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Preparation Paper/Study Guide:

International Court of Justice (ICJ)

**“Certain Activities Carried Out by Nicaragua in the Border
Area (Costa Rica v. Nicaragua)”**

Introduction

On the 18 November 2010, the Republic of Costa Rica (hereinafter “Costa Rica”) instituted proceedings against the Republic of Nicaragua (hereinafter “Nicaragua”) on the basis of the four following allegations: *“the incursion into, occupation of and use by Nicaragua’s Army of Costa Rican territory as well as breaches of Nicaragua’s obligations towards Costa Rica”* under several international law instruments.

Costa Rica claims that the alleged violations concern *“an initial area of around three square kilometers of Costa Rican territory, located at the northeast Caribbean tip of Costa Rica”*, at the mouth of the San Juan border river, and more specifically in Laguna los Portillos (also known as “Harbor Head lagoon”), on the sea coast of Isla Portillos.



Costa Rica’s Position

As a basis for the jurisdiction of the Court, the Applicant refers to Article XXXI of the American Treaty on Pacific Settlement signed at Bogotá on 30 April 1948 (hereinafter the “Pact of Bogotá”) and to the declarations made under Article 36, paragraph 2, of the Statute of the Court, by Costa Rica on 20 February 1973 and by Nicaragua on 24 September 1929 (as amended on 23 October 2001)

Costa Rica charges Nicaragua with having occupied, in two separate incidents, the territory of Costa Rica in connection with the construction of a canal (hereinafter also referred to as the “caño”) across Costa Rican territory from the San Juan river to Laguna los Portillos (also known as “Harbor Head lagoon”), and certain related works of dredging on the San Juan river.

The first incursion occurred on or around the 18 October 2010, at the same time as President Ortega of Nicaragua gave the order to start dredging works. Nicaragua was reported to have been felling trees and depositing sediment from the dredging works on Costa Rican territory.

After a brief withdrawal, on or around the 1 November 2010 a second contingent of Nicaraguan troops entered the Costa Rican territory and established a camp. This second incursion has resulted in the continuing occupation by armed Nicaraguan military forces of an initial area of around 3 square kilometers of Costa Rican territory, located at the north-east Caribbean tip of Costa Rica, although evidence shows that Nicaraguan military forces have also ventured further inside Costa Rican territory, to the south of that area. Nicaragua has also seriously damaged that part of Costa Rican territory under its occupation.

Costa Rica states that the “ongoing and planned dredging and the construction of the canal will seriously affect the flow of water to the Colorado River of Costa Rica, and will cause further damage to Costa Rican territory, including the wetlands and the beautiful national wildlife protected areas located in the region”



Edén Pastora, head of the dredging operations undertaken by Nicaragua, has allegedly confirmed in television interviews that the purpose of the operations in the canal is to “restore the Nicaraguan border river to its historic channel to the sea” and that the 1858 Treaty of Limits proves that the Isla Calero “is part of Nicaragua, not Costa Rica”. The general fear in Costa Rica is that Nicaragua intends by the artificial canalization of the San Juan River to modify the natural watercourse which forms the boundary as set out in the first and second Alexander Awards.

Costa Rica accordingly requests the Court

“to adjudicate and declare that Nicaragua is in breach of its international obligations . . . as regards the incursion into and occupation of Costa Rican territory, the serious damage inflicted to its protected rainforests and wetlands, and the damage intended to the Colorado River, wetlands and protected ecosystems, as well as the dredging and canalization activities being carried out by Nicaragua on the San Juan River. In particular the Court is requested to adjudge and declare that, by its conduct, Nicaragua has breached:

- (a) the territory of the Republic of Costa Rica, as agreed and delimited by the 1858 Treaty of Limits, the Cleveland Award and the first and second Alexander Awards;*
- (b) the fundamental principles of territorial integrity and the prohibition of use of force under the Charter of the United Nations and the Charter of the Organization of American States;*
- (c) the obligation imposed upon Nicaragua by Article IX of the 1858 Treaty of Limits not to use the San Juan River to carry out hostile acts;*
- (d) the obligation not to damage Costa Rican territory;*
- (e) the obligation not to artificially channel the San Juan River away from its natural watercourse without the consent of Costa Rica;*
- (f) the obligation not to prohibit the navigation on the San Juan River by Costa Rican nationals;*
- (g) the obligation not to dredge the San Juan River if this causes damage to Costa Rican territory (including the Colorado River), in accordance with the 1888 Cleveland Award;*
- (h) the obligations under the Ramsar Convention on Wetlands;*
- (i) the obligation not to aggravate and extend the dispute by adopting measures against Costa Rica, including the expansion of the invaded and occupied Costa Rican territory or by adopting any further measure or carrying out any further actions that would infringe Costa Rica’s territorial integrity under international law”.*

Nicaragua’s Position

Nicaragua however dismisses these claims and argues the following:

The sequence of events that has brought the Parties again before the Court can be explained briefly. It is a repetition of what has been happening for nearly two centuries: every time Nicaragua attempts to make any substantial use of the San Juan River, Costa Rica finds a reason for dispute. So it was in 1884 when Nicaragua signed the first canalization treaty with the United States, Costa Rica decided to navigate the river with a ship of war that led to the Arbitration of President Cleveland; and so it was a 100 years later when there was again talk of an inter-oceanic canal through Nicaragua, Costa Rica decided that it was going to navigate the river with armed guards that led to the first recourse to this Court. And now, as soon as Nicaragua begins a modest dredging and cleaning effort in order to recover part of the original water flow of the San Juan River and improve navigation, Costa Rica finds reasons to start an international scandal.

The ostensible reason is a dispute over a swamp of under 3 sq. km located at the mouth of the San Juan River. However, there should be no mistake, the real objective of this dispute is to stop any attempt by Nicaragua to even moderately dredge and clean up the San Juan River.

If Nicaragua is not permitted to continue with its dredging project, which is really scarcely more than a minor cleaning operation, then Nicaragua will be denied any right at all to dredge and maintain the flow of the San Juan River. Without even minor cleaning, the river's mouth will be dried up in a matter of decades. Then not only will navigation be impossible, but the extensive wetlands of Nicaragua along the lower San Juan that depend on the waters of this river, will be destroyed .

History of the Costa Rica/ Nicaragua Boundary

The 1858 Treaty of Limits between Costa Rica and Nicaragua, and the first and second Alexander Awards, defined and settled with a permanent and definite character the territorial boundary line between Costa Rica and Nicaragua (from Punta Castilla to the point three miles below Castillo Viejo). The validity of the 1858 Treaty of Limits was upheld by the Cleveland Award of 1888.

The 1858 Treaty of Limits delimited the boundary between Costa Rica and Nicaragua from the Caribbean Sea to the Pacific Ocean. The part of the boundary between a point three English miles below Castillo Viejo and the Caribbean Sea was clearly fixed as following the right bank of the San Juan River:

"The dividing line between the two Republics, starting from the Northern Sea, shall begin at the end of Punta de Castilla, at the mouth of the San Juan de Nicaragua River, and shall run along the right bank of the said river up to a point of three English miles distant from Castillo Viejo ..."

The 1858 Treaty of Limits also shows that the drafters had made a clear distinction between the San Juan River and the Colorado. Article V, a transitional provision, stated that:

"As long as Nicaragua does not recover the full possession of all her rights in the port of San Juan del Norte, the use and possession of Punta de Castilla shall be common and equal both for Nicaragua and Costa Rica ; and in the meantime, and as long as this community lasts, the boundary shall be the whole course of the Colorado River. It is furthermore stipulated that, as long as the said port of San Juan del Norte remains a free port, Costa Rica shall not charge Nicaragua any custom duties at Punta de Castilla ."

This transitional provision was terminated shortly thereafter with the promulgation of the Regulations for the port and population of San Juan del Norte as approved in 1861, when Nicaragua recovered possession over the port and a condominium was established by Costa Rica and Nicaragua over the Bay of San Juan pursuant to Article IV of the 1858 Treaty of Limits.

The Cleveland Award expressly confirmed this position:

"The boundary line between the Republics of Costa Rica and Nicaragua, on the Atlantic side, begins at the extremity of Punta de Castilla at the mouth of the San Juan de Nicaragua River, as they both existed on the 15th day of April 1858.

...

The branch of the River San Juan known as the Colorado River must not be considered as the boundary between the Republics of Costa Rica and Nicaragua in any part of its course“.

Following the Cleveland Award, the 1896 Delimitation Convention (Pacheco-Matus) was concluded. Costa Rica and Nicaragua thereby agreed to name a Commission for the purpose of properly tracing and marking the boundary line between the two Republics. It was further agreed to request the President of the United States of America to appoint an Engineer who would undertake the function of umpire to decide, with binding effect, any disagreement between the Commissioners of Costa Rica and Nicaragua. The President of the United States appointed Mr. Edward Porter Alexander.

The Commission commenced its demarcation work in 1897. During the work of the Commission, Mr. Alexander rendered five Awards²⁰. According to the first Award of 30 September 1897:

“I have accordingly made personal inspection of this ground, and declare the Initial boundary to run as follows, to wit:

Its direction shall be due northeast and southwest, across the bank of sand, from the Caribbean Sea into the waters of Harbor Head Lagoon. It shall pass at its nearest point, 300 feet on the northwest side from the small hut now standing in that vicinity. On reaching the waters of Harbor Head Lagoon, the boundary line shall turn to the left, or southeastward, and shall follow the water’s edge around the harbor until it reaches the river proper by the first channel met. Up this channel, and up the river proper, the line shall continue to ascend as directed in the treaty“.

The second Alexander Award settled the tracing and marking of the boundary line starting at Punta Castilla, in the Caribbean Sea, until it reaches the point three English miles below Castillo Viejo, along the southern bank of the San Juan River. Relevantly, the Second Award provided as follows:

“The Costa Rican Commission proposed that the Court proceeded with the measurement of the line that ran from the starting point and continued along the shore of Harbor Head and thence along the shore around the harbor until it reaches the San Juan river proper by the first channel met and thence along the bank of the river to a point three miles below Castillo Viejo and that a map should be made of such line and that all of that should be set down in the daily record.

The Nicaraguan Commission expressed the opinion that the measurement and mapping work on that portion of the line was pointless and worthless because, according to the Award by General E. P. Alexander, the [right] bank of the Harbor and of the river formed the boundary and that therefore the dividing line was subject to change and not permanent . . . To that end, the two Commissions have decided to hear the decision that the Court would render within a week to their respective arguments submitted to him on that question‘.

Hence it is quite clear that the consequence of any disagreement on the question of whether the measurement is more or less accurate must be that the view of the party favoring greater accuracy should prevail.



Current Situation

The broader area concerned in the present dispute is referred to as Isla Calero ; a landmass comprising some 151 square kilometers in total, situated between the San Juan and Colorado Rivers and the Caribbean Sea. Included in this area, there is a smaller area to the north called Isla Portillos, adjacent to Punta Castilla and bordered by the San Juan River and the Laguna los Portillos. The entirety of Isla Calero (including Isla Portillos) is recognized to be wholly within the territory of Costa Rica. The northern part of Isla Portillos is currently occupied by Nicaraguan forces.

Nicaragua has commenced the construction of a canal which would divide the northern part of Isla Portillos in two, and would join the San Juan River to the Laguna Los Portillos. This would have the effect of artificially cutting across Costa Rican territory and of placing what is clearly Costa Rican territory on the left bank of that canal.

Furthermore, Nicaragua has expressed its intention to dredge the San Juan River from the new canal to the point where the San Juan and Colorado Rivers diverge. Nicaragua claims that the Colorado River

”was a river that did not have the same volume of flow as it currently has, and with the passing of time, obstructions that took place at this point kept deviating the waters of the San Juan River to the Colorado River. Thus, the Colorado River is fed in about 90% by Nicaraguan waters, what are these Nicaraguan waters? The waters that come from the north of our country, to drain the Managua lake, the great lake of Granada and then drain through the San Juan River“.

Nicaragua takes the position that it is restoring the historic flow and channels of the San Juan River. This is entirely inconsistent with the clear delimitation of the San Juan River as the boundary in this sector between Nicaragua and Costa Rica set out in the 1858 Treaty of Limits, the Cleveland Award and the first and second Alexander Awards. According to those instruments, the Colorado River has always fallen exclusively within the territory of Costa Rica and formed no part of the border.

During the course of the occupation, the following damage to Costa Rican territory has been perpetrated by Nicaragua, in violation of its international obligations:

- the installation of military camps in Costa Rican territory;
- the handling and storage of fuels in Costa Rican territory, with potential damage to the wildlife of Costa Rica’s wildlife protected areas;
- the landing of Nicaraguan army helicopters without Costa Rican permission and in disregard of the fragile ecosystems in Costa Rica’s wildlife protected areas
- the penetration by Nicaraguan armed vessels of Costa Rica’s maritime territorial waters in the Caribbean Sea

The ICJ’s Jurisdiction

The Court has jurisdiction over the present dispute by virtue of:

- (a) Article XXXI of the American Treaty on Pacific Settlement, Bogotá, 30 April 1948 (the Pact of Bogotá) pursuant to Article 36 (1) of the Statute of the Court
- (b) the operation of the declarations of acceptance made respectively by the Republic of Costa Rica dated 20 February 1973, and by the Republic of Nicaragua dated 24 September 1929 (as modified 23 October 2001), pursuant to Article 36 (2) of the Statute of the Court.

Costa Rica requests the Court to adjudicate and declare that Nicaragua is in breach of its international obligations as regards the incursion into and occupation of Costa Rican territory, the serious damage inflicted to its protected rainforests and wetlands, and the damage intended to the Colorado River, wetlands and protected ecosystems, as well as the dredging and canalization activities being carried out by Nicaragua on the San Juan River. The Court is also requested to determine the reparation which must be made by Nicaragua.

Further links for useful readings

http://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm

<https://www.cia.gov/library/publications/the-world-factbook/fields/2070.html>

<http://www.icj-cij.org/homepage/index.php>

<http://www.usip.org/sites/default/files/resources/pwks50.pdf>

<http://www.lasc.umd.edu/InfoStudents/GVPT309P/Documents/Boundarydisputes002.pdf>

http://www.people.fas.harvard.edu/~jidoming/images/jid_boundary.pdf

<http://www.americasquarterly.org/content/borders-central-america-and-international-law>

http://www.cartercenter.org/resources/pdfs/news/peace_publications/conflict_resolution/Solving_Territorial_Conflicts.pdf

<http://edition.cnn.com/2010/WORLD/americas/11/10/costa.rica.nicaragua.dispute/index.html>