

INTERNATIONAL COURT OF JUSTICE

**DISPUTE CONCERNING
NAVIGATIONAL AND RELATED RIGHTS**

(COSTA RICA *v.* NICARAGUA)

MEMORIAL OF COSTA RICA



VOLUME 1

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Sketch map 1
CENTRAL AMERICA



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Chapter 1

Introduction

A. Scope of the Dispute

1.01. The present proceedings were commenced by an Application which was filed with the Registry on 29 September 2005. They concern breaches by Nicaragua of Costa Rica's rights of navigation and related rights in respect of the San Juan River (hereafter "the San Juan"). 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").¹

1.02. Costa Rica is a Central American Republic bounded on the north by Nicaragua and on the south by Panama. The territorial scope of the present dispute concerns that part of the boundary between Costa Rica and Nicaragua that follows the course of the San Juan. It is shown on **Sketch Map 1**, opposite.

1.03. The San Juan is a major river which flows from Lake Nicaragua in a generally easterly direction to the Caribbean Sea, a length of about 205 kilometres. For much of that distance (from below Castillo Viejo until near its mouth) the southern or right bank of the River constitutes the boundary between the two States.

1.04. The present boundary between Costa Rica and Nicaragua was first established by the Treaty of Limits. It left the waters of the San Juan within Nicaragua, but at the same time the Parties expressly recognised important Costa Rican rights of use of the River, in particular perpetual rights of free navigation of boats and passengers sailing to or from Costa Rica for commercial purposes. The validity of the Treaty of Limits was subsequently challenged by Nicaragua and was upheld in an arbitral award issued by the

¹ Costa Rica and Nicaragua, Treaty of Limits, San José, 15 April 1858 (sometimes referred to as the Cañas-Jeréz Treaty). In this Memorial, unless otherwise indicated, the English translation of the Treaty of Limits which will be used is the one submitted by Costa Rica to President Cleveland: see Annexes, Vol 2, Annex 7(b). The authoritative Spanish text is at Annexes, Vol 2, Annex 7(a). Also annexed are the translation submitted to President Cleveland by Nicaragua: Annexes, Vol 2, Annex 7(c), and a translation published in British and Foreign State Papers: Annexes, Vol 2, Annex 7(d).

President of the United States of America, Grover Cleveland, on 22 March 1888 ("the Cleveland Award").² At the same time the Cleveland Award confirmed and authoritatively interpreted the extent of Costa Rican rights of use of the River. These rights were further specified (with the force of *res judicata*) by the Central American Court of Justice in its judgment of 13 September 1916 in the case *Costa Rica v. Nicaragua* ("the 1916 Judgment")³ and they were supplemented in the Agreement pursuant to Article IV of the Pact of Amity, Washington, D.C., 9 January 1956 ("the 1956 Agreement"), in particular articles 1 and 2.⁴

1.05. Costa Rica's rights of navigation on the River were and remain of considerable significance. The area contains national parks and forest reserves on both sides of the River. There are few roads, and none which proceed to the Caribbean coast in an east-west direction. The normal method of transport is by boat; this includes public transport, local traffic by riparians going to market or to school, and transport for the growing tourist industry. In short, the San Juan is for many purposes the only road.

1.06. Since the 1990s Nicaragua has imposed and maintained important restrictions on the navigation of Costa Rican boats and their passengers on the San Juan, restrictions tending to deny the substance of Costa Rica's rights entirely. These include the following:

- (a) the imposition of charges on Costa Rican boats and their passengers;
- (b) the obligation to stop successively at each Nicaraguan military post on the Nicaraguan bank of the River to report the names of the passengers and to obtain authorisation to navigate or, as the case may be, to continue to navigate, on the River;
- (c) the prohibition imposed by Nicaraguan authorities on Costa Rican police personnel and their boats to navigate the San Juan River, with or without their service weapons (*armas de reglamento*);

2 The Award was given in English: see Papers relating to the Foreign Relations of the United States, 1889/1, 456-9: Annexes, Vol 2, Annex 16.

3 English translation published in (1917) 11 AJIL 181: Annexes, Vol 2, Annex 21.

4 1465 United Nations Treaty Series 233: Annexes, Vol 2, Annex 24.

- (d) the imposition of timetables for navigation on the River;
- (e) the obligation to use the Nicaraguan flag as a precondition for navigating on the River;
- (f) limitations to free moorage along the banks of the River; and
- (g) other limitations to expeditious transit on the River.

1.07. Since the Application was filed, Nicaragua has tightened existing restrictions on the use of the River and imposed new ones, in particular requiring a passport and (for Costa Ricans) a visa, and prohibiting Costa Rican riparians from fishing in the River.

1.08. In these proceedings Costa Rica seeks, in particular, 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, and which also prevents Costa Rica from fulfilling its responsibilities to guard and protect the River under article IV of the Treaty of Limits and article 2 of the 1956 Agreement and otherwise.

B. The Court's Jurisdiction

1.09. The Court has jurisdiction over the present dispute in accordance with the provisions of article 36, paragraph 2, of its Statute, by virtue of the operation of the following:

- (a) the declarations of acceptance made respectively by the Republic of Costa Rica dated 20 February 1973, and by the Republic of Nicaragua dated 24 September 1929;
- (b) the Tovar-Caldera Agreement, Alajuela, 26 September 2002.⁵

1.10. The Court also has jurisdiction over the present dispute in accordance with the provisions of article 36, paragraph 1, of its Statute, by virtue of the operation of article XXXI of the American Treaty on Pacific Settlement of Disputes, Bogotá, 30 April 1948 (the Pact of Bogotá).⁶ The Parties have also

⁵ 2197 United Nations Treaty Series 78: Annexes, Vol 2, Annex 29.

⁶ 30 United Nations Treaty Series 55. Both Costa Rica and Nicaragua are parties to the Pact of Bogotá.

expressed their mutual commitment to the Pact of Bogotá through the Pact of Amity, Washington, D.C., 21 February 1949, article III.⁷

1.11. Under the Tovar-Caldera Agreement, in consideration of Nicaragua maintaining unchanged for three years the legal status with respect to its declaration of acceptance of this Court, Costa Rica agreed during the same period not to initiate any action “before the Court nor before any other authority on any matter or protest mentioned in treaties or agreements currently in force between both countries”. The purpose of this Agreement was explained by then President Bolaños of Nicaragua in the following terms:

“we always acknowledge the International Court and precisely what we are doing now is establishing a standstill period, but I am certain that in three years Nicaragua and Costa Rica will not need to have recourse to any court.”⁸

1.12. During the three-year standstill period, the two Parties were indeed able to make progress on a number of important issues for the Central American region, to their mutual benefit. Unfortunately, however, the dispute over navigational and related rights on the San Juan remains unresolved. It is this dispute which is now submitted to the Court.

C. The Structure of this Memorial

1.13. This Memorial is filed in accordance with the Court’s Order of 29 November 2005.

1.14. The Memorial consists of five further Chapters, as follows:

Chapter 2 sets out the necessary geographical and historical background to the issues, in particular tracing the process by which the Treaty of Limits was agreed, applied, upheld and interpreted both by the Parties and in the course of third-party dispute settlement;

⁷ 1465 *United Nations Treaty Series* 221: Annexes, Vol 2, Annex 23.

⁸ In Spanish: “Siempre reconocemos a la Corte Internacional y lo que estamos haciendo precisamente es dar un compás de espera, pero estoy seguro que dentro de tres años Nicaragua y Costa Rica no vamos a necesitar acudir a ninguna Corte”. Statement by President Bolaños, as reported in “The San Juan Frozen”, *La Prensa*, Managua, 27 September 2002: Annexes, Vol 5, Annex 178.

Chapter 3 traces the emergence of the dispute submitted to the Court and details the attempts by Costa Rica to resolve it;

Chapter 4 sets out the scope of the Costa Rica's rights under the Treaty of Limits, subsequent agreements and decisions and general international law;

Chapter 5 details the breaches by Nicaragua of those rights; and

Chapter 6 sets out the remedies sought by Costa Rica at this stage of the proceedings.

1.15 In addition, **Appendix A** outlines certain issues relating to the status of the River in international law, and **Appendix B** describes the evolution and functions of the Costa Rican Revenue Guard (*Resguardo Fiscal*) on the River.

1.16 Annexed to this Memorial are five volumes of documentary annexes (Annexes 1-245). A list of annexes is provided at the end of this volume.

Chapter 2

Geographical and Historical Background

A. The geography of the San Juan basin

2.01. The San Juan runs approximately 205 kilometres from Lake Nicaragua to the Caribbean Sea. In earlier times the River was also referred to as the Desaguadero, because it constitutes the only natural outlet of Lake Nicaragua to the sea (the term *desaguadero* means "outlet"). It flows within the largest river basin in the Central American isthmus. The geographical extension of the basin is defined by Lake Nicaragua, the San Juan River system, the basins of the Indio and Maiz Rivers in Nicaragua on the north and the Costa Rican river basin system on the south. For the course of the River with some key locations see **Sketch Map 2** opposite.

2.02. The San Juan lies completely within the tropical region, but differences in altitude and relief allow for a certain climatic diversity. The central mountain chain permits the definition of an eastern region with a tropical rain forest and rainfall between 4,000 and 6,000 mm per year; a western zone or tropical savannah region located in the drainage area of Lake Nicaragua, with rainfall ranging from 700 to 2,500 mm but with a very marked dry season; and an intermediate region with rainfall of more than 2,500 mm and without a marked dry season.

2.03. The upper stretch of the River, to the mouth of the San Carlos River in Costa Rica, is narrow, deep, without islands and with few rapids. By contrast its lower stretch, downstream from the mouth of the San Carlos, is wide, shallow and has several islets, as well as a stretch where there are significant rapids. As will be seen from **Sketch Map 2**, the San Juan divides some 19.3 kms from the sea. The San Juan itself is the northerly of the two rivers and empties into the Caribbean Sea at the Bay of San Juan del Norte. The Colorado River is the southern and larger stream: it runs entirely within Costa Rica, reaching the sea at Barra del Colorado.

2.04. The tributaries of the northern sector of the San Juan flow through Nicaraguan territory. They are short in length, generally oriented north to south

Sketch map 2
COSTA RICA-NICARAGUA BORDER



Symbols

- Communities
- Paved Road
- Unpaved road passable all year long
- - - - Unpaved road passable only during dry season
- International limit
- Free navigation zone
- Rivers

Sketch map 2
COSTA RICA-NICARAGUA BORDER



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and have gentle slopes. The largest of these is the Sábalo. The tributaries of the southern sector originate in Costa Rican territory at elevations of up to 3,000 metres. Except for those which flow into Lake Nicaragua, these tributaries are located entirely within Costa Rican territory. They have more extensive drainage basins and contribute up to 70% of the total flow of the San Juan. The most important of these southern tributaries are the Sarapiquí and the San Carlos.

2.05. As will be seen from **Sketch Map 3** opposite, various small towns and villages are located along or near the San Juan. On the Nicaraguan side are the towns of Castillo Viejo, San Carlos and the villages of El Castillo and San Juan del Norte. On the Costa Rican side the villages include: Tiricias, Jocote, Crucitas, Finca Baladuca, San Antonio, Jardín, Chorreras, Flor, Boca San Carlos, La Cureña, Remolinito, Boca Sarapiquí (also known as Trinidad), Tigra, Fátima, Delta Costa Rica and, further south-east, the town of Barra del Colorado.

2.06. The population of the region (numbering in the thousands) mostly depends on agriculture and fishing. Poverty remains widespread, and access by road and air is very difficult given the natural configuration of the zone. There are no railways and no sealed roads along or parallel to the River. Communication between the villages and farms along the San Juan is almost entirely riverine. But tourism is already a significant contributor to the economy and has great potential for development. **Sketch Map 4** (on the following page) shows the protected areas and wildlife reserves along the Costa Rican bank. There are also similar reserves on the Nicaraguan side. The region is one with significant biodiversity.

2.07. At the mouth of the San Juan is a complex area of marshland and waterways linking the River with the Bay of San Juan del Norte. In the 19th century the Bay was a major port with deep water access, even though (at that time as today) most of the water flowing in the San Juan upstream of Delta Costa Rica went down the River Colorado. During the course of the 19th century the Bay of San Juan del Norte became increasingly silted up, a situation which has continued to the present day and is shown on **Sketch Map 5** following. The port town of San Juan del Norte was originally located on the

Sketch map 3 MAIN ROADS AND COMMUNITIES



SYMBOLS

LIMITS

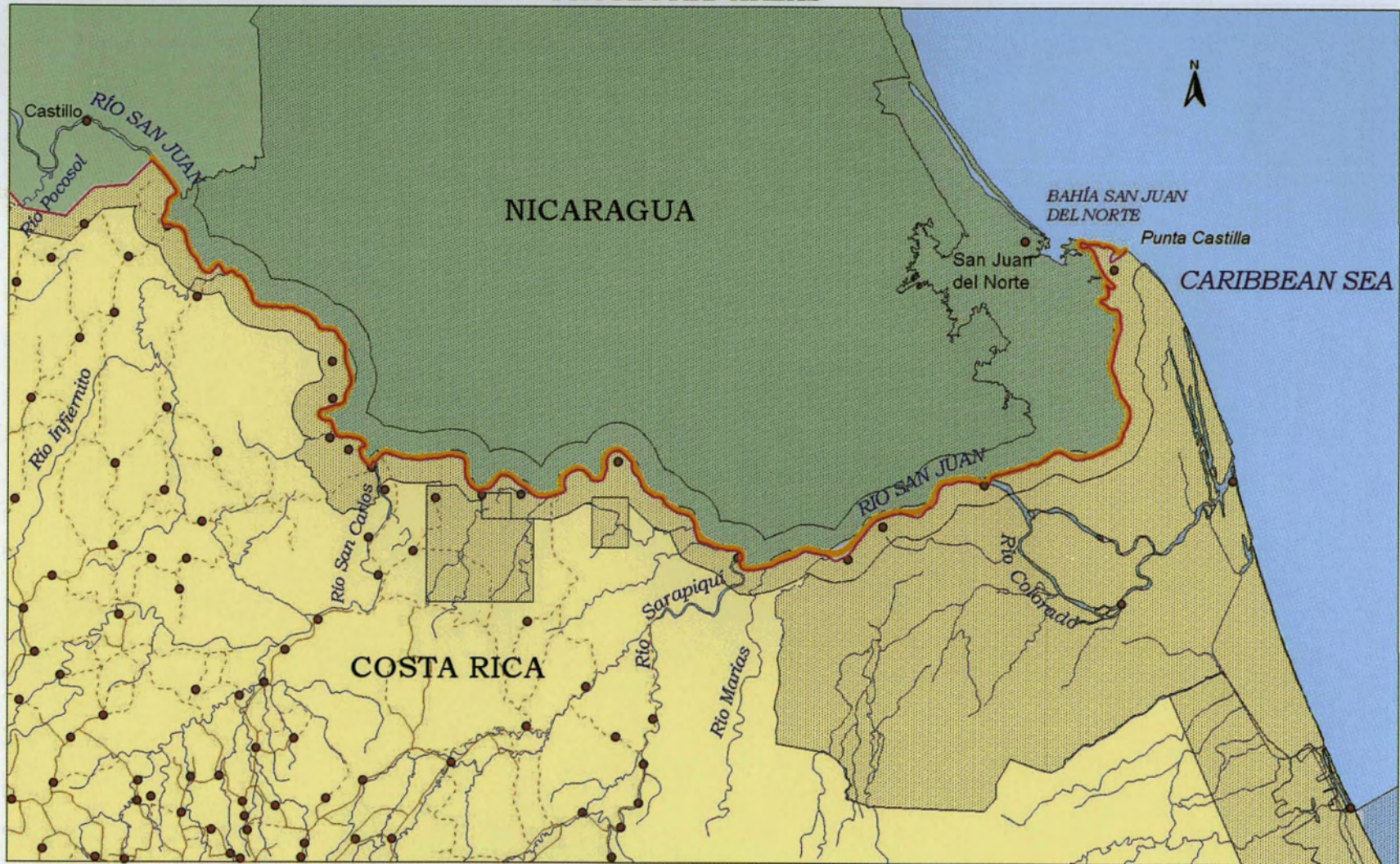
- INTERNATIONAL LIMIT
- FREE NAVIGATION ZONE

ACCESSIBILITY

- UNPAVED ROAD PASSABLE ALL YEAR LONG
- UNPAVED ROAD PASSABLE ONLY DURING DRY SEASON
- RIVERS
- COMMUNITIES



For illustrative purposes only

Sketch map 4
PROTECTED AREAS








SYMBOLS

LIMITS

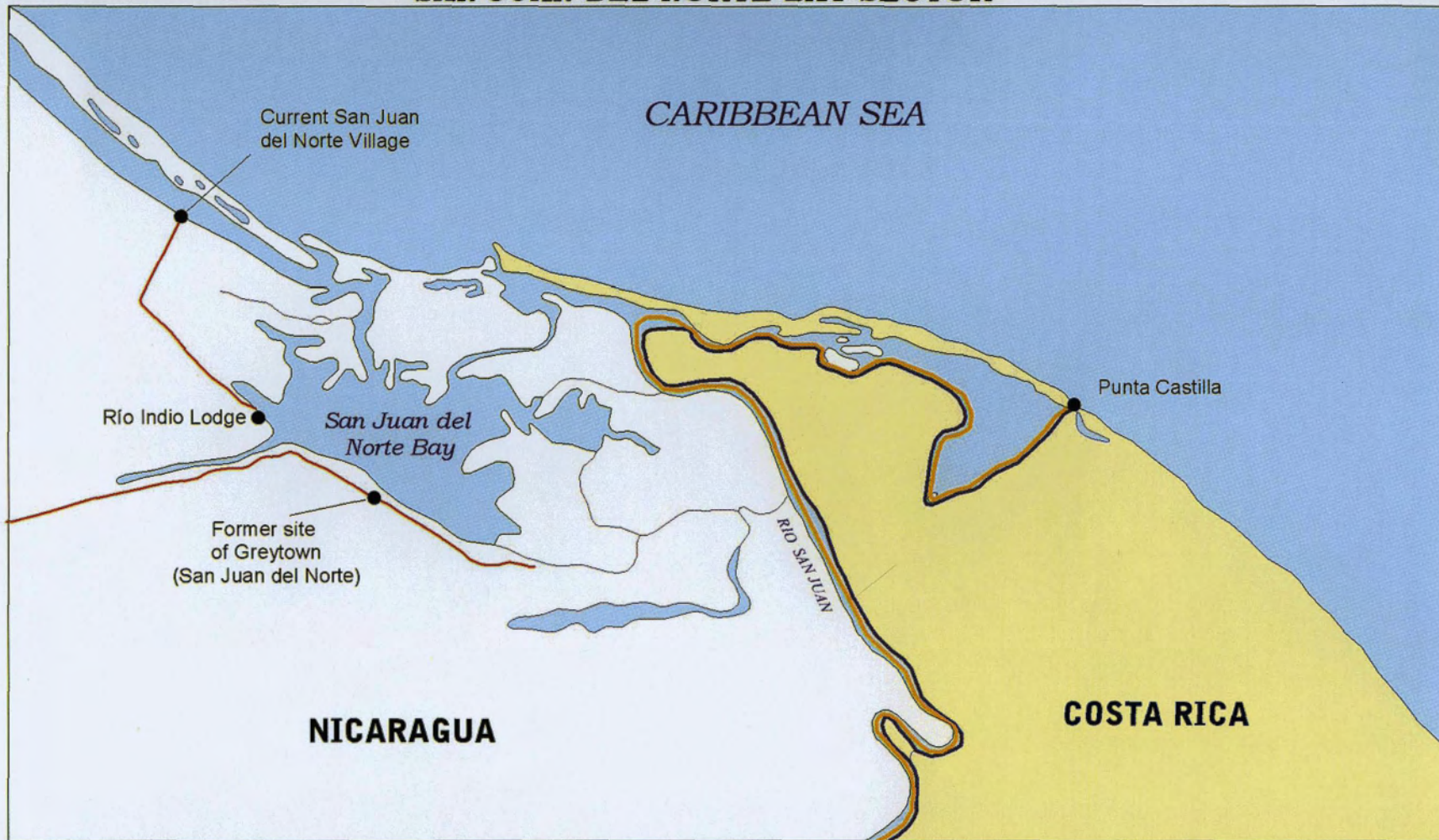
-  INTERNATIONAL LIMIT
-  FREE NAVIGATION ZONE

ACCESSIBILITY





-  UNPAVED ROAD PASSABLE ALL YEAR LONG
-  UNPAVED ROAD PASSABLE ONLY DURING DRY SEASON
-  RIVERS
-  COMMUNITIES
-  WILD PROTECTED AREAS

For illustrative purposes only

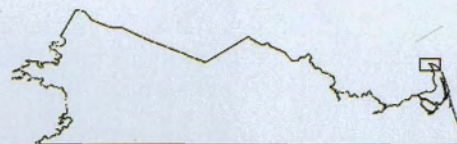
Sketch map 5
**PUNTA CASTILLA AND
 SAN JUAN DEL NORTE BAY SECTOR**



SYMBOLS

-  FREE NAVIGATION ZONE
-  INTERNATIONAL LIMIT
-  PATH PASSABLE ONLY DURING DRY SEASON
-  RIVERS

Location diagram



For illustrative purposes only

Bay; from 1848 (during the period of the British protectorate of Mosquitia) it was named Greytown. Following the silting of the Bay and the decline in trans-Isthmian traffic which resulted from the opening of the Panama Canal, Greytown was abandoned and the village of San Juan del Norte moved to an arm of the bay to the north.

B. Historical background

(1) The San Juan under Spanish rule (1492-1821)

2.08. During the period of Spanish colonial rule the San Juan never belonged exclusively to any one of the provinces of the Captaincy-General of Guatemala. The position of the San Juan River was first defined by the King of Spain's Royal Ordinance of 29 November 1540 to Diego Gutiérrez, for the conquest of the Province of Cartago.⁹ Under this Ordinance the River was divided into two. The upper part, 15 leagues in length from its outlet in the Lake, was to belong to the Province of Nicaragua. The lower part, to the mouth of the river on the Northern or Caribbean Sea, was to belong to Costa Rica. As far as concerned the use of the River and the Lake for purposes of navigation and fishing, it was provided that both should be common to the two Provinces without distinction. Thus, the Royal Ordinance to Diego Gutierrez provided as follows:

"Firstly, I grant you license and faculty so that on our behalf and in our name and that of the Royal Crown of Castille you may conquer and populate the land that remains for us in said Province of Veragua, inclusive from sea to sea... measured in the said manner must commence your conquest and population, and end at the Rio Grande, towards the west of the other part of Cape Camarón, the coast of said river towards Honduras remaining under the governance of the said province of Honduras, also if in said river there be islands populated or to be populated with Indians, which have not been populated and conquered by Spaniards, you can conquer them, and the navigation and fishing and other uses of the said river shall be common, provided and insofar as you do not come within fifteen leagues of the lagoon of Nicaragua, since those fifteen leagues and with the said lagoon must stay and stays to the governance

⁹ 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) (hereafter Peralta), 101-103: Annexes, Vol 2, Annex 1.

of Nicaragua; but the navigation and fishing that remains with you in said river, and the said fifteen leagues and the lagoon that remain with Nicaragua shall be common..."¹⁰

2.09 The condition of the San Juan in regard to this territorial arrangement was reaffirmed by the King of Spain through a Royal Ordinance (*Real Provisión*) issued on 6 May 1541.¹¹

2.10 This situation was reflected in the instrument of appointment of Don Juan de Cavallon as *Alcalde Mayor* of the Province of New Cartago and Costa Rica in 1561. The appointment was made on 17 May 1561 by the *Audiencia* of Guatemala, by order of the King. It described the limits of his jurisdiction as follows:

"As far as the boundary of the city of Nata 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."¹²

2.11 These jurisdictional limits were continuously understood as the territory of Costa Rica. In the years prior to 1821, when Spanish colonial rule ceased, no alterations of importance were made by the Crown in the limits of Costa Rica in the area of the San Juan. Disputes only arose later in the nineteenth century.

¹⁰ Translation by Costa Rica. Original Spanish: "Primeramente, vos doy licencia y facultad para que por nos y en nuestro nombre e de la Corona Real de Castilla podays conquistar y poblar la tierra que queda para nos en la dicha provincia de Veragua, ynclusa de mar a mar... medidas de la manera que dicha es, ha de començar la dicha vuestra conquista y poblacion y acabar en el Rio Grande, hacia Poniente de la otra parte del cabo del Camaron, con que la costa del dicho rio hacia Honduras quede en la gobernacion de la dicha provincia de Honduras, e ansymismo si en el dicho rio oviere algunas yslas pobladas o por poblar de yndios, y no estuvieren pobladas y conquistadas de españoles, las podays vos conquistar, y que la navegacion y pesca y otros aprovechamientos del dicho rio sean comunes, e ansy mismo, con tanto que no llegueis a la laguna de Nicaragua con quinze leguas, por quanto estas quinze leguas con la dicha laguna a de quedar e quede á la gobernacion de Nicaragua; pero la navegacion y pesca de lo que a vos os queda en el dicho rio, y las quinze leguas y laguna que quedan a Nicaragua ha de ser comun...": Annexes, Vol 2, Annex 1.

¹¹ Real Provision de SS. MM el Emperador y la Reina Doña Juana sobre los limites de la gobernacion de Cartago, y en particular sobre los del Desaguadero ó Río de San Juan de Nicaragua, 6 May 1541, in Peralta, 125-27: Annexes, Vol 2, Annex 2.

¹² "Titulo de Alcalde Mayor de las Provincias de Nueva Cartago y Costa Rica, en favor del Licenciado Juan Cavallon.- Limites de estas Provincias", 17 May 1561, in Peralta, 194-5: Annexes, Vol 2, Annex 3. The "Southern Sea" is the Pacific Ocean; the "Northern Sea" the Caribbean Sea.

(2) The post-independence period (1821-1856)

2.12. The independence from Spain of the Central American Provinces was declared on 15 September 1821.¹³ In addition to establishing their own constitutions, the States of Guatemala, El Salvador, Honduras, Nicaragua and Costa Rica combined to form the Federal Republic of the United Provinces of Central America (1823-1839).¹⁴

2.13. The Fundamental Law of the State of Costa Rica of 25 January 1825, Article XV, reasserted the limits of Costa Rica, establishing that the territory reached both seas and extended from south to north, "being its limits on the north the mouth of the San Juan River and the shield of Veraguas...".¹⁵ Likewise the Decree of Basis and Guarantees of 1841, established the limits of the national territory of Costa Rica, declaring the limit of the national territory in the following terms:

"On the west, the La Flor River and continuing its line along the shore of the Lake of Nicaragua and the San Juan River, down to the mouth of the latter on the Atlantic Ocean; on the north, the same ocean from the mouth of the San Juan River to the Shield of Veraguas..."¹⁶

Those were also the limits set forth in later Costa Rican constitutions prior to the Treaty of Limits.¹⁷

¹³ All the territories today comprising Costa Rica and Nicaragua were administered by Spain as the Captaincy-General of Guatemala. The Captaincy-General became independent from Spain on 15 September 1821. It was incorporated into the Mexican Empire of Augustín de Iturbide on 5 January 1822, but separated from Mexico in July 1823. A Constitution of the Central American Federation was adopted on 22 November 1824. The Federation comprised Guatemala, El Salvador, Honduras, Nicaragua and Costa Rica. Nicaragua separated from the Federation on 30 April 1838 and the Federation was subsequently dissolved.

¹⁴ See J Sáenz Carbonell, *Historia Diplomática de Costa Rica (1821-1910)* (1st edn, San José: Editorial Juricentro, 1996), 39-42, and the recital by a Chamber of the Court in *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening)*, I.C.J. Reports 1992, p. 351, in particular 600-1 (paragraphs 402-3).

¹⁵ Fundamental Law of the State of Costa Rica, 25 January 1825, Article 15, *Colección de Constituciones de Costa Rica: Del pacto de Concordia a la Constitución Política de 1949* (San José, Imprenta Nacional, 2000), 80-1: Annexes, Vol 6, Annex 193.

¹⁶ Decree of Basis and Guarantees of Costa Rica, 8 March 1841, Article 1.1, *Digesto Constitucional de Costa Rica* (San José: Colegio de Abogados, 1946), 89: Annexes, Vol 6, Annex 194.

¹⁷ Constitution of 9 April 1844, Article 47, *Digesto Constitucional de Costa Rica*, (San José: Colegio de Abogados, 1946), 107: Annexes, Vol 6, Annex 195; Constitution of 10 February 1847, Article 25, *Digesto Constitucional de Costa Rica* (San José: Colegio de Abogados, 1946), 130: Annexes, Vol 6, Annex 196; Constitution of 30 November 1848, Article 7, *Digesto Constitucional de Costa Rica*, (San José: Colegio de Abogados, 1946), 154: Annexes, Vol 6, Annex 198. The 1859 Constitution reflected the new situation arising from the Treaty of Limits: Constitution of 27 December 1859, Article 4, *Digesto Constitucional de Costa Rica* (San José: Colegio de Abogados, 1946), 169: Annexes, Vol 6, Annex 203.

2.14 At this time the principal territorial issue between Costa Rica and Nicaragua concerned the latter's claim to the Nicoya peninsula on the Pacific coast. In 1824 the people of Nicoya opted by plebiscite to become part of Costa Rica, a decision approved by decree of the Central American Federal Congress on 9 December 1825.¹⁸ This situation was not finally accepted by Nicaragua until the Treaty of Limits of 1858.

2.15 In the period prior to the conclusion of the Treaty of Limits, four key circumstances were at play in terms of the relations between Costa Rica, Nicaragua and third States. Brief reference needs to be made to each of these.

(a) The proposed trans-Isthmian canal

2.16 The independence of the Central American Provinces from Spain coincided with the growth in interest in an interoceanic canal. At the time (and for most of the century) it was thought that the route via the San Juan and Lake Nicaragua was preferable to the Panama route. From 1826, a series of contracts and treaties were negotiated which envisaged an interoceanic canal by way of the San Juan and Lake Nicaragua. Most of these contracts and treaties were negotiated with Nicaragua, although the earliest contracts were negotiated by the Central American Republic and subsequent to the dissolution of the federation Costa Rica was also closely involved as a Party, solely or jointly. Negotiations over the proposed canal continued after the Treaty of Limits was signed: these are addressed below.

(b) The British protectorate over the Mosquito Indians

2.17 There was a long-standing British interest in the Caribbean coast of Central America, referred to as the Mosquito Coast. Article 6 of the Treaty of Peace between Great Britain and Spain of 3 September 1783 affirmed that English wood-cutters had the right to operate between the River Belize and the River Hondo (a coast corresponding roughly to present-day Belize) and provided for common navigation by both States along the rivers.¹⁹ Nonetheless an English presence remained along the more southerly Mosquito Coast after

¹⁸ C Obregón Quesada, *El Río San Juan en la lucha de las potencias (1821-1860)* (1st edn, San José: EUNED, 2001), 45.

¹⁹ Treaty of Peace between Great Britain and Spain, signed at Versailles, 3 September 1783, 48 CTS 481, 484-5.

the 1783 treaty. A formal base for this was asserted in 1844 when Great Britain proclaimed a protectorate over the "Kingdom of the Mosquitos", i.e. the Mosquito (Meskito) Indians who inhabited the region.²⁰ A statement by the British Foreign Office dated 30 June 1847 declared that the Mosquito Protectorate extended from San Juan del Norte to Cape Honduras.²¹ In 1848 Great Britain, with the aid of Mosquito forces, seized San Juan del Norte, renaming it Greytown.

2.18 According to the Report accompanying the Award of 2 July 1881 in the *Mosquito Coast Arbitration*, Great Britain by the 1850 Clayton-Bulwer Treaty and the 1852 Crampton-Webster Treaty "tacitly renounced" its protectorate over the Mosquito Coast.²² Article I of the Clayton-Bulwer Treaty provided, *inter alia*, that neither the United States nor Great Britain would exercise dominion over the coast.²³ But it remained to settle definitely the relation between the Mosquito Coast and the rest of Nicaragua. That issue was addressed in the Treaty of Managua of 28 January 1860, by which Great Britain expressly renounced the protectorate in favour of Nicaragua, subject to a temporary guarantee of local autonomy for the Indians and with San Juan del Norte as a free port.²⁴

²⁰ Memorandum on the Mosquito Shore, F.O. 15 December 1843; Macdonald to Aberdeen, 20 December 1843, in F.O. 15/36; Rodríguez, 246 n 28.

²¹ Palmerston, No. 14, 30 June 1847, F.O. 15/44, cited by Rodríguez, 285 n 59.

²² Treaty between Great Britain and Nicaragua relative to the Mosquito Indians and the Rights and Claims of British Subjects, Managua, 28 January 1860: 121 CTS 317. See *Mosquito Coast Arbitration*, Award of the Emperor of Austria as to the Interpretation to be put on certain Articles of the Treaty between Great Britain and Nicaragua of 28 January 1860, Vienna, 2 July 1881, art 1, reprinted, 72 BFSP 1212; Report accompanying the Award, in H La Fontaine, *Pasicrisie Internationale 1794-1900* (1902, reprinted Nijhoff, The Hague, 1997), 387 (hereafter *Pasicrisie Internationale*).

²³ Convention for Facilitating and Protecting the Construction of a Ship Canal between the Atlantic and Pacific Oceans etc. between Great Britain and the United States, Washington, D.C., 19 April 1850 (Clayton-Bulwer Treaty), 104 CTS 41, 42-3; Annexes, Vol 2, Annex 4.

²⁴ See *Mosquito Coast Arbitration*, Vienna, 2 July 1881, art 1, reprinted, 72 BFSP 1212; Report accompanying the Award, in *Pasicrisie Internationale*, 387:

"In dem Vertrage von Managua wurde von England das Protectorat über das Mosquito-Gebiet ausdrücklich aufgegeben (Art. I, Alin. 2), die Souveränität der Republik Nicaragua über das ganze innerhalb ihrer Grenzen gelegene Gebiet der Mosquito-Indianer unter den im Vertrag specificirten Bedingungen und Verpflichtungen anerkannt (Art. I, Alin. I), zugleich aber den Mosquito-Indianern ein genau abgegrenztes Territorium zugewiesen und vorbehalten (Art. II, VIII), innerhalb desselben sie das Recht der Selbst-regierung («self-government») zu geniessen haben (Art. III)."

"In the Treaty of Managua, England expressly relinquished its protectorate over the Mosquito region (Art. I, Line 2), recognized the sovereignty of the Republic of Nicaragua over the entire region of the Mosquito Indians lying within its borders, subject to conditions and obligations specified in the Treaty (Art. I, Line 1), but at the same time assigned and reserved to the Mosquito Indians a specifically delimited territory (Art II, VIII), within which they are to enjoy the right of self-government (Art III)." (Translation provided by Costa Rica.)

(c) *Agreements between Great Britain and the United States*

2.19 The rivalry between the United States of America and Great Britain concerning control of the isthmus and an interoceanic canal was addressed by the Clayton-Bulwer Treaty on 19 April 1850, which stipulated the neutrality of all inter-oceanic communications through the Central American isthmus, clearly referring to the passage to be opened via the San Juan. The Treaty acknowledged that the issue of authority over the San Juan remained unsettled: articles IV and VI provided that both States would endeavour to convince any State having or claiming jurisdiction or rights over the territories where the canal might pass to facilitate the construction of the canal.²⁵

(d) *Conflicts arising from the intervention of the filibusters*

2.20 By 1854, the state of Nicaragua had been undergoing internal conflict for several years, prompting one of the Nicaraguan factions to sign an agreement to secure the support of American mercenaries, known as “filibusters” and led by William Walker.²⁶ After a few months in Nicaragua, Walker quickly made known his intentions to conquer the entire Central American region and to establish slavery there. Soon he controlled most of Nicaragua including the newly opened transit route, seizing all the ships and property of the *Compañía Accesoria del Tránsito*, owned by Cornelius Vanderbilt and associates.

2.21 Costa Rica, after a campaign against the filibusters, first in the north-western region of Costa Rica and at the town of Rivas in Nicaragua, and then by campaigning in the region of the San Juan (assisted by other Central American countries) managed to overpower the invader. During this period, Costa Rica was active in the region of the San Juan and at the end of the conflict was left in possession of all the steamers previously owned by the *Compañía Accesoria del Tránsito*.²⁷

²⁵ Clayton-Bulwer Treaty: Annexes, Vol 2, Annex 4.

²⁶ A general account of the filibusters is found in CH Brown, *Agents of Manifest Destiny* (University of North Carolina Press, Chapel Hill, 1980).

²⁷ On 22 December 1856, the Costa Rican army arrived at Trinidad, in the mouth of the Sarapiquí River, and captured the filibuster camp there. It also captured four steamers anchored in San Juan del Norte. With these the army travelled upriver and captured the remaining four steamers as well. By 30 December 1856 it had also taken Fort San Carlos. See D Folkman, *La Ruta de Nicaragua* (3rd edn, Managua: Imprelibros, 2001), 158-9; J Sáenz Carbonell, *Historia Diplomática de Costa Rica (1821-1910)* (1st edn, San José, Editorial Juricentro, 1996), 209.

(3) The conclusion of the Treaty of Limits 1858

2.22. After the filibusters had been defeated and Nicaragua had returned to normality, negotiations between the two countries to settle outstanding bilateral matters, including the issue of the San Juan, resumed.

2.23. On 6 July 1857²⁸ and 8 December 1857,²⁹ agreements were signed dealing with the matter of limits and the issue of the San Juan. The Treaty signed on 6 July 1857 was not ratified by Costa Rica. The Treaty of 8 December 1857 was not ratified by either Costa Rica or Nicaragua.

2.24. However through the mediation of the Salvadorian Minister of Foreign Affairs, Pedro Romulo Negrete, the Governments of Costa Rica and Nicaragua reached agreement on 15 April 1858 on a Treaty of Limits, otherwise referred to as the Cañas-Jerez Treaty.

2.25 The Treaty of Limits established Nicaragua's dominion and sovereign jurisdiction over the waters of the San Juan, but at the same time asserted Costa Rica's navigational rights on the lower course of the river. Accordingly, article VI of the 1858 Treaty stated:

"ARTICLE VI

The Republic of Nicaragua shall have 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 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."

²⁸ Costa Rica-Nicaragua, Treaty of Limits (Cañas-Juárez), Managua, 6 July 1857 (unratified), www.manfut.org/cronologia/t-canasjuarez.html: Annexes, Vol 2, Annex 5.

²⁹ Costa Rica-Nicaragua, Convention of Peace (Cañas-Martínez), Rivas, 8 December 1857 (arts 8, 9 subject to ratification; remainder in force on signature), 49 BFSP 1222: Annexes, Vol 2, Annex 6.

2.26. The Treaty of Limits was ratified by Costa Rica on 16 April 1858 and by Nicaragua on 26 April 1858.³⁰ On that same day the ratification instruments were exchanged by the two Presidents in the city of Rivas, Nicaragua.

2.27. Besides establishing Costa Rica's navigational rights, the 1858 Treaty of Limits established other rights and obligations for both parties:

- (a) the Bay of San Juan del Norte, on the Caribbean, and the Bay of Salinas, on the Pacific, are common to both Republics (article IV);
- (b) both Republics have a common obligation to contribute to the defence of the bays of San Juan del Norte and Salinas (article IV);
- (c) Costa Rica has an obligation to contribute to the custody of the San Juan (article IV);
- (d) both Republics have an obligation to contribute, with all the efficiency within their reach, to the defence of the San Juan in case of external aggression (article IV);
- (e) Nicaragua has an obligation not to bind itself to canalization or transit contracts "without first hearing the opinion of the Government of Costa Rica as to the disadvantages which the transaction might occasion the two countries...if the transaction does not injure the natural rights of Costa Rica, the vote asked for shall be only advisory" (article VIII). In other words, if the canalization or transit contracts injure Costa Rica's natural rights, its opinion is compulsory; and
- (f) both Costa Rica and Nicaragua have an obligation not to commit acts of hostility against each other, whether in the port of San Juan del Norte on the River or on Lake Nicaragua, even in the event of war between them (article IX).

(4) Nicaragua's challenge to the Treaty of Limits and the Cleveland Award 1888

2.28 By 1860, the navigability of the Bay of San Juan del Norte and the San Juan itself had deteriorated, due to large amounts of sediments that were effectively closing the mouth of the Bay. This made Costa Rica's agreement to

³⁰ The Treaty was in fact twice ratified by Nicaragua: by decree of President Tomas Martinez, President of the Republic of Nicaragua, reproduced in 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), 53-4 (hereafter Pérez Zeledón, *Argument*); and by the Constituent Assembly of the Republic of Nicaragua: *Gaceta de Nicaragua*, No. 15, 28 May 1858, cited in Pérez Zeledón, *Argument*, 55. See also Decree of the Constitutional Assembly in its Legislative Character, approving the Treaty of Limits of 15 April, 1858, 4 June 1858, reproduced in *The Case of the Republic of Nicaragua* (Washington, D.C., Gibson Bros, 1888), Appendix C, 40: Annexes, Vol 6, Annex 202.

any canalization contract even more important.³¹ In the years after the signing of the Treaty of Limits there were many projects and agreements for canal and transit projects along the San Juan. Although none would actually materialize, it is noteworthy that Nicaragua involved Costa Rica in these projects.³²

2.29. For example the Ayon-Chevalier Canal Contract³³ was signed in Paris on 6 October 1868. The contract required the accession of Costa Rica,³⁴ but soon after it was concluded it became apparent that the French party did not have the means to carry out the project and the Costa Rican Government withdrew its support.

2.30. From 1870 Nicaragua began to challenge the validity of the 1858 Treaty of Limits. It did so despite more than a decade of observance of the Treaty by both countries.³⁵

2.31. On 16 March 1886, by Decrees XXXI and XXXII,³⁶ the Costa Rican Government created a Revenue Guard for the Colorado River, which would have at its service a national steamboat. The functions of the Colorado River Revenue Service included “[t]o reconnoitre at least once a week the Rivers San Juan, Colorado, Sarapiquí and San Carlos; the first in the whole extent that it is navigable for Costa Rica, the second in its entire extent, and the latter two along the entire stretches that are navigable by steamer.” The Colorado Revenue Guard had the main mission to “prevent contraband in the waters and territories of its circumscription.”

³¹ As mentioned above (paragraph 2.03), the Colorado River has always been entirely Costa Rican territory.

³² See, e.g., Canalization Contract with Felix Belly of 1 May 1858: Annexes, Vol 2, Annex 8.

³³ See Republic of Nicaragua–M. Chevalier, Contract for the Excavation of an Interoceanic Canal across Central America (Ayon-Chevalier), 6 October 1868, Articles 53-56, especially Article 56 which provided that the refusal of Costa Rica to adhere to the present treaty will make the treaty null and void: 61 BFSP 1266: Annexes, Vol 2, Annex 11.

³⁴ See Costa Rica-Nicaragua, Treaty for the excavation of an Interoceanic Canal (Jiménez-Montecalegre), San José, 18 June 1869, 61 BFSP 1144: Annexes, Vol 2, Annex 13 (by which Costa Rica acceded to the Ayon-Chevalier Contract).

³⁵ See Remarks made by the Government of Costa Rica to the Government of Nicaragua when the latter submitted to the Nicaraguan Congress its “doubts” in regard to the validity of the Treaty of Limits: Costa Rica Foreign Minister, Lorenzo Montufar, to Nicaraguan Foreign Minister, Tomás Ayón, 1 February 1870, reproduced in Pérez Zeledón, *Argument*, 274-8: Annexes, Vol 3, Annex 30.

³⁶ Costa Rica, Decree No XXXI establishing a maritime and customs guard at the mouth of the Colorado River, 16 March 1886, *Colección de Disposiciones Legislativas y Administrativas emitidas en el año 1886, Edición Oficial* (San José: Imprenta Nacional, 1887): Annexes, Vol 6, Annex 205; Decree No XXXII fixing the functions of the Maritime and Customs Guard on the Colorado River, 16 March 1886, *Colección de Disposiciones Legislativas y Administrativas emitidas en el año 1886, Edición Oficial* (San José: Imprenta Nacional, 1887): Annexes, Vol 6, Annex 206.

2.32. The decision of Costa Rica to establish a permanent Revenue Guard in the San Juan area met with opposition from the Nicaraguan authorities. Together with the dispute about the validity of the Treaty of Limits which had already been raised by Nicaragua, this situation induced both Parties to agree to arbitrate their differences. On 24 November 1886 a treaty was signed by Ascensión Esquivel on behalf of Costa Rica and José Antonio Román on behalf of Nicaragua.³⁷ By the Esquivel-Román Treaty both countries agreed to submit the question of the validity of the Treaty of Limits to the arbitration of the President of the United States. Article VI of the Esquivel-Román Treaty stipulated that if the Award found the Treaty of Limits valid, it should also decide whether Costa Rica could navigate the San Juan River with vessels of war or of the Revenue Guard. In addition, the Award would decide any other point of doubtful interpretation raised by either of the Parties. Article X of the Esquivel-Román Treaty stipulated that if the Arbitral Award found the Treaty of Limits valid, both countries would appoint commissioners to demarcate the boundary, as established in Article II of the Treaty of Limits.

2.33. Following the exchange of ratifications of the Esquivel-Román Treaty on 1 June 1887, the President of the United States of America, Grover Cleveland, accepted the duties of Arbitrator. Thereafter Costa Rica and Nicaragua attempted to settle the dispute without the need for arbitration, but were unable to reach a settlement.³⁸

2.34. On 22 June 1887, Nicaragua submitted to Costa Rica 11 points it considered as of doubtful interpretation. Of particular interest is Point 8, asking whether Costa Rica was entitled to navigate the waters of the San Juan with vessels of war or of the Revenue Guard. In its reply before President Cleveland, Nicaragua argued that Costa Rica could do neither:

³⁷ Costa Rica-Nicaragua, Convention to submit to the arbitration of the Government of the United States the question in regard to the validity of the Treaty of April 15, 1858 (Esquivel-Román), Guatemala, 24 December 1886, 168 CTS 371: Annexes, Vol 2, Annex 14.

³⁸ On 26 July 1887 the Presidents of Costa Rica and Nicaragua signed a Treaty (known as the Soto-Carazo Treaty) in an attempt to resolve the dispute and avoid the Arbitration: see *Memoria anual de la Secretaría de Relaciones Exteriores y Carteras Anexas 1888* (San José: Imprenta Nacional, 1888): Annexes, Vol 2, Annex 15. Nicaragua thereby undertook to withdraw its objections to the validity of the Treaty of Limits; only in the event that both legislatures failed to approve it would the arbitration before President Cleveland continue. The Costa Rican Congress approved the treaty in September 1887 but the Nicaraguan Congress rejected it. See J Sáenz Carbonell, *Historia Diplomática de Costa Rica (1910-1948)* (2nd edn, San José: Editorial Juricentro, 2000), 466-7.

“Vessels of the revenue service are akin to vessels of war. While they have not all the means of aggression as the former, still they are armed vessels, capable of enforcing their demands by force, and must be classed in the same category as vessels of war. Neither have the right, under a commercial license, to invade the territory, domain, or sovereignty of the Republic of Nicaragua.”³⁹

2.35. Costa Rica argued that it was beyond dispute that Costa Rica could navigate the San Juan with Revenue Guard vessels:

“It was stipulated in the treaty, to the benefit of Nicaragua, that Nicaraguan vessels could bring their cargoes to the Costa Rican bank of the river and unload them there; and this permission, or right, presupposes, necessarily, the correlative right of Costa Rica to watch its own banks by the only practicable means, which is the revenue police, during the whole course of the river navigable for Costa Rica.

If this only means of vigilance would not be permitted, the Costa Rican commerce would be deprived of protection and at the mercy of smuggling.”⁴⁰

In respect of men-of-war, Costa Rica argued that the principle that a port of free entry is considered accessible to men-of-war of all nations ought to apply to navigable rivers.⁴¹

2.36. On 22 March 1888, President Cleveland rendered his Award.⁴² The first article of the Award declared the Treaty of Limits valid. The second article of the Award stated as follows:

“*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.”

2.37. The third article of the Award referred to each of the 11 points of doubtful interpretation presented by Nicaragua. Points 10 and 11 of the third article state:

³⁹ *Reply of the Republic of Nicaragua to the Case of the Republic of Costa Rica Submitted to His Excellency Honourable Grover Cleveland, President of the United States* (Washington, D.C.: Gibson Bros, 1887) 49: Annexes, Vol 6, Annex 208.

⁴⁰ Pérez Zeledón, *Argument*, 156

⁴¹ *Ibid.*

⁴² Award upon the validity of the Treaty of Limits of 1858 between Costa Rica and Nicaragua, 22 March 1888: Annexes, Vol 2, Annex 16.

“10. The Republic of Nicaragua remains bound not to make any grants for canal purposes across her territory without first asking the opinion of the Republic of Costa Rica, as provided in article VIII of the Treaty of Limits of the 15th day of April, 1858. The natural rights of the Republic of Costa Rica alluded to in the said stipulation are the rights which, in view of the boundaries fixed by the said Treaty of Limits, she possesses in the soil thereby recognized as belonging exclusively to her; the rights which she possesses in the harbors of San Juan del Norte and Salinas Bay; and the rights which she possesses in so much of the river San Juan as lies more than three English miles below Castillo Viejo, measuring from the exterior fortifications of the said castle as the same existed in the year 1858; and perhaps other rights not here particularly specified. These rights are to be deemed injured in any case where the territory belonging to the Republic of Costa Rica is occupied or flooded; where there is an encroachment upon either of the said harbors injurious to Costa Rica; or where there is such an obstruction or deviation of the River San Juan as to destroy or seriously impair the navigation of the said river or any of its branches at any point where Costa Rica is entitled to navigate the same.

11. The Treaty of Limits of the 15th day of April, 1858, does not give to the Republic of Costa Rica the right to be a party to grants which Nicaragua may make for inter-oceanic canals; though in cases where the construction of the canal will involve an injury to the natural rights of Costa Rica, her opinion or advice, as mentioned in Article VIII of the Treaty, should be more than “advisory” or “consultative”. It would seem in such cases that her consent is necessary, and that she may thereupon demand compensation for the concessions she is asked to make; but she is not entitled as a right to share in the profits that the Republic of Nicaragua may reserve for herself as a compensation for such favours and privileges as she, in her turn, may concede.”

2.38. Pursuant to article VII of the Esquivel-Roman Treaty, both countries agreed to accept the Award unconditionally.⁴³ At no stage did Nicaragua challenge the validity of the Award.

(5) Implementation of the Treaty of Limits after 1888: the Alexander Awards

2.39 In accordance with article X of the Esquivel-Román Treaty, both countries appointed commissioners to demarcate the boundary line and the Commission started work on 16 June 1890. However, due to the differences as to how best to approach the demarcation, it was agreed that both countries should resort to the assistance of an external arbitrator who could resolve any disputes which arose in the field during the process.

⁴³ Esquivel-Román Convention, art VII: Annexes, Vol 2, Annex 14.

2.40. Accordingly, on 27 March 1896 a Treaty was signed by Leonidas Pacheco, on behalf of Costa Rica, and Manuel C. Matus, on behalf of Nicaragua, to carry out the demarcation process.⁴⁴ According to article II of the Pacheco-Matus Convention, in the event of disagreement between the Costa Rican and Nicaraguan commissioners, an engineer appointed by the President of the United States would decide on the matter, and the demarcation process would be carried out in accordance with his decision.

2.41. The Pacheco-Matus Convention having been ratified by both countries and entered into force, United States President McKinley appointed as arbitrator an engineer, Edward Porter Alexander. The demarcation process began in 1897 and was concluded in 1900. In all, Alexander rendered five awards addressing the conflicts that had arisen between Costa Rica and Nicaragua during the demarcation process.⁴⁵ For the most part, the Alexander Awards are not relevant to the present dispute: however, the First Award of 30 September 1897 may be noted. This fixed the Atlantic terminus of the land boundary at Punta Castilla, where the right or south-east bank of the River met the sea. In so doing the Arbitrator noted that "throughout the treaty the river is treated and regarded as an outlet of commerce. This implies that it is to be considered as in average condition of water, in which condition alone it is navigable."⁴⁶

(6) The 1916 Judgment of the Central American Court of Justice

2.42. With the construction of the Panama Canal, the pressure for an inter-oceanic waterway in Nicaragua abated. Nonetheless as a result of information that Germany was interested to open a Canal in Nicaragua, the United States sought to safeguard its security interests by concluding in February 1913 the Chamorro-Weitzel Treaty.⁴⁷ Costa Rica protested this Treaty, first to the

⁴⁴ Pacheco-Matus Convention for the demarcation of the boundary line between Costa Rica and Nicaragua, 27 March 1896, *Papers Relating to the Foreign Relations of the United States* (Washington, D.C.: Government Printing Office, 1897), 101: Annexes, Vol 2, Annex 17.

⁴⁵ First Award rendered by the umpire, EP Alexander, San Juan del Norte, 30 September 1897; Second Award, San Juan del Norte, 20 December 1897; Third Award, San Juan del Norte, 22 March 1898; Fourth Award, Greytown, 26 July 1899; Fifth Award, Greytown, 10 March 1900. For the texts of the Alexander Awards see *Pacific International*, 528-39. The First Award is reprinted in Annexes, Vol 2, Annex 18.

⁴⁶ *Pacific International*, 531.

⁴⁷ United States-Nicaragua, Convention for the Construction of a Canal by the River San Juan (Chamorro-Weitzel), Washington, D.C., 8 February 1913, *Republic of Costa Rica, Complaint before the Central American Court of Justice* (Washington, D.C.: Press of Gibson Bros., Inc. 1916) Annex L, 82-86: Annexes, Vol 2, Annex 19.

United States,⁴⁸ and then to Nicaragua,⁴⁹ on the ground *inter alia* that it had not been consulted. In the event the United States Senate rejected it.⁵⁰

2.43. Then, on 5 August 1914, Nicaragua signed a treaty with the United States (the Chamorro-Bryan Convention) which granted the United States perpetual ownership rights for the construction and maintenance of an inter-oceanic canal through the San Juan.⁵¹ This Treaty was signed without Costa Rica's knowledge or consent. Since the Chamorro-Bryan Treaty affected Costa Rica's rights under the Treaty of Limits and the Cleveland Award, on 24 March 1916 Costa Rica filed a case against Nicaragua before the Central American Court of Justice.⁵²

2.44. In Costa Rica's argument before the Court its navigational rights were clearly set forth in the following terms:

"The Cañas-Jerez Treaty, explained by the Cleveland Award, concedes to Costa Rica the perpetual right to free navigation in the waters of the San Juan River from its outlet in the Atlantic up to a point within three English miles of Castillo Viejo, for the purposes of commerce, whether with Nicaragua or the interior of Costa Rica, through any of the waterways of that country that flow or may flow into the San Juan; it also gives to Costa Rican vessels the right, exempt from imposts of any class, to touch at points on the Nicaragua banks of that river along the part thereof in which navigation is common, and puts Costa Rican vessels of the revenue service on the same footing with the merchant vessels of the same country (Costa Rica) in order that they may protect its rights or for the said purposes of commerce.

That, with regard to the San Juan River, the conventional rights of Costa Rica are, in a certain aspect, less than the corresponding rights of co-ownership (*condominio*):

⁴⁸ Costa Rican Minister Plenipotentiary in Washington, D.C., JB Calvo, to the United States Secretary of State, William Jennings Bryan, 17 April 1913: Annexes, Vol 3, Annex 38.

⁴⁹ Costa Rican Minister in Nicaragua, F Cabezas Gómez, to Nicaraguan Foreign Minister, Diego M Chamorro, 27 April 1913: Annexes, Vol 3, Annex 39.

⁵⁰ The Treaty was presented to the Senate Foreign Relations Committee in June 1913. The Platt Amendment was introduced following a suggestion by the Nicaraguan Government in the hope that it might facilitate Senate approval. The Treaty encountered opposition not only from Costa Rica and El Salvador but also from the Democrats who considered the Platt Amendment fostered imperialistic practices by the United States. In August 1913 it was rejected by the Foreign Relations Committee. See F Rodríguez Serrano, *El Canal por Nicaragua* (Managua, Editorial Alemana, 1968) 24; LF Sibaja Chacón, *Nuestro Limite con Nicaragua* (San José, Litografía Don Bosco, 1973) 212.

⁵¹ United States-Nicaragua, Convention for the construction of a Canal by the River San Juan (Bryan-Chamorro), Washington, D.C., 5 August 1914, 220 CTS 215: Annexes, Vol 2, Annex 20.

⁵² The Central American Court of Justice was created by the General Treaty of Peace and Amity, Washington, D.C., (Costa Rica, Guatemala, Honduras, Nicaragua and El Salvador), Washington, D.C., 20 December 1907, 206 CTS 63.

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 Rican vessels, as well merchantmen as revenue cutters, in the zone in which navigation is common, have a free course over the whole river, throughout its length and breadth, and free access, exempt from imposts, to any point on the Nicaraguan shore.”⁵³

2.45. Costa Rica based its position on articles VI and VIII of the 1858 Treaty of Limits, and on the 1888 Cleveland Award. Nicaragua responded to Costa Rica’s demand on 25 August 1916 but confined its challenge to the jurisdiction of the Court.

2.46. On 30 November 1916, the Central American Court of Justice gave judgment in favour of Costa Rica. In doing so it held that:

“...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:

⁵³ Annexes, Vol 2, Annex 21, 196-7 The original Spanish text reads:

“El Tratado Cañas-Jerez explicado por el Laudo Cleveland, concede a Costa Rica el derecho perpetuo de libre navegación en las aguas del río San Juan, desde su desembocadura en el Atlántico hasta tres millas inglesas antes del Castillo Viejo, para fines comerciales, ya sea con Nicaragua o con el interior de Costa Rica, por cualquiera de las vías de ésta que dan o den al río San Juan; da a las naves costarricenses la facultad de atracar, exentas de impuestos de cualquier clase, en la ribera nicaragüense del mismo río, en la parte en que la navegación es común, y equipara las embarcaciones costarricenses del servicio fiscal con las mercantes del mismo país, para que puedan proteger los derechos de ésta, o para los expresados fines comerciales.

Que en cuanto al río San Juan los derechos convencionales de Costa Rica son en cierto aspecto menores que los correspondientes al condominio: Costa Rica no puede, por ejemplo, surcar esta corriente con naves de guerra, como si puede hacerlo Nicaragua, de seguro; pero por otra parte, son mayores que los de una mera copropiedad porque los barcos costarricenses, así mercantiles como fiscales en la zona en que la navegación es común, tienen libre curso en todo el río, a lo largo y a lo ancho y libre acceso, exento de impuestos, a cualquier lugar de la ribera nicaragüense.”

... 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 from constituting a cause for disquiet, would imply a function appropriate to territorial sovereignty.”⁵⁴

2.47. The Court went on to state that:

“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’.”⁵⁵

2.48. The Court necessarily had to pronounce on Costa Rica’s rights on the San Juan, since these were affected by the Bryan-Chamorro Convention. In particular the Central American Court declared that:

“...the Government of Nicaragua has violated, to the injury of Costa Rica, the rights granted to the latter by the Cañas-Jerez Treaty of Limits of [April 15, 1858], by the Cleveland Award of [March 22, 1888], and by the Central American Treaty of Peace and Amity of [December 20, 1907].”⁵⁶

2.49. As a result of this judgment (and the judgment rendered by the Court in a parallel case presented by El Salvador against Nicaragua about its own rights on the Gulf of Fonseca⁵⁷), Nicaragua terminated its participation in the Court.

⁵⁴ Ibid, 219-220.

⁵⁵ Ibid, 222. The original Spanish text reads:

“Costa Rica tiene derecho indiscutido a la margen derecha del río; al suelo colocado dentro de sus límites jurisdiccionales; posee el condominio en los puertos de San Juan del Norte y en la Bahía de Salinas, el derecho contractual de perpetua navegación en el río, empezando desde tres millas abajo del Castillo Viejo, comprensivo de la amplia facultad de tránsito y de comercio, y que impone a Nicaragua el deber no entorpecer esa navegación, y el de tener, por el contrario, expedito el curso del río; los de atracar en sus dos riberas en toda la zona en que la navegación es común; y los que conciernen a su guarda y defensa ‘con toda la eficacia que estuviere a su alcance’.”

⁵⁶ Ibid, 229.

⁵⁷ *Republic of El Salvador v Republic of Nicaragua*, Central American Court of Justice, 9 March 1917, (1917) 11 AJIL 674.

Its doing so, however, could not affect the status of decisions already given as *res judicata*.⁵⁸

(7) Later developments

2.50. In the late 1930s, there was renewed interest between Costa Rica and Nicaragua in the canalization of the San Juan. The Governments of both countries favoured the construction of a Canal terminating at Lake Nicaragua, since there was no intention to connect it to the Pacific Ocean. The result was the Treaty known as the Zuñiga Montufar–Cordero Reyes Treaty,⁵⁹ signed on 5 April 1940 and duly ratified by both countries. But (as with previous agreements for a canal by way of Lake Nicaragua), the canal works were never seriously begun. The Treaty expired five years after its signature in accordance with its own terms: see article X. Article III of the Treaty acknowledged Costa Rica's rights of free navigation and in fact extended its rights to the whole of the San Juan from its source in Lake Nicaragua to its outlet on the Caribbean.

2.51. In December 1948, the faction which had lost the civil war in Costa Rica earlier that year attempted to invade the country, having the support of Nicaragua under Anastasio Somoza's regime. The Government of Costa Rica requested assistance from the Inter-American system with respect to these events, invoking the Inter-American Reciprocal Assistance Treaty (the Rio Treaty). As a means of settling the issue, both countries signed the Pact of Amity of 21 February 1949.⁶⁰ Through this Pact they committed to solve any difference among themselves through peaceful means of settling international disputes. To achieve this goal, they accepted the application of the Inter American Treaty for the Peaceful Settlement of Disputes (the Pact of Bogotá), even though that Treaty had not yet entered into force.

⁵⁸ A Chamber of the Court paid careful attention to the *El Salvador/Nicaragua* judgment in its 1992 decision on the status of the Gulf of Fonseca: *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua Intervening)*, I.C.J. Reports 1992, p. 351, in particular 600-1 (paras. 402-3).

⁵⁹ Costa Rica-Nicaragua, Convention for the Canalization of the San Juan River (Cordero-Zuñiga), San José, 5 April 1940 (in force 21 June 1940), Ministerio Relaciones Exteriores, *Convención para la canalización del Río San Juan y otros particulares relacionados con dicha canalización* (San José: Imprenta Nacional, 1940), 15-22: Annexes, Vol 2, Annex 22.

⁶⁰ Costa Rica-Nicaragua, Pact of Amity (Sevilla-Esquivel), Washington, D.C., 21 February 1949 (in force 15 July 1949), 1465 UNTS 221: Annexes, Vol 2, Annex 23.

2.52. In 1955, the faction which had lost the 1948 Costa Rican civil war made a further attempt, with the aid of the same Nicaraguan Government, to take over the Government of Costa Rica. The conflict was resolved through the intervention of the Organization of American States. On 9 January 1956 the two States concluded an Agreement pursuant to Article IV of the Pact of Amity of 21 February 1949.⁶¹ Among other things, they agreed to facilitate and expedite transit through the San Juan and promised to cooperate to safeguard the common border.

⁶¹ Costa Rica-Nicaragua, Agreement pursuant to Article IV of the Pact of Amity (Fournier-Sevilla), Washington, D.C., 9 January 1956, 1465 UNTS 233, 234: Annexes, Vol 2, Annex 24.

Chapter 3

The Dispute before the Court

A. Overview

3.01. Prior to 1980, apart from sporadic and occasional incidents, Costa Rica did not encounter difficulties in exercising its rights of free and perpetual navigation on the San Juan River. The period from 1980 to 1998 records some Nicaraguan breaches of Costa Rica's rights, but in this period these were not of a systematic or permanent character.

3.02. By contrast in the period after July 1998, Nicaragua adopted a policy which involved systematic and permanent violations of Costa Rica's rights, which continue to the present day and which effectively amount to an outright denial of these rights.

3.03. Despite repeated attempts by Costa Rica to seek a diplomatic solution to the dispute, no settlement has been reached. As a last resort, on 29 September 2005, Costa Rica presented its case to this Court.

B. Nicaragua's violations of Costa Rica's rights between 1980 and 1998

3.04. Nicaragua's violations of Costa Rica's rights of free and perpetual navigation in the period between 1980 and 1998 were of an *ad hoc* and temporary character.

3.05. An example is a shooting incident involving a Costa Rican official vessel in 1980. On 4 November 1980 the vessel, which was transporting Costa Rican Ministry of Health officials on the River, was shot at by the Nicaraguan Army.⁶² Costa Rica protested this action on 5 November 1980 and Nicaragua responded on 12 November 1980. In its response, Nicaragua

⁶² "Sandinista guards attack Costa Ricans", *La Nación*, San José, 6 November 1980: Annexes, Vol 5, Annex 110.

apologised for the incident and stated that it did not reflect the official position of the Nicaraguan Government. Nicaragua pledged full respect for Costa Rica's rights of free navigation.⁶³ However, earlier the Nicaraguan authorities declared that Costa Rica ought to give notice to Nicaragua each time it entered the River, in order to prevent Costa Rican vessels being confused with irregular groups operating in the area.⁶⁴ Costa Rica rejected the condition proposed by Nicaragua and reaffirmed its rights of free and perpetual navigation on the River.⁶⁵

3.06. Further incidents occurred in 1982 and 1983. On 6 June 1982 a Nicaraguan Army Patrol intercepted a Costa Rican vessel transporting tourists on the San Juan River from Barra del Colorado, Costa Rica, to Puerto Viejo de Sarapiquí, also in Costa Rica. The Patrol required the passengers to disembark from the vessel and proceeded to question them, noting their details in a register. The Patrol then indicated that it was forbidden to transport tourists in Costa Rican vessels through the San Juan, particularly North American and European tourists.⁶⁶ This violation was duly protested by the Costa Rican Foreign Ministry on 8 June 1982.⁶⁷ Nicaragua did not respond.

3.07. On 13, 20 and 27 June 1982 Costa Rican vessels transporting passengers through the San Juan were again stopped. Passengers of the vessels were searched and required to produce identification.⁶⁸

3.08. On 4 July 1982, Nicaraguan Army officers demanded payment for a "departure clearance" ("*derecho de zarpe*"). This action was protested by Costa Rica on 16 July 1982.⁶⁹ Nicaragua did not respond.

⁶³ Nicaraguan Ambassador in Costa Rica, Javier Chamorro Mora, to Costa Rican Foreign Minister, Bernd Niehaus Quesada, Note No. E.N.1323/80, 12 November 1980: Annexes, Vol 3, Annex 40; "Nicaragua conditions navigation on the waters of the San Juan River", *La Nación*, San José, 8 November 1980: Annexes, Vol 5, Annex 111.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ Manager of Swiss Travel Services, Emilia Gamboa, to Costa Rican Minister of Public Security, Angel Edmundo Solano, 7 June 1982: Annexes, Vol 6, Annex 223. See also "New protest to Nicaragua", *La Nación*, San José, 11 June 1982: Annexes, Vol 5, Annex 113.

⁶⁷ Costa Rican Foreign Minister, Fernando Volio, to Nicaraguan Chargé d'Affaires a.i. to Costa Rica, Oscar Ramón Téllez, Note No. D.M.133-82, 8 June 1982: Annexes, Vol 3, Annex 41.

⁶⁸ Manager of Swiss Travel Services, Emilia Gamboa, to Costa Rican Deputy Foreign Minister, Ekhart Peters, 5 July 1982: Annexes, Vol 6, Annex 224.

⁶⁹ 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: Annexes, Vol 3, Annex 42.

3.09. From 16 to 22 July 1982, the Nicaraguan Army prohibited Costa Rican vessels from navigating the San Juan. Costa Rica protested this action.⁷⁰

3.10. Nicaragua responded on 2 August 1982 that the actions carried out by the Nicaraguan Army were sovereign acts undertaken in order to preserve the security and internal order of Nicaragua. It was further stated that the actions taken by local Nicaraguan authorities which restricted Costa Rica's rights established in the Treaty of Limits would cease and that the perpetrators would be punished.⁷¹ On 19 August 1982 Costa Rica responded to Nicaragua's letter of 2 August 1982, rejecting Nicaragua's interpretation of its authority to impose restrictions on Costa Rican navigation.⁷² On 6 September 1982 Nicaragua responded, affirming the position taken in its letter of 2 August with respect to its prerogative to impose restrictions on Costa Rica's rights of free navigation.⁷³

3.11. On 23 February 1983, members of the Nicaraguan Army stopped two Costa Rican journalists navigating the San Juan. These journalists were searched and their belongings were seized, including notebooks, film and recording tape. Costa Rica protested this action on 8 March 1983.⁷⁴

3.12. In addition to the restrictions imposed on navigation with tourists, Nicaragua committed other violations of Costa Rica's rights to free navigation in this period. Among the most important were the imposition of timetables, whereby Costa Rican vessels could only navigate between 6 am and 5 pm; the obligation to stop at Army posts and allow personal searches as well as the seizure of personal belongings, and the imposition of a charge for navigation on the San Juan. Nicaragua argued that it was only exercising revenue control activities and applying security controls, referring to the movement of the

⁷⁰ Costa Rican Foreign Minister, Fernando Volio, to Nicaraguan Chargé d'Affaires to Costa Rica, Oscar Ramón Téllez, Note No. D.M. 127-82, 20 July 1982: Annexes, Vol 3, Annex 43.

⁷¹ Nicaraguan Chargé d'Affaires a.i. to Costa Rica, Oscar Ramón Téllez, to Costa Rican Foreign Minister, Fernando Volio Jiménez, Note No. E.N. 789/82, 2 August 1982: Annexes, Vol 3, Annex 44.

⁷² Costa Rican Foreign Minister, Fernando Volio, to Nicaraguan Chargé d'Affaires a.i. to Costa Rica, Oscar Ramón Téllez, Note No. D.M. 189-82, 19 August 1982: Annexes, Vol 3, Annex 45.

⁷³ Ambassador of Nicaragua in Costa Rica, Rogelio Ramírez Mercado, to Costa Rican Foreign Minister, Fernando Volio Jiménez, Note No. E.N. 865/82, 6 September 1982: Annexes, Vol 3, Annex 46.

⁷⁴ 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: Annexes, Vol 3, Annex 47.

“*Contras*”, contra-revolutionary groups operating in the region. The then Deputy Minister of Foreign Affairs of Nicaragua indicated that the vigilance exercised was necessary to prevent enemy individuals to the Nicaraguan Government entering Nicaragua as part of a tourist group.⁷⁵ He indicated that the measures taken by Nicaragua in respect of Costa Rican navigation with tourists were not intended to restrain Costa Rica’s rights of free navigation but were taken to safeguard the security of Nicaragua.⁷⁶ Similar declarations from Nicaraguan officials followed, arguing that Nicaragua could impose restrictions and had the right to stop and detain any person deemed by Nicaragua to be a danger to the State. Costa Rica, on the other hand, protested and insisted upon its rights of free navigation in accordance with the relevant instruments.⁷⁷

3.13. On 4 April 1983 delegations from Costa Rica and Nicaragua met in San Juan del Sur, Nicaragua, to discuss these disagreements. This meeting did not result in any agreement.⁷⁸ Another high level meeting took place on 14 April 1983 in Liberia, Costa Rica. At that meeting, Nicaragua acknowledged that there had been violations of Costa Rica’s rights. *La Nación* reported that:

“Dr. Sergio Ramírez Mercado, member of Nicaragua’s National Reconstruction Junta, announced yesterday [in Liberia], in a meeting with delegates from our Government [Costa Rican], that his country will respect gradually the right of free navigation of Costa Rican vessels in the San Juan River.

The official added that within a non-specified term, they would totally obey the provisions of the Cañas-Jerez treaty and the Cleveland Award, which allow Costa Rica the free navigation on that waterway.”⁷⁹

3.14. Soon after the bilateral meeting of 14 April 1983, Costa Rican navigation on the San Juan returned to normal. But as a result of the increased

⁷⁵ “Nicaraguans announce control on the San Juan”, *La Nación*, San José, 17 June 1982: Annexes, Vol 5, Annex 115.

⁷⁶ *Ibid.*

⁷⁷ “Free passage along the San Juan River is demanded”, *La Nación*, San José, 16 June 1982: Annexes, Vol 5, Annex 114. See also “Problems on the San Juan River continue”, *La Nación*, San José, 4 July 1982: Annexes, Vol 5, Annex 116.

⁷⁸ “Today will take place a high level meeting with Nicaragua”, *La Nación*, San José, 4 April 1983: Annexes, Vol 5, Annex 119. See also “Meeting with Nicaraguans failed”, *La República*, San José, 5 April 1983: Annexes, Vol 5, Annex 120.

⁷⁹ “Ramírez offers gradual respect to navigation on the San Juan River”, *La Nación*, San José, 15 April 1983: Annexes, Vol 5, Annex 122. See also “Nicaragua guarantees freedom on the San Juan River”, *La República*, San José, 15 April 1983: Annexes, Vol 5, Annex 121.

security threat caused by the Nicaraguan civil war, there was in fact little Costa Rican navigation on the River from 1984 until the end of the conflict in 1989.⁸⁰ The violence and the effects of the civil war in Nicaragua made most riparians leave the region. Even the Costa Rican police temporarily suspended navigation on the San Juan during that period due to the increased security risks.⁸¹

3.15. After the end of the Nicaraguan civil war in 1989, Costa Rican riparians gradually returned to the region.

3.16. In February 1994, the Nicaraguan Army began charging passengers travelling on Costa Rican vessels a fee of US\$5 to navigate the San Juan.⁸² In March 1994 Nicaragua announced that it would impose unilateral migration controls on the San Juan to Costa Rican tourism, in addition to a charge of US\$5.00 for a tourism card.⁸³ The Nicaraguan Ambassador to Costa Rica declared at that time:

“I obviously respect the interpretation made by Foreign Affairs Minister Niehaus, but my country makes a sovereign interpretation of the Cañas-Jerez Treaty, since when it was signed tourism did not exist; and commerce was foreseen as an exchange of merchandise.”⁸⁴

This new charge, imposed by force, was applied to all passengers navigating the River.⁸⁵

⁸⁰ Affidavit of Armando Perla Perez, 28 January 2006: Annexes, Vol 4, Annex 92; and Affidavit of Windel Hodgson Hodgson, 28 January 2006: Annexes, Vol 4, Annex 93.

⁸¹ Affidavit of Carlos Luis Alvarado Sánchez, 27 January 2006: Annexes, Vol 4, Annex 88; and Affidavit of Daniel Soto Montero, 27 January 2006: Annexes, Vol 4, Annex 89.

⁸² “\$5 to navigate on the San Juan River” *La Nación*, San José, 10 March 1994: Annexes, Vol 5, Annex 126. As reported by the Costa Rican newspaper *La Nación*, the Nicaraguan Army imposed the payment of this fee by force, and even opened fire upon Costa Rican vessels in order to enforce payment.

⁸³ Nicaraguan Foreign Minister, Ernesto Leal, to Costa Rican Foreign Minister, Bernd Niehaus Quesada, Note No. 940284, 21 March 1994: Annexes, Vol 3, Annex 48.

⁸⁴ “Conflict with the Nicaraguans due to tourism on the San Juan”, *La República*, San José, 5 March 1994: Annexes, Vol 5, Annex 123.

⁸⁵ “Ticos were machine-gunned at the San Juan River”, *La Nación*, San José, 8 March 1994: Annexes, Vol 5, Annex 124.

3.17. Costa Rica protested this action on 15 March 1994.⁸⁶ Nicaragua's response was communicated on 21 March 1994.⁸⁷ In this communication, Nicaragua formulated for the first time an interpretation of Costa Rica's rights of free navigation. It argued that the phrase "purposes of commerce" in article VI of the Treaty of Limits should be interpreted in a restrictive way. Nicaragua's note of 21 March 1994 stated:

"...the [Cañas-Jerez] Treaty establishes that the Republic of Costa Rica "shall have the perpetual rights of free navigation in the said waters... *con objetos de comercio*" and not for other type of activities. Therefore, the expression in the Treaty "*con objetos de comercio*", excludes any other activity, and the terms of the Treaty should be interpreted in the standard sense they had at the time and, being it a Treaty of Limits, it should be interpreted in a restrictive way."⁸⁸

Additionally, Nicaragua argued that the charge for the tourist card was not a toll but a "measure of migration control".⁸⁹

3.18. On 22 March 1994 the Nicaraguan Government stopped charging Costa Rican nationals for the tourist card, although the charge remained in respect of other foreign nationals on Costa Rican vessels.⁹⁰ Costa Rica continued to reject the charge in its modified version.⁹¹

3.19. As a result of the imposition of the charge, all Costa Rican vessels were obliged to stop at the Nicaraguan Army posts. There were several incidents where Costa Rican vessels that did not stop were shot at. For example, on 6 March 1994 a Nicaraguan Army officer with an AK-47 shot at three Costa Rican boats.⁹² Costa Rica protested this action and requested that Costa Rica's

⁸⁶ This note is referred to in the note from Nicaraguan Foreign Minister, Ernesto Leal, to Costa Rican Foreign Minister, Bernd Niehaus Quesada, Note No. 940284, 21 March 1994: Annexes, Vol 3, Annex 48, which records Costa Rica's objection.

⁸⁷ Nicaraguan Foreign Minister, Ernesto Leal, to Costa Rican Foreign Minister, Bernd Niehaus Quesada, Note No. 940284, 21 March 1994: Annexes, Vol 3, Annex 48.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ "Foreign Ministers will analyze the transit on the San Juan River", *La Nación*, San José, 13 April 1994: Annexes, Vol 5, Annex 129.

⁹¹ "Niehaus rules out arbitration", *La Nación*, San José, 20 April 1994: Annexes, Vol 5, Annex 130.

⁹² "Ticos were machine-gunned at the San Juan River", *La Nación*, San José, 8 March 1994: Annexes, Vol 5, Annex 124.

rights to free and perpetual navigation on the San Juan be respected.⁹³ Although Nicaragua responded that the tourism card would be charged only to foreigners from third countries⁹⁴ and not to Costa Ricans, the charges continued intermittently.

3.20. A new Costa Rican administration was inaugurated on 8 May 1994 and continued to pursue a settlement of the dispute. As an outcome of high level contacts, on 5 June 1994, the Ministers of Tourism of Costa Rica and Nicaragua signed two Agreements of Understanding. One of these was general in scope; the other dealt specifically with tourism activity on the San Juan.⁹⁵ By the Agreement of Understanding on the Tourist Activity in the Border Zone of the San Juan River, both Ministers agreed to develop joint sustainable tourism in the San Juan area, with the aim of establishing a zone of free transit between the two countries and of promoting mutual investment and coordinated development. Through this Agreement, it was recognized that both countries could establish controls on their own vessels carrying out tourist activities. Unfortunately neither of these Agreements was implemented.

C. Nicaragua's violations from 1998 to the present

3.21. Until July 1998 Costa Rica enjoyed free navigation of official vessels and official personnel carrying their service arms on the San Juan. The prohibition by Nicaragua of Costa Rica's free navigation by official personnel and official vessels in July 1998 was unilateral and in breach of Costa Rica's rights, as further particularised in Chapter 4.

3.22. Nicaragua did not communicate its decision to prohibit navigation by official Costa Rican vessels and personnel carrying their service arms through regular channels. On 14 July 1998 a Nicaraguan Army officer came to Costa

⁹³ "Costa Rica demands Nicaraguans to withdraw charge on the San Juan", *La República*, San José, 17 March 1994: Annexes, Vol 5, Annex 128.

⁹⁴ Nicaraguan Foreign Minister, Ernesto Leal, to Costa Rican Foreign Minister, Bernd Niehaus Quesada, Note No. 940284, 21 March 1994: Annexes, Vol 3, Annex 48.

⁹⁵ Agreement of Understanding between the Ministries of Tourism of the Republic of Costa Rica and the Republic of Nicaragua, Barra del Colorado, Costa Rica, 5 June 1994: Annexes, Vol 2, Annex 25; and Agreement of Understanding between the Ministries of Tourism of the Republic of Costa Rica and the Republic of Nicaragua on the tourist activity in the border zone of the San Juan River, 5 June 1994, Barra del Colorado, Costa Rica: Annexes, Vol 2, Annex 26.

Rican territory and informed Costa Rican police officials that from that day on they would require express permission to navigate the San Juan carrying their service arms.⁹⁶

3.23. After the Nicaraguan decision was made known to Costa Rica, the Government of Costa Rica initiated a number of high level contacts with the Nicaraguan authorities through the Ministry of Public Security. As a result, Costa Rica announced that the Nicaraguan authorities had lifted the restrictions imposed on Costa Rican navigation, in consequence of what was perceived to be an understanding reached on 16 July 1998.⁹⁷ Despite this announcement, the restrictions continued. On 30 July 1998, the Nicaraguan Minister of Defence, Mr Jaime Cuadra and the Costa Rican Minister of Public Security, Mr Juan Rafael Lizano concluded an agreement, known as the Cuadra-Lizano Joint Communiqué. It provided for navigation of Costa Rican police vessels carrying service arms, and that Costa Rica would give notice to the Nicaraguan authorities who could accompany the Costa Rican police vessels if they chose to. It was acknowledged that Costa Rican police vessels could navigate the River even if the Nicaraguan authorities failed to accompany them.⁹⁸ On 11

⁹⁶ In a report by the Costa Rican Atlantic Police Command, the notification of Nicaragua's prohibition was recorded in the following way:

"By July 14 of 1998, at the 15:10 hours, First Lieutenant Álvaro Ríos Cárdenas came to the Delta Costa Rica Police Post, named Delta No. 7. Mr. Ríos identified himself as the Chief of the Nicaraguan Army Post located at the Nicaragua delta in front of the Costa Rican Post and he presented himself to Inspector William Herrera-Chávez, who was the Chief of the Costa Rican Atlantic Command Police Unit and he informed him verbally that the reason of his visit was to inform him of the instructions given to him by Colonel Lieutenant Orlando Talavera, Chief of the South Detachment of the Nicaraguan Army, and that the passage through the San Juan River is banned as of that time and date for any Costa Rican authority." See Intendent Commander in service of the Atlantic Command, Sarapiquí, Daniel Soto Montero, to Costa Rican Foreign Ministry, 14 February 2006: Annexes, Vol 6, Annex 240. This incident was also recorded by the press: "Nicaragua unbending with Police", *La Nación*, San José, 23 July 1998: Annexes, Vol 5, Annex 136.

⁹⁷ "Prohibition lifted", *La Nación*, San José, 17 July 1998: Annexes, Vol 5, Annex 134. In this press article, the Nicaraguan Defence Minister was quoted as saying that "everything will be normalized as it had been occurring for many years." Furthermore, it was reported that: "a similar opinion was issued yesterday by Nicaraguan Commander-in-Chief, General Joaquín Cuadra, according to AFP, who stated that the incident 'is nothing more than a misunderstanding regarding the manner in which military vessels must transit on the river.'"

⁹⁸ Cuadra-Lizano Joint Communiqué, 30 July 1998: Annexes, Vol 2, Annex 28. During the press conference which followed the signing of the Communiqué, the Nicaraguan Minister of Defence stated that "Costa Rica has always travelled on the river and they are not being denied the right to travel on it and no one is taking away the fact that the river belongs to Nicaragua", thereby acknowledging Costa Rica's continuous exercise of its navigational rights, "Border agreement with Nicas", *La Nación*, San José, 31 July 1998: Annexes, Vol 5, Annex 141. The President of Nicaragua explained the contents of the Joint Communiqué as follows: "this is neither an agreement nor anything that has an obligatory sense, it is only a communiqué that serves as a guideline between two neighbouring countries that face a misunderstanding": "Agreement criticized: new practices can be dangerous", *La Prensa*, Managua, 1 August 1998: Annexes, Vol 5, Annex 144. Evidently the Nicaraguan understanding at the time was not that Costa Rican police had misused Costa Rica's navigational rights by carrying their service arms whilst transiting the San Juan, but rather that the whole issue was due to a misunderstanding between Nicaraguan military authorities and Costa Rican police authorities which the Joint Communiqué was intended to solve.

August 1998, just a few days after the Nicaraguan President had publicly defended the agreement,⁹⁹ Nicaragua declared that it considered the Cuadrilatero Joint Communiqué to be null and void.¹⁰⁰ Costa Rica did not accept this unilateral declaration.¹⁰¹ The dispute in respect of police navigation with service weapons remained unresolved.

3.24. After the situation with the navigation of official personnel and official vessels deteriorated, Nicaragua accelerated the imposition of restrictions and charges on Costa Rican navigation. By 2001, Nicaragua had imposed a so-called “departure clearance certificate” (“*derecho de zarpe*”) of US\$25, charged only on Costa Rican vessels navigating the San Juan River. It had also re-established a US\$5 charge for a tourism card and an immigration tax of US\$4 for Costa Ricans. Further, Nicaragua required that all Costa Rican vessels stop at every Nicaraguan Army post along the River for inspection, permission to proceed and the payment of those charges.¹⁰²

3.25. For a period Nicaragua also imposed an obligation to use the Nicaraguan flag, a measure that was re-imposed in October 2005 in response to Costa Rica instituting these proceedings before the International Court of Justice.¹⁰³

⁹⁹ “Nicaragua forfeited”, *La Prensa*, Managua, 31 July 1998: Annexes, Vol 5, Annex 142. The Nicaraguan President is quoted as saying that he “...justified the new position adopted by Nicaragua because they recognized our sovereignty... I believe that what we have done is to place stairs so that they can get out of the storm, which, in many cases, was the media’s storm. We haven’t yielded at any time; they must consult and notify us to navigate in such a way.”

¹⁰⁰ Acting Nicaraguan Foreign Minister, Carlos Gurdíán Debayle, to Costa Rican Foreign Minister, Roberto Rojas, Note No. VM/08/0685/98, 11 August 1998: Annexes, Vol 3, Annex 49.

¹⁰¹ Costa Rican Foreign Minister, Roberto Rojas, to Acting Nicaraguan Foreign Minister, Carlos R. Gurdíán Debayle, Note No. DM- 097-98, 12 August 1998: Annexes, Vol 3, Annex 50.

¹⁰² Costa Rican Deputy Foreign Minister, Elayne Whyte, to Nicaraguan Foreign Minister, Francisco Xavier Aguirre Sacasa, Note No. DVM-111-01, 18 April 2001: Annexes, Vol 3, Annex 70; Costa Rican Foreign Minister, Roberto Rojas to Nicaraguan Foreign Minister, Francisco Xavier Aguirre, Note No. DM-207-2001, 9 May 2001: Annexes, Vol 3, Annex 71; Affidavit of Notary Sergio Gerardo Ugalde Godínez, 5 May 2001: Annexes, Vol 4, Annex 83.

¹⁰³ Costa Rican Foreign Minister, Roberto Tovar Faja, to Nicaraguan Foreign Minister, Norman Caldera Cardenal, Note No. DM-484-05, 20 October 2005: Annexes, Vol 3, Annex 81; Mr Jorge Lao Jarquín and Mr Santos Arrieta Flores to Costa Rican Foreign Minister Tovar, 22 November 2005: Annexes, Vol 6, Annex 238; Municipal Mayor of San Carlos, Costa Rica, Lic Alfredo Córdoba Soro, to Director of Foreign Policy, Costa Rican Foreign Ministry, Lic José Joaquín Chaverri Seevers, Note No. AM-1315-2005, 18 October 2005: Annexes, Vol 6, Annex 235; “Nicaragua conditions passing of Costa Rican vessels”, *La Nación*, San José, 16 October 2005: Annexes, Vol 5, Annex 185; “Costa Rican vessels will bear the Nicaraguan Flag”, *La Prensa*, Managua, 17 October 2005: Annexes, Vol 5, Annex 186; “Nicaragua demands a Visa and Passport on the River”, *La Nación*, San José, 30 October 2005: Annexes, Vol 5, Annex 189; “Costa Rican Foreign Affairs Minister seeks dialogue regarding visas and flags”, *El Nuevo Diario*, Managua, 1 November 2005: Annexes, Vol 5, Annex 190.

3.26. Additionally, in response to Costa Rica instituting these proceedings before the Court, since October 2005 Nicaragua imposed an obligation on all Costa Ricans to obtain a visa in order to enter Nicaraguan territory and made this a requirement for navigating the San Juan.¹⁰⁴ Thus Costa Ricans are required to obtain and carry a passport bearing a Nicaraguan visa in order to use the San Juan, even when transiting from one part of Costa Rican territory to another.

3.27. Nicaragua also re-imposed timetables for navigation on the San Juan. Costa Rican vessels are not allowed to navigate between 5 pm and 6 am.¹⁰⁵

3.28. Additionally, Nicaraguan authorities have banned Costa Rican residents of the Costa Rican bank area from fishing for subsistence purposes on the River. This ban is being enforced by measures including detention of those fishing or carrying fish and the seizure of their belongings including their boats, a measure which effectively also denies their right to navigate on the River.¹⁰⁶

3.29. More recently Nicaragua has declared, through its Foreign Minister, that navigation by local Costa Rican residents was allowed by Nicaragua as a courtesy but not as of right.¹⁰⁷ In Nicaragua's view, navigation for communication purposes, such as going to school, health centres, shopping or simple communication between towns and peoples, was not for purposes of commerce: such activities might be permitted as a courtesy but could be prohibited at any time.¹⁰⁸

¹⁰⁴ Nicaragua requires Costa Ricans entering Nicaraguan territory to obtain a consular visa: Decree No. 70-2005, 12 October 2005, amending Decree No. 57-2005, 31 August 2005. Prior to 12 October 2005, Costa Ricans did not require a visa to enter Nicaraguan territory.

¹⁰⁵ See Affidavit of 5 May 2001: Annexes, Vol 4, Annex 83.

¹⁰⁶ See Affidavit of Leonel Morales Chacón, 6 July 2006: Annexes, Vol 4, Annex 106; Affidavit of Erick Maikol Martínez Lopez, 6 July 2006: Annexes, Vol 4, Annex 107; Affidavit of Victor Julio Vargas Hernández, 6 July 2006: Annexes, Vol 4, Annex 105; Affidavit of Josefa Alvarez Aragon, 6 July 2006: Annexes, Vol 4, Annex 109; and Affidavit of Jose Moreno Rojas, 6 July 2006: Annexes, Vol 4, Annex 108.

¹⁰⁷ Nicaraguan Foreign Minister, Norman Caldera Cardenal, to Costa Rican Foreign Minister, Roberto Tovar Faja, Note No. MRE/DM-JI/1284/11/05, 9 November 2005: Annexes, Vol 3, Annex 82.

¹⁰⁸ *Ibid.*

D. Attempts by Costa Rica to resolve the dispute

3.30. Costa Rica has proposed diplomatic solutions to Nicaragua on many occasions, including the use of available mechanisms of peaceful resolution, such as mediation through the Organization of American States, by other Latin American States, the European Union or Spain, and international arbitration. The Government of Nicaragua has rejected all these proposals.

3.31. In respect of the dispute concerning navigation of the River by Costa Rican police, on 30 July 1998 the Cuadra-Lizano Joint Communiqué was signed. However, as noted above, on 11 August 1998 the Minister of Foreign Affairs of Nicaragua communicated to the Minister of Foreign Affairs of Costa Rica that Nicaragua rejected the Cuadra-Lizano Joint Communiqué and its contents.¹⁰⁹ Costa Rica did not accept this unilateral declaration and by note of 12 August 1998, it affirmed its intent to search for a diplomatic solution.¹¹⁰ Nicaragua responded on 28 August 1998, but made no concrete suggestion, nor did it propose another meeting.¹¹¹

3.32. On 8 October 1998 the Deputy Ministers of Foreign Affairs of Costa Rica and Nicaragua met in El Salvador. Costa Rica proposed mediation of the European Union to resolve the dispute, a proposal immediately rejected by Nicaragua.¹¹²

3.33. On 11 May 1999 the Costa Rican Deputy Foreign Minister sent a note and a draft proposal to his Nicaraguan counterpart, requesting that formal

¹⁰⁹ Acting Nicaraguan Foreign Minister, Carlos R. Gurdíán Debayle, to Costa Rican Foreign Minister, Roberto Rojas López, Note No. VM/08/0685/98, 11 August 1998: Annexes, Vol 3, Annex 49.

¹¹⁰ Costa Rican Foreign Minister, Roberto Rojas López, to Nicaraguan Foreign Minister by Law, Carlos R. Gurdíán Debayle, Note No. DM-097-98, 12 August 1998: Annexes, Vol 3, Annex 50. It states:

"...In regard to the comment made in your letter referring to your Illustrious Government's willingness to work based on the international legal documents that determine Nicaragua's and Costa Rica's rights on the San Juan River, I should like to reiterate that Costa Rica has never intended to exercise any rights other than those granted by said instruments and, in this respect, it reiterates its readiness to maintain the channels of negotiation that should always exist between sister nations: open, insofar as Nicaragua is equally willing and prepared to appoint appropriately authorized persons to carry out negotiations. In view of the above, I would like to request Your Excellency to indicate the steps which should be taken in order that the goodwill expressed in your letter may result in the appropriate resolution to this dispute."

¹¹¹ Nicaraguan Acting Foreign Minister, Carlos Roberto Gurdíán, to Costa Rican Foreign Minister, Roberto Rojas, Note No. MRE/98/02638, 28 August 1998: Annexes, Vol 3, Annex 51.

¹¹² "Ticos requested European mediation", *La Tribuna*, Managua, 9 October 1998: Annexes, Vol 5, Annex 153.

negotiations recommence.¹¹³ Although Nicaragua acknowledged receipt of the note,¹¹⁴ it did not respond to Costa Rica's proposal, nor did it make any counter-proposal.

3.34. The Deputy Ministers of Foreign Affairs of both countries met in August 1999 in Miami, and in December 1999 in San José, but again no agreement was reached.¹¹⁵

3.35. In the context of a maritime delimitation negotiation between Costa Rica and Nicaragua, it was proposed that the issue of the San Juan River dispute be discussed once again.¹¹⁶ In a meeting between the Deputy Ministers of Foreign Affairs of both countries, held in Managua on 16 February 2000 a draft proposal was accepted.¹¹⁷ This proposal was discussed by the Ministers of Foreign Affairs of both countries when they met on the occasion of the Ninth EU-Rio Group Summit which took place on 24 February 2000 in Portugal.¹¹⁸ Both Ministers indicated their approval, but the Nicaraguan Minister requested more time to examine the draft agreement. A few days later Nicaragua sent a drastically modified version of the draft agreement previously approved by the Deputy Ministers. A Costa Rican counter-proposal, more consistent with the draft which had been originally accepted by the Deputy Ministers, was rejected in its entirety by Nicaragua.

3.36. In this context, on 3 March 2000 the Government of Costa Rica requested the assistance of the Organization of American States (OAS) to find

¹¹³ Costa Rican Deputy Foreign Minister, Walter Niehaus, to Nicaraguan Deputy Foreign Minister, Guillermo Argüello Poessy, Note No. DVM: 607-99, 11 May 1999: Annexes, Vol 3, Annex 54.

¹¹⁴ Nicaraguan Deputy Foreign Minister, Guillermo Argüello Poessy, to Costa Rican Deputy Foreign Minister, Walter Niehaus, Note No. MRE/99/01347, 12 May 1999: Annexes, Vol 3, Annex 55.

¹¹⁵ See Affidavit of Walter Niehaus Bonilla, 23 February 2006: Annexes, Vol 4, Annex 104.

¹¹⁶ Costa Rican Foreign Minister, Roberto Rojas López, to Nicaraguan Foreign Minister, Eduardo Montealegre, Note No. DM 015-2000, 21 January 2000: Annexes, Vol 3, Annex 56; and the Nicaraguan response: Nicaraguan Foreign Minister, Eduardo Montealegre, to Costa Rican Foreign Minister, Roberto Rojas López, Note No. MRE/DM/3882/01/00, 28 January 2000: Annexes, Vol 3, Annex 57; Costa Rican Foreign Minister, Roberto Rojas López, to Nicaraguan Foreign Minister, Eduardo Montealegre, Note No. DM-079-2000, 15 February 2000: Annexes, Vol 3, Annex 58; and the Nicaraguan response: Nicaraguan Foreign Minister, Eduardo Montealegre, to Costa Rican Foreign Minister, Roberto Rojas López, Note MRE/DM/3965/02/00, 16 February 2000: Annexes, Vol 3, Annex 59.

¹¹⁷ Affidavit of Walter Niehaus Bonilla, 23 February 2006: Annexes, Vol 4, Annex 104.

¹¹⁸ IX Ministerial Summit, European Union and Group of Rio, 24 February 2000, Vilamoura, Portugal.

a solution to the dispute.¹¹⁹ The Permanent Council of the OAS convened an emergency meeting on 8 March 2000 where both countries were given the opportunity to address the Council and express their respective positions. Costa Rica's address to the Permanent Council gave an overview of Nicaragua's actions and of the steps taken by Costa Rica to resolve the differences, including the importance of resorting to the appropriate mechanisms of the Inter-American system, in particular mediation and arbitration.¹²⁰ The Nicaraguan Foreign Minister's speech focused on the inapplicability of the Inter-American system in relation to the dispute.¹²¹ With the support of the Permanent Council it was agreed that the Secretary General of the OAS would seek to facilitate negotiations between the two governments.¹²² Consequently, meetings took place in Washington, D.C., Managua and San José. At the last of those meetings, on 3 April 2000 in San José, it was announced that, despite the good offices and active involvement of the OAS Secretary General, no agreement to resolve the dispute could be reached and that the dispute remained unresolved.¹²³

3.37. The good offices of the OAS having failed, the Costa Rican Foreign Minister proposed recourse to mediation by letter of 10 April 2000.¹²⁴ The Nicaraguan Foreign Minister responded by letter on 6 May 2000, rejecting Costa Rica's proposal.¹²⁵ Costa Rica replied on 22 May 2000, emphasising that there was a significant divergence of opinion between Costa Rica and Nicaragua as to the substance of the dispute and its efforts to seek a resolution.¹²⁶

¹¹⁹ "Costa Rica declares bilateral dialogue exhausted, Government requests mediation by the OAS", *Press Release, Press Office of the Ministry of Foreign Affairs of Costa Rica*, 3 March 2000: Annexes, Vol 5, Annex 156. See also Permanent Representative of Costa Rica to the Organization of American States, Amb. Hernan R. Castro, to President of the Permanent Council of the Organization of American States, James Schofield Murphy, 3 March 2000: Annexes, Vol 3, Annex 60.

¹²⁰ Costa Rican Foreign Minister Roberto Rojas López, Statement to the Permanent Council of the Organization of American States, 8 March 2000, OEA/Ser.G CP/ACTA 1224/00: Annexes, Vol 6, Annex 228.

¹²¹ Nicaraguan Foreign Minister Eduardo Montealegre, Statement to the Permanent Council of the Organization of American States, 8 March 2000, OEA/Ser.G CP/ACTA 1224/00: Annexes, Vol 6, Annex 229.

¹²² "OAS Secretary General Facilitates Reinitiating Dialogue between Costa Rica and Nicaragua", *Press Release of the Organization of American States, Washington, D.C.*, 8 March 2000: Annexes, Vol 5, Annex 158. See also "Costa Rica forced to accept the dominion of Nicaragua over the San Juan", *La Noticia*, Managua, 17 March 2000: Annexes, Vol 5, Annex 159.

¹²³ "Dialogue regarding River at a dead end," *La Nación*, San José, 4 April 2000: Annexes, Vol 5, Annex 161.

¹²⁴ Costa Rican Foreign Minister, Roberto Rojas López, to Nicaraguan Foreign Minister, Eduardo Montealegre, Note No. DM- 125-2000, 10 April 2000: Annexes, Vol 3, Annex 61.

¹²⁵ Nicaraguan Foreign Minister, Eduardo Montealegre, to Costa Rican Foreign Minister, Roberto Rojas López, Note No. MRE/DM/4366/04/00, 6 May 2000: Annexes, Vol 3, Annex 62.

¹²⁶ Costa Rican Foreign Minister, Roberto Rojas López, to Nicaraguan Foreign Minister, Eduardo Montealegre, Note No. DM-165-2000, 22 May 2000: Annexes, Vol 3, Annex 63.

3.38. Despite unsuccessful diplomatic efforts to resolve the dispute, the President of Costa Rica continued to attempt to reach an effective solution with his Nicaraguan counterpart. The two Presidents met in private on the occasion of a multilateral meeting in Panama City on 17 June 2000,¹²⁷ when the Nicaraguan President requested a proposal.¹²⁸ In view of that request the Costa Rican President felt there was a chance finally to resolve the dispute.¹²⁹ Subsequently, in a letter dated 28 June 2000, he proposed a compromise formula which would have permitted navigation by Costa Rican police carrying their service arms, who would give prior notice to the Nicaraguan authorities.¹³⁰ The President of Nicaragua responded on 29 June 2000, stating that Nicaragua agreed to allow "...the Costa Rican police authorities to navigate that part of the river, with the acquiescence, in each case, of the Nicaraguan authorities".¹³¹ The President of Costa Rica responded on 29 July 2000, setting out the difficulties encountered by the Costa Rican Minister of Public Security with his Nicaraguan counterpart in attempts to re-establish a *modus operandi*.¹³² In his reply of 3 August 2000, the President of Nicaragua insisted that his proposed formula required the "acquiescence" of the Nicaraguan authorities on each occasion.¹³³

3.39. Consequently negotiations were stalled. Costa Rica communicated with Nicaragua on each occasion when Nicaragua violated its rights of free navigation;¹³⁴ the Nicaraguan replies tended to assert its sovereignty as taking

¹²⁷ President of Costa Rica, Miguel Angel Rodríguez Echeverría, to the President of Nicaragua, Arnaldo Alemán Lacayo, 28 June 2000: Annexes, Vol 3, Annex 64.

¹²⁸ "Nicaragua asks for a Costa Rican proposal", *La Nación*, San José, 18 June 2000: Annexes, Vol 5, Annex 163.

¹²⁹ Another follow up meeting took place on 29 June 2000, in Mexico City. As result of the verbal exchanges between the two Presidents, it was felt that an agreement had been finally reached. However, as the correspondence of 29 June 2000 and 29 July 2000 demonstrates, no agreement was reached: see President of Nicaragua, Arnaldo Alemán Lacayo, to President of Costa Rica, Miguel Angel Rodríguez, 29 June 2000: Annexes, Vol 3, Annex 65; President of Costa Rica, Miguel Angel Rodríguez, to President of Nicaragua, Arnaldo Alemán Lacayo, 29 July 2000: Annexes, Vol 3, Annex 66.

¹³⁰ President of Costa Rica, Miguel Angel Rodríguez, to President of Nicaragua, Arnaldo Alemán Lacayo, 28 June 2000: Annexes, Vol 3, Annex 64.

¹³¹ President of Nicaragua, Arnaldo Alemán Lacayo, to President of Costa Rica, Miguel Angel Rodríguez, 29 June 2000: Annexes, Vol 3, Annex 65.

¹³² President of Costa Rica, Miguel Angel Rodríguez, to President of Nicaragua, Arnaldo Alemán Lacayo, 29 July 2000: Annexes, Vol 3, Annex 66.

¹³³ President of Nicaragua, Arnaldo Alemán Lacayo, to President of Costa Rica, Miguel Angel Rodríguez, 3 August 2000: Annexes, Vol 3, Annex 67.

¹³⁴ For example, Costa Rican Deputy Foreign Minister, Elayne Whyte, to Nicaraguan Foreign Minister, Francisco Xavier Aguirre Sacasa, Note No. DVM- 111-01, 18 April 2001: Annexes, Vol 3, Annex 70. See also Costa Rican Foreign Minister, Roberto Rojas López, to Nicaraguan Foreign Minister, Francisco Xavier Aguirre Sacasa, Note No. DM-207-2001, 9 May 2001: Annexes, Vol 3, Annex 71.

priority over Costa Rica's rights, or simply denied Costa Rica's rights altogether. In a letter of 9 May 2001, Costa Rica proposed that both countries jointly resort to international law to resolve the dispute by way of mediation.¹³⁵ On a visit to the San Juan on 10 May 2001, the President of Nicaragua rejected any such possibility. He stated: "We have nothing to do in an international organisation. Nothing, nothing."¹³⁶ Eventually, on 3 August 2001, the Nicaraguan Foreign Minister responded to Costa Rica's letter of 9 May,¹³⁷ almost three months after its receipt. In this communication, it was stated that Nicaragua would persist in charging all vessels for "the departure clearance service (*"servicio del derecho de zarpe"*) that both Nicaraguan and foreign vessels in any Nicaraguan port, including those located in the said river, are charged when travelling to another State". There was no response to Costa Rica's request for mediation nor did Nicaragua suggest any other diplomatic means to resolve the dispute. On 26 September 2001, Costa Rica's Foreign Minister responded, stating once again Costa Rica's willingness to continue a diplomatic effort. He stated: "...I trust that, despite the differences, we may dialogue in greater depth in the search for adequate solutions."¹³⁸

3.40. On 23 October 2001, the Government of Nicaragua presented a reservation to its declaration of acceptance under article 36 of the Statute of the International Court of Justice, intended to avoid the jurisdiction of the Court in cases based on the interpretation of treaties or awards concluded on or before 31 December 1901.¹³⁹

3.41. Nicaraguan elections took place in November 2001 and a new Government was inaugurated in January 2002. Costa Rica proposed that the

¹³⁵ Costa Rican Foreign Minister, Roberto Rojas López, to Nicaraguan Foreign Minister, Francisco Xavier Aguirre Sacasa, Note No. DM-207-2001, 9 May 2001: Annexes, Vol 3, Annex 71.

¹³⁶ "Nicaragua rejects arbitration", *La Nación*, San José, 11 May 2001: Annexes, Vol 5, Annex 171. As reported by the press, on this occasion Nicaragua prohibited all Costa Rican navigation on the San Juan River for about half a day.

¹³⁷ Nicaraguan Foreign Minister, Francisco Xavier Aguirre Sacasa, to Costa Rican Foreign Minister, Roberto Rojas López, Note No. DRE/DM-JI/0818/08/01, 3 August 2001: Annexes, Vol 3, Annex 72.

¹³⁸ Costa Rican Foreign Minister, Roberto Rojas López, to Nicaraguan Foreign Minister, Francisco Xavier Aguirre Sacasa, Note No. DM 355- 2001, 26 September 2001: Annexes, Vol 3, Annex 73.

¹³⁹ Declaration Recognizing as Compulsory the Jurisdiction of the International Court of Justice, under Article 36, Paragraph 2, of the Statute of the Court, Nicaragua Reservation, UN Reference C.N.1157.2001.Treaties-I, 5 December 2001: Annexes, Vol 6, Annex 231. This reservation was objected to by Costa Rica on 18 December 2001, UN Doc. A/56/770, 1 February 2002: Annexes, Vol 6, Annex 232.

Presidents of Costa Rica and Nicaragua meet, and they did so on 27 February 2002.¹⁴⁰ The outcome was a recommendation to re-initiate dialogue between the two countries. Thus the Minister of Foreign Affairs of Costa Rica proposed in a letter of 11 March 2002 that the two governments jointly request the good offices of an impartial third party, recommending the mediation of H.M. the King of Spain.¹⁴¹

3.42. In his response of 23 April 2002, the Nicaraguan Foreign Minister did not comment on Costa Rica's proposal; instead he expressed willingness to hold discussions at the Ministerial level.¹⁴² On 2 May 2002, Costa Rican Foreign Minister Rojas announced that he had recommended that President Rodríguez file an application before the International Court of Justice, as the only possible means to resolve the dispute. In response, President Bolaños of Nicaragua requested President Rodríguez not to act on this advice but to allow the newly elected President of Costa Rica, President Pacheco, the opportunity to continue negotiations.¹⁴³

3.43. When the new Costa Rican Government took office in May 2002, there was a sense that a new start could be made, on this and other issues.¹⁴⁴ On 16 June 2002, the Presidents of Costa Rica and Nicaragua met in Managua in order to discuss the possibility of a diplomatic solution to the dispute.¹⁴⁵ Nicaragua demonstrated a renewed disposition to hold talks but nothing more.

3.44. Given the time constraints that the Nicaraguan reservation of 23 October 2001 could place on the Court's jurisdiction and given Costa Rica's desire to negotiate without the pressure of a time limit, the Costa Rican Foreign Minister, by letter dated 5 August 2002, requested that Nicaragua withdraw the reservation.¹⁴⁶ Nicaragua did not answer that letter. The Costa Rican Foreign

¹⁴⁰ "Bolaños sees a solution about the San Juan", *La Nación*, San José, 28 February 2002: Annexes, Vol 5, Annex 172.

¹⁴¹ Costa Rican Foreign Minister, Roberto Rojas López, to Nicaraguan Foreign Minister, Norman Caldera Cardenal, Note No. DM-030-2002, 11 March 2002: Annexes, Vol 3, Annex 74.

¹⁴² Nicaraguan Foreign Minister, Norman Caldera Cardenal, to Costa Rican Foreign Minister, Roberto Rojas López, Note No. MRE/DM-JI/481/04/02, 23 April 2002: Annexes, Vol 3, Annex 75.

¹⁴³ "Bolaños prefers to deal with Pacheco on the San Juan case", *La Prensa*, Managua, 3 May 2002: Annexes, Vol 5, Annex 173.

¹⁴⁴ An account of the improved relations can be seen in Nicaraguan Foreign Minister, Norman Caldera Cardenal, to Minister of Governance of Nicaragua, Arturo Harding, Note No. MRE/DM-JI/0680/05/2, 27 May 2002: Annexes, Vol 6, Annex 233.

¹⁴⁵ "Costa Rica defends dialogue", *Al Día*, San José, 17 June 2002: Annexes, Vol 5, Annex 176.

¹⁴⁶ Costa Rican Foreign Minister, Roberto Tovar Faja, to Nicaraguan Foreign Minister, Norman Caldera, Note No. DM-202-2002, 5 August 2002: Annexes, Vol 3, Annex 79.

Minister continued to propose alternatives to avoid proceedings before the International Court of Justice. Eventually the Foreign Ministers signed an Agreement, witnessed by the Presidents of both countries, agreeing to “freeze” for three years the situation as to Nicaragua’s acceptance of the jurisdiction of the Court. The Tovar-Caldera Agreement of 26 September 2002 was intended to permit other areas of the bilateral agenda to be advanced, regardless of the ongoing dispute relating to the San Juan.¹⁴⁷

3.45. The Tovar-Caldera Agreement was an important step towards improving bilateral relations. It underlined the acknowledgment, made by the President of Nicaragua, that his country “recognizes” the International Court of Justice, and kept open recourse to the Court by suspending the entry into force of Nicaragua’s new reservation, while maintaining intact the respective legal positions of the parties.¹⁴⁸

3.46. After the Tovar-Caldera Agreement was concluded, both countries engaged on an ambitious bilateral and regional agenda. There were negotiations on a maritime boundary agreement between Costa Rica and Nicaragua, the signing of a free trade agreement between Central America and the United States of America and the conclusion of a Cooperation Agreement with the European Union. In addition, the Puebla–Panama Plan, an ambitious border development plan, was signed by the two Foreign Ministers in February 2005.¹⁴⁹ This plan would allow foreign aid to be channelled into social and environmental projects in the under-developed border region.

3.47. Subsequently the issue of Costa Rica’s rights of navigation on the San Juan River was again discussed. The Foreign Ministers took up the matter, and in various meetings held in the months prior to the expiration of the Tovar-Caldera Agreement they tried to settle the dispute but were unsuccessful. In the days leading up to the expiry of the Tovar-Caldera Agreement, the Costa Rican

¹⁴⁷ Tovar-Caldera Agreement, Alajuela, 26 September 2002: Annexes, Vol 2, Annex 29.

¹⁴⁸ “The San Juan Frozen”, *La Prensa*, Managua, 27 September 2002: Annexes, Vol 5, Annex 178.

¹⁴⁹ Trans-border Development Plan, San Juan del Sur, Nicaragua, 17 February 2005. The main objective of this Plan is to contribute to the promotion and the creation of productive, economical, social and institutional opportunities in the border region. With a total of 28 projects, it aims to contribute to the strengthening of the Central American integration process

Ambassador to the Organization of American States met a senior adviser to the Nicaraguan Foreign Minister in order to propose alternatives for a settlement. The Costa Rican Ambassador proposed to his Nicaraguan counterpart that a peaceful settlement could be attained by recourse to mediation, arbitration or resort to a Chamber of the Court. Nicaragua rejected all these proposals.¹⁵⁰

3.48. Thus it became clear that no diplomatic settlement was possible. On 29 September 2005 the Government of the Republic of Costa Rica concluded that it had no alternative than to institute the present proceedings.

3.49. In a letter to the Nicaraguan Foreign Minister, dated 28 September 2005, the Costa Rican Foreign Minister summarised the position in the following terms:

“With the actions resulting from the Agreement that we signed on 26 September, 2002, we have demonstrated through the mechanisms of dialogue and cooperation how much can be achieved in benefit of our countries, both in the bilateral sphere as well as in the process of the Central American integration. At that time we agreed to promote the Central American Free Trade Treaty with the United States of America, the Central American Agreement of Association with the European Union, the Puebla-Panama Plan and a Programme of border development to strengthen the economic and social conditions of the inhabitants of an area that should always be one of cooperation and never one of confrontation. Today, as a result of an atmosphere of respect, fraternity and mutual trust, we have made those aspirations a reality of opportunities, that we must continue increasing. Notwithstanding, despite all the achievements attained, it is also true that, as the abovementioned Agreement expires, the only source of discord between our nations still remains. The views our countries hold in relation to Costa Rica's rights of navigation on the San Juan River have still not been able to be resolved by mutual understanding. Costa Rica acknowledges that the ownership and sovereignty of the San Juan River belong to Nicaragua. But Costa Rica has the right that her navigation on the San Juan River be fully respected, in accordance to what is established in the pertinent legal instruments. Costa Rica does not seek more rights, or less rights, than those granted by said instruments. Why not do away, once and for all, with the only source of discord between Costa Rica and Nicaragua? If our views diverge and have not been able to be reconciled bilaterally, nor by mechanisms of either mediation or arbitration, how can we not accept that at least one of the parties present the matter before the highest international judicial instance in order to overcome, once and for all, our only cause of disagreement? Therefore, I am fulfilling my duty to inform you, and through you to the people of Nicaragua, that Costa Rica has decided to present the case before the International Court of Justice in order that

¹⁵⁰ Affidavit of Javier Sancho Bonilla, 8 February 2006: Annexes, Vol 4, Annex 97.

it may analyze the points of view of our countries and establish the validity of each one of them. To have recourse to the International Court of Justice could never represent a rupture in the friendship between two nations. Both Costa Rica and Nicaragua have accepted the Court as a means of assuring the peaceful coexistence and mutual respect between nations. The resolution of the differences should never be left to irrationality, but to the means of peaceful solution of controversies offered by international law. For this reason, Costa Rica cannot accept any threat as a reprisal for exercising this legitimate right. We approach the International Court of Justice with the sincere intention that its eventual decision will contribute to there never again be a motive for disagreement between Costa Rica and Nicaragua. I sincerely hope that, by this means, we may leave behind, for future generations, fraternal and friendly relations between our countries without any causes that may affect them. This is our historic responsibility.”¹⁵¹

¹⁵¹ Costa Rican Foreign Minister, Roberto Tovar Faja, to Nicaraguan Foreign Minister, Norman Caldera Cardenal, Note No. DM- 462-05, 28 September 2005: Annexes, Vol 3, Annex 80.

Chapter 4

Costa Rica's Navigational and Related Rights

A. Introduction

4.01. The purpose of this Chapter is to present the navigational and related rights of Costa Rica on the San Juan as they result from international law, particularly the Treaty of Limits of 1858 (especially articles IV and VI), 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.¹⁵² The following explanation of these navigational and related rights only concerns rights which are at stake in the present proceedings. It does not address other rights of Costa Rica under treaties in force or any other rules of international law.

4.02. There is no dispute between the parties as to the geographical scope of the rights of navigation recognized to Costa Rica by the Treaty of Limits. This is determined in article VI of the Treaty of Limits as being between the mouth of the river in the Atlantic Ocean and the point located three English miles distant from Castillo Viejo (see **Sketch Map 2** opposite page 7 above). As to this stretch of the San Juan, the rights of navigation of Costa Rica and Nicaragua are described by article VI as "common".

4.03. It is apparently not disputed, either, that the exercise of Costa Rica's rights requires no prior authorization from Nicaragua. What Nicaragua challenges is the scope of those rights, arguing that most of the navigational uses relied on by Costa Rica are not covered by the Treaty of Limits and the Cleveland Award and that these are therefore—according to Nicaragua—subject to its unilateral decision and regulation.¹⁵³

¹⁵² Costa Rica-Nicaragua, Agreement pursuant to Article IV of the Pact of Amity (Fournier-Sevilla), Washington, D.C., 9 January 1956: Annexes, Vol 2, Annex 24.

¹⁵³ In his statement before the Permanent Council of the Organization of American States of 8 March 2000, Nicaraguan Minister of Foreign Affairs Eduardo Montealegre declared: "Any navigation undertaken by Costa Rica in the waters of the San Juan River that does not correspond to the navigation expressly contemplated in the Jerez-Cañas Treaty and the Cleveland Award in force in the part of the river established in the international instruments currently in effect should be expressly authorized by Nicaragua, as the country possessing full sovereignty over the waters of the said river and, as such, able to establish all manner of regulations that, by virtue of the said sovereignty, it deems necessary to establish" (Translation by Costa Rica) OEA/Ser.G CP/ACTA 1224/00, 23: Annexes, Vol 6, Annex 229. See also Acting Nicaraguan Foreign Minister, Carlos Gurdíán, to Costa Rican Foreign Minister, Roberto Rojas López, Note No. MRE/98/02638, 28 August 1998: Annexes, Vol 3, Annex 51.

4.04. Article VI of the Treaty of Limits provides that Costa Rica holds perpetual rights of free navigation on the San Juan. While granting free navigation to Costa Rica, article VI makes no distinction between official and private vessels. Neither are Costa Rica's rights limited to "Costa Rican citizens" or "Costa Rican private boats". Article VI plainly confers rights on Costa Rica as a State. These rights apply without distinction to any vessel sailing to or from Costa Rica, and to passengers and goods on board any such vessel.

4.05. The present chapter proceeds in seven sections:

Section B analyses the general scope of the right of navigation, in particular its "perpetual" and "free" character. It shows that this right cannot be limited, restricted, conditioned or interfered with.

Section C addresses the meaning of the rights of navigation "for the purposes of commerce" ("*con objetos de comercio*"), as set out in article VI of the Treaty of Limits, and demonstrates that this phrase includes freedom of navigation for communication and tourism as well as trade activities such as transport of goods.

Section D turns to the right of Costa Rica to navigate on the lower part of the River where navigation is common, in order to protect commerce and for reasons of revenue control, as set out in the Cleveland Award and the 1916 Judgment of the Central American Court of Justice.

Section E refers to Costa Rica's rights and obligations to safeguard the San Juan and to contribute to its defence, as well as the common bay of San Juan del Norte, and their implications for navigation, in accordance with article IV of the Cañas-Jerez Treaty, the 1916 Judgment and the 1956 Agreement.

Section F explains the right of navigation for re-supply of personnel and relief of border posts on the Costa Rican bank of the River, which is a corollary of the foregoing rights and was acknowledged by the Cuadra-Lizano Joint Communiqué of 30 July 1998.

Section G is devoted to other related rights of Costa Rica with regard to the San Juan. It includes (1) the right of Costa Rican vessels

to land at any part of the bank where navigation is common, as established by article VI of the Cañas-Jerez Treaty; (2) the right of Costa Rica to see Nicaragua making its best efforts and collaborating with Costa Rica in order to facilitate traffic on the San Juan; and (3) the customary rights of fishing by residents of the Costa Rican bank of the River.

B. A perpetual right of free navigation

4.06. The first sentence of article VI of the Treaty of Limits shows the close link between the legal situations of the contracting Parties with regard to the San Juan:

“The Republic of Nicaragua shall have 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 the perpetual right of free navigation on the said waters, between the said mouth and the point, three English miles distant from Castillo Viejo.”

There is an evident interrelation between Nicaragua’s sovereignty over the waters of the San Juan and Costa Rica’s perpetual rights to free navigation. Article VI makes Nicaragua’s dominion and sovereign jurisdiction over the River conditional upon the Costa Rican perpetual rights of free navigation.

4.07. The adjective “perpetual” refers to the temporal dimension of this right. It entails a permanent, continuous, uninterrupted and enduring right. Costa Rica is entitled permanently to enjoy its right to free navigation. Evidently, no temporal limitation to this right is permitted.

4.08. Article VI furthermore establishes the extent and the content of the right: it is one of *free* navigation. The adjective “free” implies that navigation, i.e. movement of persons or goods along the River, shall be unqualified and unconditional. The concept of “free” both at the time of the conclusion of the Treaty of Limits in 1858 and today remains virtually the same. In contemporary dictionaries, “free” was defined as:

"1. Being at liberty; not being under necessity or restraint, physical or moral... 5. Unconstrained; unrestrained; not under compulsion or control ... 8. Not obstructed; as, the water has a *free* passage or channel ... 15. Not encumbered with; as *free* from a burden... 16. Open to all, without restriction or without expense ... 18. Possessing without vassalage or slavish conditions."¹⁵⁴

According to Dr Johnson's dictionary: "1. At liberty; not a vassal; not enslaved; not a prisoner; not dependent... 2. Uncompelled; unrestrained."¹⁵⁵ The word is similarly defined in modern dictionaries. The first meaning of the word "free" provided by the *Oxford Dictionary of English* is the following: "able to act or be done as one wishes; not under the control of another". Other meanings include: "not subject to engagements or obligations", "given or available without charge".¹⁵⁶

4.09. It follows that any limitation imposed upon navigation that by right is "free" constitutes a denial of that right. Unlike other 19th century treaties dealing with rights of fluvial navigation, the 1858 Treaty in no way subordinates the right of navigation of the riparian State: in particular, it contains no language relating to national treatment, domestic regulations or other such conditions. The Act for the Navigation of the Danube signed at Vienna on 7 November 1857 may be cited by way of contrast. Article I provides as follows:

"La navigation du Danube, depuis l'endroit où ce fleuve devient navigable jusque dans la mer Noire, et depuis la mer Noire jusqu'au dit endroit, sera entièrement libre sous le rapport du commerce, tant pour le transport des marchandises que pour celui des voyageurs; en se conformant toutefois aux dispositions du présent Acte de navigation ainsi qu'aux règlements de police fluviale."¹⁵⁷

4.10. In particular, the right of free navigation includes the right for Costa Rican vessels to carry their own flag. This was clearly recognized by Nicaragua when it claimed that American vessels navigating the San Juan

¹⁵⁴ *Webster's Dictionary of the English Language* (London: CA Goodrich, 1848), 480 col 1 (emphasis in original).

¹⁵⁵ Samuel Johnson's *Dictionary of the English Language* (London: HU Todd, London, 1827).

¹⁵⁶ *The Oxford Dictionary of English* (2nd ed., Oxford: Oxford University Press, 2003), 687-8.

¹⁵⁷ 117 CTS 474 (emphasis added). Bilateral treaties also contain similar provisions. To mention but one example: article VI of the Treaty between Brazil and Uruguay modifying their frontiers on Lake Merim and the River Yaguaron of 30 October 1909, 209 CTS 429, provides that "Brazilian and Uruguayan vessels remain... subject, in the jurisdictional waters of each of the two republics, to the fiscal and police regulations which they have established or may hereafter establish."

could not use the American flag. This can be seen from the letter addressed to Secretary of State Seward of the United States of America by the Nicaraguan Minister in Washington, D.C., Luis Molina, on 7 October 1868:

“On the other hand I can assure Your Excellency that the present administration of Nicaragua does not feel disposed to consent that any other flag, except her own and the one of Costa Rica, as bordering state, should float in the navigation of her interior waters; that it considered as unauthorized the use of the United States flag made by the Central American Transit Company.”¹⁵⁸

4.11. Article VI of the Treaty of Limits also creates a fiscal freedom: “no charges of any kind, or duties, shall be collected unless when levied by mutual consent of both Governments.” This clearly means that a distinct and express agreement between the parties would be required in order to levy any charge or duty.

4.12. The Cleveland Award also addressed certain economic aspects of free navigation. Answering points raised by Nicaragua, and on the basis of the interpretation of the 1858 Treaty, the Cleveland Award states in the third point of the *dispositif* that:

“4. The Republic of Costa Rica is not bound to concur with the Republic of Nicaragua in the expenses necessary to prevent the bay of San Juan del Norte from being obstructed; to keep the navigation of the River or Port free and unembarrassed, or to improve it for the common benefit.

5. The Republic of Costa Rica is not bound to contribute any proportion of the expenses that may be incurred by the Republic of Nicaragua for any of the purposes above mentioned.”¹⁵⁹

4.13. As to what constitutes “freedom of navigation”, reference may be made to the decision of the Permanent Court of International Justice concerning that term in the Convention of Saint-Germain en Laye. The Court explained:

“According to the conception universally accepted, the freedom of navigation referred to by the Convention comprises freedom of movement for vessels, freedom to enter ports, and to make use of plant and docks, to load and unload goods and to transport goods and passengers.

¹⁵⁸ Perez Zeledón, *Argument*, 100: Annexes, Vol 6, Annex 207.

¹⁵⁹ Cleveland Award, 22 March 1888, Third point: Annexes, Vol 2, Annex 16.

From this point of view, freedom of navigation implies, as far as the business side of maritime or fluvial transport is concerned, freedom of commerce also. But it does not follow that in all other respects freedom of navigation entails and presupposes freedom of commerce.

What the Government of the United Kingdom is concerned with in this case is the principle of freedom of navigation regarded from the special aspect of the commercial operations inherent in the conduct of the transport business; for that Government has never contended that the impugned measures constituted an obstacle to the movement of vessels.

For this reason the Court—whilst recognizing that freedom of navigation and freedom of commerce are, in principle, separate conceptions—considers that it is not necessary, for the purposes of the present case, to examine them separately.”¹⁶⁰

4.14. The International Law Association’s Helsinki Rules of the Uses of the Waters of International Rivers provides for its part the following definition of “free navigation”:

“‘Free navigation’, as the term is used in this Chapter, includes the following freedom for vessels of a riparian State on a basis of equality:

- (a) freedom of movement on the entire navigable course of the river or lake;
- (b) freedom to enter ports and to make use of plants and docks; and
- (c) freedom to transport goods and passengers, either directly or through transshipment, between the territory of one riparian State and the territory of another riparian State and between the territory of a riparian State and the open sea.”¹⁶¹

4.15. Clearly, a broad interpretation has been adopted. As Charles Rousseau rightly summarized:

“En d’autres termes la liberté de la navigation comprend par définition, à côté de la liberté de circulation sur la voie d’eau, l’activité économique qui en est le corollaire (embarquement, débarquement, transbordement, mise en magasin, voire conclusion de contrats relatifs à ces diverses opérations).”¹⁶²

4.16. Hence, the perpetual right of free navigation includes the unrestricted and permanent right of movement of 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, i.e. “either with Nicaragua or with the

¹⁶⁰ *Oscar Chinn*, Judgment, PCIJ, Series A/B, No 63 (1934), 83.

¹⁶¹ Article XIV, International Law Association, *Report of the Fifty-Second Conference* (Helsinki, 1966), 507.

¹⁶² Charles Rousseau, *Droit international public*, tome IV, Les relations internationales (Paris: Sirey, 1980), 495.

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.”¹⁶³ Costa Rica’s perpetual right of free navigation is a right to navigate freely, without impediments, conditions, restrictions or charges and duties of any kind. Any interference, whether in the form of regulations, impediments, charges, restrictions or any condition that might be imposed, is a violation of this right.

C. The meaning of “*objetos de comercio*”

4.17. In the *Oscar Chinn* case, the Permanent Court also established the link between freedom of navigation and freedom of commerce, a link evidenced by the existence of an impressive numbers of treaties of “commerce and navigation”. Nicaragua itself has invoked one such treaty before this Court, arguing (successfully) for a broad interpretation.¹⁶⁴

4.18. After stipulating the perpetual right of free navigation, article VI of the Treaty of Limits specifies “said navigation being for the purposes of commerce”. In the original Spanish the term is “*con objetos de comercio*”. Thus article VI reads as follows:

“The Republic of Nicaragua shall have 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 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.” (Emphasis added.)

¹⁶³ Treaty of Limits, article VI: Annexes, Vol 2, Annex 7(b).

¹⁶⁴ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, I.C.J. Reports 1986, p. 14 at 135 (para 270).

4.19. It will be noted that the term “purposes of commerce” is annexed to the geographical description, i.e. to the places to which those purposes could be oriented: whether to Nicaragua or to the interior of Costa Rica, through the above-mentioned rivers or from any part of the Costa Rican bank of the San Juan. This formulation does not require that the commerce be linked with any particular destination. Article VI specifies that navigation can be carried out if its destination is Nicaragua, or the interior of Costa Rica, even if the navigation continues to other rivers, and no matter where the navigation from the Costa Rican bank proceeds. In short, Costa Rican navigational rights on the relevant part of the San Juan include *cabotage* or coastal navigation between two Costa Rican points, or navigation between one Costa Rican and one Nicaraguan point, or navigation between two points of the Nicaraguan bank where navigation is common, as well as transit to and from the sea.

(1) “*Objetos*”

4.20. Since 1994,¹⁶⁵ and contrary to its previous position,¹⁶⁶ Nicaragua has challenged the scope of the expression “*con objetos de comercio*” (“for the purposes of commerce”). Nicaragua now contends that this expression must be understood as referring exclusively to *transportation of commercial goods*, so that transportation of persons is excluded. Thus in March 2000, the Nicaraguan Foreign Minister, Mr Eduardo Montealegre, advanced this position before the Permanent Council of the Organization of American States, in the following terms:

“This means that Nicaragua exercises, without any discussion, full sovereignty, control and jurisdiction over the entire course of the San Juan River and that Costa Rica’s rights, which Nicaragua has always respected, are limited to free navigation along a stretch of the river, and only for transporting *objetos de comercio*. This specific provision of the Treaty excludes tourism and other activities.”¹⁶⁷

¹⁶⁵ Nicaraguan Foreign Minister, Ernesto Leal, to Costa Rican Foreign Minister, Bernd Niehaus Quesada, Note No. 940284, 21 March 1994: Annexes, Vol 3, Annex 48.

¹⁶⁶ See Nicaraguan Chargé d’Affaires a.i. to Costa Rica, Oscar R. Téllez, to Costa Rican Foreign Minister, Fernando Volio Jiménez, Note No. E.N. 789/82, 2 August 1982: Annexes, Vol 3, Annex 44.

¹⁶⁷ Translation by Costa Rica (emphasis added). Original text: “Esto quiere decir que Nicaragua ejerce, sin discusión alguna, plena soberanía, control y jurisdicción sobre el río San Juan en toda su extensión, y los derechos de Costa Rica, que Nicaragua siempre ha respetado, se limitan a la libre navegación en un trecho del río y únicamente para el transporte de objetos de comercio. Esta disposición expresa del Tratado excluye el turismo y otras actividades.”: Annexes, Vol 6, Annex 229.

4.21. Nicaragua's new interpretation of this passage in article VI of the Treaty of Limits is contrary to the ordinary meaning of the expression "*objetos de comercio*" in its context and in light of its object and purpose. It is contrary to the *travaux préparatoires* as well as the practice of the Parties with regard to navigation on the River. It is contrary to the position previously adopted by Nicaragua itself.

4.22. The wording "*objetos de comercio*" clearly includes navigation with any commercial goal. The English version submitted by both Parties to President Cleveland was "for the purposes of commerce".¹⁶⁸ "Purposes of commerce" was the wording employed in the Cleveland Award itself. It was also the meaning employed in the English translation of the 1916 judgment of the Central American Court of Justice as published in the *American Journal of International Law*.¹⁶⁹

4.23. The contemporary translation of the Treaty of Limits published in the *British and Foreign State Papers* gives the relevant phrase in article VI as "for commercial purposes".¹⁷⁰ This leads to the same result as there is no relevant difference between "purposes of commerce" and "commercial purposes". So too does the 1898 version published by John Bassett Moore.¹⁷¹ All these translations confirm that "navigation" was intended to include commerce in general, and was not limited to transportation of trade goods.

4.24. The same point was expressed by EP Alexander, the arbitrator appointed by the parties to decide upon conflicts on the demarcation of the boundary established by the Treaty of Limits. He commented in his first award of 30 September 1897: "throughout the treaty, the [San Juan] river is treated and regarded as an outlet of commerce."¹⁷²

¹⁶⁸ See Annexes, Vol 2, Annex 7(b) and Annex 7(c).

¹⁶⁹ Annexes, Vol 2, Annex 21.

¹⁷⁰ 48 BFSP 1049: see Annexes, Vol 2, Annex 7(d).

¹⁷¹ JB Moore, *History and Digest of the International Arbitrations to Which the United States has been a Party* (Washington, D.C.: Government Printing Office, 1898), Vol V, 4706.

¹⁷² Award No. 1, 30 September 1897, *Pasicrisie Internationale 1794-1900* (1902, reprinted Nijhoff, The Hague, 1997), 528, 531: Annexes, Vol 2, Annex 18.

4.25. According to the *Dictionary of the Spanish Language of the Spanish Academy*, the authoritative reference dictionary in the Spanish speaking world, in the edition contemporary to the conclusion of the Treaty of Limits, the term “objeto” means:

“What is perceived with one of the senses, or in regard to which they are exercised. *Objectum*. // It is also called the term or end of the acts of the potencies. *Objectum*. // The purpose or intent to which a thing is directed or pointed at. *Finis, scopus, objetum*. // The matter and the subject of a science; as the object of the theology, which is God. Among the facultatives it is divided in material and formal. The material is referred to the same subject or matter of the faculty, and the formal to its end; as in medicine the material OBJECT is the illness and the formal is the sanity. *Objectum, Vel materiale vel formale facultatis*. //obs. Objection or fault, doubt.//obs. Fault and exception.//Of attribution. Refers to the main or ultimate end to which all acts of the faculty or of the potency are directed, and by extension it is said of other things that are mainly attempted. Attributionis objectum.”¹⁷³

4.26. None of these definitions of the term “objetos” corresponds to “cosa” (thing), nor was the latter the meaning given by the Parties in the Treaty, which is Nicaragua’s current interpretation.

4.27 One of the clearest indications that the use of the word “objetos” was intended to mean “purposes” is provided by the 1858 Treaty itself. Article VI is not the only place where the Treaty uses the word “objetos”. Article VIII reads as follows:

“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 objetos*, sin oír antes la opinión del Gobierno de Costa Rica acerca de los inconvenientes que el negocio pueda tener para los dos países; con tal que esta opinión se emita dentro de treinta días después de recibida la consulta; caso que el de Nicaragua manifieste ser urgente la resolución; y no dañándose en el negocio los derechos naturales de Costa Rica, este voto será consultivo.”¹⁷⁴

¹⁷³ La Academia Española, *Diccionario de la lengua castellana por la Academia Española* (10th edn, Madrid: Imprenta Nacional, 1852), 482. Original in Spanish: “Lo que se percibe con alguno de los sentidos, ó acerca de lo cual se ejercen. *Objectum*. // Se llama también el término ó fin de los actos de las potencias. *Objectum*. // El fin ó intento á que se dirige ó encamina alguna cosa. *Finis, scopus, objectum*. // La materia y el sujeto de una ciencia; como el OBJETO de la teología, que es Dios. Entre los facultativos se divide en material y formal. El material llaman al mismo sujeto ó material de la facultad, y el formal el fin de ella; como en la medicina el OBJETO material es la enfermedad, y el formal la sanidad. *Objectum, vel materiale vel formale facultatis*. // ant. Objeción ó tacha, reparo. // ant, Tacha y excepción. // DE ATRIBUCIÓN. Lllaman al principal ó ultimo fin al cual se dirigen todos los actos de la facultad ó de la potencia, y por extension se dice de otras cosas que principalmente se intentan. Attributionis objectum.”

¹⁷⁴ Annexes, Vol 2, Annex 7(a) (emphasis added).

Clearly, “*objetos*” was used in both articles to mean *purposes*.

4.28 The translation of the Treaty of Limits presented by Costa Rica to Cleveland, which was not contested by Nicaragua, confirms this. Article VIII is translated in the following way:

“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 purposes* without first hearing the opinion of the Government of Costa Rica as to the disadvantages which the transaction might occasion the two countries; provided that the said opinion is rendered within the period of 30 days after the receipt of the communication asking for it, if Nicaragua should have said that the decision was urgent; and, if the transaction does not injure the natural rights of Costa Rica, the vote asked for shall be only advisory.”¹⁷⁵

When speaking of the “*expresados objetos*” (aforesaid purposes), the article refers to the contracts of canalization or transit that Nicaragua may have entered into.

4.29. Thus each text—the original in Spanish and the translation presented to President Cleveland—demonstrates that the word “*objetos*” was employed to mean “purposes” in both instances in which the Treaty employed that term, i.e. in articles VI and VIII.

4.30. Nicaragua’s questions to Arbitrator Cleveland in relation to points which it thought were doubtful and required interpretation show that it also treated the phrase “*objetos de comercio*” as referring to “purposes of commerce”. In a document sent to President Cleveland on 22 June 1887, Nicaragua stated:

“4. Nicaragua consented, by Article IV, that the Bay of San Juan, which always exclusively 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?”¹⁷⁶

¹⁷⁵ Annexes, Vol 2, Annex 7(b) (emphasis added).

¹⁷⁶ Letter from Fernando Guzman to Costa Rican Foreign Minister, “Points Which, According to the Government of Nicaragua, are Doubtful and Require Interpretation, 22 June 1887, reproduced in Pérez Zeledón, *Argument*, 9-11 at 9-10: Annexes, Vol 3, Annex 36 (emphasis added).

4.31. Similarly the fourth of Nicaragua's questions to the arbitrator read as follows:

"If Costa Rica, who, according to Article VI of the treaty, has only the right of free navigation *for the purposes of commerce* in the waters of the San Juan river, can also navigate with men-of-war or revenue cutters in the same waters?"¹⁷⁷

4.32. Thus in arguing that Costa Rica did not have the right to navigate with war vessels, Nicaragua insisted twice that article VI refers to "the purposes of commerce" or to "commercial purposes".¹⁷⁸

4.33. At that time Nicaragua raised before the arbitrator all the issues it had as to the correct interpretation of the Treaty of Limits—and there were several. But in referring to Costa Rica's right of free navigation in the San Juan, Nicaragua had no doubt that the phrase was properly rendered as "purposes of commerce". It furthermore stated that Costa Rica's commerce in the River could not be interfered with. Clearly, Nicaragua did not envisage the possibility that "*objetos de comercio*" should be limited to the transport of "commercial items".

4.34. In subsequent statements Nicaragua also consistently acknowledged that "*objetos de comercio*" represents "*con fines de comercio*", an expression indisputably meaning "for the purposes of commerce" and which cannot be understood as limited to carriage of commercial goods. Official statements made by Nicaragua in 1897, 1954 and 1974 provide examples.

4.35. Thus the Secretariat of the Diet of the Mayor Republic of Central America (of which Nicaragua formed part at that time), protesting against a decree adopted by the Constitutional Congress of Costa Rica which allegedly allowed vessels of all nations to navigate the San Juan with the purpose of importing goods to Costa Rica, stated:

¹⁷⁷ Ibid (emphasis added).

¹⁷⁸ Cf also the following passage: "Article VI of the Treaty provides that Costa Rica shall have perpetual rights of free navigation upon the San Juan River from its mouth to three English miles below Castillo Viejo *for the purposes of commerce*... 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 was flagrant, *her commerce on this river* could not be interfered with. This article simply transformed to a perfect right what the law of nations denominates an imperfect right- a right of outlet to the sea, an a right of trade, by means of this natural highway, with foreign nations." Second and third emphasis added: *Reply of the Republic of Nicaragua to the Case of the Republic of Costa Rica*, 48: Annexes, Vol 6, Annex 208.

“When the State of Nicaragua became aware of it, it caused the overall impression that the abovementioned decree threatens the sovereignty of the Nation that has the exclusive dominion and sovereign jurisdiction over the waters of the San Juan River, and Costa Rica only has the right to free navigation for *purposes of commerce* [*para fines de comercio*] from the mouth in the Atlantic up to three English miles before reaching Castillo Viejo; ...”¹⁷⁹

4.36. In 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, it was mentioned that, following certain border incidents, “some confusion as to the true legal situation of the San Juan river” was observed in the Costa Rican and foreign press. The Report continued:

“[w]ith the aim of clarifying this confusion the Nicaraguan Ministry of Foreign Affairs sees fit to present the public with the compilation of the following documents, which establish Nicaragua’s and Costa Rica’s rights in the San Juan River.”¹⁸⁰

After mentioning the Treaty of Limits, the Cleveland Award, the Matus-Pacheco Convention, the Alexander Awards and a sketch-map showing the boundary as demarcated, the Nicaraguan Ministry of Foreign Affairs concluded:

“To sum up the matter, and in accordance with the documents we are presenting to the public, Nicaragua has the dominion and supreme jurisdiction over the whole San Juan River, and 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.”¹⁸¹

¹⁷⁹ Letter of the Secretary to the Diet of the Mayor Republic of Central America to the Minister of Foreign Affairs of Costa Rica, 27 July 1897 (emphasis added): Annexes, Vol 3, Annex 37. Translation by Costa Rica, the original text in Spanish reads: “Al tenerse conocimiento de él en el Estado de Nicaragua, causó generalmente la impresión de que el indicado decreto es atentatorio á la soberanía de la Nación, que exclusivamente tiene el dominio y sumo imperio de las aguas del río San Juan, y Costa Rica únicamente el derecho de libre navegación para fines de comercio desde su desembocadura en el Atlántico hasta tres millas inglesas antes de llegar al *Castillo Viejo*...”

¹⁸⁰ Translation by Costa Rica. Original Spanish: “A fin de aclarar esa confusión el Ministerio de Relaciones Exteriores de Nicaragua ha creído del caso presentar al público la compilación de los siguientes documentos, que determinan los derechos de Nicaragua y Costa Rica en el río San Juan.” *Situación jurídica del Río San Juan* (Ministerio de Relaciones Exteriores, Managua, 1954), 6: Annexes, Vol 6, Annex 219.

¹⁸¹ *Ibid*, translation by Costa Rica. Original Spanish: “Resumiendo la cuestión, y de conformidad con los documentos que presentamos al público, Nicaragua tiene el dominio y sumo imperio sobre todo el río San Juan, y 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.”

The phrase “*con fines de comercio y fiscales*” clearly refers to commercial and fiscal “purposes”. “*Fines*” in Spanish means “purposes”, “ends” or “goals”. According to the Nicaraguan position, “*fines de comercio*” is equivalent to “*objetos de comercio*”.

4.37. This statement was repeated verbatim in a later edition of the same official publication twenty years later, showing the continued acknowledgement by Nicaragua of Costa Rica’s rights of navigation for “commercial and fiscal purposes”.¹⁸²

4.38 If the purpose of the Treaty was to limit Costa Rican navigation to the transportation of commercial “objects”, the normal words employed would have been “*mercaderías*”, “*bienes*” (merchandise, goods), or the expression “*artículos de comercio*”. Indeed a number of treaties contemporary to the Treaty of Limits which dealt with commercial navigation explicitly refer to both transport of persons and “goods”. Nothing in the Treaty of Limits permits the phrase “*con objetos de comercio*” to be interpreted in the narrow way Nicaragua now does.

4.39. As noted in Chapter 2, the Treaty of Limits was preceded by an earlier treaty (the 1857 Cañas-Juarez Treaty) which never entered into force. Instead negotiations were resumed, leading to the conclusion of the Cañas-Jerez Treaty. It is worth noting, however, the fundamental change of the wording of the relevant provision. Article 5 of the unratified 1857 Treaty read:

“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 *artículos de comercio de importación y exportación*, 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 artículos que se introduzcan por sus respectivas aduanas.” (Emphasis added)

“The Republic of Costa Rica, as well as the one of Nicaragua, will have free use of the waters of the San Juan River, for navigation and transportation of articles of trade of import and export, observing customs legislation, and complying with the fiscal duties of each Republic, as well as those that will be taxed over the articles that will be brought in through their respective customs.”¹⁸³

¹⁸² *Situación jurídica del Río San Juan* (Ministerio de Relaciones Exteriores, Managua, 1974), 6: Annexes, Vol 6, Annex 222.

¹⁸³ Translation by Costa Rica: Annexes, Vol 2, Annex 5 (emphasis added).

Thus article 5 referred to navigation and transport of articles of trade for import and export (“*artículos de comercio de importación y exportación*”). The Treaty of Limits of 1858 discarded this terminology for a much broader one. It did not confine the right of navigation to the transportation of trade articles; it included commerce in its broadest sense, including the transport of persons.

4.40. Subsequent treaty practice between the parties shows that when they intended to refer to “commercial goods”, they normally used the words “*artículos*” “*mercaderías*” or “*efectos*”, not “*objetos de comercio*”. This is the case of the Treaty of Commerce (Volio-Zelaya) concluded on 14 August 1868, in which the parties agreed on freedom of trade for citizens of both countries with regard to non-prohibited goods (“*artículos*”, “*efectos*”).¹⁸⁴ Other treaties between Costa Rica and Nicaragua employ the term “*objeto(s)*” to mean “purposes” unless the context clearly indicates otherwise.¹⁸⁵

4.41. In conclusion, the expression in article VI of the Treaty of Limits—“*con objetos de comercio*”—entitles Costa Rica to the most ample faculty of commerce in the San Juan, a right that is free and perpetual. It entitles Costa Rica to a real right of use, making it possible for all vessels (except for vessels of war) sailing to or from Costa Rica to transit freely, either for communication, trade or simple transit between any points within Costa Rican territory, or to or from points abroad, or on either bank of the River where Costa Rica has a right of free navigation.

(2) “*Comercio*”

4.42. The purposes specified in article VI of the Treaty of Limits are those of “commerce”. The term “commerce” is preceded by the plural “purposes” (“*objetos*”). It necessarily means that there may be more than one purpose of commerce. Indeed, this interpretation is in conformity with the broad scope of the word “commerce”, in particular during the 19th century.

¹⁸⁴ See articles 1 and 2: Annexes, Vol 2, Annex 10. See also the unratified Additional Convention of 21 December 1868 (Esquivel-Rivas): Annexes, Vol 2, Annex 12. Art 2 refers to “*las tarifas sobre fletes de productos ó mercaderías de importación ó exportación*” (“the tariffs for the shipping of import or export products or merchandizes”); translation by Costa Rica.

¹⁸⁵ See e.g. Preliminary Convention on a scientific survey, San José, 13 July 1868, art 1: Annexes, Vol 2, Annex 9.

4.43 The expression “*con objetos de comercio*” is similar to the French “*sous le rapport du commerce*”, first employed at the Congress of Vienna in relation to freedom of navigation. The provisions adopted at the Congress of Vienna constituted the basis for the development of the modern law of international watercourses and served as a model for most of the treaties regulating fluvial navigation during the 19th century.¹⁸⁶

4.44. The expression “*sous le rapport du commerce*” was proposed by the Prussian representative Wilhem von Humboldt, apparently with the intention of denying freedom of navigation to non-riparian States. But this was not the interpretation followed by other States, in particular France and Great Britain.¹⁸⁷ When a Treaty concerning navigation of the Danube was concluded on 7 November 1857, the same discussion arose with regard to the term “*sous le rapport du commerce*”, which was also incorporated in this Treaty.¹⁸⁸ The British Government explicitly declared that this formula was equivalent to “*tant pour le transport des marchandises que pour celui des voyageurs*”.¹⁸⁹ Thus the most important previous treaties related to fluvial navigation that were available to the negotiators of the Treaty of Limits confirm Costa Rica’s position.

4.45. The expression “*sous le rapport du commerce*” was also used, *inter alia*, by the *Institut de droit international* in its “*Projet de règlement international de navigation fluviale*” adopted at the Heidelberg session in 1887. The first paragraph of article 3 reads as follows:

“La navigation dans tout le parcours des fleuves internationaux, du point où chacun d’eux devient navigable jusque dans la mer, est entièrement libre et ne peut, sous le rapport du commerce, être interdite à aucun pavillon.”¹⁹⁰

¹⁸⁶ Article 2 of the *Règlement pour la libre navigation des rivières*, Vienna, 24 March 1815, 64 CTS 13, Martens, 2 NRG 434 reads as follows: “La navigation dans tout le cours des rivières indiquées dans l’article précédent, du point où chacune d’elles devient navigable jusqu’à son embouchure, sera entièrement libre, et ne pourra, *sous le rapport du commerce*, être interdite à personne; bien entendu que l’on se conformera aux règlements relatifs à la police de cette navigation, lesquels seront conçus d’une manière uniforme pour tous, et aussi favorable que possible au commerce de toutes les nations” (emphasis added).

¹⁸⁷ See Engelhardt (ed), *Du régime conventionnel des fleuves internationaux. Etudes et projet de règlement général précédés d’une introduction historique* (Paris: Cotillon, 1879), 31-3.

¹⁸⁸ Act for the Navigation of the Danube, Vienna, 7 November 1857, 117 CTS 471. Art I provided that navigation of the Danube would be “entièrement libre sous le rapport de commerce, tant pour le transport des marchandises que pour celui des voyageurs”.

¹⁸⁹ Engelhardt, 85-6.

¹⁹⁰ Institut de Droit international, *Tableau général des Résolutions (1873-1956)* (Basel: Verlag für Recht und Gesellschaft, 1957), 71.

Evidently, in the view of the members of the *Institut*, freedom of navigation could not be prohibited to any flag when carried out *in relation to commerce*.

4.46. The same broad approach has been taken by the Court in interpreting treaty provisions guaranteeing freedom of commerce. In *Military and Paramilitary Activities in and against Nicaragua*, Nicaragua relied on a statement of the Permanent Court of International Justice which precisely included transportation of persons within the meaning of “commerce”. According to Nicaragua:

“Although it is a larger concept, freedom of commerce includes freedom of trade. Both expressions have a unique French translation: ‘liberté de commerce’—which consists, as the Permanent Court pointed out, of ‘the right—in principle unrestricted—to engage in any commercial activity, whether it be concerned with a trading properly so-called, that is the purchase and sale of goods, or whether it be concerned with industry, and in particular the transport business; or finally, whether it is carried on inside the country or, by the exchange of imports and exports with other countries’ (Oscar Chinn case, Judgment, 1934, P.C.I.J., Series A/B No. 63, p. 84). In the same Judgment, the Court pointed out that

‘According to the conception universally accepted, the freedom of “navigation...comprises freedom of movement for vessels, freedom to enter ports and to make use of plants and docks, to load and unload goods and to transport goods and passengers” (Id., p. 65)

This definition conforms to the conventional and customary rules in force...”¹⁹¹

4.47 At the *Jurisdiction and Admissibility* stage, the Court found that to the extent that Nicaragua’s claims constituted a dispute as to the “interpretation or application” of the 1956 Treaty, the Court had jurisdiction over those claims.¹⁹² At the *Merits*, Nicaragua repeated its assertions that commerce ought to be given a broad interpretation:

“Since the word ‘commerce’ in the 1956 Treaty must be understood in its broadest sense, all of the activities by which the United States has deliberately inflicted on Nicaragua physical damage and economic losses of all types, violate the principle of freedom of commerce, which the Treaty establishes in very general terms.”¹⁹³

¹⁹¹ *Memorial of Nicaragua (Questions of Jurisdiction and Admissibility)*, I.C.J. Pleadings, *Military and Paramilitary Activities in and against Nicaragua*, Vol I, 403-4 (emphasis added).

¹⁹² *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, *Jurisdiction and Admissibility*, I.C.J. Reports 1984, p. 392 (para 83).

¹⁹³ *Memorial of Nicaragua*, cited in *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, *Merits*, I.C.J. Reports 1986, p. 14 at 139 (para 278).

The Court concluded that although Nicaragua had not established that the United States Government was responsible for all acts of the *contras*, the prohibition on Nicaraguan vessels entering US ports “and transactions relating thereto” constituted a measure in contradiction with freedom of commerce and navigation in article XIX of the 1956 Agreement.¹⁹⁴

4.48. In the *Oil Platforms* case, the Court also had the opportunity to analyse the meaning of the word “commerce” used in a bilateral treaty. It said:

“The Court must now consider the interpretation according to which the word ‘commerce’ in Article X, paragraph 1, is restricted to acts of purchase and sale. According to this interpretation, the protection afforded by this provision does not cover the antecedent activities which are essential to maintain commerce as, for example, the procurement of goods with a view to using them for commerce.

In the view of the Court, there is nothing to indicate that the parties to the Treaty intended to use the word ‘commerce’ in any sense different from that which it generally bears. The word ‘commerce’ is not restricted in ordinary usage to the mere act of purchase and sale; it has connotations that extend beyond mere purchase and sale to include ‘the whole of the transactions, arrangements, etc., therein involved’ (Oxford English Dictionary, 1989, Vol. 3, p. 552).

In legal language, likewise, this term is not restricted to mere purchase and sale because it can refer to

‘not only the purchase, sale, and exchange of commodities, but also the instrumentalities and agencies by which it is promoted and the means and appliances by which it is carried on, and transportation of persons as well as of goods, both by land and sea’ (Black’s Law Dictionary, 1990, p. 269).

Similarly, the expression ‘international commerce’ designates, in its true sense, ‘all transactions of import and export, relationships of exchange, purchase, sale, transport, and financial operations between nations’ and sometimes even ‘all economic, political, intellectual relations between States and between their nationals’ (*Dictionnaire de la terminologie du droit international* (produced under the authority of President Basdevant), 1960, p. 126 [translation by the Registry]).

Thus, whether the word ‘commerce’ is taken in its ordinary sense or in its legal meaning, at the domestic or international level, it has a broader meaning than the mere reference to purchase and sale.

Treaties dealing with trade and commerce cover a vast range of matters ancillary to trade and commerce, such as shipping, transit of goods and persons, the right to establish and operate businesses, protection from molestation, freedom of communication, acquisition and tenure of property. Furthermore, in his Report

¹⁹⁴ Ibid, 139-140 (paras 278-9).

entitled 'Progressive Development of the Law of International Trade', the Secretary-General of the United Nations cites, among a number of items falling within the scope of the Law of International Trade, the conduct of business activities pertaining to international trade, insurance, transportation, and other matters (United Nations, Official Records of the General Assembly, twenty-first session, Annexes, Agenda item 88, doc. A/6396...)

The Court also notes that, in the decision in the Oscar Chinn case (P.C.I.J., Series A/B, No. 63, p. 65), the Permanent Court of International Justice had occasion to consider the concept of freedom of trade under Article I of the Convention of Saint-Germain. The dispute before the Court arose in the context of measures taken by the Belgian Government in relation to river traffic in the waterways of the Congo. The Permanent Court observed:

'Freedom of trade, as established by the Convention, consists in the right 'in principle unrestricted' to engage in any commercial activity, whether it be concerned with trading properly so-called, that is the purchase and sale of goods, or whether it be concerned with industry, and in particular the transport business; or, finally, whether it is carried on inside the country or, by the exchange of imports and exports, with other countries.' (Ibid., p. 84.)

The expression 'freedom of trade' was thus seen by the Permanent Court as contemplating not only the purchase and sale of goods, but also industry, and in particular the transport business.

The Court concludes from all of the foregoing that it would be a natural interpretation of the word 'commerce' in Article X, paragraph 1, of the Treaty of 1955 that it includes commercial activities in general – not merely the immediate act of purchase and sale, but also the ancillary activities integrally related to commerce."¹⁹⁵

4.49. In its judgment on the *Merits*, the Court affirmed the broad interpretation given to "commerce" in its earlier judgment:

"...the Court considers that where a State destroys another State's means of production and transport of goods destined for export, or means ancillary or pertaining to such production or transport, there is in principle an interference with the freedom of international commerce. In destroying the platform, whose function, taken as a whole was precisely to produce and transport oil, the military actions made commerce in oil, at that time and from that source, impossible, and to that extent prejudiced freedom in commerce."¹⁹⁶

¹⁹⁵ *Oil Platforms (Islamic Republic of Iran v United States of America)*, Preliminary Objection, I.C.J. Reports 1996 (II), p. 803 at 818-19 (paras 45-6, 48-9).

¹⁹⁶ *Oil Platforms (Islamic Republic of Iran v United States of America)*, *Merits*, I.C.J. Reports 2003, p. 161 at 198-204 (paras 79-89, esp 89).

4.50. Clearly, for the Court, the term “commerce” is not limited to the operation of purchase and sale of goods: it includes the transportation of persons and can refer to “all economic, political, intellectual relations between States and between their nationals.”¹⁹⁷

4.51. To sum up, the only intelligible meaning that the term “*con objetos de comercio*” as used in article VI of the 1858 Treaty of Limits can have is “for purposes of commerce”, i.e. “the purpose[s] or intention[s] to which a thing is directed or pointed”, as the 1852 *Dictionary of the Spanish Language of the Spanish Academy* defined “*objeto*”.¹⁹⁸ The purposes are those “of commerce”, which includes trade but is not confined to it, as Nicaragua itself has already stated before this Court.

(3) Commerce as communication

4.52. As already seen, by its definition navigation implies travel or movement from one place to another. Article VI of the Treaty of Limits provides for the spatial extension from, or to, where this movement can take place:

“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.”

4.53. On the Costa Rican bank of the San Juan and on those of its tributaries mentioned in article VI (San Carlos and Sarapiquí), there are villages and towns whose inhabitants use the River as their principal means of communication. Given the lack of roads, as shown in **Sketch Map 3** (opposite page 8 above), there is effectively little choice. But even if there were roads, the River would remain the easiest and most effective way to travel.

¹⁹⁷ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, I.C.J. Reports 1996 (II), p. 818 (para 45).

¹⁹⁸ La Academia Española, *Diccionario de la lengua castellana por la Academia Española* (10th edn, Madrid: Imprenta Nacional, 1852), 482.



A family on the Costa Rican bank of the San Juan (near La Tigra) with their boat.



School and church on Costa Rican bank of the San Juan.

4.54. The inhabitants have used the waters of the San Juan for communication and contact since the very inception of those villages and towns. They have also used the River to carry on trade with the village of San Juan del Norte. The reasons they travel are those common to human society in any part of the world: for example, contact with family and friends, education, health care, access to their farms, and performing their jobs. This commerce along the River is not only to the advantage of Costa Rican inhabitants, but also to the inhabitants of the only Nicaraguan town on the region, San Juan del Norte, who are economically dependent on trade with their Costa Rican neighbours.

4.55. The use of the San Juan for navigation by Costa Rican government officials as well as by the inhabitants of the region has been vital.¹⁹⁹ The River enables Costa Rican government officials to provide essential services to the local population—a majority of who are of Nicaraguan origin—including health, education and security.

4.56. Navigation through the San Juan for these purposes falls within the rights acknowledged by article VI of the Cañas-Jerez Treaty. The second meaning of the word “*comercio*” given by the *Dictionary of the Spanish Language* of the Spanish Academy contemporary to the conclusion of the Cañas-Jerez Treaty is “*Comunicación y trato de unas gentes ó pueblos con otros. Commercium, communicatio.*”²⁰⁰ As stated above, Nicaragua has recognized before this Court that the term “commerce” is larger than “trade”. The former includes the latter. This was also the understanding of the Central American Court of Justice in 1916 when it declared that Costa Rica possesses “*el derecho contractual de perpetua navegación en el río, empezando desde tres millas abajo del Castillo Viejo, comprensivo de la amplia facultad de tránsito y de comercio*”.²⁰¹ A narrow interpretation of the word “commerce” as meaning exclusively “trade” would be contrary to the ordinary meaning of the term in its context.

¹⁹⁹ “San Juan: Calm and uneasiness”, *La Nación*, San José, 4 July 1999: Annexes, Vol 5, Annex 155.

²⁰⁰ Translation by Costa Rica: “Communication and dealing of people or towns with others. *Commercium, communicatio*”: La Academia Española, *Diccionario de la lengua castellana por la Academia Española* (10th edn, Madrid: Imprenta Nacional, 1852), 170.

²⁰¹ Annexes, Vol 2, Annex 21 at 222: “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”.

4.57 Costa Rican boats have a perpetual right of free navigation for the purpose of communication between the villages and towns, or any other point situated on the Costa Rican bank of the San Juan, to any place on both banks of the River where navigation is common, or to the interior of Costa Rica, through the San Carlos River, the Sarapiquí, or any other route proceeding from the Costa Rican bank of the San Juan, as stated in article VI of the Treaty of Limits. This was the practice before the Treaty and has remained so since, and until the present dispute arose.

(4) Commerce as transportation of goods and persons (including tourism)

4.58. It is evident that the transportation of persons, including the transportation of tourists along the San Juan, falls within the activities pursued "*con objetos de comercio*" ("for the purposes of commerce"), in accordance with article VI of the Treaty of Limits. Transport of passengers is a longstanding commercial activity.

4.59. Indeed in the 1850s the most important commerce carried out on the San Juan was the transport of passengers. The San Juan was well-known at the time as a transit route, given the tens of thousands of passengers that used its waters to travel from the east coast of the United States of America to its west coast, as well as those migrants travelling to San José and other localities in Costa Rica. The Californian gold rush merely intensified the use of the River as a route for passengers.

4.60. Throughout the 19th century there was substantial commercial transportation of passengers, both leaving from and coming to Costa Rica. Most of the European immigrants who settled in Costa Rica during the second half of the 19th century used this route (the Atlantic port of Limón not yet having been developed). They arrived at San Juan del Norte Bay, navigated upstream on the San Juan to the Sarapiquí River, and from there, the trip followed by mule to the interior.

4.61. The Treaties of Friendship, Commerce and Navigation concluded by Nicaragua with France and Great Britain, respectively on 11 April 1859 and 11

February 1860, offer striking evidence that the 1858 Cañas-Jerez Treaty, when referring in its article VI to “*objetos de comercio*”, included both transportation of goods and persons. After regulating the rights and duties of the parties with regard to a possible construction of an inter-oceanic route, both article XXXIII of the France-Nicaragua Treaty of 1859 and article XXVI of the Great Britain-Nicaragua Treaty of 1860 provide the same safeguard:

“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.”²⁰²

4.62. By these treaties with France and Great Britain, Nicaragua evidently sought to preserve the existing rights of a third State (Costa Rica) recognised by it in a prior treaty, the Treaty of Limits.

4.63. International practice contemporary to the Treaty of Limits also shows that, by referring to freedom of navigation with purposes of commerce, States had in mind transport of not only goods but also persons. The following treaties can be cited as evidence of this understanding:

- (a) Treaty of Commerce and Navigation between Austria and Belgium of 2 May 1854;²⁰³
- (b) Treaty of Commerce and Navigation between Sweden-Norway and the Two Sicilies of 10 April 1856;²⁰⁴

²⁰² France-Nicaragua, *Traité d’Amitié, de Commerce et de Navigation*, Washington, D.C., 11 April 1859, art XXXIII, 120 CTS 337, 351; Great Britain-Nicaragua, *Treaty of Friendship, Commerce and Navigation*, Managua, 11 February 1860, art XXVI, 121 CTS 363, 383. The Spanish text reads as follows: “Queda entendido que nada de lo contenido en este Tratado deberá entenderse que afecta el reclamo del Gobierno y ciudadanos de la República de Costa Rica de un libre pasaje de sus personas y propiedades por el Río San Juan del océano y para el océano.” The French text is: “Il est entendu que rien de ce qui est contenu dans ce Traité ne devra être compris de façon à affecter la réclamation du Gouvernement et des citoyens de la République de Costa Rica à un libre passage par la rivière San-Juan pour leurs personnes et leurs propriétés de l’océan et vers l’océan”.

²⁰³ Article III reads as follows: “Cette liberté de navigation comprend pour les navires et sujets des 2 Hautes Parties Contractantes, la faculté de faire le commerce d’entrée et de sortie dans la même étendue que les navires et sujets nationaux, tout comme aussi la faculté de se livrer à toutes les opérations commerciales dont l’exercice est permis en vertu des lois. *Quant au transport des personnes et des marchandises* d’un port à l’autre, dans les États respectifs des Hautes Parties Contractantes, la liberté de commerce est réciproquement soumise aux restrictions généralement existantes pour la navigation des nations étrangères les plus favorisées dans chacun des 2 pays, sans que pour cela le commerce réciproque provenant des ports étrangers, ou dirigé vers de tels ports, ait à éprouver aucune limitation” (emphasis added): 111 CTS 431.

²⁰⁴ The Treaty did not recognise the extension of the freedom of navigation and commerce between two ports located on the territory of the same State, stating that “la navigation des côtes ou du cabotage demeurant exclusivement réservée aux bâtiments nationaux pour le transport tant des marchandises que des personnes”: Article IV (emphasis added): 114 CTS 480.

- (c) Act for the Navigation of the Danube between Austria, Bavaria, Turkey and Württemberg of 7 November 1857;²⁰⁵
- (d) Treaty of Peace, Friendship and Commerce between China and Great Britain of 26 June 1858.²⁰⁶

4.64. In the early 1970s Costa Rican entrepreneurs started organizing tourist journeys through different rivers and waterways in Costa Rica,²⁰⁷ the most notable being the route starting in Puerto Viejo de Sarapiquí, following the Sarapiquí River, using the San Juan to access the Colorado River, and then on to Barra del Colorado or continuing to the Tortugero Canals, and back again using the same route. Transit through the San Juan was necessary in order to transport those passengers within Costa Rican territory. But commercial navigation of passengers for tourism purposes has also been conducted with Nicaragua, as with the Río Indio Lodge and San Juan del Norte. See **Sketch Map 6** opposite.

4.65 These tourist routes have been used by Costa Rican boatmen, tour operators, hotel owners and sport fishing resorts for many years without any interference or objection from Nicaragua.²⁰⁸

4.66. Of course tourism is a commercial activity. Within the World Trade Organization, tourism is a service sector covered by the General Agreement on Trade in Services (GATS). The GATS' schedules largely follow a classification based on the United Nations Central Product Classification (CPC) system, which identifies 11 basic service sectors, plus a 12th category for

²⁰⁵ Article 1: "La navigation du Danube, depuis l'endroit où ce fleuve devient navigable jusque dans la mer Noire, et depuis la mer Noire jusqu'au dit endroit, sera entièrement libre sous le rapport du commerce, tant pour le transport des marchandises que pour celui des voyageurs ; en se conformant toutefois aux dispositions du présent Acte de navigation ainsi qu'aux règlements de police fluviale" (emphasis added): 117 CTS 474.

²⁰⁶ Article XIV: "British subjects may hire whatever boats they please for the transport of goods or passengers...": 119 CTS 167.

²⁰⁷ Affidavit of Marvin Hay-Gonzalez, 28 January 2006: Annexes, Vol 4, Annex 91; Affidavit of Wilton Hodgson Hodgson, 1 February 2006: Annexes, Vol 4, Annex 96; and Affidavit of Ruben Lao Hernández, 17 February 2006: Annexes, Vol 4, Annex 103. See also Manager of Swiss Travel Services, Emilia Gamboa, to Costa Rican Minister of Public Safety, Angel Edmundo Solano, 7 June 1982: Annexes, Vol 6, Annex 223.

²⁰⁸ See Manager of Swiss Travel Services, Emilia Gamboa, to Costa Rican Minister of Public Security, Angel Edmundo Solano, 7 June 1982: Annexes, Vol 6, Annex 223. See also Affidavit of Santos Martín Arrieta Flores, 27 January 2006: Annexes, Vol 4, Annex 87; Affidavit of Marvin Hay-Gonzalez, 28 January 2006: Annexes, Vol 4, Annex 91; Affidavit of Daniel Reese Wise, 29 January 2006: Annexes, Vol 4, Annex 95; Affidavit of Wilton Hodgson Hodgson, 1 February 2006: Annexes, Vol 4, Annex 96; and Affidavit of Ruben Lao Hernández, 17 February 2006: Annexes, Vol 4, Annex 103.

Sketch map 6
TOURIST ROUTE



SYMBOLS

- INTERNATIONAL LIMIT
- FREE NAVIGATION ZONE
- TOURIST ROUTE
- UNPAVED ROAD PASSABLE ALL YEAR LONG
- UNPAVED ROAD PASSABLE ONLY DURING DRY SEASON
- RIVERS
- COMMUNITIES

For illustrative purposes only

miscellaneous services. "Tourism and travel related services" is one of these 12 basic service sectors. The tourism category breaks down into sub-sectors for hotels and restaurants, travel agencies and tour operators, tourist guide services and other related services. Tourism services are included in the new services negotiations which began in January 2000.²⁰⁹

4.67. As the Convention establishing the Sustainable Tourism Zone of the Caribbean, signed on Margarita Island, 12 December 2001, explains in its preamble:

"Tourism constitutes the main economic activity for most countries of the region referred to as the Greater Caribbean, and it represents in itself, a significant factor in foreign exchange earnings, economic and social development."²¹⁰

Both Costa Rica and Nicaragua are signatories to this Convention, though neither has yet ratified it.

4.68. In the *Kasikili/Sedudu Island* case the Court recalled that the Parties interpreted the notion of freedom of navigation as including movement of tourist boats. In particular, the Court mentioned, this applied to the southern channel whose waters *and banks* are entirely within Botswana. The Court recalled the Parties' agreement with regard to non-impediment of navigation "including free movement of tourists".²¹¹

4.69. It is worth noting that the Nicaraguan Minister of Tourism Pedro Joaquín Chamorro, shortly before becoming Minister of Defence, recognized that navigation for purposes of tourism is included within Costa Rica's navigational rights. On 26 July 1998, Minister Chamorro affirmed that he was not opposed to Costa Rica using the San Juan for purposes of tourism,

²⁰⁹ http://www.wto.org/english/tratop_e/serv_e/tourism_e/tourism_e.htm#top. Equally, in the framework of the UNCITRAL Model Law on International Commercial Arbitration adopted on 21 June 1985, "commercial" is interpreted as covering "matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road." (United Nations, doc. A/40/17, annex I).

²¹⁰ www.acs-aec.org/Documents/Misc/STZC_LEGAL_DOC_AND_INDICATO.DOC.

²¹¹ *Kasikili/Sedudu Island (Botswana/Namibia)*, I.C.J. Reports 1999, p. 1049, 1071-2, 1106-8 (paras 40, 102, 103). See also the declarations of Judges Ranjeva (*ibid*, 1110) and Koroma (*ibid*, 1112).

since “this is the modern way of commerce” (although he disagreed with what he called “Costa Rican heavily armed transit navigation”).²¹²

4.70. The 1956 Agreement provides both further evidence of the existence of the right of navigation for the transport of persons in accordance with the Treaty of Limits and the Cleveland Award, and an additional basis for assuring this right. Article 1 of the 1956 Agreement provides that Costa Rica and Nicaragua...

“shall collaborate to the best of their ability in order to carry out those undertakings and activities which require a common effort by both States and are of mutual benefit and, in particular, in order to facilitate and expedite traffic on the Pan American Highway and on the San Juan River within the terms of the Treaty of 15 April 1858 and its interpretation given by arbitration on 22 March 1888, and also to facilitate those transport services which may be provided to the territory of one Party by enterprises which are nationals of the other.”²¹³

4.71. The reference to “traffic” on the San Juan can only be understood as including transportation of both goods and persons. This is its ordinary meaning, as found in standard dictionaries.²¹⁴ The same can be said of the reference to “transport services”. By requiring both parties “to facilitate those transport services which may be provided to the territory of one Party by enterprises which are nationals of the other”, article 1 of the 1956 Agreement creates a further legal ground for the transportation of persons through the San Juan by Costa Rican boats.

4.72. For all these reasons it is clear that Costa Rica possesses a right of navigation for transportation of persons, including tourists, in the stretch of the San Juan where it has a perpetual right of free navigation.

²¹² “Costa Rica Exhibits its ‘Army’ on the San Juan River”, *La Prensa*, Managua, 26 July 1998: Annexes, Vol 5, Annex 138. See also “Chamorro objects to Patrols”, *La Nación*, San José, 27 July 1998: Annexes, Vol 5, Annex 139.

²¹³ Annexes, Vol 2, Annex 24.

²¹⁴ According to the *Diccionario de la Lengua Española de la Real Academia Española*, “tráfico” has the following meanings: “Acción de traficar. 2. Circulación de vehículos por calles, caminos, etc. 3. Por ext., movimiento o tránsito de personas, mercancías, etc. por cualquier otro medio de transporte” (21st edn, Madrid: Espasa Calpe, 1992), vol. I, 2005. Translation by Costa Rica: “Action of trafficking. 2. Circulation of vehicles through streets, roads, etc. 3. By extension, movement or traffic of people, merchandizes, etc. by any means of transportation”. The *Oxford Dictionary of English* attributes as first meaning of the word “traffic” the following: “vehicles moving on a public highway: a stream of heavy traffic. • the movement of ships, trains, aircraft, or pedestrians: *Europe’s air traffic*. • the transportation of goods or passengers: *the increased use of railways for goods traffic*.” (2nd edn, Oxford: Oxford University Press, 2003), 1870. In French, “trafic” is defined as “Ensemble des transports de marchandises ou de voyageurs, ou de circulations de véhicules ou de bâtiments, qui s’effectuent, pendant une durée définie (jour, mois, année), sur une voie de communication ou sur l’ensemble des voies d’un territoire”: *Grand Dictionnaire Encyclopédique Larousse* (Paris: Larousse, 1985), vol. 10, 10340.

D. Costa Rica's right of protection of commerce and revenue control

4.73. Costa Rica's understanding of article VI of the Treaty of Limits has been consistent. As mentioned above, the perpetual right of free navigation is a State right and as such it is not limited to private vessels. Public vessels also enjoy this right. This was the position successfully upheld by Costa Rica before President Cleveland in 1888 and it is its position today.

4.74. By Decree No XXXI of the Costa Rican Government, dated 16 March 1886, a guard (one officer, five men) was created at the mouth of the Colorado River "with the purpose of establishing the necessary surveillance of contraband in the Atlantic coast of the Republic."²¹⁵ Decree No XXXII of the same date gave further detail as to this "maritime and terrestrial guard", which was to have at its disposal "a national steamer" with a crew of four. That Decree gave the guard various functions, including:

"1st- To prevent contraband in the waters and territories of its circumscription.

...

5th- To reconnoitre at least once a week the Rivers San Juan, Colorado, Sarapiquí, and San Carlos; the first in the whole extent that it is navigable for Costa Rica, the second in its entire extent, and the latter two along the entire stretches that are navigable by steamer.

The itinerary shall be reserved in order that the guard's actions are not eluded.

6th- To institute preliminary proceedings and to report seizures to the respective authority at Limon."²¹⁶

4.75. Nicaragua opposed these instructions on the basis that they would go beyond Costa Rica's entitlements. Costa Rica rejected this contention, on the following grounds:

"I should add that Costa Rica has the perpetual right to navigate the San Juan River, or part of it, in accordance with the treaty: that it is obliged, and naturally so, to guard and defend the river, since it has the use of its waters, and because a part of its right bank belongs to it, because the river is the common entry to both Republics, and it is in the direct interests of both to defend it: that, given this obligation, Costa Rica may use the necessary means to fulfil it and it may, for the same reason, navigate the river in any kind of vessel: that, in order to do so, Costa Rica does not require Nicaragua's approval or request, since it would not be acting as Nicaragua's ally but in the exercising of its own right: and that, should the opposite occur, Costa Rica would be left totally defenceless at Nicaragua's will."²¹⁷

²¹⁵ Annexes, Vol 6, Annex 205.

²¹⁶ Annexes, Vol 6, Annex 206.

²¹⁷ Costa Rican Foreign Minister, Ascensión Esquivel, to Nicaraguan Foreign Minister, Francisco Castellón, 31 August 1886: Annexes, Vol 3, Annex 34.

4.76. The matter was referred to President Cleveland as one of Nicaragua's disputed points. In its pleadings before President Cleveland, Costa Rica began by noting that article VI of the Treaty was not expressed in exclusive terms. It asserted as "beyond discussion that Costa Rica can navigate in the San Juan river with public vessels, which are not properly men-of-war". It noted the rights of Nicaragua under the Treaty to bring cargo to the Costa Rican bank:

"this permission, or right, presupposes, necessarily, the correlative right of Costa Rica to watch its own banks by the only practicable means, which is the revenue police, during the whole course of the river navigable for Costa Rica."

Otherwise Costa Rica would be at the mercy of smugglers.²¹⁸ The Reply went on to deal separately with men-of-war, which it supported largely by analogy from other situations, pointing out that the prohibition of acts of war on the San Juan did not entail the prohibition of navigation.²¹⁹ It also argued by implication from the duty of Costa Rica to defend its bank under the Treaty that it had the necessary correlative right to use regular men-of-war on the River for that purpose.²²⁰

4.77. Nicaragua's argument also largely focused on men-of-war. As to customs vessels it argued that:

"Vessels of the revenue service are akin to vessels of war. While they have not all the means of aggression as the former, still they are armed vessels, capable of enforcing their demands by force, and must be classed in the same category as vessels of war. Neither have the right, under a commercial license, to invade the territory, domain, or sovereignty of the Republic of Nicaragua."²²¹

4.78. So far as the fourth question raised by Nicaragua is concerned, the terms of President Cleveland's Award were as follows:

"Second. The Republic of Costa Rica under said treaty and the stipulations contained in the sixth article thereof, has not the right of navigation on the river San Juan with vessels of war; but she may navigate said river with such vessels of the revenue service

²¹⁸ Pérez Zeledón, *Argument*, 156: Annexes, Vol 6, Annex 207.

²¹⁹ *Ibid*, 158.

²²⁰ *Ibid*, 159-160.

²²¹ *Reply of the Republic of Nicaragua to the Case of the Republic of Costa Rica*, 49: Annexes, Vol 6, Annex 208.

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."²²²

4.79. Hence the Award made it clear that, although it did not have a right to navigate with vessels of war, Costa Rica does have a right to navigate with vessels of the revenue service (which were public armed vessels). The Award also detailed the scope of this right of navigation: (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.

4.80. The recognition of a right of navigation for public vessels of a neighbouring country was not exceptional in Latin America at that time. It can be explained by the fraternal relations existing among the region and their collaborative efforts to preserve their independence. Treaties concluded at the time show that this right of navigation with public vessels even extended to war vessels. The following are examples:

- (a) Convention on fluvial navigation concluded between the Argentine Confederation and Brazil of 20 November 1857 (article 3);²²³
- (b) Agreement on the navigation of Putumayo and Iza Rivers between Brazil and Peru of 29 September 1876 (article 5);²²⁴ and
- (c) Treaty of Commerce and Fluvial Navigation between Bolivia and Brazil of 12 August 1910 (article 16).²²⁵

There are also examples in other regions of the world in which the right to navigate with war vessels was accorded to a neighbouring State.²²⁶

4.81. In drawing a distinction between men-of-war and revenue cutters, the Cleveland Award evidently took into account contemporary naval practice, and

²²² Annexes, Vol 2, Annex 16.

²²³ 118 CTS 45, 47.

²²⁴ 151 CTS 93.

²²⁵ 211 CTS 388, 390-1.

²²⁶ See notably the Treaty between Iraq and Iran concerning the boundary along the Shatt-al-Arab, 4 July 1937, Article 4(b), 190 LNTS 241.

the distinction would have been familiar to all concerned. In the mid-to-late 19th century, revenue cutters were coastguard vessels, lightly armed auxiliary vessels used for a variety of purposes associated with the enforcement of customs, quarantine and revenue laws. In case of need they could be used as auxiliary vessels for naval purposes, e.g. in the enforcement of blockades, and United States naval cutters of the Civil War period led exciting and dangerous lives. A useful illustrated review of this period is provided by DL Canney, *U.S. Coast Guard and Revenue Cutters 1790-1935*. Canney notes that what is now the United States Coast Guard was previously called the United States Revenue Cutter Service, “a domestic law enforcement agency originally under the Treasury Department”.²²⁷ Initially cutters were small or medium-sized sailing vessels, built for economy rather than speed.

“In the first group of cutters, built in 1791 and 1792, armament was limited to the small arms issued to the crewmen and small swivel guns. Subsequently, the vessels rarely carried more than six relatively small cannon. Only when the cutters were called in to assist with naval operations did armament increase significantly.”²²⁸

4.82. United States cutters in service at the time of the Cleveland Award include, for example, the *Corwin* (commissioned 1877, eight officers and 33 enlisted men, three guns, a veteran of the Bering sea patrol), the *Forward* (commissioned 1882, seven officers and 31 enlisted men, two guns) and the *Fessenden* (commissioned 1883, seven officers and 33 enlisted men, four guns; she was the last side-wheel steamer and spent most of her career cruising on the Great Lakes).²²⁹

4.83. It is true that President Cleveland excluded the possibility of Costa Rica navigating with vessels of war. But he acknowledged that other public vessels could do so, particularly “such vessels of the Revenue Service as may be related to and connected with her enjoyment of the ‘purposes of commerce’ accorded to her in said article, or as may be necessary to the protection of said enjoyment.”²³⁰

²²⁷ DL Canney, *US Coast Guard and Revenue Cutters 1790-1935* (Naval Institute Press, Annapolis, 1995), xiii. Copies of this work have been deposited with the Registrar.

²²⁸ *Ibid.*, 1.

²²⁹ *Ibid.*, 44-6.

²³⁰ Cleveland Award, Second point: Annexes, Vol 2, Annex 16.

4.84. It is significant that in opposing before President Cleveland Costa Rica's use of revenue cutters, Nicaragua referred to them as "armed vessels, capable of enforcing their demands by force". But President Cleveland refused to assimilate those vessels of the revenue service to war vessels. Only the latter were declared to be excluded from the perpetual right of free navigation recognised by the Cañas-Jerez Treaty.

4.85. Following the Cleveland Award, Costa Rica continued to navigate with armed personnel on revenue cutters or other vessels on the lower part of the River and Nicaragua respected this right. This can be seen from an incident that occurred at the place where the San Juan ceases to be the boundary between Costa Rica and Nicaragua. On 21 February 1892, the Costa Rican steamer *Adela* began its voyage, with the Commander of a fiscal post and eight guards on board, at the mouth of San Carlos River in the direction of Castillo Viejo. The purpose of the journey was to install the Guards at the fiscal post at Terrón Colorado, Los Chiles, on the Costa Rican side of the border near the source of the San Juan in the Lake of Nicaragua.

4.86. The author of the report relates that "before entering the waters under the exclusive dominium of Nicaragua, I did hide in Costa Rican territory the arms and ammunitions that I carried for that post [*resguardo*]." ²³¹ Then the Commander went by boat to the post of Castillo Viejo to request Nicaraguan permission to continue navigating on the San Juan with their arms and personnel, explaining "the fiscal purpose" of that journey, i.e. installing the guards in their post. The Nicaraguan official, after consulting the Ministry of War of Nicaragua, denied permission and the Costa Rican Commander was obliged to transport its arms and ammunition by land, which was extremely difficult to do. ²³²

4.87. This account shows the significant distinction between navigation on the part of the San Juan that constitutes the border between Costa Rica and Nicaragua, and the part of the River where both banks are Nicaraguan. In the former, navigation of a steamer carrying fiscal guards with their arms and ammunition was usual and did not provoke objection or response from the Nicaraguan authorities. In the latter, such a right of navigation did not exist; on this occasion the Costa Rican commander requested permission, which was denied.

²³¹ Letter of Ciro A. Navarro, Assistant to the Inspectorate to the Inspector General of the Treasury, 9 March 1892 (translation by Costa Rica): Annexes, Vol 6, Annex 209.

²³² *Ibid.*

4.88. Another Nicaraguan agent was prepared to be more flexible. The Chief of the Costa Rican Guard (*resguardo*) of El Colorado informed his superiors that the Customs Administrator of Nicaragua in San Juan del Norte had authorised him to seize contraband and criminals *on the Nicaraguan shores* and also that he “had free passage with [his] armed guards through the Castillo in case I wanted to carry out any mission in Rio Frio”.²³³ The latter position is located further west of the Castillo Viejo. Clearly, this authorisation allowed official navigation on the San Juan beyond the waters that form the common boundary. By contrast there was no need for authorisation in respect of areas of the San Juan where the navigation was common.

4.89. Reports from 1893 to 1909 refer to the substantial activities of the fiscal guards (“*resguardos*”) in the region of the border of the San Juan. Undoubtedly these fiscal guards used the San Juan to perform their duties.²³⁴

4.90. Costa Rica has always respected the prohibition on navigation with vessels of war. Indeed, since the adoption of the Political Constitution of 1949, Costa Rica does not possess an Army and there is no material possibility for Costa Rica to breach this obligation: Costa Rica does not have any vessels of war, but only police vessels with minimum defensive capacity. Photographs of the relevant vessels are shown **opposite**.

4.91. Costa Rica’s right to navigate with fiscal vessels was accurately described by Costa Rica before the Central American Court of Justice as follows:

²³³ Report of the Chief of the Guard [*resguardo*] of Colorado, Juan Francisco Zeledón, to the General Inspector of the Treasury, 31 October 1892 transcribed in Document N. 97 from the Inspector of the Treasury to the Secretary of State in charge of the Treasury, dated 8 November 1892: Annexes, Vol 6, Annex 210.

²³⁴ In a Report of 31 March 1894, the Commander of the Post Río Colorado-Colonia informed the General Inspector of Treasury of activities carried between 1893 and 1894. He mentioned the existence of posts at Rosalía, El Toro and the confluence of the Reventazón and Parismina Rivers: Annexes, Vol 6, Annex 211. A Report of 10 March 1895 set out the jurisdiction of the different Guards under the jurisdiction of El Colorado and their activities: Annexes, Vol 6, Annex 212. See also the Report of 16 March 1906 concerning the same region: Annexes, Vol 6, Annex 213, as well as the proposal for the creation of a new guard at the confluence of the River Chirripó with the Colorado. See Sub-Inspector to the Treasury of Colorado to the General Inspector of the Treasury, 24 November 1908: Annexes, Vol 6, Annex 215, and the Report of 7 December 1909 relating to police activities displayed by the Guard of Colorado concerning the Costa Rican bank of the San Juan. See Sub-Inspector to the Treasury of Barra del Colorado to the General Inspector of the Treasury, 7 December 1909: Annexes, Vol 6, Annex 216.

Sketch map 7
POLICE AND MILITARY BORDER POSTS



SYMBOLS

LIMITS

- INTERNATIONAL LIMIT
- FREE NAVIGATION ZONE
- RIVERS

▲ Costa Rican Police Posts

1. Boca del Río San Carlos
2. La Cureña (closed)
3. Boca del Río Sarapiquí
4. Delta Costa Rica
5. Puerto Lindo
6. Barra del Colorado Norte
7. Barra del Colorado Sur

■ Nicaraguan Military Posts

- A. Boca del San Carlos
- B. Boca del Sarapiquí
- C. Delta San Juan

For illustrative purposes only



Police boat that was formerly used for re-supply operations of Costa Rican police posts in the San Juan region.

“That, with regard to the San Juan River, the conventional rights of Costa Rica are, in a certain aspect, less than the corresponding rights of co-ownership (*condominio*): 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 Rican vessels, as well merchantmen as revenue cutters, in the zone in which navigation is common, have a free course over the whole river, throughout its length and breadth, and free access, exempt from imposts, to any point on the Nicaraguan shore.”²³⁵

4.92. In its Judgment, the Court acknowledged the extent of Costa Rica’s rights stating that:

“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 from constituting a cause for disquiet, would imply a function appropriate to territorial sovereignty.”²³⁶

4.93. The purpose of those vessels of the revenue service was and still is broadly the same: to prevent contraband, smuggling and trafficking of persons and other related activities proper to border areas. Costa Rica’s Foreign Minister Roberto Rojas López, in his intervention before the Permanent Council of the Organization of American States on 8 March 2000, summarized the situation as follows:

“The Award—accepted by both countries without objection—acknowledges Costa Rica the right that its revenue service vessels freely navigate on the lower part of the San Juan in order to fulfil its duties. Obviously, a revenue service vessel, destined by its own nature to fulfil services such as preventing contraband, illegal immigration, drug trafficking and other aspects involved in border control, will necessarily require that the governmental agents transported in it carry protective equipment. If not, how can they be expected to perform these tasks? No fiscal police in the world can achieve this only through requests or verbal suggestions.

²³⁵ Annexes, Vol 2, Annex 21, 197. Original Spanish: “Que en cuanto al río San Juan los derechos convencionales de Costa Rica son en cierto aspecto menores que los correspondientes al condominio: Costa Rica no puede, por ejemplo, surcar esa corriente con naves de guerra, como si puede hacerlo Nicaragua, de seguro; pero por otra parte, son mayores que los de una mera copropiedad porque los barcos costarricenses, así mercantes como fiscales en la zona en que la navegación es común, tienen libre curso en todo el río, a lo largo y a lo ancho y libre acceso, exento de impuestos, a cualquier lugar de la ribera nicaragüense.

²³⁶ Annexes, Vol 2, Annex 21, 220. Original Spanish: “El concepto de que los derechos de navegación otorgados a Costa Rica en el río San Juan no se extienden a buques de guerra, sino simplemente a embarcaciones para fines fiscales y defensivos; interpretación que en nada desvirtúa la doctrina expuesta sobre el dominio útil que a Costa Rica corresponde en gran parte del río San Juan, porque la navegación con buques de guerra además de poder construir una causa de intranquilidad, implicaría una función propia del soberano territorial.”

Note that Costa Rica is not making a capricious interpretation of the Treaty or the Award, but is only defending a right that they guarantee: navigating with fiscal service vessels which, as it was understood by Nicaragua during the time of the Award, were vessels that carried arms. Of course, we are dealing here with light service arms that are duly registered and which at no moment, not even today, may injure or threaten the sovereignty or security of Nicaragua.

Since the late 19th century, Costa Rica organized its fiscal guards at the border region with Nicaragua. One of its tasks was to reconnoitre, at least once a week, the lower part of the San Juan in order to fulfil its duties. Surveillance was performed by personnel with service arms. Nicaragua not only did not protest against the surveillance activities by Costa Rican Police, but, as is confirmed in many documents from the period and from recent years, in various opportunities its border authorities performed coordinated tasks with Costa Rican authorities. As a result, it can be concluded that the Cleveland Award, in the opinion of the Nicaragua government, authorized the navigation of Costa Rican fiscal service vessels, with crew that carried service arms.”²³⁷

4.94. In modern times, Costa Rica’s right to protect its commercial navigation on the San Juan with armed revenue service vessels, as confirmed by the 1888 Cleveland Award, is performed by the National Coastguard Service, the Fiscal Control Police, the Border Police and the Rural and Civil Guards, navigating on Costa Rican official vessels. **Appendix B** of this Memorial sets out the administrative position as it has evolved.²³⁸

4.95. As attested by several witnesses, Costa Rican police—who were referred to as the *Resguardo* until the mid-1970s—regularly navigated the San Juan with personnel openly carrying their service weapons. They even carried out joint tasks with the Nicaraguan armed forces.²³⁹

4.96. To sum up, Costa Rica’s perpetual right of free navigation with official vessels and armed personnel in order to protect commerce stems from the Treaty of Limits, as interpreted by the Cleveland Award and affirmed by the 1916 Judgment.

²³⁷ Translation by Costa Rica, OEA/Ser. G CP/ACTA 1224/00, 8 March 2000, 16: Annexes, Vol 6, Annex 228.

²³⁸ Of particular relevance are the Rural Assistance Guard Law No. 4639 of 23 September 1970: Annexes, Vol 6, Annex 220, modified by Law No. 4766 of 28 May 1971: Annexes, Vol 6, Annex 221; the General Law of Police, Law No. 7410 of 26 May 1994: Annexes, Vol 6, Annex 226; and the Law of Creation of the National Coastguard Service, Law No. 8000 of 5 May 2000: Annexes, Vol 6, Annex 230.

²³⁹ Affidavit of Carlos Luis Alvarado Sanchez, 27 January 2006: Annexes, Vol 4, Annex 88; Affidavit of Daniel Soto Montero, 27 January 2006: Annexes, Vol 4, Annex 89; Affidavit of Luis Angel Jirón Angulo, 28 January 2006: Annexes, Vol 4, Annex 90; Affidavit of José Granados Montoya, 29 January 2006: Annexes, Vol 4, Annex 94; and Affidavit of Ruben Lao Hernández, 17 February 2006: Annexes, Vol 4, Annex 103.

E. Rights and obligations to safeguard (*guarda*) the River and to contribute to its defence, as well as defence of the common bays

4.97. According to article IV of the 1858 Treaty:

“The Bay of San Juan del Norte, as well as the Salinas Bay, shall be common to both Republics, and so, consequently, shall be their advantages, and the obligation to defend them. Costa Rica shall also be obliged, for the part that belongs to her of the banks of the San Juan River, and in the same terms as Nicaragua is by Treaties, to contribute to the security thereof in the same manner as the two Republics shall contribute to its defence in case of aggression from abroad; and they shall do this as effectively as shall be in their power.”²⁴⁰

4.98. In its 1916 Judgment the Central American Court of Justice recalled the existence of this Costa Rican right and the obligation to safeguard and defend the San Juan:

“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.’”²⁴¹

4.99. As a consequence of the existence of rights and obligations for both parties in relation to the San Juan, as well as their shared sovereignty over the bays of San Juan del Norte and Salinas, article IV of the 1858 Treaty of Limits grants rights and imposes obligations on both States. Article IV distinguishes

²⁴⁰ This translation is taken from *British and Foreign State Papers*. The original text reads as follows: “La Bahía de San Juan del Norte, así como la de Salinas, serán comunes a ambas Repúblicas, y por consiguiente lo serán sus ventajas y la obligación de concurrir a su defensa. También estará obligada Costa Rica por la parte que le corresponde en las márgenes del río de San Juan, en los mismos términos que por tratados lo está Nicaragua, a concurrir a la guarda de él; del propio modo que concurrirán las dos Repúblicas a su defensa en caso de agresión exterior; y lo harán con toda la eficacia que estuviere a su alcance”: Annexes, Vol 2, Annex 7(d).

²⁴¹ Annexes, Vol 2, Annex 21, 222 (emphasis added). Original Text: “Costa Rica tiene derecho indiscutido a la margen derecha del río; al suelo colocado dentro de sus límites jurisdiccionales; posee el condominio en los puertos de San Juan del Norte y en la Bahía de Salinas, el derecho contractual de perpetua navegación en el río, empezando desde tres millas abajo del Castillo Viejo, comprensivo de la amplia facultad de tránsito y de comercio, y que impone a Nicaragua el deber de no entorpecer esa navegación, y el de tener, por el contrario, expedito el curso del río; los de atracar en sus dos riberas en toda la zona en que la navegación es común; y los que conciernen a su guarda y defensa ‘con toda la eficacia que estuviere a su alcance.’”

three sets of rights and obligations: (1) the defence of the common bays, (2) the safeguarding of the San Juan and (3) the defence of the River in case of aggression. Nicaragua argues that article IV refers to the third obligation only, and that even in such a case Costa Rica's defence of the River should be accomplished exclusively from its own bank.²⁴² Although interrelated, these are separate rights and obligations. The first two are permanent and continuous: they have existed ever since the entry into force of the 1858 Treaty. The third is envisaged in case of aggression. In assimilating the case of aggression to the other two, Nicaragua effectively rejects Costa Rica's rights and obligations to defend the bay of San Juan del Norte and to safeguard the San Juan where navigation is common.

4.100. In order to defend the Bay of San Juan del Norte, which is common to both States, Costa Rica is entitled to navigate the lower part of the San Juan with the vessels and personnel necessary to perform that duty. This is practically the only means for Costa Rica to defend the Bay. The Bay is now effectively closed to the ocean and the only way to access the condominium is by police vessels navigating the lower part of the San Juan.

4.101. The safeguarding ("*guarda*") of the San Juan in the stretch where Costa Rica is a co-riparian also requires navigation. This activity is performed by police posts located in the region and by public vessels that supply them. According to the 1852 *Dictionary of the Spanish Academy* the relevant meanings of the term "*guarda*" corresponds to:

"com. La persona que tiene á su cargo y cuidado la conservación de alguna cosa. Custos. // f. La acción de guardar, conservar ó defender. Custodia// Observancia y cumplimiento de algún mandato, ley ó estatuto. Observantia."²⁴³

Clearly, "*guarda*" is employed in article IV of the 1858 Treaty of Limits in the sense of custody, i.e. "the action of safeguard, keeping or defence".

²⁴² See Acting Nicaraguan Foreign Minister, Carlos Roberto Gudián, to Costa Rican Foreign Minister, Roberto Rojas López, Note No. MRE/98/02638, 28 August 1998: Annexes, Vol 3, Annex 51.

²⁴³ La Academia Española, *Diccionario de la lengua castellana por la Academia Española* (10th edn, Madrid: Imprenta Nacional, 1852), 357. English translation by Costa Rica: "com. The person who has under its care and safekeeping the preservation of something. Custos. // f. The action of safekeeping, conserving or defending. Custody // Observance and fulfillment of a mandate, law or statute. Observantia."

4.102. The main threats that both Nicaragua and Costa Rica faced during the 19th century came from the Caribbean through the San Juan. Plans for the construction of the inter-oceanic canal and the consequent increase in activity in the border region of the San Juan required both countries to undertake the duties expressed in article IV of the Treaty of Limits. During the 20th century, the obligation to safeguard the San Juan was understood—together with actions against trafficking and smuggling—as the obligation to counter other threats to the security of both countries, such as the illegal passage of insurgents or of weapons from one country to the other. This obligation was of particular importance in the context of the events of 1948 and 1955, when there was tension between both countries relating to the activity of insurgent groups operating across borders. As a result, the parties concluded the Treaty of Amity of 21 February 1949 and the Agreement pursuant to Article IV of that Treaty of 9 January 1956.

4.103. Article 1 of the 1956 Agreement²⁴⁴ commits both Nicaragua and Costa Rica to facilitate and expedite transit on the San Juan within the terms of the 1858 Treaty of Limits and its interpretation in the Cleveland Award. In article 2 both countries specifically undertake to organize the surveillance of their common border as a means to prevent weapons or armed groups from illegally entering each other's territory. In the case of Costa Rica, this task could only be performed through navigation on the San Juan with service arms or through police posts along the Costa Rican bank, which in turn would also imply armed police navigation for purposes of re-supply and relief of personnel.

4.104. Until 14 July 1998 the general trend was one of collaboration between Nicaraguan Armed Forces and Costa Rican Police in order to perform the tasks of safeguarding and defending the River. An example is the Joint Communiqué issued by the Commander in Chief and the Chief of the National Police of Nicaragua and the Minister of Public Security and the Colonel of the Police Force of Costa Rica dated 8 September 1995 (the Cuadra-Castro Agreement), by which it was agreed that:

“FIRST: In the interests of strengthening the National Security, sovereignty and independence of our countries, the Nicaraguan Army and the Costa Rican Police Force

²⁴⁴ Annexes, Vol 2, Annex 24.

will coordinate, as of this date, the operational plans that involve our authorities and allow for the necessary development of joint, parallel patrolling at the border of both countries, thereby joining forces in the battle against the illegal trafficking of persons, vehicles, contraband of any nature and joint operations, following the exchange of information and planning carried out by both parties.

SECOND: As of this moment, the chiefs of the border units of both countries will coordinate and cooperate more closely in planning and carrying out joint parallel patrolling along our countries' common border, exchanging operative information of the common entities involved, with respect to all activities affecting the stability of the terrestrial and aerial border zone related to drug trafficking, arms trafficking, smuggling, rustling, naval piracy, illegal trafficking of persons and the presence and/or passage of criminal gangs."²⁴⁵

4.105. Costa Rica's navigation on the San Juan with public vessels carrying police personnel with its arms and ammunition took place both before and after this arrangement, without any Nicaraguan opposition, until 14 July 1998, when the first serious violation of this right was committed. A register of Costa Rica's police navigation shows that between August and December 1994 there were 33 return journeys on the River to Barra del Colorado, 107 during 1995, 126 in 1997 and five in June 1998. Registers also show that Costa Rica's police navigated the San Juan in the direction of Boca San Carlos twice in February 1995, 18 times in 1996, 40 times in 1997 and 23 times between January and June 1998.²⁴⁶

4.106. To sum up, the tasks of custody and safeguarding of the San Juan on those parts where the navigation is common to both countries, as well as the contribution to defence of the River and the common bay of San Juan del Norte, can only be carried out by Costa Rica through navigation on the San Juan. Its right to do so was recognised in the Cleveland Award, the 1916 Judgment of the Central American Court of Justice, the 1956 Agreement, the 1995 Cuadra-Castro Agreement, the 1998 Cuadra-Lizano Joint Communiqué and in the conduct of both parties.

²⁴⁵ Annexes, Vol 2, Annex 27.

²⁴⁶ See First Commandant, Mayor Hugo Espinoza, Sarapiquí Atlantic Command, to General Director of the Border Police, Colonel Max Cayetano Vega, Note 3054-98, P.F.S., 18 December 1998: Annexes, Vol 6, Annex 227. It may be noted that before 1994 there appear to have been no log books recording navigation: the practice of keeping log books recording navigation seemingly only started in 1994.



Service arms carried by Costa Rican police agents navigating the San Juan for the purposes of re-supply of Costa Rican police posts in the San Juan region.

F. Re-supply of and transport of personnel to and from border posts

4.107 The rights and obligations to protect commerce, to safeguard the River, and to defend it as well as the common bay of San Juan del Norte, have as a corollary the right to use the River for re-supply and relief of personnel in border posts charged with these duties. Nicaragua acknowledged this through the agreement signed by the Nicaraguan Minister of Defence in Managua on 30 July 1998.

4.108. Costa Rica has the right and the obligation to maintain border posts along its bank of the San Juan. This obligation translates into the right of the Costa Rican police to use the River as a means for relief of personnel and re-supply purposes, since even to this day there are no other practicable means to achieve it by land, due to the geographical configuration of the zone, its climate and conditions and the lack of suitable roads. The right bank of the San Juan constituting the boundary is approximately 150 kilometres in length and in practice the River is the only way that bank can be reached. From the police posts it could take days on foot to reach other villages.

4.109. Since the perpetual right of free navigation includes navigation with public armed vessels, and since the existence of the police posts at the border is a requirement in order to fulfil Costa Rica's obligations concerning the safeguarding and defence of the San Juan and falls within its right to protect its commerce upon it, there exists as a corollary a right to navigate with public vessels carrying personnel, arms and ammunition for the re-supply and relief of personnel in those police posts.

4.110. Navigation on the San Juan with the purpose of re-supply and relief of personnel in border posts on the Costa Rican bank is a purely passive activity. Unlike measures directed at protecting commerce, which could imply active measures, it is confined to the mere transport of the necessary personnel, weapons and ammunition.

4.111. Nicaragua's views with regard to this right have been contradictory. Until the first serious breach of Costa Rica's right on 14 July 1998, Nicaragua had generally respected it. At one point, what Nicaragua disputed was the right

of the Costa Rican police personnel to navigate with their arms, not the navigation itself. Nicaraguan President Arnaldo Alemán affirmed that: “Our warning is that there is a right to circulate on the San Juan, but unarmed.”²⁴⁷

4.112. Subsequently Nicaragua changed its position and denied the existence of any right of navigation for Costa Rican public vessels. President Alemán stated that “the Costa Rican Civil Guard does not need to navigate the San Juan River to supply the surveillance posts in the border with Nicaragua”, adding that “[t]he Costa Rican police have facilities in their territory to carry out the supply of their border posts through the land, without entering in the waters of that waterway that belongs to Nicaragua.”²⁴⁸

4.113. Nicaraguan Foreign Minister Eduardo Montealegre, speaking before the Permanent Council of the Organization of American States on 8 March 2000, likewise stated that:

“Nicaragua, in honour of the historical ties of friendship and cooperation that exist between the two countries and Governments, has made every effort to cooperate in resolving the alleged need of the Costa Ricans to supply and relieve their border posts on the right bank of the San Juan River via the aforementioned river itself, despite the fact that Costa Rica has easy access to these areas by land and by numerous airplane landing strips.”²⁴⁹

4.114. These statements were and remain untrue: Costa Rica does not possess all-weather roads or numerous landing strips in the border area.

4.115. This right was exercised by Costa Rica without great difficulty (despite occasional incidents in the period immediately prior to the Pact of Amity of 21 March 1949 and again during the civil war in Nicaragua during the 1980s) until 14 July 1998. Only two weeks later, Nicaragua was willing to revert to the

²⁴⁷ Costa Rican translation, original in text Spanish: “La llamada de atención de parte nuestra es que hay derecho de circulación sobre el Río San Juan, pero no armados” in “Prohibition Lifted”, *La Nación*, San José, 17 July 1998: Annexes, Vol 5, Annex 134. See also: “Costa Rican Guard banned from navigating on the San Juan River with arms”, *La Tribuna*, Managua, 17 July 1998: Annexes, Vol 5, Annex 133; “Alemán Reiterates Sovereignty over the San Juan River”, *La Presna Libre*, San José, 23 July 1998: Annexes, Vol 5, Annex 135; “Costa Rican President suspends visit”, *El Nuevo Diario*, Managua, 24 July 1998: Annexes, Vol 5, Annex 137.

²⁴⁸ “Nicaragua: Alemán suggests to Civil Guard not to navigate the San Juan”, *Deutsche Presse Agentur*, Managua, 4 August 1998: Annexes, Vol 5, Annex 146. See also “Permits to Navigate Armed?”, *El Nuevo Diario*, Managua, 17 March 2000: Annexes, Vol 5, Annex 160.

²⁴⁹ Translation by Costa Rica: Annexes, Vol 6, Annex 229.



Costa Rican Coastguard agent and vessel at the Colorado River.



Guard Coast Post Delta Costa Rica near the mouth of the Colorado River, June 2006.

status quo ante, as set out in the Cuadra-Lizano Joint Communiqué of 30 July 1998.²⁵⁰

4.116. A good summary of the legal situation was given by Nicaraguan Minister of Defense Jaime Cuadra in the press conference held at the Augusto César Sandino Airport in Managua after the signature of the Cuadra-Lizano Joint Communiqué of 30 July 1998:

“When faced with questions from Nicaraguan reporters Cuadra denied that the agreement took away sovereignty from the country. ‘Costa Rica has always transited on the river and they are not being denied the right to travel on it and no one is taking away the fact that the river belongs to Nicaragua.’”²⁵¹

4.117. In conclusion, the right to navigate the San Juan with official vessels carrying personnel and ammunition for the re-supply and relief of police posts along the Costa Rican bank of the San Juan is a corollary of Costa Rica’s rights to protect commerce, to safeguard the river and to contribute to its defence, as well as the defence of the common bay of San Juan del Norte. It was recognised by the Cuadra-Lizano Joint Communiqué on 30 July 1998, which (despite its repudiation by Nicaragua) is a valid and binding agreement.

G. Other related rights

4.118. The navigational rights of Costa Rica recognized by the Treaty of Limits are also associated with other rights which arise from the same treaty or from other international binding instruments and which also have consequences relative to the navigation of the San Juan. These include:

- (1) the right to land at any part of the banks of the River where navigation is common;
- (2) facilitation of traffic on the River; and
- (3) a customary right to fish on its waters for subsistence purposes for residents living on the Costa Rican bank of the San Juan.

²⁵⁰ Annexes, Vol 2, Annex 28.

²⁵¹ Costa Rican translation, original text in Spanish: “Ante preguntas de reporteros nicaragüenses Cuadra negó que el acuerdo reste soberanía a su país. ‘De ninguna manera. Costa Rica siempre ha transitado el río y no se les quita a ellos el derecho de navegarlo y no se nos quita a nosotros que el río pertenece a Nicaragua’”, in “Border agreement with Nicas”, *La Nación*, San José, 31 July 1998: Annexes, Vol 5, Annex 141. See also: “Agreement tends to confirm Nicaraguan sovereignty in the San Juan” *La Prensa*, Managua, 1 August 1998: Annexes, Vol 5, Annex 143.

(1) The right to land at any part of the Nicaraguan bank of the River where navigation is common

4.119. According to article VI of the Treaty of Limits, Costa Rica's perpetual right of free navigation includes the right to land at any part of the Nicaraguan bank of the San Juan where navigation is common. Nicaragua has an equivalent right with regard to the Costa Rican bank, which has always been respected.

4.120. The Central American Court of Justice, in its 1916 Judgment, clearly confirmed that in the zone where navigation is common, Costa Rica has "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."²⁵²

(2) Facilitation of traffic on the River

4.121. In accordance with the Agreement pursuant to Article IV of the 1949 Treaty of Amity, signed on 9 January 1956, Costa Rica and Nicaragua...

"shall collaborate to the best of their ability in order to carry out those undertakings and activities which require a common effort by both States and are of mutual benefit and, in particular, in order to facilitate and expedite traffic on the Pan American Highway and on the San Juan River within the terms of the Treaty of 15 April 1858 and its interpretation given by arbitration on 22 March 1888, and also to facilitate those transport services which may be provided to the territory of one Party by enterprises which are nationals of the other."²⁵³

4.122. This provision is further evidence of the existence of the right of navigation for the purpose of transport of passengers in accordance with the Treaty of Limits and the Cleveland Award and constitutes an additional basis for the improvement of the conditions for its exercise. By virtue of this provision, each party is also obliged (and each has a corresponding right) to make its best efforts and to collaborate with the other in order to facilitate navigation on the San Juan as established in the Treaty of Limits and interpreted by the Cleveland Award and to facilitate transport services provided by enterprises of one party in the territory of the other.

²⁵² Annexes, Vol 2, Annex 21, 219.

²⁵³ Costa Rica-Nicaragua, 1956 Agreement, article 1: Annexes, Vol 2, Annex 24.

4.123. Article 1 of the 1956 Agreement puts the Pan American Highway, which traverses Costa Rican and Nicaraguan territory, on the same footing as the San Juan, which is contiguous to the border between the two States. Both have in common the fact of being important means of communication within and between both countries. Clearly, the 1956 Agreement imposes an autonomous obligation of best efforts in order to facilitate transport in the San Juan on both parties, which necessarily include navigation by Costa Rican enterprises of transport.

(3) Customary right to fish in favour of residents of the Costa Rican bank

4.124. In addition, residents on the Costa Rican bank have always fished the waters of the San Juan for purposes of subsistence. The fact that they do so is entirely unsurprising. As this Court said in the *Kasikili/Sedudu Island* case:

“It is, moreover, not uncommon for the inhabitants of border regions in Africa to traverse such borders for purposes of agriculture and grazing, without raising concern on the part of the authorities on either side of the border.”²⁵⁴

4.125. The Commission charged with determining the Eritrea/Ethiopia boundary dispute, after having decided that boundaries in rivers should be determined by reference to the location of the main channel, clearly stated that:

“Regard should be paid to the customary rights of the local people to have access to the river.”²⁵⁵

4.126. In some cases, customary rights of border populations have been recognized by treaties, including the right to fish on rivers. For instance, article 9 of the Agreement between Great Britain and Belgium of 22 November 1934 concerning water rights on the boundary between Tanganyika and Ruanda-Urundi provides that:

“Any of the inhabitants of the Tanganyika Territory or of Ruanda-Urundi shall be permitted to navigate any river or stream forming the common boundary and take

²⁵⁴ *Kasikili/Sedudu Island (Botswana/Namibia)*, I.C.J. Reports 1999, p. 1094 (para 74).

²⁵⁵ Eritrea-Ethiopia Boundary Commission, *Decision Regarding Delimitation of the Border between the State of Eritrea and the Federal Democratic Republic of Ethiopia*, 13 April 2002, 41 ILM 1057, 1116 (para 7.3).

therefrom fish and aquatic plants and water for domestic purposes and for any purposes confirming with their customary rights.”²⁵⁶

4.127. Customary rights have also been expressly recognized in cases in which the boundary delimitation entirely left a river to one of the neighbours. The Protocol concluded between Great Britain and France on 1 July 1912 provides in article 8:

“In the part of the Moa included between cairns XV and XVI the river and the islands belong entirely to France. The inhabitants of the two banks have, however, equal rights of fishing in this part.”²⁵⁷

4.128. The customary right of fishing of the residents of the Costa Rican bank of the San Juan consists of catching fish from the bank and from boats, using in some cases nets of reduced dimensions. This activity is performed for subsistence purposes, essentially for family consumption. It has been carried on for as long as the region has been inhabited. Indeed, this practice entirely corresponds with the first regime of the San Juan ever applied. As mentioned, the Royal Ordinance of 29 November 1540 determined that fishing on the River would be common.²⁵⁸ The right of fishing of the residents of the Costa Rican bank of the San Juan for subsistence purposes has been respected by Nicaragua until very recently, when—after the institution of these proceedings—it began to prevent the riparians from engaging in it.

H. Conclusions

4.129. To summarise, the following conclusions may be drawn:

- (1) Costa Rica has a conventional perpetual right of free navigation over the portion of the San Juan where it is a riparian State, and is entitled to exercise this right without restrictions or interference.
- (2) This right includes in particular the right of navigation for the purposes of commerce, its vessels having the power to land indiscriminately on

²⁵⁶ Agreement regarding Water Rights on the Boundary between Tanganyika and Ruanda-Urundi, London, 22 November 1934, 190 LNTS 106.

²⁵⁷ 9 Martens NRG (3rd) 805.

²⁵⁸ See paragraph 2.08.

the Nicaraguan side of the River where the navigation is common, without being subject to charges of any kind or duties, unless levied by mutual consent of both Governments. It includes:

- (i) the right of free navigation for communication;
 - (ii) the right of free navigation for transportation of goods; and
 - (iii) the right of free navigation for the transportation of persons, including tourism
- (3) This right also includes the right of navigation with the following purposes:
- (i) protection of commerce and of revenue control;
 - (ii) safeguarding or custody of the San Juan;
 - (iii) defence of the common bay of San Juan del Norte; and
 - (iv) as a corollary of these purposes, re-supply and personnel relief at border posts.
- (4) Residents of the Costa Rican bank of the San Juan are entitled to perform their customary right to fish, both from that bank and within the waters of the San Juan along that bank, for subsistence purposes.
- (5) Costa Rica is also entitled to see Nicaragua make its best efforts and collaborate with Costa Rica in order to facilitate the traffic on the San Juan to facilitate transport services provided by enterprises of Costa Rica in the territory of Nicaragua, including the waters of the San Juan.

Chapter 5

Nicaragua's breaches of Costa Rica's rights

A. Introduction

5.01. It was in the context of the Nicaraguan war (1980-1989) that Nicaragua began to challenge Costa Rica's navigational and related rights on the San Juan. Initially these challenges were sought to be justified as temporary measures based on national security requirements. In 1994, however, Nicaragua started shifting its position, reaching a point where today it effectively denies most of Costa Rica's rights.

5.02. In this Chapter, Costa Rica will particularise the different breaches committed by Nicaragua of specific aspects of the navigational and related rights of the River appertaining to Costa Rica.

5.03. The present Chapter is in four main parts.

Section B deals with breaches of Costa Rica's rights of perpetual and free navigation. *Subsection (1)* deals with Nicaragua's conduct in requiring Costa Rican vessels to land on the Nicaraguan bank of the River and to pay for a so-called "departure clearance certificate" (*derecho de zarpe*). *Subsection (2)* discusses Nicaragua's conduct in imposing other charges on Costa Rican vessels navigating the River. *Subsection (3)* addresses Nicaragua's conduct in requiring Costa Ricans and foreigners travelling on Costa Rican vessels to carry a passport and to obtain a Nicaraguan visa. *Subsection (4)* discusses Nicaragua's conduct in imposing timetables on Costa Rican navigation on the River. *Subsection (5)* turns to the searches conducted by Nicaraguan officials of Costa Ricans and foreigners travelling on Costa Rican vessels and of the vessels themselves. *Subsection (6)* addresses Nicaragua's conduct in requiring Costa Rican vessels to carry the Nicaraguan flag whilst navigating the River.

Section C turns to breaches of Costa Rica's right of navigation for the purposes of commerce (*con objetos de comercio*). *Subsection (1)* addresses breaches regarding

communication. *Subsection (2)* discusses breaches concerning the transportation of goods and persons, including tourism.

Section D deals with breaches of Costa Rica's right of protection of commerce, its right and obligation to safeguard and defend the River and the common bay of San Juan del Norte and its right of navigation of its agents for purposes of supply and relief of the police posts along the Costa Rican bank of the River.

Section E deals with breaches of other related rights of Costa Rica.

B. Breaches of Costa Rica's rights of perpetual and free navigation

5.04. In Chapter 4, Costa Rica set out the scope of its rights of perpetual and free navigation. These are categorical rights deriving in the first place from article VI of the Treaty of Limits, which in terms grants Costa Rica an unrestricted right of navigation for the purposes of commerce, including the most ample faculty of transit and commerce.

5.05. Despite the clear wording of the Treaty of Limits and its authoritative interpretation by the Cleveland Award and later by the Central American Court of Justice, in the period since 1994 Nicaragua has engaged in a series of actions which amount to a serious denial of Costa Rica's rights.

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

5.06. Pursuant to article VI of the Treaty of Limits the vessels of Costa Rica and Nicaragua have the right to land on either side of the River. Nowhere is it stipulated that Costa Rican vessels have an *obligation* to land on the Nicaraguan bank and report to the Nicaraguan authorities.

5.07. Before the civil war in Nicaragua started, the practice had been that Costa Rican boatmen who needed to navigate the San Juan to transit from one part of Costa Rican territory to another, e.g. from Barra del Colorado to Puerto Viejo de Sarapiquí or vice versa, would obtain a departure clearance certificate

issued by Costa Rican authorities (either in Barra del Colorado or Puerto Viejo de Sarapiquí), and would show it on request to the Nicaraguan authorities when entering the San Juan.²⁵⁹

5.08. In the early 1980s Nicaraguan army authorities started forcing Costa Rican vessels to stop at Nicaraguan posts along the River and demanding payment for their own “departure clearance certificate” every time the River was used for transit, even when the Costa Rican vessels were travelling from one part of Costa Rican territory to another. According to several witnesses, at that time the Nicaraguan Army members justified this charge as a contribution towards the purchase of food and supplies for their post.²⁶⁰

5.09. On 6 November 1980, in the context of the incident two days earlier when Nicaraguan Army officials at Boca de Sarapiquí shot at a Costa Rican vessel transporting personnel of the Ministry of Health, the Sandinista Government announced that, to avoid conflict, every time Costa Ricans wished to navigate the San Juan entering by Boca de Sarapiquí, they should report to the Nicaraguan authorities.²⁶¹

5.10. At that time, the Nicaraguan Foreign Minister was reported as stating:

“What happens – he said – is that Costa Ricans have a right of navigation on the San Juan according to the Cañas-Jerez Treaty. But because in that area there are counterrevolutionary bands, we have asked the Costa Ricans to notify when they are going to cross the San Juan”. He added that: “it is not that we want to ignore their right to navigate the river, but simply that they notify us, as the Hondurans do when they navigate on the Coco River, so as to avoid accidents like the one of the previous Tuesday.”²⁶²

5.11. However, on 4 July 1982, Nicaraguan Army officials at the border post at the mouth of the Sarapiquí River verbally informed boatmen from Swiss Travel Services, a Costa Rican tour operator, about certain “new conditions”

²⁵⁹ As explained in Affidavit of Wilton Hodgson Hodgson, 1 February 2006: Annexes, Vol 4, Annex 96; and Affidavit of Rubén Lao Hernández, 17 February 2006: Annexes, Vol 4, Annex 103.

²⁶⁰ Affidavits of Windel Hodgson Hodgson, 28 January 2006: Annexes, Vol 4, Annex 93, and Armando Perla Perez, 28 January 2006: Annexes, Vol 4, Annex 92.

²⁶¹ “Nicaragua conditions navigation on the waters of the San Juan River”, *La Nación*, San José, 8 November 1980: Annexes, Vol 5, Annex 111.

²⁶² *Ibid.*

under which Costa Rican boatmen and passengers would be allowed to navigate the San Juan. As reported by Swiss Travel Services to Costa Rica's Foreign Ministry, the new conditions faced by their boatmen were as follows:

1. They must pay the departure clearance certificate at Barra del Colorado at the Rural Assistance Guard.
2. Bring the departure clearance certificate to the border post, and exchange it for a new one that they prepare with a cost of ₡10,00 since they argue that the departure clearance certificate issued by the Costa Rican authorities is not valid when navigating the San Juan River.
3. To this effect, the boatman must climb up to the post, which is located on top of a hill, under the rain, and with mud, etc., taking approximately 20 minutes going up and 20 going down. In the meanwhile, the customers wait sitting in the boat...²⁶³

5.12. This situation was protested by Costa Rica on 16 July 1982.²⁶⁴ Nicaragua responded on 2 August 1982, saying that:

"Based on this eminent dominion that Nicaragua exercises over that part of its national territory, our country has the right to establish regulations over said river, which in no way are contrary to the right of free navigation that Costa Rica possesses."²⁶⁵

5.13. The Costa Rican Foreign Minister responded on 19 August 1982, saying that the Government of Costa Rica could not accept

"the thesis of the Government of Nicaragua that this country has the right 'to establish regulations over said river', in detriment of the right of Costa Rica, nor the thesis that Nicaragua has 'the obligation' to 'exercise acts of sovereignty and jurisdiction over that part of its national territory and over the vessels that navigate on it', in detriment of Costa Rica's right. This interpretation, which the Government of Costa Rica rejects, contradicts and limits what by virtue of the Treaty does not admit contradiction or limitation."²⁶⁶

²⁶³ Manager of Swiss Travel Services, Emilia Gamboa, to Costa Rican Deputy Foreign Minister, Ekhart Peters, 13 July 1982: Annexes, Vol 6, Annex 225.

²⁶⁴ 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: Annexes, Vol 3, Annex 42.

²⁶⁵ Nicaraguan Chargé d'Affaires a.i to Costa Rica, Oscar Ramón Téllez, to Costa Rican Foreign Minister, Fernando Volio Jiménez, Note No. E.N. 789/82, 2 August 1982: Annexes, Vol 3, Annex 44.

²⁶⁶ Costa Rican Foreign Minister, Fernando Volio Jiménez, to Nicaraguan Chargé d'Affaires a.i to Costa Rica, Oscar Ramón Téllez, Note No. DM-189-82, 19 August 1982: Annexes, Vol 3, Annex 45.

5.14. While asking Nicaragua to cease the violations to Costa Rica's navigational rights, the note also protested the maintenance and increase in the charge for a departure clearance certificate that apparently had taken place recently: this constituted "a tax that is excluded by article six of the Cañas-Jerez Treaty".²⁶⁷

5.15. The Nicaraguan Ambassador in Costa Rica responded on 6 September 1982 stating that:

"...the San Juan River is a river absolutely Nicaraguan, and on the base of this unquestionable reality Nicaragua has exercised, exercises, and will continue to exercise all the attributes of its sovereignty, without any detriment to Costa Rica's right to free navigation, that will continue to be respected by Nicaragua... Free navigation to the degree that such right is not used to harm the national interests, alter the order and peace of the nation, attempt against Nicaragua's territorial integrity, or to disrespect the rights that international norms recognize to the sovereign States."²⁶⁸

5.16. However, Nicaragua did acknowledge that the departure clearance certificate was being improperly imposed. The note said:

"Finally, regarding the purported taxes that according to Your Excellency are being charged by our authorities in the zone, proper measures have already been adopted to prohibit that practice, if it were true they were being demanded, in accordance with that stipulated in the 1858 Treaty."²⁶⁹

5.17. In the period after the end of the civil war, things seem to have returned to normal. Thus Mr Ruben Lao Hernández, a boatman on the River for more than 60 years, states that

"After the end of the Nicaraguan counterrevolution, around the year nineteen eighty eight, navigation along the San Juan River returned to normal, and he did not encounter any problems navigating, even at night."²⁷⁰

²⁶⁷ Ibid.

²⁶⁸ Nicaraguan Ambassador to Costa Rica, Rogelio Ramírez Mercado, to Costa Rican Foreign Minister, Fernando Volio Jiménez, Note No. E.N. 865/82, 6 September 1982: Annexes, Vol 3, Annex 46.

²⁶⁹ Ibid.

²⁷⁰ Affidavit of Rubén Lao Hernández, 17 February 2006: Annexes, Vol 4, Annex 103.

5.18. On the other hand, it appears that on occasion payments were demanded. Thus Mr Armando Perla Pérez, a boat captain resident in Barra del Colorado who has navigated the San Juan since the late 1970s, states:

"...when the war was over, navigation returned back to normal and ... they could navigate without restrictions and without making payments for tourist or immigration purposes, but ... they were sometimes charged a departure clearance certificate of one thousand colones."²⁷¹

5.19. In March 2001 complaints were made by Costa Ricans living in the San Juan area that they were being charged US\$25 for permission to travel on the River. In consequence, the Costa Rican Deputy Minister of Foreign Affairs sent a note to the Nicaraguan Minister of Foreign Affairs on 18 April 2001, protesting the charge. The note stated:

"I address Your Excellency on the matter of a fee of US\$25.00 (twenty five US dollars) that the Nicaraguan authorities charged Costa Ricans travelling along the San Juan River during the past month of March. This illegal charge took place when Costa Ricans were navigating the San Juan River in vessels carrying the national flag. In this respect, we are enclosing one of the receipts issued by the Nicaraguan authorities, which proves the charge of the above-mentioned fee.

This fact constitutes a flagrant violation of the Republic of Costa Rica's rights of free navigation on the San Juan River that the Cañas-Jerez Treaty of 1858, the Cleveland Award of 1888 and the Central American Court judgement of 1916 grant the Republic of Costa Rica."²⁷²

Nicaragua did not respond to this note.

5.20. In a notarial deed of 5 May 2001,²⁷³ it is recorded how a Costa Rican boatman was charged the amount of US\$25 at the Boca Sarapiquí Post when entering the San Juan on the way from Puerto Viejo de Sarapiquí to Barra del Colorado, despite the fact that the purpose of his journey was commercial.²⁷⁴

²⁷¹ Affidavit of Armando Perla Pérez, 28 January 2006: Annexes, Vol 4, Annex 92.

²⁷² Costa Rican Deputy Foreign Minister, Elayne Whyte, to Nicaraguan Foreign Minister, Francisco Xavier Aguirre Sacasa, Note No. DVM-111-01, 18 April 2001: Annexes, Vol 3, Annex 70.

²⁷³ Affidavit of 5 May 2001: Annexes, Vol 4, Annex 83.

²⁷⁴ "Having been asked about our destination and the purpose of the trip, we said we were going to Barra del Colorado for commercial purposes because we were looking for some property to buy.... After we concluded the payment to the immigration officer, a young man who identified himself as Sergeant Manuel Trejos of the Nicaraguan Army asked Mr. Lao details about the vessel and about our destination. This information was written on a document called 'Departure Clearance Certificate', which is issued by the Nicaraguan Army and which was handed to Mr.

He had to report at the next Nicaraguan Post located at Delta Colorado and present the departure clearance certificate in order to be allowed to continue his journey.²⁷⁵ On his return to Puerto Viejo de Sarapiquí, he was once again charged the amount of US\$25 for the departure clearance certificate when he passed the Nicaraguan Post at Delta Colorado.²⁷⁶

5.21. On 8 May 2001 Costa Rican journalists navigating the San Juan on their way from Puerto Viejo de Sarapiquí to the Colorado River reported that the Nicaraguan Army was charging US\$25 to each Costa Rican vessel every time it entered the San Juan. According to the press report, the boatman who was transporting them was charged US\$25 at the Nicaraguan Army post at Boca Sarapiquí when entering the San Juan on the way to Delta Colorado (in Costa Rica), and he was charged the same amount again on the return journey.²⁷⁷

5.22. On 9 May 2001, Costa Rica again protested the charge of the departure clearance certificate, together with other related violations of Costa Rica's navigational rights.²⁷⁸

Lao. The consecutive number of that document was zero three zero five. Once the document was filled out, Mr. Lao paid a fee of twenty-five American dollars. Upon payment, the Nicaraguan Army issued an official cash receipt numbered zero three hundred and five": Affidavit of 5 May 2001: Annexes, Vol 4, Annex 83. For a copy of this Departure Clearance Certificate and the receipt thereof see Annexes, Vol 6, Annex 241 (a).

²⁷⁵ "We arrived at the post of the Nicaraguan Army, called El Delta Post, at the twelve hours and thirty minutes. There Mr. Lao got off the vessel and climbed some wood logs up to the Post booth, where an officer of the Nicaraguan Army asked him to show the 'Departure Clearance Certificate', to which Mr. Lao complied. After the certificate was checked, he was authorized to enter the mouth of the Colorado River in Costa Rican territory. Once on the Colorado River, we stopped at the Costa Rican Border Police post, known as Delta Costa Rica Post, with the purpose of looking at the property of the area and requesting information about the sale of property in Costa Rican territory": Deed of 5 May 2001: Annexes, Vol 4, Annex 83.

²⁷⁶ "At thirteen hours and thirty minutes, we left the mouth of the Colorado River to begin our return toward Puerto Viejo de Sarapiquí. There we were also required to stop at the so-called El Delta Post of the Nicaraguan Army, and we had to request authorization of the Army officers to be able to continue our course on the San Juan River. After asking Mr Lao information about the vessel and our final destination, and after we replied that it was Puerto Viejo de Sarapiquí, the officer wrote the information on the so-called 'Departure Clearance Certificate', and instructed Mr. Lao to pay again the amount of twenty-five American dollars in order to authorize the navigation. Mr. Lao paid the above amount and the aforementioned "Departure Clearance Certificate" was handed to him. This document was numbered zero four zero four and it indicated the payment of the twenty-five American dollars. Mr. Lao was not given any official cash receipt by the Nicaraguan Army as the officer said that they had no receipts." Affidavit of 5 May 2001: Annexes, Vol 4, Annex 83. For a copy of this Departure Clearance Certificate see Annexes, Vol 6, Annex 241(b).

²⁷⁷ "Nicas insist on charging", *La Nación*, San José, 8 May 2001: Annexes, Vol 5, Annex 169.

²⁷⁸ Costa Rican Foreign Minister, Roberto Rojas López, to Nicaraguan Foreign Minister, Francisco Xavier Aguirre Sacasa, Note No. DM-207-2001, 9 May 2001: Annexes, Vol 3, Annex 71, emphasis added.

5.23. Nicaragua responded Costa Rica's note in the following terms:

"With regard to the motive for your protest, I would like to inform you that the sum of US\$25.00 being charged is, contrary to that expressed by Your Excellency, not for navigating the San Juan River, nor does it constitute any type of tax, but is, rather, the amount charged for providing the departure clearance certificate service that both Nicaraguan and foreign vessels in any Nicaraguan port, including those located in the said river, are charged when travelling to another State.

I have the honour to inform you, dear Minister, that, in the interests of strengthening the fraternal ties of friendship and cooperation that exist between our countries and Governments, the President of the Republic has given instructions to extend the departure clearance certificate to Costa Rican vessels for free in Boca de Sarapiquí and the Delta of the San Juan River, as an act of courtesy, with the exception of vessels related to tourist activities or when they use the Port of San Juan del Norte. The vessels that receive the complimentary departure clearance certificate will only be required to report at the Nicaraguan Army's Military Control Posts on the lower course of the San Juan River."²⁷⁹

5.24. As can be seen, Nicaragua attempted to justify the charging of the departure clearance certificate not as a tax or a payment for navigating the San Juan but rather as an "amount charged for providing the departure clearance certificate service that both Nicaraguan and foreign vessels in any Nicaraguan port, including those located in the said river, are charged when travelling to another State". The charge was justified as a payment for providing a "departure clearance certificate service" which does not exist since there are no port facilities on the San Juan. It is a mere consequence of Nicaragua forcing Costa Rican vessels to stop at its army posts along the river. The charge clearly contradicts article VI of the Treaty of Limits.

5.25. With these considerations in mind, on 26 September 2001 the Costa Rican Foreign Minister responded in the following terms:

"Secondly, the difference should be established between Costa Rican vessels heading specifically for Nicaraguan territory and Costa Rican vessels that have to call at a Nicaraguan port in order to comply with the requirement imposed by the Nicaraguan

²⁷⁹ Nicaraguan Foreign Minister, Francisco Xavier Aguirre Sacasa, to Costa Rican Foreign Minister, Roberto Rojas López, Note No. MRE/DM-JI/0818/08/01, 3 August 2001: Annexes, Vol 3, Annex 72.

authorities of reporting to them. In the latter case, the departure clearance certificate is illogical, since these vessels are travelling between points in Costa Rican territory. In short, the Nicaraguan authorities deliberately impose a condition to report, which represents an economic advantage. Such measure totally violates the corresponding provisions of the Cañas-Jerez Treaty.

Thirdly, it is pleasing to hear the Honourable Government of Nicaragua's declarations of good will. We hope that this good will shall contribute to correctly interpreting the provisions of the Cañas-Jerez Treaty, that, in its Article 6, at the part that corresponds, establishes: '...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'. This aspect is related to that of the previous point in the sense that one may pose the question: 'Which is the service rendered corresponding to the departure clearance certificate?'"²⁸⁰

5.26. Despite Costa Rica's protests, Nicaragua has maintained the requirement of a departure clearance certificate for all Costa Rican vessels navigating the San Juan, regardless of whether they are transiting from one part of Costa Rican territory to another or whether the vessel's final destination is within Nicaragua. It is charged together with the immigration fees that are described in the next section.²⁸¹

5.27. The cost of the departure clearance certificate has varied with time. For example, in April 2000 a charge of 2000 colones for each Costa Rican vessel was announced.²⁸² In May 2001 it was reported and proven that the charge was of US\$25,²⁸³ while in May 2002 the cost of the departure clearance certificate was reported by the press to be 1000 colones.²⁸⁴ By 2003, the press reported

²⁸⁰ Costa Rican Foreign Minister, Roberto Rojas, to Nicaraguan Foreign Minister, Francisco Xavier Aguirre Sacasa, Note No. DM-355-2001, 26 September 2001: Annexes, Vol 3, Annex 73.

²⁸¹ "Nicaraguan Government charges 1500 colones to each Costa Rican who navigates in the San Juan for a short while", *Diario La Extra*, San José, 11 April 2000: Annexes, Vol 5, Annex 162. See also "Nicas insist on charging", *La Nación*, San José, 8 May 2001: Annexes, Vol 5, Annex 169; "Neighbours of the San Juan River feel defenceless", *La Nación*, San José, 22 June 2002: Annexes, Vol 5, Annex 177; "A river of calm and fees", *La Nación*, San José, 14 May 2003: Annexes, Vol 5, Annex 179; and "Costa Rican vessels will bear the Nicaraguan flag", *La Prensa*, Managua, 17 October 2005: Annexes, Vol 5, Annex 186.

²⁸² "Nicaraguan Government charges 1500 colones to each Costa Rican who navigates in the San Juan for a short while", *Diario La Extra*, San José, 11 April 2000: Annexes, Vol 5, Annex 162.

²⁸³ See the Affidavit of 5 May 2001: Annexes, Vol 4, Annex 83; copies of receipts in Annexes, Vol 6, Annexes 241 (a) and (b); and "Nicas insist on charging", *La Nación*, San José, 8 May 2001: Annexes, Vol 5, Annex 169.

²⁸⁴ "Neighbours of the San Juan River feel defenceless", *La Nación*, San José, 22 June 2002: Annexes, Vol 5, Annex 177.

that the cost was raised from 2000 to 4000 colones (approximately US\$4 to US\$8).²⁸⁵ More recently and more consistently, it has been fixed at US\$5.²⁸⁶

5.28. Additionally, not only has the cost of the departure clearance certificate varied over time, but apparently it varies from post to post: currently it may be US\$5 or \$10. As can be seen from the two receipts (**shown opposite**) given by Nicaraguan Army Officers dated 23 June 2006, US\$5 was charged as a departure clearance certificate at the Army Post located in Boca Sarapiquí, but at the Army post of San Juan del Norte the charge imposed was US\$10.²⁸⁷

(2) Other charges

5.29. Notwithstanding article VI of the Treaty of Limits, Nicaragua has argued that, because Costa Rican vessels navigating the San Juan in transit from one part of Costa Rica to another are entering Nicaraguan territory, all passengers are required to pay immigration charges.

5.30. In the context of the incident which occurred on the San Juan on 4 November 1980,²⁸⁸ Costa Rican residents of the border region reported that Nicaraguan officials had began demanding a payment of ₡7 (seven colones, the Costa Rican currency, approximately US\$1 at that time) for each quintal (i.e. 100 pounds) of beans and corn being transported by Costa Rican vessels on the San Juan. They also reported that Nicaraguan Army officials were forcing them to land on the Nicaraguan bank to pay that fee.²⁸⁹ The Nicaraguan Foreign Minister stated that he was not aware of such charges²⁹⁰, and they were suspended immediately.

²⁸⁵ "A river of calm and fees", *La Nación*, San José, 14 May 2003: Annexes, Vol 5, Annex 179.

²⁸⁶ "Costa Rican vessels will bear the Nicaraguan flag", *La Prensa*, Managua, 17 October 2005: Annexes, Vol 5, Annex 186.

²⁸⁷ See Annexes, Vol 6, Annexes 241(c) and (d).

²⁸⁸ Nicaraguan Army officials shot at a Costa Rican vessel transporting personnel of the Ministry of Health (see paragraph 5.95).

²⁸⁹ "Sandinista guards attack Costa Ricans", *La Nación*, San José, 6 November 1980: Annexes, Vol 5, Annex 110.

²⁹⁰ According to the Costa Rican press report: "...Foreign Minister D'Escoto said in our country that he was not aware that the Nicaraguan southern border authorities were charging ₡7 per quintal of corn or beans that leave Costa Rica through the San Juan River and that they (the Costa Ricans) are forced to go to the Nicaraguan border to cancel that fee". See "Foreign Affairs Minister says that the Cañas-Jerez Treaty is unquestionable", *La Nación*, 9 November 1980: Annexes, Vol 5, Annex 112.

REPUBLICA DE NICARAGUA
FUERZA NAVAL - EJERCITO DE NICARAGUA

Recibo Oficial de Caja N° 11156

23 de Junio 20 06 Por CS: 5

Recibo del Sr. (a): Dany Lao
La Cantidad de: Cinco Dolares
En concepto de: Salpe Internacional

Cheque No. _____ Banco _____
Efectivo: US\$
Firma del que recibe: [Signature] Firma del que entrega: Dany Lao

NOTA: ESTE RECIBO NO ES VALIDO SI LLEVA BORRONES O ENMIENDAS.
LITONIC Rm. 28035-3317 C.A. 023 C.Z. 8569 40b 501 (2) 10001 - 14000 15740 ORIGINAL

• Zarpe 1 230606.

REPUBLICA DE NICARAGUA
FUERZA NAVAL - EJERCITO DE NICARAGUA

Recibo Oficial de Caja N° 7473

23 de Junio 20 06 Por CS: 10.00 \$

Recibo del Sr. (a): Renny Jao Hernandez Varela
La Cantidad de: Diez Dolares Nuevos
En concepto de: Pago de Salpe internacional

Cheque No. _____ Banco _____
Efectivo: _____
Firma del que recibe: [Signature] Firma del que entrega: [Signature]

NOTA: ESTE RECIBO NO ES VALIDO SI LLEVA BORRONES O ENMIENDAS.
LITONIC Rm. 28035-3317 C. Aut. 023 OF 3283 40b 501 (2) 6001-8000 02/06 ORIGINAL

• Zarpe 2 230606

Two receipts for "international departure clearance", both dated 23 June 2006 and given to the same boatman: one for navigating from Boca Sarapiquí to San Juan del Norte (US\$5) and the other from San Juan del Norte to Boca Sarapiquí (US\$10).

5.31. This remained the situation until early March 1994, when Nicaragua unilaterally announced that immigration controls would be imposed on Costa Rican tourism transiting on the San Juan, in addition to the charge of US\$5 for a tourism card.²⁹¹

5.32. On 6 March 1994, following an incident in which a Costa Rican government official and his companions were shot at by the Nicaraguan Army, it was reported that US\$5 was being charged indiscriminately to Costa Ricans for navigating the San Juan.²⁹²

5.33. The Costa Rican Foreign Minister discussed both the shooting incident and the charge of US\$5 for navigation on the River with his Nicaraguan counterpart. The Nicaraguan Minister of Foreign Affairs informed him that "the fee of the US\$5 is only in force on the Nicaraguan bank."²⁹³ According to a Nicaraguan press note, the charge of US\$5 was only charged to the tourists when they navigated beyond the area where Costa Rica has free navigation.²⁹⁴ However, in practice this distinction has not been observed and the tourist card was charged to all persons travelling in Costa Rican vessels on the River.²⁹⁵

5.34. A team of journalists visited the area to verify the situation and reported that, in effect, all persons navigating on Costa Rican vessels were being forced to dock on the Nicaraguan bank and were charged US\$5. As they reported it, failure to do so entailed security risks, since the Nicaraguan army officials carried AK-47 guns.²⁹⁶

²⁹¹ "Conflict with the Nicaraguans due to tourism on the San Juan", *La Nación*, San José, 5 March 1994: Annexes, Vol 5, Annex 123.

²⁹² The Costa Rican Government official and his companions were on a mission to distribute school supplies in Costa Rican schools at Barra del Colorado. On their return trip they were shot at in the Delta Colorado area and forced to land on the Nicaraguan bank. See "Ticos were machine-gunned at the San Juan River", *La Nación*, San José, 8 March 1994: Annexes, Vol 5, Annex 124.

²⁹³ *Ibid.*

²⁹⁴ "Problem with Ticos solved", *La Prensa*, Managua, 8 March 1994: Annexes, Vol 5, Annex 125.

²⁹⁵ "Ticos were machine-gunned at the San Juan River", *La Nación*, San José, 8 March 1994: Annexes, Vol 5, Annex 124.

²⁹⁶ "\$5 to navigate on the San Juan River", *La Nación*, San José, 10 March 1994: Annexes, Vol 5, Annex 126.

5.35. The Costa Rican Minister of Foreign Affairs protested to Nicaragua on 15 March 1994, requesting that the “toll that was being charged to Costa Ricans while navigating the San Juan River stop being charged.”²⁹⁷

5.36. Nicaragua replied to the note of protest, stating:

“the charge for the Tourist Card is not a transit toll, but a measure of migratory control. In any case, we must remember that Costa Rica’s perpetual right of free navigation, in the portion indicated in the Treaty [of Limits] does not include tourism, and much less the free access to Nicaragua’s sovereign territory to foreign citizens who travel in Costa Rican vessels that navigate on said River, “for the purpose of transporting tourists”, as your own note states.”²⁹⁸

5.37. The note further added that:

“The Cañas-Jerez Treaty does not limit in any way the exercise of Nicaragua’s Sovereign Rights to establish the necessary migratory and security controls, along and across the whole San Juan... In conformity with these sovereign rights the Government of Nicaragua has established Migratory Control Posts to regulate the payment of the entry visa of citizens of those countries that, according to the Treaties in force, are not exempted from this requirement.”²⁹⁹

5.38. In this response, although the Nicaraguan Government argued that in its view tourism does not qualify as a commercial activity, it acknowledged that Costa Rican citizens could not be charged for navigating the San Juan. Beginning on 22 March 1994, the Nicaraguan Government modified the measure, so that the tourist card would only be charged to passengers who are not Costa Rican citizens. Costa Rica nevertheless “rejected such measure, since it considered that it violates her right of free navigation in the river with national flag vessels, established in the Cañas-Jerez Treaty of Limits.”³⁰⁰

²⁹⁷ “Costa Rica Demands Nicaraguans to withdraw charge on the San Juan”, *La República*, San José, 17 March 1994: Annexes, Vol 5, Annex 128.

²⁹⁸ Nicaraguan Foreign Minister, Ernesto Leal, to Costa Rican Foreign Minister, Bernd Niehaus Quesada, Note No. 940284, 21 March 1994: Annexes, Vol 3, Annex 48.

²⁹⁹ *Ibid.*

³⁰⁰ “Niehaus rules out arbitration”, *La Nación*, San José, 20 April 1994: Annexes, Vol 5, Annex 130. See also “Foreign Ministers will analyze the transit on the San Juan River” *La Nación*, San José, 13 April 1994: Annexes, Vol 5, Annex 129.

5.39. Despite its previous statements, Nicaragua started charging Costa Ricans for the US\$5 "tourist card". By mid-1999, and in the context of the tension between both States that resulted from Nicaragua's prohibition of Costa Rican police navigation, the Nicaraguan Government ordered that all passengers being transported on Costa Rican vessels be charged ₡1500, approximately US\$5 at the time, for navigating the River, together with ₡2000 for the departure clearance certificate for each vessel.³⁰¹ This measure was applied both to other foreigners and to Costa Ricans, including those who owned property on Costa Rican territory adjacent to the San Juan and had to use the River to access their property.³⁰²

5.40. On 8 May 2001 the Costa Rican press reported that Nicaraguan authorities were charging US\$5 for every Costa Rican who navigated the San Juan. Those charges were demanded each time the vessels entered the San Juan, both on their way from Puerto Viejo de Sarapiquí to Delta Colorado and on their return journey.³⁰³

5.41. The charge of US\$5 for the tourist card was recorded in a notarial deed on 5 May 2001.³⁰⁴ The testimony of Mr Norman Scott Chinchilla was that:

"he himself, who owns property bordering on Nicaragua, is forced to pay the corresponding tourist charge, in spite of not being a tourist himself, which deprives him from freely exercising the commercial and agricultural activities on his property."³⁰⁵

³⁰¹ "Nicaraguan Government charges 1500 colones to each Costa Rican who navigates in the San Juan for a short while", *Diario La Extra*, 11 April 2000: Annexes, Vol 5, Annex 162.

³⁰² "San Juan: Calm and Uncasiness", *La Nación*, San José, 4 July 1999: Annexes, Vol 5, Annex 155.

³⁰³ "Nicas insist on charging", *La Nación*, San José, 8 May 2001: Annexes, Vol 5, Annex 169. See also "An infuriating game", *La Nación*, 9 May 2001: Annexes, Vol 5, Annex 170.

³⁰⁴ "Once we were on the left margin of the river, we got off the vessel and climbed some wood logs up to the post of the Nicaraguan authorities. Once at the post, we identified ourselves to a gentleman who claimed to be an immigration officer. Having been asked about our destination and the purpose of the trip, we said that we were going to Barra del Colorado for commercial purposes because we were looking for some property to buy. He gave us some immigration forms and asked us to pay the amount of five American dollars, which was a fee established by the Nicaraguan authorities. He also gave us a receipt numbered with the D Series, number two eight four three six three, for the corresponding payment made by Mr. Alvarado and the undersigned, indicating on the receipt that the payment covered "two Tourist Cards". See Affidavit of 5 May 2001: Annexes, Vol 4, Annex 83. For a copy of the receipt of the tourist card charged to the two passengers see: Annexes, Vol 6, Annex 242 (a).

³⁰⁵ Affidavit of 5 May 2001: Annexes, Vol 4, Annex 83.

5.42. On 9 May 2001 Costa Rica protested the charge for the tourist card, together with other related violations of Costa Rica's navigational rights.³⁰⁶

5.43. Nicaragua responded to Costa Rica's note of protest in the following terms:

"Finally, with regard to the US\$5 the migration authorities charge each person entering Nicaraguan territory; allow me to inform you that the latter amount applies to all foreigners entering the country."³⁰⁷

5.44. On 26 September 2001 the Costa Rican Foreign Minister responded to the Nicaraguan note of 3 August 2001, insisting that the US\$5 charge, as well as the requirement that Costa Rican vessels call at Nicaraguan posts, constituted violations of Costa Rica's right to free navigation.³⁰⁸

5.45. Despite this protest, Nicaraguan authorities continued to charge all Costa Ricans navigating the San Juan US\$5 for the tourist card.

5.46. Beginning in 2002, in addition to the US\$5 tourist card, the Nicaraguan Government began charging an additional US\$2 for "immigration fees for entering Nicaraguan territory". Accordingly, Costa Ricans and other nationals who were transported in Costa Rican vessels on the San Juan from one part of Costa Rica to another had to pay US\$7 to be allowed such transit.³⁰⁹

5.47. At the beginning of May 2002, Nicaraguan authorities at the Boca de Sarapiquí post once again raised the amount of the immigration fees by an additional US\$2, justified as "immigration fees for exiting Nicaraguan territory", making a total of US\$9 for each trip along the San Juan. Initially the additional payment of US\$2 was only charged during weekends and on

³⁰⁶ Costa Rican Foreign Minister, Roberto Rojas López, to Nicaraguan Foreign Minister, Francisco Xavier Aguirre Sacasa, Note No. DM-207-2001, 9 May 2001: Annexes, Vol 3, Annex 71.

³⁰⁷ Nicaraguan Foreign Minister, Francisco Xavier Aguirre Sacasa, to Costa Rican Foreign Minister, Roberto Rojas López, Note No. MRE/DM-II/0818/08/01, 3 August 2001: Annexes, Vol 3, Annex 72.

³⁰⁸ Costa Rican Foreign Minister, Roberto Rojas López, to Nicaraguan Foreign Minister, Francisco Xavier Aguirre Sacasa, Note No. DM-355-2001, 26 September 2001: Annexes, Vol 3, Annex 73.

³⁰⁹ "Nicas raise River charge", *La Nación*, San José, 21 May 2002: Annexes, Vol 5, Annex 174.

holidays; from Monday to Friday the charge was US\$7. Subsequently, US\$9 was charged at all times. These measures seriously affected those engaged in the commercial transportation of passengers, since the high costs discouraged many to travel from Sarapiquí to Barra del Colorado and Tortugero.³¹⁰

5.48. The Director of Nicaraguan Immigration justified the new immigration charges explaining that “[i]t is not that a new tax is being applied... what happens is that the immigration fee fully established in Nicaraguan laws is being complied with.”³¹¹

5.49. In this context, on 21 May 2002 the Costa Rican Embassy in Managua formally requested that the Ministry of Foreign Affairs inform Costa Rica: “How much are the Nicaraguan authorities charging Costa Rican vessels and citizens for navigating the San Juan River in the sector where our country has free navigation?”³¹²

5.50. The Nicaraguan Ministry of Foreign Affairs responded on 29 May 2002:

“With regard to the motive for your Honourable Embassy’s inquiry, the Ministry states that in those cases where Costa Ricans enter Nicaraguan territory and navigate the lower course of the San Juan River with purposes that differ from those stipulated in the Jerez-Cañas Treaty, they must comply with the same requirements applied to all persons of foreign nationality who enter the country via any international migration post, as stipulated in the provisions of the Regulations for the Issuing, Format and Use of the Special Tourist Card published in the official daily *La Gaceta* Number 153 of 16 August 1993 and in the Law that created the Nicaraguan Institute of Tourism published in the official daily *La Gaceta* Number 149 of 11 August 1998, and the Ministry of Governance Agreement No. 001-94 of 15 March 1994 in which the Migration and Immigration Duties are established.

The Ministry informs the Embassy that the Republic of Nicaragua faithfully complies with its international obligations and, consequently, respects the rights of navigation on the lower course of the San Juan River *con objetos de comercio* granted to Costa Rica under the Jerez-Cañas Treaty and the Cleveland Award.”³¹³

³¹⁰ Ibid.

³¹¹ “Immigration confirms charge to Ticos on the San Juan”, *El Nuevo Diario*, Managua, 22 May 2002: Annexes, Vol 5, Annex 175.

³¹² Costa Rican Embassy in Nicaragua to Ministry of Foreign Affairs of Nicaragua—General Directorate for Latin America, Note Verbale No. ECR-079-5-2002, 21 May 2002: Annexes, Vol 3, Annex 76.

³¹³ Nicaraguan Ministry of Foreign Affairs Directorate of Sovereignty, Territory and International Legal Affairs to Costa Rican Embassy in Managua, Note Verbale No. MRE/DGSTAJI/335/05/02, 29 May 2002: Annexes, Vol 3, Annex 78.

5.51. More recently, the document for which a charge of US\$5 (**shown opposite**) is made has been referred to as a “transit permit through the border points” (“*permiso de tránsito en los puntos fronterizos*”), which is charged to both boatmen and passengers.³¹⁴

5.52. As can clearly be observed, Nicaragua sought to justify the charges imposed on Costa Rican navigation on the River on the ground that this navigation was not carried out “*con objetos de comercio*”. But as demonstrated in Chapter 4, all the navigation that was subject to the charges is plainly protected by the Treaty of Limits and by subsequent decisions which are binding on Nicaragua.

5.53. It remains the case that all passengers and boatmen navigating on Costa Rican vessels are being charged US\$9, in clear violation of Costa Rica’s right of free navigation.³¹⁵

(3) Visas and Passports

5.54. Nicaragua has imposed a requirement that both Costa Ricans as well as other foreign nationals from countries that require a visa to enter Nicaragua must carry their passports with a Nicaraguan visa while transiting the San Juan on Costa Rican vessels, even when travelling between different parts of Costa Rican territory. If this requirement is not complied with, Nicaragua refuses the right of navigation.

5.55. The first attempt to impose such a restriction occurred on 6 June 1982, when Nicaraguan army officials requested a mandatory visa for navigation on the San Juan for a group of tourists who were being transported by the Costa Rican company Swiss Travel Services, from Barra del Colorado to Puerto

³¹⁴ For copies of receipts see Annexes, Vol 6, Annexes 243 (a) and (b).

³¹⁵ See Affidavit of Carlos Lao Jarquín, 27 January 2006: Annexes, Vol 4, Annex 84; Affidavit of Geovanny Navarro Garro, 27 January 2006: Annexes, Vol 4, Annex 85; Affidavit of Pablo Gerardo Hernández Varela, 27 January 2006: Annexes, Vol 4, Annex 86; Affidavit of Santos Martín Arrieta Flores, 27 January 2006: Annexes, Vol 4, Annex 87; Affidavit of Marvin Hay-Gonzalez, 28 January 2006: Annexes, Vol 4, Annex 91; Affidavit of Windel Hodgson Hodgson, 28 January 2006: Annexes, Vol 4, Annex 93; Affidavit of Daniel Reesc Wise, 28 January 2006: Annexes, Vol 4, Annex 95; and Affidavit of Wilton Hodgson Hodgson, 1 February 2006: Annexes, Vol 4, Annex 96. For copies of the receipts for payment of the \$4 for “migratory services”, which must be paid in addition to the \$5 Tourist Card, see: Annexes, Vol 6, Annexes 245(a) and (b).

MINISTERIO DE GOBERNACION
 DIVISION GENERAL ADMINISTRATIVA FINANCIERA
 SISTEMA DE CONTABILIDAD

No. 0413849

RECIBO OFICIAL DE CAJA

UNIDAD RECAUDADORA: Migracion y Ext.

CORDOBAS
 DOLARES

LUGAR Y FECHA: Carapigui 21-11-05.

RECIBIDO POR: Carlos Lao Jarquin

POR CUENTA DE: El mismo

LA CANTIDAD DE: Cuatro dolares netos

EN CONCEPTO DE: (300) Desp migr. (E43)

DEPARTAMENTO: R. G. J. MUNICIPIO: OLC DEPENDENCIA: M. G. E.

NOTA: NO ES VALIDO CON ENMIENDAS O BORRONES
 ORIGINAL CLIENTE

FIRMA DEL CAJERO

• Entry and Exit Receipt

MINISTERIO DE GOBERNACION
 DIVISION GENERAL ADMINISTRATIVA FINANCIERA
 SISTEMA DE CONTABILIDAD

No. 0413893

RECIBO OFICIAL DE CAJA

UNIDAD RECAUDADORA: Migracion y Ext.

CORDOBAS
 DOLARES

LUGAR Y FECHA: Carapigui 21-11-05.

RECIBIDO POR: El mismo

POR CUENTA DE: El mismo

LA CANTIDAD DE: Cinco dolares netos

EN CONCEPTO DE: (340) permiso de transito en los puertos Fronterizos

DEPARTAMENTO: R. S. J. MUNICIPIO: OLC DEPENDENCIA: M. G. E.

NOTA: NO ES VALIDO CON ENMIENDAS O BORRONES
 ORIGINAL CLIENTE

FIRMA DEL CAJERO

• Transit permit

Each person navigating in a Costa Rican vessel on the San Juan must pay US\$4 for a "migratory clearance" (entry to and exit from Nicaragua) and US\$5 for a "transit permit through border points".

Viejo, Sarapiquí, both in Costa Rican territory.³¹⁶ This event was duly protested by Costa Rica's Foreign Minister.³¹⁷

5.56. On 4 July 1982, Nicaraguan army officials requested passports at the Nicaraguan Army post located in the outlet of the Sarapiquí River on the San Juan for a group of tourists who were being transported by the Costa Rican company Swiss Travel Services, from Barra del Colorado to Puerto Viejo, Sarapiquí.³¹⁸ Costa Rica's Foreign Minister also protested this event.³¹⁹

5.57. Although Nicaragua did not respond Costa Rica's notes of protest, for the time being the incidents requesting visas for the navigation on the San Juan ceased.

5.58. Thereafter Nicaragua did not request passports and visas for navigation on the San Juan until October 2005, after Costa Rica instituted the present proceedings.

5.59. Initially, as retaliation for Costa Rica having presented the case before the International Court of Justice and purportedly as a way of financing the costs of the litigation, members of the Nicaraguan Congress threatened to impose a tax of 35% on all Costa Rican imports, the so-called "Patriotic Tax". Instead of imposing the tax, the Nicaraguan Government decided to impose on Costa Ricans a US\$20 visa fee (plus US\$5 for the relevant application form). That the visa fee was in substitution for the Patriotic Tax was expressly acknowledged by Nicaragua's Foreign Minister:

"We have to see what measures can be taken based on other points of view so it is not interpreted that we want to punish the Court for having accepted the case. What we could achieve with measures like this [the Patriotic Tax] is to make the Court hostile."³²⁰

³¹⁶ Manager of Swiss Travel Services, Emilia Gamboa, to Costa Rican Minister of Public Security, Angel Edmundo Solano, 7 June 1982: Annexes, Vol 6, Annex 223.

³¹⁷ 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: Annexes, Vol 3, Annex 41.

³¹⁸ Manager of Swiss Travel Services, Emilia Gamboa, to Costa Rican Deputy Foreign Minister, Ekhart Peters, 13 July 1982: Annexes, Vol 6, Annex 225.

³¹⁹ 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: Annexes, Vol 3, Annex 42.

³²⁰ "We can stop the case", *El Nuevo Diario*, Managua, 2 October 2005: Annexes, Vol 5, Annex 184.

“With such measure (the imposition of the Visa to Costa Ricans), considering that some 100 thousand Costa Ricans enter Nicaraguan territory each year, the funds necessary to allow Nicaragua to face the case presented in The Hague over the San Juan River would be obtained. At that moment, Minister Caldera indicated that with that measure Nicaragua would not need to impose the patriotic tax of 35 per cent to Costa Rican products that enter Nicaragua, an initiative that was proposed by some members of the National Assembly.”³²¹

5.60. In October 2005 local residents on the Costa Rican side were informed by Nicaraguan officials that from 17 October 2005 any person, including children, transiting on the San Juan would be required to show their identification documents to the Nicaraguan authorities.³²² Subsequently the Nicaraguan authorities warned local residents and boat owners that without a passport and a Nicaraguan visa, they would not be allowed to navigate the San Juan.³²³

5.61. This admonition has been enforced, at least selectively. On 15 November 2005, a Nicaraguan Immigration official on the Boca de Sarapiquí Army Post forbade navigation to a local boatman who was transporting two European tourists from Puerto Viejo towards Tortuguero. The Nicaraguan official demanded his passport with the Nicaraguan visa: since the Costa Rican boatman did not carry it he was prevented from continuing his journey to Tortuguero, and could not complete the transportation service contracted with his passengers.³²⁴ He was told that henceforth he would have to present his passport with a Nicaraguan visa to be able to navigate the San Juan or else he “would not pass”.³²⁵ According to this boatman’s testimony, he was also informed by the Nicaraguan authorities that a visa is only valid for a single entry into the San Juan.³²⁶

³²¹ “Ticos will pay for a visa”, *El Nuevo Diario*, Managua, 19 October 2005: Annexes, Vol 5, Annex 188.

³²² “Nicaragua conditions passing of Costa Rican vessels”, *La Nación*, San José, 16 October 2005: Annexes, Vol 5, Annex 185.

³²³ “Nicaragua demands a Visa and Passport on the River”, *La Nación*, San José, 30 October 2005: Annexes, Vol 5, Annex 189.

³²⁴ “On November fifteenth of this year, our colleague Pablo Hernandez Varela was heading from Puerto Viejo de Sarapiquí to Tortuguero with two tourists, and since he was not carrying his passport, the Nicaraguan authorities sent him back, which forced him to return along with the tourists...”: Mr. Jorge Lao Jarquin and Mr. Santos Arrieta Flores to Costa Rican Foreign Ministry, 22 November 2005: Annexes, Vol 6, Annex 238.

³²⁵ Affidavit of Pablo Gerardo Hernández Varela, 27 January 2006: Annexes, Vol 4, Annex 86.

³²⁶ *Ibid.*

5.62. On 21 November 2005, another local Costa Rican boatman was detained for approximately two hours by the Nicaraguan authorities at the Boca del Sarapiquí Army post on the San Juan, when he was travelling from Tortuguero towards Puerto Viejo, Sarapiquí. The Nicaraguan officials alleged that the Costa Rican boatman was not carrying his passport at the time.³²⁷ In order to continue with his commercial activity of transportation of passengers, this boatman had no choice but to travel twice to San José to obtain a Nicaraguan visa, at a cost of US\$25 on each occasion, in addition to travel costs and time spent.³²⁸ A copy of the visa stamped in the boatman's passport is shown in the following page.

5.63. Other witnesses have given their accounts of how Nicaraguan authorities have demanded that they carry a Costa Rican passport with a Nicaraguan visa to be allowed to navigate the San Juan, as well as evidence of the resulting loss suffered in respect of their commercial activities.³²⁹

5.64. Until the filing of this Memorial, Nicaragua continues to impose the requirement of a visa and a passport to navigate the San Juan. This is a clear violation of Costa Rica's right to free and perpetual navigation. Costa Rica does not contest the right of Nicaragua to require a visa for any foreigner, including Costa Ricans, to stay in Nicaragua's territory. However, Costa Rica contests the imposition of a visa whether as a requirement for navigating the San Juan or for landing on the Nicaraguan bank. According to the Treaty of Limits, Costa Ricans have the right to land on the Nicaraguan bank, just as Nicaraguans do on the Costa Rican bank. This landing (without the purpose of staying in Nicaraguan territory) is also covered by article VI and no visa can be required.

³²⁷ "Yesterday the same thing occurred to our colleague Carlos Lao Jarquin, who was returning from Tortuguero to Puerto Viejo de Sarapiquí. He was not carrying tourists and at the Post at the mouth of the Sarapiquí, the Nicaraguan authorities retained him there for a time period of between an hour-and-a-half and two hours because he was not carrying a passport being that, as we said, he was traveling to Costa Rican territory": Mr. Jorge Lao Jarquin and Mr. Santos Arrieta Flores to Costa Rican Foreign Ministry, 22 November 2005: Annexes, Vol 6, Annex 238.

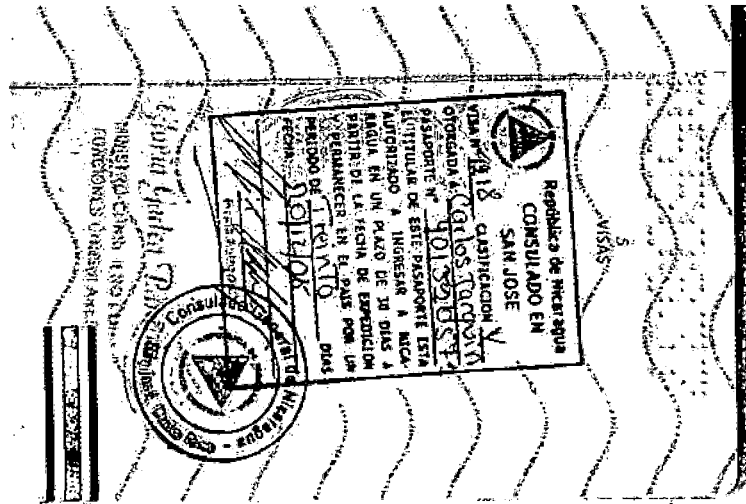
³²⁸ Affidavit of Carlos Lao Jarquin, 27 January 2006: Annexes, Vol 4, Annex 84. Copies of the payment receipts for each visa, as well as of the visas themselves, are included in: Annexes, Vol 6, Annex 244.

³²⁹ Affidavit of Geovanny Navarro Garro, 27 January 2006: Annexes, Vol 4, Annex 85; Affidavit of Santos Martín Arrieta Flores, 28 January 2006: Annexes, Vol 4, Annex 87; Affidavit of Marvin Hay-Gonzalez, 28 January 2006: Annexes, Vol 4, Annex 91; Affidavit of Armando Perla Pérez, 28 January 2006: Annexes, Vol 4, Annex 92; Affidavit of Windel Hodgson Hodgson, 29 January 2006: Annexes, Vol 4, Annex 93; Affidavit of Daniel Reese Wisc, 29 January 2006: Annexes, Vol 4, Annex 95.

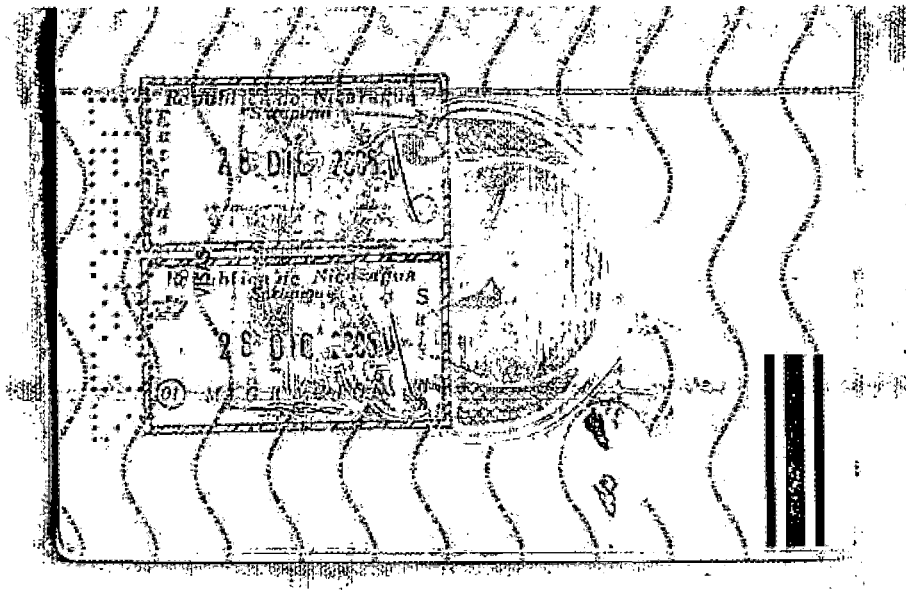
5.65. In this regard three points must be underlined. First, a regime of visas cannot apply to a use of a river established by treaty as “free” without any qualification. When Costa Ricans (or citizens of other countries on board Costa Rican boats) navigating on the San Juan are exercising that right of navigation, no visa can be required. Any such requirement would annul the qualification of “free”, establishing a condition that must be fulfilled in order that the navigation be authorised, a condition that moreover has a significant economic cost. Second, if such a condition could be imposed, the subsequent denial of a visa would effectively render Costa Rica’s right of navigation void of content: a *right* of free navigation is effectively denied if it is made subject to a discretionary precondition, such as the grant of a visa. Third, from a practical perspective this requirement could effectively prevent riparians from using the San Juan at all, since they would need to use the River to travel to the nearest Nicaraguan Consulate in Costa Rica, something they would not be able to do since they do not have a visa in the first place. Moreover, the visa is granted for a single entry only. A person who needs to use the San Juan every day would in principle be required to obtain one visa each day, which (quite apart from the cost) would be virtually impossible for any person living in the region.

5.66. The financial burden imposed by the requirement to obtain a visa should not be overlooked. A visa costs US\$25 for every entry on the River, in addition to the expenses incurred for travelling to the nearest Nicaraguan Consulate to obtain the visa. Thus, for a person who does not have the means to pay for the visa and related costs, in practice navigation on the River is impossible; it would also be prohibitive when the transit of entire families is considered.

5.67. In short, Nicaragua not only requires consular authorisation to navigate the River (which authorisation can in principle be denied); it also requires that the authorisation be paid for, further restraining the ability to travel freely on the San Juan. By these actions Nicaragua undermines the ability of Costa Rica, Costa Ricans and other nationals transiting to and from Costa Rican territory to effectively exercise the rights of perpetual and free navigation.



• Visa Dec 05



• Entry and Exit seal 28-12-2005

Visa granted for a single entry to Nicaragua, valid for 30 days, required for Costa Rican citizens to be permitted to navigate the San Juan. A boatman's passport stamped with an entry and exit seal on the same day at Sarapiquí by Nicaraguan authorities. The passport holder was required to obtain a new visa in order to navigate in the San Juan again.

(4) Timetables

5.68. The imposition of navigational timetables constitutes a restriction that inevitably violates Costa Rica's perpetual rights of free navigation. None of the applicable instruments authorise Nicaragua to impose timetables or time limits on Costa Rican navigation of the River.

5.69. Before the civil war in Nicaragua that followed the Sandinista revolution in 1979, no timetables were imposed on Costa Rican navigation.³³⁰ It was in the context of the Nicaraguan civil war that Nicaragua first imposed timetables.

5.70. In March 1983 the Nicaraguan army prohibited navigation on the San Juan after 6pm. The Nicaraguan officials affirmed that the measure was taken for national security reasons due to the possibility of a counter-revolutionary attack.³³¹ This action was protested by Costa Rica on 8 March 1983 as a violation of the Treaty of Limits.³³²

5.71. The impact of such restrictions on individuals using the River is illustrated in the statement of Marvin Hay González:

“according to his experience, it was dangerous to navigate the San Juan River around the eighties due to the armed conflict in Nicaragua... [O]n several occasions, the Nicaraguan Army forced him to stop the vessel in the afternoon, and he recalls that they pointed machine guns at him as he was told that he was not allowed to navigate the river, and that he had to sleep overnight on his vessel in order to continue his journey the next day... [Navigation] returned to normal after the war.”³³³

5.72. As Marvin Hay González stated in his affidavit, after the end of the war in Nicaragua navigation returned to normal. This is confirmed by boatman Ruben Lao who stated that:

³³⁰ Several boatmen with many years of navigating the San Juan have confirmed that it was during the times when the Sandinistas held power in Nicaragua that the timetables and other restrictions to Costa Rican navigation on the San Juan were imposed. See Affidavit of Marvin Hay Gonzalez, 28 January 2006: Annexes, Vol 4, Annex 91; Affidavit of Wilton Hodgson Hodgson, 1 February 2006: Annexes, Vol 4, Annex 96; and Affidavit of Ruben Lao Hernández, 16 February 2006: Annexes, Vol 4, Annex 103.

³³¹ “Foreign Affairs Ministry will protest again to Nicaragua”, *La Nación*, San José, 7 March 1983: Annexes, Vol 5, Annex 118.

³³² 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: Annexes, Vol 3, Annex 47.

³³³ See Affidavit of Marvin Hay Gonzalez, 28 January 2006: Annexes, Vol 4, Annex 91.

“After the end of the Nicaraguan counterrevolution, around the year nineteen eighty eight, navigation along the San Juan River returned to normal, and he did not encounter any problems navigating, even at night.”³³⁴

5.73. On the occasion of a visit by the Nicaraguan President to the San Juan on 3 August 1998, the Nicaraguan Army prohibited all Costa Rican navigation on the River between 9am and 5pm.³³⁵

5.74. On 4 July 1999 Costa Rican residents in the border region indicated that Nicaragua had restricted navigation in the San Juan from 6am to 5.30pm.³³⁶ Similar accounts were given by witnesses. For example Messrs Norman Scott Chinchilla and Jorge Lao Jarquín attest to the imposition of timetables for Costa Rican navigation on the San Juan.³³⁷ The statement of two Nicaraguan Army officers—one from the post at Boca Sarapiquí, and the other at the post of Delta Colorado—are also recorded confirming the timetables.³³⁸

5.75. On 9 May 2001 the Government of Costa Rica protested the imposition of timetables on Costa Rican navigation.³³⁹ The Nicaraguan Foreign Minister replied that the Republic of Nicaragua was entitled to the imposition of such timetables, stating that:

“In relation to the limitation on the navigation on the San Juan River as regards the hours of the day, it should be noted that it is Nicaragua’s right and obligation, as the sovereign State, to adopt the regulations necessary for guaranteeing the safety of the people and vessels travelling along the river and avoid all manner of criminal activities.”³⁴⁰

³³⁴ Affidavit of Ruben Lao Hernández, 16 February 2006: Annexes, Vol 4, Annex 103.

³³⁵ “Nicaraguan hostility worsens”, *La Nación*, San José, 4 August 1998: Annexes, Vol 5, Annex 147.

³³⁶ “San Juan: Calm and uneasiness”, *La Nación*, San José, 4 July 1999: Annexes, Vol 5, Annex 155.

³³⁷ “He also states that the Nicaraguan authorities have set restrictions on the navigation schedule on the San Juan River.” Statement by Mr. Norman Scott Chinchilla, recorded in the Affidavit of 5 May 2001: Annexes, Vol 4, Annex 83.

³³⁸ “After the payment was concluded, we asked Sergeant Trejos whether we were allowed to navigate at night, but he replied that navigation on the San Juan River was prohibited after five o’clock in the afternoon as instructed by superior authorities... At that moment, we asked the young officer, who identified himself as Sergeant García, whether we could navigate the River at night to continue our return, but he replied that navigation on the San Juan River was prohibited after five thirty in the afternoon as instructed by superior authorities. I then observed a handwritten notice that said that navigation on the San Juan River was only allowed from six in the morning until five thirty in the afternoon.” Affidavit of 5 May 2001: Annexes, Vol 4, Annex 83.

³³⁹ Costa Rican Foreign Minister, Roberto Rojas López, to Nicaraguan Foreign Minister, Francisco Xavier Aguirre Sacasa, Note No. DM-207-2001, 9 May 2001: Annexes, Vol 3, Annex 71.

³⁴⁰ Nicaraguan Foreign Minister, Francisco Xavier Aguirre Sacasa, to Costa Rican Foreign Minister, Roberto Rojas López, Note No. MRE/DM-JI/0818/08/01, 3 August 2001: Annexes, Vol 3, Annex 72.

5.76. Costa Rica's response to the Nicaraguan letter of 3 August 2001 reaffirmed that the imposition of timetables on Costa Rica for navigation on the San Juan violated its rights of free navigation as established by the relevant instruments.³⁴¹

5.77. Despite Costa Rica's efforts to have its rights respected, Nicaragua has continued to impose timetables and time limits on Costa Rica's navigation on the San Juan. This action continues to cause great inconvenience to the Costa Ricans who regularly need to use the San Juan in order to travel, including travel for reasons related to health and education.³⁴²

(5) Searches

5.78. In addition to other violations of the Costa Rican rights of free navigation, Nicaraguan officials have conducted searches of Costa Rican and other nationals navigating the San Juan on Costa Rican vessels with the clear purpose of creating obstacles to Costa Rican navigation on the River.

5.79. It was in the early 1980s, in the context of the Nicaraguan civil war, that searches of Costa Ricans and their belongings were first carried out by the Nicaraguan Army.³⁴³ A number of these incidents have already been mentioned.³⁴⁴

³⁴¹ Costa Rican Foreign Minister, Roberto Rojas López, to Nicaraguan Foreign Minister, Francisco Xavier Aguirre Sacasa, Note No. DM-355-2001, 26 September 2001: Annexes, Vol 3, Annex 73.

³⁴² In her affidavit, witness Sandra Díaz Alvarado, who works for the regional Health Service in San Carlos, stated that the timetables imposed by Nicaragua prevent neighbours from travelling to the nearest health post in case of an emergency: Affidavit of Sandra Díaz Alvarado, 16 February 2006: Annexes, Vol 4, Annex 100. Similarly, witness Diane Gómez Bustos, who teaches at Boca Río Cureña, stated in her affidavit that the navigational timetables imposed by Nicaragua have affected her teaching activities: see Affidavit of Diane Gómez Bustos, 16 February 2006: Annexes, Vol 4, Annex 101.

³⁴³ See Affidavit of Marvin Hay-Gonzalez, 28 January 2006: Annexes, Vol 4, Annex 91; and Affidavit of Armando Perla Pérez, 28 January 2006: Annexes, Vol 4, Annex 92.

³⁴⁴ See "Nicas confiscate material from journalists on the San Juan", *La Nación*, San José, 24 February 1983: Annexes, Vol 5, Annex 117. See also Manager of Swiss Travel Services, Emilia Gamboa, to Costa Rican Minister of Public Security, Angel Edmundo Solano, 7 June 1982: 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: Annexes, Vol 3, Annex 41; Manager of Swiss Travel Services, Emilia Gamboa, to Costa Rican Deputy Foreign Minister, Ekhart Peters, 5 July 1982: Annexes, Vol 6, Annex 224; Manager of Swiss Travel Services, Emilia Gamboa, to Costa Rican Deputy Foreign Minister, Ekhart Peters, 13 July 1982: 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: 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: Annexes, Vol 3, Annex 47.

5.80. On 1 May 2004 three Costa Ricans who were transiting the San Juan were stopped by Nicaraguan officers from the Ministry of Environment and Natural Resources of Nicaragua. Additionally, their belongings were seized.³⁴⁵

5.81. Searches of passengers of Costa Rican vessels have increased significantly after Costa Rica filed the application in the present case.³⁴⁶ Witnesses have complained about the searches carried out by Nicaraguan Army members at the Boca de San Carlos post, which are carried out even for the schoolchildren who must travel on the River to reach their school in Boca de San Carlos, in Costa Rica territory.³⁴⁷ Another schoolteacher explained how the members of the Nicaraguan Army have searched her belongings when she passed that Army post, purportedly looking for fish or crayfish.³⁴⁸ Another witness stated that Nicaraguan Army members pointed their machine guns at him when he passed that Army post, and then proceeded to search his vessel and his belongings. According to this witness, many Costa Ricans living in the area have suffered abuse from the Nicaraguan Army authorities, but are afraid to report them because of fear of reprisals.³⁴⁹

5.82. For the reasons given, it is clear that by forcing Costa Rican vessels and their passengers to land at the Nicaraguan Army posts, and by searching the passengers and their possessions, Nicaragua is unlawfully interfering with Costa Rica's perpetual rights of free navigation on the San Juan.

(6) Flags

5.83. In the context of the differences that arose between both countries in July 1998, after the Nicaraguan Government prohibited Costa Rican police from navigating on the San Juan, in August 1998 Costa Rican boatmen stated

³⁴⁵ "Charge for Ticos travelling on the San Juan reinstated", *El Nuevo Diario*, Managua, 7 May 2004: Annexes, Vol 5, Annex 180.

³⁴⁶ In the Affidavit of Santos Martín Arrieta Flores, 27 January 2006, the deponent states that the passengers he transports in his vessels have been regularly searched at the Nicaraguan Army Post located in Boca de Sarapiquí: Annexes, Vol 4, Annex 87.

³⁴⁷ See Affidavit of Diane Gomez Bustos, 16 February 2006: Annexes, Vol 4, Annex 101.

³⁴⁸ See Affidavit of Sandra Díaz Alvarado, 16 February 2006: Annexes, Vol 4, Annex 100.

³⁴⁹ See Affidavit of Luis Yanan Corea Trejos, 16 February 2006: Annexes, Vol 4, Annex 102.

that the Nicaraguan authorities had warned them that they were unable to fly the Costa Rican flag while navigating on the River.³⁵⁰

5.84. Shortly after, on 25 September 1998, Nicaraguan officials stationed in Boca de Sarapiquí forced Costa Rican boatmen to remove the Costa Rican flag which they flew over their vessels.³⁵¹

5.85. Likewise in 2001, the Nicaraguan authorities once again forced a Costa Rican boatman to lower the Costa Rican flag while navigating the San Juan.³⁵² This and other Nicaraguan actions in violation of Costa Rica's perpetual rights of free navigation were protested by Costa Rica.³⁵³ After Nicaragua sought to justify its requirement in terms of a rule of "international custom and courtesy",³⁵⁴ the Costa Rican Foreign Minister responded:

"...since the circumstances are that of river and not maritime navigation and due to the non-existence of internationally binding regulations, the Nicaraguan authorities cannot demand of Costa Rican vessels that they lower their Costa Rican flag, nor that they raise the flag of that sister country, on navigating the San Juan River."³⁵⁵

5.86. After the exchange of diplomatic notes on this matter, it appears that Nicaragua did not again request Costa Rican boatmen to lower the Costa Rican flag.

5.87. However in October 2005, after Costa Rica had filed its application before the Court, Nicaragua began once again demanding that Costa Rican

³⁵⁰ "Nicaraguan hostility worsens", *La Nación*, San José, 4 August 1998: Annexes, Vol 5, Annex 147.

³⁵¹ "Commerce decreases along the border", *La Nación*, San José, 27 September 1998: Annexes, Vol 5, Annex 152.

³⁵² The witness declared that "on one occasion, the authorities of the Nicaraguan Army ordered him to take down the Costa Rican flag from his vessel and informed him that it had to be substituted by the Nicaraguan flag every time the vessel was to pass through the San Juan River": Affidavit of 5 May 2001: Annexes, Vol 4, Annex 83. A similar statement was also presented by another witness in the following terms: "...around the year two thousand one, the Nicaraguan Army were demanding to fly the Nicaraguan flag on our vessels in order to be able to navigate the San Juan River. This action was maintained for several weeks until Costa Rica challenged the measure officially and the practice was suspended": Affidavit of Santos Martín Arrieta Flores, 27 January 2006: Annexes, Vol 4, Annex 87.

³⁵³ Costa Rican Foreign Minister, Roberto Rojas López, to Nicaraguan Foreign Minister, Francisco Xavier Aguirre Sacasa, Note No. DM-207-2001, 9 May 2001: Annexes, Vol 3, Annex 71.

³⁵⁴ Nicaraguan Foreign Minister, Francisco Xavier Aguirre Sacasa, to Costa Rican Foreign Minister, Roberto Rojas López, Note No. MRE/DM-II/0818/08/01, 3 August 2001: Annexes, Vol 3, Annex 72.

³⁵⁵ Costa Rican Foreign Minister, Roberto Rojas López, to Nicaraguan Foreign Minister, Francisco Xavier Aguirre Sacasa, Note No. DM-355-2001, 26 September 2001: Annexes, Vol 3, Annex 73.

residents and boatmen carry the Nicaraguan flag in their vessels while navigating the River. This measure was first verbally announced by Nicaraguan authorities to the local Costa Rican residents of the Boca de San Carlos region, with the threat that failure to comply would entail a fine or impediment of navigation.³⁵⁶

5.88. This measure taken by Nicaragua caused concern among local Costa Rican residents who need to use the San Juan regularly as a means of communication for reasons ranging from commerce to education and health. On 18 October 2005 the Municipal Mayor of San Carlos denounced this measure to the Costa Rican Foreign Ministry, indicating that it was causing fear to Costa Rican residents in the bordering zone of Boca San Carlos, for whom it was difficult if not impossible to obtain a Nicaraguan flag.³⁵⁷

5.89. On 20 October 2005 the Costa Rican Foreign Minister requested the Nicaraguan Foreign Minister not to apply the requirement of carrying the Nicaraguan flag so as not to aggravate the situation in the region.³⁵⁸ The Nicaraguan Foreign Minister did not agree to Costa Rica's request, but rather insisted on Nicaragua's prerogative to impose the pertinent regulations on its territory. In a note dated 9 November 2005 Nicaragua's Foreign Minister stated:

"In compliance with the rights established in the Treaty and the Award, it is the duty of the State of Nicaragua, as Sovereign, to regulate and provide the rules and provisions she deems necessary to exercise the vesting of these powers over her territory."³⁵⁹

³⁵⁶ "Nicaragua conditions passing of Costa Rican vessels", *La Nación*, San José, 16 October 2005: Annexes, Vol 5, Annex 185. See also "Costa Rican vessels will bear the Nicaraguan flag", *La Prensa de Nicaragua*, Managua, 17 October 2005: Annexes, Vol 5, Annex 186; "Nicaragua conditions passing of Costa Rican vessels", *El Nuevo Diario*, Managua, 17 October 2005: Annexes, Vol 5, Annex 187; and "Costa Rican Foreign Affairs Minister seeks dialogue regarding visas and flags", *El Nuevo Diario*, 1 November 2005: Annexes, Vol 5, Annex 190.

³⁵⁷ 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: Annexes, Vol 6, Annex 235. See also Affidavit of José Moreno Rojas, 16 July 2006: Annexes, Vol 4, Annex 108.

³⁵⁸ Costa Rican Foreign Minister, Roberto Tovar Faja, to Nicaraguan Foreign Minister, Norman Caldera Cardenal, Note No. DM-484-05, 20 October 2005: Annexes, Vol 3, Annex 81.

³⁵⁹ Nicaraguan Foreign Minister, Norman Caldera Cardenal, to Costa Rican Foreign Minister, Roberto Tovar Faja, Note No. MRE/DM-JI/1284/11/05, 9 November 2005: Annexes, Vol 3, Annex 82.

5.90. To this day Nicaragua continues to impose an obligation to carry the Nicaraguan flag on all Costa Rican vessels transiting the River.³⁶⁰

5.91. Costa Rica's perpetual rights of free navigation on the San Juan entitle Costa Rican vessels to carry the Costa Rican flag while navigating. As recalled in Chapter 4, Nicaragua itself stated in 1868 that the only flags that can be carried while navigating the San Juan are the Nicaraguan and the Costa Rican flags.³⁶¹ Nicaragua cannot force Costa Rican vessels to lower the Costa Rican flag, nor force them to carry the Nicaraguan flag as a condition for navigating the River.

C. Breaches of Costa Rica's rights of navigation for the purposes of commerce

5.92. As has been noted in Chapter 4, Nicaragua seeks to minimize the scope of the Costa Rican rights of free navigation for commercial purposes, contending that it is limited to the transportation of commercial goods. This recent Nicaraguan view of article VI of the Treaty of Limits has been already rebutted in that Chapter.

5.93. This section will address the breaches committed by Nicaragua of Costa Rica's right of free navigation for the purposes of commerce, both in its sense of communication and that of trade.

(1) Commerce as communication

5.94. It was in the early 1980s, in the context of the armed opposition to the Sandinista Government, that Nicaragua first imposed restrictions on Costa Rica's use of the San Juan for communication purposes.

³⁶⁰ As confirmed by Affidavit of Carlos Lao Jarquín, 27 January 2006: Annexes, Vol 4, Annex 84; Affidavit of Geovanny Navarro Garro, 27 January 2006: Annexes, Vol 4, Annex 85; Affidavit of Pablo Gerardo Hernández Varela, 27 January 2006: Annexes, Vol 4, Annex 86; Affidavit of Santos Martín Arrieta Flores, 27 January 2006: Annexes, Vol 4, Annex 87; Affidavit of Marvin Hay-Gonzalez, 28 January 2006: Annexes, Vol 4, Annex 91; Affidavit of Daniel Reese Wise, 28 January 2006: Annexes, Vol 4, Annex 95; and Affidavit of Diane Gómez Bustos, 16 February 2006: Annexes, Vol 4, Annex 101; Affidavit of José Moreno Rojas, 16 July 2006: Annexes, Vol 4, Annex 108.

³⁶¹ See paragraph 4.10.

5.95. On 4 November 1980 a Costa Rican official vessel transporting Costa Rican officials from the Ministry of Health was shot at by the Nicaraguan Army while navigating the River.³⁶² At that time, the Nicaraguan Foreign Minister, acknowledging Costa Rica's rights of free navigation but invoking national security considerations, requested that all Costa Ricans inform Nicaraguan officials when they entered the San Juan, in order to avoid such incidents.³⁶³

5.96. It is noteworthy that, at that time, Costa Rican navigation for official purposes, such as those performed by the officials from the Ministry of Health, was not considered by Nicaragua as being outside the scope of Costa Rican navigational rights. By acknowledging that Costa Rica had a right of free navigation when the incident took place and subsequently formally apologising for it, not only did Nicaragua recognise that Costa Rica was entitled to official navigation, but also that such navigation was for the purpose of communication, since this is precisely what the Health officials were doing. As seen in Chapter 4, it was only in the 1990s that Nicaragua began to take a different and more restrictive view.

5.97. On 4 August 1998, shortly after Nicaragua issued the prohibition on navigation by Costa Rican police, officials from the Nicaraguan Army prevented a judge, a fiscal agent, a public defender and two officials from the Judicial Investigation Organism, from navigating the San Juan on their way to Fátima de Sarapiquí to investigate the death of an 11-month old child. The Costa Rican officials were navigating in an official vessel. When they reported to the Nicaraguan guard posts at Boca de Sarapiquí the Nicaraguan Army officer refused to authorise their passage.³⁶⁴

5.98. In September 1998 Nicaraguan officials likewise prevented Costa Rican technicians from the Programme of the Eradication of Screwworms from

³⁶² "Foreign Affairs Minister says that the Cañas-Jerez Treaty is unquestionable", *La Nación*, San José, 9 November 1980: Annexes, Vol 5, Annex 112.

³⁶³ "Nicaragua conditions navigation on the waters of the San Juan River", *La Nación*, San José, 8 November 1980: Annexes, Vol 5, Annex 111.

³⁶⁴ "Nicaragua would charge visa to Costa Rican policemen", *La Nación*, San José, 6 August 1998: Annexes, Vol 5, Annex 150.

Cattle from navigating the San Juan on their way to implement the Programme in the Costa Rican border zone. As with previous violations, this incident was protested by Costa Rica.³⁶⁵

5.99. Nicaragua responded to Costa Rica's note of protest in the following terms:

"In this respect, I beg to differ with Your Excellency's remarks concerning the fact that the Jeréz-Cañas Treaty and the Cleveland Award establish a right of passage along the San Juan River. On the contrary, allow me to remind you that the perpetual rights of free navigation granted by Nicaragua to Costa Rica in the aforementioned legal instruments are specifically limited to *objetos de comercio* and a perfectly clearly defined stretch of the said river."³⁶⁶

5.100 On 26 September 2000, two officials from the Costa Rican Judicial Investigation Organism and an officer from the police public force were travelling unarmed in a Costa Rican vessel, on a mission to investigate a cattle robbery that had taken place in a farm on the Caño Río Jardín area, situated five kilometres from the mouth of the San Carlos on its southern bank. Their navigation was prevented by Nicaraguan Army officers at the Boca de San Carlos post and they were informed that in accordance with orders received, they would not be able to continue their journey.³⁶⁷ This violation was also protested by Costa Rica.³⁶⁸

5.101 It is important to note that tightened Nicaraguan restrictions have resulted in the suspension, from November 2005, of domiciliary health services provided by the Social Security Office to certain local communities such as Boca Cureña and Las Chorreras.³⁶⁹ As a result, the 80 inhabitants of Las Chorreras community (including 13 children) have lost their primary health

³⁶⁵ Costa Rican Foreign Minister, Roberto Rojas López, to Nicaraguan Foreign Minister, Eduardo Montealegre, 7 September 1998: Annexes, Vol 3, Annex 52.

³⁶⁶ Nicaraguan Foreign Minister, Eduardo Montealegre, to Costa Rican Foreign Minister, Roberto Rojas López, 30 September 1998: Annexes, Vol 3, Annex 53.

³⁶⁷ "Police were not allowed to navigate", *La Nación*, San José, 28 September 2000: Annexes, Vol 5, Annex 166. See also "Energetic protest against Nicaragua" *La Nación*, San José, 29 September 2000: Annexes, Vol 5, Annex 167.

³⁶⁸ Costa Rican Acting Foreign Minister, Elayne Whyte, to Nicaraguan Acting Foreign Minister, José Adán Guerra, Note No. DVM-420-00, 28 September 2000: Annexes, Vol 3, Annex 68.

³⁶⁹ 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,

service. Similarly, the 84 inhabitants of Boca Cureña (including 10 children) have also lost their primary health service.³⁷⁰ The locations mentioned are shown on **Sketch Map 3** (opposite page 8 above).

5.102 Education services have also been affected. Schoolteacher Diane Gomez Bustos, who has been teaching in the region for six years, testifies that

“on account of her duties, the only way of travelling to and from Boca Rio Cureña is via the San Juan River, in particular when she must attend training and planning meetings, visit relatives or attend to any other matter... [O]n occasion, she has not, especially in the afternoons, been allowed to travel along the San Juan River, from Boca de San Carlos to her place of work in Boca Rio Cureña, which has prevented her from beginning classes on time at the school where she teaches.”³⁷¹

5.103. Restrictions imposed by Nicaragua have also prevented Costa Rican residents of the border region as well as other Costa Ricans from using the River as a waterway for communication. For many Costa Ricans, the River constitutes the only means of access to their farms and properties and Nicaragua’s restrictions on Costa Rica’s free navigation, as well as the intimidating attitude of its authorities, are seriously affecting them.³⁷²

North Huetar Region, Dr. Omar Alfaro Murillo, Note No. RHNPI-303, 7 November 2005: Annexes, Vol 6, Annex 236; Regional Director of the North Huetar Regional Medical Services, Dr. Omar Alfaro Murillo, to General Director of Regional Management and Health Service Networks, Dr. Armando Villalobos Castañeda, Note No. DGRSSRH-2511-05, 15 November 2005: 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: Annexes, Vol 6, Annex 239. See also Affidavit of Ana Gabriela Mazariegos Zamora, 14 February 2006: Annexes, Vol 4, Annex 98; Affidavit of Kattia Patricia Corrales Barboza, 16 February 2006: Annexes, Vol 4, Annex 99; and Affidavit of Sandra Díaz Alvarado, 16 February 2006: Annexes, Vol 4, Annex 100.

³⁷⁰ 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: Annexes, Vol 6, Annex 239.

³⁷¹ See Affidavit of Diane Gómez Bustos, 16 February 2006: Annexes, Vol 4, Annex 101.

³⁷² See, e.g., “Charge for Ticos travelling on the San Juan reinstated”, *El Nuevo Diario*, Managua, 7 May 2004: Annexes, Vol 5, Annex 180; “Nicaragua conditions passing of Costa Rican vessels”, *La Nación*, San José, 16 October 2005: Annexes, Vol 5, Annex 185; “Nicaragua conditions passing of Costa Rican vessels”, *El Nuevo Diario*, Managua, 17 October 2005: Annexes, Vol 5, Annex 187.

(2) Commerce as transportation of goods and persons (including tourism)

5.104. As has been established, Costa Rica's navigational rights include the commercial transportation of goods and persons. In a pattern which will be by now familiar, Nicaraguan restrictions on Costa Rica's navigation for the transportation of tourists started in the early 1980s. In 1982, the navigation of the Costa Rican tourist company Swiss Travel Services was interfered with by the Nicaraguan Army on several occasions.³⁷³

5.105. Swiss Travel Services reported that on 6 June 1982 members of the Nicaraguan Army stopped them when they attempted to enter the San Juan, while transporting a group of tourists from the Tortuguero Channels on their way to the Sarapiquí River. The army members informed them that navigation of the River by Costa Rican vessels was no longer authorised, especially if they were transporting North American and European tourists.³⁷⁴ Although this incident was protested by Costa Rica,³⁷⁵ similar incidents continued to occur.³⁷⁶

5.106. In its response to the Costa Rican protests, Nicaragua affirmed that as sovereign it has the right to adopt the necessary measures aimed to preserve its safety and internal order. But it did not deny that Costa Rica's rights of free navigation on the San Juan include the transportation of tourists.³⁷⁷

³⁷³ See Manager of Swiss Travel Services, Emilia Gamboa, to Costa Rican Minister of Public Security, Angel Edmundo Solano, 7 June 1982: Annexes, Vol 6, Annex 223; Manager of Swiss Travel Services, Emilia Gamboa, to Costa Rican Deputy Foreign Minister, Ekhart Peters, 5 July 1982: Annexes, Vol 6, Annex 224, and Manager of Swiss Travel Services, Emilia Gamboa, to Costa Rican Deputy Foreign Minister, Ekhart Peters, 13 July 1982: Annexes, Vol 6, Annex 225.

³⁷⁴ Manager of Swiss Travel Services, Emilia Gamboa, to Costa Rican Minister of Public Security, Angel Edmundo Solano, 7 June 1982: Annexes, Vol 6, Annex 223.

³⁷⁵ 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: Annexes, Vol 3, Annex 41.

³⁷⁶ Manager of Swiss Travel Services, Emilia Gamboa, to Costa Rican Deputy Minister of Foreign Affairs, Ekhart Peters, 5 July 1982: Annexes, Vol 6, Annex 224; Manager of Swiss Travel Services, Emilia Gamboa, to Costa Rican Deputy Foreign Minister, Ekhart Peters, 13 July 1982: 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: Annexes, Vol 3, Annex 42; Costa Rican Foreign Minister, Fernando Volio, to Nicaraguan Chargé d'Affaires a.i. to Costa Rica, Oscar Ramón Téllez, Note No. D.M. 127-82, 20 July 1982: Annexes, Vol 3, Annex 43.

³⁷⁷ Nicaraguan Chargé d'Affaires a.i. to Costa Rica, Oscar Ramón Téllez, to Costa Rican Foreign Minister, Fernando Volio Jiménez, Note No. E.N. 789/82, 2 August 1982: Annexes, Vol 3, Annex 44.

5.107. As noted above, in March 1994 the Nicaraguan Government instructed its officials in the San Juan to charge US\$5 for a mandatory tourist card to any Costa Rican navigating along the River. In response the Costa Rican Foreign Minister stated that “such measure was unacceptable and that, evidently, commerce includes tourist activity.” He added that “it is inadmissible that in the 20th Century national and international tourism not be considered an important activity in modern commerce.”³⁷⁸

5.108. Nonetheless Nicaragua’s restrictions on Costa Rica’s commercial transportation of passengers, particularly tourists, have continued and have resulted in significant losses to the Costa Rican tourism industry.³⁷⁹ Tour operators and boatmen have been forced to curtail their operations.³⁸⁰ This situation persists to this day.

D. Breaches of Costa Rica’s rights of protection of commerce, safeguard, defence and re-supply of police posts

5.109. As established in Chapter 4, Costa Rica has the right to protect navigation for the purposes of commerce on the San Juan as well as the right and obligation to safeguard the San Juan and to defend the San Juan and the common Bay of San Juan del Norte.³⁸¹ These rights and obligations entail that Costa Rican officials be able to navigate the San Juan, carrying their service arms, and, when necessary, to carry out personnel relief and re-supply of police posts on the Costa Rican bank. This section describes Nicaragua’s actions which have violated these rights.

³⁷⁸ “Conflict with the Nicaraguans due to tourism on the San Juan”, *La República*, San José, 5 March 1994: Annexes, Vol 5, Annex 123.

³⁷⁹ “...William Rojas, president of the Tourism Chamber of Sarapiquí, considered that the imposition of that charge discourages the presence of national tourism in the region and assured that in fact a number of excursions have been cancelled because of the elevated costs...”: “Neighbours in the San Juan River feel defenceless”, *La Nación*, San José, 22 June 2002: Annexes, Vol 5, Annex 177. See also “Tourist card affects us, the *ticos* say”, *Barricada*, Managua, 13 March 1994: Annexes, Vol 5, Annex 127.

³⁸⁰ “...The transit of tourists towards the Tortuguero Canals in Limon, has been notoriously reduced in the past few days, since many oppose paying the \$34 demanded by Nicaragua for navigating on the San Juan River...”: “Conflict over the San Juan scares away tourists”, *La Nación*, San José, 8 November 2005: Annexes, Vol 5, Annex 192. See also Affidavit of Carlos Lao Jarquín, 27 January 2006: Annexes, Vol 4, Annex 84; Affidavit of Geovany Navarro Garro, 27 January 2006: Annexes, Vol 4, Annex 85; Affidavit of Pablo Gerardo Hernández Varela, 27 January 2006: Annexes, Vol 4, Annex 86; Affidavit of Santos Martín Arrieta Flores, 27 January 2006: Annexes, Vol 4, Annex 87; Affidavit of Marvin Hay-Gonzalez, 28 January 2006: Annexes, Vol 4, Annex 91; Affidavit of Windel Hodgson Hodgson, 28 January 2006: Annexes, Vol 4, Annex 93; Affidavit of Daniel Reese Wise, 29 January 2006: Annexes, Vol 4, Annex 95; and Affidavit of Ruben Lao Hernández, 17 February 2006: Annexes, Vol 4, Annex 103.

³⁸¹ See paragraphs 4.73-4.117.

5.110. On 14 July 1998 the Government of Nicaragua abruptly prohibited Costa Rican police officers from navigating the San Juan carrying their service arms.³⁸² This unprecedented measure interrupted navigation of Costa Rican police officers, which had been exercised over a substantial period in accordance with the Treaty of Limits, the Cleveland Award and the judgment of the Central American Court of Justice.

5.111. Traditionally, Costa Rican police navigated the San Juan, carrying their service arms and in uniform, without any difficulty and without restriction by Nicaragua. The navigation they carried out was to investigate crimes and wrongdoing in different parts of Costa Rican territory, as well as to carry out relief of personnel and re-supply of the different Costa Rican police posts in the area. Indeed they carried out joint tasks with the Nicaraguan Army on certain occasions.³⁸³

5.112. Some days after the first prohibition on 14 July 1998, Nicaragua's Vice President Enrique Bolaños was quoted as referring to the rules that Nicaragua would impose on Costa Rica for her police to navigate the San Juan River armed, thereby indicating that before 14 July 1998 no such restrictions existed.³⁸⁴ A similar statement was made by the Nicaraguan Army Commander-in-Chief who, referring to the implementation of the Cuadra-Lizano Communiqué, was quoted as saying that before the conflict the use of arms by the Costa Rican Civil Guard was permitted for reasons of self-defence, since without them they would be exposed to the criminals: however, he said that "now any transit will be under strict Nicaraguan supervision."³⁸⁵

³⁸² See Note of the Intendent Commander in service of Atlantic Command, Sarapiquí, Daniel Soto Montero, to Costa Rican Foreign Ministry, 14 February 2006: Annexes, Vol 6, Annex 240. The press also recorded this incident: "...the Nicaraguan army delivered an order impeding the Costa Rican police of the Northern zone to navigate the San Juan River with arms. ...The prohibition was ordered by Coronel Orlando Talavera, head of the Southern Military post (on the border with Costa Rica) with the support of Nicaraguan army leaders...": "Border dispute with Nicaraguans", *La Nación*, San José, 16 July 1998: Annexes, Vol 5, Annex 131. See also "Aleman: Ticos out", *El Nuevo Diario*, Managua, 17 July 1998: Annexes, Vol 5, Annex 132.

³⁸³ See Affidavit of Carlos Luis Alvarado Sánchez, 27 January 2006: Annexes, Vol 4, Annex 88; Affidavit of Daniel Soto Montero, 27 January 2006: Annexes, Vol 4, Annex 89; Affidavit of Luis Angel Girón Angulo, 28 January 2006: Annexes, Vol 4, Annex 90; Affidavit of José Granados Montoya, 29 January 2006: Annexes, Vol 4, Annex 94; Affidavit of Ruben Lao Hernández, 17 February 2006: Annexes, Vol 4, Annex 103; and Affidavit of Victor Julio Vargas Hernández, 6 July 2006: Annexes, Vol 4, Annex 105.

³⁸⁴ "Nicaragua hardens its position", *La Prensa*, Managua, 5 August 1998: Annexes, Vol 5, Annex 148. See also "Ticos will pay the price", *La Tribuna*, Managua, 6 August 1998: Annexes, Vol 5, Annex 151.

³⁸⁵ "General Cuadra avoids commenting on the San Juan River", *La Tribuna*, Managua, 1 August 1998: Annexes, Vol 5, Annex 145.

5.113. Costa Rica's right to protect its commercial navigation on the San Juan with armed Revenue Guard vessels, as established by the Treaty of Limits and the Cleveland Award, includes the right to prevent criminal activities, such as smuggling of arms, drugs or immigrants. This task was performed by armed Revenue Guard vessels in the past. In modern times, and in accordance with Costa Rica's legal framework, these tasks are performed by the National Coastguard Service, the Fiscal Control Police, the Border Police and the Rural and Civil Guards, all navigating on Costa Rican official vessels. The evolution of the Costa Rican public forces in this context is detailed in **Appendix B**.

5.114. Costa Rica is also being prevented from exercising its right to safeguard the San Juan, as established in article IV of the 1858 Treaty of Limits—a right which is also a duty. Nicaragua's prohibition of navigation by police carrying service arms, as well as of police navigation for the purposes of relief of personnel and supply of police posts along the Costa Rican bank of the River, prevents Costa Rica from doing so.

5.115. Nicaragua's prohibition of Costa Rican police navigation on the San Juan prevents Costa Rican officers from maintaining surveillance of the River. Such surveillance, carried on from the bank of the River, is necessary to prevent its being used for criminal acts, such as trafficking of persons, drugs, arms and merchandise, and also to prevent security threats such as terrorist activities, which could pose a danger to the peace and security of both countries and the region.

5.116. For example, on 14 January 1999 the Nicaraguan police intercepted two vessels with 19 kilograms of cocaine near San Juan del Norte, on their way to Costa Rican territory, demonstrating that the area is a drug-trafficking route.³⁸⁶

5.117. Moreover, a press report of 13 June 2005 shows how the lack of police presence at the Nicaraguan border has opened Costa Rica's northern door to

³⁸⁶ "The capture of two boats with 19 kilograms of cocaine in the vicinity of the San Juan del Norte, in Nicaragua, finally convinced the authorities of that country of the existence of drug trafficking network on that water way The zone is a drug trafficking route, mainly because there is no police in the municipality of San Juan del Norte and since its inhabitants work on the coconut plantations, and when the harvest is finished, they work selling drugs that they find along the river": "Vessels investigated", *La Nación*, San José, 17 January 1999: Annexes, Vol 5, Annex 154.

drug trafficking. Of the 330 kilometres of border shared by Nicaragua and Costa Rica, the Costa Rican Police have identified some 20 points of entry for arms and drug smuggling.³⁸⁷ Many of them are in the San Juan border area.

5.118. The illegal traffic of arms is a major security concern, as Costa Rican territory is used by groups who traffic excess arms from the Nicaraguan civil war from Nicaragua to irregular groups in other countries using Costa Rica's territory.³⁸⁸

5.119. The prohibition of police navigation carrying service arms, as well as of police navigation for purposes of relief of personnel and re-supply of the police posts along the Costa Rican bank, prevents Costa Rica from defending the River.

5.120. Nicaragua's prohibition on navigation of the River by Costa Rica's official authorities also hinders Costa Rica from complying with its obligation to defend the common Bay of San Juan del Norte from external aggression, should it be necessary, as laid down in article IV of the Treaty of Limits.

5.121. By prohibiting the navigation of Costa Rican police carrying their service arms on the San Juan, it has been impossible for Costa Rica to carry out personnel relief and to re-supply police posts. This has made it difficult or impossible to provide proper protection to the Costa Rican territory and population. Indeed one post, that at La Cureña (as shown on **Sketch Map 7**

³⁸⁷ "The Northern Border: An open door for drug dealers", *La Nación*, San José, 13 June 2005: Annexes, Vol 5, Annex 181.

³⁸⁸ "Days earlier, the Panamanian Police confiscated two arsenals which were believed to have passed through Costa Rican territory. In Los Chiles, police not only pay special attention to boats navigating on the Frio River from San Carlos de Nicaragua, but also to those that pick up undocumented people at the edge of the San Juan River and then enter Costa Rican territory through the Medio Queso River. According to police reports, there are groups working between Costa Rica and Nicaragua that take advantage of arms caches that are buried after armed conflicts in the neighbouring country, in order to negotiate them with the Revolutionary Armed Forces (FARC) in Colombia... Edgar Hernández, Regional Director of the Costa Rican Police Force in Ciudad Quesada, and Gerardo Hernández, who works in Los Chiles, told *La Nación*, that they were concerned about the lack of surveillance on the San Juan. They added that there are areas that are entirely without any type of surveillance, such as Cureña and Remolinito de Sarapiquí. The lack of police is due to the July 1998 measure by Nicaragua forbidding armed Costa Rican police from navigating on the river. Both police chiefs agreed that such a weakness could be currently being taken advantage of by traffickers. In 1994, 1996 and 1999, the weapons used for the kidnappings that took place in Pital, Boca Tapada, Agua Zarcas and Cutris de San Carlos and most recently in Caño Zapota de Pococi, entered the country through the San Juan River, according to police": "Intense arms control", *La Nación*, San José, 25 September 2000: Annexes, Vol 5, Annex 165.

opposite) had to be closed on September 1999 because it was impossible to resupply it.

5.122. Transit on the San Juan is important not only to deliver supplies to police posts in the northern border area, but also to patrol 130 kilometres of border. Since July 1998, when Nicaragua prohibited the navigation of Costa Rican police carrying their service arms, the delivery of supplies and relief of personnel at the police posts of Delta Costa Rica, Puerto Lindo, Barra Colorado Sur and Barra Colorado Norte has become very difficult. From these posts it may take days on foot to reach other villages, for example in order to proceed with a judicial investigation or deliver a judicial order.³⁸⁹ By contrast, a trip between Boca del Sarapiquí to Cureña (one and a half days in the dry season, longer in the wet) would take only 30 minutes by boat on the San Juan.³⁹⁰

5.123. Following the prohibition imposed by the Nicaraguan authorities on navigation of the River by police officers carrying their service arms, the Costa Rican inhabitants of the neighbouring towns and villages along the River began to report that security in the area was deteriorating, putting their personal safety at risk.³⁹¹

³⁸⁹ For example, to reach guard post Delta 14 in Cureña de Sarapiquí was only possible in the dry season. It took seven hours, the last two kilometres had to be made on foot. Normally this journey would take two hours by boat from the main police post in the area (Comando Atlántico) located in Puerto Viejo de Sarapiquí. Another example of difficult access is Delta Costa Rica. The trip takes seven hours (instead of two) going through Puerto Viejo, Guapiles, Cariari, Las Palmitas and finally Puerto Lindo de Limón from which the remaining part of the trip is done by boat along the Colorado River. "Neighbours in the San Juan River feel defenceless", *La Nación*, San José, 22 June 2002: Annexes, Vol 5, Annex 177.

³⁹⁰ *Ibid.*

³⁹¹ "The police retreat generates certain uneasiness. Farmer Rigoberto Acevedo, from San Antonio, Sarapiquí, stated that, although he understands the limitations that the authorities now have in travelling through the region, their presence is necessary. 'If there were an emergency here, we would not have anyone to rescue us', he warned. The presence of officers has been almost completely reduced in the settlements along the Costa Rican river bank, since the Nicaraguan government forbade – on July 15, 1998 – the navigation of armed Costa Rican police officers on the San Juan River": "San Juan: Calm and uneasiness", *La Nación*, San José, 4 July 1999: Annexes, Vol 5, Annex 155. "The inhabitants of settlements such as Palo Seco, Cureña or Fatima feel that their security has withered since July 15, 1998 when the Nicaraguan government forbade the Costa Rican police from transiting on the river with their service arms. 'Before, our police would visit us almost every day; now up to two months pass by and we do not see them', manifested Carlos Rugama Guzmán, a neighbour of Fatima. Transiting on the river is not only important for supplying 7 police guard posts, but also for guarding the Costa Rican river bank which comprises 130 kilometres of natural border": "Neighbours in the San Juan River feel defenceless", *La Nación*, San José, 22 June 2002: Annexes, Vol 5, Annex 177.

5.124. A press report of 22 June 2002 documents how the level of human security in the San Juan area has weakened since July 1998.³⁹² For instance, before the prohibition imposed by Nicaragua on Costa Rican police navigation, the Costa Rican police would visit the area of Fatima de Sarapiquí regularly; at present months go by without police visits to the area.³⁹³

5.125. Since early August 1998, shortly after the prohibition on the navigation of Costa Rican police carrying their service arms, Nicaragua has argued that Costa Rican official vessels do not need to use the San Juan for relief and supply purposes because Costa Rica possesses good roads and airports in the border region.³⁹⁴

5.126. The President of Nicaragua himself stated that: “the Costa Rican Civil Guard does not need to navigate the San Juan River to supply the surveillance posts at the border with Nicaragua.” And further, “[t]he Costa Rican guards have ‘facilities’ in their territory to take supplies to their border posts by the land, without entering into the waters of that waterway, which belongs to Nicaragua.”³⁹⁵

5.127. During an intervention before the Permanent Council of the Organization of American States on 8 March 2000, Nicaragua’s Foreign Minister Eduardo Montealegre stated that:

“Nicaragua, in honour of the historical ties of friendship and cooperation that exist between the two countries and Governments, has made every effort to cooperate in resolving the alleged need of the Costa Ricans to supply and relieve their border posts

³⁹² “Neighbours of the San Juan River feel defenceless”, *La Nación*, San José, 22 June 2002: Annexes, Vol 5, Annex 177.

³⁹³ “The Costa Rican police have not yet travelled down here. We still have not seen them on the river”, stated Sunsing, who has lived in the area for 41 years. ‘I do hope that they return soon. We really need them here since there are many undocumented people who are coming over from the other side and are giving us much trouble’, stated María Cristina Arrieta, a farm owner at the small community of La Tigra. ‘My house was broken into and all of my food was stolen, even my watch’, stated Ventura Monge: “San Juan spices up relationship with Nicaraguans”, *La Nación*, San José, 10 July 2000: Annexes, Vol 5, Annex 164.

³⁹⁴ “Special Commission in charge of the San Juan”, *La Prensa*, Managua, 6 August 1998: Annexes, Vol 5, Annex 149.

³⁹⁵ “Nicaragua: Alemán suggests Civil Guard not to navigate the San Juan,” *Deutsche Presse Agentur*, Managua, 4 August 1998: Annexes, Vol 4, Annex 146.

on the right bank of the San Juan River via the aforementioned river itself, despite the fact that Costa Rica has easy access to these areas by land and by numerous airplane landing strips.”³⁹⁶

5.128. These statements by Nicaragua, aimed at justifying the restriction imposed on Costa Rican police navigation on the San Juan, were and are not correct as a matter of fact. But they are also irrelevant as a matter of law. Nicaragua has sought to present the question in terms of whether re-supply of police posts is a “need”, instead of a *right* derived from Costa Rica’s right to protect its commercial navigation on the San Juan, its right and obligation to defend the San Juan and the common Bay of San Juan del Norte and its right and obligation to safeguard the San Juan.

5.129. On 3 August 1998, during a visit to the towns on the San Juan the Nicaraguan President Arnoldo Alemán stated as follows:

“... if we need to make use of the institution of the armed forces of Nicaragua, we shall make use of them... The sovereignty of a nation is not something that is discussed, it is defended with arms in hand.”³⁹⁷

This statement was made against the background of opposition in Nicaraguan political circles to the Cuadra-Lizano Joint Communiqué and it was clearly intended to intimidate Costa Rica.

5.130. As has already been explained in Chapter 3, an attempt was made by Costa Rica in mid-2000 to try to find an amicable solution to the situation. Costa Rican President Rodríguez sent a note to President Alemán on 28 June 2000, proposing the mechanism they both had agreed upon as a means of reaching a definitive solution to the problem.³⁹⁸ Through this note, the President of Costa Rica re-stated the relevant provisions of the Cuadra-Lizano Joint Communiqué, including the provision that in exercising its rights Costa

³⁹⁶ Nicaraguan Foreign Minister, Eduardo Montealegre, Statement to the Permanent Council of the Organization of American States, 8 March 2000, OEA/Ser.G CP/ACTA 1224/00: Annexes, Vol 6, Annex 229.

³⁹⁷ “Alemán: I could take up the arms”, *El Nuevo Diario*, Managua, 30 July 1998: Annexes, Vol 5, Annex 140.

³⁹⁸ President of Costa Rica, Miguel Ángel Rodríguez Echeverría, to President of Nicaragua, Arnoldo Alemán Lacayo, 28 June 2000: Annexes, Vol 3, Annex 64.

Rica would be willing to inform the Nicaraguan authorities of its passage through the River, as had been the practice immediately prior to 14 July 1998.³⁹⁹

5.131. In his response, the President of Nicaragua sought to subject Costa Rica's police navigation to Nicaragua's authorisation or "acquiescence".⁴⁰⁰

5.132. On 29 July 2000 the Costa Rican President sent a second note to Nicaragua's President, again seeking the re-establishment of "the *modus operandi* that existed until July 1998, in which the vessels carrying members of the Costa Rican police could navigate on the lower course of the river, having previously informed the Nicaraguan authorities in each case."⁴⁰¹ The note further expressed concern that

"...in the conversations held, subsequent to your letter, between the Nicaraguan Minister of Defence and the Costa Rican Minister of Public Security with a view to putting these demonstrations of willingness into practice, it has still not been possible to reach an agreement on the reestablishment of the *modus operandi*, or on the procedures by which Costa Rica, in each case, would inform Nicaragua, respectively, of the transit of Costa Rican police on the lower San Juan...."⁴⁰²

5.133. The President of Nicaragua responded on 3 August 2000, once again denying Costa Rica's navigational rights, since he insisted on "the acquiescence" of the Nicaraguan authorities as a prior requirement to allow Costa Rican police navigation.⁴⁰³ He referred to "pending situations that require, on our part, the concurrence of other Powers of State, in accordance with our internal legislation."⁴⁰⁴

5.134. Thus Nicaragua asserted that nothing less than express authorisation was required in order for Costa Rican official authorities to navigate the River,

³⁹⁹ Ibid.

⁴⁰⁰ President of Nicaragua, Arnoldo Alemán Lacayo, to President of Costa Rica, Miguel Ángel Rodríguez, 29 June 2000: Annexes, Vol 3, Annex 65.

⁴⁰¹ President of Costa Rica, Miguel Ángel Rodríguez Echeverría, to President of Nicaragua, Arnoldo Alemán Lacayo, 29 July 2000: Annexes, Vol 3, Annex 66.

⁴⁰² Ibid.

⁴⁰³ President of Nicaragua, Arnoldo Alemán Lacayo, to President of Costa Rica, Miguel Ángel Rodríguez, 3 August 2000: Annexes, Vol 3, Annex 67.

⁴⁰⁴ Ibid.

an authorisation that had to be granted by Nicaragua's National Assembly.⁴⁰⁵ Costa Rica could not accept this proposal, which would entail denying Costa Rica's right for its authorities to navigate the San Juan in the terms established by the international instruments. The imposition of any system of prior authorisation would mean that Costa Rica's navigation would be subject to permission, a permission which could be denied by Nicaragua at any time.

5.135. Subsequently, certain other incidents occurred in which Nicaragua further restricted Costa Rica's enjoyment of its navigational rights.

5.136. In 2005, in response to Costa Rica instituting these proceedings before the Court, the Nicaraguan Government announced that in order to enforce the prohibition on Costa Rica's official authorities to navigate the San Juan, the presence of the Nicaraguan army in the area would be reinforced. The Nicaraguan press reported on 1 October 2005 that the Nicaraguan authorities had commanded their Army in the San Juan to "intercept, capture or open fire... in case a vessel with Costa Rican armed guards is sighted."⁴⁰⁶ On 2 October 2005 it was reported by the Nicaraguan Press that the President of Nicaragua commanded the Nicaraguan Army that "under no circumstance" could armed Costa Rican guards navigate that waterway.⁴⁰⁷ These actions and statements clearly aggravate the dispute and constitute a continued denial of Costa Rica's rights.

E. Breaches of other Related Rights

5.137. Subsequently, certain other incidents occurred in which Nicaragua further restricted Costa Rica's enjoyment of its navigational rights.

⁴⁰⁵ In October 2000, the Nicaraguan Government announced to the media that they would present before the National Assembly an official request to delegate on the Nicaraguan army the responsibility of granting permission for the navigation of Costa Rican armed officials in the San Juan River: "Permission will be requested from the Congress for the navigation of armed Costa Rican police", *ACAN-EFE Press Agency*, Madrid, 12 October 2000: Annexes, Vol 5, Annex 168.

⁴⁰⁶ "The Army guards the River", *La Prensa*, Managua, 1 October 2005: Annexes, Vol 5, Annex 182.

⁴⁰⁷ "In alert", *La República*, San José, 2 October 2005: Annexes, Vol 5, Annex 183.

(1) The right to land at any part of the Nicaraguan bank of the River where navigation is common

5.138. Under article VI of the Treaty of Limits, Costa Rican vessels have a perpetual right of free navigation including the right to land at any part of the Nicaraguan bank of the San Juan where navigation is common. In the words of the Central American Court of Justice, this entails “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”.⁴⁰⁸ Such free access implies the right to stop or not to stop, to moor or not to moor – and is quite inconsistent with an obligation to stop in order to pay taxes, as is the present situation.

(2) Facilitation of traffic on the River

5.139. But independently of particular violations of this character, detailed above, there is a more fundamental point. The purpose of the transit regime on the San Juan is to facilitate traffic, not to deter or prevent it. The parties expressed this underlying objective in juridical terms in concluding article 1 of the 1956 Agreement, whereby they promised to

“collaborate to the best of their ability...in particular, in order to facilitate and expedite traffic... on the San Juan River within the terms of the Treaty of 15 April 1858 and its interpretation given by arbitration on 22 March 1888, and also to facilitate those transport services which may be provided to the territory of one Party by enterprises which are nationals of the other.”⁴⁰⁹

5.140. The evidence set out above shows that, far from collaborating, Nicaragua is doing everything it can to prevent Costa Rican traffic on the San Juan – with the consequence that the waterway is these days largely empty of traffic. Nicaragua’s conduct is the antithesis of that required by article 1 of the 1956 Agreement and constitutes – independently of individual instances – a violation of that treaty provision.

⁴⁰⁸ Annexes, Vol 2, Annex 21, 219.

⁴⁰⁹ Costa Rica-Nicaragua, 1956 Agreement, article 1: Annexes, Vol 2, Annex 24.

(3) Customary right to fish in favour of residents of the Costa Rican bank

5.141. Since the creation of the Province of Costa Rica by the Spanish Royal Crown in 1540, a right to fish in the waters of the San Juan River was established: it was expressly stipulated that as between the two Provinces of Costa Rica and Nicaragua, “the navigation and fishing and other uses of the said river shall be common”.⁴¹⁰ Ever since, the residents, both Costa Rican and Nicaraguan, along the banks of the San Juan have fished there for subsistence. So far as Costa Ricans are concerned, Nicaragua has breached this long standing right.

5.142. After Costa Rica lodged the present Application before the Court, Nicaraguan officials have banned Costa Rican residents on the southern bank of the River from all fishing on the River.⁴¹¹ Residents who attempt to fish in the River now face detention and the seizure of their belongings, including their boats,⁴¹² lines and any fish they may have caught. These measures have been taken by Nicaragua against residents of the Costa Rican bank of the San Juan in the area of Boca de San Carlos. Erick Maikol Martínez López’s affidavit clearly sums up the situation:

“...He says that all his life he and his family have fished in the San Juan River for feeding and that, until recently, they never had problems to do it... Since some time ago, particularly since the situation with Nicaragua aggravated because of the navigation on the San Juan River, the Nicaraguan authorities have banned fishing in the River. He says that he knows that they do not allow fishing and that family members and friends have been affected, since they have been detained and their belongings have been seized, including the fish, the lines and even the boat, which has affected them financially as they are poor people... He continues to indicate that just today members of the Nicaraguan Army told him that he will not be allowed the passage through the San Juan River, even paying the nine dollars that regularly are charged for navigating on said River... Finally, he indicates that many neighbours prefer not to denounce the abuses against them by the Nicaraguan authorities for fear that they will be prohibited the navigation or be detained...”⁴¹³

⁴¹⁰ See paragraph 2.08.

⁴¹¹ As confirmed by Affidavit of Leonel Morales Chacón, 6 July 2006: Annexes, Vol 4, Annex 106; Affidavit of Erick Maikol Martínez López, 6 July 2006: Annexes, Vol 4, Annex 107; Affidavit of Victor Julio Vargas Hernández, 6 July 2006: Annexes, Vol 4, Annex 105; Affidavit of Josefa Alvarez Aragón, 6 July 2006: Annexes, Vol 4, Annex 109; and Affidavit of José Moreno Rojas, 6 July 2006: Annexes, Vol 4, Annex 108.

⁴¹² Affidavit of Josefa Alvarez Aragón, 6 July 2006: Annexes, Vol 4, Annex 109.

⁴¹³ Affidavit of Erick Maikol Martínez López, 6 July 2006: Annexes, Vol 4, Annex 107.

5.143. Furthermore, Nicaragua has seized personal belongings which are associated with fishing, such as lines and fishing rods, even if the person or persons have not fished at all in the San Juan.⁴¹⁴ The residents of the Costa Rican bank are powerless against these actions of the Nicaraguan authorities and are afraid to fish for subsistence, given the grave consequences that they face. This conduct of Nicaragua not only violates the long standing right of the local residents to fish, but also diminishes and threatens the livelihood and subsistence of entire communities on the Costa Rican bank.

F. Conclusions

5.144. This Chapter has demonstrated that Nicaragua has violated and continues to violate the obligation to respect Costa Rica's perpetual right of free navigation over the portion of the San Juan where it is a riparian State, including especially the right of navigation for the purposes of commerce, without being subject to charges of any kind or duties, unless levied by mutual consent of both Governments. In particular it has done so:

- (1) by imposing charges on Costa Rican vessels and/or their passengers, in the form of a departure clearance certificate, an "immigration fee" (one to enter and another to exit the River) and a "tourist card" or "transit permit";
- (2) by imposing timetables to navigation, requesting Costa Rican vessels to obtain permission to navigate the River, to stop at the Nicaraguan bank and to fly the Nicaraguan flag;
- (3) by requiring passengers to carry their passports with a Nicaraguan visa;
- (4) by conducting searches of the passengers and their possessions; and
- (5) by denying that the transportation of persons, including tourism, as well as navigation for the purpose of communication between different points of Costa Rican territory, either by individuals or by Costa Rican officials, are included within the scope of the navigation with the purposes of commerce.

⁴¹⁴ Affidavit of Leonel Morales Chacón, 6 July 2006: Annexes, Vol 4, Annex 106.

5.145. It has also been demonstrated that:

- (6) By preventing Costa Rican official vessels transporting members of the police with their regular arms with the purpose of re-supply and relief of the police posts along the Costa Rican bank of the San Juan and by denying that such Costa Rican activity is a right, Nicaragua has violated and continues to violate the obligation to respect Costa Rica's right of navigation with the following purposes:
 - (i) protection of commerce and of revenue control;
 - (ii) safeguarding or custody of the San Juan; and
 - (iii) defence of the common bay of San Juan del Norte.
- (7) By preventing residents of the Costa Rican bank of the San Juan, both from that bank and within the waters of the San Juan along that bank, to fish for subsistence purposes, Nicaragua has violated and continues to violate their customary right to fish for subsistence purposes.
- (8) Through its overall conduct with regard to the Costa Rican navigational and related rights, and its disregard to the relevant applicable instruments, Nicaragua has violated and continues to violate the obligation to make its best efforts to collaborate with Costa Rica in order to facilitate traffic on the San Juan and facilitate transport services provided by enterprises of Costa Rica in the territory of Nicaragua, including the waters of the San Juan.

Chapter 6

The Remedies sought by Costa Rica

A. Introduction

6.01. Chapter 5 of this Memorial demonstrated that Nicaragua has violated its obligations with regard to the navigational and related rights of Costa Rica on the San Juan. As set out in the Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission: "Every internationally wrongful act of a State entails the international responsibility of that State."⁴¹⁵ The present chapter formulates the remedies sought by Costa Rica as a consequence of the internationally wrongful acts committed by Nicaragua. They consist of:

- (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.

B. Declaration of violations of Nicaragua's obligations

6.02. Costa Rica requests the Court to adjudge and declare that Nicaragua is in breach of its international obligations as particularised in Chapters 4 and 5 of this Memorial, in denying to Costa Rica the free exercise of its rights of navigation and associated rights on the San Juan. Costa Rica's primary purpose in instituting these proceedings has been to obtain a declaratory judgment that its rights have been violated by Nicaragua. Such a declaration, made by the principal judicial organ of the United Nations, will amount to a final determination of those rights and will oblige Nicaragua to cease its

⁴¹⁵ Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission at its fifty-third session (2001), Art 1, annexed to General Assembly, Resolution 56/83, 12 December 2001 (hereinafter "ILC Articles on State Responsibility").

wrongful conduct, which has consisted in denying those rights and preventing Costa Rica from exercising them. As the Permanent Court of International Justice has said, such a declaration serves:

“to ensure recognition of a situation at law, once and for all and with binding force as between the Parties; so that the legal position thus established cannot again be called in question in so far as the legal effects ensuing therefrom are concerned.”⁴¹⁶

6.03. 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

⁴¹⁶ *Interpretation of Judgments Nos. 6 and 8 (Factory at Chorzów)*, P.C.I.J. Series A, No. 13 (1926), p. 20.

bank of the River with their official equipment, service arms and ammunition, and for the purposes of protection as established in the relevant instruments, and in particular article 2 of the Cleveland Award;

- (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 I 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.

C. Cessation of continuing internationally wrongful conduct

6.04. As a consequence of the determination of the unlawful conduct of Nicaragua as set out above, Nicaragua is obliged to cease all internationally wrongful conduct which has a continuing character. According to the ILC's Articles on State Responsibility:

"The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation."⁴¹⁷

6.05. The Court has emphasised the obligation to cease internationally wrongful acts having a continuing character. For example, in the *Military and Paramilitary Activities in and against Nicaragua*, the Court decided:

"that the United States of America is under a duty immediately to cease and to refrain from all such acts as may constitute breaches of the foregoing legal obligations."⁴¹⁸

6.06. As the International Law Commission recalled in its commentary to article 30:

⁴¹⁷ Article 14(2). See also article 30(a) of the Articles on State Responsibility.

⁴¹⁸ I.C.J. Reports 1986, p. 149, *dispositif* para (12)

“the Tribunal in the *Rainbow Warrior* arbitration stressed ‘two essential conditions intimately linked’ for the requirement of cessation of wrongful conduct to arise, ‘namely that the wrongful act has a continuing character and that the violated rule is still in force at the time in which the order is issued’. While the obligation to cease wrongful conduct will arise most commonly in the case of a continuing wrongful act, article 30 also encompasses situations where a State has violated an obligation on a series of occasions, implying the possibility of further repetitions. The phrase ‘if it is continuing’ at the end of subparagraph (a) of the article is intended to cover both situations.”⁴¹⁹

6.07. At the time of the filing of the present Memorial, Nicaragua continues to infringe the obligations enumerated above and, of course, these obligations are still in force.

D. Full Reparation

6.08. Evidently:

“[i]t is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.”⁴²⁰

6.09. Consequently, the Court is requested to determine the reparation which must be made by Nicaragua. As the Permanent Court also recalled:

“[t]he essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.”⁴²¹

6.10. In the present proceedings, reparation takes the form of restitution and compensation.

⁴¹⁹ United Nations, *Report of the International Law Commission on the work of its Fifty-third session*, GAOR, Fifty-sixth session, Supplement No. 10 (A/56/10, 2001), 216.

⁴²⁰ *Factory at Chorzów, Jurisdiction*, P.C.I.J., Series A, No. 9 (1926), p. 21.

⁴²¹ *Factory at Chorzów, Merits*, P.C.I.J., Series A, No. 17 (1928), p. 47.

(1) Restitution

6.11. Costa Rica essentially looks for restitution in the form of restoration of the situation prior to the Nicaraguan breaches referred to above. According to article 35 of the ILC Articles on State Responsibility:

“A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

- (a) is not materially impossible;
- (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.”

6.12. In these proceedings restitution signifies the reestablishment of the full enjoyment by Costa Rica of its navigational and related rights over the San Juan as elaborated in Chapter 4 of this Memorial. Clearly, neither of the two exceptions for excluding restitution envisaged in article 35 of the ILC Articles is present here.

6.13. This form of *restitutio in integrum* includes the abrogation of all legislative and administrative measures taken by Nicaragua which contradict or deny the obligations enumerated above.

(2) Compensation

6.14. Insofar as restitution does not constitute comprehensive reparation for the injuries caused by Nicaraguan wrongful acts, Costa Rica seeks pecuniary compensation from Nicaragua for all damages caused by the unlawful acts that have been committed or may yet be committed.

6.15. In particular, compensation should include, *inter alia*:

- (a) the loss caused to Costa Rican vessels arising from the so-called “departure clearance certificate” imposed on Costa Rican vessels navigating the San Juan River;
- (b) the loss caused to Costa Rica for the charge of tourism cards, transit permits and immigration fees imposed on Costa Rican vessels navigating the San Juan River;

- (c) the loss caused to Costa Rica for the charge of a consular visa to any Costa Rican citizen seeking to navigate the San Juan River;
- (d) the losses caused to Costa Rica for the further expenses incurred by Costa Rican citizens, the consequential losses in their activities, as well as all other material and moral damage suffered by them;
- (e) the expenses and costs incurred by Costa Rica as a result of Nicaragua's violations causing Costa Rica to be unable to resupply the police posts along the Costa Rican bank through the San Juan River;
- (f) interest at prevailing rates from the time the claim arose until payment of the judgment; and
- (g) such other relief as the Court may deem appropriate.

6.16. In accordance with the practice stemming from previous case law,⁴²² Costa Rica respectfully requests the Court to reserve the determination of the scope of compensation due from Nicaragua to a subsequent phase of this case. This is particularly required in the present proceedings because Nicaragua's breaches are still continuing. As the Court stated in the *Hostages Case*:

"As to the consequences of this finding [the breaches of Iran's obligations under the 1961 and 1963 Vienna Conventions] it clearly entails an obligation on the part of the Iranian State to make reparation for the injury thereby caused to the United States. Since however Iran's breaches of its obligations are still continuing, the form and amount of such reparation cannot be determined at the present date."⁴²³

6.17. Consequently, 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. This is consistent with the Court's

⁴²² *Ibid.*, 64; *Corfu Channel, Merits*, I.C.J. Reports 1949, p. 26; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits*, I.C.J. Reports 1986, p. 142 (para 284); *Armed Activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda)*, judgment of 19 December 2005, *dispositif* para (14).

⁴²³ *United States Diplomatic and Consular Staff in Tehran*, I.C.J. Reports 1980, pp. 41-42 (para 90).

holding in the *Fisheries Jurisdiction* case (*Federal Republic of Germany v Iceland*):

“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.”⁴²⁴

E. Assurances and guarantees of non-repetition

6.18. Costa Rica also respectfully requests the Court to determine, in accordance with article 30(b) of the ILC Articles on State Responsibility, that Nicaragua provide assurances and guarantees against repetition of its international wrongful acts.

6.19. According to the International Law Commission,

“[a]ssurances and guarantees are concerned with the restoration of confidence in a continuing relationship, although they involve much more flexibility than cessation and are not required in all cases. They are most commonly sought when the injured State has reason to believe that the mere restoration of the pre-existing situation does not protect it satisfactorily.”⁴²⁵

6.20. The Court has admitted that in some circumstances such assurances and guarantees should be granted. In the *LaGrand* Case, the Court held:

“that the commitment expressed by the United States to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1(b) [of the 1963 Vienna Convention on Consular Relations] must be regarded as meeting Germany’s request for a general assurance of non-repetition.”⁴²⁶

⁴²⁴ *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, Merits, I.C.J. Reports 1964, p. 204 (para 66). Equally, in *Military and Paramilitary Activities in and against Nicaragua*, the Court stated: “The opportunity should be afforded Nicaragua to demonstrate and prove exactly what injury was suffered as a result of each action of the United States which the Court has found contrary to international law.” I.C.J. Reports 1986, pp. 142-143 (para 284).

⁴²⁵ United Nations, *Report of the International Law Commission on the work of its Fifty-third session*, GAOR, Fifty-sixth session, Supplement No. 10 (A/56/10, 2001), 219.

⁴²⁶ *La Grand (Germany v. United States of America)*, I.C.J. Reports 2001, p. 466, 512 (para 123).

6.21. Equally, in the *Case concerning armed activities on the territory of the Congo*, the Court took the view that

“the commitments assumed by Uganda under the Tripartite Agreement [of 26 October 2004] must be regarded as meeting the DRC’s request for specific guarantees and assurances of non-repetition.”⁴²⁷

6.22. The record of Nicaraguan denials or rejections of the relevant instruments related to the San Juan and its violations of Costa Rican rights at different times shows that Costa Rica “has reason to believe that the mere restoration of the pre-existing situation does not protect it satisfactorily”. This is the third time in history that Costa Rica has been obliged to have recourse to adjudication (arbitration by President Cleveland, the Central American Court of Justice and this Court) in order to obtain recognition and respect of its rights as first established by the Treaty of Limits.

6.23. The assurances and guarantees of non-repetition sought by Costa Rica include a statement by Nicaragua to this effect by means of its own choosing, and the abrogation of those legislative and administrative measures taken by Nicaragua that, if continued in force, would constitute a violation of any of the abovementioned obligations.

F. Conclusions

6.24. Accordingly, Costa Rica seeks the following remedies in the present proceedings:

- (1) that the Court adjudge and declare that Nicaragua is in breach of its international obligations as referred to in Chapters 4 and 5 of this Memorial and enumerated in paragraph 6.03 above;
- (2) the cessation by Nicaragua of all the breaches of the obligations referred to in paragraph 6.03 above having a continuing character;

⁴²⁷ *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, judgment of 19 December 2005, para 256.

- (3) the obligation of Nicaragua 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 (a) the restoration of the situation prior to the Nicaraguan breaches and (b) compensation in an amount to be determined in a separate phase of these proceedings; and
- (4) appropriate assurances and guarantees on the part of Nicaragua that it shall not repeat its unlawful conduct.

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 article 2 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.

Ambassador Edgar Ugalde Alvarez

Agent of Costa Rica

29 August 2006

Appendix A.

The status of the San Juan River in international law

A1. As shown in Chapter 4 of this Memorial, Costa Rica's navigational and related rights stem from the relevant treaties, in particular the Treaty of Limits, as well as binding interpretations of that Treaty made in the Cleveland Award and by the Central American Court of Justice. These instruments apply to the San Juan irrespective of any theory about distinctions to be drawn between "national" and "international" rivers.

A2. By contrast, Nicaragua has repeatedly qualified the San Juan as a purely "national river", and this characterisation has then been used as a main argument to reject or minimise Costa Rica's navigational and related rights that are at stake in the present proceedings. For the sake of completeness, Costa Rica attaches this Appendix to its Memorial in order to demonstrate that the San Juan is governed by an international regime. The second part of this Appendix will analyze the impact of customary international law on the navigational and related rights of Costa Rica.

I. The San Juan is an international river

A3. As mentioned in Chapter 2, the San Juan was the main means of communication to the Atlantic Ocean for both Costa Rica and Nicaragua during the 19th century. Indeed, the River had been one of the most important international means of communication in Central America and was used by vessels from different flags and continents. Before the entry into force of the Treaty of Limits, neither State possessed exclusive jurisdiction over the River. Pursuant to the Treaty of Limits, Nicaragua obtained sovereignty over the entire waters of the San Juan. This decision was taken in the context of the envisaged construction of an inter-oceanic canal by way of Lake Nicaragua, as explained in Chapter 2 above.⁴²⁸

A4. As the record reveals, Costa Rica at all times since the entry into force of the Treaty of Limits has recognised that the northern bank, the waters and the bed of the San Juan belong to Nicaragua.

⁴²⁸ See paragraph 2.16.

A5. Although there exist other examples of contiguous rivers where the boundary is defined along one bank, this is not the situation normally encountered. In general, the boundary is established in such cases using either the *thalweg* or the median line, or a combination of both. In the literature, it has been explained that the method of defining the boundary along one bank was used in earlier times, that it is ill-adapted to technical requirements and that it leads to unjust or inequitable results.⁴²⁹ In general, when this kind of boundary is established with regard to navigational rivers, the parties agree to grant freedom of navigation to the riparian State other than the sovereign.⁴³⁰ The general drawbacks of this method of delimitation are such that in some cases, States agreed to modify such early delimitations, to replace them with the *thalweg* or the median line.⁴³¹

⁴²⁹ Thus P de Lapradelle qualified the boundary on one bank as the "limite fluviale impérialiste par excellence", *La frontière. Etude de droit international* (Paris: Les éditions internationales, 1928), 95; see also LJ Bouchcz, "The Fixing of Boundaries in International Boundary Rivers", (1968) 12 *ICLQ* 791; C Rousseau, *Droit international public* (Paris: Sirey, 1977), vol. III, 253-4; C de Visscher, *Problèmes de confins en droit international public* (Paris: Pedone, 1969), 58-9; L Caflisch, "Règles générales du droit des cours d'eau internationaux", (1989-VII) 219 *Recueil des Cours* 69; SC McCaffrey, *The Law of International Watercourses. Non-Navigational Uses* (Oxford: Oxford University Press, 2001), 71, fn 88; SMA Salman, "The Present State of Research Carried Out by the English-speaking Section of the Centre for Studies and Research", in Centre for Studies and Research in International Law and International Relations of The Hague Academy of International Law, *Water Resources and International Law (2001)* (The Hague: Kluwer, 2002), 79-80.

⁴³⁰ See, e.g.: Treaty of Peace between Austria and France, 17 October 1797, art 11, 54 CTS 157, 161; Arrangement between France, Great Britain and Russia and Turkey for the Definitive Settlement of the Continental Boundaries of Greece, 21 July 1832, art VI, 82 CTS 477, 483; Treaty of Peace between Russia and Turkey with regard to the Danube, 14 September 1829, 80 CTS 83, esp. Art III; Agreement between France and Liberia, 18 September 1907, art III, 101 BFSP 1013, 3 NRG (3rd series) 1004; Treaty between Afghanistan and Great Britain for the Establishment of Neighbouring Relations, 2 November 1921, art 2, 14 LNTS 67; Convention between Great Britain and the Netherlands respecting the delimitation of the boundary in Borneo, 26 March 1928, art 2, 108 LNTS 332, 334; Treaty between Iraq and Iran concerning the boundary along the Shatt-al-Arab, 4 July 1937, 190 LNTS 242. Even in cases when the river is a non-navigable one, some rights to the non-sovereign riparian are also recognized: see, e.g., Boundary Convention between Basle and France concerning the Doubs, 20 June 1780, 47 CTS 331, esp art I; Treaty of Cession and Boundaries between Sardinia and Switzerland with regard to the Foron, 16 March 1816, 65 CTS 447, esp art I.

⁴³¹ Thus the Treaty of 16 June 1803 amongst Sardinia, Switzerland and Geneva, 65 CTS 447 moved the boundary located on one bank of the Rhone (allocating its waters to Sardinia) to the median line. The Treaty of 30 November 1909 between Brazil and Uruguay modified the boundary located at the Uruguayan banks of the Yaguaron river and the Lake of Merim, moving them to the *thalweg* of the former and to a longitudinal line in the latter: 209 CTS 419. The agreement of 4 September 1913 between France and Great Britain modified the boundary following the bank of the Uldafu and Biwa rivers by virtue of the agreement of 25 June 1903 to the *thalweg*. The boundary followed the left bank of the Moa was kept, but it was recognized that the inhabitants of the two banks have equal rights of fishing in this part: 9 Martens, RGT, 3rd series, 802. Other examples include the Pruth (Treaty of Berlin, 13 July 1878, 153 CTS 171, 187, art XLV), the Shatt -al-Arab (Iran-Iraq, Treaty of 13 June 1975, 1017 UNTS 55); the Sabine (boundary fixed by a treaty between Spain and the United States on the western bank in 1819 and moved to the median line by an agreement between Mexico and the United States, quoted by F Schroeter, "Les systèmes de délimitation dans les fleuves internationaux", (1992) 38 AFDI 956-957, according to the Russian interpretation, the Usury/Amour (the Treaty between the Russian Federation and the People's Republic of China of 14 October 2004, fixes the boundaries on the median line of the main channel of navigation where the rivers are navigable, and on the median line where they are not. Available in Russian at: <http://www.akdi.ru/gd/proekt/096937GD.SHTM>). At the beginning of the 20th century, Argentine Foreign Affairs Minister Zeballos claimed that, by virtue of the *uti possidetis iuris* of 1810, the entire waters of the River Plate (Rio de La Plata) belonged to Argentina (JA Barberis, "Régimen jurídico internacional del Río de La Plata" in JA Barberis and EA Pigretti, *Régimen jurídico del Río de La Plata* (Buenos Aires: Abeledo Perrot, 1970), 52-53). The Treaty Concerning the Río de La Plata and the Corresponding Maritime Boundary (Uruguay-Argentina), 19 November 1973, entered into force 12 February 1974, 1295 UNTS 306, divided the waters of the river between the two riparian States. In the *Frontier Dispute (Benin/Niger)* case, Benin unsuccessfully argued that the boundary ran along the left bank of the Niger River: *Frontier Dispute (Benin/Niger), Judgment*, I.C.J. Reports 2005, pp. 121-122, paras. 51-56.

A6. Nicaragua argues that the San Juan is a “national river”.⁴³² This expression is used as a means of denying or restricting Costa Rican rights. Furthermore, Nicaragua wrongly contends that, through the category of “international river”, Costa Rica aims at placing the San Juan under a regime of shared sovereignty.⁴³³

A7. Two simple and obvious considerations refute the characterisation of the San Juan as a purely “national” river. First, the San Juan is a waterway regulated by international instruments. Second, the San Juan is a navigational waterway whose banks belong to two different States. Article 6 of the Cañas-Jerez Treaty states this explicitly, referring to “the portion of the bank of the San Juan, which is hereby declared to belong to Costa Rica”. These two elements are sufficient to establish the San Juan as an international river.⁴³⁴

A8. The characterization of the San Juan as an international river is in conformity with the position of the Permanent Court of International Justice in interpreting article 331 of the Treaty of Versailles. It said:

“The actual wording of Article 331 shows that internationalization is subject to two conditions: the waterway must be navigable and must naturally provide more than one State with access to the sea. These are the two characteristics—and this observation, as will be seen, is not without importance in relation to the question to be answered—by which a distinction has for a long while been made between the so-called international rivers and national rivers.”⁴³⁵

⁴³² See, e.g., “The San Juan River belongs to Nicaragua”, Press Release, Press Office of the Ministry of Foreign Affairs of Nicaragua, 6 March 2000: Annexes, Vol 5, Annex 157. According to Mr Mauricio Herdocia Sacasa, Agent of Nicaragua: “The San Juan River is a national river; it is a river where the exclusive sovereignty is recognised, therefore, that holds a lot of weight before the International Court of Justice, specially taking into account that the issue of sovereignty is a fundamental factor upon which international law rests. ‘Nicaragua has a solid position. It is a strong position under international law and the instruments. If one reviews the Jerez-Cañas Treaty and the Cleveland Award, under no ground you will find that (the alleged right of the *tiquillos*) applies either to armed navigation or transportation, and even less to the navigation of tourists,’ he recalled.”: “Ticos claim ‘new and additional’ rights”, *El Nuevo Diario*, Managua, 4 November 2005: Annexes, Vol 5, Annex 191.

⁴³³ See, e.g., “The San Juan River belongs to Nicaragua”, Press Release, Press Office of the Ministry of Foreign Affairs of Nicaragua, 6 March 2000: Annexes, Vol 5, Annex 157.

⁴³⁴ It should also be noted that art 2(a) of the United Nations Convention on the Law of the Non-navigational Uses of International Watercourses, 21 May 1997, GA Res 51/229 (not yet in force) defines a “Watercourse” as “a system of surface waters and ground waters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus”; art 2(b) defines an “International watercourse” as “a watercourse, parts of which are situated in different States”. In accordance with this systems approach, the San Juan, with its ground waters, tributaries and delta situated in two different States, is an “international watercourse”.

⁴³⁵ *Territorial Jurisdiction of the International Commission of the River Oder*, Judgment No. 16, P.C.I.J. Series A No 23 (10 September 1929), p. 25.

A9. Both criteria are met here. Furthermore, as set out above, the rights and obligations of both riparian States with regard to the San Juan are specifically regulated by international instruments.

A10. The fact that both banks of the San Juan do not belong to the same State is an essential element compelling rejection of Nicaragua's characterisation of the San Juan as a "national river". The Permanent Court, in analysing the legal status of the Kiel Canal before the conclusion of the Treaty of Versailles, stated that "the Kiel Canal, having been constructed by Germany in German territory, was, until 1919, an internal waterway *of the state holding both banks*".⁴³⁶ The judgment also stressed that:

"[t]he Court considers that the terms of article 380 [of the Treaty of Versailles] are categorical and give rise to no doubt. It follows that the canal has ceased to be an internal and national navigable waterway, the use of which by the vessels of states other than the riparian state is left entirely to the discretion of that state, and that it has become an international waterway intended to provide under treaty guarantee easier access to the Baltic for the benefit of all nations of the world."⁴³⁷

A11. Hence, the fact that the waters of the San Juan belong in their entirety to Nicaragua is not sufficient to deny the characterisation of the river as international. Indeed, a similar situation is found in the case of international rivers crossing different States (so-called "successive rivers"): in each part of the territory of the different States, the waters of these rivers (and even both banks) are, in their entirety, under the exclusive sovereignty of a single State — but this is without prejudice to the existence of international obligations as to such rivers, both under treaties and general international law.

A12. Costa Rica is clearly a riparian State of the San Juan. According to the definition espoused by the Helsinki Rules on the Uses of the Waters of International Rivers, adopted by the International Law Association in 1966 and considered to largely reflect general international law:

"the term 'riparian State' refers to a State through or along which the navigable portion of a river flows or a lake lies."⁴³⁸

⁴³⁶ *The S.S. 'Wimbledon'*, P.C.I.J. Series A, No. 1, p. 23 (1923) (emphasis added).

⁴³⁷ *Ibid.*, p. 22.

⁴³⁸ Art XII, para. 3. See International Law Association, *Report of the Fifty-Second Conference* (Helsinki, 1966), 505.

A13. Conventional practice from different continents clearly demonstrates that when two States wish to attribute a river entirely to one of them, in order to give that State complete freedom over the river, they chose to allocate not only the waters but also both banks of the river to a single State. These cases include:

- The Treaty of Osnabruck of 24 October 1648 between Sweden and the Emperor of Germany, as regards the River Oder;⁴³⁹
- The Treaty of Utrecht of 11 April 1713 between France and Portugal with regard to the boundary along the Amazon River;⁴⁴⁰
- The Treaty between Poland and Prussia of 18 September 1773 over the River Netze;⁴⁴¹
- The Treaty between the Ottoman Empire and Russia of 14 September 1829 regarding the boundary of the Danube;⁴⁴²
- The Treaty between France and Great Britain of 10 August 1889 regarding the boundary between Gambia and Senegal.⁴⁴³

A14. Nicaragua has recognized the status of Costa Rica as a riparian on the San Juan. In a note dated 18 October 1886, the Minister of Foreign Affairs of Nicaragua explains with regard to Costa Rica that "article 2 [of the 1858 Treaty of Limits] made her *riparian* in part of the right hand bank of said River; while article 4 established her duties for incurring in that concession."⁴⁴⁴ He went on to say:

"It is already evident, from the above, that assuming the Treaty of Limits is valid, Costa Rica would merely be a *riparian* of the San Juan River, from its mouth in the Atlantic to three English miles before reaching *Castillo Viejo*."⁴⁴⁵

A15. But even if a river exclusively flows within the territory of one State (i.e. the two banks belong to the same State), this does not necessarily preclude its having an international character. Discussing the Latin American conception of the fluvial regime in international law, a leading author has written:

⁴³⁹ 1 CTS 198, 244, Art X. Twiss explains that "Sweden having obtained under the Treaty of Osnabruck (24 Oct. 1648) the cession of the entire river Oder from the Emperor of Germany, was held to have acquired thereby possession of a margin of two German miles on the further bank, as an inseparable accessory to the stream." T Twiss, *The Law of Nations Considered as Independent Political Communities. On the Rights and Duties of Nations in Time of Peace* (Oxford: Clarendon Press, 1892), 238-9.

⁴⁴⁰ Art X: "...les deux bords de la rivière des Amazones, tant le méridional que le septentrional, appartiennent en toute propriété, domaine et souveraineté à Sa Majesté Portugaise": 45 CTS 259.

⁴⁴¹ 45 CTS 253, 259, Art II. Twiss, 238 pointed out that "by the Treaty of Warsaw (18 September 1773), Poland agreed that the entire river Netze should belong to Prussia, and Prussia contended, and was ultimately successful in her contention, that the cession of the entire river implied the cession of the stream and both its banks."

⁴⁴² 60 CTS 83.

⁴⁴³ 172 CTS 185.

⁴⁴⁴ Note of Secretary of State in charge of the Foreign Affairs of the Republic of Nicaragua, F Castellón, to Secretary of Foreign Affairs of Costa Rica, Ascensión Esquivel, 18 October 1886 (emphasis added), in: República de Costa Rica, *Memoria de la Secretaría de Relaciones Exteriores y Carteras Anexas 1887* (San José: Imprenta Nacional, 1887): Annexes, Vol 3, Annex 35.

⁴⁴⁵ *Ibid* (emphasis added).

“Dans la conception américaine, un fleuve ne doit pas être considéré comme international au point de vue du régime qui doit lui être appliqué par cela seul qu’il est commun à deux ou plusieurs États ; un fleuve dans cette conception ne doit être considéré comme international que lorsque réellement il présente un intérêt universel au point de vue du commerce et de la navigation ; ce fleuve pourra dès lors être un fleuve qui traverse ou sépare plusieurs États ou un fleuve intérieur.”⁴⁴⁶

A16. What is essential for the characterization of a river as international is its regulation by international law, notably by treaty. For instance, the Treaty of Versailles internationalized the River Oder from its confluence with the Oppa, although the Oder ran (at that time) entirely on German territory.⁴⁴⁷ For some authors, the fact that an international river becomes “national” due to changes in the territorial sovereignty (i.e. when both banks that happened to belong to two different States later become under the sovereignty of a single State), does not deprive it of its international regime.⁴⁴⁸ Indeed, this was the situation of the River Po. The Peace Treaties of Zurich of 10 November 1859⁴⁴⁹ and Vienna of 3 October 1866⁴⁵⁰ made it an internal Italian river. Nevertheless, freedom of navigation was maintained.⁴⁵¹

A17. On this basis it is not surprising that the Central American Court of Justice, analyzing the rights and obligations of Costa Rica with regard to the San Juan, came to the following conclusion:

“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 from

⁴⁴⁶ C Sosa-Rodriguez, *Le droit fluvial international et les fleuves de l'Amérique latine* (Paris: Pedone, 1935), 110.

⁴⁴⁷ Art 331 of Treaty of Peace signed at Versailles on 28 June 1919.

⁴⁴⁸ Carathéodory, “Das Stromgebietsrecht und die internationale Flussschiffahrt,” vol. 2, in F von Holtendorff, ed., *Handbuch des Völkernatz* (Hamburg, JF Richter, 1887), 303; V d’Erlach, *Conference on Navigable Waterways*, 81; RR Baxter, *The Law of International Waterways, with particular regard to interoceanic canals* (Cambridge MA, Harvard University Press, 1964), 112 (quoted by B Vitányi, *The International Regime of River Navigation* (Alphen van den Rijn, Sijthoff and Noordhoff, 1979)).

⁴⁴⁹ Treaty of Peace Between Austria and France and Sardinia, 121 CTS 155, 161, art XVIII.

⁴⁵⁰ 132 CTS 209, 211, arts III, IV.

⁴⁵¹ See the intervention of Mr Bignami, on behalf of Italy, at the Conference of Barcelona: Société des Nations, Conférence de Barcelone, *Comptes rendus et textes relatifs à la Convention sur le régime des voies navigables d'intérêt international et à la déclaration portant reconnaissance u droit au pavillon des Etats dépourvus de littoral maritime* (Geneva, 1921), 75; P Fauchille, *Traité de droit international public*, Vol I (1925), 560; B Vitányi, *The International Regime of River Navigation* (Alphen aan den Rijn: Sijthoff, 1979), 211.

constituting a cause for disquiet, would imply a function appropriate to territorial sovereignty."⁴⁵²

A18. To sum up, the San Juan possesses an international status, since its banks belong to two different States, it provides access to the sea to both of them and its regime is regulated by international law, particularly treaty law.

II. General international law concerning navigational rights on international waterways and its relation to the dispute

A19. Chapter 4 of this Memorial focuses on the navigational and related rights of Costa Rica on the San Juan. With the exception of the customary right of fishing for subsistence purposes of the inhabitants living along the river, it dealt with those rights from the conventional viewpoint. However, this is not the only source of Costa Rican rights. As the first part of this Appendix demonstrated, the San Juan has an international character, and Costa Rica is a riparian State. Given this situation, general international law rules relative to navigation on international waterways are also applicable.

A20. There is no doubt that there exist general international law rules related to waterways in general and rivers in particular. The Permanent Court of International Justice, analysing the geographic extent of the rights of navigation established by article 331 of the Treaty of Versailles, explained:

“The Court must therefore go back to the principles governing international fluvial law in general and consider what position was adopted by the Treaty of Versailles in regard to these principles.

It may well be admitted, as the Polish Government contend, that the desire to provide upstream States with the possibility of free access to the sea played a considerable part in the formation of the principle of freedom of navigation on so-called international rivers.

⁴⁵² Annexes, Vol 2, Annex 21, 220. According to an author writing at the time of the rendering of the Central American Court's judgment, the “rights of Costa Rica in Nicaraguan territory are not dependent merely upon the good faith of Nicaragua in observing her treaty obligations; they rest upon an even stronger basis than that, for they are positive rights belonging to Costa Rica whereby a portion of the territory of Nicaragua is made subservient to certain uses and interests of Costa Rica. In other words, an international servitude has been created by reason of these rights making part of the territory of Nicaragua as the servient state serve certain uses and interests of Costa Rica as the dominant state”: CP Anderson, *The Disturbing Influence in Central America of the Nicaraguan Canal Treaty with the United States of America and Its Conflict with the Treaty Rights of Costa Rica* (Gibson Bros, Washington, D.C., 1917), 7-8.

But when consideration is given to the manner in which States have regarded the concrete situations arising out of the fact that a single waterway traverses or separates the territory of more than one State, and the possibility of fulfilling the requirements of justice and the considerations of utility which this fact places in relief, it is at once seen that a solution of the problem has been sought not in the idea of a right of passage in favour of upstream States, but in that of a community of interest of riparian States. This community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the use of the whole course of the river and the exclusion of any preferential privilege of any riparian State in relation to the others.⁴⁵³

A21. Of course, what the Court said must be adapted to the particular situation of each waterway, in this case, the San Juan. Irrespective of the existence or not of a generalised right to navigation in international rivers in favour of vessels of all nations, it has been asserted that such a customary right does exist in favour of riparian States. The Helsinki Rules of the Uses of the Waters of International Rivers can be considered as declaring an existing general international law rule when it states in its Article XIII that:

“Subject to any limitations or qualifications referred to in these Chapters, each riparian State is entitled to enjoy rights of free navigation on the entire course of a river or lake.”⁴⁵⁴

A22. It must be noted that the Cleveland Award qualifies Costa Rican rights declared in the 1858 Cañas-Jerez Treaty, including those of navigation, as “natural rights”, and acknowledged that “perhaps” these are not the only rights Costa Rica possesses.⁴⁵⁵

A23. While recognizing to Costa Rica navigational and related rights, the 1858 Treaty could not have had the intention to restrict the existing rights in accordance with general international law. On the contrary, it extended them.

⁴⁵³ *Territorial Jurisdiction of the International Commission of the River Oder*, P.C.I.J. Series A No 23, pp. 26-27 (1929).

⁴⁵⁴ International Law Association, *Report of the Fifty-Second Conference* (Helsinki, 1966), 506.

⁴⁵⁵ As the Cleveland Award held: “*The natural rights of the Republic of Costa Rica alluded to in the said stipulation [art VIII of the Treaty of Limits] are the rights which, in view of the boundaries fixed by the said Treaty of Limits, she possesses in the soil thereby recognized as belonging exclusively to her; the rights which she possesses in the harbors of San Juan del Norte and Salinas Bay; and the rights which she possesses in so much of the river San Juan as lies more than three English miles below Castillo Viejo, measuring from the exterior fortifications of the said castle as the same existed in the year 1858; and perhaps other rights not here particularly specified.*” Cleveland Award, paragraph 10 (emphasis added): Annexes, Vol 2, Annex 16.

This is the case, for example, with regard to the rights granted to all kind of Costa Rican vessels (with the exception of war vessels), freedom from dues, and the right to navigate between two points on the Nicaraguan bank. On the other hand, while recognizing particular conventional rights not existing at the customary level, Nicaragua restricted itself its rights as a riparian State having sovereignty over the waters. This is the case with regard to the exercise of some rights of police that cannot be applied to Costa Rican vessels.

A24. Accordingly navigation by private vessels flying the Costa Rican flag, transporting goods and passengers from one point of Costa Rican territory to another, from Costa Rica to Nicaragua or vice-versa, and from Costa Rica to the sea or vice-versa, can be considered as rights also rooted in general international law. Other navigational and related rights of Costa Rica have a conventional character agreed by both riparian States and recognised in successive international awards and decisions.

III. Conclusions

A25. By way of summary the following conclusions may be reached:

- (a) The San Juan is an international river, whose left bank and waters are under the sovereignty of Nicaragua and whose right bank from the end of Punta de Castilla to a point three English miles distant from Castillo Viejo is under the sovereignty of Costa Rica.
- (b) The rights and obligations of both riparian States with regard to the river are defined by binding international instruments, in particular the Treaty of Limits, the Cleveland Award, the 1916 Judgment of the Central American Court of Justice and the 1956 Agreement.
- (c) Treaty law applicable between the Parties extended Costa Rican navigational and related rights existing under general international law, and to that extent limited Nicaragua's jurisdiction over the River.

Appendix B

The Revenue Guard: Creation and Development

B1. The Costa Rican Revenue Guards were created in the 19th century as part of the Government's effort to control contraband, both of goods whose production was a State monopoly, such as liquor, and foreign articles that were taxed by law.

B2. For example, through Decree No. XVII of 10 May 1847, the Military Guards of the Sarapiquí and La Flor Rivers were created. Article 2 of this Decree assigned to each one a Commander subject to the orders of the General Intendant, and a number of troops which was contingent on the circumstances. Article 3 gave them their tasks, in particular to "apprehend the articles and effects that are illegally introduced in the State, and to impede the exit of any person that does not bear its passport..."⁴⁵⁶

B3. In the 1858 Regulations of the Treasury (Decree No. IV of 23 March 1858) a Chapter was included that referred to the Revenue Guards. Article 161 of Chapter XIX decreed that "besides the fixed revenue guards that are established by these Regulations or that are established by the Customs Ordinances, there will be an ambulatory guard, whose most immediate chief will be the Inspector of the Subordinate Treasury..."⁴⁵⁷ Article 162 stated that:

"there will always be an ambulatory round, watching over to prevent the commission of any fraud or contraband from the Rio Grande to the vicinity of Turrialba; another round will carry out the same vigilance in the territory comprehended between said Rio Grande and the one of Chomes; and another from the latter to the confines of Nicaragua. The Inspector of Treasury will ensure that each of these rounds carries out the service alternatively in each of the said territories four months a year."⁴⁵⁸

B4. Article 163 established as the functions and obligation of the ambulatory rounds the following:

⁴⁵⁶ *Leyes decretos y órdenes expedidos por los Supremos Poderes Legislativo y Ejecutivo de Costa Rica en los años de 1847 y 1848*, Tomo X (San José: Imprenta la Paz, 1863), 90-91: Annexes, Vol 6, Annex 197.

⁴⁵⁷ *Colección de las leyes, decretos y órdenes expedidos por los Supremos Poderes Legislativo y Ejecutivo de Costa Rica en el año de 1858*, Tomo XV (San José: Imprenta la Paz, 1871), 58-59: Annexes, Vol 6, Annex 201.

⁴⁵⁸ *Ibid*, 59.

"1st to obey and carry out the orders that they receive from the Revenue Judge, of the Inspector of Treasury, of the Administrators of Public Funds, and from the Governors of the Provinces in regards to the pursuit of frauds and contrabands, and the capture of smugglers or defrauders:

2nd to continuously make the round in the territory in which they are to carry out their service, always watching that transgressions against the Fiscal interests are not committed, and therefore pursuing and seizing the clandestine factories and sales of gunpowder and liquors: the clandestine plantations and sales of tobacco, and the introductions and extractions of articles that are attempted to be carried out by contraband:

3rd to frequently visit the spirit shops, to weight the liquors, to check the measures and to report to the respective Administrator and to the Treasury Inspector the faults they observe; and

4th to equally visit the sales of foreign liquors and the beer distilleries to verify that they are being made with the proper authorization."⁴⁵⁹

B5. On 6 February 1878, through Decree No. X, a Guard was created at the mouth of the San Carlos River. The Decree referred to the growing productive importance of the lands bordering the San Carlos River. It created the Guard to prevent produce from being exported without paying the corresponding taxes (article 2), and to charge those taxes and report this to the Treasury Department. It was also charged with the duty to prevent any import of goods lacking the authorization of the Treasury Ministry (article 3). The San Carlos River Guard had responsibility to pursue "the articles of Fiscal monopoly and to proceed with the utmost diligence in the pursuit of fraud that might be committed against the National Treasury..."⁴⁶⁰

B6. On 16 March 1886, through Decree No. XXXI, the Costa Rican Government created a Revenue Guard at the mouth of the Colorado River, "with the purpose of establishing the necessary surveillance of contraband in the Atlantic coast of the Republic."⁴⁶¹ This Revenue Guard depended on the General Treasury Inspection (article 1). On that same day, and reflecting the importance given to this new maritime and terrestrial Guard, the functions of

⁴⁵⁹ Ibid, 59-60.

⁴⁶⁰ *Colección de las disposiciones legislativas y administrativas expedidas en el año 1878* (San José: Imprenta Nacional), 30-32, article 5: Annexes, Vol 6, Annex 204.

⁴⁶¹ *Colección de las disposiciones legislativas y administrativas emitidas en el año 1886* (San José: Imprenta Nacional, 1887), 152-153: Annexes, Vol 6, Annex 205.

the Colorado Guard were determined through Decree No. XXXII, which also established that a national steamer would be assigned to it. The functions of this Guard were to be the following:

“1st To prevent contraband in the waters and territories of its circumscription.

2nd To give the relevant notice and information for the persecution of smuggling to the guards in San Carlos and Sarapiquí, or to the Inspector General, according to the circumstances.

3rd To request assistance from the guards of Sarapiquí and San Carlos, and obtain it whenever the Commander of Colorado deems it necessary.

4th To make at least one monthly visit to the port of Limon in order to take correspondence to and from Colorado.

5th To reconnoitre at least once a week the Rivers San Juan, Colorado, Sarapiquí and San Carlos; the first in the whole extent that it is navigable for Costa Rica, the second in its entire extent, and the latter two along the entire stretches that are navigable by steamer.

The itinerary shall be reserved in order that the guard's actions are not eluded.

6th To institute preliminary proceedings and to report seizures to the respective authority at Limon.

7th To carry out orders received from higher revenue authorities that have been duly communicated.”⁴⁶²

B7. Other guards were created in different parts of the country. By the time of the National Budget Law of 16 August 1888, the following Guards were contemplated and their respective resources assigned, including the salaries of their personnel:

- Ambulatory Guard to the interior;
- Puntarenas Guard;
- Guanacaste Guard;
- Limón Guard;
- Infiernito Guard;
- Carrillo Guard;
- San Carlos Guard;
- Sarapiquí Guard;
- Barranca Guard;
- Colorado Guard; and
- Frio River and Saboyal Guard.⁴⁶³

⁴⁶² Ibid, 153-154: Annexes, Vol 6, Annex 206.

⁴⁶³ *Colección de las disposiciones legislativas y administrativas emitidas en 1888* (San José: Imprenta Nacional, 1889), 464-467.

B8. In that same National Budget Law the salaries of the Captains and personnel of the national steamers *Mora* and *Juan Santamaria* were also included.⁴⁶⁴ In 1891 another steamer was purchased from England to service the Atlantic coast, and through Decree No. CCCXXXIV of 13 July 1891, it was named *Braulio Carrillo*.⁴⁶⁵

B9. In a Report of the Commandant of the Colorado Guard to the General Inspector of the Treasury of 10 March 1895, it was stated that:

"For the better service and fulfilment of the duties of the Guard of this zone, it was divided into four Bodies, as follows:

- I. Guard of San Carlos: Integrated by four guards and a Chief, who traverse from the Mouth of the River with the same name up to the dock of San Rafael, penetrating the channels of Rosalía, Patastes, Tres Amigos, Sábalos, Estero Grande and Arenal.
- II. Guard of Sarapiquí: Integrated by four guards and a Chief; traverses from the mouth of the River with the same name up to Hacienda Vieja, visiting the channels of Toro Amarillo, San José, Masalla and Sucio, and la Tigra.
- III. Guard of Tortugero: Integrated by two guards who watch over the beach and traverse the Bay and Channel of Tortugero, Palacio Jalora, Parismina and Reventazón.
- IV. Guard of Barra del Colorado: Main centre of the Guard's operations, is integrated by a Commandant, a Second Chief and five guards; traverses from the Barra del Colorado up to the mouth of the same, penetrating in Caño de Palma, Symon Lagoon, Agua Dulce, Pereira, Chirripó and Lagunas."⁴⁶⁶

B10. The main tasks carried out by the Colorado Guard, as was explained in the 1895 Report, included seizures, charging import taxes, preparing reports for judicial purposes, granting agricultural permits to the inhabitants of the maritime mille and carrying out commissions.⁴⁶⁷ The 1895 Report mentioned that three boats transporting goods imported from San Juan del Norte, Nicaragua, had attempted to elude the vigilance of the Guard to avoid paying import taxes but were apprehended, and that three boats transporting rubber illegally extracted from Costa Rican forests were seized.⁴⁶⁸

⁴⁶⁴ Ibid, 467.

⁴⁶⁵ (San José: Imprenta Nacional, 1891), 50-51.

⁴⁶⁶ Report of Rafael Cruz, Commandant of the Post Río Colorado, to the General Inspector of Treasury, Note No. 89, 10 March 1895: Annexes, Vol 6, Annex 212.

⁴⁶⁷ Ibid.

⁴⁶⁸ Ibid.

B11. In 1897 the Government of Costa Rica acquired a new steamer, which was named *Chirripó* and possessed a rapid fire cannon. The *Chirripó* was charged to render service from Talamanca to San Juan del Norte, carrying mail and passengers.⁴⁶⁹ Other steamers mentioned in the 1897 Report of the Secretary of War and Navy included the following:

- The Turrialba, which carried two Nordfelt machine guns and a one-pound cannon.
- The Poas, which was the largest and had two Drig System rapid fire cannons, one of one pound and the other of six pounds.
- The Nicoya, which was stationed to serve to the Barra del Colorado route.
- Other small steamers, the Doctor Castro, the Puntarenas and the General Fernandez were stationed in Puntarenas and the Gulf of Nicoya.⁴⁷⁰

B12. With the purpose of unifying and reorganizing the diverse regulations governing the Revenue Guards and re-establishing the Fiscal Tribunal, a law for the Organization of the Revenue Guards was promulgated in 1923.⁴⁷¹

B13. According to article 1 of this Law, the Revenue Guards form a specialized corps for the vigilance and protection of the interests of the Public Revenue.⁴⁷² Article 2 states that the Revenue Guards are part of the public force and are therefore subject to military discipline.⁴⁷³

B14. Article 6 specifies that the Revenue Guards will take on different names, according to their particular functions, such as Customs, Ports, Telegraphs, Border, Forests, etc. According to articles 7 and 8, the Guards are considered as either fixed or ambulatory: those of Customs and of Ports are fixed and all the others ambulatory.⁴⁷⁴

⁴⁶⁹ Report of the Navy Inspector E.G. Chamberlain to the Secretary of War and the Navy of Costa Rica, 1897, Memoria de Guerra y Marina correspondiente al año económico de 1897-98 (San José: Tipografía Nacional, 1898), 195; Annexes, Vol 6, Annex 213.

⁴⁷⁰ Ibid.

⁴⁷¹ Colección de Leyes y Decretos, Segundo Semestre, Año de 1923 (San José: Imprenta Nacional, 1923), 306-325; Annexes, Vol 6, Annex 217.

⁴⁷² Ibid, 306.

⁴⁷³ Ibid.

⁴⁷⁴ Ibid, 307.

B15. Article 9 specifies the purposes of the Guards:

- a) The investigation and prosecution of any infraction of the Treasury laws and, in particular, the Customs and the monopolies.
- b) The pursuit and capture of those suspected of faults or crimes against the Public Treasury.
- c) The seizure of any object that exists in contravention of a Treasury law.
- d) Policing and surveillance of roads and paths.
- e) Maintenance of Public Order.
- f) Providing assistance to the authorities and other public functionaries in the exercising of their functions.
- g) Repressing illegal games⁴⁷⁵

B16. Article 18 provides that “the vessels of the Guards will attend to the transportation of merchandize and passengers in those places where there are no such private initiatives” and that the Department of Treasury will establish the corresponding tariffs.⁴⁷⁶ Article 19 made the same provision for mail and telegraph services.⁴⁷⁷

B17. It can be appreciated that the roles and functions of the Revenue Guards went beyond fiscal control duties. Indeed, they also carried out general policing and surveillance, including border protection, as well as transportation of merchandize, mail and people.

B18. With the abolition of the armed forces in 1949, Costa Rica’s protection of its territorial integrity was assigned to the police. Article 12 of Costa Rica’s Political Constitution provides:

“Article 12 The Army as permanent institution is abolished. There shall be the necessary police forces for the surveillance and the preservation of the public order.”⁴⁷⁸

⁴⁷⁵ *Ibid.*

⁴⁷⁶ *Ibid.*, 309.

⁴⁷⁷ *Ibid.*, 310.

⁴⁷⁸ Constitution of the Republic of Costa Rica, 8 November 1949, Bilingual Edition, San José: Comisión Nacional para el Mejoramiento de la Administración de la Justicia, 2001, 18: Annexes, Vol 6, Annex 218.

B19. Following the promulgation of the Law for the Creation of the Rural Assistance Guard (Law No. 4639 of 23 September 1970), the customs and other police controls that were carried out by the Revenue Guards, as well as its personnel, were transferred to the newly created Rural Assistance Guard. This Law established the following:

“Article 2 The Rural Assistance Guard Corps will have jurisdiction in the entire Republic. To the Rural Assistance Guard will be incorporated the Revenue Guard and the Village and Town Police.”⁴⁷⁹

B20. Law No. 4639 of 1970 also established the tasks and responsibilities of the Rural Assistance Guard, many of which corresponded to those formerly performed by the Revenue Guard. For example, the Law established by article 3 the following:

“Article 3:

The Rural Assistance Guard will have as functions:

- ...
- c) Ensure the observance of the laws against contraband, narcotics and the ones protecting the public treasury;
- d) Cooperate in the guard and surveillance of the borders, coasts, customs and ports;
- ...
- l) Provide due collaboration to the Ministry of Treasury, when it is required, regarding the vigilance of the public revenue;
- ...

For the proper performance of its functions, the Rural Assistance Guard shall have the same powers and attributions in regards to arrest, detention, seizure and search that currently possess the Village and Town Police and the Revenue Guard”⁴⁸⁰

B21. Law No. 4639 of 1970 was amended by Law No. 4766 of 28 May 1871, which added two new sub-paragraphs to article 3:

- “n) To perform the same juridical acts that formerly appertained to the Village and Town Police and the Revenue Guard; and
- ñ) To exercise all the other responsibilities that in accordance with the juridical order where assigned to the authorities mentioned in the

⁴⁷⁹ Colección de leyes, decretos, acuerdos y resoluciones, Segundo Semestre 1970, I Tomo (San José: Imprenta Nacional, 1970), 564: Annexes, Vol 6, Annex 220.

⁴⁸⁰ Ibid. 565.

previous paragraph, except for those that refer to the municipal regime."⁴⁸¹

B22. With the promulgation of the General Law of Police (Law No. 7410 of 26 May 1994) the Rural Assistance Guard Law No. 4639 was abrogated, but the Rural Guard Corps was retained as one of the police bodies regulated by the new Law No. 7410. Article 6 of Law No. 7410 establishes Costa Rica's different police bodies:

"The following will be the police bodies, in charge of the public security: the Civil Guard, the Rural Assistance Guard, the Police in charge of the control of non-authorized drugs and connected activities; the Border Police, the Immigration Police, the Fiscal Control Police, the State Security Direction, the Transit Police, the Penitentiary Police and the other police corps whose competence is foreseen in the Law."⁴⁸²

B23. As can be seen, Law No. 7410 created the Fiscal Control Police as a specialized corps in charge of fiscal and revenue control, thereby removing those functions from the Rural Assistance Guard. Articles 27 and 28 of Law No. 7410 established the new Fiscal Control Police. Article 28 provided that:

"The Fiscal Control Police will have the following obligations and attributions:

- a) Ensure compliance with the fiscal laws.
- b) Assist the Ministry of Treasury in all tasks required to control tax evasion.
- c) Carry out all type of searches in order to persecute crimes of fiscal nature. A judicial authorization will be required to perform searches and the other legal requirements must be complied with.
- d) Inspect commercial establishments at any moment.
- e) To ensure the respect of the Political Constitution, the international treaties, the laws and related regulations."⁴⁸³

B24. Law No. 7410 also created the Border Police, with the following responsibilities:

⁴⁸¹ Colección de Leyes, Decretos, Acuerdos y Resoluciones. Primer Semestre, I Tomo (San José: Imprenta Nacional 1971), 1170: Annexes, Vol 6, Annex 221.

⁴⁸² Colección de leyes, decretos y reglamentos, I Semestre 1994, I Tomo (San José: Imprenta Nacional, 1995), L-260: Annexes, Vol 6, Annex 226.

⁴⁸³ Ibid, L-265-66.

“Article 24. Responsibilities

The following will be the responsibilities of the Border Police:

- a) To watch and safeguard the terrestrial, maritime and aerial borders, including the public buildings where immigration and customs activities are performed.
- b) To ensure respect for the Political Constitution, the international treaties and the laws that guaranty the integrity of the national territory, the territorial waters, the continental shelf, the patrimonial sea or the exclusive economic zone, the aerial space and the exercise of the rights that correspond to the State.”⁴⁸⁴

B25. As can be seen, since 1994 the revenue or fiscal control tasks were taken over by the new Fiscal Control Police, which does not possess boats or vessels to perform its duties in waterways such as the San Juan. Nevertheless, Law No. 7410 establishes the principles of cooperation, collaboration and supplementation between the different police bodies. Article 8 of Law No. 7410 states the following:

“Article 8. Responsibilities

The following are general responsibilities of all police corps:

- ...
 - e) To act according to the principle of cooperation and mutual aid, with a view to proper coordination, in accordance with the instances and the organs foreseen to that effect.
 - f) To act, in a supplementary way, in the performance of the necessary emergency acts, when confronted by situations that should be attended by a specialized police corp.”⁴⁸⁵

B26. According to this provision, the absence of the Fiscal Police in any part of the country can be made up for by other police corps. In the case of the San Juan border area, in the absence of the Fiscal Police, its revenue control and related duties can be performed by the Rural Guard and the Border Police. Indeed it was these police corps who continued maintaining presence on the San Juan border zone, carrying out general policing, protecting the territory and assisting the Costa Rican population in that region.

⁴⁸⁴ Ibid, L-265.

⁴⁸⁵ Ibid, L-261.

B27. Furthermore, in the year 2000 the National Coastguard Service was created as a new police body specifically charged with the performance of police functions in all of the country's navigable waterways. Article 2 of the Law of Creation of the National Coastguard Service (Law No. 8000 of 5 May 2000) specifically charges the Coastguard Service to collaborate with the administrative and judicial authorities in the protection of the law. This article reads:

"The responsibilities of the [National Coastguard] Service are:

- ...
- g) To collaborate with the administrative and judicial authorities in charge of protecting the natural resources, fighting against the illicit traffic of drugs and related activities, as well as against the illegal immigration, the arms traffic and other illicit activities."⁴⁸⁶

B28. Thus it can be appreciated that currently the National Coastguard Service is entitled to assist the Fiscal Police, the Rural Guard and the Border Police in their responsibilities in the San Juan River border area and in the rest of the Costa Rican towns and villages that require the San Juan as a means of access.

B29. More recently, in the Regulations for the Organization of the Ministry of Public Security of 1 December 2004, the work of the Civil Guard, the Rural Assistance Guard, the Police in charge of the control of non-authorized drugs and connected activities, and the Border Police was unified under the direction of the Ministry of Public Security. Articles 52 and 54 of these Regulations present an integrated approach to the work of these bodies:

"ARTICLE 52: the Civil Guard, the Rural Assistance Guard, the Police in charge of the control of non-authorized drugs and connected activities, and the Border Police will depend on the Ministry of Public Security, in accordance with what is stipulated in article 6 of the General Law of Police number 7410 and its reforms, as well as with what is stipulated in Law N° 8000 that creates the National Coastguard Service, and in the Executive Decree N° 23427 MP. The Public Reserve Force will also be ascribed when it is summoned on a temporary basis.

...

ARTICLE 54: The Rural Assistance Guard, the Civil Guard, and the Border Police, as components of the Public Force of this Ministry, will act under one single police command, in each region within the national territory that is determined by the

⁴⁸⁶ Diario Oficial La Gaceta No. 99, Alcance No. 34 (San José: Imprenta Nacional, 24 May 2000), 1: Annexes, Vol 6, Annex 230.

Ministry in accordance with the competences and responsibilities that are granted to them in the General Law of Police and its reforms.”⁴⁸⁷

Conclusions

B30. This Appendix has demonstrated the following:

- (a) Although the Revenue Guards were originally created with the task of controlling contraband and illegal production of goods, their tasks and duties were more ample, and in the areas of their jurisdiction, particularly in the rural and border areas, included general policing and even border protection.
- (b) It was the Revenue Guard who carried out fiscal control, border protection and other police tasks in the San Juan River bordering region, and who effectively navigated in armed vessels and carrying their service arms.
- (c) The Revenue Guards existed as such since their creation during the 19th Century until 1971, when they were absorbed by the newly created Rural Assistance Guard.
- (d) The Rural Assistance Guard was the main police body present in the rural and bordering areas, and, together with the Border Police, continued carrying out ample policing duties, including those that formerly appertained to the Revenue Guards.
- (e) The Rural Assistance Guard and the Border Police, supplemented by the support of the National Coastguard Service, are the police corps legally entitled in modern times to carry out the tasks, functions and responsibilities that appertain to the Revenue Guard.
- (f) Under the auspices of the Public Force, the work of these police corps is more closely coordinated, acting under one single police command in the regions where they are present.

⁴⁸⁷ Diario Oficial La Gaceta No. 6, Alcance No. 1 (San José: Imprenta Nacional, 10 January 2005), 9: Annexes, Vol 6, Annex 234.

CERTIFICATION

I have the honour to certify that the documents annexed to this Memorial are true copies and conform to the original documents and that the translations into English made by Costa Rica are accurate translations.

Ambassador Edgar Ugalde Alvarez
Agent of Costa Rica
29 August 2006

LIST OF ANNEXES

(VOLUME 2)

Agreements, Awards and Judicial Decisions

Annex	Title	Date
1	Capitulación con Diego Gutiérrez para la conquista de la Provincia de Cartago (extracts) Source: MM de Peralta, <i>Costa Rica, Nicaragua y Panamá en el Siglo XVI. Su Historia y sus Límites</i> (Madrid: Librería M. Murillo, 1883), 101-103	29 November 1540
2	Real Provision de SS. MM el Emperador y la Reina doña Juana sobre los límites de la gobernacion de Cartago, y en particular sobre los del Desaguadero ó rio de San Juan de Nicaragua (extracts) Source: MM de Peralta, <i>Costa Rica Nicaragua y Panamá en el Siglo XVI. Su Historia y sus Límites</i> (Madrid: Librería de M. Murillo, 1883), 125-127	6 May 1541
3	Titulo de Alcalde Mayor de las Provincias de Nueva Cartago y Costa Rica, en favor del Licenciado Juan Cavallon.- Límites de estas Provincias (extracts) Source: MM de Peralta, <i>Costa Rica Nicaragua y Panamá en el Siglo XVI. Su Historia y sus Límites</i> (Madrid: Librería de M. Murillo, 1883), 194-195	17 May 1561
4	United States-Great Britain, Convention Concerning a Ship Canal Connecting the Atlantic and Pacific Oceans (Clayton-Bulwer) Articles I, IV, VI Source: 104 CTS 41; 38 BFSP 4	Washington, D.C., 19 April 1850 (in force 4 July 1850)

- 5 Treaty of Limits (Cañas-Juárez) Managua, 6 July 1857 (unratified)
Source: www.manfut.org/cronologia/t-canasjuarez.html
- 6 Convention of Peace (Cañas-Martínez) Rivas, 8 December 1857 (Arts 8, 9 subject to ratification, unratified; remainder in force on signature)
Source: 49 BFSP 1222
- 7 Costa Rica-Nicaragua, Treaty of Limits (Cañas-Jérez) San José, 15 April 1858
- (a) Original version in Spanish
Source: *Colección de las Leyes, Decretos y Ordenes expedidos por los Supremos Poderes Legislativo y Ejecutivo de Costa Rica en el año de 1858*, Tomo XV, (San José: Imprenta de la Paz, 1871), 175 – 188
- (b) English translation: Costa Rican version submitted to Cleveland
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), Document No. 1, 185
- (c) English translation: Nicaraguan version submitted to Cleveland
Source: *The Case of Nicaragua*, 1887, Appendix B, 34
- (d) English translation
Source: 48 BFSP 1049

- 8 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, Article 1
Rivas, 1 May 1858
Source: F. Belly, *Carte d'étude pour le trace et le profil de Canal de Nicaragua* (Paris: Chez Dalmont et Duod, Éditeurs, 1858), Document II, 19-27
- 9 Costa Rica-Nicaragua, Preliminary Convention on a Scientific Survey (Volio-Zelaya). Article 1
San Jose, 13 July 1868
Source: JM Bonilla, *Colección de Tratados Internacionales*. (Managua: Tipografía Internacional, 1909), 365-366
- 10 Costa Rica-Nicaragua, Treaty of Commerce (Volio-Zelaya) Articles 1, 2
San José, 14 August 1868
Source: JM Bonilla, *Colección de Tratados Internacionales* (Managua: Tipografía Internacional, 1909), 386-392
- 11 Republic of Nicaragua-M. Chevalier, Contract for the Excavation of an Interoceanic Canal across Central America (Ayon-Chevalier) Articles 53-56
Paris, 6 October 1868
Source: 61 BFSP 1266 (French)
- 12 Costa Rica-Nicaragua, Convention Additional to the Preliminary Convention on a Scientific Survey of 13 July 1868 relative to the improvement of the Colorado or San Juan Rivers (Esquivel-Rivas). Article 2
San José, 21 December 1868 (unratified)
Source: JM Bonilla, *Colección de Tratados Internacionales*. (Managua: Tipografía Internacional, 1909), 369-371
- 13 Costa Rica-Nicaragua, Treaty for the excavation of an Interoceanic Canal (Jiménez-Montealegre) Article 1
San José, 18 June 1869
Source: 61 BFSP 1144

- 14 Costa Rica-Nicaragua, Convention to submit to the arbitration of the Government of the United States the question in regard to the validity of the treaty of April 15, 1858 (Esquivel-Román)
Source: 168 CTS 371
Guatemala, 24 December 1886
- 15 Costa Rica-Nicaragua, Convention (Soto-Carazo)
Source: *Memoria anual de la Secretaría de Relaciones Exteriores y Carteras Anexas 1888* (San José: Imprenta Nacional, 1888)
Managua, 26 July 1887 (unratified)
- 16 Cleveland Award upon the validity of the Treaty of Limits of 1858 between Costa Rica and Nicaragua
Source: *Papers relating to the Foreign Relations of the United States transmitted to Congress, with the annual message of the President, Part I, December 3, 1888.* (Washington, D.C.: Government Printing Office, 1889.)
Washington, D.C., 22 March 1888
- 17 Costa Rica-Nicaragua, Delimitation Convention (Pacheco-Matus) Article 2
Source: *Papers Relating to the Foreign Relations of the United States* (Washington, D. C.: Government Printing Office, 1897), 101
San Salvador, 27 March 1896
- 18 First Award rendered by the umpire, EP Alexander, San Juan del Norte on September 30, 1897, in the boundary question, between Costa Rica and Nicaragua
Source: H. LaFontaine, *Pasicrisie Internationale 1794-1900: Histoire Documentaire des Arbitrages Internationaux* (1902, reprinted 1997, Martinus Nijhoff, The Hague), 529-532
30 September 1897

- 19 United States-Nicaragua, Convention for the construction of a Canal by the River San Juan (Chamorro-Weitzel) Washington, D.C., 8 February 1913
Source: Republic of Costa Rica, *Complaint before the Central American Court of Justice* (Washington, D.C.: Press of Gibson Bros., Inc. 1916) Annex L, 82-86
- 20 United States-Nicaragua, Convention for the construction of a Canal by the River San Juan (Bryan-Chamorro) Washington, D.C., 5 August 1914
Source: 220 CTS 215
- 21 *Republic of Costa Rica v Republic of Nicaragua*, Central American Court of Justice, Opinion and Decision of the Court 30 September 1916
Source: (1917) 11 *AJIL* 181-229
- 22 Costa Rica-Nicaragua, Convention for the Canalization of the San Juan River (Cordero-Zúñiga) Articles 3, 10 San José, 5 April 1940 (in force 21 June 1940)
Source: Ministerio Relaciones Exteriores, *Convención para la canalización del Río San Juan y otros particulares relacionados con dicha canalización* (San José: Imprenta Nacional, 1940) 15-22
- 23 Costa Rica-Nicaragua, Pact of Amity (Sevilla-Esquivel) Washington, D.C., 21 February 1949 (in force 15 July 1949)
Source: 1465 UNTS 221
- 24 Costa Rica-Nicaragua, Agreement pursuant to Article IV of the Pact of Amity (Fournier-Sevilla) Articles 1, 4 Washington, D.C., 9 January 1956
Source: 1465 UNTS 233, 234
- 25 Costa Rica-Nicaragua, Agreement of Understanding between the Ministries of Tourism of the Republic of Costa Rica and the Republic of Nicaragua (Roesch-Guzmán) Barra del Colorado, 5 June 1994
Source: Copy of the original

- 26 Costa Rica-Nicaragua, Agreement of Understanding between the Ministries of Tourism of the Republic of Costa Rica and the Republic of Nicaragua on the Tourist Activity in the Border Zone of the San Juan River (Roesch-Guzmán) Barra del Colorado, 5 June 1994
Source: Copy of the original
- 27 Army of the Republic of Nicaragua-Ministry of Public Security of the Republic of Costa Rica, Joint Communiqué (Cuadra-Castro) La Cruz, 8 September 1995
Source: Copy of the original
- 28 Ministry of Defence of Nicaragua-Ministry of Government, Police and Public Security of Costa Rica, Joint Communiqué (Cuadra-Lizano) Managua, 30 July 1998
Source: Copy of the original
- 29 Costa Rica-Nicaragua, Agreement (Tovar-Caldera) Alajuela, 26 September 2002
Source: 2197 UNTS 78

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Diplomatic Correspondence

Annex	Description	Date
30	Costa Rica Foreign Minister Lorenzo Montufar to Nicaraguan Foreign Minister Tomás Ayón, 1 February 1870, reproduced in P. Pérez Zeledón, <i>Argument on the Question of the Validity of the Treaty of Limits between Costa Rica and Nicaragua</i> (Washington, D.C.: Gibson, 1887) 274-8	1 February 1870
31	Secretary of Foreign Affairs of Costa Rica, Ascensión Esquivel to Secretary of State in charge of the Foreign Affairs of the Republic of Nicaragua, Francisco Castellón, 29 June 1886, reproduced in <i>Memoria de la Secretaría de Relaciones Exteriores y Carteras Anexas de la República de Costa Rica</i> (San José: Imprenta Nacional, 1887)	29 June 1886
32	Nicaraguan Foreign Minister, Francisco Castellón, to Costa Rican Foreign Minister, Ascensión Esquivel, 3 August 1886, reproduced in <i>Memoria de la Secretaría de Relaciones Exteriores y Carteras Anexas de la República de Costa Rica</i> (San José: Imprenta Nacional, 1887)	3 August 1886
33	Secretary of Foreign Affairs of Costa Rica, Ascensión Esquivel to Secretary of State in charge of the Foreign Affairs of the Republic of Nicaragua, Francisco Castellón, 19 August 1886, reproduced in <i>Memoria de la Secretaría de Relaciones Exteriores y Carteras Anexas de la República de Costa Rica</i> (San José: Imprenta Nacional, 1887)	19 August 1886

- 34 Costa Rican Foreign Minister, Ascensión Esquivel, to Nicaraguan Foreign Minister, Francisco Castellón, 31 August 1886, reproduced in *Memoria de la Secretaría de Relaciones Exteriores y Carteras Anexas de la República de Costa Rica* (San José: Imprenta Nacional, 1887) 31 August 1886
- 35 Secretary of State in charge of the Foreign Affairs of the Republic of Nicaragua, Francisco Castellón, to Secretary of Foreign Affairs of Costa Rica, Ascensión Esquivel, 18 October 1886, reproduced in *Memoria de la Secretaría de Relaciones Exteriores y Carteras Anexas de la República de Costa Rica* (San José: Imprenta Nacional, 1887) 18 October 1886
- 36 Letter from Fernando Guzman to Costa Rican Foreign Minister, reproduced in P Pérez Zeledón, *Argument on the Question of the Validity of the Treaty of Limits between Costa Rica and Nicaragua* (Washington, D.C.: Gibson, 1887), 9-11 22 June 1887
- 37 Secretary to the Diet of the Mayor Republic of Central America to the Minister of Foreign Affairs of Costa Rica, 27 July 1897, reproduced in *Memoria de Relaciones Exteriores, Gracia, Justicia, Culto y Beneficiencia de la República de Costa Rica*. (San José: Tipografía Nacional, 1897) 12-15 27 July 1897
- 38 Costa Rican Minister Plenipotentiary in Washington, D.C., J.B. Calvo to United States Secretary of State, William Jennings Bryan, 17 April 1913, reproduced in *The Republic of Costa Rica against The Republic of Nicaragua, Complaint before the Central American Court of Justice* (Washington, D.C.: Press of Gibson Bros Inc. 1916), 70-72 17 April 1913

- 39 Costa Rican Minister in Nicaragua, F. Cabezas Gómez to Nicaraguan Foreign Minister, Diego M. Chamorro, 27 April 1913, reproduced in *The Republic of Costa Rica against The Republic of Nicaragua, Complaint before the Central American Court of Justice* (Washington, D.C.: Press of Gibson Bros Inc. 1916), 68-69 27 April 1913
- 40 Nicaraguan Ambassador in Costa Rica, Javier Chamorro Mora, to Costa Rican Foreign Minister, Bernd Niehaus Quesada, Note No. E.N.1323/80 12 November 1980
- 41 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
- 42 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
- 43 Costa Rican Foreign Minister, Fernando Volio Jiménez, to Nicaraguan Chargé d'Affaires a.i to Costa Rica, Oscar Ramón Téllez, Note No. D.M. 127-82 20 July 1982
- 44 Nicaraguan Chargé d'Affaires a.i. to Costa Rica, Oscar Ramón Téllez, to Costa Rican Foreign Minister, Fernando Volio Jiménez, Note No. E.N. 789/82 2 August 1982
- 45 Costa Rican Foreign Minister, Fernando Volio Jiménez, to Nicaraguan Chargé d'Affaires a.i to Costa Rica, Oscar Ramón Téllez, Note No. DM 189-82 19 August 1982
- 46 Ambassador of Nicaragua to Costa Rica, Rogelio Ramírez Mercado, to Costa Rican Foreign Minister, Fernando Volio Jiménez, Note No. E.N. 865/82 6 September 1982

- 47 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
- 48 Nicaraguan Foreign Minister, Ernesto Leal, to Costa Rican Foreign Minister, Bernd Niehaus Quesada, Note No. 940284 21 March 1994
- 49 Acting Nicaraguan Foreign Minister, Carlos R. Gurdíán Debayle, to Costa Rican Foreign Minister, Roberto Rojas López, Note. No. VM/08/0685/98 11 August 1998
- 50 Costa Rican Foreign Minister, Roberto Rojas López, to Acting Nicaraguan Foreign Minister, Carlos R. Gurdíán Debayle, Note No. DM-097-98 12 August 1998
- 51 Acting Nicaraguan Foreign Minister, Carlos Roberto Gurdíán, to Costa Rican Foreign Minister, Roberto Rojas López, Note No. MRE/98/02638 28 August 1998
- 52 Costa Rican Foreign Minister, Roberto Rojas López, to Nicaraguan Foreign Minister, Eduardo Montealegre 7 September 1998
- 53 Nicaraguan Foreign Minister, Eduardo Montealegre, to Costa Rican Foreign Minister, Roberto Rojas López, Note No. [illegible] 30 September 1998
- 54 Costa Rican Deputy Foreign Minister, Walter Niehaus, to Nicaraguan Deputy Foreign Minister, Guillermo Argüello Poessy, Note No. DVM: 607 -99 11 May 1999
- 55 Nicaraguan Deputy Foreign Minister, Guillermo Argüello Poessy, to Costa Rican Deputy Foreign Minister, Walter Niehaus, Note No. MRE/99/01347 12 May 1999

- 56 Costa Rican Foreign Minister, Roberto Rojas López, to Nicaraguan Foreign Minister, Eduardo Montealegre, Note No. DM-015-2000 21 January 2000
- 57 Nicaraguan Foreign Minister, Eduardo Montealegre, to Costa Rican Foreign Minister, Roberto Rojas López, Note No. MRE/DM/3882/01/00 28 January 2000
- 58 Costa Rican Foreign Minister, Roberto Rojas López, to Nicaraguan Foreign Minister, Eduardo Montealegre, Note No. DM-079-2000 15 February 2000
- 59 Nicaraguan Foreign Minister, Eduardo Montealegre, to Costa Rican Foreign Minister Roberto Rojas López, Note No. MRE/DM/3965/02/00 16 February 2000
- 60 Permanent Representative of Costa Rica to the Organization of American States, Amb. Hernan R. Castro, to the President of the Permanent Council of the Organization of American States, James Schofield Murphy 3 March 2000
- 61 Costa Rican Foreign Minister, Roberto Rojas López, to Nicaraguan Foreign Minister, Eduardo Montealegre, Note No. DM-125-2000 10 April 2000
- 62 Nicaraguan Foreign Minister, Eduardo Montealegre, to Costa Rican Foreign Minister, Roberto Rojas López, Note No. MRE/DM/4366/04/00 6 May 2000
- 63 Costa Rican Foreign Minister, Roberto Rojas López, to Nicaraguan Foreign Minister, Eduardo Montealegre, Note No. DM-165-2000 22 May 2000
- 64 President of Costa Rica, Miguel Ángel Rodríguez Echeverría, to President of Nicaragua, Arnoldo Alemán Lacayo 28 June 2000

- 65 President of Nicaragua, Arnoldo Alemán Lacayo, to President of Costa Rica, Miguel Ángel Rodríguez Echeverría 29 June 2000
- 66 President of Costa Rica, Miguel Ángel Rodríguez Echeverría, to President of Nicaragua, Arnoldo Alemán Lacayo 29 July 2000
- 67 President of Nicaragua, Arnoldo Alemán Lacayo, to President of Costa Rica, Miguel Ángel Rodríguez Echeverría 3 August 2000
- 68 Costa Rican Acting Foreign Minister, Elayne Whyte, to Nicaraguan Acting Foreign Minister, José Adán Guerra, Note No. DVM-420-00 28 September 2000
- 69 Nicaraguan Acting Foreign Minister, José Adán Guerra, to Costa Rican Foreign Minister, Roberto Rojas López, Note No. MRE/VM-JI/483/10/00 18 October 2000
- 70 Costa Rican Deputy Foreign Minister, Elayne Whyte, to Nicaraguan Foreign Minister, Francisco Xavier Aguirre Sacasa, Note No. DVM-111-01 18 April 2001
- 71 Costa Rican Foreign Minister, Roberto Rojas López, to Nicaraguan Foreign Minister, Francisco Xavier Aguirre Sacasa, Note No. DM-207-2001 9 May 2001
- 72 Nicaraguan Foreign Minister, Francisco Xavier Aguirre Sacasa, to Costa Rican Foreign Minister, Roberto Rojas López, Note No. MRE/DM-JI/0818/08/01 3 August 2001
- 73 Costa Rican Foreign Minister, Roberto Rojas López, to Nicaraguan Foreign Minister, Francisco Xavier Aguirre Sacasa, Note No. DM-355-2001 26 September 2001

- 74 Costa Rican Foreign Minister, Roberto Rojas López, to Nicaraguan Foreign Minister, Norman Caldera Cardenal, Note No. DM-030-2002 11 March 2002
- 75 Nicaraguan Foreign Minister, Norman Caldera Cardenal, to Costa Rican Foreign Minister, Roberto Rojas López, Note No. MRE/DM-JI/481/04/02 23 April 2002
- 76 Costa Rican Embassy in Nicaragua to Ministry of Foreign Affairs of Nicaragua-General Directorate for Latin America, Note Verbale No. ECR-079-5-2002 21 May 2002
- 77 Nicaraguan Deputy Foreign Minister, Salvador Stadthagen Icaza, to Costa Rican Deputy Foreign Minister, Elayne Whyte Gomez, Note No. MRE/DV-JI/0068/05/02 27 May 2002
- 78 Nicaraguan Ministry of Foreign Affairs, Directorate of Sovereignty, Territory and International Legal Affairs to Costa Rican Embassy in Managua, Note Verbale No. MRE/DGSTAJI/335/05/02 29 May 2002
- 79 Costa Rican Foreign Minister, Roberto Tovar Faja, to Nicaraguan Foreign Minister, Norman Caldera Cardenal, Note No. DM-202-2002 5 August 2002
- 80 Costa Rican Foreign Minister, Roberto Tovar Faja, to Nicaraguan Foreign Minister, Norman Caldera Cardenal, Note No. DM-462-05 28 September 2005
- 81 Costa Rican Foreign Minister, Roberto Tovar Faja, to Nicaraguan Foreign Minister, Norman Caldera Cardenal, Note No. DM-484-05 20 October 2005

82 Nicaraguan Foreign Minister, Norman 9 November 2005
 Caldera Cardenal, to Costa Rican Foreign
 Minister, Roberto Tovar Faja, Note No.
 MRE/DM-JI/1284/11/05

(VOLUME 4)**Affidavits**

Annex	Description	Date
83	Sergio Gerardo Ugalde Godínez Deed No. 22	5 May 2001
84	Carlos Lao Jarquín Deed No. 146-1	27 January 2006
85	Geovany Navarro Garro Deed No. 147-1	27 January 2006
86	Pablo Gerardo Hernández Varela Deed No. 148-1	27 January 2006
87	Santos Martín Arrieta Flores Deed No. 149-1	27 January 2006
88	Carlos Luis Alvarado Sánchez Deed No. 150-1	27 January 2006
89	Daniel Soto Montero Deed No. 151-1	27 January 2006
90	Luis Ángel Jirón Angulo Deed No. 152-1	28 January 2006
91	Marvin Hay Gonzalez Deed No. 153-1	28 January 2006
92	Armando Perla Pérez Deed No. 154-1	28 January 2006
93	Windel Hodgson Hodgson Deed No. 155-1	28 January 2006

94	José Granados Montoya Deed No. 156-1	29 January 2006
95	Daniel Reese Wise Deed No. 157-1	29 January 2006
96	Wilton Hodgson Hodgson Deed No. 160-1	1 February 2006
97	Javier Sancho Bonilla Deed No. 162-1	8 February 2006
98	Ana Gabriela Mazariegos Zamora Deed No. 164-1	14 February 2006
99	Kattía Patricia Corrales Barboza Deed No. 167-1	16 February 2006
100	Sandra Díaz Alvarado Deed No. 168-1	16 February 2006
101	Diane Gómez Bustos Deed No. 169-1	16 February 2006
102	Luis Yanan Corea Torres Deed No. 171-1	16 February 2006
103	Ruben Lao Hernández Deed No. 172-1	17 February 2006
104	Walter Niehaus Bonilla Deed No. 173-1	23 February 2006
105	Victor Julio Vargas Hernández Deed No. 203-1	6 July 2006
106	Leonel Morales Chacón Deed No. 204-1	6 July 2006

- 107 Erick Maikol Martínez López 6 July 2006
Deed No. 205-1

- 108 José Moreno Rojas 6 July 2006
Deed No. 206-1

- 109 Josefa Alvarez Aragón 6 July 2006
Deed No. 207-1

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Press reports

Annex	Title	Source	Date
110	"Sandinista guards attack Costa Ricans"	<i>La Nación</i> , San José	6 November 1980
111	"Nicaragua conditions navigation on the waters of the San Juan River"	<i>La Nación</i> , San José	8 November 1980
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