

# 航行及相关权利争端案

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## [案件导读]

本案涉及哥斯达黎加和尼加拉瓜关于圣胡安河航行权及其他相关权利的争端。<sup>1</sup>依据哥斯达黎加与尼加拉瓜 1858 年签订的边界条约，两国在圣胡安河下游的边界为哥斯达黎加一侧河岸，尼加拉瓜对该河段享有主权，但哥斯达黎加享有“商业”航行权。法院依据条约解释的一般规则，采用“条约演化解释”方法，认为应当考虑条约中一般性术语含义的演化，因此“商业”一词应依其现代含义解释为既包括货物贸易，也包括运送乘客的服务贸易。法院没有讨论适用于国际河流航行的一般规则，但基于对 1858 年条约的目的解释判定哥斯达黎加河岸居民享有满足日常生活需要的“最低限度航行权”，并依据一般国际法裁定哥斯达黎加河岸居民的生存性捕鱼权是一种习惯法权利。

## [关键词]

边界河流，航行权，商业航行权，航行管理权，沿岸居民权利，最低限度航行权，生存性捕鱼权，条约演化解释，条约目的解释，条约系统解释

## 一、圣胡安河航行权与相关权利争端的产生与发展

哥斯达黎加和尼加拉瓜是以圣胡安河右岸为界的相邻国家。依据两国 1858 年签订的边界条约（1858 Treaty of Limits），圣胡安河下游河段的主权属于尼加拉瓜，但哥斯达黎加在该河段上享有永久性的“商业”航行权。

因尼加拉瓜质疑 1858 年条约的有效性，两国曾将争议提交美国总统克利夫兰（Cleveland）仲裁。1888 年，克利夫兰裁定 1858 年条约有效，并就条约涉及的圣胡安河航行权问题做出以下解释：哥斯达黎加的军事船只无权在圣胡安河上航行，但其税务船只可以在圣胡安河上航行，只要它的航行是“以商业为目的”。

1914 年，尼加拉瓜与美国签订《查莫罗—布莱恩条约》（Chamorro-Bryan

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<sup>1</sup> *Dispute regarding Navigational and Related Rights* (Costa Rica v Nicaragua), Judgement, I.C.J. Reports 2009, p. 213.

Treaty), 赋予美国经圣胡安河修建和维护洋间运河的永久性、排他性的权利。1916 年, 哥斯达黎加将尼加拉瓜诉至中美洲法院, 称其违反了 1858 年条约第 8 条规定的义务, 即在圣胡安河两国边界河段启动任何运河项目前必须先与哥斯达黎加磋商。中美洲法院于同年做出判决, 支持了哥斯达黎加的主张。

1956 年, 哥斯达黎加和尼加拉瓜签订《福涅尔-塞维利亚协定》(Fournier-Servilla Agreement), 同意促进圣胡安河交通的便利和快捷, 并合作保卫双方的共同边界。

20 世纪 80 年代, 两国之间开始发生一系列影响圣胡安河航行权的事件。尼加拉瓜以保护其在武装冲突背景下的国家安全为由, 采取了一些限制哥斯达黎加航行权的“临时性特别措施”。在哥方抗议下, 这些措施部分被中止。但 20 世纪 90 年代中期, 尼加拉瓜又采取了进一步的措施, 包括对哥斯达黎加船只上的旅客收取费用, 以及要求哥斯达黎加船只在尼加拉瓜的军事站点停船接受检查。

1998 年, 两国争端升级, 尼加拉瓜禁止哥斯达黎加运送警务人员的船只在圣胡安河上航行。两国经协商签订了一项部长级协议《夸德拉-利萨诺联合声明》(Cuadra-Lizano Joint Communiqué), 允许哥斯达黎加的警务船只在一定条件下通过圣胡安河为边界站点运送补给, 但尼加拉瓜随即单方面宣布该协定无效。

2005 年 9 月 29 日, 哥斯达黎加向国际法院提起诉讼, 要求法院判定尼加拉瓜“剥夺了哥斯达黎加在圣胡安河上的自由航行权及相关权利, 从而违反了它承担的国际义务。”<sup>2</sup>

2009 年 7 月 13 日, 法院对该案做出判决, 首先确定了“哥斯达黎加在圣胡安河上自由航行权的范围”, 继而查明“尼加拉瓜是否有权且在何种程度上有权管理哥斯达黎加船只的航行, 以及争议期间尼加拉瓜的具体行为是否损害了哥斯达黎加的权利”, 最后法院讨论了哥斯达黎加河岸居民的生存性捕鱼权问题。<sup>3</sup>

## 二、法院关于哥斯达黎加自由航行权的判决

### (一) 哥斯达黎加自由航行权的法律基础

哥斯达黎加请求法院考虑“一般国际法上‘国际河流’的航行规则”,<sup>4</sup> 但

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<sup>2</sup> Judgement, p. 221, para. 12.

<sup>3</sup> Judgement, pp. 231-232, para. 29.

<sup>4</sup> Judgement, pp. 232-233, para. 32.

法院认为并没有必要判断“在习惯国际法上是否存在适用于‘国际河流’航行的制度”，也没有必要判断“圣胡安河是否属于‘国际河流’”，因为两国 1858 年签订的边界条约完整地确定了适用于圣胡安河争议河段的航行权规则，结合两国间的其它条约、克利夫兰裁决和中美洲法院判决来对 1858 年条约进行解释，足以解决哥斯达黎加自由航行权的范围问题。<sup>5</sup>

1858 年边界条约中确定哥斯达黎加自由航行权的主要条款是第 6 条：

“尼加拉瓜共和国对圣胡安河从湖泊源头到大西洋入海口的河水拥有完全的所有权和统治权；但哥斯达黎加共和国对圣胡安河从河口到老卡斯蒂洛下游三英里处的河段享有永久性的商业（*con objetos de comercio*）自由航行权，无论是与尼加拉瓜通航还是与哥斯达黎加境内河流通航，这些河流包括圣卡洛斯河、萨拉皮基河及哥斯达黎加境内与圣胡安河该河段连接的任何其它水道。两国的船舶都可以在该河段常用航道的任意一边河岸停泊，不用缴纳任何税赋，除非两国政府另有约定。”

除此以外，法院认为 1858 年条约中还有一些条款与圣胡安河航行权相关，特别是第 5 条、第 8 条和第 2 条。第 5 条要求尼加拉瓜在“属于她的河岸”努力捍卫河流安全。第 8 条要求尼加拉瓜在与第三方达成任何关于修建运河或通过权的协议之前都必须与哥斯达黎加协商。第 2 条则是划界条款，它确定本案争议河段上的两国边界为哥斯达黎加一侧的河岸。<sup>6</sup>

法院认为还应参考两国间的其它相关条约，例如双方约定合作促进圣胡安河交通之便利和快捷的《福涅尔—塞维利亚协定》；<sup>7</sup> 应当依据 1888 年的克利夫兰仲裁裁决和 1916 年的中美洲法院判决来解释 1858 年条约和其他的相关条约。<sup>8</sup>

关于哥斯达黎加援引的《夸德拉—利萨诺联合声明》等部长级联合声明，法院则认为它们不属于哥斯达黎加自由航行权的条约基础，因为这些声明仅是一些为履行条约义务而做出的务实安排，特别是为履行 1956 年《福涅尔—塞维利亚协定》条约中的合作义务而做出的安排，但这些务实安排的法律意义与条约本身相比非常有限，其中规定的合作形式是可以依当事方需要而改变的；而且尼加拉

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<sup>5</sup> Judgement, p. 233, paras. 34–36.

<sup>6</sup> Judgement, p. 234, para. 38.

<sup>7</sup> Judgement, p. 234, para. 39.

<sup>8</sup> Judgement, p. 235, para. 41.

瓜在《夸德拉-利萨诺联合声明》发布后已立即宣布它无效。<sup>9</sup>

## （二）法院关于“商业”航行权范围的判决

1858 年条约第 6 款中哥斯达黎加“商业”航行权的范围是本案的争议焦点。在该条约的西班牙语作准文本中，限定哥斯达黎加“自由航行权”的表述是“*con objetos de comercio*”。法院分别分析了“*con objetos*”与“*comercio*”的含义。

### 1. 法院对“*con objetos*”一词的解释

尼加拉瓜认为“*objetos*”一词仅表示物质性的货物或商品，“*con objetos*”仅限于购买或贩卖上述货物或商品的行为。而哥斯达黎加认为“*con objetos*”应取其抽象意义，即“为了商业目的”。<sup>10</sup>

就单独的词义来看，“*con objetos*”既有具体含义，也有抽象含义。法院对其进行了系统解释。首先，1858 年条约的其它条款，即条约第 8 条，也使用了这一措辞，而该措辞在第 8 条中只可能取抽象含义。<sup>11</sup> 其次，在未生效的 1857 年条约中，两国用“*articulos de comercio*”一词来表示“物品”或“货物”，这说明，假如两国想要使用“*objetos*”的具体含义，它们会用另一词汇来表示。<sup>12</sup> 最后，两国在 1887 年向美国总统克利夫兰提请仲裁时，在各自提交的 1858 年条约英文版中都将“*con objetos de comercio*”翻译成“为了商业目的”。<sup>13</sup> 基于上述分析，法院接受了哥斯达黎加的主张，认为“*con objetos*”应解释为“为了商业目的”。

### 2. 法院对“商业（*comercio*）”一词的解释

在考虑“商业”一词的含义时，法院既未接受哥斯达黎加“过于宽泛”的解释，也未接受尼加拉瓜“过分狭义”的解释。<sup>14</sup>

哥斯达黎加提出，“商业”至少应包括“为追求商业目的的任何行为”，除此以外，它还应扩展到非营利性行为，包括“哥斯达黎加河岸村庄之间的人员流动和往来”以及“为本地居民提供必要服务的公务航行。”法院认为，接受哥斯

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<sup>9</sup> Judgement, pp. 234-235, para. 40.

<sup>10</sup> Judgement, p. 238, para. 50.

<sup>11</sup> Judgement, p. 239, para. 54.

<sup>12</sup> Judgement, pp. 239-240, para. 55.

<sup>13</sup> Judgement, p. 240, para. 56.

<sup>14</sup> Judgement, p. 241, para. 60.

达黎加的这种解释意味着任何形式的航行都在“为商业目的的航行”范围之内，从而让这一用语完全失去意义，无法解释条约制定者为何特别使用“为商业目的的航行”来限定哥斯达黎加自由航行权的范围。<sup>15</sup>

尼加拉瓜认为应依据条约签订时“商业”一词的通行含义，将其限定为“商品的购买与销售”。但法院认为这里应当对条约用语进行“演化解释”。

法院首先承认，解释条约用语确实应当依据当事国缔结条约时的共同意愿，且在国际法院过去审理的部分案件中，虽然条约用语的含义已发生改变，法院仍然坚持使用其原始含义。<sup>16</sup>

但法院认为：

“这并不意味着，如果某个用语的含义已不同于条约缔结时，不应考虑解释适用条约时该用语的含义。”<sup>17</sup>

法院指出了应当考虑条约用语演化含义的两种情况：

“一方面，基于当事国的默示合意，《维也纳条约法公约》第 31 条第 3 款 b 项所指的当事国嗣后惯例可使（条约用语）偏离原始含义。另一方面，在一些情形下，当事国缔结条约之时的意愿是，或者可以推定它们的意愿是，使其采用的措辞或部分措辞的含义或内容可以演化，而非一成不变，从而为国际法的发展留有余地。”<sup>18</sup>

法院特别强调，在后一种情况下：“这其实是为了尊重当事国缔结条约时的共同意愿，而非偏离这种意愿。”<sup>19</sup>

为进一步论证条约演化解释的合理性并说明其适用条件，法院援引了 1978 年爱琴海大陆架划界案（Aegean Sea Continental Shelf Case）中国际法院为演化解释“领土地位”一词所做的论证：

“一旦确认‘希腊的领土地位’这一表述在希腊加入[1928 年一般议定书]的文件中被用作一个一般性术语（a generic term），用来指代一般国际法上包含在领土地位概念中的任何事宜，那么必然可以推定，起草者有意让它的含义遵循法律的演变，符合特定时间有效的法律赋予

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<sup>15</sup> Judgement, p. 241, para. 61.

<sup>16</sup> Judgement, p. 242, para. 63.

<sup>17</sup> Judgement, p. 242, para. 64.

<sup>18</sup> Judgement, p. 242, para. 64.

<sup>19</sup> Judgement, p. 242, para. 64.

该表述的含义。在法院看来，当忆及 1928 年议定书的性质，上述推定显得更有说服力，因为 1928 年议定书是一项和平解决争端的公约，具有一般性和延续性（*continuing duration*），很难想象在这样的公约中，起草者会有意让类似‘国内管辖权’和‘领土地位’之类的用语有固定含义而不顾及国际法的嗣后发展。”<sup>20</sup>

法院认为，虽然上述论证涉及的是对条约保留中用语的解释，但也完全适用于对条约自身用语的解释。法院对该案适用演化解释的理由进行了归纳：

“当缔约国在条约中使用一般性术语（*generic terms*）时，其已然已经意识到这些术语的含义有可能与时俱进，如果该条约已经历史久远或具有‘延续性（*continuing duration*）’，作为一般原则，必须推定缔约国有意使这些术语具有不断演化的含义。”<sup>21</sup>

法院继而指出，本案同样满足上述条件，因而也应适用演化解释：

“在当前案件中，1858 年条约第 6 条使用的‘商业’一词也是如此。首先，这是一个一般性的术语，用来指代一类活动；其次，1858 年条约具有无限延续性（*unlimited duration*），从一开始它就意在创设一个以永久性为特征的法律制度。”<sup>22</sup>

据此，法院得出结论：“商业”一词在 1858 年当事国缔约条约时可能是狭义的，但是“为满足条约适用的目的，应当接受它现在的含义。”<sup>23</sup> 法院将“商业”一词的现代含义适用于圣胡安河下游的航行行为，从而判定哥斯达黎加在条约第 6 条项下的权利不仅包括“货物运输”，还包括“运送乘客”：

“根据 1858 年条约第 6 条，自由航行权涵盖两种私人航行：以商业为目的的货运船只航行，以及付费乘船的客运船只航行。”<sup>24</sup>

### （三）法院关于河岸居民非商业航行权的判决

在界定 1858 年条约中“商业”航行权的范围后，法院又对 1858 年条约进行了目的解释，从而判定哥斯达黎加河岸居民享有为满足基本需求的非商业航行

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<sup>20</sup> *Aegean Sea Continental Shelf* (Greece v. Turkey), Judgement, I.C.J. Reports 1978, p. 32, para. 77.

<sup>21</sup> Judgement, p. 243, para. 66.

<sup>22</sup> Judgement, p. 243, para. 67.

<sup>23</sup> Judgement, p. 244, para. 70.

<sup>24</sup> Judgement, p. 245, para. 73.

权：

“在河岸构成两国边界的地段，考虑到当地的地理情况，1858 年条约的拟定者不可能有意剥夺河畔的哥斯达黎加居民为满足基本需求而使用河流的权利，即使他们的活动并非商业性质。”<sup>25</sup>

法院还参考 1858 年条约的背景、目标和其它条款，对其进行了系统解释。法院指出，虽然条约第 6 条无法推导出河岸居民的非商业性航行权，但如果把 1858 年条约各条款视为一个整体，特别是考虑条约确定边界的方式，就能推导出这种权利：

“鉴于 1858 年条约缔结的历史背景、条约序言与条约第 1 条确定的条约目标和目的，既然当事国在第 2 条中选择以河岸作为边界，就应当推定当事国在条约缔约时的意图是为哥斯达黎加一侧河岸的居民保留在河岸村庄维持正常生活的最低限度航行权。”<sup>26</sup>

#### （四）法院关于公务船只航行权的判决

法院认为，1858 年条约第 6 条并没有规定适用于公务船只的特别制度，它为“商业”航行确定的唯一判断标准是航行的商业目的，而非船只的所有权性质，因此以商业为目的的公务船只航行也包括在第 6 条许可的商业航行范围之内。<sup>27</sup>

法院进一步确认，除 1888 年克利夫兰裁决涉及的税务船只以外，1858 年条约第 6 条许可的范围不包括为维护公共秩序的航行，或提供非经济获利目的公共服务的航行。<sup>28</sup>

法院认为哥斯达黎加不享有经圣胡安河为其河岸警务站点运送给养和人员的一般性权利，因为它没有证明河流运输是满足上述需求的唯一方式；<sup>29</sup> 但哥斯达黎加的公务船只在特定情况下，为了给河岸居民提供满足日常生活必需的服务，有权在圣胡安河上航行。<sup>30</sup>

### 三、法院关于尼加拉瓜航行管理权的判决

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<sup>25</sup> Judgement, p. 246, para. 79.

<sup>26</sup> Judgement, p. 246, para. 79.

<sup>27</sup> Judgement, p. 247, para. 80.

<sup>28</sup> Judgement, pp. 247-248, para. 83.

<sup>29</sup> Judgement, pp. 247-248, para. 83.

<sup>30</sup> Judgement, p. 248, para. 84.

### （一）法院关于尼加拉瓜航行管理权一般属性的判决

法院认为，根据 1858 年条约，尼加拉瓜有权对哥斯达黎加在圣胡安河上行使自由航行权的行为进行管理，但这种权力并非没有限制，本案涉及的每项管理措施都应当具有以下属性：

“（1）它不应使自由航行权无法行使或实质阻碍其行使；（2）它应与条约条款一致，例如条约第 6 条中禁止单方面收税的规定；（3）它必须有合法目的，例如航行安全、避免犯罪、公共安全和边境控制；（4）它应是非歧视性的，航行时间表等规定应当对两国船只同样适用；（5）它不应是不合理的，即，它对航行权产生的负面影响不应明显超过它为实现管理目的产生的正面效果。”<sup>31</sup>

哥斯达黎加称，尼加拉瓜的管理措施产生的影响超过了必要限度，因而缺乏合理性。但法院认为，根据国际法上已确立的一般原则，哥斯达黎加对该主张负有举证义务。<sup>32</sup> 法院还进一步指出：“管理者（在本案中是河流主权享有者）对于评估管理措施的必要性承担主要职责，也对基于具体情况选择它认为最适当的方式来满足上述需求承担主要职责。”<sup>33</sup> 因此，仅仅简单声称某项管理措施缺乏合理性是不够的，需要提供明确而具体的事实才能说服法院。

### （二）法院关于尼加拉瓜通知义务的判决

哥斯达黎加与尼加拉瓜关于航行管理权的核心争议是，尼加拉瓜是否有义务将其管理措施通知哥斯达黎加，或在措施出台之前与哥斯达黎加进行磋商。虽然 1858 年条约没有规定当事国的通知义务，但法院基于三个因素判定尼加拉瓜应将其管理措施通知哥斯达黎加。第一，1956 年《福涅尔—塞维利亚协定》规定两国应合作促进圣胡安河交通的便利化。第二，尼加拉瓜的管理措施涉及圣胡安河这样一条特殊河流，一国对它享有主权，另一国享有自由航行权，基于实际需要应当将管理措施通知另一国。第三，尼加拉瓜既然想要将某种行为纳入管理范围，理所当然应当通知实施这些行为的主体。然而，法院认为尼加拉瓜并不担负在出台管理措施之前就通知哥斯达黎加或与之磋商的义务。<sup>34</sup>

<sup>31</sup> Judgement, pp. 249-250, para. 87.

<sup>32</sup> Judgement, p. 253, para. 101. cf. *Maritime Delimitation in the Black Sea* (Romania v. Ukraine), Judgement of 3 February 2009, p. 86, para. 68, and cases cited there.

<sup>33</sup> Judgement, p. 253, para. 101.

<sup>34</sup> Judgement, pp. 250-252, paras. 91-97.



### （三）法院关于尼加拉瓜具体管理措施合法性的判决

法院依次讨论了哥斯达黎加指控的尼加拉瓜采取的各项具体管理措施，希望在尼加拉瓜的主权与哥斯达黎加的自由航行权之间达到平衡。

#### 1. 停船与证件要求

法院判定尼加拉瓜有权要求哥斯达黎加船只在进入及驶离圣胡安河时停船接受检查，有权要求船员与乘客登记和携带身份证件，因为：

“尼加拉瓜作为主权国家，有权知道进入其领土者的身份，有权知道他们是否离开。要求出示护照或其它身份证件是行使这种权力的合法方式。尼加拉瓜也有执法和环保方面的相关责任。”<sup>35</sup>

#### 2. 离境许可

哥斯达黎加认为，尼加拉瓜无权要求哥方船只取得尼方颁发的离境许可，但尼加拉瓜指出，这项要求是为确保进入圣胡安河的船只具有适航性，不会发生燃料泄漏，并且没有携带非法货物。法院认为，尼加拉瓜宣称的这些管理目的，包括航行安全、环境保护和刑事法律执行，都是合法目的；此外，颁发离境许可并没有对哥斯达黎加行使自由航行权造成重大阻碍。<sup>36</sup> 因此法院没有支持哥斯达黎加的主张。

#### 3. 签证与游客卡

尼加拉瓜要求在圣胡安河上航行的哥斯达黎加船上人员取得尼加拉瓜签证和购买尼加拉瓜游客卡，哥斯达黎加认为这是对其自由航行权的非法限制，因为“这意味着自由航行权成为尼加拉瓜可以任意决定是否授予的特权。”<sup>37</sup>

法院认为，应当区分签证和游客卡两个问题，游客卡没有任何合法目的支撑，因此与尼加拉瓜的条约义务不符，<sup>38</sup> 而签证涉及的问题较为复杂。

关于签证要求，法院首先承认：“每个国家都享有对非国民进入其领土的控制权，而给予或拒绝签证的权力正是这种控制权的实际表现。”<sup>39</sup>

继而法院讨论了“谁享有 1858 年条约规定的商业目的自由航行权以及谁可以从中受益”的问题：

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<sup>35</sup> Judgement, p. 254, para. 104.

<sup>36</sup> Judgement, p. 256, para. 109.

<sup>37</sup> Judgement, p. 257, para. 111.

<sup>38</sup> Judgement, pp. 258-259, para. 119.

<sup>39</sup> Judgement, p. 257, para. 112.

“根据 1858 年条约第 6 条，自由航行权的权利主体是哥斯达黎加。哥斯达黎加船只的拥有者和运营者在圣胡安河上进行商业目的航行时可以从自由航行权中受益，船上乘客同样可以从自由航行权中受益，即便乘客不是哥斯达黎加国民。”<sup>40</sup>

法院认为签证权蕴含自由裁量权，尼加拉瓜不能要求这些“可以从哥斯达黎加自由航行权中受益”的人取得尼方签证，因为如果不让他们享受这种利益，即是对自由航行权的阻碍，是对 1858 年条约义务的违反。<sup>41</sup> 虽然哥斯达黎加并未证明尼加拉瓜有武断拒签的情形，且哥斯达黎加河岸社区居民、经常在圣胡安河运送货物的哥斯达黎加商人以及大多数圣胡安河游客都享受例外或免签，但法院认为这些情况都没有改变尼加拉瓜签证要求的违法性质。<sup>42</sup>

作为补充说明，法院指出，尼加拉瓜有权为了执法或环保等合法目的拒绝某个特定人员进入其领土，正如前面提到的，尼加拉瓜有权为了这些合法目的要求哥斯达黎加船上人员出示身份证件。尼加拉瓜可以在查看身份证件时基于合法目的做出拒绝某人进入圣胡安河的决定，这就不涉及对自由航行权的侵犯。类似分析也适用于紧急情况下自由航行权的减损。<sup>43</sup>

法院关于签证要求的判决受到了法官塞普尔韦达-埃莫（Judge Sepulveda-Amor）和纪尧姆（Judge *Ad hoc* Guillaume）的质疑。

塞普尔韦达-埃莫法官在其单独意见中指出，法院关于签证要求的判决与关于其它管理措施的判决不一致：尼加拉瓜的签证要求是基于合法目的，即边界和移民管理，哥斯达黎加没有举出任何证据证明签证要求对其自由航行权造成了实质性损害，也没有证明签证要求的不合理性或歧视性，法院在判决中声称“要求自由航行权的受益人取得签证会阻碍自由航行权”，但并没有说明原因。<sup>44</sup> 判决中也没有说明为什么非哥斯达黎加国民也有权从自由航行权中受益，从而不遵循圣胡安河主权所有者的要求。<sup>45</sup> 塞普尔韦达-埃莫法官认为，禁止尼加拉瓜对圣胡安河上航行的外国人加以签证要求，将增加尼加拉瓜的公共安全风险，将免于

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<sup>40</sup> Judgement, para. 114.

<sup>41</sup> Judgement, pp. 257-258, para. 115.

<sup>42</sup> Judgement, p. 258, para. 116.

<sup>43</sup> Judgement, p. 258, para. 118.

<sup>44</sup> Sepulveda-Amor, J., sep. op., paras. 8-12.

<sup>45</sup> Sepulveda-Amor, J., sep. op., para. 13.

签证的权利扩展到除哥斯达黎加以外的所有外国人尤其如此，这可能将迫使尼加拉瓜沿圣胡安河左岸建立一系列移民关卡，即使这样也不一定能完全阻止外国人从圣胡安河非法进入尼加拉瓜的陆地领土。<sup>46</sup>

纪尧姆法官提出了两个观点：其一，自由航行权的受益权人(beneficiaries)仅是哥斯达黎加船只及其运营者，而不包括船上人员，因此尼加拉瓜可以在任何情况下要求这些人员取得签证。其二，主权国家对外国人进入其领土设置条件是最牢固确立的主权权利之一。纪尧姆法官认为，本案判决事实上也承认了尼加拉瓜基于执法和环保等理由拒绝某些人进入其领土的权利，这样处理并非没有好处；但更简明的处理方式是：直接支持尼加拉瓜的签证要求，同时在判决中指出尼加拉瓜执行签证规则时不得实质阻碍哥斯达黎加行使自由航行权。<sup>47</sup>

#### 4. 收费

哥斯达黎加请求法院宣布，尼加拉瓜不得对圣胡安河上航行的哥斯达黎加船只及乘客收取任何费用。这一请求主要涉及离境许可、签证和游客卡费用。尼加拉瓜认为，这些并非是为航行付费，而是为提供各种文件的服务付费。如前所述，法院已判定尼加拉瓜无权要求哥斯达黎加船上人员购买游客卡或取得签证，但有权要求哥方船只取得离境许可，那么尼加拉瓜是否有权对离境许可证收费？<sup>48</sup>

法院讨论了双方争议的 1858 年条约第 6 条最后一句话的含义：

“两国的船舶都可以在该河段常用航道的任意一边河岸停泊，不用缴纳任何税赋/费用和关税，除非两国政府另有约定。”

其中“不用缴纳”的对象，尼加拉瓜翻译为“税赋(impost)”，哥斯达黎加则翻译为“费用(charge)和关税(duty)”，即，尼加拉瓜认为这句话只涉及税赋，而哥斯达黎加认为，依据这句话，尼加拉瓜不得对哥方船只收取“任何费用”。不论如何翻译，法院认为这句话包含的核心意思有两个：一是赋予双方船只在对侧河岸停泊的权利，二是规定行使这种特定权利是免费的，不用缴纳钱财的。法院认为不能将这句话进行延伸解读为禁止尼加拉瓜对圣胡安河上航行的船只收取任何费用，<sup>49</sup>

具体到本案涉及的费用，即离境许可证费用，法院认为，虽然尼加拉瓜有权

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<sup>46</sup> Sepulveda-Amor, J., sep. op., paras. 14-15.

<sup>47</sup> Guillaume, J., decl., para. 21.

<sup>48</sup> Judgement, p. 259, para. 120.

<sup>49</sup> Judgement, pp. 259-260, paras. 121-122.

在圣胡安河上为了安全、环境和执法等目的检查船只、颁发离境许可，但这些属于主权国家行使警察权的行为，不包括对船只运营者提供服务，因此收费是违法的。<sup>50</sup>

## 5. 航行时间表

尼加拉瓜为圣胡安河上的航行设置了时间表，禁止船只在晚上航行，哥斯达黎加认为这是对其“永久”和“自由”航行权的侵犯。<sup>51</sup> 但法院认为，管理者有权对管理对象施以限制。尼加拉瓜设置航行时间表是为了合法目的，即航行安全和环境保护，且其普遍适用于圣胡安河上航行的所有船只，具有非歧视性。虽然哥斯达黎加的自由航行权受到一定影响，但法院认为这种影响没有构成“非法阻碍”。<sup>52</sup> 哥斯达黎加提出，设置时间表是“不合理的”，航行安全目的可以通过其它方式实现，例如要求船只在晚上航行时打开灯光，以及在危险地段设置灯光指示等等。但法院认为哥斯达黎加没有论证这些措施的可行性，包括其成本和有效性等等，因此不能证明尼加拉瓜管理措施的不合理性。<sup>53</sup>

## 6. 悬挂国旗

法院判定，尼加拉瓜作为圣胡安河的主权享有者，有权要求哥斯达黎加船只悬挂尼加拉瓜国旗。“这一要求从任何方面来说都不能被视为哥斯达黎加船只行使 1858 年条约下的自由航行权的阻碍。”<sup>54</sup>

# 四、法院关于哥斯达黎加沿岸居民生存性捕鱼权的判决

本案判决中讨论的沿岸居民生存性捕鱼不包括商业性捕鱼或竞技垂钓，也不包括在河上使用船只捕鱼，而只包括哥斯达黎加河岸居民为生存目的从该侧河岸进行的捕鱼活动。<sup>55</sup>

当事国双方都承认哥斯达黎加居民生存性捕鱼实践的长期存在，它们的争议在于这种实践对尼加拉瓜是否有约束力。<sup>56</sup>

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<sup>50</sup> Judgement, p. 260, para. 123.

<sup>51</sup> Judgement, p. 261, para. 125.

<sup>52</sup> Judgement, p. 261, paras. 126-127.

<sup>53</sup> Judgement, p. 262, para. 128.

<sup>54</sup> Judgement, p. 263, para. 132.

<sup>55</sup> Judgement, pp. 265-266, para. 141.

<sup>56</sup> Judgement, p. 265, para. 140.

为解决这一争议，法院作出了以下论证：

“这种实践因其性质，特别是因其发生的区域遥远，涉及的人口稀少，所以不可能在任何官方文件中以任何正式形式被记录。在法院看来，从这种延续了非常长时间未被打扰和未被质疑的实践中产生了一种权利，尼加拉瓜对此从未提出反对，这一点是特别重要的。法院从而判定哥斯达黎加拥有一项习惯法权利。”<sup>57</sup>

法院补充说明，这种权利受制于尼加拉瓜基于适当目的，特别是为保护资源和环境而采取的渔业管理措施。<sup>58</sup>

## 五、圣胡安河航行权与相关权利案的影响与启示

### （一）条约演化解释

#### 1. 条约中意义演化用语的两种解释方法

如果条约订立后，其中某些用语的含义随着时间流逝发生了演化，是应当依据这些词汇在条约订立之时的意义来解释（当时意义解释），还是依据它们在条约适用之时的意义来解释（演化解释/当代意义解释），《维也纳条约法公约》第31条和32条所反映的条约解释习惯法规则并未给出明确答案。

当时意义解释方法在国际司法实践中应用广泛。例如，国际法院在1952年美国国民在摩洛哥权利案（Rights of Nationals of the United States of America in Morocco）中对“争议”一词的解释，<sup>59</sup>国际仲裁庭在1994年阿根廷—智利边界案（Boundary Dispute between Argentina and Chile）中对“分水岭（water-parting）”一词的解释，<sup>60</sup>都是依据其在条约签订时的意义。在1999年卡西基利岛/塞杜杜岛案（Kasikili/Sedudu Island Case）中，国际法院考虑到1890年条约缔结时的情况，将英文文本中的主航道中间线（centre of the main channel）和德文文本中使用的主航道中心线（thalweg）二词认定为

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<sup>57</sup> Judgement, pp. 265-266, para. 141.

<sup>58</sup> Judgement, pp. 265-266, para. 141.

<sup>59</sup> *Rights of Nationals of the United States of America in Morocco* (France v. United States of America), Judgement, I.C.J. Reports 1952, p. 176.

<sup>60</sup> *Case concerning a boundary dispute between Argentina and Chile concerning the delimitation of the frontier line between boundary post 62 and Mount Fitzroy*, 22 RIAA. (1994), para. 130.

同义词。<sup>61</sup> 2002 年厄立特里亚-埃塞俄比亚划界仲裁案 (Delimitation of the Border between Eritrea and Ethiopia)<sup>62</sup>和 2002 年喀麦隆与尼日利亚领土和海洋边界争端案 (Land and Maritime Boundary between Cameroon and Nigeria)<sup>63</sup>同样采用了“当时意义解释”方法。

相对来说, 演化解释/当代意义解释是比较新的一种条约解释方法。国际法院首次运用条约演化解释方法是在 1971 年纳米比亚案 (Namibia Case) 中:

“《国际联盟盟约》第 22 条中所指‘今世特别困难状况’和人民的‘福祉与发展’并非一成不变的概念, 而是从定义上就具有演化性 (by definition evolutionary), ‘神圣的信任’概念也是如此。”<sup>64</sup>

继该案之后, 国际法院适用演化解释方法的典型案例还有本案判决援引的爱琴海大陆架划界案, 以及 1997 年多瑙河案 (Gabčíkovo-Nagymaros Project Case)。在后案中, 国际法院注意到当事国 1977 年条约中的第 15、19 和 20 条都是由关于环境保护的“演进性条款”组成, 因此判定: 这个领域新涌现出的理念应当“包含在共同合作计划中”。<sup>65</sup>

## 2. 条约演化解释的适用条件

虽然国际司法实践对条约中意义演化用语采用的解释方法并不一致, 但它们都遵循一个同样的原则, 即“解释条约用语应当依据当事国缔结条约时的共同意愿”。<sup>66</sup>

至于如何确定当事国缔约时的共同意愿, 国际法委员会在其报告中指出, 应当通过条约解释的一般方法来解决:

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<sup>61</sup> *Kasikili/Sedudu Island* (Botswana/Namibia), Judgment, I.C.J. Reports 1999 (II), p. 1062, para. 25.

<sup>62</sup> *Delimitation of the Border between Eritrea and Ethiopia*, Award of 13 April 2002, 25 R. I. A. A. pp. 83-195.

<sup>63</sup> *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgement, I.C.J. Reports 2002, Para. 59.

<sup>64</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276(1970)*, Advisory Opinion, I.C.J. Reports 1971, para. 53.

<sup>65</sup> *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), Judgment, I.C.J. Reports 1997, para. 112.

<sup>66</sup> Judgment, p. 242, para. 63. See also, Guillaume, J., decl., para. 10, and *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276(1970)*, Advisory Opinion, I.C.J. Reports 1971, para. 53.

“解释者必须从 1969 年《维也纳公约》第 31 条和 32 条所指的物质材料中找到关于当事方这方面意愿的确凿证据，即，条约用语、上下文、条约目的与宗旨，必要时可以使用条约准备材料。”<sup>67</sup>

国际法学会在经过热烈讨论后，也在其关于“国际法上的时际法问题”的决议中作出类似表述：

“当条约提及某个法律或其它概念且并未定义它时，应当依据条约解释的通常方法来确定这个概念是应当依据条款起草时的含义来解释，还是依据条约适用时的含义来解释。”<sup>68</sup>

国际法院在司法实践中适用“条约解释的通常方法”探究缔约国关于条约解释的意愿，逐渐明确了条约演化解释方法的适用条件。<sup>69</sup> 法院在纳米比亚案中提到，“从定义上具有演化性”的概念应作演化解释。在爱琴海大陆架划界案中，法院除了从解释对象自身性质出发，指出“一般性术语（generic term）”应当进行演化解释，还首次提出，因为某些条约具有“延续性（continuing duration）”，起草者不太可能让其中的一般性术语有固定含义而不顾及国际法的嗣后发展。<sup>70</sup> 在本案中，法院对爱琴海大陆架划界案的论证逻辑进行了梳理，清晰地归纳出条约演化解释的两个适用条件，即条约用语的“一般性”和条约的“延续性”，并以此为前提论证了条约演化解释方法在本案中的适用。<sup>71</sup>

### 3. 本案的影响与争议

本案确认和巩固了条约演化解释方法的两个适用条件，对后续国际争端案例中条约演化解释的适用产生了重要影响。

在本案判决作出的同一年（2009 年），WTO 上诉机构即援引本案判决，适用条约演化解释方法在中—美出版物市场准入案（China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products）中作出了对中国的不利裁决。中国认为

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<sup>67</sup> Report of the International Law Commission on the work of its fifty-seventh session, 2005, A/CN.4/SER.A/2005/Add.1 (Part 2), p. 88, para. 474.

<sup>68</sup> Resolution of the Institut de droit international, Wiesbaden, 11 August 1975, on the ‘International Problem in Public International Law’. Vol. 56, p. 536, para. 4.

<sup>69</sup> 参见吴卡：《条约解释的新动向：当代意义解释对当时意义解释》，载《法学评论》2013 年第 2 期（总第 178 期），第 85 页。

<sup>70</sup> Judgement, p. 243, para. 66.

<sup>71</sup> Judgement, p. 243, para. 67.

自己在《服务贸易总协定》(GATS) 下就“录音产品分销服务 (sound recording distribution service)”所作承诺只适用于物质产品, 而不包括电子产品, 因为 2001 年中国入世时后者并不存在。然而, WTO 专家组和上诉机构都认为, “录音产品”和“分销”等术语具有充分的通用性 (sufficiently generic), 它们使用的情形会随着时间的变化而变化, 而且 GATS 及其承诺表属于无期限的多边条约, 成员承担的都是延续性、开放性的义务, 若因成员加入时间不同而对相同用语赋予不同涵义, 必然会破坏 GATS 具体义务承诺的可预见性、稳定性和明确性, 因此“录音产品分销服务”依其当代意义应当适用于电子方式分销的产品。

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该案再次确认了由爱琴海大陆架划界案提出、经本案确认和巩固的两个条约演化解释适用条件, 即条约用语的“一般性”(或“通用性”), 以及条约的“延续性”(或“无期限性”)。有学者认为, 在当事国并未在约文中明确表达演化解释意图时, “国际法院和 WTO 上诉机构主要根据条约用语的性质来直接推定当事国有按条约用语演化后的含义解释的意图, 进而运用该方法, 显然不符合条约解释的法理。”<sup>73</sup>

纪尧姆法官也对本案判决确认的演化解释适用条件提出了质疑。<sup>74</sup> 他认为在当事国没有明确表达当时意义解释或演化解释意图时, 只能用“推定”方式确认当事国缔约时的意图, 本案法院采用的演化解释适用条件即为“推定”, 但法院没有解释为什么要适用这种推定, 而不能适用其它的推定。他援引 1923 年常设国际法院温布尔登案 (Wimbledon Case) 的判决, 指出“对主权的限制”是采用限制性解释的充分条件,<sup>75</sup> 据此他认为本案中对尼加拉瓜领土主权的限制也应当进行限制性的解释。

## (二) 沿岸居民的权利

法院对 1858 年条约第 6 条的具体解释在本案之外没有广泛适用意义, 但法院关于沿岸居民最低限度航行权和生存性捕鱼权的判决对处理沿岸国与沿岸居

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<sup>72</sup> *China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (DS363)*, Appellate Body Report, paras. 395-397.

<sup>73</sup> 吴卡:《条约演化解释方法的最新实践及其反思》, 载《法学家》2012 年第 1 期, 第 161 页。

<sup>74</sup> Guillaume, J., decl., para. 15.

<sup>75</sup> S.S. “*Wimbledon*”, Judgements, 1923, P.C.J.J., Series A, No. 1, p. 24.



民之间的关系有一定的普适性。

### 1. 沿岸居民的最低限度航行权

虽然 1858 年条约第 6 条的措辞仅涉及商业航行，但法院对 1858 年条约进行了目的解释和系统解释，认为：

“在河岸构成两国边界的地段，考虑到当地的地理情况，1858 年条约的拟定者不可能有意剥夺河畔的哥斯达黎加居民为满足基本需求而使用河流的权利，即使他们的活动并非商业性质。”<sup>76</sup>

表面上看，这一结论仍然基于对特定条约的解释，但它的适用范围可能超越特定的条约关系，因为 1858 年条约采用的划界方式及适用的地理情况并非孤例，在世界其它地方也存在以河岸为界且该侧河岸居民日常利用河流通航的情况。有学者考证，在世界各国的现行边界中，共有 25 段国际边界以河岸为界，其总长度达到约 4000 公里。<sup>77</sup> 纪尧姆法官在其声明中列举了其中七段，它们分别存在于瑞士与法国、冈比亚与塞内加尔、塞内加尔与毛里塔尼亚、利比里亚与科特迪瓦、马来西亚与印度尼西亚、阿富汗与巴基斯坦、以及危地马拉与洪都拉斯之间。他还列举了联邦国家不同法域之间的类似安排，例如瑞士的苏黎世与沙夫豪森之间，美国的弗吉尼亚州与哥伦比亚特区之间、阿拉巴马州与乔治亚州之间、佛蒙特州与新罕布什尔州之间的边界。<sup>78</sup> 如果对这些国家（州）之间的边界条约或协定参照本案判决进行目的解释和系统解释，在条约约文没有相反表示的前提下，一般来说也应当肯定沿岸居民为满足日常基本需求的最低限度航行权。

纪尧姆法官表示理解法院支持“沿岸居民最低限度航行权”的根源，即人道主义考虑，但他批评法院在这个问题上的论证“极为薄弱”。在他看来，1858 年条约的唯一目的是确定当事国之间的边界，对条约的目的解释无法推导出缔约双方与约文本身相反的意图，即赋予哥斯达黎加在尼加拉瓜领土上进行“非商业性航行”的权利。他认为法院最多只能从 1858 年条约序言和国际法一般原则中推导出双方当事国为解决沿岸居民交通困难问题进行谈判的义务。<sup>79</sup>

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<sup>76</sup> Judgement, p. 246, para. 79.

<sup>77</sup> Coalter G. Lathrop, *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, The American Journal of International Law, Vol. 104, No. 3 (July 2010), p. 459.

<sup>78</sup> Guillaume, J., decl., para. 6.

<sup>79</sup> Guillaume, J., decl., para. 19.

## 2. 沿岸居民的生存性捕鱼权

哥斯达黎加提出，有一种实践长期存在，即允许圣胡安河哥方一侧河岸居民为生存目的在河内捕鱼。哥斯达黎加认为这种实践不受 1858 年条约影响，是一种习惯法权利（customary right）。哥斯达黎加强调这种实践的延续性，并指出在本案提起以前，尼加拉瓜从未对这种实践提出反对。尼加拉瓜则认为，哥斯达黎加并未证明这种实践已成为一种对尼加拉瓜有约束力的习惯（custom）。尼加拉瓜承认其过去一般都会容忍哥斯达黎加河岸居民在圣胡安河进行非商业性捕鱼，但认为这种容忍不能被视为法律权利的来源。而且尼加拉瓜认为哥斯达黎加一贯接受，它除了条约规定的权利以外，再没有任何其它习惯法权利。在庭审中，尼加拉瓜重申它“绝对没有任何禁止哥斯达黎加居民生存性捕鱼活动的意图”。<sup>80</sup>

法院判定哥斯达黎加居民为生存目的从哥方一侧河岸在圣胡安河捕鱼是哥斯达黎加拥有的“一项习惯法权利”。法庭认为“从这种延续了非常长时间未被打扰和未被质疑的实践中产生了一种权利”，并强调“尼加拉瓜对此从未提出反对”特别重要。<sup>81</sup>

作为对比，法院分析了哥斯达黎加居民在圣胡安河用船只进行捕鱼的实践。法院认为这种实践只有“有限的和晚近的证据”，而且这些证据主要还是关于尼加拉瓜当局对这种捕鱼活动的反对，因此不足以产生相应的权利。<sup>82</sup> 通过这种对比，法院强调了“长期的”、“未被反对的”实践对于证明习惯法权利的重要性。

法院这种论证习惯法权利的方式受到纪尧姆法官和塞普尔韦达-埃莫法官的质疑。纪尧姆法官认为生存性捕鱼权的习惯法地位并不确定，因此法院判决不应有先例作用。<sup>83</sup> 塞普尔韦达-埃莫法官认为法院未论证习惯法规则必要构成要素的存在，与国际法院以往确认习惯法规则的方式不一致，并指出法院应考虑其它“更可靠的法律基础”来支持哥斯达黎加居民的生存性捕鱼权，即依据“既得权原则（principle of acquired or vested rights）”，或基于尼加拉瓜在庭审中做出的“不阻碍哥斯达黎加沿岸居民生存性捕鱼”的承诺。<sup>84</sup>

纪尧姆法官和塞普尔韦达-埃莫法官的质疑有其合理性，因为法院的确没有

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<sup>80</sup> Judgement, p. 265, para. 140.

<sup>81</sup> Judgement, pp. 265-266, para. 141.

<sup>82</sup> Judgement, p. 266, para. 143.

<sup>83</sup> Guillaume, J., decl., para. 22.

<sup>84</sup> Sepulveda-Amor, Sep. Op., paras. 20-36.

充分论证习惯法规则必要构成要素的存在,即关于生存性捕鱼权的普遍国家实践和法律确信。事实上,生存性捕鱼权并不是源于习惯国际法的权利,而是因为特定地域由特定人群长期使用资源产生的既得权。享有这项权利的主体并非作为主权国家的哥斯达黎加,而是作为个人的哥斯达黎加河岸居民。相应地,尼加拉瓜负有容忍这项私权利在其主权范围内行使的义务。

国际司法实践曾多次涉及对国家主权范围内他国民众传统权利或既得权利的认可。在1992年土地、岛屿和海洋边界争端案(Land, Island and Maritime Frontier Dispute)中,国际法院指出,在领土划界将一方当事国国民的财产划归另一当事国领土的情况下,双方当事国应当“充分尊重既得权利,以人性和有序的方式”采取必要措施。<sup>85</sup> 1999年厄立特里亚—也门仲裁案(Eritrea v. Yemen Case)确认了红海海域的传统捕鱼权:“在对这些岛屿行使主权时,也门应当维护传统捕鱼制度,允许厄立特里亚和也门两国的渔民自由进入和使用这些岛屿,从而让这些贫穷而勤勉的渔民能够维持生活和生计。”<sup>86</sup> 2002年厄立特里亚—埃塞俄比亚划界仲裁案指出,在两国间的河流内划定边界时,“应当考虑当地民众进入河流的习惯法权利。”<sup>87</sup> 2016年南海仲裁案(The South China Sea Arbitration)也提及“领海内的传统捕鱼权继续得到国际法的保护”。<sup>88</sup> 上述案例涉及陆地边界、边界河流、岛屿和领海等不同地域范围,但都反映了同样的习惯法原则,即,在国家边界与民众传统活动范围不符的情况下,当地民众的传统权利应当受到权利行使地主权国家的尊重,除非当事国通过条约或协议做出了新的安排。

### (三) 国际河流航行制度

在本案中,哥斯达黎加要求法院考虑“一般国际法上适用于‘国际河流’航行的规则”,<sup>89</sup> 但法院认为并没有必要判断“在习惯国际法上是否存在适用于‘国

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<sup>85</sup> *Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras; Nicaragua intervening), Judgement, I.C.J. Reports 1992, para. 66.

<sup>86</sup> *Award of the Arbitral Tribunal in the first stage of the proceedings between Eritrea and Yemen (Territorial Sovereignty and Scope of the Dispute)*, decision of 9 October 1998, 22 R.I.A.A. p. 329, para. 526.

<sup>87</sup> *Delimitation of the Border between Eritrea and Ethiopia*, Award of 13 April 2002, 25 R.I.A.A., p. 172, para 7.3.

<sup>88</sup> *The South China Sea Arbitration* (Philippines v. China), Award of 12 July 2016, PCA Case No 2013-19, para. 804.

<sup>89</sup> Judgement, pp.232-233, para. 32.

际河流’航行的制度”，也没有必要判断“圣胡安河是否属于‘国际河流’。”<sup>90</sup>

事实上，习惯国际法上并没有关于“国际河流”的明确定义，也不存在规定“国际河流”航行权的制度。一些河流基于条约对所有国家的商业船只开放航行；一些河流对沿岸国船只开放；还有一些河流由沿岸国享有绝对主权，不对任何国际航行开放。在这方面，拉丁美洲和欧洲国家对待跨境河流航行权的态度有鲜明的区别。欧洲的主要跨境河流都存在自由航行制度，但在拉丁美洲不存在“自由航行”的普遍实践，因此，如果没有国家特许或条约规定，在拉美大陆上是不存在所谓国际河流自由航行权的。

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<sup>90</sup> Judgement, p. 233, para. 34.

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,  
ADVISORY OPINIONS AND ORDERS

**DISPUTE REGARDING NAVIGATIONAL  
AND RELATED RIGHTS**

(COSTA RICA *v.* NICARAGUA)

**JUDGMENT OF 13 JULY 2009**

**2009**

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,  
AVIS CONSULTATIFS ET ORDONNANCES

**DIFFÉREND RELATIF À DES DROITS  
DE NAVIGATION ET DES DROITS CONNEXES**

(COSTA RICA *c.* NICARAGUA)

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JUDGMENT

DISPUTE REGARDING NAVIGATIONAL  
AND RELATED RIGHTS  
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DIFFÉREND RELATIF À DES DROITS  
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13 JUILLET 2009

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DISPUTE REGARDING NAVIGATIONAL  
AND RELATED RIGHTS

(COSTA RICA v. NICARAGUA)

*Geographical and historical context and origin of the dispute.*

*The San Juan River — Border between Costa Rica and Nicaragua — History of Costa Rica and Nicaragua after independence — War on the filibusters — 1858 Treaty of Limits — 1888 Cleveland Award — Demarcation of the boundary — 1916 decision of the Central American Court of Justice — 1956 Fournier-Sevilla Agreement — Incidents relating to navigation on the San Juan — 1995 Cuadra-Castro Communiqué — Prohibition by Nicaragua of navigation of Costa Rican police vessels — 1998 Cuadra-Lizano Communiqué — 2002 Tovar-Caldera Agreement — Proceedings instituted before the Court by Costa Rica — No objections to the jurisdiction of the Court raised by Nicaragua.*

\*

*Costa Rica's right of free navigation on the San Juan River.*

*Legal basis of the right of free navigation — No need for the Court to decide whether the San Juan is an "international river" — The 1858 Treaty is sufficient to settle the question of the extent of Costa Rica's right of free navigation — Costa Rica's right of free navigation mainly based on Article VI of the 1858 Treaty — Relevance of the Cleveland Award, the 1916 decision of the Central American Court of Justice and the Fournier-Sevilla Agreement.*

*Disagreement between the Parties as to the types of navigation covered by the 1858 Treaty — Interpretation of the expression "con objetos de comercio" in Article VI of the Treaty — Treaty provisions establishing limitations on sovereignty — General rules of interpretation applicable — No intention by authors of 1858 Treaty to establish any hierarchy as between Nicaragua's sovereignty over the San Juan and Costa Rica's right of free navigation — None of the points under examination in the case was settled by the Cleveland Award of 1888 or by the decision of the Central American Court of Justice of 1916.*

*Meaning of the phrase "con objetos" — Necessity to be able to give the sen-*

*tence coherent meaning — Additional arguments — Meaning of the word “objetos” in Article VIII of the 1858 Treaty — 1857 “Cañas-Martínez” Peace Treaty — English translations of the 1858 Treaty submitted by each Party to President Cleveland — The expression “con objetos de comercio” means “for the purposes of commerce”.*

*Meaning of the word “commerce” — Evolving meaning of generic terms in a treaty — Present meaning of the notion of “commerce” must be accepted for purposes of applying the Treaty — The right of free navigation applies to the transport of persons as well as the transport of goods — Navigation by vessels used in the performance of governmental activities or to provide public services which are not commercial in nature cannot be regarded as falling within the “purposes of commerce” under Article VI.*

*Types of navigation covered by the right of free navigation “for the purposes of commerce” pursuant to Article VI of the 1858 Treaty — Navigation of vessels belonging to Costa Rican riparians in order to meet the basic requirements of everyday life does not fall within the scope of Article VI of the Treaty — Navigation covered by other provisions of the Treaty — Population inhabiting the south bank of the San Juan Costa Rican commonly used the river for travel at the time of the conclusion of the Treaty — Presumption that the Parties intended to preserve the right of riparians to use the river to meet their essential requirements — Right to be inferred from the provisions of the Treaty as a whole.*

*No special régime for “official vessels” established in Article VI of the 1858 Treaty — “Official vessels” navigating for the “purposes of commerce” — “Official vessels” used for public order activities — Question of revenue service vessels settled by the 1888 Cleveland Award — Navigation of official Costa Rican vessels used for public order activities and public services lies outside the scope of Article VI of the 1858 Treaty — Right of navigation of certain Costa Rican official vessels for the purpose of providing services to population is inferred from the provisions of the Treaty as a whole.*

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*Nicaragua’s power of regulation of navigation on the San Juan River.*

*Characteristics of regulations — Environmental protection as a legitimate purpose of a regulation — Lack of any specific provision in the Treaty relating to notification of regulatory measures — Factors imposing an obligation of notification — 1956 Agreement — Particular situation of a river in which two States have rights — Notification implicit in the nature of regulation — Obligation of Nicaragua to notify Costa Rica of regulations — Costa Rica’s obligation to establish unreasonableness and allegedly disproportionate impact of regulations.*

*Requirement to stop and identification — Right of Nicaragua to know the identity of persons entering and leaving its territory — Nicaraguan requirement that vessels stop on entering and leaving the San Juan is lawful — No legal justification for the requirement to stop at any intermediate point — Failure of Costa Rica to show that the regulation is unreasonable.*

*Departure clearance certificates — Purposes invoked by Nicaragua are legitimate — Requirement for departure clearance certificates does not appear to*

*have imposed any significant impediment to freedom of navigation — No suggestion from Costa Rica that it would be in a position to issue departure clearance certificates — No instance of navigation being impeded by an arbitrary refusal of a certificate.*

*Visas and tourist cards — Distinction to be made between requiring visas and requiring tourist cards — The power of a State to issue or refuse visas entails discretion — Titleholder and beneficiaries of the right of free navigation — Nicaragua may not impose a visa requirement on persons who benefit from Costa Rica's right of free navigation — Imposition of a visa requirement constitutes a breach of the Treaty right — Legal situation remains unaffected even if no impediment to the freedom of navigation resulting from visa requirement — Tourist cards are not intended to facilitate control over entry into the San Juan River — No legitimate purpose — Purchase of tourist cards is inconsistent with the freedom of navigation.*

*Charges — No service provided by issuance of departure clearance certificates — Requirement to pay is unlawful.*

*Timetabling — Prohibition of night time navigation — Measure is not impediment to the freedom of navigation — Purpose pursued is legitimate — Unreasonableness not established.*

*Flags — Nicaragua may require certain Costa Rican vessels to fly its flag — No impediment to the exercise of the freedom of navigation — No evidence that Costa Rican vessels have been prevented from navigation on the San Juan River as a result of this requirement.*

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*Subsistence fishing by riparians of the Costa Rican bank.*

*Question of admissibility raised by Nicaragua — The Court's power of appreciation — The alleged interferences by Nicaragua with the claimed right of subsistence fishing post-date the filing of the Application — A sufficiently close connection exists between the claim relating to subsistence fishing and the Application — Nicaragua has not been disadvantaged by Costa Rica's failure to give notice of the claim in the Application — Nor has the Court been disadvantaged in its understanding of the issues — Objection to admissibility cannot be upheld.*

*Merits of the claim — Dispute solely concerns subsistence fishing — Practice long established — Failure of Nicaragua to deny existence of a right arising from such a practice — Costa Rica has a customary right — Nicaragua may take regulatory measures adopted for proper purposes — Customary right does not extend to fishing from vessels on the river.*

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*Claims made by the Parties in their final submissions.*

*The claims of Costa Rica upheld or dismissed in the operative part of the Judgment — A finding of wrongfulness regarding the conduct of a State entails an obligation to cease that conduct — Cessation of a violation of a continuing character and the consequent restoration of the legal situation constitute a form of reparation — No evidence that Costa Rica has suffered a financially assess-*

*able injury — Assurances and guarantees of non-repetition ordered only if the circumstances so warrant — No reason to suppose that a State will repeat act or conduct declared wrongful.*

*Nicaragua's claim to be upheld to the extent that it corresponds to the reasoning in respect of Costa Rica's claims — Nicaragua's request for a declaration as to certain rights and obligations of the Parties not upheld.*

## JUDGMENT

*Present: President OWADA; Judges SHI, KOROMA, AL-KHASAWNEH, BURGENTHAL, ABRAHAM, KEITH, SEPÚLVEDA-AMOR, BENNOUNA, SKOTNIKOV, CAÑADO TRINDADE, YUSUF, GREENWOOD; Judge ad hoc GUILLAUME; Registrar COUVREUR.*

In the case concerning the dispute regarding navigational and related rights,

*between*

the Republic of Costa Rica,

represented by

H.E. Mr. Edgar Ugalde-Alvarez, Ambassador, Vice-Minister of Foreign Affairs of Costa Rica,

as Agent;

Mr. James Crawford, S.C., F.B.A., Whewell Professor of International Law, University of Cambridge, member of the Institut de droit international,

Mr. Lucius Caflisch, Emeritus Professor of International Law, Graduate Institute of International and Development Studies, Geneva, member of the International Law Commission, member of the Institut de droit international,

Mr. Marcelo G. Kohen, Professor of International Law, Graduate Institute of International and Development Studies, associate member of the Institut de droit international,

Mr. Sergio Ugalde, Senior Adviser to the Ministry of Foreign Affairs of Costa Rica, member of the Permanent Court of Arbitration,

Mr. Arnaldo Brenes, Senior Adviser to the Ministry of Foreign Affairs of Costa Rica,

Ms Kate Parlett, Special Adviser to the Ministry of Foreign Affairs of Costa Rica, Solicitor (Australia), PhD candidate, University of Cambridge (Jesus College),

as Counsel and Advocates;

H.E. Mr. Francisco José Aguilar-de Beauvilliers Urbina, Ambassador of Costa Rica to the Kingdom of the Netherlands,

Mr. Ricardo Otarola, Chief of Staff to the Vice-Minister of Foreign Affairs of Costa Rica,

Mr. Sergio Vinocour, Minister and Consul General of Costa Rica in the French Republic,  
 Mr. Norman Lizano, Consul General of Costa Rica in the Kingdom of the Netherlands,  
 Mr. Carlos Garbanzo, Counsellor at the Permanent Mission of Costa Rica to the United Nations Office at Geneva,  
 Mr. Fouad Zarbiev, PhD candidate, Graduate Institute of International and Development Studies, Geneva,  
 Mr. Leonardo Salazar, National Geographic Institute of Costa Rica,  
 as Advisers;  
 Mr. Allan Solis, Third Secretary at the Embassy of Costa Rica in the Kingdom of the Netherlands,  
 as Assistant Adviser,

*and*

the Republic of Nicaragua,  
 represented by

H.E. Mr. Carlos José Argüello Gómez, Ambassador of Nicaragua to the Kingdom of the Netherlands,  
 as Agent and Counsel;

Mr. Ian Brownlie, C.B.E., Q.C., F.B.A., member of the English Bar, former Chairman of the International Law Commission, Emeritus Chichele Professor of Public International Law, University of Oxford, member of the Institut de Droit international, Distinguished Fellow, All Souls College, Oxford,

Mr. Stephen C. McCaffrey, Professor of International Law at the University of the Pacific, McGeorge School of Law, Sacramento, United States of America, former member of the International Law Commission,

Mr. Alain Pellet, Professor at the University of Paris Ouest, Nanterre-La Défense, member and former Chairman of the International Law Commission, associate member of the Institut de droit international,

Mr. Paul Reichler, Attorney at Law, Foley Hoag LLP, Washington D.C., member of the Bar of the United States Supreme Court, member of the Bar of the District of Columbia,

Mr. Antonio Remiro Brotóns, Professor of International Law, Universidad Autónoma, Madrid, associate member of the Institut de droit international,

as Counsel and Advocates;

Ms Irene Blázquez Navarro, Doctor of Public International Law, Universidad Autónoma, Madrid,

Ms Clara E. Brillenbourg, Foley Hoag LLP, member of the Bars of the District of Columbia and New York,

Mr. Lawrence H. Martin, Attorney at Law, Foley Hoag LLP, Washington D.C., member of the Bar of the United States Supreme Court, member of the Massachusetts Bar, member of the Bar of the District of Columbia,

Mr. Walner Molina Pérez, Juridical Adviser, Ministry of Foreign Affairs of Nicaragua,

Mr. Daniel Müller, Researcher at the Centre de droit international de Nanterre (CEDIN), University of Paris Ouest, Nanterre-La Défense,

Ms Tania Elena Pacheco Blandino, Counsellor, Embassy of Nicaragua in the Kingdom of the Netherlands,  
Mr. Julio César Saborio, Juridical Adviser, Ministry of Foreign Affairs of Nicaragua,  
Mr. César Vega Masís, Director of Juridical Affairs, Sovereignty and Territory, Ministry of Foreign Affairs of Nicaragua,  
as Assistant Counsel,

THE COURT,

composed as above,

after deliberation,

*delivers the following Judgment:*

1. On 29 September 2005 the Republic of Costa Rica (hereinafter “Costa Rica”) filed in the Registry of the Court an Application of the same date, instituting proceedings against the Republic of Nicaragua (hereinafter “Nicaragua”) with regard to a “dispute concerning navigational and related rights of Costa Rica on the San Juan River”.

In its Application, Costa Rica seeks to found the jurisdiction of the Court on the declaration it made on 20 February 1973 under Article 36, paragraph 2, of the Statute, as well as on the declaration which Nicaragua made on 24 September 1929 under Article 36 of the Statute of the Permanent Court of International Justice and which is deemed, pursuant to Article 36, paragraph 5, of the Statute of the present Court, for the period which it still has to run, to be acceptance of the compulsory jurisdiction of this Court. Costa Rica also seeks to found the jurisdiction of the Court on the Tovar-Caldera Agreement signed between the Parties on 26 September 2002. In addition, Costa Rica invokes as a basis of the Court’s jurisdiction the provisions of Article XXXI of the American Treaty on Pacific Settlement, officially designated, according to Article LX thereof, as the “Pact of Bogotá”.

2. Pursuant to Article 40, paragraph 2, of the Statute, the Registrar immediately communicated a certified copy of the Application to the Government of Nicaragua; and, in accordance with paragraph 3 of that Article, all States entitled to appear before the Court were notified of the Application.

3. Pursuant to the instructions of the Court under Article 43 of the Rules of Court, the Registrar addressed to States parties to the Pact of Bogotá the notifications provided for in Article 63, paragraph 1, of the Statute of the Court. In accordance with the provisions of Article 69, paragraph 3, of the Rules of Court, the Registrar moreover addressed to the Organization of American States the notification provided for in Article 34, paragraph 3, of the Statute of the Court, and asked that organization whether or not it intended to furnish observations in writing within the meaning of Article 69, paragraph 3, of the Rules of Court.

4. Since the Court included upon the Bench no judge of the nationality of either of the Parties, each Party proceeded to exercise its right conferred by Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case. Costa Rica chose Mr. Antônio Cançado Trindade and Nicaragua Mr. Gilbert Guillaume. Mr. Cançado Trindade was subsequently elected as a Member of the Court. Costa Rica informed the Court that it had decided not to choose a new judge *ad hoc*.

5. By an Order dated 29 November 2005, the Court fixed 29 August 2006 and 29 May 2007, respectively, as the time-limits for the filing of the Memorial of Costa Rica and the Counter-Memorial of Nicaragua; those pleadings were duly filed within the time-limits so prescribed.

6. Referring to Article 53, paragraph 1, of the Rules of Court, the Government of the Republic of Ecuador and the Government of the Republic of Colombia respectively asked to be furnished with copies of the pleadings and documents annexed. Having ascertained the views of the Parties pursuant to that Article, the Court decided not to grant these requests. The Registrar communicated the Court's decision to the Government of the Republic of Ecuador and the Government of the Republic of Colombia, as well as to the Parties.

7. By an Order of 9 October 2007, the Court authorized the submission of a Reply by Costa Rica and a Rejoinder by Nicaragua, and fixed 15 January 2008 and 15 July 2008 as the respective time-limits for the filing of those pleadings. The Reply and the Rejoinder were duly filed within the time-limits so prescribed.

8. By letter of 27 November 2008, the Agent of Costa Rica expressed his Government's desire to produce five new documents, in accordance with Article 56 of the Rules of Court. As provided for in paragraph 1 of that Article, those documents were communicated to Nicaragua. By letter of 10 December 2008, the Agent of Nicaragua informed the Court that his Government did not give its consent to the production of the requested documents.

The Court decided, pursuant to Article 56, paragraph 2, of the Rules, to authorize the production of four of the five documents submitted by Costa Rica, it being understood that Nicaragua would have the opportunity, pursuant to paragraph 3 of that Article, to comment subsequently thereon and to submit documents in support of those comments. That decision was communicated to the Parties by letters from the Registrar dated 18 December 2008.

9. In accordance with Article 53, paragraph 2, of the Rules of Court, the Court decided, after ascertaining the views of the Parties, that copies of the pleadings and documents annexed would be made available to the public as from the opening of the oral proceedings.

10. Public hearings were held between 2 and 12 March 2009, at which the Court heard the oral arguments and replies of:

*For Costa Rica:* H.E. Mr. Edgar Ugalde-Alvarez,  
Mr. Arnoldo Brenes,  
Mr. Sergio Ugalde,  
Mr. Lucius Caffisch,  
Mr. Marcelo G. Kohen,  
Mr. James Crawford,  
Ms Kate Parlett.

*For Nicaragua:* H.E. Mr. Carlos José Argüello Gómez,  
Mr. Ian Brownlie,  
Mr. Antonio Remiro Brotóns,  
Mr. Alain Pellet,  
Mr. Paul Reichler,  
Mr. Stephen C. McCaffrey.

11. At the hearings, Members of the Court put questions to the Parties, to which replies were given in writing, within the time-limit fixed by the President in accordance with Article 61, paragraph 4, of the Rules of Court. Pursuant to Article 72 of the Rules of Court, each of the Parties submitted comments on the written replies provided by the other.

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12. In its Application, the following claims were made by Costa Rica:

“For these reasons, and reserving the right to supplement, amplify or amend the present Application, as well as to request the Court to establish provisional measures which might be necessary to protect its rights and to prevent the aggravation of the dispute, Costa Rica requests the Court to adjudge and declare that Nicaragua is in breach of its international obligations as referred to in paragraph 1 of this Application in denying to Costa Rica the free exercise of its rights of navigation and associated rights on the San Juan River. In particular the Court is requested to adjudge and declare that, by its conduct, Nicaragua has violated:

- (a) the obligation to facilitate and expedite traffic on the San Juan River within the terms of the Treaty of 15 April 1858 and its interpretation given by arbitration on 22 March 1888;
- (b) the obligation to allow Costa Rican boats and their passengers to navigate freely and without impediment on the San Juan River for commercial purposes, including the transportation of passengers and tourism;
- (c) the obligation to allow Costa Rican boats and their passengers while engaged in such navigation to moor freely on any of the San Juan River banks without paying any charges, unless expressly agreed by both Governments;
- (d) the obligation not to require Costa Rican boats and their passengers to stop at any Nicaraguan post along the river;
- (e) the obligation not to impose any charges or fees on Costa Rican boats and their passengers for navigating on the river;
- (f) the obligation to allow Costa Rica the right to navigate the river in accordance with Article Second of the Cleveland Award;
- (g) the obligation to allow Costa Rica the right to navigate the San Juan River in official boats for supply purposes, exchange of personnel of the border posts along the right bank of the San Juan River, with their official equipment, including the necessary arms and ammunitions, and for the purposes of protection, as established in the pertinent instruments;
- (h) the obligation to collaborate with Costa Rica in order to carry out those undertakings and activities which require a common effort by both States in order to facilitate and expedite traffic in the San Juan River within the terms of the Treaty of Limits and its interpretation given by the Cleveland Award, and other pertinent instruments;
- (i) the obligation not to aggravate and extend the dispute by adopting



measures against Costa Rica, including unlawful economic sanctions contrary to treaties in force or general international law, or involving further changes in the régime of navigation and associated rights on the San Juan River not permitted by the instruments referred to above.

Further, the Court is requested to determine the reparation which must be made by Nicaragua, in particular in relation to any measures of the kind referred to in paragraph 10 above.”

Paragraph 10 of the Application reads as follows:

“Costa Rica seeks the cessation of this Nicaraguan conduct which prevents the free and full exercise and enjoyment of the rights that Costa Rica possesses on the San Juan River, and which also prevents Costa Rica from fulfilling its responsibilities under Article II of the 1956 Agreement and otherwise. In the event that Nicaragua imposes the economic sanctions referred to above, or any other unlawful sanctions, or otherwise takes steps to aggravate and extend the present dispute, Costa Rica further seeks the cessation of such conduct and full reparation for losses suffered.”

13. In the written proceedings, the following submissions were presented by the Parties:

*On behalf of the Government of Costa Rica,*  
in the Memorial and in the Reply:

“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."

*On behalf of the Government of Nicaragua,*  
in the Counter-Memorial:

"On the basis of the facts and legal considerations set forth in the Counter-Memorial, the Court is requested:

To adjudge and declare that the requests of Costa Rica in her Memorial are rejected, on the following bases:

- (a) either because there is no breach of the provisions of the Treaty of 15 April 1858 on the facts;
- (b) or, as appropriate, because the obligation breach of which is alleged is not included in the provisions of the Treaty of 15 April 1858.

Moreover, the Court is also requested to make a formal declaration on the issues raised by Nicaragua in Section 2 of Chapter 7."

The relevant part of Section 2 of Chapter 7 of the Counter-Memorial reads as follows:

"Finally, in view of the above considerations, and in particular those indicated in Chapter 2 (E), Nicaragua requests the Court to declare that:

- (i) Costa Rica is obliged to comply with the regulations for navigation (and landing) in the San Juan imposed by Nicaraguan authorities in particular related to matters of health and security;
- (ii) Costa Rica has to pay for any special services provided by Nicara-

gua in the use of the San Juan either for navigation or landing on the Nicaraguan banks;

- (iii) Costa Rica has to comply with all reasonable charges for modern improvements in the navigation of the river with respect to its situation in 1858;
- (iv) revenue service boats may only be used during and with special reference to actual transit of the merchandise authorized by Treaty;
- (v) Nicaragua has the right to dredge the San Juan in order to return the flow of water to that obtaining in 1858 even if this affects the flow of water to other present day recipients of this flow such as the Colorado River."

in the Rejoinder:

"On the basis of the facts and legal considerations set forth in the Counter-Memorial and the Rejoinder, the Court is requested:

To adjudge and declare that the requests of Costa Rica in her Memorial and Reply are rejected in general, and in particular, on the following bases:

- (a) either because there is no breach of the provisions of the Treaty of Limits of 15 April 1858 or any other international obligation of Nicaragua;
- (b) or, as appropriate, because the obligation breach of which is alleged, is not an obligation under the provisions of the Treaty of Limits of 15 April 1858 or under general international law.

Moreover, the Court is also requested to make a formal declaration on the issues raised by Nicaragua in Section II of Chapter VII of her Counter-Memorial and reiterated in Chapter VI, Section I, of her Rejoinder."

The relevant part of Chapter VI, Section I, of the Rejoinder reads as follows:

- "(i) Costa Rica is obliged to comply with the regulations for navigation (and landing) in the San Juan imposed by Nicaraguan authorities in particular related to matters of health and security;
- (ii) Costa Rica has to pay for any special services provided by Nicaragua in the use of the San Juan either for navigation or landing on the Nicaraguan banks;
- (iii) Costa Rica has to comply with all reasonable charges for modern improvements in the navigation of the river with respect to its situation in 1858;
- (iv) revenue service boats may only be used during and with special reference to actual transit of the merchandise authorized by Treaty;
- (v) Nicaragua has the right to dredge the San Juan in order to return the flow of water to that obtaining in 1858 even if this affects the flow of water to other present day recipients of this flow such as the Colorado River."

14. At the oral proceedings, the following submissions were presented by the Parties:

*On behalf of the Government of Costa Rica,*  
at the hearing of 9 March 2009:

“Having regard to the written and oral pleadings and to the evidence submitted by the Parties, may it please the Court to adjudge and declare that, by its conduct, the Republic of Nicaragua has violated:

- (a) the obligation to allow all Costa Rican vessels and their passengers to navigate freely on the San Juan for purposes of commerce, including communication and the transportation of passengers and tourism;
- (b) the obligation not to impose any charges or fees on Costa Rican vessels and their passengers for navigating on the River;
- (c) the obligation not to require persons exercising the right of free navigation on the River to carry passports or obtain Nicaraguan visas;
- (d) the obligation not to require Costa Rican vessels and their passengers to stop at any Nicaraguan post along the River;
- (e) the obligation not to impose other impediments on the exercise of the right of free navigation, including timetables for navigation and conditions relating to flags;
- (f) the obligation to allow Costa Rican vessels and their passengers while engaged in such navigation to land on any part of the bank where navigation is common without paying any charges, unless expressly agreed by both Governments;
- (g) the obligation to allow Costa Rican official vessels the right to navigate the San Juan, including for the purposes of re-supply and exchange of personnel of the border posts along the right bank of the River with their official equipment, including service arms and ammunition, and for the purposes of protection as established in the relevant instruments, and in particular the Second article of the Cleveland Award;
- (h) the obligation to facilitate and expedite traffic on the San Juan, within the terms of the Treaty of 15 April 1858 and its interpretation by the Cleveland Award of 1888, in accordance with Article 1 of the bilateral Agreement of 9 January 1956;
- (i) the obligation to permit riparians of the Costa Rican bank to fish in the River for subsistence purposes.

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.

The Court is requested to reject Nicaragua's request for a declaration."

*On behalf of the Government of Nicaragua,*  
at the hearing of 12 March 2009:

"On the basis of the facts and legal considerations set forth in the Counter-Memorial, Rejoinder and oral pleadings,

*May it please the Court to adjudge and declare that:*

The requests of Costa Rica in her Memorial, Reply and oral pleadings are rejected in general, and in particular, on the following bases:

- (a) either because there is no breach of the provisions of the Treaty of Limits of 15 April 1858 or any other international obligation of Nicaragua;
- (b) or, as appropriate, because the obligation breach of which is alleged, is not an obligation under the provisions of the Treaty of Limits of 15 April 1858 or under general international law.

Moreover the Court is also requested to make a formal declaration on the issues raised by Nicaragua in Section II of Chapter VII of her Counter-Memorial, in Section I, Chapter VI, of her Rejoinder and as reiterated in these oral pleadings."

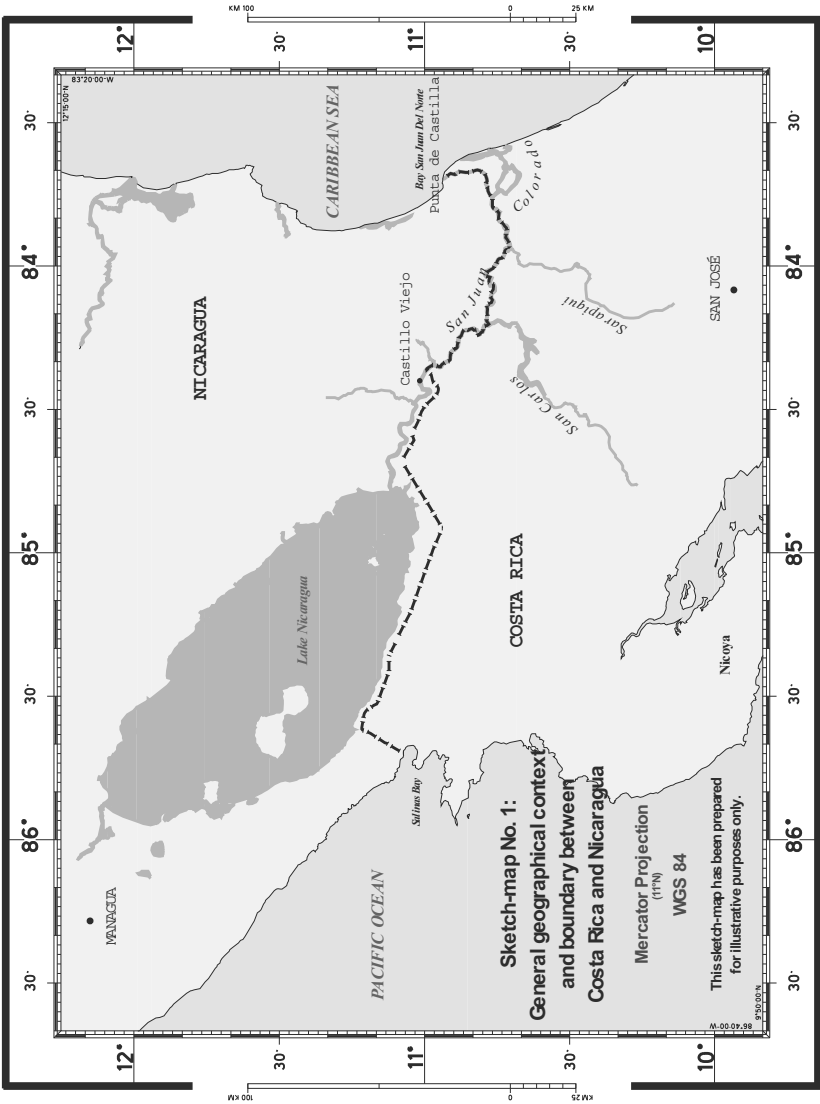
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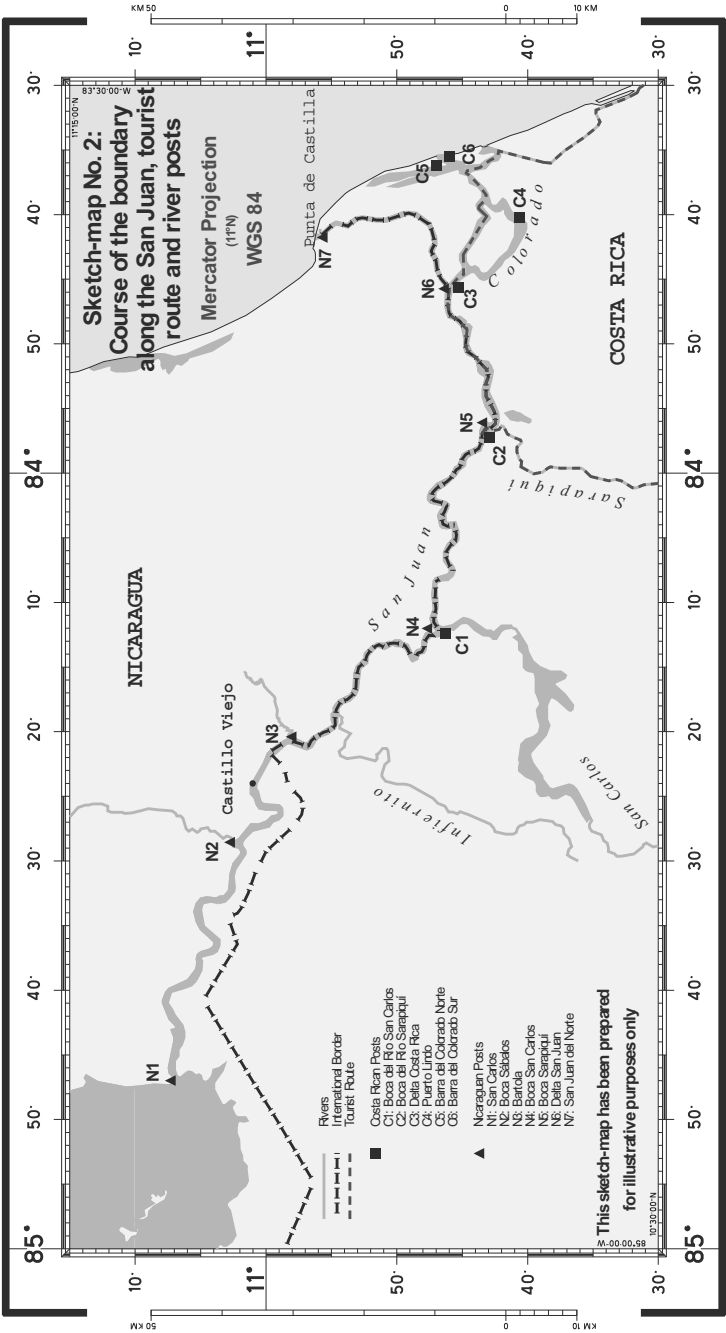
#### I. GEOGRAPHICAL AND HISTORICAL CONTEXT AND ORIGIN OF THE DISPUTE

15. The San Juan River runs approximately 205 kilometres from Lake Nicaragua to the Caribbean Sea (see sketch-maps Nos. 1 and 2). Some 19 kilometres from the Caribbean Sea it divides into two branches: the San Juan itself continues as the northerly of the two branches and empties into the Caribbean Sea at the bay of San Juan del Norte; the Colorado River is the southern and larger of the two branches and runs entirely within Costa Rica reaching the Caribbean Sea at Barra de Colorado.

16. Part of the border between Costa Rica and Nicaragua runs along the right bank (i.e. the Costa Rican side) of the San Juan River from a point three English miles below Castillo Viejo, a small town in Nicaragua, to the end of Punta de Castilla, where the river enters the Caribbean Sea. Between Lake Nicaragua and the point below Castillo Viejo, the river runs entirely through Nicaraguan territory.

17. Both Costa Rica and Nicaragua, which had been under Spanish colonial rule, became independent States in 1821. Shortly after independence, Costa Rica and Nicaragua, together with El Salvador, Guatemala and Honduras, decided to constitute the Federal Republic of Central America. In 1824 the people living in the district of Nicoya on the Pacific coast, originally within Nicaragua, opted by plebiscite to become part of





Costa Rica. On 9 December 1825 the Federal Congress of Central America issued a decree which provided that Nicoya would be “for the time being . . . separated from the State of Nicaragua and annexed to that of Costa Rica”. The situation regarding Nicoya remained unchanged at the time of the dissolution of the Federal Republic of Central America in 1839. Thereafter, Nicaragua did not however recognize Nicoya as belonging to Costa Rica.

18. During the mid-1850s, Nicaragua underwent a period of internal conflict which involved a group of American adventurers, known as “filibusters” (“filibusteros”), led by William Walker. The Government of Costa Rica as well as those of El Salvador, Guatemala and Honduras joined Nicaragua’s efforts to defeat the filibusters. In May 1857, Walker capitulated and abandoned Nicaraguan territory. Following the defeat of the filibusters, war broke out between Costa Rica and Nicaragua. At the end of those hostilities, the two countries engaged in negotiations to settle outstanding bilateral matters between them, relating, *inter alia*, to their common boundary, to the navigational régime on the San Juan River, and to the possibility of building an inter-oceanic canal across the Central American isthmus.

19. On 6 July 1857 a Treaty of Limits was signed, dealing with territorial limits and the status of the San Juan River, but was not ratified by Costa Rica. On 8 December 1857 a Treaty of Peace was signed by the Parties but was not ratified by either Costa Rica or Nicaragua. Through the mediation of the Salvadoran Minister for Foreign Affairs, the Governments of Costa Rica and Nicaragua reached agreement on 15 April 1858 on a Treaty of Limits, which was ratified by Costa Rica on 16 April 1858 and by Nicaragua on 26 April 1858. The 1858 Treaty of Limits fixed the course of the boundary between Costa Rica and Nicaragua from the Pacific Ocean to the Caribbean Sea. According to the boundary thus drawn the district of Nicoya lay within the territory of Costa Rica. Between a point three English miles from Castillo Viejo and the Caribbean Sea, the Treaty fixed the boundary along the right bank of the San Juan River. It established Nicaragua’s dominion and sovereign jurisdiction over the waters of the San Juan River, but at the same time affirmed Costa Rica’s navigational rights “con objetos de comercio” on the lower course of the river (Article VI). The 1858 Treaty established other rights and obligations for both parties, including, *inter alia*, an obligation to contribute to the defence of the common bays of San Juan del Norte and Salinas as well as to the defence of the San Juan River in case of external aggression (Article IV), an obligation on behalf of Nicaragua to consult with Costa Rica before entering into any canalization or transit agreements regarding the San Juan River (Article VIII) and an obligation not to commit acts of hostility against each other (Article IX).

20. Following challenges by Nicaragua on various occasions to the validity of the 1858 Treaty, the Parties submitted the question to arbitration by the President of the United States. The Parties agreed in addition that if the 1858 Treaty were found to be valid, President Cleveland



should also decide whether Costa Rica could navigate the San Juan River with vessels of war or of the revenue service. In his Award rendered on 22 March 1888, President Cleveland held that the 1858 Treaty was valid. He further stated, with reference to Article VI of the 1858 Treaty, that Costa Rica did not have the right of navigation on the San Juan River with vessels of war, but that it could navigate with such vessels of the Revenue Service as may be connected to navigation “for the purposes of commerce”.

21. Following the Cleveland Award, a boundary commission was established to demarcate the boundary line. An engineer, Mr. Edward Alexander, was charged with the task of resolving any “disputed point or points” which might arise in the field during the demarcation process, which began in 1897 and was concluded in 1900. Mr. Alexander rendered five awards to this end.

22. On 5 August 1914, Nicaragua signed a treaty with the United States (the Chamorro-Bryan Treaty) which granted the United States perpetual and “exclusive proprietary rights” for the construction and maintenance of an inter-oceanic canal through the San Juan River. On 24 March 1916 Costa Rica filed a case against Nicaragua before the Central American Court of Justice claiming that Nicaragua had breached its obligation to consult with Costa Rica prior to entering into any canalization project in accordance with Article VIII of the 1858 Treaty. On 30 September 1916, the Central American Court of Justice ruled that, by not consulting Costa Rica, Nicaragua had violated the rights guaranteed to the latter by the 1858 Treaty of Limits and the 1888 Cleveland Award.

23. On 9 January 1956 Costa Rica and Nicaragua concluded an Agreement (the Fournier-Sevilla Agreement) according to the terms of which the Parties agreed to facilitate and expedite traffic in particular through the San Juan River and agreed to co-operate to safeguard the common border.

24. In the 1980s various incidents started to occur relating to the navigational régime of the San Juan River. During that period Nicaragua introduced certain restrictions on Costa Rican navigation on the San Juan River which it justified as temporary, exceptional measures to protect Nicaragua’s national security in the context of an armed conflict. Some of the restrictions were suspended when Costa Rica protested. During the mid-1990s further measures were introduced by Nicaragua, including the charging of fees for passengers travelling on Costa Rican vessels navigating on the San Juan River and the requirement for Costa Rican vessels to stop at Nicaraguan Army posts along the river.

25. On 8 September 1995 the Commander-in-Chief of the Nicaraguan Army and the Costa Rican Minister of Public Security signed a document, known as the Cuadra-Castro Joint Communiqué, which provided for the co-ordination of operations in the border areas of the two States against the illegal trafficking of persons, vehicles and contraband.

26. In July 1998 further disagreements between the Parties regarding the extent of Costa Rica's navigational rights on the San Juan River led to the adoption by Nicaragua of certain measures. In particular, on 14 July 1998, Nicaragua prohibited the navigation of Costa Rican vessels that transported members of Costa Rica's police force. On 30 July 1998, the Nicaraguan Minister of Defence and the Costa Rican Minister of Public Security signed a document, known as the Cuadra-Lizano Joint Communiqué. The text allowed for Costa Rican armed police vessels to navigate on the river to re-supply their boundary posts on the Costa Rican side, provided that the Costa Rican agents in those vessels only carried their service arms and prior notice was given to the Nicaraguan authorities, which could decide on whether the Costa Rican vessels should be accompanied by a Nicaraguan escort. On 11 August 1998, Nicaragua declared that it considered the Cuadra-Lizano Joint Communiqué to be legally null and void. Costa Rica did not accept this unilateral declaration. Differences regarding the navigational régime on the San Juan River persisted between the Parties.

27. On 24 October 2001, Nicaragua made a reservation to its declaration accepting the jurisdiction of the Court (see paragraph 1 above), according to which it would no longer accept the jurisdiction of the Court in regard to "any matter or claim based on interpretations of treaties or arbitral awards that were signed and ratified or made, respectively, prior to 31 December 1901". Under the Tovar-Caldera Agreement, signed by the Parties on 26 September 2002, Nicaragua agreed to a three year moratorium with regard to the reservation it had made in 2001 to its declaration accepting the jurisdiction of the Court. For its part, Costa Rica agreed that during the same three year period it would not initiate any action before the International Court of Justice nor before any other authority on any matter or protest mentioned in treaties or agreements currently in force between both countries.

28. Once the agreed three year period had elapsed without the Parties having been able to settle their differences, Costa Rica, on 29 September 2005, instituted proceedings before the Court against Nicaragua with regard to its disputed navigational and related rights on the San Juan River (see paragraph 1 above). Nicaragua has not raised any objections to the jurisdiction of the Court to entertain the case.

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29. Taking account of the subject of the dispute as summarized above and of the Parties' submissions and arguments, the Court will proceed in the following manner.

It will first determine the extent of Costa Rica's right of free navigation on the San Juan River (II).

It will next ascertain whether, and to what extent, within the ambit of

the right thus defined, Nicaragua has the power to regulate navigation by Costa Rican boats and whether the specific measures it has decided and put into effect to this end during the period of the dispute are compatible with Costa Rica's rights (III).

It will then consider the question of the right which Costa Rica claims for inhabitants of the Costa Rican bank of the river to engage in subsistence fishing (IV).

Finally, in the light of its reasoning on the preceding points, it will consider the Parties' claims as presented to it in their final submissions, in respect in particular of the appropriate remedies (V).

## II. COSTA RICA'S RIGHT OF FREE NAVIGATION ON THE SAN JUAN RIVER

30. The Parties agree that Costa Rica possesses a right of free navigation on the section of the San Juan River where the right bank, i.e. the Costa Rican side, marks the border between the two States by virtue of the Treaty of Limits (the Jerez-Cañas Treaty) concluded between them on 15 April 1858. This is the part of the river which runs from a point three English miles below Castillo Viejo, a town in Nicaraguan territory, to the mouth of the river at the Caribbean Sea (see paragraph 16 above).

Upstream from the point referred to above, the San Juan flows entirely in Nicaraguan territory from its source in Lake Nicaragua, in the sense that both its banks belong to Nicaragua. The section of the river in which the right bank belongs to Costa Rica, the section at issue in this dispute, is some 140 kilometres long.

31. While it is not contested that the section of the river thus defined belongs to Nicaragua, since the border lies on the Costa Rican bank, with Costa Rica possessing a right of free navigation, the Parties differ both as to the legal basis of that right and, above all, as to its precise extent, in other words as to the types of navigation which it covers.

### *1. The Legal Basis of the Right of Free Navigation*

32. According to Costa Rica, its right of free navigation on the part of the San Juan River that is in dispute derives on the one hand from certain treaty provisions in force between the Parties, primarily but not exclusively the Treaty of Limits of 15 April 1858, and on the other hand from the rules of general international law that are applicable, even in the absence of treaty provisions, to navigation on "international rivers". The San Juan is said to fall into this category, at least as regards the section

whose course follows the border, with Costa Rica thus possessing a customary right of free navigation in its capacity as a riparian State.

33. According to Nicaragua, on the contrary, the San Juan is not an “international river”, since it flows entirely within the territory of a single country by virtue of the provisions of the 1858 Treaty of Limits, which establish the border in such a way that no part of the river falls under the sovereignty of a State other than Nicaragua. Moreover, Nicaragua challenges the existence of a general régime that might be applicable, under customary international law, to rivers whose course, or one of whose banks, constitutes the border between two States, and more widely to “international rivers”. Lastly, according to Nicaragua, even if such a régime were to exist, it would be superseded in this case by the treaty provisions which define the status of the San Juan River and govern the riparian States’ right of navigation. It is these special provisions which should be applied in order to settle the present dispute, in any event that part of it relating to the right of navigation on the river.

34. The Court does not consider that it is required to take a position in this case on whether and to what extent there exists, in customary international law, a régime applicable to navigation on “international rivers”, either of universal scope or of a regional nature covering the geographical area in which the San Juan is situated. Nor does it consider, as a result, that it is required to settle the question of whether the San Juan falls into the category of “international rivers”, as Costa Rica maintains, or is a national river which includes an international element, that being the argument of Nicaragua.

35. Indeed, even if categorization as an “international river” would be legally relevant in respect of navigation, in that it would entail the application of rules of customary international law to that question, such rules could only be operative, at the very most, in the absence of any treaty provisions that had the effect of excluding them, in particular because those provisions were intended to define completely the régime applicable to navigation, by the riparian States on a specific river or a section of it.

36. That is precisely the case in this instance. The 1858 Treaty of Limits completely defines the rules applicable to the section of the San Juan River that is in dispute in respect of navigation. Interpreted in the light of the other treaty provisions in force between the Parties, and in accordance with the arbitral or judicial decisions rendered on it, that Treaty is sufficient to settle the question of the extent of Costa Rica’s right of free navigation which is now before the Court. Consequently, the Court has no need to consider whether, if these provisions did not exist, Costa Rica could nevertheless have relied for this purpose on rules derived from international, universal or regional custom.

37. The main provision which founds Costa Rica’s right of free navi-

gation is contained in Article VI of the 1858 Treaty (see paragraphs 43 and 44 below); this has been the focus of the arguments exchanged between the Parties as to the extent of the right of navigation on the San Juan.

Article VI, after conferring on Nicaragua full and exclusive sovereignty (“*exclusivamente el dominio y sumo imperio*”) over the whole of the San Juan, from its source in the lake to its mouth at the sea, grants Costa Rica, on the section of the river which follows the border between the two States (see paragraph 30 above), a perpetual right (“*los derechos perpetuos*”) of free navigation “*con objetos de comercio*”, according to the terms of the Spanish version of the Treaty, which is the only authoritative one, the meaning of which the Court will be required to return to below. In addition, Article VI gives vessels of both riparian countries the right to land freely on either bank without being subject to any taxes (“*ninguna clase de impuestos*”), unless agreed by both Governments.

38. Other provisions of the 1858 Treaty, though of less importance for the purposes of the present case, are not without relevance as regards the right of navigation on the river. This applies in particular to Article IV, which obliges Costa Rica to contribute to the security of the river “for the part that belongs to her of the banks”, to Article VIII, which obliges Nicaragua to consult Costa Rica before entering into any agreements with a third State for canalization or transit on the river, and of course to Article II, which establishes the border as the Costa Rican bank on the section of the river which is at issue in this dispute.

39. Besides the 1858 Treaty, mention should be made, among the treaty instruments likely to have an effect on determining the right of navigation on the river and the conditions for exercising it, of the agreement concluded on 9 January 1956 between the two States (known as the Fournier-Sevilla Agreement), whereby the Parties agreed to collaborate to the best of their ability, in particular in order to facilitate and expedite traffic on the San Juan in accordance with the 1858 Treaty and the Arbitral Award made by President Cleveland in 1888 (for the text of the relevant provision of the 1956 Agreement, see paragraph 94 below).

40. Costa Rica has also invoked before the Court the joint ministerial communiqués published on 8 September 1995 (known as the Cuadra-Castro Joint Communiqué; see paragraph 25 above) and 30 July 1998 (known as the Cuadra-Lizano Joint Communiqué; see paragraph 26 above). In the Court’s view, however, these statements issued by the ministers responsible, on each side, for matters of defence and public security, cannot be included in the conventional basis of the right of free navigation granted to Costa Rica. Rather, these are practical arrangements, in part aimed at implementing previous treaty commitments, including in particular the obligation of co-operation referred to in the Agreement of 9 January 1956 (see paragraph 23 above and paragraph 94 below). The legal effects of such arrangements are more limited than the

conventional acts themselves: modalities for co-operation which they put in place are likely to be revised in order to suit the Parties. Furthermore, the second of them was promptly declared null and void by Nicaragua (see paragraph 26 above).

41. The above-mentioned treaty instruments must be understood in the light of two important decisions which settled differences that emerged between the Parties in determining their respective rights and obligations: the Arbitral Award made by the President of the United States on 22 March 1888 (known as the Cleveland Award); and the decision rendered, on the application of Costa Rica, by the Central American Court of Justice on 30 September 1916.

The first of these two decisions settled several questions concerning the interpretation of the 1858 Treaty which divided the Parties in that case; the second found that Nicaragua, by concluding an agreement with the United States permitting the construction and maintenance of an inter-oceanic canal through the San Juan River, had disregarded Costa Rica's right under Article VIII of that Treaty to be consulted before the conclusion of any agreement of that nature.

Although neither of these decisions directly settles the questions that are now before the Court, they contain certain indications which it will be necessary to take into account for the purposes of the present case.

## *2. The Extent of the Right of Free Navigation Attributed to Costa Rica*

42. Having thus defined the legal basis of the right which Costa Rica argues has been partly disregarded by Nicaragua, the Court must now determine its precise extent, in other words, its field of application. The Parties disagree considerably over the definition of this field of application, i.e., as to the types of navigation which are covered by the "perpetual right" granted to Costa Rica by the 1858 Treaty. Their difference essentially concerns the interpretation of the words "libre navegación . . . con objetos de comercio" in Article VI of the Treaty of Limits; this brings with it a major disagreement as to the definition of the activities covered by the right in question and of those which, not being thus covered, are subject to Nicaragua's sovereign power to authorize and regulate as it sees fit any activity that takes place on its territory, of which the river forms part.

### *(a) The meaning and scope of the expression "libre navegación . . . con objetos de comercio"*

43. In its Spanish version, which is the only authoritative one, Article VI of the Treaty of Limits of 1858 reads as follows:

"La República de Nicaragua tendrá exclusivamente el dominio y

sumo imperio sobre las aguas del río de San Juan desde su salida del Lago, hasta su desembocadura en el Atlántico; pero la República de Costa Rica tendrá en dichas aguas los derechos perpetuos de libre navegación, desde la expresada desembocadura hasta tres millas inglesas antes de llegar al Castillo Viejo, con objetos de comercio, ya sea con Nicaragua ó al interior de Costa Rica por los ríos de San Carlos ó Sarapiquí, ó cualquiera otra vía procedente de la parte que en la ribera del San Juan se establece corresponder á esta República. Las embarcaciones de uno ú otro país podrán indistintamente atracar en las riberas del río, en la parte en que la navegación es común, sin cobrarse ninguna clase de impuestos, á no ser que se establezcan de acuerdo entre ambos Gobiernos.”

44. Leaving aside for the moment the phrase whose interpretation, and indeed translation into English and French, divides the Parties, this article may be translated thus:

“The Republic of Nicaragua shall have exclusive *dominium* and *imperium* over the waters of the San Juan River from its origin in the lake to its mouth at the Atlantic Ocean; the Republic of Costa Rica shall however have a perpetual right of free navigation on the said waters between the mouth of the river and a point located three English miles below Castillo Viejo, [*con objetos de comercio*], whether with Nicaragua or with the interior of Costa Rica by the rivers San Carlos or Sarapiquí or any other waterway starting from the section of the bank of the San Juan established as belonging to that Republic. The vessels of both countries may land indiscriminately on either bank of the section of the river where navigation is common, without paying any taxes, unless agreed by both Governments.” [*Translation by the Court.*]

45. The Parties’ disagreement is greatest on the meaning of the words “con objetos de comercio”. For Nicaragua, this expression must be translated into French as “avec des marchandises de commerce” and into English as “with articles of trade”; in other words, the “objetos” in question here are objects in the concrete and material sense of the term. Consequently, the freedom of navigation guaranteed to Costa Rica by Article VI relates only to the transport of goods intended to be sold in a commercial exchange. For Costa Rica, on the contrary, the expression means in French “à des fins de commerce” and in English “for the purposes of commerce”; the “objetos” in the original text are therefore said to be objects in the abstract sense of ends and purposes. Consequently, according to Costa Rica, the freedom of navigation given to it by the Treaty must be attributed the broadest possible scope, and in any event encompasses not only the transport of goods but also the transport of passengers, including tourists.

46. Before directly addressing the question which has been submitted to it, the Court will make three preliminary observations of a more general nature. It will then consider what is to be understood by “con objetos” and then by “comercio” within the meaning of Article VI, since there is in fact a twofold disagreement between the Parties.

(i) *Preliminary observations*

47. In the first place, it is for the Court to interpret the provisions of a treaty in the present case. It will do so in terms of customary international law on the subject, as reflected in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties, as the Court has stated on several occasions (see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007 (I), pp. 109-110, para. 160; see also *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, Judgment, I.C.J. Reports 1994, pp. 21-22, para. 41.)

Consequently, neither the circumstance that Nicaragua is not a party to the Vienna Convention on the Law of Treaties nor the fact that the treaty which is to be interpreted here considerably pre-dates the drafting of the said Convention has the effect of preventing the Court from referring to the principles of interpretation set forth in Articles 31 and 32 of the Vienna Convention.

48. In the second place, the Court is not convinced by Nicaragua's argument that Costa Rica's right of free navigation should be interpreted narrowly because it represents a limitation of the sovereignty over the river conferred by the Treaty on Nicaragua, that being the most important principle set forth by Article VI.

While it is certainly true that limitations of the sovereignty of a State over its territory are not to be presumed, this does not mean that treaty provisions establishing such limitations, such as those that are in issue in the present case, should for this reason be interpreted *a priori* in a restrictive way. A treaty provision which has the purpose of limiting the sovereign powers of a State must be interpreted like any other provision of a treaty, i.e. in accordance with the intentions of its authors as reflected by the text of the treaty and the other relevant factors in terms of interpretation.

A simple reading of Article VI shows that the Parties did not intend to establish any hierarchy as between Nicaragua's sovereignty over the river and Costa Rica's right of free navigation, characterized as “perpetual”, with each of these affirmations counter-balancing the other. Nicaragua's sovereignty is affirmed only to the extent that it does not prejudice the substance of Costa Rica's right of free navigation in its domain, the establishment of which is precisely the point at issue; the right of free navigation, albeit “perpetual”, is granted only on condition that it does not prejudice the key prerogatives of territorial sovereignty.



There are thus no grounds for supposing, *a priori*, that the words “libre navegación . . . con objetos de comercio” should be given a specially restrictive interpretation, any more than an extensive one.

49. Lastly, the Court observes that none of the points under examination in this case was settled by the Cleveland Award of 1888 or by the decision of the Central American Court of Justice of 1916. Each of the Parties has sought to use these previous decisions as an argument to support its own case. However, these attempts do not convince the Court one way or the other.

The Cleveland Award confined itself to settling the questions of interpretation which the Parties had expressly submitted to the arbitrator. Those questions did not concern the meaning of the words “con objetos de comercio”; it is therefore futile to seek in the Award the answer to a question that was not put before the arbitrator. Consequently, while the Award declares that Costa Rica does not have the right, under the Treaty, to navigate on the San Juan with vessels of war, whereas it does have the right to do so with vessels of its revenue service, there is nothing to be inferred from this with regard to vessels belonging to the State and not falling into either of those two categories. Likewise, while the arbitrator used the words “for the purposes of commerce” and placed them in quotation marks, it may be supposed that this was simply because that was the English translation of the words “con objetos de comercio” which both Parties had supplied to the arbitrator, who did not wish, in his interpretation of the Treaty, to go beyond the questions which had been put before him.

As for the decision of the Central American Court of Justice of 1916, however important this might be, its operative part was based only on the application of the express provisions of Article VIII of the Treaty, which are not at issue in the present case.

(ii) *The meaning of the phrase “con objetos”*

50. It is now appropriate to consider the issue of the meaning of the phrase “con objetos de” as used in Article VI of the 1858 Treaty, specifically whether it means “for the purposes of” — as Costa Rica contends — or “with articles of” — as Nicaragua contends.

51. It should first be observed that the Spanish word “objetos” can, depending on its context, have either of the two meanings put forward. Thus, the context must be examined to ascertain the meaning to be ascribed here. The two meanings — one concrete and the other abstract — are sufficiently different that examination of the context will generally allow for a firm conclusion to be reached.

52. Having conducted this examination, the Court is of the view that the interpretation advocated by Nicaragua cannot be upheld.

The main reason for this is that ascribing the meaning “with goods” or “with articles” to the phrase “con objetos” results in rendering meaningless the entire sentence in which the phrase appears.

The part of Article VI which is relevant in this connection reads: "Costa Rica tendrá . . . los derechos perpetuos de libre navegación . . ., con objetos de comercio, ya sea con Nicaragua ó al interior de Costa Rica."

If Nicaragua's interpretation were to be accepted, there would be no intelligible relationship between the clause following the phrase "con objetos de comercio", i.e., "ya sea con Nicaragua ó al interior de Costa Rica" ("whether with Nicaragua or with the interior of Costa Rica"), and the preceding part of the sentence.

Either the words "with Nicaragua" would relate to "objetos de comercio", which would hardly make sense, since it would not be meaningful to speak of "goods (or articles) of trade with Nicaragua"; or these words relate to "navegación" and that would make even less sense, because the expression "navegación . . . con Nicaragua" would simply be incomprehensible.

By contrast, Costa Rica's interpretation of the words "con objetos" allows the entire sentence to be given coherent meaning. If the phrase means "purposes of commerce", then the immediately following clause, "ya sea con Nicaragua . . .", plainly relates to "comercio" ("for the purposes of commerce with Nicaragua . . ."), and the sentence then conveys a perfectly comprehensible idea.

Thus, in the present instance a literal analysis of the sentence containing the words requiring interpretation leads to one of the proposed meanings being preferred over the other.

53. The preceding finding is supported by three additional arguments which all point to the same conclusion.

54. First, "objetos" is used in another article of the 1858 Treaty, Article VIII, in which context it can only have the abstract meaning of "purposes" or "subjects": "Nicaragua se compromete á no concluir otro (contrato) sobre los expresados objetos . . ." ("Nicaragua engages not to conclude any other contract for those purposes . . .").

It is reasonable to infer that the Parties tended to understand "objetos" in its abstract sense, or, at least, that this meaning was familiar to them in their treaty practice.

55. Second, a further indication may be deduced from the "Cañas-Martínez" Peace Treaty signed by the Parties on 8 December 1857 but which was never ratified and hence did not enter into force. On the question of navigation on the San Juan, this instrument, replaced by the 1858 Treaty of Limits, which repeats some of the earlier provisions, included the expression "artículos de comercio", which undoubtedly translates as "articles" or "goods" of commerce. This would tend to show that when the Parties at the time wished to refer to physical property giving rise to commercial transactions, they used a term other than "objetos de comercio", a term having the advantage of being unambiguous. Further, it is reasonable to believe that the Parties' replacement of one word with another in two successive instruments, the second of

which was drafted shortly after the first, indicates that the Parties wished in the second to refer to something different from that in the first and that the two terms used must not be taken to mean the same thing.

56. Finally, the Court also considers it significant that in 1887, when the two Parties each submitted an English translation of the 1858 Treaty to President Cleveland for use in the arbitration proceedings he was asked to conduct, even though their translations were not identical on all points, they did use the same phrase to render the original “con objetos de comercio”: “for the purposes of commerce”.

By itself, this argument is undoubtedly not conclusive, because the only authoritative version of the instrument is the Spanish one and at the time the Parties might have made the same mistake in translation, which cannot be treated as an implicit amendment of the 1858 Treaty. It is also no doubt true that Nicaragua might have paid insufficient heed to the meaning of the term “objetos de comercio”, which was not at issue in the questions submitted to the arbitrator; this could be the explanation for a translation done by it in haste. It nonetheless remains the case that this concurrence, occurring relatively soon after the Treaty was concluded, is a significant indication that at the time both Parties understood “con objetos de comercio” to mean “for the purposes of commerce”.

This is the meaning accepted by the Court.

(iii) *The meaning of the word “commerce”*

57. The preceding finding does not entirely resolve the issue of interpretation argued by the Parties. Now that it has been determined that “con objetos de comercio” means “for the purposes of commerce”, the meaning to be ascribed to the word “commerce” in the context of Article VI remains to be determined, so that the exact extent of the right of free navigation can be defined. On this point as well, the Parties disagree.

58. In Nicaragua’s view, for purposes of the Treaty, “commerce” covers solely the purchase and sale of merchandise, of physical goods, and excludes all services, such as passenger transport. This interpretation is clearly consistent with Nicaragua’s contention, just rejected, that “con objetos” means “with merchandise”. But, Nicaragua argues, even if the phrase is translated as “for the purposes of commerce”, the result is the same, because in 1858 the word “commerce” necessarily meant trade in goods and did not extend to services, the inclusion of services being a very recent development. Nicaragua admits that passengers were already being transported on the San Juan in 1858, and even that this was an especially profitable activity, but it adds that this activity did not fall within the scope of what was commonly called “commerce” at that time. As for the transport of tourists, there was no such activity at the time in question.

Nicaragua contends that it is important to give the words used in the Treaty the meaning they had at the time the Treaty was concluded, not their current meaning, which can be quite different, because this is the only way to remain true to the intent of the drafters of the Treaty; and determining that intent is the main task in the work of interpretation.

59. Costa Rica argues that “commerce” as used in the Treaty takes in any activity in pursuit of commercial purposes and includes, *inter alia*, the transport of passengers, tourists among them, as well as of goods. The Applicant adds that “commerce” is a broad concept which extends even beyond for-profit activities; in this regard it cites the nineteenth-century editions of the *Dictionary of the Royal Spanish Academy*, which gives the word “comercio” the second meaning of “comunicación y trato de unas gentes ó pueblos con otros”, or communication and dealings of some persons or peoples with others. It follows, argues Costa Rica, that “commerce” includes movement and contact between inhabitants of the villages on the Costa Rican bank of the San Juan River, and the use of the river for purposes of navigation by Costa Rican public officials providing the local population with essential services, in areas such as health, education and security.

60. The Court can subscribe to neither the particularly broad interpretation advocated by Costa Rica nor the excessively narrow one put forward by Nicaragua.

61. In respect of the first, the Court observes that, were it to be accepted, the result would be to bring within the ambit of “navigation for the purposes of commerce” all, or virtually all, forms of navigation on the river. If that had been the intent of the parties to the Treaty, it would be difficult to see why they went to the trouble of specifying that the right of free navigation was guaranteed “for the purposes of commerce”, given that this language would have had virtually no effect. While Costa Rica did maintain in the hearings that the phrase “for the purposes of commerce” in the context of Article VI did not result in restricting the scope of the “right of free navigation” granted earlier in the same sentence, but rather was intended to enlarge that right, the Court cannot adopt this view: expressly stating the purpose for which a right may be exercised implies in principle the exclusion of all other purposes and, consequently, imposes the limitation thus defined on the field of application of the right in question — subject to the possibility that the right may be exercisable beyond that scope on separate legal bases.

Thus, the language found in Article VI means that the right of free navigation granted to Costa Rica in that provision applies exclusively within the ambit of navigation “for the purposes of commerce” and ceases to apply beyond that ambit; the bounds of which it is now for the Court to determine. This determination is without effect on the existence of any right of navigation which Costa Rica may enjoy pursuant to provisions other than Article VI.

62. In respect of the narrow interpretation advanced by Nicaragua,

the Court observes that it is supported mainly by two arguments: the first is based on the Respondent's interpretation of the phrase "con objetos", which has just been rejected; the second is based on the assertion that "commerce" should be given the narrow meaning it had when the Treaty was entered into.

63. The Court does not agree with this second argument.

It is true that the terms used in a treaty must be interpreted in light of what is determined to have been the parties' common intention, which is, by definition, contemporaneous with the treaty's conclusion. That may lead a court seised of a dispute, or the parties themselves, when they seek to determine the meaning of a treaty for purposes of good-faith compliance with it, to ascertain the meaning a term had when the treaty was drafted, since doing so can shed light on the parties' common intention. The Court has so proceeded in certain cases requiring it to interpret a term whose meaning had evolved since the conclusion of the treaty at issue, and in those cases the Court adhered to the original meaning (to this effect, see, for example, the Judgment of 27 August 1952 in the case concerning *Rights of Nationals of the United States of America in Morocco (France v. United States of America)* (*I.C.J. Reports* 1952, p. 176), on the question of the meaning of "dispute" in the context of a treaty concluded in 1836, the Court having determined the meaning of this term in Morocco when the treaty was concluded; the Judgment of 13 December 1999 in the case concerning *Kasikili/Sedudu Island (Botswana/Namibia)* (*I.C.J. Reports* 1999 (*II*), p. 1062, para. 25) in respect of the meaning of "centre of the main channel" and "thalweg" when the Anglo-German Agreement of 1890 was concluded).

64. This does not however signify that, where a term's meaning is no longer the same as it was at the date of conclusion, no account should ever be taken of its meaning at the time when the treaty is to be interpreted for purposes of applying it.

On the one hand, the subsequent practice of the parties, within the meaning of Article 31 (3) (*b*) of the Vienna Convention, can result in a departure from the original intent on the basis of a tacit agreement between the parties. On the other hand, there are situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used — or some of them — a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law. In such instances it is indeed in order to respect the parties' common intention at the time the treaty was concluded, not to depart from it, that account should be taken of the meaning acquired by the terms in question upon each occasion on which the treaty is to be applied.

65. A good illustration of this reasoning is found in the Judgment handed down by the Court on 18 December 1978 in the case concerning *Aegean Sea Continental Shelf (Greece v. Turkey)* (*I.C.J. Reports* 1978, p. 3).

Called upon to interpret a State's reservation to a treaty excluding

from the Court's jurisdiction "disputes relating to territorial status" of that State, where the meaning of "territorial status" was contested, the Court stated:

"Once it is established that the expression 'the territorial status of Greece' was used in Greece's instrument of accession [to the General Act of 1928] as a generic term denoting any matters comprised within the concept of territorial status under general international law, the presumption necessarily arises that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time. This presumption, in the view of the Court, is even more compelling when it is recalled that the 1928 Act was a convention for the pacific settlement of disputes designed to be of the most general kind and of continuing duration, for it hardly seems conceivable that in such a convention terms like 'domestic jurisdiction' and 'territorial status' were intended to have a fixed content regardless of the subsequent evolution of international law." (*Aegean Sea Continental Shelf (Greece v. Turkey)*, *Judgment*, *I.C.J. Reports 1978*, p. 32, para. 77.)

66. Though adopted in connection with the interpretation of a reservation to a treaty, the Court's reasoning in that case is fully transposable for purposes of interpreting the terms themselves of a treaty.

It is founded on the idea that, where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is "of continuing duration", the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning.

67. This is so in the present case in respect of the term "comercio" as used in Article VI of the 1858 Treaty. First, this is a generic term, referring to a class of activity. Second, the 1858 Treaty was entered into for an unlimited duration; from the outset it was intended to create a legal régime characterized by its perpetuity.

68. This last observation is buttressed by the object itself of the Treaty, which was to achieve a permanent settlement between the parties of their territorial disputes. The territorial rules laid down in treaties of this type are, by nature, particularly marked in their permanence, for, as the Court has recently recalled:

"[I]t is a principle of international law that a territorial régime established by treaty 'achieves a permanence which the treaty itself does not necessarily enjoy' and the continued existence of that régime is not dependent upon the continuing life of the treaty under which the régime is agreed" (*Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *Preliminary Objections*, *I.C.J. Reports 2007 (II)*, p. 861, para. 89).

69. This is true as well of the right of free navigation guaranteed to Costa Rica by Article VI. This right, described as “perpetual”, is so closely linked with the territorial settlement defined by the Treaty — to such an extent that it can be considered an integral part of it — that it is characterized by the same permanence as the territorial régime *stricto sensu* itself.

70. The Court concludes from the foregoing that the terms by which the extent of Costa Rica’s right of free navigation has been defined, including in particular the term “comercio”, must be understood to have the meaning they bear on each occasion on which the Treaty is to be applied, and not necessarily their original meaning.

Thus, even assuming that the notion of “commerce” does not have the same meaning today as it did in the mid-nineteenth century, it is the present meaning which must be accepted for purposes of applying the Treaty.

71. Accordingly, the Court finds that the right of free navigation in question applies to the transport of persons as well as the transport of goods, as the activity of transporting persons can be commercial in nature nowadays. This is the case if the carrier engages in the activity for profit-making purposes. A decisive consideration in this respect is whether a price (other than a token price) is paid to the carrier — the boat operator — by the passengers or on their behalf. If so, then the carrier’s activity is commercial in nature and the navigation in question must be regarded as “for the purposes of commerce” within the meaning of Article VI. The Court sees no persuasive reason to exclude the transport of tourists from this category, subject to fulfilment of the same condition.

On the other hand, any navigation not carried out either to transport goods intended to form the subject of commercial transactions or to transport passengers in exchange for money paid by them or on their behalf cannot be regarded as falling within the “purposes of commerce” under Article VI. That is the case, in particular, of navigation by vessels used in the performance of governmental activities or to provide public services which are not commercial in nature.

(b) *The activities covered by the right of free navigation belonging to Costa Rica*

72. Based on the foregoing, the Court is now in a position to determine with greater precision the types of activities which are covered by Costa Rica’s right of free navigation, and those which are not.

For the sake of convenience, the Court, in addressing this issue, will distinguish between private navigation — that is to say navigation by vessels belonging to private owners — and that of “official (or public) vessels” — that is to say vessels which are the property of the Republic of

Costa Rica including all its public authorities —, although this distinction, as will be explained below, is of only limited relevance.

(i) *Private navigation*

73. As has just been said, two types of private navigation are certainly covered by the right of free navigation pursuant to Article VI of the 1858 Treaty: the navigation of vessels carrying goods intended for commercial transactions; and that of vessels carrying passengers who pay a price other than a token price (or for whom a price is paid) in exchange for the service thus provided.

In the first instance, the commercial activity is conducted by persons who are the owners of the goods intended for sale. These persons may themselves be carried on the vessel: they can also entrust their goods for carriage to the vessel's operator for an agreed price or free of charge. This last aspect is of no relevance: in any event, navigation which is carried out in order to transport goods intended for sale, or goods that have just been purchased, in the context of a commercial exchange must be regarded as taking place "for the purposes of commerce", whether or not the owner of the goods is onboard the vessel, and whether or not the vessel's operator has been paid to provide carriage. It is understood that navigation "for the purposes of commerce" also includes the return journey of persons who have transported goods intended for sale.

In the second instance, however, the fact that the vessel's owner receives payment for his activity is critical. Indeed, if the carriage of passengers is considered, it is not the passengers themselves who are exercising a commercial activity (unless they are travelling in order to transport goods, in which case the journey falls under the previous instance), it is the carrier, provided that he does so to make a profit.

74. The question was raised as to whether the navigation of vessels belonging to the inhabitants of the villages on the Costa Rican bank of the river in order to meet the basic requirements of everyday life, such as taking children to school or in order to give or receive medical treatment, was protected by the right of free navigation when it is carried out free of charge. The Parties discussed the issue: according to Nicaragua the answer is no, since the Respondent considers that only the carriage of goods benefits from the guarantee provided by Article VI of the Treaty; according to Costa Rica the answer is yes, based on the particularly broad definition of "commerce" adopted by the Applicant.

75. The Court has already indicated that it could not subscribe to a definition of the word "commerce" as broad as the one put forward by Costa Rica. It has also indicated (in paragraph 71 above) that the carriage of passengers free of charge, or the movement of persons on their



own vessels for purposes other than the conduct of commercial transactions, could not fall within the scope of “navigation for the purposes of commerce” within the meaning of Article VI of the 1858 Treaty.

76. It does not necessarily follow that such activities are not at all covered by freedom of navigation: other provisions of the 1858 Treaty may have the effect of guaranteeing the right of the inhabitants of the Costa Rican bank to navigate on the river, within certain limits, even when they are not doing so within the context of commercial activities.

77. In this regard, the Court is of the opinion that there is reason to take into account the provisions of the Treaty as a whole, especially those fixing the boundary between the two States, in order to draw, if need be, certain necessary implications. In other words, even if no provision expressly guaranteeing a right of non-commercial navigation to the inhabitants of the Costa Rican bank can be found in the Treaty, the question must be asked whether such a right does not flow from other provisions with a different purpose, but of which it may, to a certain extent, be the necessary consequence.

78. As has been said, the two States decided, by the Treaty of Limits, to fix their common boundary on the south bank of the San Juan River along the whole stretch of the river running from its mouth to a point located three English miles downstream from Castillo Viejo. This was decided in Article II of the 1858 Treaty. At the time, there was already a population inhabiting the Costa Rican side of the boundary thus defined, that is to say living on the bank of the river or not far from it. In view of the great difficulty of travelling inland, due to the limited inland communications network, that population commonly used and still uses the river for travel for the purpose of meeting the essential needs of everyday life which require expeditious transportation, such as transport to and from school or for medical care.

79. The Court is of the opinion that it cannot have been the intention of the authors of the 1858 Treaty to deprive the inhabitants of the Costa Rican bank of the river, where that bank constitutes the boundary between the two States, of the right to use the river to the extent necessary to meet their essential requirements, even for activities of a non-commercial nature, given the geography of the area. While choosing, in Article II of the Treaty, to fix the boundary on the river bank, the parties must be presumed, in view of the historical background to the conclusion of this Treaty and of the Treaty’s object and purpose as defined by the Preamble and Article I, to have intended to preserve for the Costa Ricans living on that bank a minimal right of navigation for the purposes of continuing to live a normal life in the villages along the river. The Court considers that while such a right cannot be derived from the express language of Article VI, it can be inferred from the provisions of the Treaty as a whole and, in particular, the manner in which the boundary is fixed.

(ii) "*Official vessels*"

80. It is clear that the 1858 Treaty does not establish, in its Article VI, any special régime for "official" (or "public") vessels.

The only criterion provided for by Article VI is based not on the public or private ownership of the vessel but on the purpose of navigation: either it is undertaken for the "purposes of commerce" and benefits from the freedom established; or it is undertaken for purposes other than "commerce" and it does not. From this point of view the distinction between public and private vessels is devoid of legal significance. In the same way that a part of private navigation is not covered by the "perpetual right of free navigation" (in the case of pleasure craft for example), conversely, it is not inconceivable that "public vessels" might sail for the "purposes of commerce", if they met the conditions on which such a characterization depends.

81. In reality, when debating the question of "official vessels" the Parties particularly had in mind those used by the Costa Rican authorities for the exercise of public order activities — such as the police and customs — or for the provision of public services having no object of financial gain and therefore no commercial character.

82. As has already been noted (paragraph 49 above), the Cleveland Award only came to a decision regarding Costa Rican vessels of war and revenue service vessels, by denying the former the right to navigate on the San Juan and authorizing the navigation of the latter "as may be related and connected to her enjoyment of the 'purposes of commerce' accorded to her in said article [Article VI] or as may be necessary to the protection of said enjoyment". Nothing can thus be inferred from this regarding the navigation of other Costa Rican official vessels.

83. In the light of the foregoing, the Court is of the opinion that, as a general rule, the navigation of Costa Rican vessels for the purposes of public order activities and public services with no object of financial gain, in particular police vessels, lies outside the scope of Article VI of the 1858 Treaty, with the exception of revenue service vessels, the question of which was settled by the 1888 arbitration. Further, it is not convinced that a right for Costa Rica to sail such vessels can be inferred from Article IV of the Treaty, according to which "Costa Rica shall also be obliged, for the part that belongs to her of the banks of the San Juan River . . . 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". This provision, contrary to what Costa Rica contends, does not accord it any right of navigation in ordinary circumstances. It places an obligation upon it to "safeguard" the river from within its own territory.

Moreover, the Court considers that, in any event, Costa Rica has not proved its assertion that river transport is the only means to supply its police posts located along the river bank or to carry out the relief of the personnel stationed in them. Indeed, the materials in the case file show

that the posts in question are accessible, for example, by using the Costa Rican rivers communicating with the San Juan, in proximity of which they are located.

Lastly, for the reasons set out above (paragraph 40), Costa Rica cannot invoke the “Cuadra-Lizano” Joint Communiqué of 30 July 1998 in order to claim a right to navigate with official vessels which are armed or transporting arms.

84. Nonetheless, the Court is of the opinion that the reasons given above (in paragraphs 78 and 79) with regard to private vessels which navigate the river in order to meet the essential requirements of the population living on the river bank, where expeditious transportation is a condition for meeting those requirements, are also valid for certain Costa Rican official vessels which in specific situations are used solely for the purpose of providing that population with what it needs in order to meet the necessities of daily life, as defined in paragraph 78 above.

Consequently, this particular aspect of navigation by “official vessels” is covered by the right of navigation defined in paragraph 79 above: this right is not guaranteed by Article VI of the Treaty but is inferred from the provisions of the Treaty as a whole, in particular from the fixing of the boundary along the river bank.

### III. NICARAGUA’S POWER OF REGULATION OF NAVIGATION

85. In this part of the Judgment the Court addresses the power of Nicaragua to regulate the navigation of that part of the San Juan River in which Costa Rica has the right of navigation as determined in Part II of the Judgment. In respect of matters lying outside the scope of Costa Rica’s right of free navigation, and in respect of other parts of the river, which are not subject to the régime of the 1858 Treaty, Nicaragua, as sovereign, has complete power of regulation.

#### *1. General Observations*

86. In their written pleadings, the Parties disagreed about the extent or even the very existence of the power of Nicaragua to regulate the use of the river so far as Costa Rica was concerned. In the course of the oral proceedings that difference of positions largely disappeared. However, the Parties continue to disagree on the extent of the regulatory power of Nicaragua and on certain measures which Nicaragua has adopted and continues to apply.

In the first part of the oral proceedings, Nicaragua states that whatever the precise nature and extent of Costa Rica’s rights within the provisions of the Treaty of Limits and the Cleveland Award, Nicaragua

“must have the exclusive competence to exercise the following regulatory powers: (a) the protection and maintenance of the right of navigation, that is to say, the power to maintain public order and standards of safety in respect of navigation; (b) the protection of the border, including resort to immigration procedures in respect of foreign nationals navigating in Nicaragua’s territorial waters; (c) the exercise of normal police powers; (d) the protection of the environment and natural resources; and (e) the maintenance of the treaty provisions prescribing the conditions of navigation in accordance with the Treaty”.

Costa Rica, while accepting that Nicaragua does have a power of regulation, asserts that Nicaragua’s sovereignty over the San Juan must be seen as a part — an important part — of the fluvial régime established in 1858 and that the regulations enacted by Nicaragua must not infringe Costa Rica’s perpetual right of free navigation. It states that the regulations must be lawful, public, reasonable, non-arbitrary and non-discriminatory and adopted to fulfil a legitimate public purpose. Nicaragua accepts Costa Rica’s statement of principle.

The Parties disagree whether Nicaragua is obliged to notify Costa Rica about the regulations it has made or to consult Costa Rica in advance about proposed regulations. The Court rules on these differences in the course of this part of the Judgment.

(a) *Characteristics*

87. For essentially the reasons given by the Parties, the Court concludes that Nicaragua has the power to regulate the exercise by Costa Rica of its right to freedom of navigation under the 1858 Treaty. That power is not unlimited, being tempered by the rights and obligations of the Parties. A regulation in the present case is to have the following characteristics:

- (1) it must only subject the activity to certain rules without rendering impossible or substantially impeding the exercise of the right of free navigation;
- (2) it must be consistent with the terms of the Treaty, such as the prohibition on the unilateral imposition of certain taxes in Article VI;
- (3) it must have a legitimate purpose, such as safety of navigation, crime prevention and public safety and border control;
- (4) it must not be discriminatory and in matters such as timetabling must apply to Nicaraguan vessels if it applies to Costa Rican ones;
- (5) it must not be unreasonable, which means that its negative impact on the exercise of the right in question must not be manifestly excessive

when measured against the protection afforded to the purpose invoked.

88. Costa Rica has challenged the role of environmental protection as a reason for Nicaragua's regulations, indicating that it is a pretext to impose other requirements. But in the course of the oral proceedings Costa Rica itself emphasized environmental matters. For its part, Nicaragua points to the evidence it presented showing that the San Juan River and the Nicaraguan shore adjacent to it are extremely important and gravely threatened natural reserves. It also refers to related international obligations arising under the 1971 Ramsar Convention on Wetlands, the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora and the 1992 Convention on Biodiversity Conservation and Protection of Priority Wild Areas in Central America.

89. The Court considers that, over the course of the century and a half since the 1858 Treaty was concluded, the interests which are to be protected through regulation in the public interest may well have changed in ways that could never have been anticipated by the Parties at the time: protecting the environment is a notable example. As will appear from the rulings made later in this Judgment (see paragraphs 104, 109, 118, 127 and 141), Nicaragua, in adopting certain measures which have been challenged, in the Court's opinion, is pursuing the legitimate purpose of protecting the environment.

90. The Parties mentioned two other matters relating to regulation making by Nicaragua. Costa Rica suggested that Nicaragua had not adopted the measures and regulations being challenged in accordance with Nicaraguan law. It did not, however, put before the Court the relevant Nicaraguan constitutional and other requirements, and it did not begin to indicate how such non-compliance with Nicaraguan law, assuming it to have occurred, could have significance in international law.

Nicaragua contended that it had the power to regulate to "maintain the discipline of the Treaty". It did not however indicate how that would extend its regulatory powers in the present context.

Because the Parties did not develop these two contentions, the Court does not take them any further.

(b) *Notification*

91. The Court now turns to the question whether Nicaragua has a legal obligation to notify Costa Rica of the measures it adopts to regulate navigation on the river, or to give notice and consult with Costa Rica prior to the adoption by Nicaragua of such measures. In answer to a

question from a Member of the Court, Nicaragua said that, as the exclusive holder of sovereign authority and title over the river, under the Treaty or otherwise, it had no obligation to consult with or inform Costa Rica before making such regulations. Nicaragua states that nevertheless, in the interests of good neighbourliness and as a courtesy, it had regularly consulted with, informed and engaged in dialogue with Costa Rica about the measures. It then documented that claim by reference to the disputed measures. Costa Rica's answer to the question reviews actions taken by Nicaragua and concludes that notice was not given. Costa Rica, in its comments on Nicaragua's answer, rejects Nicaragua's position that it was under no legal obligation to consult, referring to what it says is the plain meaning of the text of Article VI of the Treaty.

92. However, the part of the text of Article VI on which Costa Rica depends concerns only the imposition of certain charges. Because that provision does not extend to the full range of measures taken to regulate navigation on the river, it cannot be read as imposing a general obligation of notification and consultation, and the Court need not consider that argument further. The remainder of Costa Rica's comments and the whole of Nicaragua's addressed the contacts which each had had with the other relating to the various measures.

93. The Treaty imposes no express general obligation on either of the Parties to notify the other about measures it is taking relating to navigation on the river. It contains a requirement of agreement in Article VI and a requirement of consultation in Article VIII which imply prior contact between the Parties. Under Article VI the two Parties are required to agree if they wish to impose any taxes in the situation contemplated by that provision. Under Article VIII, if the Government of Nicaragua is proposing to enter into an arrangement for canalization or transit on the San Juan, it must first consult with the Government of Costa Rica about the disadvantages the project might occasion between the two Parties.

94. Despite the lack of any specific provision in the Treaty relating to notification, the Court sees three factors as together imposing an obligation of notification of regulations in the circumstances of this case. The first is to be found in the 1956 Agreement under which the Parties agreed as follows:

"The two Parties, acting in the spirit which should move the members of the Central American family of nations, shall collaborate to the best of their ability in order to carry out those undertakings and activities which require a common effort by both States and are of mutual benefit and, in particular, in order to facilitate and expedite traffic on the Pan American Highway and on the San Juan River

within the terms of the Treaty of 15 April 1858 and its interpretation given by arbitration on 22 March 1888, and also in order to facilitate those transport services which may be provided to the territory of one Party by enterprises which are nationals of the other.”

It is difficult to see how the obligation, set out under the terms of the 1956 Agreement, to collaborate to facilitate traffic on the San Juan and to facilitate transport services being provided in the territory of one country by the nationals of the other could be met without Nicaragua notifying Costa Rica of relevant regulations which it adopts.

95. The second factor indicating that Nicaragua is obliged to notify the adoption of the regulations lies in its very subject-matter: navigation on a river in which two States have rights, the one as sovereign, the other to freedom of navigation. Such a requirement arises from the practical necessities of navigation on such a waterway. If the various purposes of navigation are to be achieved, it must be subject to some discipline, a discipline which depends on proper notification of the relevant regulations.

96. The third factor lies in the very nature of regulation. If the regulation is to subject the activity in question to rules, those undertaking that activity must be informed of those rules. Notification will assist in the better application of the regulation and the more effective pursuit of its purposes. Notification will also enable those subject to the regulation to bring facts within their particular knowledge to the attention of the appropriate authority and to suggest other ways of pursuing and achieving the relevant purpose.

97. The Court concludes that Nicaragua is under an obligation to notify Costa Rica of the regulations which it makes regarding the navigational régime on the San Juan River. That obligation does not however extend to notice or consultation prior to the adoption by Nicaragua of such regulations.

(c) *The factual context*

98. The Court considers it necessary to provide a factual context for the assessment which follows of the particular Nicaraguan regulations and actions challenged by Costa Rica. For this purpose, the Court recalls information presented to it about the population on the Costa Rican bank, the tourists using the river, and Costa Rican access to the area. According to Costa Rica, about 450 people, about half of them Nicaraguans, live along the approximately 140 kilometres of the Costa Rican bank. Nicaragua does not challenge these figures.

99. According to Nicaragua, with an exception in 1982 when war time emergency measures applied, Costa Rican tourist navigation has not

been prevented. Its figures show an increase from 711 in 1998 to 2,590 in 2004. Costa Rica does not challenge those figures nor, especially, their increase. Indeed, it drew on one of the Nicaraguan sources to show the increase in tourist numbers. Rather, its arguments about the impeding of tourism are general, depending in large part on the drawing of adverse inferences from the Nicaraguan requirements relating to the stopping and inspecting of vessels, the registering of passengers, the issue of visas and tourist cards, and the charging of fees. The evidence before the Court indicates that much of that travel by tourists begins or ends within Costa Rica, in the Sarapiquí and Colorado Rivers and includes only the approximately 25 kilometres of the San Juan River between the points where those two rivers join it. The vessels in which the tourists travel, according to the limited record before the Court, appear to provide for about ten passengers.

100. The Parties have provided the Court with information about measures Nicaragua has undertaken, and to this day continues to undertake, in regulating the use of the river. Costa Rica contends that the information shows that Nicaragua is acting unlawfully, not for legitimate purposes but for reasons of harassment, and unreasonably and in a discriminatory way. Nicaragua submits the opposite.

101. The Court notes that Costa Rica, in support of its claim of unlawful action, advances points of fact about unreasonableness by referring to the allegedly disproportionate impact of the regulations. The Court recalls that in terms of well established general principle it is for Costa Rica to establish those points (cf. *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 86, para. 68, and cases cited there). Further, a court examining the reasonableness of a regulation must recognize that the regulator, in this case the State with sovereignty over the river, has the primary responsibility for assessing the need for regulation and for choosing, on the basis of its knowledge of the situation, the measure that it deems most appropriate to meet that need. It will not be enough in a challenge to a regulation simply to assert in a general way that it is unreasonable. Concrete and specific facts will be required to persuade a court to come to that conclusion.

## 2. *The Legality of the Specific Nicaraguan Measures Challenged by Costa Rica*

102. The Court now considers the measures adopted by Nicaragua which are challenged by Costa Rica.



(a) *Requirement to stop and identification*

103. Costa Rica, in its final submissions, requests the Court to declare that Nicaragua has the obligation not to require Costa Rican vessels to stop at any Nicaraguan post along the river, and not to require their passengers to carry passports. Costa Rica contends that the requirements of stopping and registering have the practical effect of rendering near impossible the exercise of Costa Rica's treaty rights of free navigation and that they do not have much of a preventive effect. They cannot be regarded as reasonable or lawful. Nicaragua says that, since before the 1960s, it has required boat operators, including Nicaraguans, travelling on the river to stop and identify themselves, their passengers and their cargoes. The requirement, it says, is a fundamental element of its law enforcement efforts in the area. It considers it quite telling that Costa Rica has, since at least the 1960s, found it necessary to implement the same requirement on its own rivers. Nicaragua explains that its army posts are spread widely, leaving vast stretches of the river far removed from law enforcement officials, and that it is only by keeping track of vessels as they enter and leave the river that it can effectively monitor them to ensure that they do not engage in unlawful activities. Nicaragua also cites environmental protection and navigational safety as reasons for these requirements.

104. So far as the lawfulness of the requirement is concerned, the Court is of the opinion that Nicaragua, as sovereign, has the right to know the identity of those entering its territory and also to know that they have left. The power to require the production of a passport or identity document of some kind is a legitimate part of the exercise of such a power. Nicaragua also has related responsibilities in respect of law enforcement and environmental protection. To that extent, the Nicaraguan requirement that vessels stop on entering the river and leaving it and that they be subject to search is lawful. The Court cannot, however, see any legal justification for a general requirement that vessels continuing along the San Juan River, for example, from the San Carlos River to the Colorado River, stop at any intermediate point, in that case at Sarapiquí.

105. In its Memorial, Costa Rica also called attention to the right which the vessels of Costa Rica and Nicaragua have under Article VI to land on either side of the river, which it cited in support of the proposition that "[n]owhere is it stipulated that Costa Rican vessels have an *obligation* to land on the Nicaraguan bank and report to the Nicaraguan authorities". Costa Rica provides no elaboration of this argument. That is hardly surprising. The right of individual boatmen to tie up on the opposite bank for their own reasons and the power and responsibility of the State which is sovereign over the river to regulate it, in the

public interest, are two distinct matters. They may operate in complete harmony.

106. Costa Rica submits that more frequent Nicaraguan patrolling of the river would be reasonable, lawful and sufficiently effective. However, it provides no evidence to demonstrate that such patrolling would achieve the purposes for which the requirement in question was introduced, nor any specific evidence to show that this requirement actually interferes with tourist traffic, in particular through the delays allegedly resulting from its application. The Court recalls that it has been established that the number of tourists on the river has increased over the years the requirement has been in force. In the Court's opinion, Costa Rica has failed to show that the regulation is unreasonable.

107. Accordingly, the Court concludes that Costa Rica's challenge to the requirement that vessels stop and their crew members and passengers register and carry identity documents fails.

(b) *Departure clearance certificates*

108. Costa Rica challenges the departure clearance certificate which Nicaragua requires be issued to vessels navigating on the river. As will appear, it also challenges the associated fee or charge. According to Costa Rica, before 1979, the practice was that Costa Rican boat operators would obtain a departure clearance certificate from their own authorities (in Barra del Colorado or Puerto Viejo de Sarapiquí) and would show it on request to the Nicaraguan authorities when entering the San Juan. In the early 1980s the Nicaraguan authorities introduced their own certificates and a related fee. The matter is now the subject of the 2001 Action Plan for Issuance of Departure Clearance Certificates in the San Juan River of the Nicaraguan Army which provides as follows:

“1. Vessels navigating in between the Military Control Posts over the San Juan River shall be issued a courtesy departure clearance certificate.

2. The vessels and Nicaraguans whose domicile is close to the bank of the San Juan River and Costa Ricans whose domicile is located in the adjacent proximities shall be issued a courtesy departure clearance certificate, which shall be valid for one month and must be renewed one day before the expiration date. These shall report to the Military Control Posts located along the San Juan River.

3. The Port Captaincy in San Juan del Norte is hereby authorized to issue international departure clearance certificates to tourist vessels at a cost of US\$10.00 (ten dollars). These certificates may be

issued by the Military Control Posts in Boca de Sarapiquí and El Delta only where vessels attempt to evade the Port Captaincy.

. . . . .

5. Costa Rican vessels domiciled inland in Costa Rican territory that use the San Juan River as a transit route shall be issued an international departure clearance certificate in San Juan del Norte, subject to a symbolic fee equivalent to US\$5.00 (five dollars)."

Nicaragua says that on entry into the river, vessels are inspected to ensure that they are seaworthy, are free of fuel leaks that might pollute the river and are not carrying illegal cargo. In support of the regulation Nicaragua also cites the minutes of a 1997 meeting of the Binational Nicaragua-Costa Rica Commission:

"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."

Nicaragua considers that in this minute Costa Rica accepted that there was good reason for the registration and clearance requirements imposed by Nicaragua. For Costa Rica, the minute was concerned with drug trafficking and the passage meant only that the certificates should be obtained by vessels from their respective countries.

109. The Court considers that the purposes invoked by Nicaragua, i.e., navigational safety, environmental protection and criminal law enforcement, are legitimate ones. Further, the requirement for departure clearance certificates does not appear to have imposed any significant impediment on the exercise of Costa Rica's freedom of navigation.

The question may also be asked whether in terms of the earlier practice the inspection and certification should be undertaken by the State of nationality of the boat operators, on the analogy of maritime navigation. There is however no suggestion from Costa Rica that it would be in a position to take up this responsibility. Nor does it point to a single case where navigation has been impeded by an arbitrary refusal of a certificate.

110. Accordingly Costa Rica's claim that Costa Rican vessels need not obtain departure clearance certificates cannot be upheld. The Court considers the claim in respect of charges later (see paragraphs 120 to 124 below).

(c) *Visas and tourist cards*

111. In its final submissions, Costa Rica requests the Court to declare that Nicaragua has the obligation not to require persons exercising the right of free navigation to obtain Nicaraguan visas. Its claim also extends to tourist cards. Nicaragua states that, since at least 1979, all non-nationals have been required to obtain tourist cards when they enter Nicaragua, a requirement which includes entry into Nicaragua via the San Juan River. It says that it makes an exception for residents of Costa Rica riparian communities and for Costa Rican merchants who regularly use the river to transport goods from one community to another. It notes that those exemptions also apply to visas. Further, many of the tourists have the benefit of a visa waiver made by Nicaragua. Costa Rica points to some evidence which puts in question the operation of the exemptions for riparians.

112. Costa Rica contends that the visa and tourist card requirements are a breach of its right of free navigation. They impose unlawful limits on the freedom. The exercise of the power would mean that the right to freedom of navigation becomes a privilege to be granted or denied at the discretion of Nicaragua. For Nicaragua, the power to issue such documents is a simple consequence of its sovereignty over the river. Just as it can require that such permissions be sought by non-nationals as they enter its territory at Managua Airport, so too can it impose that requirement when non-nationals seek to enter the river over which it is sovereign.

113. The Court observes at the outset that a distinction must be drawn between requiring visas and requiring tourist cards. The power of a State to issue or refuse visas is a practical expression of the prerogative which each State has to control entry by non-nationals into its territory.

114. The requirement that passengers on Costa Rican vessels exercising freedom of navigation, other than riparians and certain Costa Rican merchants, have visas issued to them raises the question of who is entitled to and who may benefit from the right of freedom of navigation for commercial purposes stated in Article VI of the 1858 Treaty. Under Article VI of the Treaty the titleholder of the right of free navigation is Costa Rica. Owners and operators of Costa Rican vessels benefit from that right when navigating on the San Juan River for commercial purposes. Passengers on vessels exercising Costa Rica's right of free navigation also benefit from that right, even if such passengers are not Costa Rican nationals.

115. The Court recalls that the power of a State to issue or refuse a visa entails discretion. However in the present case Nicaragua may not impose a visa requirement on those persons who, in line with what was

stated in the preceding paragraph, may benefit from Costa Rica's right of free navigation. If that benefit is denied, the freedom of navigation would be hindered. In these circumstances, an imposition of a visa requirement is a breach of the Treaty right.

116. The Court observes that in fact the number of tourists travelling on the river in Costa Rican vessels has increased in the period these requirements have been in force (see paragraph 99 above). Further, Costa Rica has provided no evidence of arbitrary refusals of visas to tourists and Nicaragua points out that it does not require nationals from countries which are the source of most of the tourists visiting the San Juan to obtain visas. Furthermore, it makes exceptions for residents of Costa Rican riparian communities and Costa Rican merchants who regularly use the river. None of this, however, affects the legal situation just stated.

117. The Court accordingly concludes that Nicaragua may not require persons travelling on Costa Rican vessels which are exercising their freedom of navigation on the river to obtain visas. It would of course be another matter were they wishing to enter the land territory of Nicaragua from the river or to travel up the river beyond its shared part towards Lake Nicaragua.

118. The Court adds one point to that conclusion. It has already recognized that Nicaragua has the right to know the identity of those wishing to enter the river, for reasons, among others, of law enforcement and environmental protection (paragraph 104 above). One measure which it may properly take to protect such interests is to refuse entry to a particular person for good reasons relating to that purpose. It can do that at the point that the person identifies him or herself (see paragraphs 103 to 107 above). If such an action was justified in terms of the relevant purpose, no breach of the freedom would be involved. A similar analysis may well be available in terms of an emergency derogation of the right to navigate.

119. With regard to the requirement by Nicaragua that tourist cards be obtained, this does not appear to be intended to facilitate its control over entry into the San Juan River. In the course of the proceedings Nicaragua did no more than give some factual information about the operation of the tourist cards and the exemptions already mentioned. It referred to no legitimate purpose as justification for imposing this requirement. The requirement that passengers wishing to travel on Costa Rican vessels which are exercising Costa Rica's freedom of navigation on the river must first purchase tourist cards is inconsistent with that right to freedom of navigation. The Court accordingly concludes that Nicaragua may not require persons travelling on Costa Rican vessels which are exer-

cising Costa Rica's freedom of navigation on the river to purchase a tourist card.

(d) *Charges*

120. Costa Rica, in its final submissions, requests the Court to declare that Nicaragua has an obligation not to impose any charges or fees on Costa Rican vessels and their passengers for navigating on the river. The claims relate to payments required in respect of departure clearance certificates for vessels and visas and tourist cards for passengers. According to Nicaragua, they are not payments for navigating on the river, but for the service involved in the issue of the various documents. If Nicaragua has no legal power to require the issuing of such documents, as the Court has already held in respect of visas, then no charge or fee may of course be required. The Court has dealt with the question of the payment for tourist cards in the previous paragraph. The matter does, however, remain in respect of the issue of departure clearance certificates. Costa Rica contends that the requirement is prohibited by the Treaty. In 1982 it protested against the imposition of a charge for the issuing of a departure clearance certificate as a tax that is excluded by Article VI of the Treaty. In a later exchange, in 2001, Nicaragua contended that the sum being charged was

“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”.

Nicaragua recalls that, by decision of the President of Nicaragua and “to strengthen the ties” between the two countries and Governments, Costa Rican vessels, other than tourist vessels and those using the port of San Juan del Norte, were to be issued with the certificate without payment. In response, Costa Rica again referred to Article VI, quoting the last part of that provision, and contended that in effect no service was rendered corresponding to the departure clearance certificate. Nicaragua, says Costa Rica, ignores the plain text of Article VI of the Treaty of Limits which provides that neither country may impose charges on the other, except when there is agreement by both Governments.

121. The final sentence of Article VI in its original Spanish text provides as follows:

“Las embarcaciones de uno ú otro país podrán indistintamente atracar en las riberas del río en la parte en que la navegación es común, sin cobrarse ninguna clase de impuestos, á no ser que se establezcan de acuerdo entre ambos Gobiernos.” (For the full

text of Article VI in the Spanish original, see paragraph 43 above.)

The English translations of that sentence provided to President Cleveland by the Parties were respectively as follows:

“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.” (Costa Rica)

and

“The vessels of both countries may indiscriminately approach the shores (*atracar*) of the river where the navigation is common to both, without the collection of any class of impost unless so established by the two Governments.” (Nicaragua)

122. In the Court’s view, the final sentence of Article VI has two elements. It first confers a right on the vessels of each Party to land on the bank of the other. Second, that sentence provides that the exercise of that particular right is not to be the subject of an impost or tax. Just as the exercise of the right of navigation on the river is to be free and not the subject of any payment, so is stopping on the other bank. The Court does not read the provision as extending beyond that particular situation and as prohibiting charges for services lawfully and properly required by Nicaragua and rendered to vessels navigating on the river.

123. The Court now turns to the issue raised by Costa Rica in its correspondence with Nicaragua in 2001 (see paragraph 120 above): what is the service being rendered for the certificate and the charge. As the Court understands the situation, Costa Rica does not challenge the right of Nicaragua to inspect vessels on the river for safety, environmental and law enforcement reasons; as noted, it accepted it in respect of drug trafficking in 1997. In the Court’s opinion, that right would in any event be an aspect of Nicaraguan sovereignty over the river. But those actions of policing by the sovereign do not include the provision of any service to boat operators. In respect of Costa Rican vessels exercising freedom of navigation on the river, the payment must be seen as unlawful.

124. Accordingly, Costa Rica's claim in respect of the charge for the departure clearance certificate for those vessels must be upheld.

(e) *Timetabling*

125. In its final submissions, Costa Rica requests the Court to declare that Nicaragua has the obligation not to impose impediments to the exercise of the right of free navigation, *inter alia*, by timetables for navigation. Nicaragua, according to Costa Rica, in 1999 restricted navigation on the San Juan River from 6.00 a.m. to 5.30 p.m. Costa Rica in 2001 protested against "this unilateral restriction . . . , given that it is not stipulated by any agreement between the two States". In its response, Nicaragua noted "its right and obligation, as the sovereign State, to adopt the regulations necessary to guarantee the safety of the people and vessels travelling along the river and avoid all manner of criminal activities". Costa Rica replied that Nicaragua could not establish these limitations unilaterally since none of the instruments in force between the two countries established that it may do so. In the course of 2001 the Action Plan of the Army of Nicaragua for issuance of Departure Clearance Certificates on the River set out this requirement: "As a measure for protecting human life and safe navigation, navigation over the San Juan River remains suspended between 5.00 p.m. and 5.00 a.m." Costa Rica contends that the prohibition is a violation of a right which is "perpetual" and "free".

126. The Court recalls that the exercise of a power to regulate may legitimately include placing limits on the activity in question. The limited evidence before the Court does not demonstrate any extensive use of the river for night time navigation: tourist vessels, understandably, use the river during daylight hours; emergencies are acknowledged by Nicaragua to be an exception; and, according to the Nicaraguan Military Commander in the area between 1992 and 1995, "by long standing custom night time navigation of the river has not been practised, except in emergency situations". He explained that the prohibition "applies to everyone, Nicaraguans included. The river is treacherous to navigate at night, since there are no lights, and fallen logs and sandbars, invisible in the dark, are prevalent, as are crocodiles." The limited interference with Costa Rica's freedom to navigate does not, in the Court's opinion, amount to an unlawful impediment to that freedom, particularly when the purposes of the regulation are considered.

127. Costa Rica's challenge to the regulation also applies to one of those purposes, environmental protection. As already indicated, the Court considers that that is a legitimate purpose and accordingly rejects this ground for attacking the night time prohibition.



128. Finally, Costa Rica submits that the regulation is unreasonable. The purposes could have been better achieved by other means, it says, in particular by requiring boats travelling at night to have lights and to have dangerous places marked by lights. Costa Rica does not address the practicality of such measures, including their cost, nor their effectiveness. It proceeds only by way of assertion. It has not, in the Court's opinion, come near to establishing that the regulation is unreasonable.

129. Accordingly, Costa Rica's claim in respect of timetabling cannot be upheld.

(f) *Flags*

130. In its final submissions, Costa Rica requests the Court to declare that Nicaragua has an obligation not to impose an impediment on the exercise of the right of free navigation, *inter alia*, by conditions relating to flags. Costa Rica claims that the right of its vessels to fly its own flag and not to fly the Nicaraguan flag is a corollary right to the right of free navigation under the Treaty. For Nicaragua, the requirement that vessels fly its flag when navigating in its waters, including in the San Juan, is an attribute of Nicaragua's sovereignty, and is a matter of international custom and practice. It is a reasonable and non-burdensome requirement.

131. The Parties also disagree on the facts. While Costa Rica suggests that Nicaragua requires all of its vessels to fly the Nicaraguan flag, it has, in the Court's view, provided no persuasive evidence of this. Further, the relevant Nicaraguan document, the Action Plan of the Army of Nicaragua for Issuance of Departure Clearance Certificates in the San Juan River, while requiring its flag to be flown, adds an important qualification: "If vessels have no flag pole, they shall fly the flag on the stern turret if they have one." Nicaragua's counsel said that that limit meant the regulation was inapplicable to the vast majority of Costa Rican boats that use the river which are almost all small wooden "pangas" or simple boats with a small outboard motor and no means to display flags. Costa Rica also contends that Nicaragua does not allow its vessels to fly the Costa Rican flag. Nicaragua provides evidence from a military officer who had responsibility in the San Juan area from 2002 to 2005 that Costa Rican vessels could fly the Costa Rican flag so long as they flew the Nicaraguan flag as well; in practice, that meant only that the Costa Rican tourist boats kept a Nicaraguan flag on board and hoisted it during the times they were on the San Juan. Finally, as counsel for Costa Rica accepts, there is no evidence of any Costa Rican vessel being prevented from navigating on the river for breach of this requirement.

132. The Court considers that Nicaragua, which has sovereignty over the San Juan River, may, in the exercise of its sovereign powers, require Costa Rican vessels fitted with masts or turrets navigating on the river to fly its flag. This requirement cannot in any respect be considered an impediment to the exercise of the freedom of navigation of Costa Rican vessels under the 1858 Treaty. The Court observes, moreover, that it has not been presented with any evidence that Costa Rican vessels have been prevented from navigation on the San Juan River as a result of Nicaragua's flag requirement. Accordingly, Costa Rica's claim that Nicaragua has violated its obligation not to impose impediments on the exercise of the right of free navigation by establishing conditions relating to flags cannot be upheld.

*(g) Conclusion*

133. It follows from the above that Nicaragua has exercised its powers of regulation regarding the matters discussed under subsections (2) *(a)*, *(b)*, *(e)* and *(f)* of Section III above in conformity with the 1858 Treaty; but that it is not acting in conformity with the obligations under the 1858 Treaty when it implements measures requiring visas and tourist cards and the payment of charges in respect of vessels, boat operators and their passengers exercising the freedom of navigation (paragraphs 111 to 124 above).

#### IV. SUBSISTENCE FISHING

134. In its final submissions, Costa Rica requests the Court to declare that Nicaragua has the obligation to permit riparians of the Costa Rican bank to fish in the river for subsistence purposes. Nicaragua, in addition to challenging this claim on the merits, has also said that it is inadmissible. The Court considers that issue first.

135. Costa Rica did not include the claim in respect of fishing in its Application. It did however include it in its Memorial, explaining that it was only after the institution of the proceedings that Nicaragua had begun to prevent the riparians from engaging in fishing. In its Counter-Memorial, Nicaragua asserted that the 1858 Treaty did not provide for any fishing rights; it also challenged the existence of any customary right of subsistence fishing by Costa Rican riparians. It was only in its Rejoinder that Nicaragua submitted that the claim was not admissible on the ground that this particular claim was not included nor was it implicit in the Application. Nicaragua also asserts that this claim did not arise directly out of the subject-matter of the Application.

136. Costa Rica in the first round of the oral hearings, as well as discussing the merits of the claim, addressed its admissibility in some detail. It submitted, first, that Nicaragua, by pleading to the merits in the Counter-

Memorial, implicitly accepted the admissibility of the fisheries claim; second, that Nicaragua was to be taken as having consented to the jurisdiction of the Court and is debarred from raising the issue; third, that Costa Rica had reserved the right to supplement and modify its Application; fourth, that the claim was implicitly included as being “a step to aggravate and extend the dispute”, a matter included in the Application; and, fifth, the claim fell within “other applicable rules of international law” also referred to in the Application. Nicaragua did not respond to the specific elements of those arguments and, except for a brief reference back to its written pleadings, confined itself to the merits, denying that Costa Rica had established the existence of a customary right.

137. The Court recalls at the outset that admissibility is distinct from jurisdiction. In the current instance the Court is dealing with the question of admissibility. It is further recalled that it is for the Court to determine in the light of the circumstances of each case whether an application is admissible (*Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240). Under Article 40, paragraph 1, of the Statute of the Court, the “subject of the dispute” must be indicated in the Application; as established in the Court’s jurisprudence, an additional claim must have been implicit in the Application (*Temple of Preah Vihear (Cambodia v. Thailand)*, *Merits, Judgment, I.C.J. Reports 1962*, p. 36) or must arise “directly out of the question which is the subject-matter of that Application” (*Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, *Merits, Judgment, I.C.J. Reports 1974*, p. 203, para. 72).

With regard to Nicaragua’s argument that Costa Rica’s claim relating to subsistence fishing is inadmissible on the grounds that Costa Rica failed to include, even implicitly, the claim in its Application, the Court notes that the alleged interferences by Nicaragua with the claimed right of subsistence fishing post-date the filing of the Application. As to Nicaragua’s second argument that the claim does not arise directly out of the subject-matter of the Application, the Court considers that in the circumstances of this case, given the relationship between the riparians and the river and the terms of the Application, there is a sufficiently close connection between the claim relating to subsistence fishing and the Application, in which Costa Rica, in addition to the 1858 Treaty, invoked “other applicable rules and principles of international law”.

138. In addition, the Court observes that, as appears from the arguments on the merits which the Respondent has presented in the two rounds of written pleadings and in two rounds of oral hearings, Nicaragua has not been disadvantaged by Costa Rica’s failure to give notice in the Application. Similarly, in terms of its responsibility for the due administration of justice, the Court does not consider itself to have been

disadvantaged in its understanding of the issues by the lack of explicit reference to the claim in respect of fisheries in the Application.

139. Accordingly, Nicaragua's objection to admissibility cannot be upheld.

140. The Court now turns to the merits of Costa Rica's claim regarding subsistence fishing rights. Costa Rica submits that there has long been a practice allowing the inhabitants of the Costa Rican bank of the San Juan to fish in that river for subsistence purposes. That practice survived the Treaty of 1858. It is a customary right according to Costa Rica. In support, it refers to a Royal Ordinance of 1540 under which the upper part of the river, from the lake for 15 leagues, belonged to Nicaragua and the lower part to the Caribbean Sea to Costa Rica; for the purposes of navigation and fishing, the river and lake were to be common. It emphasizes the continuing practice of Costa Rican riparians of fishing for subsistence purposes, which, according to Costa Rica, was not challenged by Nicaragua until after the present proceedings were instituted. Nicaragua responds that Costa Rica has failed to prove that the custom is established in such a manner that it has become binding on Nicaragua. While it is true that it has usually tolerated the limited use of the San Juan for non-commercial fishing by Costa Rican riparians, this tolerance cannot be seen as a source of a legal right. Moreover, Costa Rica, according to Nicaragua, has constantly accepted that it has no rights except for those stemming from the treaties and not from customary law. Finally, at the hearings, Nicaragua reiterated that it "has absolutely no intention of preventing Costa Rican residents from engaging in subsistence fishing activities". Costa Rica, in its final statement on the matter, asked the Court in the operative part of its Judgment to record and give effect to Nicaragua's stated position that subsistence fishing will not be impeded.

141. The Court recalls that the Parties are agreed that all that is in dispute is fishing by Costa Rican riparians for subsistence purposes. There is no question of commercial or sport fishing. The Court also notes that the Parties have not attempted to define subsistence fishing (except by those exclusions) nor have they asked the Court to provide a definition. Subsistence fishing has without doubt occurred over a very long period. Leaving aside for the moment the issue of fishing in the river from boats, a point to which the Court will return, the Parties agree that the practice of subsistence fishing is long established. They disagree however whether the practice has become binding on Nicaragua thereby entitling the riparians as a matter of customary right to engage in subsistence fishing from the bank. The Court observes that the practice, by its very nature, especially given the remoteness of the area and the small, thinly spread population, is not likely to be documented in any formal way in any official record. For the Court, the failure of Nicaragua to deny the existence of a

right arising from the practice which had continued undisturbed and unquestioned over a very long period, is particularly significant. The Court accordingly concludes that Costa Rica has a customary right. That right would be subject to any Nicaraguan regulatory measures relating to fishing adopted for proper purposes, particularly for the protection of resources and the environment.

142. The Court does not agree with Nicaragua's contention that Costa Rica accepted in the course of these proceedings that it had no rights except those stemming from the treaties. Any statement that has been made in that sense related solely to disputed navigation rights under the 1858 Treaty and other binding instruments; the fisheries claim, from the outset, was based on custom.

143. The Court does not however consider that the customary right extends to fishing from vessels on the river. There is only limited and recent evidence of such a practice. Moreover that evidence is principally of the rejection of such fishing by the Nicaraguan authorities.

144. Accordingly, the Court concludes that fishing by the inhabitants of the Costa Rican bank of the San Juan River for subsistence purposes from that bank is to be respected by Nicaragua as a customary right.

## V. THE CLAIMS MADE BY THE PARTIES IN THEIR FINAL SUBMISSIONS

### *1. The Claims of Costa Rica*

145. In its final submissions to the Court at the end of the oral argument, Costa Rica made a number of distinct claims (see above, paragraph 14).

146. The principal purpose of its Application is to obtain from the Court a declaration that Nicaragua has a certain number of obligations towards Costa Rica, Costa Rican vessels and their passengers, and the inhabitants of the Costa Rican bank of the San Juan River, and that Nicaragua has violated these obligations which are listed under points (a) to (i) of the final submissions.

The Court will uphold elements of this claim in the operative part of this Judgment to the extent that they correspond to the preceding reasoning and will dismiss the others.

147. Costa Rica presents three further submissions: it requests the Court to order Nicaragua to cease all the breaches of its obligations which have a continuing character; to find that Nicaragua should make

reparation to Costa Rica for the injury caused to it by the breaches identified, in the form of the restoration of the prior situation and compensation in an amount to be determined at a later stage; and finally to give assurances and guarantees that it will not repeat its unlawful conduct.

148. As far as the first of these three submissions is concerned, it should be recalled that when the Court has found that the conduct of a State is of a wrongful nature, and in the event that this conduct persists on the date of the judgment, the State concerned is obliged to cease it immediately. This obligation to cease wrongful conduct derives both from the general obligation of each State to conduct itself in accordance with international law and from the specific obligation upon States parties to disputes before the Court to comply with its judgments, pursuant to Article 59 of its Statute.

It is not necessary, and it serves no useful purpose as a general rule, for the Court to recall the existence of this obligation in the operative paragraphs of the judgments it renders: the obligation incumbent on the State concerned to cease such conduct derives by operation of law from the very fact that the Court establishes the existence of a violation of a continuing character.

The Court may consider it appropriate, in special circumstances, to mention that obligation expressly in the operative part of its judgment. It sees no particular reason to do so in the present case.

149. As for the second submission set forth in paragraph 147 above, it should be recalled that the cessation of a violation of a continuing character and the consequent restoration of the legal situation constitute a form of reparation for the injured State. With regard to the claim for compensation, the Court notes that Costa Rica has not submitted any evidence capable of demonstrating that it has suffered a financially assessable injury. The Court therefore will not uphold that part of the submissions.

150. Finally, while the Court may order, as it has done in the past, a State responsible for internationally wrongful conduct to provide the injured State with assurances and guarantees of non-repetition, it will only do so if the circumstances so warrant, which it is for the Court to assess.

As a general rule, there is no reason to suppose that a State whose act or conduct has been declared wrongful by the Court will repeat that act or conduct in the future, since its good faith must be presumed (see *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 63; *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 272, para. 60; *Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974*, p. 477, para. 63; and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 437, para. 101). There is thus no reason, except in special circumstances of which the Court is not aware in the present case, to order a measure such as that requested by Costa Rica.

## 2. *The Claims of Nicaragua*

151. In its final submissions, Nicaragua also submitted several claims to the Court.

152. First of all, it requests the Court to dismiss all of Costa Rica's claims, either because the Respondent has not breached the obligations incumbent upon it, or because the obligations allegedly breached do not derive from any rule of international law.

The Court will uphold this claim to the extent that it corresponds to the reasoning set out in the present Judgment in respect of Costa Rica's claims.

153. Nicaragua adds a further submission. It requests the Court "to make a formal declaration on the issues raised by Nicaragua in Section II of Chapter VII of her Counter-Memorial, [and] in Section I, Chapter VI of her Rejoinder".

The declaration requested is the following:

- "(i) Costa Rica is obliged to comply with the regulations for navigation (and landing) in the San Juan imposed by Nicaraguan authorities in particular related to matters of health and security;
- (ii) Costa Rica has to pay for any special services provided by Nicaragua in the use of the San Juan either for navigation or landing on the Nicaraguan banks;
- (iii) Costa Rica has to comply with all reasonable charges for modern improvements in the navigation of the river with respect to its situation in 1858;
- (iv) revenue service boats may only be used during and with special reference to actual transit of the merchandise authorized by Treaty;
- (v) Nicaragua has the right to dredge the San Juan in order to return the flow of water to that obtaining in 1858 even if this affects the flow of water to other present day recipients of this flow such as the Colorado River."

The Court notes in this respect that Nicaragua indicated in the course of the hearings that it would be satisfied to see such a "declaration" appear in any part of the Judgment, either in the operative paragraph or simply in the reasoning. It is therefore doubtful whether these can now be viewed as formal submissions. The Court notes however that, in stating his final submissions, the Agent of Nicaragua reiterated the Respondent's request on this point.

154. In any case, the Court notes that the first two and the fourth points on which Nicaragua has requested the "declaration" in reality concern questions raised by Costa Rica and discussed by the Parties throughout the proceedings. The reasoning of the present Judgment is

therefore sufficient to respond to Nicaragua's wish that Costa Rica's obligations towards it should be stated by the Court.

155. As for the fifth point to be addressed in the requested "declaration", on the assumption that it is in the nature of a counter-claim, Costa Rica has cast doubt on its admissibility, arguing that it is not "directly connected" with the subject-matter of Costa Rica's claim, within the meaning of Article 80 of the Rules of Court. The same issue could arise in respect of the third point.

In any event it suffices for the Court to observe that the two questions thus raised were settled in the decision made in the Cleveland Award. It was determined in paragraphs 4 to 6 of the third clause of the Award that Costa Rica is not bound to share in the expenses necessary to improve navigation on the San Juan River and that Nicaragua may execute such works of improvement as it deems suitable, provided that such works do not seriously impair navigation on tributaries of the San Juan belonging to Costa Rica.

As Nicaragua has offered no explanation why the Award does not suffice to make clear the Parties' rights and obligations in respect of these matters, its claim in this regard must be rejected.

\* \* \*

156. For these reasons,

THE COURT,

(1) As regards Costa Rica's navigational rights on the San Juan River under the 1858 Treaty, in that part where navigation is common,

(a) Unanimously,

*Finds* that Costa Rica has the right of free navigation on the San Juan River for purposes of commerce;

(b) Unanimously,

*Finds* that the right of navigation for purposes of commerce enjoyed by Costa Rica includes the transport of passengers;

(c) Unanimously,

*Finds* that the right of navigation for purposes of commerce enjoyed by Costa Rica includes the transport of tourists;

(d) By nine votes to five,

*Finds* that persons travelling on the San Juan River on board Costa Rican vessels exercising Costa Rica's right of free navigation are not required to obtain Nicaraguan visas;

IN FAVOUR: *President* Owada; *Judges* Shi, Buergenthal, Abraham, Keith, Bennouna, Cançado Trindade, Yusuf, Greenwood;



AGAINST: *Judges* Koroma, Al-Khasawneh, Sepúlveda-Amor, Skotnikov;  
*Judge ad hoc* Guillaume;

(e) Unanimously,

*Finds* that persons travelling on the San Juan River on board Costa Rican vessels exercising Costa Rica's right of free navigation are not required to purchase Nicaraguan tourist cards;

(f) By thirteen votes to one,

*Finds* that the inhabitants of the Costa Rican bank of the San Juan River have the right to navigate on the river between the riparian communities for the purposes of the essential needs of everyday life which require expeditious transportation;

IN FAVOUR: *President* Owada; *Judges* Shi, Koroma, Al-Khasawneh, Buergenthal, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood;

AGAINST: *Judge ad hoc* Guillaume;

(g) By twelve votes to two,

*Finds* that Costa Rica has the right of navigation on the San Juan River with official vessels used solely, in specific situations, to provide essential services for the inhabitants of the riparian areas where expeditious transportation is a condition for meeting the inhabitants' requirements;

IN FAVOUR: *President* Owada; *Judges* Shi, Koroma, Al-Khasawneh, Buergenthal, Abraham, Keith, Sepúlveda-Amor, Bennouna, Cançado Trindade, Yusuf, Greenwood;

AGAINST: *Judge* Skotnikov; *Judge ad hoc* Guillaume;

(h) Unanimously,

*Finds* that Costa Rica does not have the right of navigation on the San Juan River with vessels carrying out police functions;

(i) Unanimously,

*Finds* that Costa Rica does not have the right of navigation on the San Juan River for the purposes of the exchange of personnel of the police border posts along the right bank of the river and of the re-supply of these posts, with official equipment, including service arms and ammunition;

(2) As regards Nicaragua's right to regulate navigation on the San Juan River, in that part where navigation is common,

(a) Unanimously,

*Finds* that Nicaragua has the right to require Costa Rican vessels and their passengers to stop at the first and last Nicaraguan post on their route along the San Juan River;

(b) Unanimously,

*Finds* that Nicaragua has the right to require persons travelling on the San Juan River to carry a passport or an identity document;

(c) Unanimously,

*Finds* that Nicaragua has the right to issue departure clearance certificates to Costa Rican vessels exercising Costa Rica's right of free navigation but does not have the right to request the payment of a charge for the issuance of such certificates;

(d) Unanimously,

*Finds* that Nicaragua has the right to impose timetables for navigation on vessels navigating on the San Juan River;

(e) Unanimously,

*Finds* that Nicaragua has the right to require Costa Rican vessels fitted with masts or turrets to display the Nicaraguan flag;

(3) As regards subsistence fishing,

By thirteen votes to one,

*Finds* that fishing by the inhabitants of the Costa Rican bank of the San Juan River for subsistence purposes from that bank is to be respected by Nicaragua as a customary right;

IN FAVOUR: *President* Owada; *Judges* Shi, Koroma, Al-Khasawneh, Buergenthal, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood; *Judge ad hoc* Guillaume;

AGAINST: *Judge* Sepúlveda-Amor;

(4) As regards Nicaragua's compliance with its international obligations under the 1858 Treaty,

(a) By nine votes to five,

*Finds* that Nicaragua is not acting in accordance with its obligations under the 1858 Treaty when it requires persons travelling on the San Juan River on board Costa Rican vessels exercising Costa Rica's right of free navigation to obtain Nicaraguan visas;

IN FAVOUR: *President* Owada; *Judges* Shi, Buergenthal, Abraham, Keith, Bennouna, Cançado Trindade, Yusuf, Greenwood;

AGAINST: *Judges* Koroma, Al-Khasawneh, Sepúlveda-Amor, Skotnikov; *Judge ad hoc* Guillaume;

(b) Unanimously,

*Finds* that Nicaragua is not acting in accordance with its obligations under the 1858 Treaty when it requires persons travelling on the San Juan River on board Costa Rican vessels exercising Costa Rica's right of free navigation to purchase Nicaraguan tourist cards;

(c) Unanimously,

*Finds* that Nicaragua is not acting in accordance with its obligations under the 1858 Treaty when it requires the operators of vessels exercising Costa Rica's right of free navigation to pay charges for departure clearance certificates;

(5) Unanimously,

*Rejects* all other submissions presented by Costa Rica and Nicaragua.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this thirteenth day of July, two thousand and nine, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Costa Rica and the Government of the Republic of Nicaragua, respectively.

(*Signed*) Hisashi OWADA,  
President.

(*Signed*) Philippe COUVREUR,  
Registrar.

Judges SEPÚLVEDA-AMOR and SKOTNIKOV append separate opinions to the Judgment of the Court; Judge *ad hoc* GUILLAUME appends a declaration to the Judgment of the Court.

(*Initialled*) H.O.  
(*Initialled*) Ph.C.