

DECLARATION OF JUDGE *AD HOC* GUILLAUME

[Translation]

- I. *Case concerning Certain Activities carried out by Nicaragua in the Border Area — New submissions presented by Costa Rica at the close of the hearings seeking recognition of its sovereignty over the disputed territory — Submissions belated and hence inadmissible — Nicaragua’s compliance with the Order of 8 March 2011 — Freedom of navigation on the San Juan River — Régime applicable to transboundary harm caused by river dredging.*
- II. *Case concerning Construction of a Road in Costa Rica along the San Juan River — Proven harm to Nicaragua as a result of construction of the road, but no evidence that such harm is significant.*

1. I agree with a number of the Court’s findings. I should, however, like to present here certain comments, and to explain why I do not agree with some of the points in the Judgment. I will do so by taking each of the joined cases in turn.

I. Case concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*

2. This first case, entitled “case concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*”, initially related only to those activities, and Costa Rica’s pleadings were directed exclusively to seeking a finding that Nicaragua had been in breach of certain of its obligations, in particular by failing to respect Costa Rica’s sovereignty over the northern part of Isla Portillos (see in particular paragraphs 1 and 2 of the Application instituting proceedings). In its final submissions, Costa Rica additionally asked the Court to find that it has sovereignty over the disputed territory (paragraph 2 (a) of its final submissions).

3. In its decision the Court found:

- (a) that Costa Rica has sovereignty over the “disputed territory”, as defined by the Court in paragraphs 69 and 70 of its Judgment;
- (b) that, by excavating three *caños* and establishing a military presence on Costa Rica’s territory, Nicaragua had violated the latter’s sovereignty.

4. I voted against the first of these findings and in favour of the second. I believe that it would be helpful if I explained my reasons for those votes. In order to do so, I will recall the applicable law and the local geographical situation, before explaining my reasoning.

1. Applicable law

5. Article II of the Treaty of Limits between Costa Rica and Nicaragua of 15 April 1858 provides that “[t]he 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 three English miles distant from Castillo Viejo”. Article IV provides that the Bay of San Juan del Norte shall be “common to both

Republics”. Article VI further provides that: “[t]he Republic of Nicaragua shall have exclusively the dominion and sovereign jurisdiction over the waters of the San Juan river from its origin in the Lake to its mouth in the Atlantic”.

6. Those provisions were interpreted as follows in point 1 of the third paragraph of President Cleveland’s Award of 22 March 1888:

“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 ownership of any accretion to said Punta de Castilla is to be governed by the laws applicable to that subject.”

7. Those texts were in turn interpreted by General Alexander, who, in his First Arbitral Award of 30 September 1897, noted the following:

- (a) “Costa Rica was to have as a boundary line the right . . . bank of the river”;
- (b) “this division implied also, of course, the ownership by Nicaragua of all islands in the river and of the left . . . bank and headland”;
- (c) “there is but one starting-point possible for such a line, and that is at the right headland of the bay”, that is to say “the extremity of Punta de Castell[a], at the mouth of the river”, as it was in 1858.

However, given that, between 1858 and 1897, the extremity of the headland had become covered by the sea, General Alexander took as the starting-point for the delimitation that same headland as it was at the time of his Award. He accordingly decided as follows:

“the initial line of the boundary to run as follows:

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 sha

ll 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.”

8. In his Second Award of 20 December 1897, General Alexander further noted that

“the San Juan river runs through a flat and sandy delta in the lower portion of its course and . . . it is obviously possible that its banks will not only gradually expand or contract but that there will be wholesale changes in its channels . . . Today’s boundary line must necessarily be affected in future by all these gradual or sudden changes. But the impact in each case can only be determined by the circumstances of the case itself, on a case-by-case basis in accordance with such principles of international law as may be applicable.”

He added that “[t]he proposed measurement and demarcation of the boundary line will not have any effect on the application of those principles”, concluding that “[t]he only effect obtained from

measurement and demarcation is that the nature and extent of future changes may be easier to determine”.

9. It was in these circumstances that the demarcation was effected, and that its results were recorded on 2 March 1898 (Alexander Proceedings Acta X).

10. In his Third Award of 22 March 1898, General Alexander further stated that “[b]orders are intended to maintain peace, thus avoiding disputes over jurisdiction. In order to achieve that goal, the border should be as stable as possible.” He accordingly concluded that “[f]luctuations in the water level will not alter a position of the boundary line, but changes in the banks or channels of the river will alter it, as may be determined by the rules of international law applicable on a case-by-case basis”.

11. It should be noted that these various awards are not totally consistent. Thus the Cleveland Award states that the boundary begins at the extremity of Punta de Castilla at the mouth of the river, as those features were on 15 April 1858. That award accordingly appears to freeze the situation as it was at a precise date. On the other hand, the second and third Alexander Awards do not preclude the possibility of changes in the boundary in the future.

2. The current geographical situation

12. As to be expected, the geographical situation has radically changed since 1897 as a result of erosion to the east of the delta and accretion to the west.

- (a) the headland of Punta de Castilla has been reduced still further, and the initial marker placed there in 1897 is today under the sea;
- (b) Harbor Head Lagoon has essentially retained its former shape;
- (c) the Parties disagree regarding the sandbank which partially closed the lagoon in 1897. Costa Rica claims that this feature still exists only in its eastern part, and that its western part has disappeared. It further contends that the channel referred to in the Alexander Awards has also disappeared (CR 2015/14, p. 31). Nicaragua maintains that this feature still exists and that it remains connected both to San Juan Island and to Punta de Castilla (CR 2015/15, p. 24);
- (d) the Island of San Juan has, it appears, been reduced in size, but is still shown on the most recent maps;
- (e) the main channel of the San Juan River has remained comparable to what it was before (with some slight changes). It is, however, difficult to determine at the current time where its actual mouth lies;
- (f) the Bay of San Juan del Norte is now completely silted up. It has disappeared, as have the Port of Greytown and the lighthouse and facilities constructed by Vanderbilt on San Juan Island.

3. The Judgment of the Court

13. Nicaragua recalls that, according to General Alexander’s First Arbitral Award, from the headland of Punta de Castilla the boundary “shall follow the water’s edge around the harbor [at Harbor Head] until it reaches the river proper by the first channel met”. It will then continue “up this channel and up the river proper”. Nicaragua claims that today the first channel met coming

from the east is the *caño* which it dredged, and that the boundary runs along that channel. It accordingly concludes that the activities carried out by it on that *caño* and a little further north were conducted on Nicaraguan territory and were lawful. Costa Rica denies this.

14. The Court has concluded that “the right bank of the *caño* which Nicaragua dredged in 2010 is not part of the boundary between Costa Rica and Nicaragua” (Judgment, paragraph 92). I entirely agree with this, and I accordingly consider, like the Court, that in dredging that *caño* and then excavating two others, and in establishing a military presence in the area, Nicaragua violated Costa Rica’s territorial sovereignty.

15. On the other hand, in my view the Court was not entitled to rule on the belated submissions by Costa Rica in which it asked the Court to recognize its sovereignty over the disputed territory, since the latter was not in a position to take such a decision in light of the material in the case file.

16. Article 40, paragraph 1, of the Statute provides that the subject of the dispute must be indicated in the application, and this is reiterated in Article 38, paragraph 1, of the Rules. The Court has deemed those provisions “essential from the point of view of legal security and the good administration of justice” (*Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, *Merits, Judgment, I.C.J. Reports 2010 (II)*, p. 656, para. 38, citing *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 267, para. 69). The subject of a dispute is thus defined by the claims presented in the application. Additional claims are not admissible unless they fall within the scope of that subject; if not, they must be dismissed for lateness. The only exception to that rule is if the new claims were implicit in the application, or arose directly out of the question which is the subject-matter of the application (*Ahmadou Sadio Diallo, op. cit.*, p. 657, para. 41, citing those two criteria as identified by the Court in its preliminary objections Judgment in the case concerning *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, p. 266, para. 67). However, in the present case, the Application concerned certain activities carried out by Nicaragua in the border area, and its subject was not the delimitation of the Parties’ territory. Moreover, Costa Rica’s new claims were not implicit in the Application; nor did they arise directly out of the question that was the latter’s subject-matter. They transformed a dispute over State responsibility into a territorial dispute.

17. Furthermore, it makes no difference that Nicaragua did not object to Costa Rica’s new submissions, and that one of its counsel even admitted that both Parties were asking the Court to rule on the course of the boundary and the resultant territorial sovereignty (CR 2015/15, p. 58). In so doing, Nicaragua did indeed accept the Court’s jurisdiction to rule on Costa Rica’s new submissions. But jurisdiction must not be confused with admissibility. Even if those new submissions fell within the Court’s jurisdiction under the *forum prorogatum* principle, they still had to comply with the procedural rules set out in the Statute and the Rules of Court. It was for the Court to ask itself *proprio motu* whether Costa Rica’s new submissions were admissible¹.

18. This was particularly necessary here, since the Court did not have before it all of the necessary material to enable it to give a clear ruling. Moreover, it carefully avoided doing so. Thus, while recognizing Costa Rica’s sovereignty over the disputed territory, it refrained from defining that territory’s limits. It is true that it defined that territory as “the northern part of Isla Portillos . . . between the right bank of the disputed *caño*, the right bank of the San Juan River up to its mouth at the Caribbean Sea and the Harbor Head Lagoon” (Judgment, paragraph 69). Thus, the

¹See to this effect, R. Kolb, *La Cour internationale de Justice*, Pedone, Paris, 2013, p. 256.

Court agreed with the Parties in its recognition of Nicaragua's sovereignty over the lagoon and over the sandbank marking the latter's margin. The Court further found that Costa Rica had sovereignty over the disputed territory. However, it also noted that the Parties had expressed differing views on the location of the mouth of the San Juan River where it flows into the Caribbean Sea, and did not address the question of its precise location. It accordingly decided to refrain from ruling on that point (Judgment, paragraph 70). It adopted the same reasoning for the stretch of the Caribbean coast lying between Harbor Head Lagoon and the mouth of the San Juan (*ibid.*).

19. I can understand the Court's scruples on these two latter points. The case file is silent on the first, and incomplete on the second. I note in particular that Professor Thorne, Costa Rica's expert, does not address this second question in his report. On the other hand, Professor Kondolf, Nicaragua's expert, states that "[t]he lagoon appears to have a hydrologic connection to Greytown Harbor to the west, via a channel behind the barrier spit" (App. 1, Sec. 2.7, to Nicaragua's Counter-Memorial, Vol. I). Furthermore, that channel appears on some of the recent photos. Finally, it is shown on the most reliable of the maps produced by Costa Rica. I would therefore tend to think that Nicaragua's description of the area is closer to the reality than that claimed by Costa Rica. The Court's silence nonetheless remains understandable.

20. The Court thus took it upon itself to define the disputed territory, and then to decide which State had sovereignty over that territory, without completely fixing its boundaries. However, according to the Court's jurisprudence, "'to define' a territory is to define its frontiers" (*Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, *I.C.J. Reports 1994*, p. 26, para. 52). In acting as it did, the Court ignored that principle, just as it ignored its jurisprudence on the admissibility of new claims. It would have sufficed in this case to find that Nicaragua's activities had taken place on Costa Rican territory, without ruling on these additional claims.

21. I also agreed with the Judgment's finding that, "by excavating two *caños* in 2013 and establishing a military presence in the disputed territory, Nicaragua has breached the obligations incumbent upon it under the Order indicating provisional measures issued by the Court on 8 March 2011" (point 3 of the operative clause). I would add that, contrary to what Costa Rica claims, Nicaragua did comply with the Order's other provisions, as the Court implicitly recognizes.

22. Point 4 of the operative clause concerns certain incidents cited by Costa Rica. It calls for certain additional comments on my part. The two incidents mentioned in paragraph 135 of the Judgment undoubtedly involved a violation by Nicaragua of Costa Rica's rights of navigation under the 1858 Treaty, as interpreted by the Court in favour of inhabitants of the right bank of the river. On the other hand, the three other instances mentioned by Costa Rica, and not accepted by the Court, did not involve such a violation (Judgment, paragraph 136). The first of them concerns a teacher who was allegedly prevented from reaching his school by boat in the absence of a letter of authorization from Nicaragua. However, the only evidence was from press articles, and the incident was not proved. The same applies to another incident involving two Costa Rican residents, who, according to a statement by a Costa Rican police officer who received the complaint, were made to pay a departure tax at a Nicaraguan army post. The last incident concerned journalists who were not allowed to travel to Isla Portillos. However, they were not engaged in commerce on the San Juan, nor were they inhabitants of the river's right bank; thus their travel was not covered by the provisions of the 1858 Treaty as interpreted by the Court. In sum, the two proven incidents are clearly regrettable, but one is bound to note that these were two isolated incidents over a period of five years, from which no general conclusions can be drawn regarding the overall conduct of the Nicaraguan authorities.

23. Costa Rica further complained of the manner in which Nicaragua was carrying out dredging works on the San Juan River. The Court rejected Costa Rica's submissions for reasons with which I am entirely in agreement. In particular, it took the view that, in the absence of any transboundary harm as a result of the dredging programme, it was unnecessary for it to determine the responsibility régime applicable in the matter (Judgment, paragraph 119). The Court thus refrained from deciding whether or not the rules governing responsibility for this type of harm under the 1858 Treaty had been modified as a result of developments in international customary law.

24. In this regard I would recall that, according to point 6 of the third paragraph of President Cleveland's Arbitral Award of 22 March 1888:

“The Republic of Costa Rica cannot prevent the Republic of Nicaragua from executing at her own expense and within her own territory such works of improvement, *provided* such works of improvement do not result in the occupation or flooding or damage of Costa Rica territory, or in the destruction or serious impairment of the navigation of the said River or any of its branches at any point where Costa Rica is entitled to navigate the same. The Republic of Costa Rica has the right to demand indemnification for any places belonging to her on the right bank of the River San Juan which may be occupied without her consent, and for any lands on the same bank which may be flooded or damaged in any other way in consequence of works of improvement.”

25. It is clear from this passage that, to quote what the Court said in its Judgment of 13 July 2009: “Nicaragua may execute [at its own expense] such works of improvement [of navigation] as it deems suitable, provided that such works do not seriously impair navigation on tributaries of the San Juan belonging to Costa Rica” (*Judgment, I.C.J. Reports 2009*, p. 269, para. 155).

26. Furthermore, according to the Cleveland Award, works of improvement conducted for purposes of navigation on the San Juan must be carried out without resulting in the occupation or flooding or damage of Costa Rican territory. The Award further states that Costa Rica is entitled to be indemnified on account of any such damage.

27. The Parties disagree on the interpretation of this latter provision. Nicaragua maintains that, in the event of any damage as a result of improvement works on the river, Costa Rica is not entitled to have those works halted, but can only claim compensation for any damage suffered. Costa Rica disagrees.

28. For my part, I observe that the first and the second sentences of point 6 of the third paragraph of the Cleveland Award differ in scope. Thus, Costa Rica's right to indemnification is recognized in the second sentence solely in the event of damage to its territory and not in the case of serious impairment of navigation. Moreover, incidental damage to Costa Rican territory as a result of works carried out on the San Juan requires indemnification on account of the damage suffered. This, it seems to me, is a case of transboundary harm covered by a régime of objective responsibility (for a comparable case, see the Arbitral Awards of 16 April 1938 and 11 March 1941 in the *Trail Smelter* case (United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. 3, pp. 1905 to 1982). In my view that responsibility régime is still applicable. The 1858 Treaty and the Cleveland Award give Nicaragua wide freedom of action in relation to works on the San Juan River. The counterpart of that freedom is an obligation to indemnify Costa Rica for damage caused

to its territory, irrespective of whether such damage is significant. This special régime, which forms a single whole, remains applicable, and I see no reason to restrict Costa Rica's right to be compensated, any more than Nicaragua's right to act. The two rights are indissolubly linked.

29. Finally, I agree entirely with the Court's rejection of all of Costa Rica's submissions regarding reparation for such damage as it may have suffered, with the exception of material damage caused by Nicaragua's wrongful acts on Costa Rican territory, that is to say, any damage resulting from the construction of the *caños*. Such damage is plainly modest, and it is to be hoped that the two States can succeed in evaluating it by joint agreement.

II. Case concerning Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)

30. As regards the second case, I agree with the Court's decision that, in constructing Route 1856, Costa Rica was in breach of its procedural obligations by not carrying out a prior environmental impact study. Nicaragua further contended that the construction of the road had had a significant harmful impact on the San Juan River. The Court rejected those claims. I agreed with that finding with a certain amount of hesitation, and would now like to provide some additional clarification in this regard.

31. There is no doubt that this road, constructed in haste by a variety of undertakings, without prior technical planning or proper supervision, suffered from numerous defects, which to date have not been remedied, or only remedied in part, and sometimes temporarily.

32. The Parties agree that the construction of the road resulted in an increase in the sedimentary load of the San Juan River. They disagree on the quantity of sediment involved.

According to Professor Kondolf, it amounts to 190,000 to 250,000 tonnes per year (Judgment, paragraph 182). In the view of Professor Thorne, it amounts, at most, to 75,000 tonnes per year (Judgment, paragraph 183). The experts further debated the proportion of those sediment totals deposited on the bed of the river to those remaining suspended. The former, according to the estimates, varies from 5 to 18 per cent.

On the other hand, both Parties consider that 90 per cent of the waters of the San Juan flow into the sea via the Colorado River, and 10 per cent via the Lower San Juan (Judgment, paragraph 198). They further agree that 16 per cent of the suspended sediments and 20 per cent of the coarse load are carried by the San Juan, with the remainder being carried by the Colorado (*ibid.*).

On the basis of these figures, Nicaragua states that 22,192 tonnes of sediment reach the Lower San Juan each year, including 7,600 tonnes of coarse sediment (CR 2015/10, p. 13). Costa Rica contends that the latter only amounts to some 750 to 1,500 tonnes per year (see, *inter alia*, the report by Professor Thorne in the Appendix to Costa Rica's Rejoinder, Vol. I, para. 4.100).

33. On the other hand, the Parties agree that the sedimentary load of the San Juan is already very high. Costa Rica estimates it at 12,678,000 tonnes per year, while Nicaragua's expert mentions a figure of 13,700,000 tonnes (Judgment, paragraph 193). Thus the average annual sedimentary load attributable to the road is estimated at from 0.6 per cent to 2 per cent of the total (Judgment, paragraphs 186 and 194).

34. It therefore appears to me clearly established that the increase in the river's sedimentary load as a result of the construction of the road has inevitably led to additional dredging works on the Lower San Juan, and thus caused harm to Nicaragua.

35. Does that amount to significant transboundary harm? That is open to question, given the sedimentary load already carried by the San Juan. Nicaragua indeed claims that the additional sedimentary load produced by the construction of the road, although marginal, has created serious obstacles to navigation over the first 3 km of the lower part of the river. While not excluding such a possibility, I am bound to note that Nicaragua has provided no evidence of this, and that its submissions on this point must accordingly be rejected.

(Signed) Gilbert GUILLAUME.
