica that Nicaragua has the right to adopt measures applicable to Costa Rican tourism on the San Juan.

4.69 The Agreement, although not in force, constitutes a clear indication that Nicaragua recognised that Costa Rica’s perpetual right of free navigation included navigation with tourists. It stipulated that each country would keep a registry of tourist operators and would sell tourist cards to those operators. Those tourist cards were intended to be valid for multiple trips in the area of the San Juan.

## **(2) Navigation of Costa Rican police on the River**

4.70 Nicaragua contends that it permitted navigation of Costa Rican police personnel carrying their normal arms as a matter of “border courtesy”.<sup>504</sup> However

503 CRM, Annexes, Vol 2, Annex 26.

504 NCM, para 1.3.43.

Nicaragua does not produce to the Court a single piece of evidence, documentary or otherwise, supporting this allegation. This Reply contains evidence that Costa Rican police continuously navigated on the River,<sup>505</sup> navigation which did not and does not require permission from Nicaragua because it falls within the scope of Costa Rica's perpetual right of free navigation under the 1858 Treaty and the 1888 Cleveland Award, specifically under the Second article of that Award.<sup>506</sup>

4.71 The *modus operandi* carried out by Costa Rican police navigating on the San Juan in the second half of the 1990's entailed only an understanding that Costa Rican police officers would communicate their passage to the Nicaraguan authorities, with the *animus* of cooperation with Nicaragua. Neither the 1995<sup>507</sup> or the 1998<sup>508</sup> Agreements established a "concession" from Costa Rica, nor is there any official document in which Nicaragua "granted" "permits" to Costa Rica, nor any document from Costa Rica requesting them, simply because that never occurred. At the time of the *modus operandi*, both countries unequivocally recognised that Costa Rica had a perpetual right of free navigation which included navigation of this kind.

4.72 Nicaragua misconstrues the Alajuela Declaration of 26 September 2002, which it cites to suggest that Costa Rica had no interest to raise the issue of navigation to re-supply border posts.<sup>509</sup> In that Declaration, both parties agreed to "freeze" the legal situation claimed by each of them for three years. Article 4 of the Declaration expressly stipulated that it could not be interpreted or prejudged as a renunciation or in detriment of the positions and rights that each party had within the framework of international law.<sup>510</sup>

4.73 In connection to the Declaration, in a Note addressed to the Nicaraguan Foreign Minister dated 26 September 2002, the Costa Rican Foreign Minister indicated the willingness of Costa Rica not to exercise any police navigation

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505 See this Reply, Appendix, paragraphs A.33-A.44.

506 See this Reply, paragraphs 3.79-3.95 above.

507 Joint Communiqué (Cuadra-Castro), La Cruz, 8 September 1995: CRM, Annexes, Vol. 2, Annex 27.

508 Joint Communiqué (Cuadra-Lizano), Managua, 30 July 1998: CRM, Annexes, Vol. 2, Annex 28.

509 NCM, para. 5.2.10.

510 CRM, Annexes, Vol 2, Annex 29.

during the three years of the Alajuela Declaration. Nicaragua misconstrues this note, arguing that it confirmed Costa Rican authorities were not convinced that they had a need for or a right of navigation by police for the purposes of re-supplying border posts.<sup>511</sup> The Note did not express anything of this character. It addressed Costa Rica's willingness not to navigate with its police forces for the purpose of re-supplying border posts in a context where Nicaragua had threatened not to permit such navigation (including threats of the use of weapons), and in a context where the Alajuela Declaration signed by both parties expressly reserved each of their claims for a period of three years.

**(3) Allegations that Costa Rica recognises the need to obtain permission to navigate on the San Juan**

4.74 Nicaragua claims that Costa Rica has repeatedly recognised the needs to obtain permission from Nicaragua to navigating on the San Juan.<sup>512</sup>

4.75 To support its allegation Nicaragua presented two notes from almost a year after Costa Rica commenced these proceedings: a Note of 19 June 2006 from Dr. Thais Ching Zamora, Director of the Puerto Viejo de Sarapiquí Health Area,<sup>513</sup> and a Note from a private organization called "Comunidad Alianza Cristiana y Misionera" from the town of Horquetas de Sarapiquí.<sup>514</sup>

4.76 In respect of the first note, the circumstances in which Dr. Ching was effectively forced to submit her note to the Nicaraguan Ambassador have already been explained.<sup>515</sup> Dr. Ching's request came under conditions of duress as a result of the Nicaraguan prohibition of navigation by Costa Rican health officials.<sup>516</sup> That prohibition may have resulted in a significant increase in health risks for riparians in the area, with children being particularly vulnerable. Bearing in mind that access to these communities is extremely difficult if one cannot navigate on the River, and also taking into consideration the rapid spread

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511 NCM, para. 5.2.10.

512 NCM, para. 6.2.11.

513 NCM, Vol II, Annex 51.

514 NCM, Vol II, Annex 52.

515 See this Reply, paragraphs 4.24-4.30 above.

516 See CRM, Annexes, Vol 4, Annex 99.



of dengue and other diseases in Central America,<sup>517</sup> it is understandable that the possibility of a major sanitary crisis<sup>518</sup> would compel Costa Rican authorities to do everything in their power to gain access to these communities, as they did.

4.77 Other examples of recent requests made by Costa Rican authorities follow the same pattern.<sup>519</sup> Nicaragua prohibits the long standing navigation of Costa Rican officials, and forces those institutions to request “permissions” to provide essential social and medical assistance. Thus Nicaragua has effectively forced these institutions to comply with its requirements for permission to navigate. In the circumstances it is clear that these requests do not amount to a concession by Costa Rica but are a product of the emergency situation Nicaragua has created.

4.78 Nicaragua attempts to present these recent requests as State practice. Two points must be emphasised in response to this attempt. First, any requests that may have been made by local institutions result from the prohibition to navigate imposed by Nicaragua, as Dr. Ching’s experience shows. Second, Nicaragua’s demands for written requests using prescribed language came well after the filing of the application by Costa Rica in September 2005, and even after the filing of Costa Rica’s Memorial.<sup>520</sup>

4.79 With respect to the second note, from “Comunidad Alianza Cristiana y Misionera de Horquetas”, an independent and private religious organization, similar considerations are applicable. This incident has also been described in this Reply,<sup>521</sup> and in any case is a request made by a citizen that does not in any way constitute State practice by Costa Rica, as neither would any other request from a private party.

4.80 It should be remembered that, as stated by Rodrigo Zamora, the preacher in charge of *Comunidad Alianza Cristiana y Misionera de Horquetas*, the

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517 See “Health Authorities Watch the Northern Border for Leptospirosis”, *La Nación*, San José, 30 October, 2007: CRR, Annexes, Vol 2, Annex 62.

518 See above, footnote 457.

519 See this Reply, paragraphs 4.26-4.41.

520 See above, paragraphs 4.26-4.41; Affidavit of Thaïs Ching Zamora, 8 August 2007: CRR, Annexes, Vol 2, Annex 55.

521 See above, paragraphs 4.42-4.43.

organization needed to transport health, sanitary and food articles to Costa Rican communities along the San Juan River. Although Nicaragua has recognised that this navigation (according to Nicaragua only with “articles of trade”) should be free,<sup>522</sup> the Nicaraguan authorities demanded that the organization seek a permit to navigate.<sup>523</sup> Evidently the request by the missionaries was made in the context of the duress created by Nicaragua, in which there was no other means for them to reach the communities they intended to visit along the San Juan River.

4.81 Even more troubling is the statement made by a staff member of the Nicaraguan Embassy in San José informing Mr. Zamora that if the missionaries were Costa Ricans there would be trouble in granting them the permission. In Mr. Zamora’s own words:

“...when he arrived at the Nicaraguan Embassy in San Jose, he was attended by a member of staff who told him that if the missionaries travelling on the San Juan River were Costa Ricans there would be problems, to which he replied that they were mostly foreign missionaries.”<sup>524</sup>

4.82 It seems that the intention behind forcing Costa Ricans to present written requests to navigate the San Juan, in precise terms dictated by the Nicaraguan Embassy, was to produce evidence upon which Nicaragua could argue that there was State practice from Costa Rica requesting permission to navigate. In other words, Nicaragua is attempting to profit from its own violations.

## G. Conclusions

4.83 This Chapter has demonstrated that Nicaragua has violated Costa Rica’s navigational and related rights in the San Juan, and that those violations are continuing. Further restrictions were imposed on Costa Rican navigation after Costa Rica filed the Application in the present case. Restrictions include the obligation to land at the Nicaraguan bank and payment for a “departure clearance certificate”, the imposition of other charges including tourist and immigration fees and searches to Costa Rican vessels and their passengers. After the filing of Costa Rica’s Application, Nicaraguan authorities required Costa Ricans

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522 See NCM, para 4.1.10.

523 See Affidavit of Rodrigo Antonio Zamora Arroya, 28 July 2007: CRR, Annexes, Vol 2, Annex 53.

524 See Affidavit of Rodrigo Antonio Zamora Arroya, 28 July 2007: CRR, Annexes, Vol 2, Annex 53.

navigating on the San Juan to purchase a Nicaraguan visa in advance and Costa Rican riparians were prevented from their long-standing practice of fishing in the River. In addition to the prohibition on navigation by Costa Rican police, all forms of navigation by Costa Rican Government officials have been subject to restrictions – which has serious implications for the provision of health and social assistance and education to inhabitants of the Costa Rican bank, many of who are Nicaraguan. Further, timetables restricting Costa Rican navigation have been maintained and new restrictions have been imposed, including limitations to the places on Costa Rican territory which can be visited when navigating on the San Juan and limitations to the duration of those visits. Costa Rican vessels are also required to fly a Nicaraguan flag when navigating on the River.

4.84 It has also been demonstrated that Costa Ricans who need to use the San Juan River are actively discouraged from doing so, both by the increased restrictions imposed by Nicaragua and by the harassment they are subjected to by the Army and Immigration authorities who control the River. As part of the strategy to discourage Costa Rican navigation on the San Juan, Nicaragua has even increased its military presence on the River in order to discourage all Costa Rican navigation. Nicaragua issued a Presidential Decree allowing their military personnel to detain Costa Rican police navigating on the River, and in fact to use force against them.<sup>525</sup> Statements of Costa Rican riparians confirm that the increased military presence on the River has indeed served to impede them from fishing and, in general, caused them to feel threatened and to fear for their personal security if they navigate. The following testimony provides evidence of this fact:

“Rafael Palacios has lived for 10 years in Medio Queso, in Los Chiles de Upala. He takes people down the river in his boat. ‘If anyone asks me to go up to the San Juan I say no, I will not take any chances,’ said Palacios. He claims that when Daniel Ortega came to power, surveillance in the San Juan River has been strengthened. ‘Now there are more soldiers with fast boats. If they see you in the river, they will catch you faster,’ said Palacios.

Along that small affluent of Medio Queso, he goes up 500 meters from the Nicaraguan post. He does not go any further.

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525 Nicaraguan Presidential Decree No. 65-2005 of 28 September 2006, Nicaraguan Official Gazette No. 188 of 29 September 2005: CRR, Annexes, Vol 2, Annex 69.

'One cannot take any chances. They can confiscate your boat and even take you to jail to San Carlos de Nicaragua. You must even pay a fine for trespassing the border,' said Palacios."<sup>526</sup>

4.85 More recently, a Nicaraguan congressman proposed to create a military school on the Nicaraguan border of the San Juan River. His statements were recorded by the Nicaraguan press in the following terms:

"Congressman Enrique Quiñónez, of the Constitutional Liberal Party, PLC, wants a military training school of the Nicaraguan army to operate along the San Juan River as an irrefutable sign that the river belongs to Nicaragua and to stop Costa Ricans from using that waterway for tourist activities.

The statements made by the Liberal legislator came when President Daniel Ortega announced his intentions to withdraw the case on the dispute for the river from The Hague and reach an extrajudicial agreement with Costa Rica.

...Concerning this matter, Quiñónez said 'many times Costa Ricans abuse their navigation rights and navigate the river armed and profit from tourism, something not even Nicaraguans have done.'

The PLC Congressman, President of the Committee of the Interior of the National Congress, said this is a very simple situation. 'I have always stated we should detach two strong police and army posts and even open a military training school and then just wait and see if any tourists will visit that zone with our soldiers practicing in their own territory.

...'I have always said we want to see our army there, as a sign of sovereignty and by no means is it an aggression because it is our territory and we can have training commandos. Maybe Costa Rican and other foreign tourists will enjoy seeing how our soldiers train in the river,' said Quiñónez."<sup>527</sup>

4.86 Nicaragua's strategy of "militarization" of the River area clearly contravenes Article IX of the 1858 Treaty of Limits, which states that:

"Under no circumstances, and even in case that the Republics of Costa Rica and Nicaragua should unhappily find themselves in a state of war, neither of them shall be allowed to commit any act of hostility against the other, whether in the port of San Juan del Norte, or the San Juan river, or in the Lake of Nicaragua."<sup>528</sup>

4.87 Nicaragua has argued that Costa Rica acquiesced in the restrictions to its navigation on the San Juan. These arguments are based on misleading or misrepresented facts, as the treatment by Nicaragua of the text signed by the

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526 "Neighbours from the San Juan plea for help", *Al Día*, San José, 14 May 2007: CRR, Annexes, Vol 2, Annex 59.

527 "The San Juan River should be militarized", *El Nuevo Diario*, Managua, 7 October 2007: CRR, Annexes, Vol 2, Annex 61.

528 CRM, Annexes, Vol 2, Annex 7(b).

Ministers of Tourism in 1995 demonstrates. Furthermore Nicaragua engaged in a policy whereby Costa Rican people and institutions were obliged to request written permission to navigate on the River from the Nicaraguan Embassy in Costa Rica. This policy was put into effect after Costa Rica presented its Application to the Court in September 2005 and seems intended to provide documentary support for allegations of State practice by Costa Rica requesting permission to navigate on the San Juan. As has been demonstrated in this Chapter, no such practice exists, and in fact the few instances where Costa Rican Government officials requested permission were due precisely to the situation created by Nicaragua's restrictions on Costa Rican navigation, and in some instances there is clear evidence of manipulation of Costa Rican officials by Nicaraguan Consular and Diplomatic representatives. Costa Rica rejected any and all allegations by Nicaragua that it has acquiesced in Nicaragua's restrictions of its perpetual right of free navigation on the River and its related rights.

## Chapter 5

### Remedies

#### A. Costa Rica's Entitlements

5.01 In its Memorial Costa Rica requests the following remedies as a consequence of the internationally wrongful acts committed by Nicaragua:

- (1) a declaration of the extent of Nicaragua's violations of its obligations;
- (2) the cessation of the internationally wrongful acts that continue to be committed by Nicaragua;
- (3) reparation by Nicaragua for damage caused as a result of those violations; and
- (4) appropriate guarantees of non-repetition by Nicaragua of its wrongful conduct.<sup>529</sup>

5.02 Nicaragua does not dispute that the Court may grant declaratory relief: in fact it requests a declaratory judgment in its favour.<sup>530</sup>

5.03 Nicaragua does not address Costa Rica's claim to cessation of internationally wrongful acts but merely asserts that Nicaragua has not committed any such acts.

#### **(1) Nicaragua's claim that Costa Rica seeks to exercise diplomatic protection**

5.04 Nicaragua claims that Costa Rica is not entitled to certain of the remedies it has claimed because they "could only be made as a matter of diplomatic protection, the conditions for which are not fulfilled in the present case." It refers generally to Costa Rica's claim for compensation for the losses and expenses incurred by Costa Rican citizens and Nicaragua's obligation to permit riparians of the Costa Rican bank to fish in the River for subsistence purposes.<sup>531</sup> Apart from these general statements it does not specify further which of the remedies

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<sup>529</sup> See CRM, para. 6.01.

<sup>530</sup> NCM, para. 7.1.1 and paras. 7.2.1-7.2.6.

<sup>531</sup> NCM, para. 7.1.10.

or claims are, in its view, diplomatic protection claims. Nor does it state which conditions it alleges are not fulfilled for such a claim to be brought. However, given that the losses all involve Costa Rican citizens and Costa Rican vessels, it appears that Nicaragua is alluding to a requirement to exhaust local remedies.

5.05 Nicaragua's objection to Costa Rica's request for remedies must be considered in the context of Costa Rica's primary claim, which is a claim concerning Costa Rica's own navigational rights under the 1858 Treaty of Limits. Article VI of the Treaty of Limits provides for a perpetual right of free navigation for the Republic of Costa Rica as a State party to that Treaty.<sup>532</sup> That right includes the unrestricted and permanent right of movement for Costa Rican vessels whether engaged in the transport of goods or passengers or both, on the routes and to the places established by the 1858 Treaty of Limits.<sup>533</sup> Costa Rica's rights of navigation are not claimed as a matter of diplomatic protection but as treaty rights belonging to Costa Rica.

5.06 An element of the compensation claimed by Costa Rica by way of reparation includes losses caused to Costa Rica for charges, visas and permits required by Nicaragua for Costa Rican vessels and Costa Rican citizens. These losses have occurred as a direct result of the internationally wrongful acts of Nicaragua in violation of Costa Rica's treaty rights of navigation. This claim for reparation does not transform Costa Rica's claim for its treaty rights into a diplomatic protection claim. It is merely an element of the loss suffered by Costa Rica as a result of Nicaragua's internationally wrongful conduct.

5.07 In 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 characterised as a diplomatic protection claim, that claim is incidental to Costa Rica's claim for its own treaty rights. The dominant claim is Costa Rica's claim for its own navigational rights pursuant to the Treaty of Limits.

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532 See, generally, CRM, paras. 4.06-4.16.

533 See CRM, para. 4.1.6.

5.08 Any diplomatic protection claim brought to vindicate the rights of Costa Rican vessels and citizens in respect of the San Juan River could be brought alongside Costa Rica's treaty claim without a need to exhaust local remedies because Article VI of the Treaty of Limits creates interdependent rights for both Costa Rica and Costa Rican nationals. The situation is analogous to the claim before the Court in the *Case Concerning Avena and other Mexican Nationals*, where Mexico asked the Court:

"...to adjudge and declare that the United States, in failing to comply with Article 36, paragraph 1, of the Vienna Convention, has 'violated its international legal obligations to Mexico, in its own right and in the exercise of its right of diplomatic protection of its nationals.'"<sup>534</sup>

The Court there noted that Mexico did not claim to be acting solely on the basis of diplomatic protection, but that it "also asserts its own claims, basing them on the injury which it contends that *it has itself suffered, directly and through its nationals*" as a result of the treaty violations of the United States.<sup>535</sup> It recalled its finding in the *LaGrand* case that the Article 36(1) of the Vienna Convention created individual rights for the national concerned, and held that in circumstances where a treaty conferred both rights on the state and individual rights, Mexico could claim for violations of both sets of rights without a need to exhaust local remedies:

"It would further observe that violations of the rights of the individual under Article 36 may entail a violation of the rights of the sending State, and that violations of the rights of the latter may entail a violation of the rights of the individual. In these special circumstances of interdependence of the rights of the State and of individual rights, Mexico may, in submitting a claim in its own name, request the Court to rule on the violation of rights which it claims to have suffered both directly and through the violation of individual rights conferred on Mexican nationals under Article 36, paragraph 1 (b). The duty to exhaust local remedies does not apply to such a request. Further, for reasons just explained, the Court does not find it necessary to deal with Mexico's claims of violation under a distinct heading of diplomatic protection. Without needing to pronounce at this juncture on the issues raised by the procedural default rule ... the Court accordingly finds that the second objection by the United States to admissibility cannot be upheld."<sup>536</sup>

5.09 A similar claim was made by Nicaragua in its applications against the United States and Costa Rica, the latter subsequently abandoned before any

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534 See *Case Concerning Avena and other Mexican Nationals (Mexico v. United States of America)*, Judgment, I.C.J. Reports 2004, p. 12, 35 (para. 40).

535 Ibid. (emphasis in original).

536 Ibid., 36 (para. 40).



finding on jurisdiction or merits. In both applications, Nicaragua claimed compensation “both on its own behalf and in respect of wrongs inflicted upon its nationals.”<sup>537</sup> In those cases, no local remedies had been employed, still less exhausted.

## (2) Assurances and guarantees of non-repetition

5.10 Nicaragua also contests Costa Rica’s request for assurances and guarantees of non-repetition. It contends that assurances and guarantees of non-repetition are not required in all circumstances and that they are not required in the present case. It has suggested that “Nicaragua has constantly and consistently reaffirmed her commitment to strictly respect the 1858 Treaty of Limits” and assurances and guarantees of non-repetition “would add nothing to these firm commitments”.<sup>538</sup>

5.11 Further, Nicaragua argues that there is “no legal basis” for the Court to comply with Costa Rica’s request that the assurances and guarantees of non-repetition include the “abrogation of those legislative and administrative measures taken by Nicaragua that, if continued in force, would constitute a violation” of Nicaragua’s obligations in respect of Costa Rica’s navigational and related rights.<sup>539</sup> It adds that Costa Rica’s submission is “vague and based on insufficient evidence”.<sup>540</sup>

5.12 Costa Rica has requested assurances and guarantees of non-repetition because Nicaragua’s violations of its navigational and related rights are consistent and continuing.<sup>541</sup> This is further evidenced by Nicaragua’s continuing denial of the very existence of Costa Rica’s rights.<sup>542</sup> This is precisely the situation in which assurances and guarantees of non-repetition are required, to ensure the restoration of confidence in a continuing relationship in circumstances where

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537 *Military and Paramilitary Activities in and against Nicaragua*, I.C.J. Reports 1986, p. 20, para. 17. See also *Application instituting Proceedings submitted by the Government of Nicaragua against Costa Rica*, *Nicaraguan Memorial*, p. 112, para. 3.

538 NCM, paras. 7.1.11-13.

539 CRM, para. 6.23.

540 NCM, para. 7.1.9.

541 See for example, this Reply, paragraphs 4.05-4.49.

542 See for example, this Reply, paragraphs 4.05-4.49.

the injured state “has reason to believe that the mere restoration of the pre-existing situation does not protect it satisfactorily”.<sup>543</sup>

5.13 Demands for assurances and guarantees of non-repetition were found to have been satisfied by the respondent State in *LaGrand*, *Avena* and *Case concerning Armed Activities on the Territory of the Congo*. In each case the respondent State had made an express additional commitment addressing the specific requests made by the applicant. It was not sufficient that the respondent State’s obligations were incorporated in an existing treaty provision which was the subject of the dispute: some new and specific commitment was required. In *LaGrand* the United States presented an apology to Germany for the specific breach of the Vienna Convention and carried out a “vast and detailed programme in order to ensure compliance by its competent authorities... with its obligations under Article 36 of the Vienna Convention.”<sup>544</sup> In *Avena* the Court noted that the United States had made “considerable efforts” to ensure that its law enforcement authorities provided consular information to persons in accordance with its obligations under the Vienna Convention: in the circumstances this was regarded as meeting Mexico’s request for a general assurance of non-repetition.<sup>545</sup> In *DRC v Uganda* Uganda entered into a new, binding international agreement which contained a specific obligation in the same terms as the DRC’s request for assurances and guarantees. The Court found that this amounted to “a clear legally binding undertaking that [the respondent] will not repeat any wrongful acts” and therefore met the DRC’s request for specific guarantees and assurances of non-repetition.<sup>546</sup> Although the Court in its recent decision in *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* declined to grant Bosnia and Herzegovina’s request for assurances and guarantees of non-repetition in respect of breaches of the obligation to prevent and punish genocide, it did so in circumstances where it had already made a direction concerning the Respondent’s continued duty of punishment and obligation to cooperate with the International Criminal Tribunal for the

543 CRM, para. 6.22. See CRM, paras. 6.19-6.23, citing *LaGrand (Germany v. United States of America)*, I.C.J. Reports 2001, p. 466, 512 (para. 123).

544 *LaGrand (Germany v. United States of America)*, I.C.J. Reports 2001, p. 466, 512 (para. 123).

545 *Case Concerning Avena and other Mexican Nationals (Mexico v. United States of America)*, Judgment, I.C.J. Reports 2004, p. 12, pp. 68-98, paras. 149-150.

546 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment of 19 December 2005, para. 257.

former Yugoslavia: again it considered that direction was sufficient to meet the Claimant's request.<sup>547</sup>

5.14 In contrast, Nicaragua has offered no apology for its consistent and continued violations of Costa Rica's rights of navigation. It has expressed its commitment to respect the Treaty of Limits but it has taken an impossibly narrow interpretation of those rights, and it has made no attempt to deny facts which, even on its own view of the matter, unquestionably constitute violations of Costa Rica's rights. In these circumstances Nicaragua's assertion that it is committed to respecting the 1858 Treaty of Limits is devoid of practical meaning. In addition, Nicaragua has offered no commitment in respect of Costa Rica's related rights, including the right of riparians to subsistence fishing. Costa Rica affirms its request for assurances and guarantees of non-repetition which are necessary to ensure that Costa Rica's rights are protected.

5.15 Nicaragua's rejection of Costa Rica's request for the abrogation of legislative and administrative measures taken by Nicaragua which, if continued in force, constitute a violation of Nicaragua's obligations<sup>548</sup> is similarly devoid of merit. Assurances and guarantees of non-repetition, including repeal of legislation which allowed the breaches to occur, may be sought by way of satisfaction.<sup>549</sup> Such assurances are a necessary element in the protection of Costa Rica's rights. Costa Rica has referred to two Nicaraguan Presidential Decrees which deal with the imposition of the requirement that Costa Ricans pay for a visa to navigate on the San Juan and the prohibition of police navigation respectively,<sup>550</sup> and the protection of Costa Rica's rights requires that these Decrees and all other relevant measures be abrogated.

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547 *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina v Serbia and Montenegro)*, Merits, Judgment, 26 February 2007, at pp. 166-167, paras. 465-466.

548 CRM, para. 6.23; NCM, para. 7.1.9.

549 See ILC Commentary to the Articles on State Responsibility, Article 30(b), para. (11); Article 37, para. (5).

550 See this Reply, paragraphs 4.52 and 4.84.

### (3) Compensation

5.16 Costa Rica has claimed reparation under established principles of international law,<sup>551</sup> including restitution and compensation.<sup>552</sup> It has specified the pecuniary compensation it claims to include:

- “(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;
- (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 the payment of the judgment; and
- (g) such other relief as the Court may deem appropriate.”<sup>553</sup>

5.17 Nicaragua alleges that Costa Rica has failed to establish a causal link between Nicaragua’s internationally wrongful acts and the injuries for which Costa Rica is claiming compensation.<sup>554</sup> In fact Costa Rica’s Memorial contains detailed specification first of Costa Rica’s rights, then of Nicaragua’s violations of those rights.<sup>555</sup> These matters are summarised in Costa Rica’s request for a declaration.<sup>556</sup> 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.<sup>557</sup>

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551 See CRM, paras. 6.08-6.10.

552 See CRM, paras. 6.11-6.17.

553 CRM, para. 6.15

554 See NCM, para. 7.1.7.

555 See CRM Chapters 4 and 5 respectively.

556 CRM, para. 6.03 and Submissions, pp. 147-148.

557 CRM, para. 6.15.

5.18 In accordance with the Court's previous practice, Costa Rica has requested the Court to reserve the determination of the scope of compensation due from Nicaragua to a subsequent phase of the case. Citing the Court's decision in the *United States Diplomatic and Consular Staff in Tehran Case*, Costa Rica notes that this "is particularly required in the present proceedings because Nicaragua's breaches are still continuing."<sup>558</sup> Consistently with the Court's decision in the *Fisheries Jurisdiction Case (Federal Republic of Germany v Iceland)*, Costa Rica requests that the Court declare that Costa Rica is entitled to compensation for all injuries caused by Nicaragua's unlawful acts, reserving its right to submit a concrete claim as to the amount, as well as evidence of damages caused, at a later stage.<sup>559</sup>

5.19 In the *Fisheries Jurisdiction Case (Federal Republic of Germany v Iceland)*, Germany requested compensation for alleged acts of harassment of its fishing vessels by Icelandic coast patrol boats. It did not, however, ask for an assessment of compensation for certain specified acts but "for a declaration of principle that Iceland is under an obligation to make compensation to [Germany] in respect of all unlawful acts of interferences with the fishing vessels of [Germany]."<sup>560</sup> The Court noted that Germany listed a large number of incidents involving its vessels and a general account of what Germany described as harassment of its fishing vessels by Iceland.<sup>561</sup> But the Court refused to accede to Germany's request, noting that Germany had not requested that compensation be assessed in a subsequent phase of the proceedings:

"It is possible to request a general declaration establishing the principle that compensation is due, provided the claimant asks the Court to receive evidence and to determine, in a subsequent phase of the same proceedings, the amount of damage to be assessed. Moreover, while the Applicant has reserved all its rights 'to claim compensation', it has not requested that these damages be proved and assessed in a subsequent phase of the present proceedings. It would not be appropriate for the Court, when acting under Article 53 of the Statute, and after the Applicant has stated that it is not submitting a claim for the payment of a certain amount of money as compensation, to take the initiative of requesting specific information and evidence concerning the

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558 CRM, para. 6.16.

559 CRM, para. 6.17.

560 *Fisheries Jurisdiction (Federal Republic of Germany v Iceland)*, *Merits*, ICJ Reports 1974 p. 175, p. 204, (para. 74).

561 *Ibid.* (paras. 74-75).

indemnity which, in the view of the Applicant, would correspond to each incident and each head of damage.”<sup>562</sup>

5.20 In *Military and Paramilitary Activities in and against Nicaragua (Merits)*, Nicaragua requested the Court to declare that compensation was due to Nicaragua and “to receive evidence and to determine, in a subsequent phase of the present proceedings, the quantum of damages to be assessed as the compensation due to the Republic of Nicaragua.”<sup>563</sup> The Court considered Nicaragua’s request for the “nature and amount of the reparation due to it to be determined in a subsequent phase of the proceedings” to be appropriate.<sup>564</sup> Similar findings have been made in other cases, including *Factory at Chorzów (Merits)*,<sup>565</sup> *Corfu Channel (Merits)*,<sup>566</sup> *United States Diplomatic and Consular Staff in Tehran*<sup>567</sup> and *Armed Activities on the Territory of the Congo*.<sup>568</sup>

5.21 Nicaragua objects to Costa Rica’s request for compensation on the basis of the “vague and indistinct character of the alleged damages and of the requested reparation.”<sup>569</sup> Nicaragua concedes that a claimant may request a general declaration establishing that compensation is due, provided it asks the Court to determine the amount of damage in a subsequent proceeding, as stated in the *Fisheries Jurisdiction Case (Federal Republic of Germany v Iceland)*. But it 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 information and slender evidence”.<sup>570</sup>

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562 Ibid., 204-205 (para. 76).

563 *Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports 1986 p. 14, p. 142 (para. 283).

564 Ibid. (para. 284).

565 *Factory at Chorzów, Merits*, PCIJ Reports, Series A, No. 17 (1928) p. 64, paras. 7-8 of the Dispositif.

566 *Corfu Channel, Merits*, ICJ Reports 1949, p. 26. In its final submissions the UK requested the Court to determine that, as a result of the breach by the Albanian Government of its obligations under international law, it had sustained damages amounting to £875,000 (ibid., 23). The Court held that it had jurisdiction under the Special Agreement to assess the amount of the compensation, but reserved the question to a subsequent phase (ibid., 26).

567 *United States Diplomatic and Consular Staff in Tehran, Judgment*, ICJ Reports 1980, pp.41-2 (para. 90); p 45, Dispositif, paras. (5)-(6).

568 *Armed Activities on the territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment of 19 December 2005, dispositif para (14). See also ibid., paras. 259-260.

569 NCM, para. 7.1.5.

570 NCM, para. 7.1.7, citing I.C.J. 1974, p. 204 (para. 76).

5.22 Nicaragua's use of the Court's decision in *Fisheries Jurisdiction* on this point is inapposite for two reasons.

- (i) First, as the Court noted in *Fisheries Jurisdiction*, Germany did not request that the damages be proved and assessed in a subsequent proceeding; it only reserved its rights "to claim compensation."<sup>571</sup> This stands in clear contrast to the present case.<sup>572</sup> After listing the specific violations of Costa Rica's rights in its submissions, Costa Rica asks the Court to adjudge and declare that Nicaragua is obliged, *inter alia*, "to make reparation to Costa Rica for all injuries caused to Costa Rica by the breaches of Nicaragua's obligations referred to above, in the form of the restoration of the situation prior to the Nicaraguan breaches and compensation in an amount to be determined in a separate phase of these proceedings."<sup>573</sup>

In the circumstances, the Court's statement that "[i]t is possible to request a general declaration establishing the principle that compensation is due, provided the claimant asks the Court to receive evidence and to determine, in a subsequent phase of the same proceedings, the amount of damage to be assessed" is directly applicable to Costa Rica's request.<sup>574</sup>

- (ii) Second, Costa Rica has not requested the Court to make "an all-embracing finding of liability which would cover matters as to which it has only limited information and slender evidence." Costa Rica has specified Nicaragua's breaches of Costa Rica's perpetual right of free navigation and related rights.<sup>575</sup> It has specified each and every right that Nicaragua has violated and has requested the Court to adjudge and declare that Nicaragua has violated those rights.<sup>576</sup> In addition, it has specified the elements which should be included in compensation, and that each element has been caused by Nicaragua's internationally wrongful acts.<sup>577</sup> Costa Rica's request is at least as specific as the submissions in cases where the Court has granted requests for a declaration that compensation

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<sup>571</sup> Ibid.

<sup>572</sup> CRM, para. 6.17.

<sup>573</sup> CRM, Submissions, para. 3(b), p. 148.

<sup>574</sup> *Fisheries Jurisdiction (Federal Republic of Germany v Iceland)*, Merits, ICJ Reports 1964, p. 204 (para. 76).

<sup>575</sup> CRM, para. 5.144.

<sup>576</sup> CRM, para. 6.03. See also CRM, Submissions, para. 2, p. 147.

<sup>577</sup> CRM, para. 6.15.

is due, reserving determination of the scope of compensation due to a subsequent phase of the case.

5.23 It is true that in both *Fisheries Jurisdiction* and *Military and Paramilitary Activities in and against Nicaragua* the Court was faced with a situation where the respondent State had failed to appear.<sup>578</sup> However, neither case supports an argument that a declaration that compensation is payable, the amount of compensation to be determined in a subsequent phase of the proceedings, cannot be made by the Court when both parties participate in the merits phase. In fact the Court has granted such a declaration in cases where both parties participated in the merits phase. This was the case in *Factory at Chorzów (Merits)*,<sup>579</sup> *Corfu Channel (Merits)*,<sup>580</sup> and most recently in *Armed Activities on the Territory of the Congo*.<sup>581</sup> Further in *United States Diplomatic and Consular Staff in Tehran*, Iran failed to appear but the Court did not refer to the fact that the respondent State failed to appear nor to Article 53 in providing that the amount of reparation was to be determined at a subsequent phase.<sup>582</sup> In *United States Diplomatic and Consular Staff in Tehran* the Court noted that where violations were continuing, as in the present case, “the form and amount of ... reparation” could not be determined at the present time.<sup>583</sup> Given that violations are continuing in the present case, it is clear that an order in the terms sought by Costa Rica is appropriate.

## B. Nicaragua’s request for a declaration

5.24 Nicaragua has requested the Court to issue a declaration about the extent of Costa Rica’s rights of navigation. The first five paragraphs of the declaration relate to the scope of Costa Rica’s rights of navigation and, consistently with

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578 As noted by NCM, para. 7.1.8.

579 *Factory at Chorzów, Merits*, P.C.I.J. Reports, Series A, No. 17 (1928) p. 64, paras. 7-8 of the Dispositif.

580 *Corfu Channel, Merits*, I.C.J. Reports 1949, p. 26.

581 *Armed Activities on the territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment of 19 December 2005, dispositif para (14).

582 *United States Diplomatic and Consular Staff in Tehran, Judgment*, I.C.J. Reports 1980, pp. 41-42 (para. 90). See also *ibid.*, 7-8. (para. 8, reproducing the US submissions).

583 *United States Diplomatic and Consular Staff in Tehran, Judgment*, I.C.J. Reports 1980, pp. 41-42 (para. 90).



Nicaragua's attempts to limit Costa Rica's rights, request the Court to declare Costa Rica's rights are of a limited character.<sup>584</sup>

5.25 In light of Costa Rica's arguments as to the scope of its rights, Nicaragua's request for a declaration in the terms it proposes must be rejected. The terms of the declaration sought by Costa Rica accurately reflect Costa Rica's perpetual rights of free navigation resulting from international law, particularly the 1858 Treaty of Limits, the Cleveland Award of 1888, the judgment of the Central American Court of Justice of 13 September 1916 and the 1956 Agreement pursuant to Article IV of the Pact of Amity.

5.26 The remaining five paragraphs of Nicaragua's declaration relate to separate allegations, some of which bear no relation to the dispute before the Court.<sup>585</sup>

5.27 Nicaragua requests the Court to declare that 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."<sup>586</sup> But the requirements actually imposed by Nicaragua (without any evident legislative basis) are a breach of Costa Rica's rights under the applicable instruments and decisions: a declaration in the terms sought by Nicaragua cannot accordingly be granted.

5.28 Nicaragua asserts that "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."<sup>587</sup> The fact is that no such services are provided, and even if they were, compulsory payment for services on a river subject to the regime of the Treaty of Limits would contradict the perpetual right of free navigation.

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<sup>584</sup> See NCM, para. 5.2.5.

<sup>585</sup> See Rules, Article 80(2). Quite apart from the requirement of timeliness, Article 80 requires a counter-claim to be "directly connected with the subject-matter of the claim of the other party": see Article 80(1). Nicaragua's "reservations", even if they had been timely presented as counter-claims, would not have satisfied this requirement. See discussion in this Reply, paras. 1.16-1.17.

<sup>586</sup> NCM, para. 7.2.6.

<sup>587</sup> *Ibid.*

5.29 Nicaragua alleges that “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.”<sup>588</sup> Exactly what is meant by this statement is unclear, especially in the circumstances that there have been no “modern improvements in the navigation of the river”, indeed no improvements of any kind. In any event (even if, hypothetically, there had been any such improvements), Costa Rica’s perpetual and free right of navigation cannot be made subject to charges by Nicaragua. This was confirmed by President Cleveland, who decided:

“4. The Republic of Costa Rica is not bound to concur with the Republic of Nicaragua in the expenses necessary to prevent the bay of San Juan de Norte from being obstructed; to keep the navigation of the river or port free and unembarrassed, or to improve it for the common benefit.

5. The Republic of Costa Rica is not bound to contribute any proportion of the expenses that may be incurred by the Republic of Nicaragua for any of the purposes above mentioned.”<sup>589</sup>

5.30 Nicaragua claims that “[r]evenue service boats may only be used during and with special reference to actual transit of the merchandise authorized by Treaty.”<sup>590</sup> This is related to Nicaragua’s attempt to limit Costa Rica’s free right of navigation, and its rights of navigation with revenue service vessels expressly recognised in the Cleveland Award. Costa Rica has shown that Nicaragua’s claim to limit Costa Rican navigation in this way is without foundation.<sup>591</sup>

5.31 Finally, Nicaragua makes an assertion about its rights to dredge the San Juan, a matter which is not related to any aspect of the dispute now before the Court. It claims:

“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.”<sup>592</sup>

This claim, like Nicaragua’s purported reservations,<sup>593</sup> is without merit and without incidence for the present case. On the contrary, any work of improvement by Nicaragua cannot result in damage to Costa Rican territory, as provided for by President Cleveland:

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588 *Ibid.*

589 CRM, Annexes, Vol 2, Annex 16. See further discussion this Reply, paragraphs 3.08-3.35.

590 NCM, para. 7.2.6.

591 See this Reply, paragraphs 3.79-3.95.

592 NCM, para. 7.2.6.

593 See discussion in this Reply, paragraphs 1.16-1.17.

“6. The Republic of Costa Rica cannot 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 occupation or flooding or damage of Costa Rica territory, or in the destruction or serious impairment of the navigation of the said river or any of its branches at any point where Costa Rica is entitled to navigate the same. The Republic of Costa Rica has the right to demand indemnification for any places belonging to her on the right bank of the river San Juan which may be occupied without her consent, and for any lands on the same bank which may be flooded or damaged in any other way in consequence of works of improvement.”<sup>594</sup>

5.32 In recent correspondence, Costa Rican Foreign Minister Roberto Tovar Faja expressed support in principle for improvement works on the San Juan, while noting that “those improvements works must be carried out without causing any damage to Costa Rican territory, as provided for in the 1888 Award of the President of the United States.”<sup>595</sup> Although the Nicaraguan Foreign Minister replied on 8 May 2006, his note made no reference to the issue of damage to Costa Rican territory.<sup>596</sup>

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<sup>594</sup> CRM, Annexes, Vol 2, Annex 16.

<sup>595</sup> See Costa Rican Foreign Minister, Roberto Tovar Faja, to Nicaraguan Foreign Minister, Norman Caldera Cardenal, Note No. DM-187-06, 5 May 2006: CRR, Annexes, Vol 2, Annex 42. See also Costa Rican Foreign Minister, Roberto Tovar Faja, to Nicaraguan Foreign Minister, Norman Caldera Cardenal, Note No. DM-37-06, 26 January 2006 (CRR, Annexes, Vol 2, Annex 39), in which Costa Rica requested information about Nicaragua’s planned works to dredge the San Juan, as had been reported by the press. In its response, Nicaragua confirmed that “infrastructure and improvements works for social benefit” were being carried out in the San Juan: Nicaraguan Foreign Minister, Norman Caldera Cardenal, to Costa Rican Foreign Minister, Roberto Tovar Faja, Note No. MRE/DM-JI/262/02/06, 17 February 2006: CRR, Annexes, Vol 2, Annex 40. Despite this assertion, to date no improvements works have begun in the area, nor has any dredging occurred. See also Nicaraguan Foreign Minister, Norman Caldera Cardenal, to Costa Rican Foreign Minister, Roberto Tovar Faja, Note No. MRE/DM-AJ/340/03/06, 16 March 2006: CRR, Annexes, Vol 2, Annex 41.

<sup>596</sup> See Nicaraguan Foreign Minister, Norman Caldera Cardenal, to Costa Rican Foreign Minister, Roberto Tovar Faja, Note No MRE/DM-JI/511/05/06, 8 May 2006: CRR, Annexes, Vol 2, Annex 43.

## SUMMARY

1 These proceedings concern breaches by Nicaragua of Costa Rica's perpetual right of free navigation and related rights in respect of the San Juan River. These rights are set out in a series of treaties and decisions including the Treaty of Limits of 15 April 1858 and the Cleveland Award of 1888, and also result from customary international law. Since the 1990s Nicaragua has imposed and maintained restrictions on the navigation of Costa Rican vessels and their passengers on the San Juan which are contrary to Costa Rica's rights. Since these proceedings were commenced, Nicaragua has tightened existing restrictions and imposed new restrictions which in combination tend to deny the substance of Costa Rica's rights entirely.

2 The San Juan is a boundary river governed by an international treaty regime attributing to Costa Rica a perpetual right of free navigation for purposes of commerce. Nicaragua's sovereignty over the waters of the San Juan cannot be used to restrict or limit the scope and exercise of the perpetual right of free navigation, which was recognised by the Treaty of Limits at the same time as sovereignty over the River was granted to Nicaragua.

3 As to the substance of the rights relied on by Costa Rica:

- (1) A good faith interpretation of the ordinary meaning of the terms in their context –both internal and external – taking into account the object and purpose of the Treaty of Limits leads to the inexorable conclusion that the phrase “*con objetos de comercio*” means “for purposes of commerce” and not “with articles of trade”.
- (2) Subsequent agreements, subsequent practice, and rules of international law applicable to the dispute, and the behaviour of Nicaragua itself, confirm this interpretation, as do the relevant antecedents of the Treaty of Limits and the circumstances of its conclusion.
- (3) Costa Rica is entitled to navigate with public vessels manned by Costa Rican officials carrying their normal arms on that part of the San Juan where navigation is common, in exercise of its right of communication through the San Juan and in order to protect its freedom of navigation, to safeguard the River and to

defend the boundary areas as well as the common Bay of San Juan del Norte.

- (4) Costa Rican vessels exercising the perpetual right of free navigation are entitled to fly the Costa Rican flag and cannot be obliged to hoist the Nicaraguan flag as a condition for that exercise.
- (5) There is a consistent practice – recognised by Nicaragua – allowing the inhabitants of the right bank of the San Juan to fish for subsistence purposes, which has created a customary right to such fishing.
- (6) The conventional right to land on the Nicaraguan bank cannot be restricted by regulations which effectively deprive the right of any practical effect.
- (7) The Agreement of 9 January 1956, concluded pursuant to Article IV of the Pact of Amity, of 21 February 1949, imposes an autonomous obligation on Nicaragua to facilitate and to expedite traffic on the San Juan River.
- (8) Any attempt by Nicaragua to deny Costa Rica's rights by considering them as representing a simple "border courtesy" dependent on the goodwill of Nicaragua has no basis and must be rejected.

4 Nicaragua has violated Costa Rica's navigational and related rights in respect of the San Juan, and those violations are continuing. Further and severe restrictions were imposed on Costa Rican navigation after Costa Rica filed the Application in the present case. Restrictions include:

- (1) the obligation to land on the Nicaraguan bank and payment for a "departure clearance certificate";
- (2) the imposition of other charges including tourist and immigration fees and searches of Costa Rican vessels and their passengers;
- (3) a prohibition on navigation by Costa Rican police, and restrictions on navigation by other Costa Rican officials, with serious implications for the provision of health and social assistance and education to inhabitants of the Costa Rican bank;
- (4) timetables restricting Costa Rican navigation;
- (5) limitations on the places on Costa Rican territory which can be visited when navigating the San Juan and on the duration of those visits;

- (6) requirements to fly the Nicaraguan flag when navigating on the San Juan; and
- (7) prohibition of fishing for subsistence purposes.

5 Nicaragua's argument that Costa Rica has acquiesced in these restrictions is without foundation.

6 Costa Rica requests appropriate remedies as a consequence of the internationally wrongful acts committed by Nicaragua, in particular:

- (1) a declaration of the extent of Nicaragua's violations of its obligations;
- (2) the cessation of the internationally wrongful acts that continue to be committed by Nicaragua;
- (3) reparation by Nicaragua for damage caused as a result of those violations, the amount to be assessed, if necessary, in a separate phase of the proceedings; and
- (4) appropriate guarantees of non-repetition by Nicaragua of its wrongful conduct.

These remedies are appropriate and Costa Rica's request for them admissible. In particular, since the case concerns rights of Costa Rica as a State under treaties and other instruments binding on the parties, Costa Rica's application is not brought within the framework of diplomatic protection, and there is no requirement to exhaust local remedies (if any exist) in Nicaragua. Rather, Costa Rica asserts its own claims, basing them on the injury which "*it has itself suffered, directly and through its nationals*" as a result of the violations by Nicaragua.<sup>597</sup> As to assurances and guarantees of non-repetition, Costa Rica's request that the Court order these is appropriate since Nicaragua's violations of its navigational and related rights are consistent, deliberate and continuing. In the circumstances Costa Rica has every "reason to believe that the mere restoration of the pre-existing situation does not protect it satisfactorily".<sup>598</sup>

7 On the other hand Nicaragua's request for a declaration bears no relation to the actual dispute between the parties and should be rejected.

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597 *Case Concerning Avena and other Mexican Nationals (Mexico v. United States of America)*, Judgment, ICJ Reports 2004, p. 12, 35-36 (para. 40) (emphasis in original).

598 *LaGrand (Germany v. United States of America)*, ICJ Reports 2001, p. 466, 512 (para. 123).

## SUBMISSIONS

1. For these reasons, and reserving the right to supplement, amplify or amend the present submissions, Costa Rica requests the Court to adjudge and declare that Nicaragua is in breach of its international obligations in denying to Costa Rica the free exercise of its rights of navigation and related rights on the San Juan.

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

- (a) the obligation to allow all Costa Rican vessels and their passengers to navigate freely on the San Juan for purposes of commerce, including communication and the transportation of passengers and tourism;
- (b) the obligation not to impose any charges or fees on Costa Rican vessels and their passengers for navigating on the River;
- (c) the obligation not to require persons exercising the right of free navigation on the River to carry passports or obtain Nicaraguan visas;
- (d) the obligation not to require Costa Rican vessels and their passengers to stop at any Nicaraguan post along the River;
- (e) the obligation not to impose other impediments on the exercise of the right of free navigation, including timetables for navigation and conditions relating to flags;
- (f) the obligation to allow Costa Rican vessels and their passengers while engaged in such navigation to land on any part of the bank where navigation is common without paying any charges, unless expressly agreed by both Governments;
- (g) the obligation to allow Costa Rican official vessels the right to navigate the San Juan, including for the 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 the Second article of the Cleveland Award;

- (h) the obligation to facilitate and expedite traffic on the San Juan, within the terms of the Treaty of 15 April 1858 and its interpretation by the Cleveland Award of 1888, in accordance with Article 1 of the bilateral Agreement of 9 January 1956;
- (i) the obligation to permit riparians of the Costa Rican bank to fish in the River for subsistence purposes.

3. Further, the Court is requested to adjudge and declare that by reason of the above violations, Nicaragua is obliged:

- (a) immediately to cease all the breaches of obligations which have a continuing character;
- (b) to make reparation to Costa Rica for all injuries caused to Costa Rica by the breaches of Nicaragua's obligations referred to above, in the form of the restoration of the situation prior to the Nicaraguan breaches and compensation in an amount to be determined in a separate phase of these proceedings; and
- (c) to give appropriate assurances and guarantees that it shall not repeat its unlawful conduct, in such form as the Court may order.

4. The Court is requested to reject Nicaragua's request for a declaration.

Agent of Costa Rica

15 January 2008



## **Appendix: Some Historical Issues**

A.01 In its Counter-Memorial, Nicaragua complains that Costa Rica has misrepresented historical facts, but it presents little or no evidence in support of its own allegations. This Appendix addresses Nicaragua's approach to the following historical issues:

- (A) whether the San Juan belonged exclusively to any of the Provinces during the Spanish period: Costa Rica establishes that it did not (see below, paragraphs A.02-A.14);
- (B) to what extent the issue of Nicoya was a live point for negotiation in concluding the Treaty of Limits, 1858: Costa Rica establishes that it was not (see below, paragraphs A.15-A.22);
- (C) whether there is relevant discrepancy in the territorial descriptions of Costa Rica as between the 1825 Constitution and that of 1841: Costa Rica establishes that there was not (see below, paragraphs A.23-A.28);
- (D) whether Costa Rica participated alongside Nicaragua in canalization contracts and agreements at the time of the Treaty of Limits: Costa Rica establishes that it did so participate (see below, paragraphs A.29-A.32);
- (E) whether Costa Rica engaged in official navigation on the lower San Juan after 1886: Costa Rica establishes that it did engage in such navigation (see below, paragraphs A.33-A.44);

### **A. The lower San Juan River and its mouths**

A.02 In its Memorial, Costa Rica claimed that the San Juan did not belong exclusively to any of the Provinces during the Spanish period.<sup>599</sup> Nicaragua disputes this, arguing that the Royal Charter given to Diego de Artieda on 1 December 1573 gave the mouths of El Desaguadero to Nicaragua, and that this situation remained unchanged until 1821.<sup>600</sup>

A.03 The Order issued on 17 May 1561 by the Captaincy General of Guatemala, by order of the King of Spain, naming Licentiate Juan Cavallón the

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<sup>599</sup> CRM, para. 2.08.

<sup>600</sup> See NCM, para. 1.2.11.

Major of the Province of Nueva Cartago and Costa Rica, set down the following limits for that Province:

“...as far as the boundary of the city of Natá and its jurisdiction, in the Kingdom of Tierra Firme, otherwise called Castilla del Oro, and then along this line to the limits of the Dukedom of Veragua, and from the Southern Sea to the Northern Sea up to *the Desaguadero, this being included...*”<sup>601</sup> (Emphasis added.)

A.04 In relation to the San Juan, the limits in the 1561 Order were similar to those established by the 1540 Royal Charter to Diego Gutiérrez.<sup>602</sup> The 1561 Order provided that the San Juan (i.e. the Desaguadero) would be part of Costa Rica, as the order states “until El Desaguadero inclusive”.<sup>603</sup>

A.05 In its Counter-Memorial Nicaragua claims that the 1573 Royal Charter “established very clearly that ‘the mouth of the Desaguadero (San Juan River)... belongs to Nicaragua...”<sup>604</sup> But it fails to explain significant contradictions in the 1573 Charter. Paragraph 5 of the Charter provided that Diego de Artieda’s conquest would commence “...on the northern part, from the mouths of the Desaguadero...”<sup>605</sup> Clearly these mouths were included: the Royal Charter uses the word “desde”, meaning “from”, which is an inclusive term. This paragraph did not stipulate that the mouth of the El Desaguadero was part of Nicaragua. Paragraph 12 of the Royal Charter has a similar reading, with the exception that after the words “El Desaguadero” it added the words “that is to the parts of Nicaragua”.<sup>606</sup> As noted above, the additional wording is not included in paragraph 5 of the Charter.

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601 See CRM, Annexes, Vol 2, Annex 3.

602 See CRM, Annexes, Vol 2, Annex 1.

603 CRM, Annexes, Vol 2, Annex 3.

604 See NCM, para. 1.2.11; see also NCM, para. 1.2.3..

605 NCM, Vol II, Annex 86, p. 303. Paragraph 5 of the Royal Charter stipulated: “...And once you arrive there, you (sic) offer to discover the entire coast of the said province, from the mouths of the Desaguadero to the confines of Veragua, in the North Sea, and you will take possession on Our behalf of whatever has not been taken; and you will discover all the inland of the said province up to the South Sea...”.

606 NCM, Vol II, Annex 86, p. 302. Paragraph 12 of the Royal Charter stipulated: “Firstly, we give you license and authority to discover, settle and pacify the aforesaid Province of Costa Rica and other lands and provinces contained therein... ..and on the northern part, from the mouths of the Desaguadero, ‘ques á las partes de Nicaragua’, all across the land, to the Province of Veragua.” It should be noted that Costa Rica does not agree with Nicaragua’s translation from the Spanish language into the English language of the words “*ques á las partes de Nicaragua*”, translated by it as “*that belong to Nicaragua*”. Costa Rica considers that those original words correct translation is: “*that is to the parts of Nicaragua*”.

A.06 Notwithstanding this contradiction, and assuming that the Royal Charter intended to leave the mouth of the Desaguadero to Nicaragua, the River itself continued to be under Costa Rican jurisdiction in accordance with the 1561 Order, which was not repealed by the 1573 Charter.

A.07 Another possible reading is that Diego de Artieda's conquest would commence from the mouths of the Desaguadero up to the parts of Nicaragua, as set down in the 1540 and 1541 Royal Charters, that is, 15 leagues to the east from Lake Nicaragua, which is consistent with the history of the border.

A.08 On either reading, the 1573 Charter did not stipulate that the entire River belonged to Nicaragua, as the 1561 Charter had clearly stipulated for Costa Rica. Nor did it establish where any new limits of Nicaragua were located. Nor did it establish that the Costa Rican borders were modified, thereby leaving unaltered the limits marked down in the previous Royal Charters. Whatever reading that is given to the 1573 Royal Charter, it cannot be cited to support the conclusion that the River San Juan, in all its extension, came under Nicaraguan jurisdiction.

A.09 No other provision of the 1573 Royal Order established a change of possession over the entire course of the River or a significant change to the relevant boundaries of the provinces, nor any modification as to the rights of navigation and fishing established in the 1540 Royal Charter,<sup>607</sup> nor any changes to the 1561 Order. The rights of the parties in respect of their boundaries and of fishing and navigation remained the same as those set forth in the 1540 Royal Charter, as amended by the 1541 Royal Charter and the 1561 Order.

A.10 Nicaragua's claim to ownership of the entire San Juan is also untenable because the provisions of a 1576 Royal Charter confirm that Nicaragua's territory did not reach as far as the mouths of the Desaguadero. The entire eastern territory of what today is Nicaragua's Caribbean coast and parts of the eastern territory of what today is Honduras were called Nueva Cartago;<sup>608</sup> its limits stretched from the mouth of the Desaguadero to Cape Camaron, bordering with

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<sup>607</sup> See CRM, Annexes, Vol 2, Annex 1.

<sup>608</sup> See Sketch Map 4.

the Province of Honduras.<sup>609</sup> On 10 February 1576 the King of Spain issued a Royal Charter authorising Diego López to conquer and settle the Province of Lataguzgalpa, which included most of the territory formerly within Nueva Cartago. The limits of this Province were set down as follows:

“Firstly. His Majesty will appoint him his Governor and Captain-General of the said Province, which is the whole land included from *the mouth of El Desaguadero to the north up to Cape Camaron*, in the same direction where the Province of Honduras begins, with all the inland territory included therein, *until reaching the boundary and jurisdiction of the Province of Nicaragua* and Nueva Segovia, and what is that of Honduras; and the said Captain Diego Lopez shall have the said Governorship during his lifetime...”<sup>610</sup> (Emphasis added.)

A sketch map showing the Province of Lataguzgalpa is opposite (Sketch Map 4).

A.11 It is clear from the provisions of the 1576 Royal Charter that the Province of Lataguzgalpa included all the land up to the boundary and jurisdiction of Nicaragua. Nicaragua’s territory did not reach to the mouths of the Desaguadero, contrary to Nicaragua’s Counter Memorial.

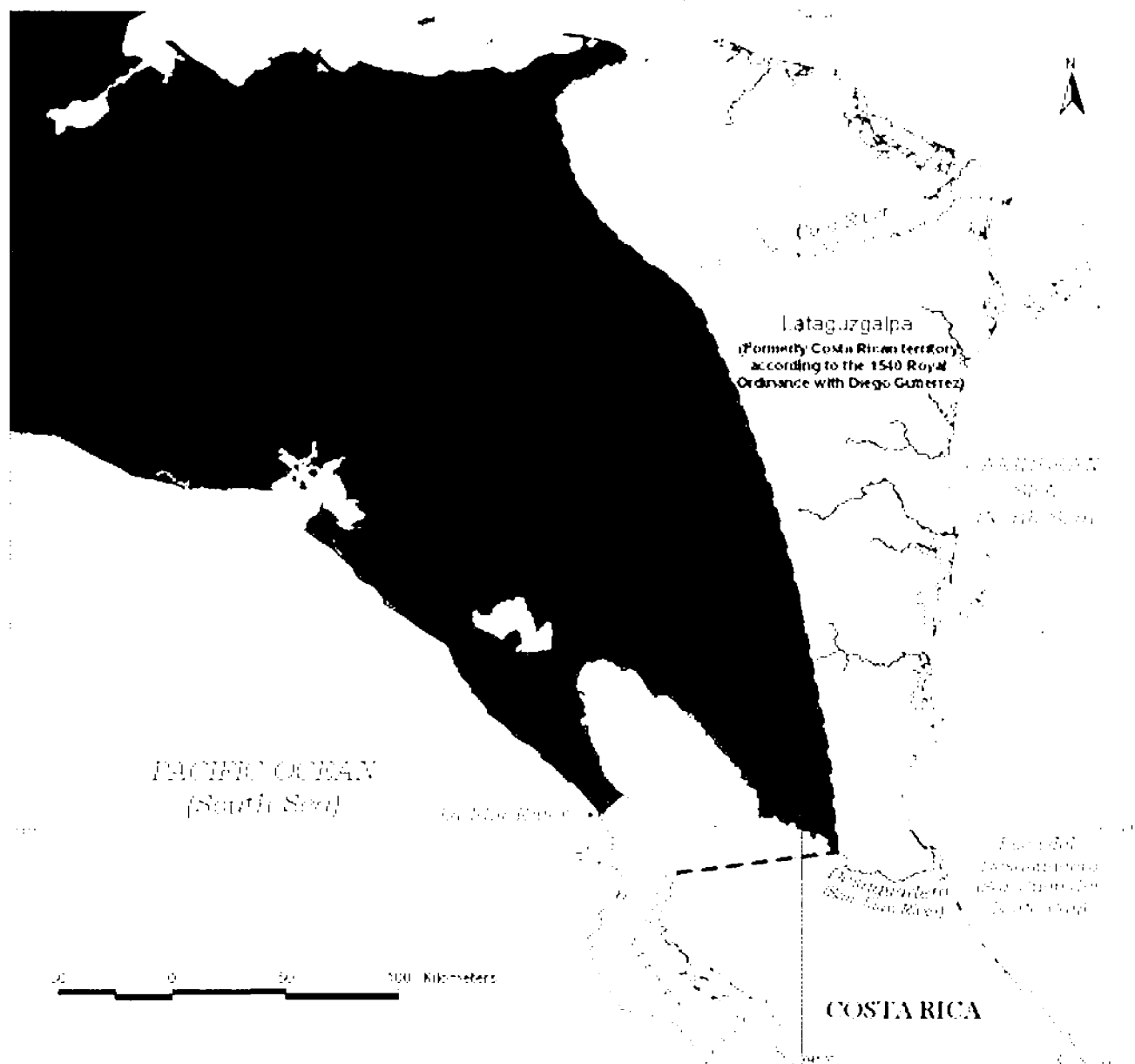
A.12 If the 1576 Royal Charter is reviewed alongside the Royal Charter of 1540, as amended in 1541, as well as the Order of 1561, it makes perfect sense, since the limits of the Province of Nicaragua reached only fifteen leagues to the east, following the Desaguadero (San Juan River) from Lake Nicaragua to the Caribbean Sea. Thus, in 1576 the entire Caribbean coast did not belong to Nicaragua, neither did the lower part of the River San Juan, including the mouth of the Desaguadero. Even if the 1573 Royal Charter had intended to allocate the mouth of the Desaguadero to Nicaragua, as Nicaragua claims, the 1576 Royal Charter allocated the territory from the northern bank of the River northwards to the Province of Lataguzgalpa. According to the 1576 Royal Charter, the limits of Nicaragua would be those set forth previously, as established by the 1540 Royal Charter and set out in Sketch Map 4. The River itself as well as the entire coast to the south belonged to Costa Rica, in accordance with the 1540

609 Capitulación con Diego Gutiérrez para la conquista de la Provincia de Cartago, 29 November 1540, in MM de Peralta, *Costa Rica, Nicaragua y Panamá en el Siglo XVI su Historia y sus Límites* (Madrid: Librería Murillo, 1883): CRM, Annexes, Vol 2, Annex 1.

610 Royal Charter of the King of Spain to Diego López in Archivo de Indias, *Colección de Documentos Inéditos relativos al descubrimiento, conquista y organización de las antiguas posesiones españolas de América y Oceanía, sacadas de los Archivos del Reyno y muy especialment del de Indias*: CRR, Annexes, Vol 2, Annex 1.

Sketch map 4

**LIMITS OF COSTA RICA AND LATAGUZGALPA ACCORDING TO THE ROYAL CHARTER  
OF THE KING OF SPAIN TO DIEGO LOPEZ, 10 FEBRUARY 1576.**



Royal Charter and 1561 Order, unaltered by the 1573 and 1576 Royal Charters. Furthermore, the 1576 Charter established that the Province of Lataguzgalpa included all the land to the north from the northern bank of the San Juan River, thus leaving Costa Rica with the same limits and jurisdiction set down in the Royal Charter of 1540, as amended by the Royal Charter of 1541 and the Order of 1561.

A.13 That this remained the situation in the 18th century can be seen from the report about the Province of Costa Rica presented by Luis Diez Navarro to the Captain General of Guatemala in 1744. This stated that the Province of Costa Rica's jurisdiction was "from the north, from the mouths of the San Juan River until the Shield of Veraguas, at the Kingdom of Tierra Firme..."<sup>611</sup> Thus in 1744 there was no doubt that the mouths of the San Juan River belonged to Costa Rica, as most of the San Juan River.

A.14 Further evidence is found in Costa Rica's 1825 Constitution which provided that Costa Rica's limits on the north were the "mouth of the San Juan River."<sup>612</sup> Costa Rica stands by its claim that the San Juan River did not belong exclusively to either of the Provinces during colonial times.

## **B. The issue of Nicoya**

A.15 Nicaragua claims that Costa Rica annexed the "Partido de Nicoya" unilaterally, taking advantage of the Nicaraguan conflict prevailing in 1824.<sup>613</sup> It contends that when negotiations for the 1858 Treaty of Limits commenced, "the District of Nicoya was part of [Nicaragua's] territory".<sup>614</sup> Both assertions are without foundation.

A.16 When independence reached Central America, the Central American territories agreed to form the Central American Federation, a supreme national body that would integrate all the territories under one single union. But internal

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611 Report regarding the Province of Costa Rica, presented by Luis Diez Navarro to the Captain General of Guatemala, *Revista de los Archivos Nacionales*, Año II-setiembre y octubre de 1939- No. 11 y 12: CRR, Annexes, Vol 2, Annex 28, p.581.

612 See NCM, para 1.2.15; CRM, Annexes, Vol 6, Annex 193, p. 769.

613 NCM, para. 1.2.4.

614 NCM, para. 1.2.49.

struggles and civil war started in Nicaragua as early as 1821, when strife broke out in Nicaragua between the cities of Leon and Granada.<sup>615</sup>

A.17 By 1824 the fate of the districts that were once under one single jurisdiction became an issue to be decided by each of those districts.<sup>616</sup> There had been a close relation between Costa Rica and the “Partido de Nicoya”, to the point that together they formed an electoral district to elect their joint representative to the Spanish Court in 1813<sup>617</sup> and again in 1820.<sup>618</sup> Given those circumstances and the close commercial relationship between Costa Rica and Nicoya, the Nicoyans had no desire to be involved in Nicaragua’s struggles. A plebiscite took place on 25 July 1824, whereby the people of Nicoya decided to join Costa Rica.<sup>619</sup> This decision, ratified by the Central American Federal Congress in 1825,<sup>620</sup> was reaffirmed by the people of Nicoya seven times between 1826 and 1854. The integration of Nicoya into Costa Rica was achieved in conformity with international law, peacefully and by the determination of its people, more than 30 years before the negotiations for the Treaty of Limits.

A.18 Nicaragua acknowledged the integration of Nicoya to Costa Rica when its Constitution of 8 April 1826 did not include Nicoya as part of Nicaraguan territory. Article II of that Constitution stated:

“The Territory of the State embraces the districts of Nicaragua, Granada, Managua, Masaya, Matagalpa, Segovia, Leon, Subtiaba, and El Realejo.”<sup>621</sup>

A.19 Nicaragua presents the negotiation of the 1858 Treaty as follows:

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615 Nicaragua acknowledges this fact: NCM, Introduction, para. 7, p. 3.

616 Masaya Treaty, 26 April 1823: CRR, Annexes, Vol 2, Annex 3. See also NCM, para. 1.2.4.

617 Resolution by the Royal Audiencia of Guatemala regarding the election of members of the Spanish Cortes for Costa Rica and Nicoya, 3 May 1813, P. Pérez Zeledón, *Reply to the Argument of Nicaragua on the Question of the Validity or Nullity to the Treaty of Limits of April 15, 1858*, (Washington, D.C.: Gibson Bros, 1887), pp.103-104: CRR, Annexes, Vol 2, Annex 2.

618 Tabla para facilitar la elección de los diputados a Cortes: CRR, Annexes, Vol 2, Annex 63.

619 Nicoya Act, 25 July 1824: CRR, Annexes, Vol 2, Annex 64.

620 Decree of the Central American Congress in 1825, approving the annexation of Nicoya to Costa Rica, P. Pérez Zeledón, *Reply to the Argument of Nicaragua on the Question of the Validity or Nullity to the Treaty of Limits of April 15, 1858*, (Washington, D.C.: Gibson Bros, 1887), p. 192: CRR, Annexes, Vol 2, Annex 5.

621 Nicaraguan Constitution, 8 April 1826, P. Pérez Zeledón, *Reply to the Argument of Nicaragua on the Question of the Validity or Nullity to the Treaty of Limits of April 15, 1858*, (Washington, D.C.: Gibson Bros, 1887), pp.107-108: CRR, Annexes, Vol 2, Annex 65. It should be noted that this description of Nicaragua’s territory did not include the mouth of the San Juan River, the San Juan River as such or any of the territories in the Caribbean Coast.

“By means of [the 1858] Treaty Nicaragua accepted the Annexation of Nicoya by Costa Rica; Costa Rica for her part recognized that Nicaragua was the entire and sole sovereign of the San Juan River and that her border with Nicaragua did not reach as far as the coast of Lake Nicaragua. In this Treaty Nicaragua also granted limited rights of navigation to Costa Rica in a part of the San Juan River.”<sup>622</sup>

The 1858 Treaty of Limits marked the final recognition by Nicaragua of the decision taken by the people of Nicoya – but that had long been an accomplished fact.

A.20 In its presentation of the *quid pro quo* of the 1858 Treaty Nicaragua fails to refer to the context of the ratification of that Treaty, which was intimately connected with the Canalization Convention between Nicaragua, Costa Rica and Félix Belly, signed on 1 May 1858 in Rivas.<sup>623</sup> Article 4 of the Nicaragua-Costa Rica-Belly Convention expressly provided that the boundary between Costa Rica and Nicaragua would be the canal. It stated:

“Dans le cas où le tracé partant de l’embouchure de la Sapoa sur le lac de Nicaragua, et aboutissant à la baie de Salinas sur le Pacifique, serait reconnu praticable par les ingénieurs, ce tracé sera choisi de préférence par la Compagnie pour aboutir du lac de Nicaragua au Pacifique, et par le fait même, le canal deviendra dans toute sa longueur la limite définitive des États de Nicaragua et de Costa-Rica. Dans le cas contraire, cette limite restera ce qu’elle est aujourd’hui, sauf règlement ultérieur.”<sup>624</sup>

As co-sovereigns of the canal, Costa Rica and Nicaragua would evidently both have rights of navigation in the waterway. This is confirmed in Article 25 of the Canalization Convention, which provided that Costa Rica and Nicaragua both could veto navigation in the canal by warships of France, England and the United States:

“Dès que la neutralité du canal aura été solennellement garantie par un acte émané des trois gouvernements de France, d’Angleterre et des Etats-Unis, l’entrée pourra en être accordée à des navires de guerre par une délibération unanime de ces trois puissances, pourvu que les gouvernements de Nicaragua et de Costa-Rica n’y mettent aucune opposition, et sauf règlement préalable avec la Compagnie concessionnaire.”<sup>625</sup>

622 NCM, para. 1.2.6.

623 CRM, Annexes, Vol 2, Annex 8.

624 Nicaragua-Costa Rica-F Belly, Convention relative to the concession for an Inter-oceanic Canal by the River San Juan and the Lake of Nicaragua (Mora-Martínez-Belly), Rivas, 1 May 1858: CRR, Annexes, Vol 2, Annex 12, Article 4.

625 Nicaragua-Costa Rica-F Belly, Convention relative to the concession for an Inter-oceanic Canal by the River San Juan and the Lake of Nicaragua (Mora-Martínez-Belly), Rivas, 1 May 1858: CRR, Annexes, Vol 2, Annex 12, Article 25. This is consistent with the account of Félix Belly, who was present for negotiations of both the 1858 Treaty and the canalization Convention: see F. Belly, *A Travers L’Amérique Centrale: le Nicaragua et le Canal Interocéanique*, Tome Second (Paris: Librairie de la Suisse Romande, 1867), 150-165, esp. 152-5. Pages 150-165 are included as CRR,



A.21 The picture which thus emerges from the negotiations leading to the 1858 Treaty is not at all that of a grant of sovereignty to Nicaragua in exchange for the incorporation of Nicoya into Costa Rica. By 1858 Nicoya was a settled matter and it remained for Nicaragua only to formally accept the incorporation of Nicoya into Costa Rica. Instead, the grant of sovereignty over the San Juan in the 1858 Treaty was balanced against the perpetual right of free navigation to Costa Rica.

A.22 At no stage did Costa Rica seek to conquer and annex any Nicaraguan territory.<sup>626</sup> The incursions into Nicaraguan territory on the part of Costa Rican forces during the Walker War were implicitly authorised by Nicaragua and were essential to the final victory against the Filibusters, a fact subsequently acknowledged by Nicaragua.<sup>627</sup>

### C. The 1825 and 1841 Constitutions

A.23 In its Counter Memorial, Nicaragua argues that Costa Rica disregarded the territorial boundaries of its own 1825 Constitution in its 1841 Constitution,<sup>628</sup> and concludes that Costa Rica did not respect the *uti possidetis* set down in its 1825 Constitution. Nicaragua attached a map depicting what it claims is the line drawn by the 1825 Costa Rican Constitution.<sup>629</sup>

A.24 Nicaragua's map does not reflect the limits set forth in the 1825 Constitution. First, it shows a straight line commencing in the mouth of the Colorado River and not in the mouth of the San Juan River, as stipulated by the 1825 Constitution. Second, the straight line terminates at the Tempisque River and not at the Salto River. Third, the Costa Rican 1825 Constitution did not establish the existence of any straight line from the mouth of the San Juan River to the Salto River, as Nicaragua implies. The map marked by Nicaragua is not a Costa Rican map from the 1820s and the limits have been marked by

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Annexes, Vol 2, Annex 66.

626 NCM, para 1.2.48(e).

627 See e.g., speech by the President of Nicaragua to the Diplomatic Corps on 14 September 2005: CRR, Annexes, Vol 2, Annex 68: "The solidarity of the Central American brothers –especially that from the Costa Rican brothers- was decisive to achieve the withdrawal of the filibusters". See also CRM, Complete Copies of Certain Annexes, Vol. 3, Annex 207 (b), p. 153.

628 See NCM, para. 1.2.19.

629 See NCM, Sketch Map 3.

Nicaragua for the purposes of this case: it is not a contemporary depiction of the boundary.

A.25 Article 15 of the 1825 Constitution laid down the boundaries of Costa Rica as follows:

“The State’s territory will extend, *for now*, from West to East, from the Salto River, which divides it from that of Nicaragua, up to the Chiriquí River, which is the border of the Republic of Colombia, and from North to South, from one sea to the other, *being its limits on the north the mouth of the San Juan River* and the shield of Veraguas, and in the south the mouth of the Alvarado River and that of Chiriquí.”<sup>630</sup> (Emphasis added.)

The 1825 Constitution established a temporary delimitation of the territory of Costa Rica. Again, Article 15 established that “The State’s territory will extend, *for now...*”, awaiting a decision by the Central American Federal Congress regarding the integration of Nicoya, integration that had been approved by the people of Nicoya six months before the drafting of the Constitution, a fact that Nicaragua omits to mention. At the time of the adoption of the 1825 Constitution the integration of Nicoya within Costa Rica had yet to be ratified by the Federal Congress. The Federal Congress Decree of 9 December 1825, issued 11 months after Costa Rica’s Constitution, agreed that Nicoya should remain part of Costa Rica.

A.26 By 1840, the Central American Federation was dissolved, Nicaragua being the first state to withdraw from the Federation in 1838. The legal situation of Nicoya remained the same as in 1825. Considering this fact, the 1841 Constitution included Nicoya as part of the territory of Costa Rica, as stipulated by the Federal Congress in 1825. There is no contradiction between the 1825 and the 1841 Costa Rican Constitutions.

A.27 As to the limits of Nicoya, it was clearly understood that it reached up to the La Flor River and Lake Nicaragua.<sup>631</sup> Nicaragua had recognised that the La Flor River was the limit between Nicaragua and Nicoya--by now part of Costa Rica--when its Legislative Assembly stipulated that “[t]he road between the

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630 CRM, Annexes, Vol 6, Annex 193, p. 769.

631 Report regarding the Province of Costa Rica, presented by Luis Díez Navarro to the Captain General of Guatemala, 1744: CRR, Annexes, Vol 2, Annex 28, p.580.

city of Rivas in Nicaragua and the District of Nicoya shall be repaired, *as far as the river called La Flor*” (emphasis added).<sup>632</sup>

A.28 None of Nicaragua’s Constitutions of this period indicated the extent of Nicaraguan territory or where its boundaries lay, and none made any reference to the San Juan River. The Nicaraguan Constitutions only stated that its limits to the south were with Costa Rica.<sup>633</sup>

#### **D. Negotiations for an inter-oceanic canal**

A.29 Nicaragua contends that Costa Rica did not participate in canalization and transit contracts in respect of the San Juan: rather “Nicaragua acted as exclusive territorial sovereign and administrative grantor, without any participation whatsoever by the Republic of Costa Rica.”<sup>634</sup> In its view, Costa Rica’s claim that it participated as a party, solely or jointly, in canal contracts and treaties “lacks any historical or documentary support”.<sup>635</sup> Nicaragua’s attempt to misrepresent Costa Rica’s participation in canal treaties and contracts is intended to undermine its claim to a perpetual right of free navigation recognised by the relevant instruments, including the 1858 Treaty of Limits.

A.30 Costa Rica’s participation in various canal contracts and treaties can be seen in documents produced to the Court, some of which have been cited by Nicaragua. For example, Costa Rica was party to the Montealegre-Jiménez Inter-Oceanic Canalization Treaty of 18 June 1869,<sup>636</sup> by which it adhered to the Ayón-Chevalier Contract for the excavation of an inter-oceanic canal.<sup>637</sup> It provided a right for Costa Rica to open roads and navigate rivers in Nicaraguan territory for the purposes of transport, such opening and navigation not to be impeded by Nicaragua “in any way whatsoever”.<sup>638</sup> An extension of Costa Rica’s rights of navigation to the entirety of the River was provided for in

632 See CRM, Complete Copies of Certain Annexes, Vol. 3, Annex 207(b), p.115 and see also p. 150. See also Sketch Map 4 in CRR.

633 See CRM, Complete Copies of Certain Annexes, Vol. 3, Annex 207(b), p. 107.

634 NCM, para. 1.3.13; see also paras. 1.2.48-1.2.49

635 NCM, para. 1.2.48.

636 NCM, Vol II, Annex 8, pp. 29-31. See also CRM, Annexes, Vol 2, Annex 13.

637 See CRM, Annexes, Vol 2, Annex 11.

638 See NCM, Vol II, Annex 8, Article 12.

Article III of the Costa Rica-Nicaragua Cordero-Zuñiga Convention of 5 April 1940.<sup>639</sup> In addition, the Costa Rica-Nicaragua-F. Belly Convention, referred to above, clearly provided for Costa Rica's participation in the canal project: indeed it provided that the boundary between the two countries would be the canal, clearly recognising navigation rights in the canal for both countries.<sup>640</sup>

A.31 In addition, several of the contracts and treaties to which Nicaragua is a party provide express recognition of Costa Rica's rights, including rights of navigation. For example, the Cass-Irisarri Treaty of 16 November 1857 provided:

"Article XX: It is understood 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>641</sup>

Costa Rica's rights were also expressly reserved in the Bryan-Chamorro Convention between Nicaragua and the United States.<sup>642</sup>

A.32 Costa Rica entered into various contracts without Nicaragua's participation, such as the Webster and Harris-Escalante Contract, between the government of Costa Rica, a British subject and a United States citizen, granting rights of navigation and transport.<sup>643</sup>

### **E. Costa Rican navigation on the San Juan River after 1888**

A.33 Nicaragua argues that there is no record of Costa Rican navigation on the lower San Juan by Costa Rican vessels of the revenue service after 1886.<sup>644</sup>

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639 CRM, Annexes, Vol 2, Annex 22, Article III.

640 See above, paras. A.19-A.21; Nicaragua-Costa Rica-F Belly, Convention relative to the concession for an Inter-oceanic Canal by the River San Juan and the Lake of Nicaragua (Mora-Martínez-Belly), Rivas, 1 May 1858: CRR, Annexes, Vol 2, Annex 12, Articles 4 and 25.

641 United States-Nicaragua, Treaty of Friendship, Commerce and Navigation (Cass-Irisarri), Washington DC, 16 November 1857: CRR, Annexes, Vol 2, Annex 10. For discussion of the mistranslation of Article XX by Nicaragua, see above, paragraphs 1.11-12. See also Great Britain-Nicaragua, Treaty of Friendship, Commerce and Navigation (Lennox Wyke-Zeledon), Managua, 11 February 1860: CRR, Annexes, Vol 2, Annex 15; and France-Nicaragua, Treaty of Friendship, Commerce and Navigation (Sartiages-Maximo Jerez), Washington DC, 11 April 1859: CRR, Annexes, Vol 2, Annex 14.

642 CRM, Annexes, Vol 2, Annex 20.

643 See NCM, Vol II, Annex 16.

644 See NCM, para. 4.2.17.

Although Costa Rica's perpetual right of free navigation is not dependent upon actual exercise or use,<sup>645</sup> Costa Rica has provided evidence that it did indeed exercise those rights.

A.34 The 1888 Cleveland Award itself constitutes clear evidence of this. The navigation of its Revenue Service cutters was one of the central issues of the arbitration: the arbitrator found in favour of Costa Rica in respect of the right of Costa Rican Revenue Service vessels to navigate on the San Juan.<sup>646</sup> Costa Rica's right of navigation was reaffirmed in the 1916 Judgment of the Central American Court of Justice, including a right of navigation with vessels of the revenue service.

A.35 The navigation of Costa Rican public vessels on the San Juan after 1888 was demonstrated by Costa Rica in its Memorial.<sup>647</sup> Of particular relevance was the trip taken by the Vessel *Adela* in 1892.<sup>648</sup> Reports detailing navigation of vessels of the Costa Rican Revenue Service in the San Juan after the Cleveland Award were annexed. Reports for the years 1906,<sup>649</sup> 1908<sup>650</sup> and 1909<sup>651</sup> describe activities carried out by the Costa Rican Revenue Service in the area of the San Juan River and include evidence of navigation on the River.

A.36 Further reports from the 20th century evidencing Costa Rican navigation on the San Juan are annexed to this Reply. Reports by the Revenue Guard of Rosalía, a post located on the San Carlos River in Costa Rican territory, provide evidence of the activities carried out by that post in the San Juan area. Thus, the Report to the Deputy Inspector of the Revenue on 20 October 1915 states:

"...The operational service between passed 21st to the 20th present was as follows: September 21, 22, 23, 24, 25, 26, 27, 28, 29 and 30 only daily and nocturnal service.

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645 See Article 6 of the 1858 Treaty of Limits: CRM, Annexes, Vol 2, Annex 7(b).

646 See CRM, Annexes, Vol 2, Annex 16.

647 See CRM, Annexes, Vol 6, Annexes 210 and 216.

648 See CRM, paras. 4.85, 4.86 and CRM, Annexes, Vol 6, Annex 209. As noted in this Reply, Nicaragua misrepresented this incident in NCM; Costa Rica's explanation of the *Adela* incident is above, paragraph 1.15. Sketch Map 1 to this Reply demonstrates the journey taken by the *Adela*.

649 See CRM, Annexes, Vol 6, Annex 214.

650 See CRM, Annexes, Vol 6, Annex 215.

651 See CRM, Annexes, Vol 6, Annex 216.

October 1, an assignment by Arturo Gonzalez and Zacarias Esquivel, departed to Boca the Rio San Carlos, returning without incident on the 3rd...<sup>652</sup>

A report from the same post of 18 December 1915, also states:

“...The operations that took place between the past 20th to the 18<sup>th</sup> present were as follows:...

30th at 6 am a task force departed to Muelle de San Carlos, formed by the guards Eliseo Villalobos and Ismael Trejos...

15th a task force formed by the guards Raf Fallas and Ismael Trejos departed to Buena Vista...

20th a mail assignment by Raf Fallas departed...<sup>653</sup>

A.37 These reports also illustrate the traffic of vessels at the time, both between Costa Rican towns as well as between Costa Rican and Nicaraguan towns. The traffic on the River included the transportation of passengers. The log of 20 October 1915 states:

“...Oct. 4th at 3pm a boat docked coming from San Juan del Norte guided by Ester Arce. Crew: Ambrosio Jirón and José Castillo. Departed to Aguas Zarcas, without cargo.

[Oct] 4th at 2 pm a boat docked coming from Sarapiquí, guided by Mr. Leslie E. Lynn, a crew member and three passengers...<sup>654</sup>

A.38 Another sample of the official records from 1968 show the various task force activities performed by the Revenue Guard at Boca del Rio San Carlos post. The Report of 5 August 1968 to Captain Jorge Gamboa detailed the following activities:

“I herewith allow myself to inform you about the assignments carried out during the month of July, complaints filed with the Inspection.-

On 24 July one for the revision of commercial licenses along the San Carlos River.

On 26 July one in El Dorado on the San Juan River, concerning some Ipecac.

On 26 July one in Infiernito concerning some Ipecac.

On 29 July one in Pocosol in relation to the felling of trees...<sup>655</sup>

652 Note from Commandant of the Rosalía Revenue Guard to the Deputy Inspector of the Treasury, 20 October 1915: CRR, Annexes, Vol 2, Annex 31.

653 Note from Commandant of the Rosalía Revenue Guard to the Deputy Inspector of the Treasury, 18 December 1915, CRR, Annexes, Vol 2, Annex 32.

654 Note from Commandant of the Rosalía Revenue Guard to the Deputy Inspector of the Treasury, 20 October 1915: CRR, Annexes, Vol 2, Annex 31. See also “Departure Clearance Certificate” issued by the Costa Rican Revenue Guard in Boca del río Sarapiquí, to a private citizen, 6 April 1868: CRR, Annexes, Vol 2, Annex 67(a), which indicates the vessel was carrying 10 passengers. Explanation of the issuance of Costa Rican “departure clearance certificates” is found in CRM, para. 5.07.

655 Note from the Revenue Guard of Boca de San Carlos to Chief of Personnel of the General Inspectorate of the Treasury, 5 August 1968: CRR, Annexes, Vol 2, Annex 35. Syrup of ipecac (*raicilla* in

A.39 Two of the missions referred to in the Report of 5 August 1968 are detailed further in additional reports. The first states:

“For your information, 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. I went to said place in company of the Fiscal Guard MISAEL MURILLO BARBOZA, and indeed there was Ipecac.”<sup>656</sup>

The second Report states:

“On Monday 29 July 1968, I went on assignment accompanied by Fiscal Guard MISAEL MURILLO BARBOZA and Mouth of Sarapiquí Park Ranger Mr. RUBEN LAO HERNANDEZ, to the place called POCO SOL by the San Juan River, in order to verify the felling of trees, of approximately two hundred and fifty ‘varas’, when we arrived to the place we verified that, as had been denounced by Captain Scot of Los Chiles de Grecia, said felling had taken place.”<sup>657</sup>

A.40 Samples of other official correspondence from 1991 detail activities undertaken by the Costa Rican police at the time in the area of the San Juan River. A Report to the Minister of Public Security by the Chief of Post of the Border Police in Sarapiquí states:

“I proceed to report the essential needs of the Border Police at Sarapiquí.

SITUATION ...

Section 2:

Perimeter of jurisdiction:...

Hamlets that are serviced by waterway (Sector A): Sarapiquí River, Sucio River, Masaya, Los Arbolitos, Pangola, Los Angeles, La Ceiba, La Trinidad.

Hamlets that are serviced by waterway (Sector B): Ochoa, Palo Seco, Cureña, Isla Morgan, Cureñita, Remolino Grande, Remolinito, Caño Tambor, Caño Copalchí, Boca de Sarapiquí, Boca Las Marías, Boca La Tigra...<sup>658</sup>

These locations are shown in Sketch Map 3. Many of the aforementioned towns are located on the right bank of the San Juan. Evidently those towns were visited via the San Juan. The Report further states:

“AREA OF JURISDICTION:

Barra del Colorado accounts for a community of about 5,500 inhabitants.

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the original Spanish) was made from “rhizome of the Ipecacuanha plant” and was used for medicinal purposes, variously to induce vomiting and as a cough medicine.

656 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, Annexes, Vol 2, Annex 33.

657 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, Annexes, Vol 2, Annex 34. The term “vara” in this context is used as a measuring unit. A “vara” measures 83.59 centimeters.

658 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. Annexes, Vol 2, Annex 36.

Our Jurisdiction Area extends approximately for 400 square kilometres. To travel to the Barra del Colorado Unit, we navigate using an azimuth from south to north, of 180° to 360°, with an approximate distance of 170 kilometres of fluvial course.”<sup>659</sup>

A.41 This Report not only reveals the size of one of the communities close to the San Juan; it also reveals the distance from Puerto Viejo de Sarapiquí to Barra del Colorado by boat, through the San Juan, which is the only means to reach that community by waterway.

A.42 Another Note dated 29 April 1992 from Major Francisco Cordoba Cordoba, Chief of Post to Lieutenant Colonel Guillermo Sáenz, Director of the Civil Guard, reports the following:

“In what is called the Deltas (advanced posts) we need to open Delta No. 7, because that is the location of the mouth of the Colorado River and the San Juan del Norte River of Nicaragua, a location with a constant movement of tourists, as well as of immigrants from the neighbouring country of Nicaragua. The Nicaraguan Government has a Park Rangers Post from IRENE, to control Sylvester Flora and Fauna of the area. It has been coordinated with the officials of the Sandinista Army, stationed across Delta No. 8, so that the Park Rangers do not intercept the tourists and Costa Rican farmers who navigate along the Río Colorado and San Juan, so they travel freely, observing the legal conditions in accordance with the navigation treaties between both countries.”<sup>660</sup>

This Note shows the early intentions of some Nicaraguan authorities to interfere with Costa Rican navigation, a situation the Costa Rican local authorities had duly informed to the Nicaraguan Army so that the applicable instruments were complied with. It demonstrates the regular transit of tourists on the San Juan. It shows that the Nicaraguan Army was not requiring Costa Rican vessels to stop and report to Nicaraguan authorities, as the Note refers only to stopping effected by Nicaraguan Park Rangers. Costa Rica actually requested the help of Nicaraguan Army officials to prevent impediments to Costa Rican navigation imposed by the Park Rangers. The Costa Rican officials clearly understood that any Nicaraguan authority requiring Costa Rican vessels to stop was a breach of the applicable instruments.

659 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, Annexes, Vol 2, Annex 36.

660 Costa Rican Police Major and Chief of 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, Annexes, Vol 2, Annex 37.



A.43 Another example is the Report dated 25 May 1992 by Major Francisco Cordoba Cordoba to Colonel Guillermo Sáenz Brenes, Director of the Civil Guard.<sup>661</sup> In that Report it is explained that Nicaraguan farmers demanded that officials from the Costa Rican Ministry of Agriculture and Cattle should come to Nicaragua to discuss an ordinance restricting the importation of agricultural products into Costa Rica, otherwise they would block Costa Rica's free navigation on the San Juan River. It is further stated that the Nicaraguan Army authorities were ready to help and support the Costa Rican authorities in case such threat would materialise. It said that on Thursday 21 May 1992 surveillance was carried out throughout the San Juan, up to Morgan Islands and down to the mouth or entrance to San Juan del Norte.

A.44 This Report evidences the type of activities carried out by the Costa Rican Civil Guard on the San Juan. It confirms the navigation throughout the River for surveillance purposes by the Costa Rican police in discharging its duties as established by Articles IV and VI of the 1858 Treaty of Limits. It shows that such operations were carried out with the full knowledge of the Nicaraguan Army, not because Costa Rica had to inform them, but because the Costa Rican and Nicaraguan authorities worked in close cooperation. Nicaraguan Army officers not only alerted the Costa Rican officials about what the Nicaraguan farmers intended to do, they also offered to cooperate with the Costa Rican authorities, should the Nicaraguan farmers blockade or impede Costa Rican navigation.

## F. Conclusions

A.45 This Appendix has demonstrated the following facts, contradicting the positions adopted by Nicaragua in its Counter-Memorial:

- (1) During the Spanish period the San Juan River did not belong exclusively to any of the Provinces. Further, Costa Rica's rights of fishing and navigation set forth by the 1540 Royal Charter as amended by the 1541 Royal Charter remained unchanged.

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<sup>661</sup> 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, Annexes, Vol 2, Annex 38.

- (2) The territory of Nicoya was incorporated into Costa Rica in 1824 by the free will and resolution of its people, a decision made in accordance with international law and reaffirmed by the people of Nicoya on seven separate occasions. The limits of Nicoya remained the same as they were before the independence of the Central American Provinces in 1821. This situation was recognised in 1825 by the Federal Congress of Central America which decided that Nicoya would remain under Costa Rican jurisdiction, thus upholding the decision of the people of Nicoya. No changes to the legal framework set up in 1825 were ever introduced by the Federal Congress. Thus, the territory of Nicoya continued to be part of the territory of Costa Rica thereafter, a fact that was merely recognised by Nicaragua in the 1858 Treaty of Limits.
- (3) Nicaragua's attempt to present the *quid pro quo* of the 1858 Treaty as a grant of sovereignty to Nicaragua in exchange for the annexation of Nicoya to Costa Rica is a misrepresentation. The 1858 Treaty balanced a grant of sovereignty to Nicaragua against attribution to Costa Rica of a perpetual right of free navigation. The right of navigation was in fact essential to those negotiations, as evidenced by contemporaneous documents and the evident assumption by both Nicaragua and Costa Rica of the likelihood of an inter-oceanic canal along the San Juan.
- (4) The Costa Rican Constitutions of 1825 and 1841 reflected the juridical situation of Nicoya and of Costa Rican territory, contrary to what is represented by Nicaragua in its Sketch Map 3.<sup>662</sup> There is no contradiction between the 1825 and 1841 Constitutions: the 1825 Constitution laid down that the limits of Costa Rica were temporary; the 1841 Constitution included the territory of Nicoya, reflecting the juridical status at that time. Nicoya's territory reached up to the La Flor River to the north, a limit recognised by Nicaragua as its border with Nicoya until it was changed by the Treaty of Limits.
- (5) Costa Rica participated either solely or jointly in several canalization contracts.
- (6) Although Costa Rica's perpetual right of free navigation is not subject to a condition of exercise or use, Costa Rica has demonstrated that it exercised its right of navigation regularly.

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662 NCM Sketch Map 3.

## CERTIFICATION

I have the honour to certify that the documents annexed to this Reply are true copies and conform to the original documents and that the translations into English made by Costa Rica are accurate translations.

Vice Minister Edgar Ugalde Alvarez

Agent of Costa Rica

15 January 2008

## LIST OF ANNEXES

### VOLUME 2

#### Agreements, Awards and Judicial Decisions

Annex	Title	Date
1	<p>Royal Charter of the King of Spain to Diego López</p> <p>Source: Archivo de Indias, <i>Colección de Documentos Inéditos relativos al descubrimiento, conquista y organización de las antiguas posesiones españolas de América y Oceanía, sacadas de los Archivos del Reyno y muy especialmente del de Indias</i> (Madrid: Imprenta de José María Pérez, Misericordia, 2., 1870), pp. 528-537</p> <p>English translation by Costa Rica</p>	10 February 1576
2	<p>Resolution by the Royal Audiencia of Guatemala regarding the election of members of the Spanish Cortes for Costa Rica and Nicoya</p> <p>Source: P. Pérez Zeledón, <i>Reply to the Argument of Nicaragua on the Question of the Validity or Nullity to the Treaty of Limits of April 15, 1858</i>, (Washington, D.C.: Gibson Bros, 1887), pp.103-104</p>	3 May 1813
3	<p>Masaya Treaty</p> <p>Source: <i>Obras Históricas Completas del Licenciado Jerónimo Pérez, impresas por disposición del Exceléntísimo Sr. Presidente de la República Don Adolfo Díaz bajo la dirección y con notas del Doctor Pedro Joaquín Chamorro</i> (Managua: Imprenta y Encuadernación Nacional, 1928), pp. 465-467</p> <p>English translation by Costa Rica</p>	26 April 1823

- 4 Decree of the Central American Federation Congress regarding an inter Oceanic Canal through Nicaragua, Guatemala 16 June 1825

Source: *Compilación de Leyes no insertas en las Colecciones Oficiales, formada por el Lic Don Cleto González Viquez*, Tomo 1 (San José), pp. 411-413

English translation by Costa Rica
- 5 Dècree of the Federal Congress of Central America in 1825, approving the annexation of Nicoya to Costa Rica 9 December 1825

Source: P. Pérez Zeledón *Argument on the Question of the Validity of the Treaty of Limits between Costa Rica and Nicaragua* (Washington D.C.: Gibson Bros., 1887), p. 192
- 6 Contract Between Nicaragua and the American Atlantic and Pacific Ship-Canal Company (Zepeda-Juarez-White), León, Articles 12, 14, 21 and 37 27 August 1849

Source: NCM Annex 14

English translation by Costa Rica
- 7 United States-Nicaragua, General Treaty of Amity, Navigation, and Commerce, (Squier-Zepeda), León, Articles IV, V, VI, VII, VIII, XXVI, XXXIII, XXXIV, XXXV 3 September 1849 (unratified)

Source: CL Wiktor, *Unperfected Treaties of the United States of America 1776-1976, Vol 1 1776-1855* (New York: Oceana Publications, 1976), pp. 280-302
- 8 United States-Great Britain, Convention Concerning a Ship Canal Connecting the Atlantic and Pacific Oceans (Clayton-Bulwer), Washington DC, Preamble and Articles III, V and VIII 19 April 1850 (in force 4 July 1850) (ratified)

Spanish version: MM Peralta, *El Canal Interoceánico de Nicaragua y Costa Rica en 1620 y en 1887* (Bruselas: Imprenta de Ad. Mertens, 1887), pp.68-71

English version: 104 CTS 41

- 9 Costa Rica-United States Treaty of Friendship, Commerce and Navigation (Molina-Webster), Washington DC, Preamble and Articles II, IV, VI, VII, VIII, XI and XII 10 July 1851  
(ratified)

Sources:

English version: *Report of the Isthmian Canal Commission 1899-1901* (Washington: Government Printing Office, 1904), pp. 417-420

Spanish version: *Colección de los Tratados Internacionales Celebrados por la Republica de Costa Rica*, Vol I (San José: Tipografía Nacional, 1893), pp. 65-72

- 10 United States-Nicaragua Treaty of Friendship, Commerce and Navigation (Cass-Irisarri), Washington DC, Articles II, IV, VII, VIII, XV, XVI, XVII and XX 16 November 1857  
(unratified)

Sources:

English version: CL Wiktor, *Unperfected Treaties of the USA, Volume II 1856-1882* (New York: Oceana Publications, 1976), pp. 135-143

Spanish version: US National Archives, Washington DC, Unperfected Treaty Series W-2

- 11 Costa Rica-Nicaragua Treaty of Peace, Friendship, Alliance and Commerce (Mora-Martínez), Rivas, Preamble and Articles 18, 19, 20 30 April 1858  
(unratified)

Source: JM Bonilla, *Colección de Tratados Internacionales* (Managua: Tipografía Internacional, 1909)

English translation by Costa Rica

- 12    Nicaragua-Costa Rica-F Belly, Convention  
relative to the Concession for an Inter-oceanic  
Canal by the River San Juan and the Lake of  
Nicaragua, (Mora-Martínez-Belly), Rivas,  
Articles 14 (French, Spanish and English);  
Articles 4 and 25 (French)  
Sources:  
French version: F Belly, *Carte d'étude pour  
le trace et le profil du Canal de Nicaragua*  
(Paris: Chez Dalmont et Doud, Éditeurs, 1858),  
Document II, pp. 10-21  
Spanish version: Archives Diplomatiques,  
Ministère des Affaires Étrangères, Paris,  
Republic of France  
English translation by Costa Rica

1 May 1858
- 13    United States-Nicaragua Treaty of Friendship,  
Commerce and Navigation (Lamar-Zeledón),  
Managua, Preamble, Articles II and XX  
Sources:  
English version: CL Wiktor, *Unperfected  
Treaties of the USA, Volume II 1856-1882* (New  
York: Oceana Publications, 1976), pp. 157-166  
Spanish version: US National Archives,  
Washington DC, Unperfected Treaty Series X-2

16 March 1859  
(unratified)
- 14    France-Nicaragua, Treaty of Friendship,  
Commerce and Navigation (Sartiges-Maximo  
Jerez), Washington DC, Article XXXIII  
Source: 120 CTS 337

11 April 1859
- 15    Great Britain-Nicaragua, Treaty of Friendship,  
Commerce and Navigation (Lennox Wyke-  
Zeledon), Managua, Preamble and Articles IV,  
V, VII, XI, XVII, XVIII, XXIII and XXVI  
Source: 121 CTS 364

11 February 1860  
(ratified)
- 16    Nicaragua-Central American Transit Company  
Inter-Oceanic Transit Contract (Molina-Morris),  
Washington, Articles VII, XIX and XXI  
Source: NCM Annex 18  
English translation by Costa Rica

10 November  
1863

- 17 United States-Nicaragua Treaty of Friendship, Commerce and Navigation (Ayon-Dickinson), Managua, Preamble, Articles II, VI, VII, VIII, IX, XV, XVI and XVII  
21 June 1867  
(ratified)  
  
Source: GP Sanger, *The Statutes at Large, Treaties and Proclamations of the United States of America from December 1867, to March 1869, Vol XV* (Boston: Little, Brown, and Co., 1869), pp. 549-562
  
- 18 Costa Rica-Nicaragua, Treaty of Peace and Friendship (Volio-Zelaya), San José, Preamble  
30 July 1868  
(unratified)  
  
English version: 134 CTS 478-482  
  
Spanish version: JM Bonilla, *Colección de Tratados Internacionales* (Managua: Tipografía Internacional, 1909), pp. 375-382
  
- 19 Costa Rica-Nicaragua, Treaty for the excavation of an Inter-oceanic Canal (Jiménez-Montealegre) San Jose, Articles IX, XIV, XV, XVI, XIX, XXIII, XXVII and XXVIII  
18 June 1869  
(unratified)  
  
Source: NCM Annex 8  
  
English version: (1870-1871) LXI *BFSP* 1144-1151
  
- 20 Costa Rica-Nicaragua, Treaty for the Deviation of the Waters of the Colorado River (Jiménez-Montealegre), San José, Articles 2 and 4  
21 June 1869  
(unratified)  
  
Spanish version: JM Bonilla, *Colección de Tratados Internacionales* (Managua: Tipografía Internacional, 1909), pp. 403-405  
  
English translation by Costa Rica
  
- 21 Costa Rica-Nicaragua, Canalization Convention (Navas-Castro), San José, Preamble  
19 January 1884  
(unratified)  
  
Spanish version: JM Bonilla, *Colección de Tratados Internacionales* (Managua: Tipografía Internacional, 1909), pp. 469-471  
  
English translation by Costa Rica



- 22 Costa Rica-Nicaragua, Treaty of Peace, 19 January 1884  
Friendship, Commerce and Extradition (Navas-Castro), San José, Preamble, Articles VIII, XIX, XXIX and XXXIII  
(unratified)  
Spanish version: JM Bonilla, *Colección de Tratados Internacionales* (Managua: Tipografía Internacional, 1909), pp. 455-466  
English translation by Costa Rica
- 23 United States of America-Nicaragua, Treaty 1 December 1884  
providing for the construction of an Interoceanic Canal across the territory of Nicaragua (Frelinghuysen-Zavala), Washington DC, Preamble, Articles IV, V, VIII and XIII  
(unratified)  
Sources:  
English version: *Report of the Isthmian Canal Commission 1899-1901* (Washington: Government Printing Office, 1904), Appendix L, pp. 359-363  
Spanish version: *Memoria de La Secretaría de Relaciones Exteriores y Carteras Anexas de la República de Costa Rica* (San José: Imprenta Nacional, 1884-1885)
- 24 Costa Rica-Nicaragua Treaty of Peace, 9 October 1885  
Commerce and Extradition (Esquivel-Chamorro), San José, Preamble, Articles VII, XVIII, XXVIII and XXXII  
(unratified)  
Source: JM Bonilla, *Colección de Tratados Internacionales* (Managua: Tipografía Internacional, 1909), pp. 489-498  
English translation by Costa Rica
- 25 Contract between the Government of the 23 March 1887  
Republic of Nicaragua and the Nicaragua Canal Association of New York for the opening of an inter-oceanic canal (Cárdenas-Menocal), Managua, Articles VII, XIII, XVI, XXX and XL  
Source: *Report of the Isthmian Canal Commission 1899-1901* (Washington: Government Printing Office, 1904), pp. 389-400

- 26 Cleveland Award upon the validity of the Treaty of Limits of 1858 between Costa Rica and Nicaragua, Washington DC, Spanish version of Award, Second Article and Third Article point 5  
22 March 1888  
Source of Spanish version: *Memoria Anual de la Secretaría de Relaciones Exteriores y Carteras Anexas 1888* (San José: Imprenta Nacional, 1888)
- 27 Contract between the Government of the Republic of Costa Rica and the Nicaragua Canal Association for the opening of an inter-oceanic canal (Pérez-Menocal), San José, Preamble, Articles VI, VII, XXVI, XXXVI, XXXVII, XXXIX, XL and XLV  
31 July 1888  
Sources:  
English version: AR Colquhoun, *The Key of the Pacific: The Nicaragua Canal* (Westminster: Archibald Constable & Co., 1895), pp. 386-407  
Spanish version: Archivo Nacional de Costa Rica

### Correspondence

Annex	Description	Date
28	Report regarding the Province of Costa Rica, presented by Luis Diez Navarro to the Captain General of Guatemala  Source: <i>Revista de los Archivos Nacionales</i> , Año III- setiembre y octubre de 1939- No. 11 y 12, (San José: Imprenta Nacional, 1939), p. 581  English translation by Costa Rica	1744
29	Secretary of State of the United States, T.F. Bayard, to Nicaraguan Envoy Extraordinary and Minister Plenipotentiary, Horacio Guzmán,  Source: United States Department of State Archives	31 October 1887

- 30 Nicaraguan Envoy Extraordinary and Minister Plenipotentiary, Horacio Guzmán, to Secretary of State of the United States, T.F. Bayard 1 November 1887  
Source: United States Department of State Archives
- 31 Note from Commandant of the Rosalía Revenue Guard to the Deputy Inspector of the Treasury 20 October 1915  
Source: Archivo Nacional de Costa Rica  
English translation by Costa Rica
- 32 Note from Commandant of the Rosalía Revenue Guard to the Deputy Inspector of the Treasury 18 December 1915  
Source: Archivo Nacional de Costa Rica  
English translation by Costa Rica
- 33 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  
Source: Archivo Nacional de Costa Rica  
English translation by Costa Rica
- 34 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  
Source: Archivo Nacional de Costa Rica  
English translation by Costa Rica
- 35 Note from the Revenue Guard of Boca de San Carlos to Chief of Personnel of the General Inspectorate of the Treasury 5 August 1968  
Source: Archivo Nacional de Costa Rica  
English translation by Costa Rica

- 36 Costa Rican Police Major, Francisco Cordoba 19 August 1991  
Cordoba, to Costa Rican Minister of Public  
Security, Luis Fishman Z., Note No. C.D.  
0666-91  
English translation by Costa Rica
- 37 Costa Rican Police Major and Chief of Post, 29 April 1992  
Francisco Cordoba Cordoba, to Costa Rican  
Director of the Civil Guard, Lieutenant  
Colonel Guillermo Sáenz, Note No. C.D.O.  
81-92  
English translation by Costa Rica
- 38 Costa Rican Chief of Post, Major Francisco 25 May 1992  
Cordoba Cordoba, to Costa Rican Director  
of the Civil Guard, Lieutenant Colonel  
Guillermo Sáenz, Note No. C.A. 372-92  
English translation by Costa Rica
- 39 Costa Rican Foreign Minister, Roberto 26 January 2006  
Tovar Faja, to Nicaraguan Foreign Minister,  
Norman Caldera Cardenal, Note No. DM-37-  
06  
English translation by Costa Rica
- 40 Nicaraguan Foreign Minister, Norman 17 February 2006  
Caldera Cardenal, to Costa Rican Foreign  
Minister, Roberto Tovar Faja, Note No. MRE/  
DM-JI/262/02/06  
English translation by Costa Rica
- 41 Nicaraguan Foreign Minister, Norman 16 March 2006  
Caldera Cardenal, to Costa Rican Foreign  
Minister, Roberto Tovar Faja, Note No. MRE/  
DM-AJ/340/03/06  
English translation by Costa Rica
- 42 Costa Rican Foreign Minister, Roberto 5 May 2006  
Tovar Faja, to Nicaraguan Foreign Minister,  
Norman Caldera Cardenal, Note No. DM-  
187-06  
English translation by Costa Rica

- 43 Nicaraguan Foreign Minister, Norman Caldera Cardenal, to Costa Rican Foreign Minister, Roberto Tovar Faja, Note No. MRE/DM-JI/511/05/06 8 May 2006  
English translation by Costa Rica
- 44 Director, Costa Rican Social Security Fund, Health Area Puerto Viejo de Sarapiquí, Dr. Thaïs Ching Zamora, to First Cónsul, Nicaraguan Consulate, Ciudad Quesada, Licenciado Mario Rivas Baldelomar. Note No. 346-2006 14 June 2006  
English translation by Costa Rica
- 45 Costa Rican Foreign Minister, Bruno Stagno Ugarte, to Nicaraguan Foreign Minister, Norman Caldera Cardenal, Note No. DM-254-06 14 August 2006  
English translation by Costa Rica
- 46 Coordinator of the Northern Regional Office of the Ombudsman's Office, Licda. Laura Navarro Rodríguez, to Consul of Nicaragua at Ciudad Quesada, Mario Rivas, Note No. DHR-RN-051-2007 22 May 2007  
English translation by Costa Rica
- 47 Nicaraguan Minister Counsellor, Emilio Rappaccioli, to Coordinator of the Northern Regional Office of the Ombudsman's Office, Licda. Laura Navarro Rodríguez, Note No. ENCR/NF/EN/133/2007 25 May 2007  
English translation by Costa Rica
- 48 Nicaraguan Embassy in Costa Rica, "Authorization to navigate" given to the Ombudsman's Office and the Ministry of Health Personnel 25 May 2007  
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- 49 IMAS Regional Manager in San Carlos, 14 August 2007  
 Marvin Chavez Thomas, to Nicaraguan  
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### Affidavits

Annex	Description	Date
50	Leonel Morales Chacón English translation by Costa Rica	30 April 2007
51	Carlos Lao Jarquín English translation by Costa Rica	28 July 2007
52	Jorge Manuel Lao Jarquín English translation by Costa Rica	28 July 2007
53	Rodrigo Antonio Zamora Arroyo English translation by Costa Rica	28 July 2007
54	Víctor Julio Vargas Hernández, Marleny Rojas Vargas, Mario Salas Jiménez and Leonel Morales Chacón English translation by Costa Rica	29 July 2007
55	Thais Ching Zamora English translation by Costa Rica	8 August 2007
56	Marvin Chavez Thomas English translation by Costa Rica	5 November 2007
57	Laura Navarro Rodríguez English translation by Costa Rica	6 November 2007

### Press Reports

Annex	Title	Source	Date
58	“New Army Posts in the San Juan River” English translation by Costa Rica	<i>El Nuevo Diario</i> , Managua,	26 March 2007
59	“Neighbours from the San Juan plea for help” English translation by Costa Rica	<i>Al Día</i> , San José	14 May 2007
60	“\$34 fee marks the end of local tourism” English translation by Costa Rica	<i>La Nación</i> , San José	10 June 2007
61	“The San Juan River should be militarized” English translation by Costa Rica	<i>El Nuevo Diario</i> , Managua	7 October 2007
62	“Health Authorities Watch the Northern Border for Leptospirosis” English translation by Costa Rica	<i>La Nación</i> , San José	30 October 2007

### Other Documents

Annex	Description	Date
63	Tabla para facilitar la elección de los diputados a Cortes Source: Archivo Nacional de Costa Rica	28 July 1820
64	Nicoya Act Source: Archivo Nacional de Costa Rica English translation by Costa Rica	25 July 1824
65	Nicaraguan Constitution, Article II Source: P. Pérez Zeledón, <i>Reply to the Argument of Nicaragua on the Question of the Validity or Nullity to the Treaty of Limits of April 15, 1858</i> , (Washington, D.C.: Gibson Bros, 1887), pp.107-108	8 April 1826

- 66 F. Belly, *A Travers L'Amérique Centrale: le Nicaragua et le Canal Interocéanique*, Tome Second (Paris: Librairie de la Suisse Romande, 1867), pp. 150-165 1867
- 67 (a) "Departure Clearance Certificate" issued by the Costa Rican Revenue Guard in Boca del río Sarapiquí to a private citizen, 16 April 1968 16 April 1968  
 (b) "Departure Clearance Certificate" issued by the Costa Rican Revenue Guard in Boca del río Sarapiquí to a Costa Rican Park Ranger, 13 June 1968 13 June 1968  
 English translation by Costa Rica
- 68 Speech by President of Nicaragua to the Diplomatic Corps 14 September 2005  
 Source: Nicaraguan Presidency  
 English translation by Costa Rica
- 69 Nicaraguan Presidential Decree No. 65-2005 of 28 September 2005 29 September 2005  
 Source: Nicaraguan Official Gazette No. 188 of 29 September 2005  
 English translation by Costa Rica
- 70 Nicaraguan Presidential Decree No. 97-2005 of 2 December 2005 7 December 2005  
 Source: Nicaraguan Official Gazette No. 237 of 7 December 2005  
 English translation by Costa Rica
- 71 "Departure clearance certificate" charged to Jorge Lao 25 October 2007  
 English translation by Costa Rica
- 72 (a) "Immigration dispatch" charged to Jorge Lao 25 October 2007  
 (b) "Transit permit at border point" charged to Jorge Lao  
 English translation by Costa Rica