

Dispute regarding Navigational and Related Rights

(Costa Rica v. Nicaragua)

NICARAGUA'S

COMMENTS ON COSTA RICA'S WRITTEN REPLY OF 19 MARCH 2009

(To the questions put to the Parties by at the close of the public sitting
of 12 March 2009 by Judges Koroma, Keith and Bennouna)

The Answers to the Question put by Judge Koroma

1. The answers given by the Parties on 19 March 2009, including the historical materials that were submitted in support of these answers, establish the following facts:

First, that in the period around 1858, when the Treaty of Limits was concluded, there were no human settlements on Costa Rica's side of the San Juan River; and there is no evidence that any permanent settlements were established on the right bank of the river before the 1960s.

Second, that in the period around 1858, and for at least the following 100 years, the transport of passengers as a business concern on the San Juan River was conducted exclusively by Nicaragua, and not by Costa Rica, and that this state of affairs was accepted by Costa Rica without exception.

2. Regarding the first point, Nicaragua demonstrated in her answer to Judge Koroma's question that, according to a number of authoritative historical sources – including official Costa Rican sources – the Costa Rican side of the river was uninhabited in the 1850s, and remained without human settlement until well into the 20th century.¹

¹ See Nicaragua's Answer to Judge Koroma's Question of 19 March 2009 and Attachments 1-4 thereto.

3. Costa Rica's answer to the question, submitted on 19 March, offers no evidence to dispute this historical fact. No historical or other sources are presented to demonstrate the existence of any human settlements on the right bank of the river until the 1960s.

4. Costa Rica's answer addresses the question of habitation in its paragraphs 8-12.² In paragraph 8, Costa Rica cites an essay from a German traveller who, in 1875, "made reference to small farms on the Costa Rican bank of the San Juan River."³ Actually, the abbreviated excerpt from the essay attached to Costa Rica's answer says only that the traveller navigated on the *Colorado River* from Costa Rica's Atlantic Coast "until the San Juan River" ("*hasta el río San Juan*").⁴ The text does not refer to any navigation on any part of the San Juan River. It is unclear from the text provided by Costa Rica where along his route he saw the "small farms," and no mention is made of how many (or few) were observed, or whether they were inhabited.

5. In paragraph 9, Costa Rica jumps ahead to "the beginning of the 20th century" and states, without citation to any source whatsoever, that the river "continued to be an important waterway enabling *Costa Rican communities in the northern region*" to communicate with each other..." It is unclear what "communities" are intended to be included in this statement since there is no evidence that any "communities" existed on the banks of the San Juan River at the beginning of the 20th century.

6. In paragraphs 10 and 11, Costa Rica attempts to show that indigenous peoples lived along both banks of the San Juan "in the 1850s." But the evidence relied on by Costa Rica does not support this. Paragraph 10 merely quotes from Costa Rica's pleadings before President Cleveland, where she said that indigenous peoples lived along the San Juan *in 1563*.⁵ The

² The first seven paragraphs of Costa Rica's answer discuss the transit of passengers, including immigrants, between central Costa Rica and the Atlantic Ocean, via the San Juan River; Nicaragua's observations on this aspect of Costa Rica's answer are set forth in paragraphs 14-18 below.

³ Elías Zeledón Cartín, *Viajes por la República de Costa Rica, Volume II* (San Jose: 1977), at p. 302. CR Answer, Attachment 4.

⁴ *Ibid.*

⁵ Pedro Perez Zeledón, *Argument on the Question of the Validity of the Treaty of Limits between Costa Rica and Nicaragua* (Washington D.C.: Gibson Bros., 1887), p. 33, CRM Complete Annexes, Volume 3. It should be noted that in 1563 Costa Rica had no juridical existence. It was only in 1573 that the first Governor for the Province of Costa Rica was appointed. This Governor, Diego de Artieda y Cherinos, departed for his new post from the Nicaraguan city of Granada, taking with him soldiers as well as farmers and artisans because none of these were available in the territory of Costa Rica, which was of very minor importance during the whole colonial period up to 1821. The few native inhabitants found along the banks of the River by the Governor of Nicaragua in 1539, were rounded up and taken to the main Spanish Colonial settlements that were located along the shores of the Great Lake of Nicaragua.

following paragraph claims that they still lived there three centuries later in the 1850s. In support of this proposition, Costa Rica says that “Travellers often described their small boats,” citing only Attachment 2 to her answers of 19 March.⁶ Actually, the indigenous people observed by these travellers, by their own account “came from Granada” (“*venían de Granada*”) – which is on Lake Nicaragua, on the opposite side of the lake from where the San Juan River begins – not from the banks of the San Juan itself;⁷ given this statement, the fact that they were observed navigating on the San Juan does not support Costa Rica’s argument that they lived on its banks, which the “travellers” described as covered on both sides by a “dense, extraordinarily leafy vegetal wall” (“*muralla vegetal, densa y extraordinariamente frondosa*”).⁸

7. In paragraph 11, Costa Rica also states, in regard to the 1850s, that “small settlements had emerged on both banks of the San Juan River.”⁹ Again, the only source for this is Attachment 2. And again, it does not support Costa Rica’s statement. To the contrary, the excerpt referenced by Costa Rica mentions no settlements of any kind on the San Juan. What it describes are two “inns for the steamship passengers” (“*posadas para los pasajeros de los vapores*”).¹⁰ And it describes them as follows: “One of them, on the Nicaraguan bank, is the property of a German; the other, on the Costa Rican bank, belongs to Don Alvarado who rented us our boat and crew in Greytown [San Juan del Norte]. Both innkeepers were absent and the canteens and dispensaries were closed, so we were unable to get anything, not even with money.”¹¹ This is the closest Attachment 2 (or any other materials submitted by Costa Rica) gets to demonstrating the existence of any settlements, or any population of any kind, on the river prior to the 1960s.

8. Finally, in paragraph 12, Costa Rica claims that her boatmen “and riparians continued to use the San Juan River as a waterway during the 20th century.” Eight affidavits annexed to Costa Rica’s written pleadings, and two annexed to Nicaragua’s pleadings, are cited in support.¹²

⁶ Moritz Wagner and Carlo Scherzer, *La República de Costa Rica en Centro América, Translation from the German Professor Jorge A. Lines* (San José: Yoruusti Library, 1944), at pp. 55 and 59. CR Answer Attachment 2.

⁷ CR Answer Attachment 2, p. 59.

⁸ CR Answer Attachment 2, p. 59.

⁹ CR Answer Attachment 2, p. 62.

¹⁰ CR Answer Attachment 2, p. 62.

¹¹ CR Answer Attachment 2, p. 62. [Original Spanish: Una de éstas, en la orilla nicaraguense, es propiedad de un alemán; la otra, en la orilla costarricense, pertenece al mismo don Alvarado que nos había alquilado el bote y los marineros en Greytown. Ambos posaderos estaban ausentes y habían cerrado las cantinas y despensas, de modo que no pudimos conseguir nada, ni con dinero.”]

¹² See CRM Anns. 91, 92, 93, 95, 96, 103, 106 and 108; RN Anns. 65 and 75.

However, when these affidavits are actually read, it is discovered that all but one address Costa Rica's use of the river, including by local riparians, *between the 1960s and the present*. Only one of the affidavits cited by Costa Rica says anything about the years before the 1960s. In that one, a Costa Rican boatman, who claims to have been navigating on the river since the 1940s, identifies the riverine communities between which he then navigated as San Juan del Norte (in Nicaragua), Barra del Colorado (on the Colorado River in Costa Rica at the point where it meets the Atlantic Ocean) and La Virgen de Sarapiquí (at the source of the Sarapiquí River in Costa Rica more than 40 km upriver from the San Juan).¹³ Thus, Costa Rica's own evidence provides no support for the proposition that there were any communities or other human settlements along her bank of the San Juan prior to the 1960s.

9. From this now firmly-established fact, the following conclusion can be drawn: When the Parties concluded the Treaty of Limits in 1858, the right of free navigation that they agreed Costa Rica would have – to navigate “*con objetos de comercio*” – was not, and could not have been, intended to include broad rights of navigation for “Costa Rican locals” for the simple reason that there were no settlements in the 1850s (or for 100 years thereafter). Therefore, even if hypothetically Costa Rica could somehow establish, at this late date, that there were a few scattered dwellings along the San Juan in 1858, there is no evidence to suggest that the Parties were even remotely thinking about them, or concerned about navigation by at most a handful of local residents when they concluded the Treaty. To be sure, the right of free navigation “*con objetos de comercio*” is available to all Costa Ricans, including those who later settled on the right bank of the river long after the treaty was concluded. However, the navigation rights of these “Costa Rican locals” do not extend beyond navigation “*con objetos de comercio*.”

10. Notwithstanding the absence of a right to navigate other than “*con objetos de comercio*,” Nicaragua has always extended to the “Costa Rican locals” the courtesy of permitting them to navigate freely on the river for all lawful uses. The “Costa Rican locals” are subject to the same regulations as are all others who use the river, except that as a further courtesy extended to them by Nicaragua they are exempt from Nicaragua's immigration requirements and they are not required to pay the fees normally required for departure clearance inspections.¹⁴

11. Nicaragua plainly has not violated any Treaty rights of Costa Rica in regard to uses of the San Juan River by “Costa Rican locals.”

¹³ See CRM Ann. 103.

¹⁴ See RN, paras. 4.74, 4.88, 5.110; see also RN, Anns. 48, 70, 72, 73, 77 and 78; CR 2009/5, p. 21, para. 35; p. 24, para. 42; CR 2009/7, pp. 38-9, para. 6; p. 41, para. 13; CRR, Ann. 50, p. 280.

12. Nor has Nicaragua violated any alleged “customary rights” of Costa Rican locals to engage in subsistence fishing. In the first place, there is no such “customary right.” Costa Rica bases her claim on the supposition that “Costa Rican locals” have been fishing on the river since time immemorial. But this is impossible. How could there be a longstanding “custom” of fishing by “Costa Rican locals” if there *were no* “Costa Rican locals” to practice this “custom” until the 1960s? Costa Rica has introduced no evidence that any fishing in or on the river was actually done, by anyone, prior to the 1960s. The reason for this is obvious. There was no custom of fishing from the Costa Rican side of the river because there were no permanent settlers living there to exercise this activity.

13. Notwithstanding the absence of a customary right, Nicaragua has always permitted “Costa Rican locals” to engage in subsistence fishing. Nicaragua considers fishing from the right bank of the river to be for subsistence purposes, and permits it. Nicaragua prohibits only commercial and sport fishing, which are done by boat. When boats are used for fishing purposes, they extend broad nets across the river to catch and sell as many fish as possible, which Nicaragua considers indiscriminate and damaging to fish and other aquatic species, and not for subsistence fishing, which in the circumstances of the San Juan River can well be done from its banks. Costa Rica claims in her answers of 19 March that Nicaragua, contrary to her word, has prohibited subsistence fishing.¹⁵ Costa Rica is mistaken. To be sure, she refers to certain affidavits, executed by Costa Rican fishermen, that attest to sanctions imposed on them by Nicaragua. But in each case, as the affidavits themselves make clear, the sanctions were applied to persons who were caught fishing from boats in the middle of the river, which Nicaragua considers commercial fishing.¹⁶ There is no evidence that Nicaragua ever prohibited or interfered with any fishing activities carried out from Costa Rica’s shore.

14. Turning to the transit of passengers, including immigrants to Costa Rica, along the San Juan River, Nicaragua largely agrees with Costa Rica’s description of this practice, as set forth in paragraphs 1-7 of her answers of 19 March. In particular, Nicaragua agrees with the statements by Costa Rica in paragraph 1 that “The San Juan River provided access to the Atlantic for Costa Rica...” and that “The route, starting from San José [the capital of Costa Rica, located in the geographic centre of the country], for example, required first to travel by land some 70 kilometres to the Sarapiquí River, then navigating on the Sarapiquí River for some 40 kilometres and then navigating the San Juan River for some 55 kilometres to the port of San Juan del Norte, otherwise called Greytown.” Nicaragua also agrees with the statement in paragraph 2 that “Immigrants and other travellers to Costa Rica also used this as their entry route to the interior of Costa Rica. They would enter by the Port of San Juan del Norte, navigate the San Juan River

¹⁵ See CR Answer, para. 25.

¹⁶ See CR Anns. 106, 107, 108 and 109 (cited in CRM paras. 5.142-5.143).

until its junction with the Sarapiquí River and then follow this river until the town of La Virgen in Sarapiquí. From there they were transported to the Central Valley of Costa Rica, where most settlers established themselves.”¹⁷

15. Although Costa Rica spends seven paragraphs supporting the undisputed fact that Costa Ricans and immigrants travelled by boat along the San Juan River en route to other destinations (in the interior of Costa Rica, or on the Atlantic Ocean beyond San Juan del Norte), she makes no mention of *how* or *under whose auspices* these travellers to or from Costa Rica navigated on the San Juan. This is a significant and perhaps deliberate omission, especially since this very subject is addressed in the attachments to Costa Rica’s 19 March answers. In particular, Attachment 1, submitted by Costa Rica, says that in the 1850s all transportation of passengers on the San Juan River, including the transport between the mouth of the Sarapiquí River and San Juan del Norte, was conducted by the steamships of the Nicaraguan Transit Company (“*de ahí [the Sarapiquí] con los vapores de la Compañía del Tránsito de Nicaragua en el río San Juan*”), an American company licensed by Nicaragua.

16. This is confirmed by Attachment 2, also submitted by Costa Rica, which likewise describes the transport of passengers on the San Juan River between San Juan del Norte and the mouth of the Sarapiquí: “With the small American steamships, that conduct the traffic between both oceans and carry the California travellers, it is possible to arrive at the mouth of the Sarapiquí.”¹⁸ From there, Costa Rica’s attachment continues with a description of navigation beyond the San Juan River, inside Costa Rican territory: navigation up the Sarapiquí to the interior of Costa Rica could only be done in “small rowboats” (“*pequeños botes*”) because “navigation on the river itself, by means of steamship, is still very problematic” owing to the fact that “the depth of the water depends completely on the rains, and is subject to many changes.”¹⁹ The document explains: “only very narrow steamships, with a maximum draught of twenty inches, would be capable of conducting this service.”²⁰ Then it makes reference to a proposal to

¹⁷ This statement by Costa Rica confirms what Nicaragua said in her 19 March answer to Judge Koroma’s question, that there were no “Costa Rican locals or immigrants” inhabiting the right bank of the San Juan River at the time the Treaty of Limits was concluded or for decades thereafter. As Costa Rica has now confirmed, her immigrants traveled past the San Juan, up the Sarapiquí, and thence by land to settle in the central part of the country.

¹⁸ CR Answer Attachment 2, p. 63 [Original Spanish: “Con los pequeños vapores norteamericanos, que mantienen el tráfico entre ambos océanos y que llevan a los viajeros californianos, se puede llegar hasta la desembocadura del Sarapiquí.”]

¹⁹ CR Answer Attachment 2, p. 63 [Original Spanish: “La navegación del río mismo, por medio de vapor, es aún bastante problemática ... La altura de agua depende por completo de las lluvias y está sometida a muchos cambios.”]

²⁰ CR Answer Attachment 2, p. 63 [Original Spanish: “[S]ólo vapores muy angostos, con un calado máximo de veinte pulgadas, serían capaces de mantener el servicio.”]

the government of Costa Rica by a Mr. Forest, to establish such a steamship service on the Sarapiquí in 1854, “but navigation on the Sarapiquí with steamships, still had not begun as of 1855.”²¹ In fact, there is no evidence that this service ever materialized. Costa Rica implies, in paragraph 3 of her 19 March answers, that the steamship service proposed to Costa Rica but never carried out by Mr. Forest involved navigation on the San Juan River. It did not. As Attachment 2, which is the source cited by Costa Rica, makes clear, the steamship service proposed by Mr. Forest was for navigation exclusively on the Sarapiquí, in Costa Rican waters, where there was no existing steamship service.²²

17. Costa Rica’s 19 March answers therefore confirm what Nicaragua said in her own 19 March answers, as well as in her written pleadings: that the commercial transportation of passengers on the San Juan River at the time the Treaty of Limits was concluded, and for more than 100 years thereafter, was always and exclusively controlled by Nicaragua. It was never authorized, licensed or controlled by Costa Rica. The evidence establishing these facts is summarized in Nicaragua’s *Counter Memorial*, at paragraphs 1.3.9 to 1.3.22, in her *Rejoinder*, at paragraphs 3.90 and 3.91, and in her 19 March answer to the question posed by Judge Keith.

18. From these facts, now supported by the documents submitted as attachments to Costa Rica’s 19 March answers, the following conclusion can be drawn: When the Parties concluded the Treaty of Limits in 1858, the right of free navigation that they agreed Costa Rica would have – to navigate “*con objetos de comercio*” – was not, and could not have been, intended to include the commercial transport of passengers on the San Juan River itself (as opposed to transport on the Costa Rican tributaries or distributaries of the river) for the simple reasons that this was a right that was exercised exclusively by Nicaragua, that was extremely valuable and important to her, and that she had no intention of giving up or sharing with Costa Rica, which made no contemporaneous manifestation of any need or desire to have it. This understanding of the Treaty was obviously shared by the Parties, at least for the next 100 years following the conclusion of the Treaty, as reflected in their consistent practice for more than ten decades: Nicaragua, and only Nicaragua, controlled, licensed and authorized passenger traffic on the San Juan; Costa Rica not only did none of this, but never attempted to do it, and never protested that Nicaragua alone was doing it.

²¹ CR Answer Attachment 2, p. 63, footnote [Original Spanish: “...pero la navegación del Sarapiquí por vapores, no había empezado aún en 1855.”]

²² CR Answer Attachment 2, p. 63, footnote.

The Answers to the Question put by Judge Keith

19. In her answer to the question asked by Judge Keith, Costa Rica struggles uphill against the evidence regarding the transport of passengers, as distinguished from goods, on the San Juan River, insisting that she has a right to carry passengers on the river both for commercial and non-commercial purposes, and whether a fare is charged or not.²³ To reach this conclusion, Costa Rica resorts to characterizing the words “*con objetos de comercio*,” as they appear in Article VI of the 1858 Treaty, “as words of *expansion* and not limitation.”²⁴

20. With this argument, Costa Rica reveals more than she perhaps intends. In particular, she confirms what Nicaragua has said all along about why Costa Rica has brought this case: to seek an “expansion” of her navigation rights under the 1858 Treaty. Costa Rica is not content that her right of free navigation under Article VI is expressly limited to navigation “*con objetos de comercio*” because this right -- to transport coffee or other articles of trade or commerce on the river, ceased to have any substantial value to her soon after the Treaty was concluded, when she stopped using the San Juan for the export and import of trade goods.²⁵ Since then, she has sought to derive rights from the Treaty that would have value for her, but not granted to her. In the arbitration before President Cleveland, she sought to expand Article VI to include a right to navigate with men of war and other public vessels. She succeeded only in obtaining from President Cleveland recognition of a right to navigate with revenue vessels -- not with men of war or other public vessels -- and only as related to navigation “*con objetos de comercio*.” In this case, she seeks to expand Article VI even further, to include a right to navigate with all public as well as private vessels, including armed police vessels, and to transport passengers of all kinds, whether paying or not. Costa Rica’s “expansive” interpretation of Article VI includes (indeed, requires) the translation of “*comercio*” as “communication,” such that any navigation between any two points constitutes “communication,” and therefore “*comercio*,” between them.²⁶ The words “*navegación con objetos de comercio*” are thus rendered by Costa Rica as “navigation with the purpose of navigation between any two points.” These “words of expansion,” to use Costa Rica’s characterization, would not only *expand* but *remove* all limits on Costa Rica’s rights under Article VI, and permit her to navigate on the river with all boats, for all purposes, with or without commercial cargo, with or without passengers.

²³ CR Answer, paras. 15 & 18.

²⁴ CR Answer, para. 16.

²⁵ See NCM, paras. 4.2.8, 4.2.17, 4.2.27, 4.3.1; see also NCM, Ann. 69; RN, paras. 3.53-3.57, 4.10-11; RN Ann. 50; CR 2009/5, pp. 44-6, paras. 6-9; CR 2009/7, pp. 48, para. 29.

²⁶ CR Answer, para. 14.

21. It is now clear, if it was not earlier, that this is precisely what Costa Rica intends. But her intention cannot be reconciled with the language of Article VI. Interpreted as Costa Rica suggests, the words “*con objetos de comercio*” lose all meaning. Costa Rica does not merely read them “expansively” -- although even this would be unjustified -- but she reads them in a manner that renders them entirely useless and without purpose, contrary to fundamental principles of treaty interpretation under the general law of treaties. If the words “*con objetos de comercio*” are to be given any meaning at all, it can only be as words of limitation, which limit Costa Rica’s right of free navigation to navigation “*con objetos de comercio*.” This necessarily means that Costa Rica does not enjoy a right of free navigation if the navigation is not “*con objetos de comercio*.”

22. Nicaragua respectfully submits that navigation for the sole purpose of transporting passengers, as distinguished from transporting goods, is not, and cannot be, navigation “*con objetos de comercio*” as those words are used in Article VI. Whether navigation “*con objetos de comercio*” means navigation “with articles of trade” or navigation “for purposes of commerce,” it does not include the commercial transport of passengers, because the evidence submitted to the Court by both Parties, including the evidence described in paragraphs 14 to 17 above, shows that the Parties did not intend to deprive Nicaragua of her exclusive right to conduct and control passenger traffic on the river when they concluded the 1858 Treaty. If they had intended to give Costa Rica this right, they would have said that Costa Rica has the right to transport passengers as well as goods on the river, as is specifically stipulated in other contemporaneous treaties and agreements.²⁷ They did not do so.

23. In paragraph 17 of her 19 March answer to Judge Keith’s question, Costa Rica lists six different ways in which her alleged “right of navigation by transporting persons or by navigation on their own” has been exercised.²⁸ Costa Rica’s list of her actual uses of the river proves nothing about the existence or extent of her “right of navigation” under the 1858 Treaty. She confuses her navigation by *right* under that Treaty, which is limited to “transportation of goods, including trade goods, both between Costa Rican villages and with Nicaraguan villages such as San Juan del Norte”, as described in paragraph 17(e) of her 19 March answer, with her navigation by *courtesy* of Nicaragua, as described in paragraphs 17 (a) through (d) and 17 (f). Only her navigation by right for “transportation of goods, including trade goods...” -- as described in paragraph 17(e) -- has been exercised continually since the conclusion of the 1858 Treaty; Costa Rica did not begin to use the river for any of the other purposes listed in paragraph 17 until the 1960s at the earliest. In paragraphs 17(a) and (b), for example, Costa Rica describes navigation of Costa Rican tourist boats, which began in the 1990s and is not, in Nicaragua’s

²⁷ See RN, para. 3.91.

²⁸ CR Answer, para. 17(a-f).

view, navigation “*con objetos de comercio.*” Nevertheless, Nicaragua has allowed this form of navigation as a courtesy to Costa Rica, subject to compliance with the regulations that govern all navigation on the San Juan River. To the same effect, in paragraphs 17(c) and (d) Costa Rica lists navigation by local Costa Rican riparians, including schoolchildren; as explained above, there were no local settlements on the right bank of the river before the 1960s, and there is no right of local riparians to engage in navigation, unless it is with goods or other articles of trade;²⁹ nevertheless, Nicaragua has allowed it as a courtesy, subject to compliance with applicable regulations. Finally, paragraph 17(f) lists “transportation of public officials to deliver essential social, health, education and security services to riparians of the Costa Rican bank of the river.” Nicaragua has previously shown that navigation by public officials in public boats for the purpose of carrying out governmental functions, of which there is no recorded occurrence before the 1990s, is not navigation “*con objetos de comercio,*” and that, accordingly, Costa Rica has no right to engage in such navigation on the San Juan.³⁰ Nevertheless, Nicaragua has allowed Costa Rica to navigate on the San Juan with public officials engaged in the performance of governmental services, provided only that they comply with regulations applicable to all navigation on the river. Costa Rican public officials are permitted by Nicaragua to navigate on the river in any public or private vessel; the only exception is that they may not navigate in police vessels, since Nicaragua has prohibited, since July 1998, navigation on the river by Costa Rican police vessels. Nicaragua has previously shown that Costa Rica has no right to navigate on the San Juan River with her police vessels,³¹ but that she allowed Costa Rican police vessels to use the river, for limited purposes and subject to strict conditions, until Costa Rica abused this courtesy between May and July 1998.³²

24. In sum, Costa Rica has failed to show, based on the language of the 1858 Treaty, the rules of treaty interpretation, or the evidence pertaining to the practice of the Parties, that she has a right to transport passengers on the San Juan River, either for hire or otherwise.

²⁹ See paras. 9 and 10, above.

³⁰ See CR, 2009/5, p. 43, para. 5; pp. 54-55, paras. 25-28; pp. 26-42, paras. 4-44. CR, 2009/7, pp. 52-54, paras. 37-41; pp. 31-37, paras. 2-15.

³¹ CR 2009/5, pp. 26-42, paras. 4-44, pp. 46-54, paras. 10-24. CR, 2009/7, pp. 31-37, paras. 2-15, pp. 48-52, paras. 31-37.

³² See RN, paras. 5.82-5.91, 5.101-5.108.

The Answers to the Question put by Judge Bennouna

25. In her 19 March answer to Judge Bennouna's question, Costa Rica denies that Nicaragua consulted with her about any of the Nicaraguan regulations governing navigation on the San Juan River, and that most of these regulations emerged from, or were modified by, a consultative process. In so doing, Costa Rica ignores the key facts, which are proven by the contemporaneous official records – including agreements between the two States and agreed minutes of meetings of their Binational Commission – that Nicaragua cited in and attached to her own 19 March answer to Judge Bennouna's question.³³

26. Costa Rica claims in Paragraph 20 of her 19 March answer that Nicaragua adopted the regulation requiring foreign nationals navigating on the San Juan to purchase Nicaraguan tourist cards (for \$5 each) in March 1994, without consulting her in advance, and that Costa Rica protested. Nicaragua maintains that, as sovereign over the river, she may enact reasonable regulations governing navigation on the river without having to clear them in advance with Costa Rica. Nevertheless, the record shows that, following the diplomatic correspondence between the two States cited by Costa Rica, they reached an agreement in June 1994, that Nicaragua would maintain her tourist card requirement, and furnish these cards to Costa Rican tour operators, "*which the latter must purchase, fill in correctly and hand over to the relevant authorities.*"³⁴ The two States further agreed "to undertake the necessary construction and improvements" to control posts along the river "in order that *the ships and tourists may comply with the required immigration procedures* efficiently, promptly and safely."³⁵ These "immigration procedures" included not only tourist cards, but also Nicaragua's immigration processing charges of \$2 upon entering and \$2 upon leaving Nicaraguan territory.³⁶ In light of this agreement, signed by the Tourism Ministers of both States, Costa Rica cannot now complain about Nicaragua's immigration procedures, or argue that she had no involvement in shaping or approving them. In fact, consultations between the Parties continued to take place regarding these regulations, and Costa Rica has only herself to blame for the fact that Nicaragua does not exempt Costa Rican nationals (other than local riparians) from her tourist card and immigration processing requirements. In September 2002, the Foreign Ministers of Nicaragua and Costa Rica signed an agreement, which Costa Rica submitted as Annex 29 to her *Memorial*, where it was agreed that Costa Rica would eliminate the fee she charges Nicaraguan nationals to obtain a Costa Rican visa, and that: "As soon as the Government of Costa Rica eliminates the visa fee, the

³³ See Nic. Answer, Attachments 5, 6 and 7.

³⁴ MCR, Vol. II, Ann. 26, p. 187.

³⁵ MCR, Vol. II, Ann. 26, pp. 187-188.

³⁶ See RN, Vol. II, Ann. 73, p. 455.

Government of Nicaragua shall also eliminate, at the national level, the charge for tourist cards and migratory services for Costa Rican citizens.”³⁷ More than six years have now passed since this agreement was made, and Costa Rica has failed thus far to comply with her obligation to eliminate the visa fee for Nicaraguan nationals. If and when she does comply, Nicaragua stands ready to honour her commitment to exempt all Costa Rican nationals from her tourist card and immigration processing requirements.

27. Costa Rica claims in Paragraph 21 that she was not consulted prior to Nicaragua’s prohibition of navigation by Costa Rican police vessels, which went into effect on 14 July 1998. Nicaragua maintains that Costa Rica has no right to navigate on the river with her police vessels, and that prior to 14 July 1998 Costa Rica did so only upon requesting and obtaining Nicaragua’s express prior permission.³⁸ Thus, Nicaragua had no legal duty to consult with Costa Rica or advise her in advance before making the decision no longer to authorize such navigation. However, Costa Rica’s own contemporaneous official police report shows that on 1 July 1998, two weeks before the prohibition was communicated to Costa Rica, Nicaragua warned Costa Rica that she would not tolerate further Costa Rican police navigation on the river to intercept and detain Nicaraguan nationals navigating in Nicaraguan waters, and insisted that the Costa Rican police terminate this practice.³⁹ When the practice continued in spite of Nicaragua’s warning, the Nicaraguan military commander responsible for the San Juan sent an officer from his staff to deliver a message personally to the Costa Rican police commander that no further use of the San Juan by Costa Rican police vessels would be allowed. This, too, is proven by Costa Rica’s own records.⁴⁰ Here again, Costa Rica has no cause to complain. In fact, Costa Rica’s President, Abel Pacheco, agreed in 2002 that Costa Rica has no reason to complain about the inability of her police vessels to navigate on the San Juan River. According to the President of Costa Rica, in published remarks: “We must understand that it is absurd that a country with no army is fighting over the passage of armed persons on a navigable river that is drying up. So, what’s this row about?”⁴¹

28. Costa Rica claims in Paragraph 22 that in August and September 1998 “Nicaragua began to prevent the transit of other Costa Rican public servants.” The evidence cited by Costa Rica does not support this assertion. Costa Rica cites only to her *Memorial*, paragraphs 5.97-5.98. Those paragraphs, in turn, rely on two annexes to the *Memorial*, numbers 150 and 52. However,

³⁷ MCR, Vol. II, Ann. 29, p. 199.

³⁸ See CMN, pp. 214-224; RN, pp. 264- 269; pp. 284-292.

³⁹ See MCR, Vol. VI, Ann. 227, p. 963.

⁴⁰ See MCR, Vol. VI, Ann. 227, p. 964.

⁴¹ CMN, Vol. II, Ann. 81.

upon consulting the cited annexes, Costa Rica's claim disappears. Annex 150 describes only how Costa Rican officials *navigating in police vessels*, were prohibited from entering the San Juan River, because of Nicaragua's prohibition on navigation by Costa Rican police vessels after July 1998. Nicaragua did not prevent any Costa Rican public officials from navigating on the San Juan in other vessels, public or private, even though they had no right to engage in such navigation because it plainly was not "*con objetos de comercio*." In fact, Costa Rica's own evidence shows that the same Costa Rican officials were permitted to navigate when they returned in a private vessel.⁴² Annex 52 describes the delays in securing Nicaraguan authorization to transit the river that were experienced by certain Costa Rican health officials engaged in the campaign to inoculate livestock against screwworm. However, Costa Rica's own evidence shows that Nicaragua gave these officials the authorization that they requested, and that they were able to carry out the inoculation program.⁴³

29. Costa Rica complains in Paragraph 23 that in 1999 Nicaragua "started to impose navigational timetables on the River." This is an exaggerated reference to Nicaragua's regulation, which was actually formalized in 1994, that navigation on the river may not take place at night, except in cases of emergency.⁴⁴ The prohibition on night-time navigation applied to all vessels, including those from Nicaragua, and it was deemed necessary as a matter of navigational safety. Costa Rica did not complain about it then, or at any time during the 1990s, and agreed since as far back as her pleadings before President Cleveland that navigation on the river after dark is dangerous;⁴⁵ at the oral hearings, Costa Rica's counsel acknowledged that Nicaragua's prohibition on navigation after nightfall is a means – although not his preferred means – to assure navigational safety.⁴⁶ The evidence showed that, by longstanding practice, boatmen from Nicaragua and Costa Rica did not attempt to navigate at night because of their own awareness of the hazards of such navigation.⁴⁷

30. In Paragraph 24, Costa Rica complains about a number of Nicaraguan regulations that, allegedly, were adopted in 2001, but in fact were adopted much earlier, and were consulted with and approved by Costa Rica herself. Specifically, Costa Rica complains about the requirements that all vessels stop and register at Nicaraguan control posts, undergo departure clearance

⁴² MCR, Vol. V, Ann. 150, p. 670.

⁴³ See MCR, Vol. III, Ann. 53.

⁴⁴ See Membreño Affidavit, Nic. Answer, Attachment 7.

⁴⁵ RN, Vol. II, Ann. 5, pp. 160-161.

⁴⁶ See CR 2009/3, p. 32, para. 26(e).

⁴⁷ RN, pp. 209-211; See also Ann. 73, para. 9.

inspections and pay for this service, and that Costa Rican nationals (other than local riparians) purchase tourist cards and pay for immigration processing when they enter the river. Costa Rica ignores the agreed Final Minutes of the Binational Commission meetings in 1995 and 1997, and the agreement of the Parties' Ministers of Tourism in 1994, where these measures were consulted and jointly approved. The 1995 Minutes state that "The Government of Costa Rica takes note of the efforts carried out by the Government of Nicaragua, regarding the installation of control posts in the Province of Río San Juan [mentioning specifically the Nicaraguan posts at Sarapiquí, El Delta and San Juan del Norte]".⁴⁸ The 1997 Minutes state that: "It was *agreed that Nicaragua will make efforts to establish posts at determined cites...* With respect to the movement of vessels, *it was considered necessary that they navigate only if duly registered by the posts that issue corresponding navigation certificates*, in this case the posts at San Juan del Norte, San Carlos and Sarapiquí."⁴⁹ The pertinent part of the 1994 agreement of the Ministers of Tourism has already been quoted above. Thus, the requirements that all vessels, including Costa Rican vessels, stop and register at Nicaraguan control posts, and continue navigating on the river only upon issuance by Nicaragua of departure clearance certificates, and that Costa Rican nationals pay for tourist cards and immigration processing, were all consulted and agreed to by the Parties, and made operative prior to 1998.

31. There appears to be a reason why Costa Rica suddenly claims that these regulations were adopted in 2001, when all of the evidence shows that they were implemented, some even upon agreement, between 1994 and 1997. In her *Memorial*, Costa Rica admitted that prior to July 1998 her navigation rights on the San Juan River were not violated by Nicaragua in a systematic way.⁵⁰ Thus, regulations that were systematically implemented prior to July 1998, as all of these regulations were, did not violate Costa Rica's rights – by her own admission. Hence her effort to post-date them to some time in 2001.

32. In paragraphs 25 and 26, Costa Rica complains first that Nicaragua imposed on Costa Rican health and social workers the obligation "to carry passports and obtain visas as a condition to navigate the River," and then complains that a year later Nicaragua "established a requirement that Costa Rican health and social workers...request permission in writing from the Nicaraguan Embassy for navigation on the River." Nicaragua notes that, as stated in her *Counter Memorial*, at paragraph 1.3.20, her requirement that all foreign nationals entering her territory present a valid passport is nothing new; it has been in force at all points of entry, including the San Juan River, since the Decree of 11 September 1862. But what is truly strange about this pair of Costa

⁴⁸ Nic. Answer, Attachment 6, p. 11.

⁴⁹ RN, Vol. II, Ann. 4, p. 24 (emphasis added).

⁵⁰ See e.g. MCR, para. 3.02.

Rican complaints is that the later requirement – that Costa Rica’s public workers need obtain only written permission from the Nicaraguan Embassy, rather than a visa with its attendant \$20 charge – actually reflects a deliberate relaxation by Nicaragua of the visa requirement, as an accommodation to Costa Rica in response to her objection to that requirement. Nicaragua recently adopted a new procedure whereby visas and/or written authorizations to enter Nicaragua, including the San Juan River, can be obtained directly from Nicaragua’s control posts on the river, without having to visit the Nicaraguan Embassy or consulates in Costa Rica.⁵¹ This new regulation further facilitates the procedures for entering Nicaragua via the San Juan River or any other part of her territory. Nicaragua, of course, maintains that she has a sovereign right to control her borders and regulate the entry of foreign nationals into her territory, and that in so doing she is free, as are other sovereign States, to require all foreign nationals, or foreign nationals from particular countries, to obtain visas before they may be allowed to enter Nicaragua.⁵² Costa Rica, which prohibits Nicaraguan nationals from entering her territory without a Costa Rican visa, has no grounds to complain. Nevertheless, Nicaragua has heard Costa Rica’s complaints, taken them into consideration, and modified her visa requirements accordingly.

33. In conclusion, the evidence does not support Costa Rica’s assertion that “Nicaragua has neither informed nor consulted Costa Rica in advance on any measures or charges imposed on Costa Rican navigation on the San Juan River,” as stated in paragraph 19 of Costa Rica’s 19 March answer. In fact, the evidence is to the contrary. It shows that, while Nicaragua has never wavered from her position that, as sovereign over the river, she has the right to regulate navigation in a reasonable manner without consulting with or obtaining approval from Costa

⁵¹ Nicaragua, Presidential Decree No. 07-2009, 13 Mar. 2009. Article 1 provides: “In accordance with the agreement creating a single Central American visa for the free movement of foreigners, approved and ratified by the National Assembly on 12 December 2006 and published in the Gazette number 13 of 18 January 2007, those citizens that desire to travel to Nicaragua, classified in category B, visa without consultation, will granted a corresponding visa, without undermining the need to comply with the requirements of the law, whenever they enter the national territory, *at all border posts*, maritime, air and land, upon presenting themselves at the Immigration Office *at those posts* where they will pay a fee for the amount of the visa and the tourist card.”

[Original Spanish: “De acuerdo al convenio de creación de visa única centroamericana para la libre movilidad de extranjeros, aprobado y ratificado por la Asamblea Nacional el 12 de diciembre de 2006 y publicado en la Gaceta numero 13 del 18 de enero del 2007, aquellos ciudadanos que deseen viajar a Nicaragua, clasificado en la categoría B, visa sin consulta se les otorgará la visa correspondiente, sin menoscabo de cumplir con los requisitos de ley, toda vez que se encuentre en el territorio nacional, en los puestos fronterizos, marítimos, aéreos y terrestre, debiéndose presentar ante la ventanilla de la oficina de Migración y Extranjería de dichos puestos donde pagarán un arancel por el importe de la visa y la tarjeta de turismo.”]

⁵² See CR, 2009/5, pp. 12-15, paras. 14-20; pp. 24-25, para. 43. CR, 2009/7, p. 44, para. 18. See also RN, pp. 215-218.

Rica, in fact, Nicaragua's regulations governing navigation on the river have resulted from a process that has included consultation, dialogue, agreement, give-and-take, and accommodation with Costa Rica in almost every case.

The Hague, 26 March 2009.

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Agent

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