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AWARD OF THE PRESIDENT OF THE UNITED STATES IN REGARD TO THE VALIDITY OF THE TREATY OF LIMITS BETWEEN COSTA RICA AND NICARAGUA OF 15 JULY 1858, DECISION OF 22 MARCH 1888[*]

SENTENCE ARBITRALE DU PRÉSIDENT DES ÉTATS-UNIS RELATIVE À LA VALIDITÉ DU TRAITÉ DE LIMITES ENTRE LE COSTA RICA ET LE NICARAGUA DU 15 JUILLET 1858, DÉCISION DU 22 MARS 1888[**]

Validity of treaty of delimitation – unconstitutionality of ratification process – statement in the Constitution of Nicaragua that the boundary is on the Southeast, the Costa Rica State, is not precise enough preclude further frontier delimitation – defects in ratification process – irregularities and defects in the formalities of ratification may be remedied by subsequent acquiescence in and approval of the treaty – the fact of approval being established, the time of approval is immaterial, provided the other party by its acquiescence has seen fit to waive the delay – acquiescence during several years in the validity of the treaty is a strong evidence of the contemporaneous exposition which has ever been thought valuable as a guide in determining doubtful questions of interpretation, even if such acquiescence is not a substitute for ratification by a Legislature – Nicaragua cannot seek to invalidate the treaty on any mere ground of irregularity in the order of its own proceedings.

Validity of treaty – treaty between two States which provides for a third State as a guarantor is not a tripartite treaty but a bilateral one with an independent and separable clause of guarantee as a feature of the arrangement – the lack of ratification by the guarantor does not preclude the validity of the treaty – in international law a guarantee is always subsidiary to the principal contract – acquiescence – failure of Government of Nicaragua to object prior to the ratification, resulted in waiver of the objection – facts which existed and were known at the time of the treaty ratification cannot be accepted as reasons for rescinding the treaty.

Boundary delimitation – interpretation of a treaty – rights of navigation on the River San Juan[***] – Costa Rica has no right of navigation with vessels of war in the River San Juan, which belongs to Nicaragua – it has the right of navigation with vessels of the Revenue service for the sole purpose of commerce – Costa Rica is not bound to contribute financially to any work for the preservation and the improvement of the navigation of the river – Costa Rica may not prevent Nicaragua from undertaking work for the improvement of the River San Juan, provided that such work does not damage Costa Rican territory – Right to indemnification for transboundary harm or interference with right to navigation – Costa Rica can deny to Nicaragua the right of deviating the waters of River San Juan in case such deviation will result in the destruction or serious

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[*] Reprinted from John Basset Moore, *History and Digest of the International Arbitrations to Which the United States has been a Party*, vol. II, Washington, 1898, Government Printing Office, p. 1946.

[**] Reproduit de John Basset Moore, *History and Digest of the International Arbitrations to Which the United States has been a Party*, vol. II, Washington, 1898, Government Printing Office, p. 1946.

[***] Secretariat note: The territorial dispute between Costa Rica and Nicaragua remains a current issue as a case is pending in 2006 in front of the International Court of Justice, namely "Dispute regarding navigational and related rights". It has been submitted by Costa Rica on 29 September 2005 with regard to the infringement of its rights on the San Juan River, and in its application Costa Rica made due reference to the arbitral award of 22 March 1888.

impairment of the navigation – Consent of Costa Rica is required where the construction of inter-oceanic canals would injure its natural rights.

Validité d'un traité de délimitation – inconstitutionnalité de la procédure de ratification – l'affirmation dans la Constitution du Nicaragua selon laquelle sa frontière Sud-Est est l'État du Costa Rica, n'est pas suffisamment précise pour exclure toute délimitation frontalière supplémentaire – défauts dans la procédure de ratification – les irrégularités et les défauts dans la procédure de ratification peuvent être compensés postérieurement par l'acquiescence à ceux-ci et à la validité du traité. Une fois que le consentement a été établi, la question de la date du consentement est inconsistante, sous réserve que l'autre Partie ait acquiescé à la prorogation du délai – l'acquiescement pendant plusieurs années à la validité du traité est une preuve sérieuse de la position qui était à l'époque considérée comme pertinente pour trancher des points d'interprétation litigieux, même si un tel acquiescement ne peut remplacer une ratification parlementaire. Le Nicaragua ne peut demander l'annulation du traité sur la seule base d'irrégularités intervenues dans ses propres procédures.

Validité conventionnelle – un traité entre deux États prévoyant la garantie d'un troisième État n'est pas un accord tripartite, mais un accord bilatéral qui comporte une clause indépendante et dissociable de garantie, spécifique à cet arrangement – l'absence de ratification par l'État garant ne compromet pas la validité du traité – en droit international une garantie est toujours accessoire au contrat principal – acquiescence – le défaut d'objection du gouvernement du Nicaragua préalablement à la ratification conduit au rejet de cette objection – des faits existants et notoires au moment de la ratification du traité ne peuvent être acceptés comme bases pour annuler un traité.

Délimitation frontalière – interprétation conventionnelle – droits de navigation sur le fleuve San Juan[*] – le Costa Rica n'a pas le droit de naviguer avec des vaisseaux de guerre sur le fleuve San Juan qui appartient au Nicaragua – il a le droit de naviguer avec des vaisseaux du Trésor à des seules fins commerciales – le Costa Rica n'est pas obligé de contribuer financièrement à des travaux visant la préservation et l'amélioration de la navigation sur le fleuve – le Costa Rica ne peut empêcher le Nicaragua d'entreprendre des travaux d'amélioration du fleuve San Juan, tant que ces travaux ne causent pas de dommages au territoire Costaricain – droit à l'indemnisation des préjudices transfrontaliers et des atteintes au droit de navigation – le Costa Rica peut interdire au Nicaragua la possibilité de dévier les eaux du fleuve San Juan au cas où des destructions ou des obstructions à la navigation résulteraient de cette déviation – le consentement du Costa Rica est requis lorsque la construction d'un canal interocéanique portant atteinte à ses droits naturels.

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Report to the Arbitrator, the President of the United States.

By GEORGE L. RIVES, *Assistant Secretary of State*.

To the PRESIDENT.

SIR: On the 24th day of December 1886 the Republics of Costa Rica and Nicaragua, by a treaty signed on that day, agreed that the question pending

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[*] Note du Secrétariat : Le différend territorial entre le Costa Rica et le Nicaragua est toujours une question d'actualité puisqu'en 2006 une affaire est pendante devant la Cour Internationale de Justice, à savoir «le différend relatif à des droits de navigation et des droits connexes». La requête introductive d'instance, qui a été déposée le 29 septembre 2005 par le Costa Rica, concerne les violations de ses droits sur le fleuve San Juan et fait dûment référence à la sentence arbitrale du 22 mars 1888.

between the Contracting Governments in regard to the validity of the "Treaty of Limits" of the 15th April 1858 should be submitted to arbitration. It was further agreed that the Arbitrator of that question should be the President of the United States of America; that within sixty days from the ratification of the Treaty of Arbitration the Contracting Governments should solicit of the Arbitrator his acceptance of the charge; that within ninety days from the notification to the parties of the acceptance of the Arbitrator, they should present to him their allegations and documents; that the arbitrator should communicate to the representative of each Government, within eight days after their presentation, the allegations of the opposing party, in order that the opposing party might be able to answer them within thirty days following that upon which the same should have been communicated; that the decision of the Arbitrator must be pronounced within six months from the date upon which the term allowed for the answers to the allegations should have expired; and that the Arbitrator might delegate his powers, provided he did not fail to intervene directly in pronouncing the final decision. It was further provided that if the Arbitrator's award should determine that the Treaty of the 15th April 1858 was valid, the same award should also declare whether Costa Rica has the right of navigation of the river San Juan with vessels of war or of the revenue service; and that he should in the same manner decide, in case of the validity of the Treaty, upon all the other points of doubtful interpretation which either of the parties might find in the Treaty and communicate to the other within thirty days after the exchange of ratifications of the Treaty of Arbitration.

In accordance with the procedure thus agreed on, the Republic of Nicaragua communicated to the Republic of Costa Rica a statement of eleven points of doubtful interpretation in the Treaty of the 15th April 1858 which it proposed to submit to the decision of the Arbitrator. The Government of Costa Rica did not communicate any corresponding statement, and now declares that it finds nothing in that Treaty which is not perfectly clear and intelligible.

The two Governments having thereafter solicited your acceptance of the charge, you were pleased, on the 30th day of July 1887, to signify your acceptance of it, and the representatives of both Governments were duly notified of that fact.

On the 27th day of October 1887 both Governments presented to you their allegations and documents. These were duly communicated to the opposing parties, and on the 3d day of December 1887 they both presented answers to the allegations of their opponents. The Spanish documents were subsequently translated and printed.

On the 16th day of January 1888, by an instrument in writing, you were pleased to delegate your powers as Arbitrator to me, in pursuance of the provisions contained in the last sentence of Article V. of the Treaty of Arbitration, and to direct me to examine into the questions at issue and report my conclusions to you.

In accordance with these directions, and after a careful consideration of the allegations of the respective parties, of their answers, and of the documents submitted by each, I have now the honor to submit the following:

Report

The questions to be passed upon by the Arbitrator, as will be observed from the foregoing statement of the Treaty of Arbitration, are capable of being classified under two heads:

First. Whether the Treaty of Limits of the 15th of April 1858 is valid.

Second. If valid, what is its true meaning in respect of the right of Costa Rica to navigate the River San Juan with vessels of war or of the revenue service, and also in respect of the eleven points submitted for decision by the Government of Nicaragua?

If the first of these questions is decided in the negative — that is, if the Treaty of Limits is decided to be invalid — it will not be necessary to consider at all the questions under the second head.

Before discussing the grounds urged by the Government of Nicaragua, on the one hand, as proving the invalidity of the Treaty of Limits, and those urged by the Government of Costa Rica on the other as establishing its validity, it will be essential to consider briefly the evidence submitted to show what were the recognized boundaries prior to the date of the Treaty, and what were the powers of the respective Governments in regard to it. This historical enquiry, it must be remembered, is not a matter of immediate concern, nor is it directly involved in the decision of the questions now submitted to arbitration; but it is important as elucidating the nature of the principal controversy, and as showing the facts upon which the parties base their respective arguments.

Two questions, essentially distinct in their character, were in discussion in 1858 touching the boundary of the two Republics. The first of these was the question whether the District of Nicoya lawfully belonged to Costa Rica or to Nicaragua; the second, as to the true boundary line between the Republics from the Caribbean Sea to the borders of Nicoya. The evidence in regard to each of these disputed questions must be reviewed in its order.

The District of Nicoya lies on the Pacific side of the Continent, and — roughly speaking — is triangular in shape, its apex lying toward the South. It is bounded on the Westward by the Pacific Ocean and on the Eastward by the Gulf of Nicoya and the Rio del Salto, or Tempisque, a small stream emptying into the head of the Gulf and having its sources not far from the Southerly shore of Lake Nicaragua. The Northerly boundary, or base of the triangle, seems to have never been accurately fixed, and its position is a matter of dispute between the Governments of Costa Rica and Nicaragua. The argument of Nicaragua, submitted to the Arbitrator, cites the authority of Don Antonio Alcedo and the historian Juarros to the effect that it is bounded by the Lake of Nicaragua on the North, which seems to imply a further boundary line running

from the Southern end of the Lake to the Pacific Ocean. The arguments of the Costa Rican Government, on the other hand, place the Northern boundary as far up as the La Flor River; and the records of land titles, and the statements of Stephens and Baily, are cited in support of this view. It is wholly unimportant, however, for the present purpose, to decide which of these opposing views is correct. It is only needful to point out that a diversity of opinion exists, and that there is no grant or agreement precisely fixing the boundaries of the District.

As to the title to the District, the facts are plainer. Nicoya, or, as it is sometimes called, Guanacaste, was undoubtedly recognized as a part of Nicaragua prior to 1826. It is asserted by Costa Rica that at times Nicoya was temporarily united with it, or placed under the control of its authorities; and some evidence is produced tending to show that such a change was made in 1573, 1593, 1692, the middle of the XVIIIth century, and even as late as 1812. But any such connection with Costa Rica can have been but temporary, and it may be regarded as settled that at the time of the Declaration of Independence from Spain in September 1821, Nicoya formed a part of Nicaragua. This condition of things seems to be distinctly recognized in the Constitution of Costa Rica, adopted 21st January 1825, in which it is stated that — "the territory of the State extends at present from West to East, from the Rio del Salto, *which divides it from Nicaragua, etc*."

It would seem, however, that about 1824 the inhabitants of Nicoya, or some of them, asked to be annexed to Costa Rica. This question was referred to the Federal Congress of Central America, the Federal Republic of Central America having been theretofore formed and its Constitution adopted 22nd November 1824, and that body on the 9th December 1825, passed the following decree:

> "The Federal Congress of the Republic of Central America, taking into consideration, firstly, the reiterated petitions of the authorities and municipal bodies of the towns of the District of Nicoya, asking for their separation from Nicaragua and their annexation to Costa Rica; and, secondly, that the said towns and people actually annexed themselves to Costa Rica at the time in which the political troubles of Nicaragua took place; and, thirdly, the topographical situation of the same district, has been pleased to decree, and does hereby decree:
>
> Article 1. For the time being, and until the demarcation of the territory of each State provided by Article VII of the Constitution is made, the District of Nicoya shall continue to be separated from Nicaragua and annexed to Costa Rica.
>
> Article 2. In consequence thereof, the District of Nicoya shall recognize its dependence upon the authorities of Costa Rica, and shall have, in the Legislature of the latter, such representation as corresponds to it."

It further appears that the Government of Costa Rica thereupon took possession of Nicoya, and has been continuously in possession of it ever since; and was so at the date of the Treaty of 1858.

The Government of Nicaragua, however, has not always acquiesced in the validity of this act of annexation. It has, on the contrary, on several occasions protested against it; and in its arguments, now before the Arbitrator, it contends that the decree above referred to was not recognized at the time; that Nicaragua was not then represented in the Federal Congress; that the decree was, by its terms, only temporary; and that the municipalities of Nicoya as well as the Legislature of Nicaragua protested against the action of Congress as soon as they were aware of it.

Here again, it is not necessary for the Arbitrator to decide the question of title. But it is clear that in 1858 Costa Rica had been continuously in possession of the District of Nicoya, under a claim of title, for more than thirty-two years.

As to the boundary line between the Rio del Salto and the Caribbean Sea, the question was purely one of fact; and it can hardly be said that any very clear or satisfactory answer was possible.

The Government of Costa Rica, in the arguments submitted to the Arbitrator, has presented an elaborate historical review of the two Provinces of Costa Rica and Nicaragua under Spanish rule, which, it may be assumed, contains a reference to all the important documents bearing upon the question of boundaries. Passing over the history of the discovery and first settlement of this region in the early part of the XVIth century, it appears that in 1541 the Emperor Charles V. decreed that the upper fifteen leagues of the San Juan River, should belong to the Province of Nicaragua; that the lower, or remaining portion of the river, should belong to the Government of Costa Rica; and that the use of the river and lake, for purposes of navigation and fishing, should be common to both Provinces. In 1561 King Philip II appointed Licentiate Don Juan Cavallon to be "Alcalde Mayor" of the Province of New Cartago and Costa Rica, describing it in the preamble of the letter of appointment as extending along the Northern Sea "up to the Outlet, this being included" (*hasta el Desaguadero inclusive*). In 1573, by articles of agreement between the Spanish Crown and Diego de Artieda, who was appointed Governor and Captain-General of Costa Rica, the boundaries of that Province were defined substantially as they continued to be down to 1821. The limits of Artieda's jurisdiction are thus defined:

> "From the Northern to the Southern Sea in width; and in length from the boundary of Nicaragua, on the side of Nicoya, right to the Valleys of Chiriqui, as far as the Province of Veragua on the Southern side; and on the Northern side, from the mouths of the Outlet, which is towards Nicaragua (*desde las bocas del Desaguadero, que es a las partes de Nicaragua*), the whole tract of land as far as the Province of Veragua."

No subsequent grant or decree by the Spanish Crown is cited, and — apart from some evidence of acts of possession by the respective Government — there is nothing further to define the boundaries of the two Provinces.

Soon after the Declaration of Independence, Costa Rica and Nicaragua, then States of the Republic of Central America, adopted Constitutions defining generally their respective boundaries.

The Constitution of Costa Rica, adopted the 21st January 1825, provides as follows:

> "Article 15. The territory of the State extends at present from West to East, from the River del Salto, which divides it from that of Nicaragua, up to the River Chiriqui, the boundary of the Republic of Colombia; and North and South from one to the other sea, the limits being on the North [Sea] the mouth of the San Juan River and the Escudo de Veraguas, and on the South [Sea] the mouth of the River Alvarado and that of the Chiriqui."

Nicaragua, by the Constitution adopted the 8th April 1826, defines her boundaries thus:

> "On the East, the sea of the Antilles; on the North, the State of Honduras; on the West, the Gulf of Conchagua; on the South, the Pacific Ocean; and on the Southeast, the free State of Costa Rica."

These are the last declarations *ante litem motam*. It will be observed that all these documents leave the precise boundary vague and undetermined. Indeed, the line to be followed between the Rio del Salto and the "mouths of the Outlet," is nowhere laid down. Nicaragua contends that a straight line from the mouth of the Rio del Salto to the mouth of the Colorado, the most Southerly of the three mouths of the San Juan, is intended. This is met by the argument that as the Rio del Salto was the boundary, that river in its whole length, and not the mouth or any other part of it, was the dividing line; and that the San Juan River proper — the Northernmost of the three channels at the mouth of that stream — formed the end of the line on the Caribbean Sea. Costa Rica further contends that the boundary line was not straight, but that it followed the course of the San Juan in its whole length and the Southern shore of Lake Nicaragua; and she alleges that she was in possession of the territory up to that line — an allegation not admitted by Nicaragua.

In my judgment the evidence establishes that the boundary of Costa Rica, under the terms of the Spanish grants (leaving Nicoya out of the question), began at the head of the Gulf of Nicoya, ran northerly along the River del Salto to its source, and thence ran to the mouth of the San Juan River at the port of San Juan del Norte — this being, at the time, the mouth of the principal channel or outlet of the stream. But the evidence is not sufficient to form the basis for any satisfactory judgment as to how this line was to be drawn between the source of the del Salto and the mouth of the San Juan. I perceive no reason for thinking that it should have been a straight line.

No decision of this question is, however, necessary; for it is only important, for present purposes, to point out that no precise line of demarcation can be found in any of the earlier documents. Nor is this surprising in view of the fact, to be inferred from the evidence that the region

through which the line ran was a rough, densely wooded and thinly settled country, where no need was felt of any exact delimitation in the days of the Spanish dominion.

But with the establishment of the Federal Republic, and, still more, with its dissolution, the questions of boundary began to assume importance.

The Federal Constitution seems to have provided by its Article VII for the demarcation of each State; but nevertheless nothing was done towards the establishment of the line between Costa Rica and Nicaragua.

In 1838 Costa Rica seems to have urged upon Nicaragua — then assuming the rank of an independent State upon her withdrawal from the Federation — a desire for a recognition of the annexation of Nicoya. In 1846, 1848, and 1852 other fruitless negotiations were undertaken with a view to settling the boundary; and in 1858, when the Treaty of Limits was signed, the question, in one form or another, had been before the two Governments for at least twenty years.

That the documentary evidence was slight and unsatisfactory, has been already shown; and that Costa Rica had for nearly the same period of twenty years laid claim to more territory than she obtained under the Treaty of Limits, fully appears from her decree of "Basis and Guarantees" of the 8th March 1841 — which asserts as the boundaries of Costa Rica the line of the River La Flor, the Shore of Lake Nicaragua and the River San Juan.

I now proceed to state the history of the negotiations which resulted in the Treaty in question, and of the executive and legislative acts which are relied on by Costa Rica as constituting a sufficient ratification.

The long and bitter struggle in which Nicaragua and other Central American States had been involved, and of which the part played by Walker and the filibusters was the most notorious incident, came to an end in 1857. The Republic of Costa Rica had taken part in that struggle, and her case states as a fact that at the close of the contest the Costa Rican troops held military positions on both sides of the San Juan. The argument of Nicaragua seems to imply that such possession was not taken until after the close of the war; but the fact itself is not in dispute. It was regarded by Nicaragua, at the time, as constituting a *casus belli*; and Costa Rica having failed to withdraw her troops, war was declared by Nicaragua on the 25th November 1857 — although negotiations for a settlement of the difficulty still continued, but without success.

In this posture of affairs the Republic of San Salvador offered mediation through its Minister, Colonel Don Pedro Rómulo Negrete. Owing principally, as it would seem, to Colonel Negrete's earnest efforts, the opposing Governments appointed Ministers Plenipotentiary, who met with the Salvadorian Minister at San José de Costa Rica, and there concluded the Treaty of Limits — the validity of which is now under examination.

By that instrument, the boundary line is made to begin at Punta de Castilla, at the mouth of the San Juan River; thence it follows the right or Southern bank of that stream to a point three miles below the Castillo Viejo; thence it runs along the circumference of a circle drawn round the outworks of the Castle as a center, with a radius of three miles, to a point on the Western side of the Castle, distant two miles from the River; thence parallel to the San Juan and the lake, at a distance of two miles therefrom, to the Sapoa River; and thence in a straight line to the center of Salinas Bay on the Pacific Ocean. The Treaty further provides that surveys shall be made to locate the boundary; that the Bay of San Juan del Norte and Salinas Bay shall be common to both Republics; and that Nicaragua shall have, exclusively, dominion and supreme control of the waters of the San Juan, — Costa Rica having the right of free navigation for the purposes of commerce in that part of the River on which she is bounded. It was further agreed that in the event of war between Costa Rica and Nicaragua, no act of hostility was to be practiced in the Port or River of San Juan, or on the Lake of Nicaragua; and the observance of this article of the Treaty was guaranteed by the Republic of San Salvador.

It is admitted by the parties to the present arbitration that the Treaty was duly ratified by Costa Rica on the 16th April 1858; and that it was not ratified at all by San Salvador. It is further established that there was some ratification by representatives of Nicaragua — but whether or not such ratification was sufficient is one of the points now in controversy, and it is therefore necessary to examine fully the powers and the proceedings of the Nicaraguan authorities.

The Republic of Nicaragua, as appears from the evidence, was a Constitutional Government of limited powers, which were defined by a written Constitution. Nicaragua, as one of the States of the Central American Republic, adopted her first Constitution on the 8th April 1826. Upon the dissolution of the Federal Republic she assumed the rank of an independent nation; and in 1838 adopted a new Constitution, which her representatives now contend was in full force and vigor at the time of the execution of the Treaty of Limits. The full text of the Nicaraguan Constitution of 1838 is not contained in the arguments which have been laid before the Arbitrator; but it sufficiently appears that power was vested in an elective President and a Congress. It also appears that by Article 2 (cited in full below), the boundaries of the State were defined; and that by Article 194, quoted in the argument of Nicaragua, a complicated method of amendment was provided, of which the only feature now necessary to notice is that no proposed amendment shall take effect until it has been approved by two successive Legislatures.

In 1857 the necessity for a complete revision of the Constitution of 1838 seems to have been generally recognized. The long and exhausting conflicts which had been waged from 1854 to 1857, and the existence, during the greater part of that time, of two hostile governments, each claiming to exercise constitutional and supreme power throughout the country, had demonstrated, to the satisfaction of the inhabitants, the importance of changes in the organic law. Accordingly a Constituent Assembly, with ample powers, was duly

elected. The due election, and the full constituent powers of this body, are facts not disputed in the arguments now submitted on behalf of Nicaragua.

In November 1857, the Constituent Assembly met, and addressed itself at once to the task of framing a new Constitution for Nicaragua, as well as of legislating upon the ordinary affairs of the nation.

On the 18th of January 1858, the previous negotiations with Costa Rica having failed, the Assembly ordered new Commissioners to be appointed to negotiate treaties of peace, limits, friendship and alliance between Nicaragua and Costa Rica.

On the 5th February 1858, a further and supplemental decree on the same subject was adopted, which is as follows:

The Constituent Assembly of the Republic of Nicaragua, in use of the legislative faculties with which it is invested, decrees:

> "Article 1. For the purpose that the Executive may comply with the decree of January 18th instant, the said Executive is hereby amply authorized to act in the settlement of the difficulties with Costa Rica in such manner as it may deem best for the interest of both countries, and for the independence of Central America, without the necessity of ratification by the legislative power.
>
> Article 2. Such treaties of limits as it may adjust shall be final, if adjusted in accordance with the bases which separately will be given to it; but, if not, they shall be subject to the ratification of the Assembly."

What were the separate bases of negotiation given to the Nicaraguan Executive does not appear from any of the documents submitted to the Arbitrator. But it is not distinctly asserted by the representatives of Nicaragua that such instructions were disregarded in the negotiation of the Treaty — the arguments relied on to prove its invalidity resting upon entirely different grounds, which will be stated hereafter.

On the 15th April 1858, the Treaty of Limits was signed by the Plenipotentiaries of Costa Rica, Nicaragua and San Salvador; and on the 26th April 1858, ratifications were personally exchanged by the Presidents of Costa Rica and Nicaragua, who met for the purpose on Nicaraguan territory at the City of Rivas. The Treaty had not then been passed upon by the Assembly, the decree of ratification being by the President alone. It is as follows:

TOMAS MARTINEZ, the President of the Republic of Nicaragua:

> "Whereas General Máximo Jerez, Envoy Extraordinary and Minister Plenipotentiary of Nicaragua to the Republic of Costa Rica, has adjusted, agreed upon and signed, on the 15th instant, a Treaty of Limits, fully in accordance with the bases which, for that purpose, were transmitted to him by way of instructions; finding that said Treaty is conducive to the peace and prosperity of the two countries, and reciprocally useful to both of them, and that it facilitates, by removing all obstacles that might prevent it, the mutual alliance of both countries, and their unity of action against all attempts of foreign conquest; considering that

the Executive has been duly and competently authorized, by legislative decree of February 26th ultimo, to do everything conducive to secure the safety and independence of the Republic; and by virture, furthermore, of the reservation of faculties spoken of in the executive decree of the 17th instant:

Does hereby ratify each and all of the articles of the Treaty of Limits made and concluded by Don José María Cañas, Minister Plenipotentiary of the Government of Costa Rica, and Don Máximo Jerez, Minister Plenipotentiary of the Supreme Government of Nicaragua, signed by them on the 15th instant, and ratified by the Costa Rican Government on the l6th. And the additional act of the same date is likewise ratified."

On the 28th May 1858, thirty-two days after the ratification, and forty-three days after the signature of the Treaty of Limits, the following decree was passed by the Constituent Assembly:

"The Constituent Assembly of the Republic of Nicaragua, in the use of legislative powers vested in it, decrees:

Sole Article. The Treaty of Limits concluded at San José on the 15th of April, instant, between General Don Máximo Jerez, Minister Plenipotentiary from this Republic, and General Don José María Cañas, Minister Plenipotentiary from the Republic of Costa Rica, with the intervention of Colonel Don Pedro Rómulo Negrete, Minister Plenipotentiary from Salvador, is hereby approved."

On the 19th August 1858, the Constituent Assembly adopted the new Constitution, of which it is only needful to cite the first article, viz:

"The Republic of Nicaragua is the same which was, in ancient times, called the Province of Nicaragua, and, after the independence, State of Nicaragua. Its territory is bounded on the East and Northeast by the Sea of the Antilles; on the North and Northwest by the State of Honduras; on the West and South by the Pacific Ocean; and on the Southeast by the Republic of Costa Rica. The laws on special limits form part of the Constitution."

No further formal ratification of the Treaty of Limits was ever had; but the arguments submitted by Costa Rica cite a number of instances in which the Government of Nicaragua, during the period between 1858 and 1870, recognized the Treaty as a valid and binding instrument.

Since 1870 the Government of Nicaragua has contended that the Treaty is invalid; and that view is now urged upon three distinct grounds, which are stated as follows in the argument submitted on its behalf:

"The Government of Nicaragua affirms the invalidity of the Treaty of 1858, and insists that it ought not to be bound thereby, for the reason —

First. That it has not received that sanction which the Constitution of the State of Nicaragua requires to give effect to, and validate, a treaty of its character.

Second. It has not been ratified by the Government of San Salvador, so as to give effect to the guarantees on behalf of that Government of the tenth article of the Treaty.

Third. That the pretended ratifications of the Treaty were exchanged before the Treaty had been submitted to the Congress of Nicaragua, and it was not approved by the first Congress of Nicaragua until after the expiration of the forty days provided for the exchange of ratifications in Article XII."

I shall consider each of these three reasons in order.

I.

The argument very forcibly presented on behalf of Nicaragua to establish the first ground of objection — the lack of such a sanction as was required by the Constitution to give effect to, and validate, a Treaty of the character of the one in question — is as follows: The Constitution of 1838 was in full force on the 15th April 1858; that Constitution fixed the boundaries of Nicaragua; the Treaty of Limits curtailed the boundaries so fixed by the Constitution; it was therefore, "in direct and flagrant violation of the fundamental law of the State, and to have validity must receive the same formal ratification that an amendment to the Constitution itself demands;" the Constitution provides that an amendment adopted by one Legislature in the manner prescribed, by a two-thirds vote of both houses, "shall not be considered as valid nor form part of the Constitution until it has received the sanction of the next Legislature;" the Treaty of Limits was never sanctioned by a second Legislature; therefore it is not valid.

This argument, it will be perceived, rests wholly upon the fundamental assumptions that the Constitution of 1838 was in force, and that it fixed the boundaries of Nicaragua. If, as a matter of fact, that Constitution was not in force, or if the boundaries were not definitely fixed by its provisions, then the whole argument falls; for the Treaty is then a mere treaty of limits, settling disputed boundaries, and is not one involving a concession of territory and an amendment to the Constitution. It is not pretended that a treaty fixing boundaries requires, on general principles, any extraordinary sanction.

The general doctrine that in determining the validity of a treaty made in the name of a state, the fundamental laws of such state must furnish the guide for determination, has been fully and ably discussed on the part of Nicaragua, and its correctness may certainly be admitted. But it is also certain that where a treaty has been approved by a government, and an effort is subsequently made to avoid it for the lack of some formality, the burden is upon the party who alleges invalidity to show clearly that the requirements of the fundamental law have not been complied with. In my judgment, Nicaragua has failed in establishing a case under this rule.

In the first place, it may well be doubted whether the Constitution of 1838 can be said to have been in full force and effect at the time of the execution of the Treaty on the 15th April 1858. The legislative power was then vested in a Constituent Assembly, — a body, it would seem, expressly chosen for the purpose of amending the Constitution in any way it saw fit. To say that such a

body could not adopt a decree which in effect modified the Constitution, is to deny to it the power to carry out the very objects for which it existed.

Moreover, the Constitution framed by the Assembly, and promulgated on the 19th August 1858, defining the boundaries of Nicaragua, adds that "the laws on special limits form part of the Constitution." If therefore the decree of the 28th May 1858, and the other acts of the Assembly, were in any respect insufficient as involving some unconstitutionality, the defect was supplied by practically embodying the Treaty of Limits, and the decree approving it, in the new Constitution, — thus giving the highest sanction possible to this legislation.

But whether or not the Constitution of 1838 was in full force in April and May 1858, I am clearly of opinion that it did not definitely fix the boundaries of the State. The power of defining absolute boundaries by a Constitution is not denied. The question is merely whether the Constitution of 1838 did in fact contain such a definition of the boundaries of Nicaragua as to preclude their adjustment by an ordinary treaty.

The provisions of that Constitution, respecting boundaries, are as follows:

> "Article 2. The territory of the State is the same as was formerly given to the Province of Nicaragua; its limits being on the East and Northeast the Sea of the Antilles; on the North and Northwest the State of Honduras; on the West and South the Pacific Ocean; and on the Southeast the State of Costa Rica. *The dividing lines with the bordering States shall be marked by a law which will make a part of the Constitution.*"

Thus it appears that "the dividing lines with the bordering States" were expressly not defined. It was plainly the intention to leave the Constitution incomplete in this respect; though a means of completing it was provided, by allowing the passage of an ordinary law by a single Legislature. It is not pretended that any law, marking the boundary on the side of Costa Rica, was passed before the execution of the Treaty of Limits. The decree approving the Treaty is the only attempt, so far as appears, to comply with this provision of the Constitution. The statement that the boundary is, "on the Southeast, the State of Costa Rica," defines nothing. What were the limits of Costa Rica in 1838, was a matter of dispute. No precise decision was possible, and I have already expressed my opinion that the evidence laid before the Arbitrator is altogether too vague to afford grounds for any satisfactory judgment. The Constitution of 1838 therefore did not fix the boundaries of Nicaragua definitely.

These views are strengthened by a consideration of the evidence adduced on the part of Costa Rica to prove acquiescence by Nicaragua for ten or twelve years in the validity of the Treaty. I do not regard such acquiescence as a substitute for ratification by a second Legislature, if such had been needed. But it is strong evidence of that contemporaneous exposition which has ever been thought valuable as a guide in determining doubtful questions of interpretation.

I conclude therefore that the first ground of objection stated by Nicaragua is untenable.

II.

The second ground of objection urged by Nicaragua to the validity of the Treaty, is that it has not been ratified by the Government at San Salvador, so as to give effect to the guarantees on behalf of that Government of the *tenth* article of the Treaty.

It is argued, in support of this objection, that the guarantee of the mediating Government against hostilities on the River and Lake was of great importance to Nicaragua; that it might well have been the controlling consideration in the mind of the negotiator of the Treaty that led him to agree to the relinquishment of claims to great tracts of territory; that the failure of San Salvador to ratify this Treaty took from it one of the chief considerations moving to Nicaragua; and that the consideration never having taken effect, the Treaty never became of valid or binding force. It is added that this was, in effect, a tripartite Treaty, and unless all the parties became bound, neither of them was.

In my opinion this argument is unsound. The Treaty was not tripartite, but was between Costa Rica and Nicaragua only, with an independent and separable clause of guarantee, as to a single feature of the arrangement, on the part of San Salvador. Without the guarantee, the Treaty was complete as between the two principals, if they saw fit to accept it in that shape. The non-ratification by the Republic of San Salvador was known to the Government of Nicaragua when ratifications were exchanged with Costa Rica. It follows therefore that Nicaragua never lost any of the considerations which induced her to consummate, by an exchange of ratifications, the negotiations for the Treaty.

The facts may be briefly recalled.

On the 15th April 1858 the Treaty of Limits was signed. In form it is a Convention agreed upon by the representatives of Costa Rica and Nicaragua, and declares that they having exchanged their respective powers, "which were examined by Hon. Señor Don Pedro R. Negrete, exercising the function of fraternal mediator in these negotiations," had agreed to and adjusted the terms of the Treaty. The Treaty itself, after reciting the desire of Costa Rica and Nicaragua for peace, fixes the boundary line between them; provides for a survey of the line, and for the common use and defense of the Bay of San Juan del Norte and Salinas Bay, and of that portion of the San Juan River on which Costa Rica borders; grants the use in common of the Punta de Castilla until Nicaragua recovers full possession of all her rights in the Port of San Juan del Norte; forbids the levying of custom duties at Punta de Castilla while San Juan del Norte remains a free port; defines the jurisdiction over, and right of navigation on, the waters of the San Juan River; secures existing contracts of canalization or public transit made by the Government of Nicaragua, and

regulates the execution of future contracts; and neutralizes the Port and River of San Juan and the Lake of Nicaragua in the event of war between Costa Rica and Nicaragua. Then follows this:

> "Article X. The stipulation of the foregoing article (that relating to neutrality) being essentially important for the proper custody of both the Port and the River against foreign aggression, which would affect the general interests of the country, the strict performance thereof is left under the special guarantee, which in the name of the mediator Government, its Minister Plenipotentiary herein present is ready to give, and does hereby give, in use of the faculties vested in him for that purpose by his Government."

Finally, Costa Rica and Nicaragua mutually give up all claims against each other, and "the two contracting parties" waive all claims for damages which either might have against the other.

This instrument is plainly, neither in form nor in substance, tripartite. The "two Governments," the "two contracting parties" spoken of in the Treaty, are always Costa Rica and Nicaragua, never San Salvador. San Salvador is not in form a contracting party at all. And in substance that Government is not a party to the agreement — the clause containing the guarantee being entirely separable from all the rest.

As a proposition of international law, it may be regarded as settled that a guarantee is always merely subsidiary to the principal contract. «Le traité par lequel un état se porte garant d'un traité conclu entre deux autres puissancés, est un traité accessoire destiné à assurer l'exécution du traité principal.» (Bluntschli, 430 *note*, Lardy's trans.) "La garantie peut être comprise dans les stipulations annexées au traité principal qu'on vent garantir, et devient alors une obligation accessoire." (Vattel, Droit des Gens, Ed. 1863, Liv. II., ch. 16, §240; note by Pradier Fodéré, the editor.) "Lorsque la garantie est destinée à assurer l'inviolabilité d'un traité elle forme toujours une obligation et un traité accessoire (*pactum accessorium*), même quand elle ferait partie de l'acte principal." (Klüber, Droit des Gens, §158.) It follows that the clause of guarantee in the Treaty of Limits is no part of the principal agreement, and that on general principles the rest of the Treaty would not stand or fall with this subsidiary or accessory contract.

The necessity for ratification by contracting powers may be freely admitted. But even conceding to it as high an importance as the execution of deeds by individuals, the failure of a guaranteeing state to ratify will not necessarily invalidate a treaty which the principal contracting parties have concluded by an exchange of ratifications as between themselves.

The analogy of individual deeds may serve to illustrate the point now under discussion. The case may readily be imagined of a deed between two parties as principals with a third party as guarantor. Leases of this character are not infrequent. If such a deed were prepared by the agents of the three parties, and if the two principal parties were to sign, seal, acknowledge, and formally deliver to each other duly executed duplicates of the deed, without

waiting for the signature of the guarantor, it is too plain for argument that neither could subsequently object, and claim the right to rescind, because the deed had not been executed and delivered by the guarantor.

So in this case. The Presidents of Costa Rica and Nicaragua in person, on the 26th April 1858 formally exchanged ratifications of the Treaty, without waiting for San Salvador. The arguments now advanced by Nicaragua, as establishing the invalidity of the Treaty, might perhaps have been urged as reasons for refusing to exchange the ratifications until San Salvador was ready to unite in the act. But the Government of Nicaragua was silent when it ought to have spoken, and so waived the objection now made. It saw fit to proceed to the exchange of ratifications without waiting for San Salvador. The Treaty was complete without Article X. To all the other articles and stipulations it contained Costa Rica and Nicaragua alone might fully bind themselves. They did so, irrevocably, by a formal exchange of ratifications; and neither may now be heard to allege, as reasons for rescinding this completed Treaty, any facts which existed and were known at the time of its consummation.

I conclude therefore that the *second* ground of objection stated by Nicaragua is untenable.

III.

The third ground of objection urged by Nicaragua to the validity of the Treaty is "that the pretended ratifications, of the Treaty were exchanged before the Treaty had been submitted to the Congress of Nicaragua, and it was not approved by the first Congress of Nicaragua until after the expiration of the forty days provided for the exchange of ratifications in Article XII."

It will be remembered that on the 5th February 1858 the Constituent Assembly of Nicaragua passed a decree by which the Executive was "amply authorized" to treat with Costa Rica "without the necessity of ratification by the legislative power"; and that it was further decreed that such treaties of limits as the Executive might adjust should be final, — if in accordance with certain separate instructions. Acting under this grant of power, the President of Nicaragua concluded and ratified the present Treaty on the 26th April 1858, eleven days after its signature by the Plenipotentiaries, without "ratification by the legislative power." On the 28th of May 1858 the Constituent Assembly adopted a decree approving the Treaty; and this decree was signed by the President on the 4th June 1858.

The argument now presented by Nicaragua is twofold, and raises two points, *first*, that the Treaty is invalid because ratifications were exchanged before approval by the Assembly; and, *second*, that it is invalid because such approval was given more than forty days after signature.

As to the first of these points, it would perhaps be enough to say that Nicaragua can not now seek to invalidate the Treaty on any mere ground of irregularity in the order of its own proceedings. If its Legislature did in fact approve the Treaty, that is enough for the present purpose. Whether such

approval was expressed before or after the exchange of ratifications is an immaterial matter now, — certainly so far as Nicaragua is concerned.

But it does not appear that there was any real irregularity in these proceedings. The full text of the Nicaraguan Constitution of 1838 not being contained in the arguments submitted to the Arbitrator, it is not made clear just what restrictions upon the treaty making power that instrument imposed. Ratification by legislative authority is not always required, even in constitutional governments. The necessity for legislative ratification is not to be presumed, but must be established as a fact. Still less can there be any presumption as to the form and manner in which the legislative sanction is to be expressed. In the present instance, the Constituent Assembly, a body of extensive powers, expressed in advance its approval of any treaty of limits that might be concluded by the Executive upon certain bases. It is not shown that the authority so given was exceeded; and it can not be said, in the absence of an express prohibition, that this mode of dealing with the subject was improper.

Again, the fact of the subsequent approval of the Treaty by the Assembly is satisfactory proof that that body approved not only the terms of the instrument, but also the manner in which the Executive had executed the authority conferred by the decree of the 5th February 1858. The time and manner of exchange of ratifications was before the Assembly, and it was fully aware that the time agreed upon for exchange had passed. Its action, under these circumstances, shows that it was of the opinion that the Treaty had been legally and in due time ratified by the President, in pursuance of the special powers conferred upon him.

In any event, all irregularities would seem to have been effectually cured by this subsequent approval of the Constituent Assembly. *Ratihabitio retrotrahitur, et mandato equiparatur*, is a recognized maxim of municipal law; and the reasons of that rule may fairly be regarded as applying to cases like the present.

That irregularities and defects in the formalities of ratification may be supplied and made good by subsequent acquiescence in and approval of the treaty, is laid down by Heffter (Droit International, § 87 *fin.*):

> «Mais il est constant qu'elle (*i. e.*, ratification) peut être supplée par des actes equivalents, et notamment par l'exécution tacite des stipulations arrêtées.»

And this opinion is cited by Pradier-Fodéré in his translation of Grotius (Vol. II., p. 270, note 1). See also Hall's International Law, page 276.

The second point — that the legislative sanction was not given until after the expiration of the forty days fixed by the Treaty for the exchange of the ratifications — seems clearly untenable. Costa Rica, and not Nicaragua, might have complained of this delay. Assuming that subsequent legislative approval was needed, Costa Rica might, if it had desired to do so, have declared the negotiations at an end on the expiration of the forty days. But it was not bound

to do so. It had a perfect right to waive this limitation of time. Either party to a Treaty may extend the time of the other, either by express agreement or by acts indicating acquiescence. Nicaragua cannot be permitted to say, as she does in effect say in this branch of her argument — "it is true that this Treaty was approved unreservedly by both the executive and legislative branches of the Government; but such approval is worthless, as it was expressed not forty but forty-three days after the signature of the Treaty."

The *fact* of approval being established, the *time* of approval is immaterial, provided the other party by its acquiescence has seen fit to waive delay.

I conclude therefore that the *third* ground of objection stated by Nicaragua is untenable.

And having examined in detail the three reasons urged by Nicaragua for holding the Treaty invalid, and finding all these reasons untenable, I conclude that the Arbitrator should decide in favor of the validity of this Treaty.

The Award

Grover Cleveland, President of the United States, to whom it shall concern, Greeting:

The functions of Arbitrator having been conferred upon the President of the United States by virtue of a Treaty signed at the City of Guatemala on the 24th day of December one thousand eight hundred and eighty-six, between the Republics of Costa Rica and Nicaragua, whereby it was agreed that the question pending between the contracting Governments in regard to the validity of their Treaty of Limits of the 15th day of April one thousand eight hundred and fifty-eight, should be submitted to the arbitration of the President of the United States of America; that if the Arbitrator's award should determine that the Treaty was valid, the same award should also declare whether Costa Rica has the right of navigation of the River San Juan with vessels of war or of the revenue service; and that in the same manner the Arbitrator should decide, in case of the validity of the Treaty, upon all the other points of doubtful interpretation which either of the parties might find in the Treaty and should communicate to the other party within thirty days after the exchange of the ratifications of the said Treaty of the 24th day of December one thousand eight hundred and eighty six;

And the Republic of Nicaragua having duly communicated to the Republic of Costa Rica eleven points of doubtful interpretation found in the said Treaty of Limits of the 15th day of April one thousand eight hundred and fifty-eight; and the Republic of Costa Rica having failed to communicate to the Republic of Nicaragua any points of doubtful interpretation found in the said last-mentioned Treaty;

And both parties having duly presented their allegations and documents to the Arbitrator, and having thereafter duly presented their respective answers

to the allegations of the other party as provided in the Treaty of the 24th day of December one thousand eight hundred and eighty-six;

And the Arbitrator pursuant to the fifth clause of said last-named Treaty having delegated his powers to the Honorable George L. Rives, Assistant Secretary of State, who, after examining and considering the said allegations, documents and answers, has made his report in writing thereon to the Arbitrator;

Now therefore I, Grover Cleveland, President of the United States of America, do hereby make the following decision and award:

First. The above-mentioned Treaty of Limits signed on the 15th day of April one thousand eight hundred and fifty-eight, is valid.

Second. The Republic of Costa Rica under said Treaty and the stipulations contained in the sixth article thereof, has not the right of navigation of the River San Juan with vessels of war; but she may navigate said river with such vessels of the Revenue Service as may be related to and connected with her enjoyment of the 'purposes of commerce' accorded to her in said article, or as may be necessary to the protection of said enjoyment.

Third. With respect to the points of doubtful interpretation communicated as aforesaid by the Republic of Nicaragua, I decide as follows:

1. 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.

2. The central point of the Salinas Bay is to be fixed by drawing a straight line across the mouth of the Bay and determining mathematically the centre of the closed geometrical figure formed by such straight line and the shore of the Bay at low-water mark.

3. By the central point of Salinas Bay is to be understood the centre of the geometrical figure formed as above stated. The limit of the Bay towards the ocean is a straight line drawn from the extremity of Punta Arranca Barba, nearly true South to the Westernmost portion of the land about Punta Sacate.

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

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

6. 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.

7. 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.

8. The right of the Republic of Costa Rica to the navigation of the River San Juan with men-of-war or revenue cutters is determined and defined in the Second Article of this award.

9. The Republic of Costa Rica can deny to the Republic of Nicaragua the right of deviating the waters of the River San Juan in case such deviation will result 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.

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

11. The Treaty of Limits of the 15th day of April one thousand eight hundred and fifty-eight does not give to the Republic of Costa Rica the right to be a party to grants which Nicaragua may make for inter-oceanic canals; though in cases where the construction of the canal will involve an injury to

the natural rights of Costa Rica, her opinion or advice, as mentioned in Article VIII of the Treaty, should be more than "advisory" or "consultative." It would seem in such cases that her consent is necessary, and that she may thereupon demand compensation for the concessions she is asked to make; but she is not entitled as a right to share in the profits that the Republic of Nicaragua may reserve for herself as a compensation for such favors and privileges as she, in her turn, may concede.

In testimony whereof, I have hereunto set my hand and have caused the Seal of the United States to be hereunto affixed.

[SEAL.] Done in duplicate at the City of Washington, on the twenty-second day of March, in the year one thousand eight hundred and eighty-eight, and of the Independence of the United States the one hundred and twelfth.

GROVER CLEVELAND.

By the President:
T. F. BAYARD,
Secretary of State.

Convention on border demarcation concluded between the Republic of Costa Rica and the Republic of Nicaragua signed at El Salvador on 27 March 1896*

The Presidents of Costa Rica and Nicaragua, having accepted the mediation of the Government of El Salvador in resolving the issue of demarcating the border between their two countries, have respectively designated as their extraordinary and plenipotentiary envoys, their Excellencies, Mr. Leonidas Pacheco and Mr. Manuel C. Matus. Following various meetings held in the presence of His Excellency, Mr. Jacinto Castellanos, Minister for Foreign Affairs of El Salvador, specially mandated representative of that Government, and their full powers having been found to be in good and proper form, the envoys have signed the following Convention. His Excellency, General Rafael A. Gutiérrez, President of the Republic of El Salvador, attended the signing ceremony to confer greater solemnity to the event.

ARTICLE I. — The Contracting Governments are bound to appoint a Commission, respectively, each composed of two engineers, or surveyors, for the purpose of duly defining and marking out the dividing line between the Republics of Costa Rica and Nicaragua according to the stipulations of the

* Original Spanish version, translation by the Secretariat of the United Nations.

Treaty of 15 April 1858 and the award of the President of the United States of America, Mr. Grover Cleveland.

ARTICLE II. — The Commissions established under article I shall include an engineer appointed by the President of the United States of America at the request of the two Parties, whose mandate shall include the following: to resolve any dispute between the Commissions of Costa Rica and Nicaragua arising from the operations. He shall have broad powers to decide whatever kind of differences may arise in the course of any operations and his ruling shall be final.

ARTICLE III. — Within three months of the signing of this Convention, which shall be duly ratified by the respective Congresses, the Representatives of both Contracting Governments in Washington shall jointly request the President of the United States of America to appoint the aforementioned engineer and confirm such appointment. Should such joint request fail to be made by the Representative in Washington of either Government or for any other reason within the stipulated time limit, upon expiration of such time limit, the Representatives of either Costa Rica or Nicaragua in Washington may separately make such request, which shall be as valid as if it had been made jointly by both Parties.

ARTICLE IV. — Upon confirmation of the appointment of the United States engineer and within three months of such appointment, the engineer shall proceed with demarcations of the border line and such operation shall be completed within 20 months of its starting date. The Commissions of the Contracting Parties shall meet in San Juan del Norte as agreed and shall begin their work at the extremity of the border starting from the Atlantic coast, as provided for by the aforementioned Treaty and award.

ARTICLE V. — The Contracting Parties agree that if, on the scheduled start date of the work, either one of the Commissions of the Republics of Costa Rica or Nicaragua failed for any reason to appear at the designated venue, the Commission of the other Republic present shall begin the work with the agreement of the United States Government engineer and such work as shall have been done shall be valid and definitive and shall not be open to appeal by the Republic that failed to send its Commissioners. The same shall apply should any or all the Commissioners of either Contracting Republic be absent once the work starts or refuse to carry out such operations as provided for in the award and Treaty referred to herein or as decided by the engineer appointed by the President of the United States.

ARTICLE VI. — The Contracting Parties agree that the deadline for the completion of the boundary marking is not mandatory so that any operations carried out upon the expiration thereof shall be valid either because such operations could not have been completed within the deadline or because the commissioners of Costa Rica and Nicaragua have agreed together with the United States Government engineer to temporarily suspended such operations

so that the time remaining would not allow for the completion of the operations.

ARTICLE VII. — Should the demarcation work be temporarily suspended, such work as has been completed until then shall be considered final and completed, with the borders being fixed at that particular location even where such suspension were to be extended indefinitely as a result of unforeseen and insuperable circumstances.

ARTICLE VIII. — The records of the operations shall be in triplicate and shall be duly signed and sealed by the commissioners and shall constitute the definitive demarcation document of the borders of the Republics with no approval or any other formality being required on the part of the signatory Republics.

ARTICLE IX. — The records to which reference is made in the foregoing article shall be prepared as follows: every day, at the end of operations, such operations as are completed shall be documented in a detailed manner, including the starting point of the operations of the day, the types of survey markers constructed, the distances separating them, the direction of the line as based on the common boundary. Any dispute arising between the Commissions of Costa Rica and Nicaragua with respect to any particular point shall be documented in the relevant record along with the ruling of the United States engineer. The records shall be in triplicate: the Commissions of Costa Rica and Nicaragua shall each keep a copy and the third copy shall be kept by the United States engineer to be deposited upon completion of the operations with the Department of State in Washington.

ARTICLE X. — The expenses relating to the travel and subsistence of the United States engineer as well as to the salary payable during his functions shall be defrayed equally by the signatory Republics.

ARTICLE XI. — The Contracting Parties undertake to cause this Convention to be ratified by their respective Congresses within six months starting from this date, even if such ratification were to require convening extraordinary sessions of the said Congresses, and the subsequent exchange shall take place within a month following the date of the last such ratification, at San José de Costa Rica or at Managua.

ARTICLE XII. — Failure to complete the acts to which reference is made earlier within the deadlines stipulated shall not render this Convention void and the Republic which failed to complete such act shall endeavour to do so as soon as possible.

In witness whereof, the parties have signed and sealed this Convention in duplicate, at the City of San Salvador on the twenty-seventh of March eighteen hundred and ninety-six.[1]

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[1] *Memoria de Relaciones Exteriores* (Costa Rica), 1897, p. 28.

FIRST AWARD OF THE ENGINEER-UMPIRE, UNDER THE CONVENTION BETWEEN COSTA RICA AND NICARAGUA OF 8 APRIL 1896 FOR THE DEMARCATION OF THE BOUNDARY BETWEEN THE TWO REPUBLICS, DECISION OF 30 SEPTEMBER 1897*

PREMIÈRE SENTENCE ARBITRALE RENDUE PAR LE SURARBITRE INGÉNIEUR, EN VERTU DE LA CONVENTION ENTRE LE COSTA RICA ET LE NICARAGUA DU 8 AVRIL 1896 POUR LA DÉMARCATION DE LA FRONTIÈRE ENTRE LES DEUX RÉPUBLIQUES, DÉCISION DU 30 SEPTEMBRE 1897**

Interpretation of treaty – treaty must be interpreted in the way in which it was mutually understood at the time by its makers – meaning understood from the language taken as a whole and not deduced from isolated words or sentences – the non use of some names may be as significant as the use of others – Treaty of limits of 15 April 1858.

Delimitation of boundary – a temporary connection between an island and mainland during the dry season may not change permanently the geographical character and political ownership of the island – the river being treated and regarded as an outlet of commerce in the Treaty; it has to be considered when it is navigable, with an average water level.

Interprétation des traités – un traité doit être interprété conformément à la conception mutuelle de ses auteurs au moment de son élaboration – le sens doit être dégagé du texte pris dans sa globalité et non déduit de termes ou de phrases isolés – le non emploi de certains noms propres peut être aussi significatif que l'emploi de certains autres.

Délimitation frontalière – une liaison temporaire pendant la saison sèche entre une île et le continent ne peut pas changer de façon permanente le caractère géographique et la possession politique de cette île – dans le traité, le fleuve étant désigné et envisagé comme une infrastructure commerciale, il doit être pris en compte lorsqu'il est navigable, c'est à dire avec un niveau d'eau moyen.

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* Reprinted from John Basset Moore, *History and Digest of the International Arbitrations to Which the United States has been a Party*, vol. V, Washington 1898, Government Printing Office, p.5074.

** Reproduit de John Basset Moore, *History and Digest of the International Arbitrations to Which the United States has been a Party*, vol. V, Washington , 1898, Government Printing Office, p. 5074.

SAN JUAN DEL NORTE, NICARAGUA,
September 30, 1897.

To the Commissions of Limits of Costa Rica and Nicaragua.

GENTLEMEN: In pursuance of the duties assigned me by my commission as engineer-arbitrator to your two bodies, with the power to decide finally any points of difference that may arise in tracing and marking out the boundary line between the two republics, I have given careful study and consideration to all arguments, counter arguments, maps, and documents submitted to me in the matter of the proper location of the initial point of the said boundary line upon the Caribbean coast.

The conclusion at which I have arrived and the award I am about to make do not accord with the views of either commission. So, in deference to the very excellent and earnest arguments so faithfully and loyally urged by each commission for its respective side, I will indicate briefly my line of thought and the considerations which have seemed to me to be paramount in determining the question; and of these considerations the principal and the controlling one is that we are to interpret and give effect to the treaty of April 15, 1858, in the way *in which it was mutually understood at the time by its makers*.

Each commission has presented an elaborate and well-argued contention that the language of that treaty is consistent with its claim for a location of the initial point of the boundary line at a place which would give to its country great advantages. These points are over six miles apart, and are indicated on the map accompanying this award.

The Costa Rican claim is located on the left-hand shore or west headland of the harbor; the Nicaraguan on the east headland of the mouth of the Taura branch.

Without attempting to reply in detail to every argument advanced by either side in support of its respective claim, all will be met and sufficiently answered by showing that those who made the treaty mutually understood and had in view another point, to wit, the eastern headland at the mouth of the harbor.

It is the meaning of the men who framed the treaty which we are to seek, rather than some possible meaning which can be forced upon isolated words or sentences. And this meaning of the men seems to me abundantly plain and obvious.

This treaty was not made hastily or carelessly. Each state had born wrought up by years of fruitless negotiations to a state of readiness for war in defense of what it considered its rights, as is set forth in article 1. In fact, war had actually been declared by Nicaragua on November 25, 1857, when, through the mediation of the Republic of Salvador, a final effort to avert it

was made, another convention was held, and this treaty resulted. Now, we may arrive at the mutual understanding finally reached by its framers by first seeking in the treaty as a whole for the general idea or scheme of compromise upon which they were able to agree. Next, we must see that this general idea of the treaty as a whole harmonizes fully with any description of the line given in detail, and the proper names of all the localities used, or *not used*, in connection therewith, for the *non use* of some names may be as significant as the use of others. Now, from the general consideration of the treaty as a whole the scheme of compromise stands out clear and simple.

Costa Rica was to have as a boundary line the right or southeast bank of the river, considered as an outlet for commerce, from a point 3 miles below Castillo to the sea.

Nicaragua was to have her prized "sumo imperio" of all the waters of this same outlet for commerce, also unbroken to the sea.

It is to be noted that this division implied also, of course, the ownership by Nicaragua of all islands in the river and of the left or northwest bank and headland.

This division brings the boundary line (supposing it to be traced downward along the right bank from the point near Castillo) across both the Colorado and the Taura branches.

It can not follow either of them, for neither is an outlet for commerce, as neither has a harbor at its mouth.

It must follow the remaining branch, the one called the Lower San Juan, through its harbor and into the sea.

The natural terminus of that line is the right-hand headland of the harbor mouth.

Next let us note the language of description used in the treaty, telling whence the line is to start and how it is to run, leaving out for the moment the proper name applied to the initial point. It is to start "at the mouth of the river San Juan de Nicaragua, and shall continue following the right bank of the said river to a point three English miles from Castillo Viejo".

This language is evidently carefully considered and precise, and there is but one starting point possible for such a line, and that is at the right headland of the bay.

Lastly, we come to the proper name applied to the starting point, "the extremity of Punta de Castillo". This name Punta de Castillo does not appear upon a single one of all the original maps of the bay of San Juan which have been presented by either side, and which seem to include all that were ever published before the treaty or since. This is a significant fact, and its meaning is obvious. Punta de Castillo must have been, and must have remained, a point of no importance, political or commercial, otherwise it could not possibly

have so utterly escaped note or mention upon the maps. This agrees entirely with the characteristics of the mainland and the headland on the right of the bay. It remains until today obscure and unoccupied, except by the hut of a fisherman. But the identification of the locality is still further put beyond all question by the incidental mention, in another article of the treaty itself, of the name Punta de Castillo.

In Article V. Costa Rica agrees temporarily to permit Nicaragua to use Costa Rica's side of the harbor without payment of port dues, and the name Punta de Castillo is plainly applied to it. Thus we have, concurring, the general idea of compromise in the treaty as a whole, the literal description of the line in detail, and the verification of the name applied to the initial point by its incidental mention in another portion of the treaty, and by the concurrent testimony of every map maker of every nation, both before the treaty and since, in excluding this name from all other portions of the harbor. This might seem to be sufficient argument upon the subject, but it will present the whole situation in a still clearer light to give a brief explanation of the local geography and of one special peculiarity of this Bay of San Juan.

The great feature in the local geography of this bay, since our earliest accounts of it, has been the existence of an island in its outlet, called on some early maps the island of San Juan. It was an island of such importance as to have been mentioned in 1820 by two distinguished authors, quoted in the Costa Rican reply to Nicaragua's argument (page 12), and it is an island to-day, and so appears in the map accompanying this award. The peculiarity of this bay, to be noted, is that the river brings down very little water during the annual dry season. When that happens, particularly of late years, sand bars, dry at all ordinary tides, but submerged more or less and broken over by the waves at all high ones, are formed, frequently reaching the adjacent headlands, so that a man might cross dry-shod.

Now, the whole claim of Costa Rica is based upon the assumption that on April 15, 1858, the date of the treaty, a connection existed between the island and the eastern headland, and that this converted the island into mainland, and carried the initial point of the boundary over to the western extremity of the island. To this claim there are at least two replies, either one seeming to me conclusive.

First, the exact state of the bar on that day can not be definitely proven, which would seem to be necessary before drawing important conclusions.

However, as the date was near the end of the dry season, it is most probable that there was such a connection between the island and the eastern Costa Rican shore as has been described. But even if that be true, it would be unreasonable to suppose that such temporary connection could operate to change permanently the geographical character and political ownership of the island. The same principle, if allowed, would give to Costa Rica *every island in the river* to which sand bars from her shore had made out during that dry season. But throughout the treaty the river is treated and regarded as an outlet

of commerce. This implies that it is to be considered as in average condition of water, in which condition alone it is navigable.

But the overwhelming consideration in the matter is that by the use of the name of Punta de Castillo for the starting point, instead of the name Punta Arenas, the makers of the treaty intended to designate the mainland on the east of the harbor. This has already been discussed, but no direct reply was made to the argument of Costa Rica quoting three authors as applying the name Punta de Castillo to the western extremity of the before-mentioned island, the point invariably called Point Arenas by all the naval and other officers, surveyors, and engineers who ever mapped it.

These authors are L. Montufar, a Guatemalan, in 1887; J. D. Gamez, a Nicaraguan, in 1889, and E. G. Squier, an American, date not given exactly, but subsequent to the treaty. Even of these, the last two merely used, once each, the name Punta de Castillo as an alternate for Punta Arenas. Against this array of authority we have, first, an innumerable number of other writers clearly far more entitled to confidence; second, the original makers of all the maps, as before pointed out, and third, the framers of the treaty itself, by their use of Punta de Castillo in Article V.

It must be borne in mind that for some years before the making of this treaty Punta Arenas had been by far the most important and conspicuous point in the bay. On it were located the wharves, workshops, offices, etc., of Vanderbilt's great transit company, conducting the through line from New York to San Francisco during the gold excitement of the early fifties. Here the ocean and river steamers met and exchanged passengers and cargo. This was the point sought to be controlled by Walker and the filibusters.

The village of San Juan cut no figure at all in comparison, and it would doubtless be easy to produce by hundreds references to this point as Punta Arenas by naval and diplomatic officers of all prominent nations, by prominent residents and officials, and by engineers and surveyors constantly investigating the canal problem, and all having a personal knowledge of the locality.

In view of all these circumstances, the jealousy with which each party to the treaty defined what it gave up and what it kept, the prominence and importance of the locality, the concurrence of all the original maps in the name, and its universal notoriety, I find it impossible to conceive that Nicaragua had conceded this extensive and important territory to Costa Rica, and that the latter's representative had failed to have the name Punta Arenas appear anywhere in the treaty. And for reasons so similar that it is unnecessary to repeat them, it is also impossible to conceive that Costa Rica should have accepted the Taura as her boundary and that Nicaragua's representative should have entirely failed to have the name Taura appear anywhere in the treaty.

Having then designated generally the mainland east of Harbor Head as the location of the initial point of the boundary line, it now becomes necessary

to specify more minutely, in order that the said line may be exactly located and permanently marked. The exact location of the initial point is given in President Cleveland's award as the "extremity of Punta de Castillo, at the mouth of the San Juan de Nicaragua River, as they both existed on the 15th of April 1858".

A careful study of all available maps and comparisons between those made before the treaty and those of recent date made by boards of engineers and officers of the canal company, and one of to-day made by yourselves to accompany this award, makes very clear one fact: The exact spot which was the extremity of the headland of Punta de Castillo April 15, 1858, has long been swept over by the Caribbean Sea, and there is too little concurrence in the shore outline of the old maps to permit any certainty of statement of distance or exact direction to it from the present headland. It was somewhere to the northeastward, and probably between 600 and 1,600 feet distant, but it can not now be certainly located. Under these circumstances it best fulfills the demands of the treaty and of President Cleveland's award to adopt what is practically the headland of to-day, or the northwestern extremity of what seems to be the solid land, on the east side of Harbor Head Lagoon.

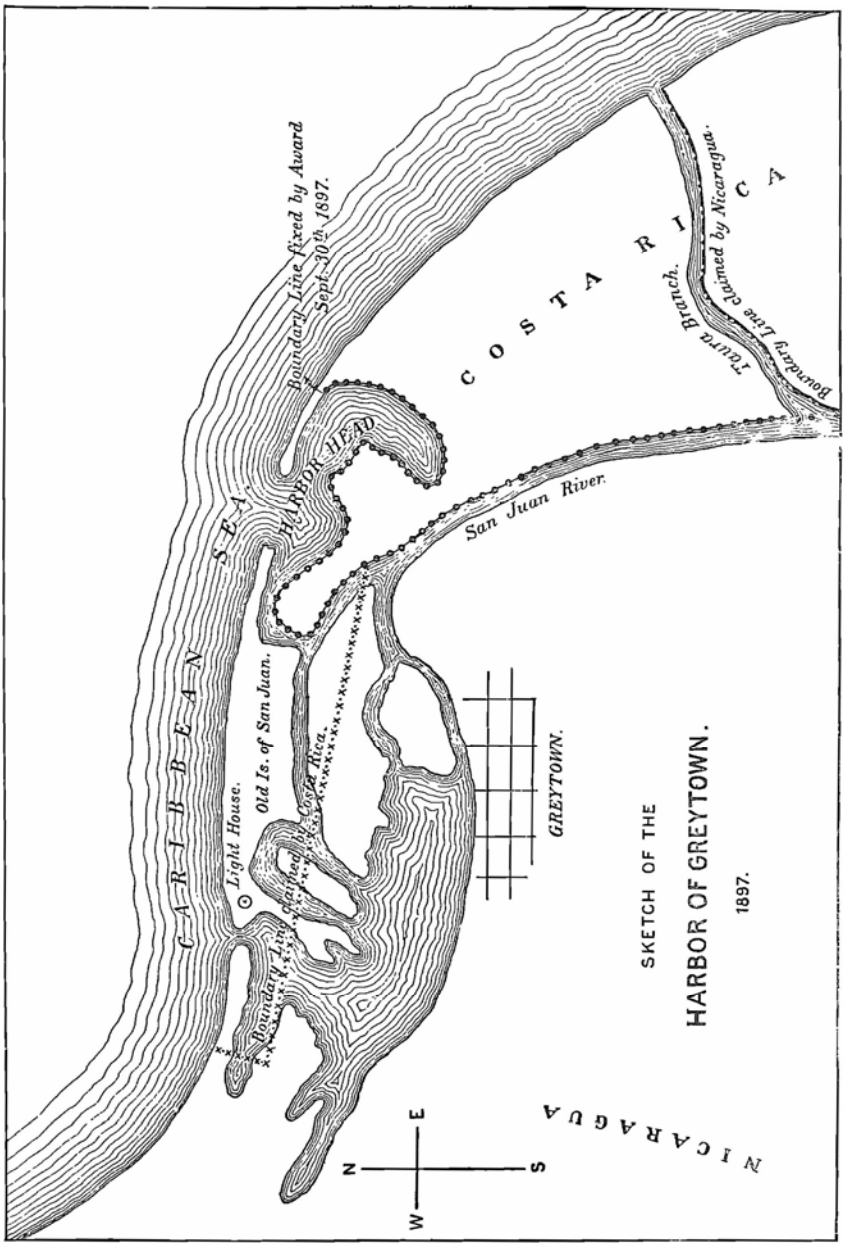
I have accordingly made personal inspection of this ground, and declare the initial line of the boundary to run as follows, to wit:

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.

I am, gentlemen, very respectfully, your obedient servant,

E. P. ALEXANDER.

SKETCH OF THE HARBOR OF GREYTOWN – 1897



SECOND AWARD OF THE ENGINEER-UMPIRE, UNDER THE CONVENTION BETWEEN COSTA RICA AND NICARAGUA OF 8 APRIL 1896 FOR THE DEMARCATION OF THE BOUNDARY BETWEEN THE TWO REPUBLICS, DECISION OF 20 DECEMBER 1897[*]

DEUXIÈME SENTENCE ARBITRALE RENDUE PAR LE SURARBITRE INGÉNIEUR, EN VERTU DE LA CONVENTION ENTRE LE COSTA RICA ET LE NICARAGUA DU 8 AVRIL 1896 POUR LA DÉMARCATION DE LA FRONTIÈRE ENTRE LES DEUX RÉPUBLIQUES, DÉCISION DU 20 DÉCEMBRE 1897[**]

Interpretation of treaty of delimitation – during demarcation process, accuracy of the measurement of the border-line is not as important as the finding natural landmarks, provided there is agreement between the two Parties – in case of disagreement, the view of the party favouring greater accuracy must prevail.

International boundary – natural changes of the banks of a river serving as an international boundary – determination of future changes made easier thanks to measurement and demarcation.

Interprétation d'un traité de délimitation – durant la procédure de démarcation, l'exactitude du métrage de la ligne frontière est moins importante que l'établissement de repères naturels, sous réserve de l'accord des deux Parties – en cas de désaccord, la position de la Partie en faveur de la plus grande exactitude doit prévaloir.

Frontière internationale – altérations naturelles des rives d'un fleuve servant de frontière internationale – détermination des modifications futures facilitée par le métrage et la démarcation.

* * * * *

Second award rendered, to San Juan del Norte, on December 20, 1897, in the boundary question between Nicaragua and Costa Rica.[***]

In pursuance once again of the duties assigned me by my commission as engineer-arbitrator to your two bodies, I have been called upon to decide on the matter submitted to me in the record dated the 7th of this month, as per the following paragraph of that record: "The Costa Rican Commission proposed

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[*] Reprinted from H. La Fontaine, *Pasicrisie Internationale: Histoire Documentaire des Arbitrages Internationaux (1794-1900)*, Imprimerie Stampelli & CIE, Berne, 1902, p.532.

[**] Reproduit de H. La Fontaine, *Pasicrisie Internationale: Histoire Documentaire des Arbitrages Internationaux (1794-1900)*, Imprimerie Stampelli & CIE, Berne, 1902, p,532.

[***] Original Spanish version, translated by the Secretariat of the United Nations.

that we proceed to 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 view 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 left bank of the Harbor and of the river formed the boundary and that therefore the dividing line was subject to change and not permanent. Therefore, the map and any data obtained shall never correspond to the actual dividing line. To that end, the two Commissions have decided to hear the decision that the arbitrator would render within a week to their respective arguments submitted to him on that question."

The above-mentioned arguments of each party have been received and duly considered. It should be noted, for a clearer understanding of the question at hand, that the San Juan river runs through a flat and sandy delta in the lower portion of its course and that it is obviously possible that its banks will not only gradually expand or contract but that there will be wholesale changes in its channels. Such changes may occur fairly rapidly and suddenly and may not always be the result of unusual factors such as earthquakes or major storms. Examples abound of previous channels now abandoned and banks that are now changing as a result of gradual expansions or contractions.

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.

The proposed measurement and demarcation of the boundary line will not have any effect on the application of those principles.

The fact that the line has been measured and demarcated will neither increase nor decrease any legal standing that it might have had it not been measured or demarcated.

The only effect obtained from measurement and demarcation is that the nature and extent of future changes may be easier to determine.

There is no denying the fact that there is a certain contingent advantage to being always able to locate the original line in future. But there may well be a difference of opinion as to how much time and expense needs to be spent in order to obtain such a contingent advantage. That is the difference now between the two Commissions.

Costa Rica wants to have that future capacity. Nicaragua feels that the contingent benefit is not worth the current expenditure.

In order to decide which one of these views should hold sway, I have to abide by the spirit and letter of the 1858 Treaty and to determine whether there is anything in either point of view that is applicable to the question. I find both things in article 3.

Article 2 describes the entire dividing line from the Caribbean Sea to the Pacific and article 3 continues thus: "measurements corresponding to this dividing line shall be taken in whole or in part by the Government commissioners, who shall agree on the time required for such measurements to be made. The commissioners shall be empowered to diverge slightly from the curve around El Castillo, from the line parallel to the banks of the river and lake, or from the straight astronomical line between Sapoá and Salinas, provided that they can agree upon this, in order to adopt natural landmarks."

The entire article is devoted to prescribing how the Commissioners should perform their task. It allows them to dispense with a few details because it says that the whole or part of the line may be measured and implies that accuracy is not as important as finding natural landmarks. But the condition expressly stipulated in the latter case and clearly understood also in the former is that the two Commissions must agree.

Otherwise, the line in its entirety must be measured, following all the practical steps described in article 2.

Clearly, therefore, 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 favouring greater accuracy should prevail.

I therefore announce my award as follows: the Commissioners shall immediately proceed to measuring the line from the starting point to a point three miles below El Castillo Viejo, as proposed by Costa Rica.

THIRD AWARD OF THE ENGINEER-UMPIRE, UNDER THE CONVENTION BETWEEN COSTA RICA AND NICARAGUA OF 8 APRIL 1896 FOR THE DEMARCATION OF THE BOUNDARY BETWEEN THE TWO REPUBLICS, DECISION OF 22 MARCH 1898[*]

TROISIÈME SENTENCE ARBITRALE RENDUE PAR LE SURARBITRE INGÉNIEUR, EN VERTU DE LA CONVENTION ENTRE LE COSTA RICA ET LE NICARAGUA DU 8 AVRIL 1896 POUR LA DÉMARCATION DE LA FRONTIÈRE ENTRE LES DEUX RÉPUBLIQUES, DÉCISION DU 22 MARS 1898[**]

International boundary – necessity of stable boundaries – the bank of a river serving as boundary means the bank with the water at the ordinary stage – fluctuations in the water level do not alter the position of the boundary line – changes in the boundary can only occur when they affect the bed of the river.

Frontière internationale – nécessité de frontières stables – les berges d'un fleuve servant de frontière sont les berges correspondantes au niveau d'eau ordinaire – les fluctuations du niveau d'eau ne modifient pas la position de la ligne frontière – les modifications de lafrontière ne peuvent résulter que de changements dans le lit du fleuve.

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Third award rendered, to San Juan del Norte, on 22 March 1898, in the boundary question between Nicaragua and Costa Rica.[***]

In indicating my reasons for the second award I referred briefly to the fact that, according to the well known rules of international law, the precise location of the dividing line on the right bank of the San Juan river that this Commission is now determining, may be altered in future by possible changes in the banks or channels of the river.

I am now being requesting by the current Nicaraguan Commissioner to complete this award with a more definitive statement as to the legal and permanent nature or stability of the border line, which is being demarcated on a daily basis.

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[*] Reprinted from H. La Fontaine, *Pasicrisie Internationale: Histoire Documentaire des Arbitrages Internationaux (1794-1900)*, Imprimerie Stampelli & CIE, Berne 1902, pp -533-535.

[**] Reproduit de H. La Fontaine, *Pasicrisie Internationale: Histoire Documentaire des Arbitrages Internationaux (1794-1900)*, Imprimerie Stampelli & CIE, Berne 1902, pp -533-535.

[***] Original Spanish version, translated by the Secretariat of the United Nations.

What is effectively being sought is that I declare that this line will remain as the exact dividing line only as long as the waters of the river remain at their current level and that in future the dividing line may be determined on the basis of the water level at any particular moment.

The commissioner for Nicaragua submits the following in support of his argument:

> "Without engaging in a detailed discussion as to the meaning of a river bed or channel, which is the entire area of a territory through which a watercourse flows, I do wish to recall the doctrine of experts on public international law, which is summed up by Mr. Carlos Calvo in his work 'Le droit international théorique et pratique', [book 40, para. 295, page 385] thus: — 'Frontiers delimited by watercourses are subject to change when the beds of such watercourses undergo changes...'
>
> I note that present-day codes are consistent with that doctrine in providing that land that a river or lake submerges and uncovers periodically does not accrue to the adjoining land because it is the watercourse bed. According to article 728 of the Honduran Civil Code, land submerged or uncovered by a watercourse from time to time during periods of ebb and flow in water level does not accrue to adjoining land.
>
> It is therefore obvious that the mathematical line obtained and which continues to be obtained in the form to which reference is made, shall be used for illustrative purposes and as a possible reference point; however, that line is not the accurate measurement of the border line, which is and always shall be the right bank of the river as it may stand at any point in time."

The commissioner's argument, seen in the light of his mandate, as mentioned earlier, is born of a misconception which must be corrected.

While it is strictly speaking accurate that "the right bank of the river as it may stand at any point in time" shall always be the border line, the commissioner is obviously mistaken in believing that the legal location of the line defining the bank of a river will change in accordance with the river's water level.

Indeed, the word "bank" is often used loosely to refer to the first piece of dry land that emerges from the water; however the inappropriateness of such language becomes apparent if one considers instances where rivers overflow their banks for many miles or where their beds dry out completely. Such loose language cannot be entertained in interpreting a treaty on the demarcation of a border line. Borders are intended to maintain peace, thus avoiding disputes over jurisdiction. In order to achieve that goal, the border should be as stable as possible.

Obviously, such a state of affairs would be unacceptable to residents and property owners close to the borders of the two countries, if the line that determines the country to which they owe allegiance and must pay taxes, and whose laws govern all their affairs, was there one minute and not there the next, because such a border line would just generate conflicts instead of

preventing them. The difficulties that would arise, for example, if certain lands and forests and their owners and residents or people employed in any capacity thereon, were required to be Costa Ricans in the dry season and Nicaraguans in the rainy season and alternatively of either nationality during the intermediate seasons are self evident. But such difficulties would definitely be inevitable if the border line between the two countries were subject to daily changes on the bank where land first rose above the water on the Costa Rican side, because in the rainy season, the river's waters submerge many miles of land in some localities.

It is for such reasons that writers on international law specifically maintain that temporary flooding does not give title to the submerged land. This is the real meaning of the language of the Honduran Code quoted by the Commissioner from Nicaragua. Transposed to the case at hand, it would read as follows: "Costa Rican land that Nicaraguan waters submerge or uncover from time to time, during periods of rise or fall in water level, does not accrue to adjoining (Nicaraguan) territory". As proof of that rule, I would like to cite examples of a host of cases in the United States of America where there are many ongoing law suits between states that have a river bank, and not the thread of a river channel, as one of their borders. I am personally familiar with one such case, where the left bank of the Savannah river is the boundary line between Georgia on the right bank and South Carolina on the left bank. During flooding, the river submerges miles of South Carolina territory, but this does not extend the power or jurisdiction of Georgia beyond the limits it had before with the water at ordinary stage. Thus, no advantage would be given to Georgia and it would be a great inconvenience to South Carolina. Nor do I believe that there is any example of such a mobile boundary in the world.

Clearly, therefore, wherever a treaty rules that the bank of a river shall be taken as a boundary, what is understood is not the temporary bank of land that emerges during exceptional high- or low-water stages, but the bank with the water at ordinary stage. And once defined by treaty, it will become permanent like the surface of the soil over which it flows. If the bank recedes the boundary line shrinks, if the bank expands towards the river, it moves forward.

The periodic rise and fall of the water level does not affect it. This is perfectly consistent with Carlos Calvo's rule quoted by the commissioner for Nicaragua that borders delimited by waterways are likely to change when changes occur in the beds of such waterways. In other words, it is the river bed that affects changes and not the water within, over or below its banks.

It would be useless to try to discuss all possible future changes in the bed or banks of the river and their impact just as it would be equally pointless to try to envisage future scenarios.

It is not this Commission's job to lay down rules for future contingencies but rather to define and mark out today's boundary line.

Let me sum up briefly and provide a clearer understanding of the entire question in accordance with the principles set out in my first award, to wit, that in the practical interpretation of the 1858 Treaty, the San Juan river must be considered a navigable river. I therefore rule that the exact dividing line between the jurisdictions of the two countries is the right bank of the river, with the water at ordinary stage and navigable by ships and general-purpose boats. At that stage, every portion of the waters of the river is under Nicaraguan jurisdiction. Every portion of land on the right bank is under Costa Rican jurisdiction. The measurement and delimitation work now being performed by the parties in the field every day defines points along this line at convenient intervals, but the border line between those points does not run in a straight line; as noted above, it runs along the banks of the river at the navigable stage in a curve with innumerable irregularities of little value which would require considerable expenditure to minutely demarcate.

Fluctuations in the water level will not alter the 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.

FOURTH AWARD OF THE ENGINEER-UMPIRE, UNDER THE CONVENTION BETWEEN COSTA RICA AND NICARAGUA OF 8 APRIL 1896 FOR THE DEMARCATION OF THE BOUNDARY BETWEEN THE TWO REPUBLICS, DECISION OF 26 JULY 1899[*]

QUATRIÈME SENTENCE ARBITRALE RENDUE PAR LE SURARBITRE INGÉNIEUR, EN VERTU DE LA CONVENTION ENTRE LE COSTA RICA ET LE NICARAGUA DU 8 AVRIL 1896 POUR LA DÉMARCATION DE LA FRONTIÈRE ENTRE LES DEUX RÉPUBLIQUES, DÉCISION DU 26 JUILLET 1899[**]

Interpretation of treaty – words must be taken in their first and simplest meanings, in their natural and obvious sense, according to their general use.

Lake boundary – bank of a lake – limit of water by dry land comprising some elements of permanency – natural, obvious and reasonable waterline preferable to technical one – water level for determining water boundary in the absence of an explicit level; general custom treats mean high water as the normal level and the assumed lake boundary, wherever wet and dry seasons prevail, in all ordinary topographical maps – exceptional situation of waterline used as starting point for boundary line rather than as boundary line – choice of the line of mean high water.

Interprétation des traités – les termes doivent être pris dans leur sens premier le plus simple, naturel et évident, conformément à leur emploi courant.

Frontière lacustre – rives d'un lac – limite de l'eau par un terrain sec comprenant des éléments de permanence – ligne de niveau d'eau naturelle, évidente et raisonnable, préférable à une ligne technique – ligne de niveau d'eau déterminant la frontière lacustre en l'absence de niveau explicite; pour les régions d'alternance de saisons sèches et humides, pratique générale de se référer dans les cartes topographiques ordinaires, à la ligne moyenne du niveau d'eau haut comme niveau normal et ligne de délimitation du lac – situation exceptionnelle où la ligne d'eau sert de point de départ de la ligne frontière au lieu d'être elle-même la ligne frontière – choix de la ligne moyenne du niveau d'eau haut.

* * * * *

Fourth Award made to Greytown, July 26, 1899, in the question of the limit between Costa Rica and Nicaragua.

As the arbitrator of whatever points of difference may arise between your two bodies in tracing and marking the boundary lines between the Republics you represent, I am called upon to decide the following question:

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[*] Reprinted from H. La Fontaine, *Pasicrisie Internationale: Histoire Documentaire des Arbitrages Internationaux (1794-1900)*, Imprimerie Stampelli & CIE, Berne 1902, pp.-535-537. (Only one of the maps mentioned in this award is reprinted)

[**] Reproduit de H. La Fontaine, *Pasicrisie Internationale: Histoire Documentaire des Arbitrages Internationaux (1794-1900)*, Imprimerie Stampelli & CIE, Berne 1902, pp. 535-537.

What level of its waters shall be taken to determine the shore line of Lake Nicaragua, parallel to which and 2 miles distant therefrom the boundary line must be traced, from near the San Juan River to the Sapoa?

It will facilitate discussion to define in advance the principal levels which must be frequently referred to. Under the influence of rainy seasons of about seven months and dry seasons of about five the level of Lake Nicaragua is in constant fluctuation. We shall have to discuss five different stages.

First. Extreme high water, the level reached only in years of maximum rainfall or some extraordinary conditions.

Second. Mean high water, the average high level of average years.

Third. Mean low water, the average low level of average years.

Fourth. Extreme low water, the lowest level reached in years of minimum rainfall or other extraordinary conditions.

Fifth. Mean water, the average between mean high water and mean low water.

The argument presented to me in behalf of Nicaragua claims that the level to be adopted in this case should be the first level named, to wit extreme high water. It argues that this line and this alone, is the true limit of what the argument calls the bed of the lake. Costa Rica claims the adoption of the third level, to wit, mean low water. This is argued principally upon two grounds: First, it is shown by a great number of legal decisions that in most States all water boundaries are invariably held to run at either extreme or mean low water. Second, it is claimed that in case of any doubt Costa Rica is entitled to its benefit, as she is conceding territory geographically hers.

I will begin with Costa Rica's first argument. The equity of adopting a low water line in the case of all water boundaries is readily admitted, even though instances of contrary practice exist.

Between all permanent lands and permanent waters usually runs a strip of land, sometimes dry and sometimes submerged. We may call it, for short, semisubmerged. Its value for ordinary purposes is much diminished by its liability to overflow, but, as an adjunct to the permanent land, it possesses often very great value. If the owner of the permanent land can fence across the semisubmerged he may save fencing his entire water front. He also can utilize whatever agricultural value may be in the semisubmerged land in dry seasons. Both of these values would be destroyed and wasted if the ownership were conferred upon the owner of the water. Therefore equity always and law generally, confers it upon the owner of the permanent land.

I recognized and followed this principle in my award No. 3, where I held that the boundary line following the right bank of the San Juan River, below Castillo, follows the lowest water mark of a navigable stage of river. And, if now the lake shore were itself to be the boundary of Costa Rica, I would not

hesitate to declare that the semisubmerged land went with the permanent land and carried her limits at least to the mean low water line.

But this case is not one of a water boundary, nor is it at all similar, or on all fours with one, for none of the equities above set forth have any application. It is a case of rare and singular occurrence and without precedent within my knowledge. A water line is in question, but not as a boundary. It is only to furnish starting points whence to mesure off a certain strip of territory. Clearly the case stands alone, and must be governed strictly by the instrument under which it has arisen. That is the treaty of 1858, and its language is as follows:

> "Thence the line shall continue toward the river Sapoa, which discharges into the Lake Nicaragua, following a course which is distant always 2 miles from the right bank of the river San Juan, with its sinuosities, up to its origin at the lake, and from the right bank of the Lake itself up to the said river Sapoa, where this line parallel to the said bank will terminate."

The principles, upon which the language and intent of treaties are to be interpreted, are well set forth in the Costa Rica argument by many quotations from eminent authors. All concur that words are to be taken as far as possible in their first and simplest meanings — "in their natural and obvious sense, according to the general use of the same words", "in the usual sense, and not in any extraordinary or unused acceptation".

We must suppose that the language of the treaty above quoted suggested to its framers some very definite picture of the lake with its banks and of the 2 miles strip of territory. It evidently seemed to them all so simple and obvious that no further words were necessary. Let us first call up pictures of the lake at different levels and see which seems the most natural, obvious and reasonable.

The very effort to call up a picture of the lake at either extreme high water or at extreme low water seems to me immediately to rule both of these levels out of further consideration. Both seem unnatural conditions, and I must believe that had either been intended, additional details would have been given.

Next, is the mean low water mark the first, most obvious and natural picture called up by the expression "the bank of the lake"? It seems to me decidedly not. During about eleven months of the year this line is submerged, invisible and inaccessible. It seems rather a technical line than a natural one. The idea of a bank is of water limited by dry land with some elements of permanency about it. Even during the brief period when the line is uncovered the idea of it is suggestive far more of mud and aquatic growths than of dry land and forest growths.

To my mind, the natural, simple and obvious idea of the bank of a lake in this climate is presented only by the line of mean high water. Here we would first find permanent dry ground every day of an average year. Here an observer, during every annual round of ordinary seasons, would see the water

advance to his very feet and then recede, as if some power had drawn the line and said to the waters, "Hitherto shalt thou come, but no further". Here the struggle between forest growths and aquatic vegetation begins to change the landscape. Here lines of drift, the flotsam and jetsam of the waves, naturally suggest the limits of the "bed of the lake".

One level of the lake remains for discussion, the mean level, or average of all waters. In a different climate, where the rainfall is more uniformly distributed throughout the year, the mean high water and mean low water lines, with all their respective features, would approach each other, tending to finally merge in the line of mean water. But, where wet and dry seasons prevail, as in the present case, the line of mean water is destitute of all obvious features, and is submerged for many months of the year. It is purely a technical and not a natural line, and is not to be understood where not expressly called for.

In argument against Nicaragua's claim of the extreme high water line, Costa Rica appeals to the general custom of geographers and scientific men in making ordinary topographical maps, who never adopt the extreme lines of overflows for the outlines of lakes. This argument of general custom has great weight but it is equally against Costa Rica's claim for the mean low water line. Wherever wet and dry seasons prevail, general custom treats mean high water as the normal state, always to be understood where no other level is expressed, and the line is assumed as the lake boundary in all ordinary topographical maps. Two quotations from Commander Lull's report of his Nicaraguan Canal survey will illustrate "Report Secretary of the Navy, 1873, p. 187":

> "In a survey made by Mr. John Baily, many years since, that gentleman professed to have found a pass with but 56 feet above the lake level, but the most of his statements are found to be entirely unreliable... For example, he finds Lake Nicaragua to be 121 feet above mean tide in the Pacific, while the true difference of level is but 107 feet." (Ibid., p. 199.)
>
> "The surface of Lake Nicaragua is 107 feet above mean tide in either sea."

From comparison of this level with the levels found by other surveys, there is no question that this figure was Lull's estimate of mean high water, as shown by his line of levels.

From every consideration of the lake, therefore, I am driven to conclude that the shore line of the lake contemplated in the treaty is the mean high water line.

I am led to the same conclusion also from the standpoint of the 2 miles strip of territory.

The treaty gives no intimation as to the purpose of this concession, and we have no right to assume one, either political or commercial. We have only to observe the two conditions put upon the strip in the treaty. Under all ordinary conditions it must be land, and 2 miles wide. This would not be the case if we adopted the line of either mean low water or mean water. In the

former case the strip would be too narrow for about eleven months of an ordinary year: in the latter case for about five months.

Without doubt, then, I conclude that mean high water mark determines the shore of the lake and it now remains to designate that level and how it shall be found.

Several surveys of the proposed Nicaraguan Canal route besides that of Commander Lull above quoted, have been made within the last fifty years. Each found a certain mean high level of the lake, and it might seem a simple solution to take an average of them all, but, as each adopted its own bench mark on the ocean and ran its own line of levels to the lake, I have no means of bringing their figures to a common standard. It seems best, therefore, to adopt the figures of that one which is at once the latest and most thorough, which has enjoyed the benefit of all of the investigations of all of its predecessors, and whose bench marks on the lake are known and can be referred to. That is the survey, still in progress, under the direction of the United States Canal Commission. Its results have not yet been made public, but, by the courtesy of Rear Admiral J. G. Walker, President of the Commission, I am informed of them in a letter dated July 10, 1899, from which I quote:

> "In reply I am cabling you to-day as follows: 'Alexander, Greytown, six,' the six meaning, as per your letter, 106 as mean high level of lake. This elevation of 106 is, to the best of our knowledge (Mr. Davis, our hydrographer) the mean high water for a number of years... The highest level of the lake in 1898 was 106.7, last of November. The elevation of our bench mark on inshore end of boiler at San Carlos is 109.37."

A complete copy of this letter will be handed you and also blue prints of the maps made by the Commission of the lower end of the lake, which may facilitate your work.

As this Commission is the highest existing authority, I adopt its finding and announce my award as follows:

The shore line of Lake Nicaragua, at the level of 106 feet, by the bench marks of the United States Nicaragua Canal Commission, shall be taken as the bank of said lake referred to in the treaty of 1858[1].

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[1] *Monthly Bulletin of the Bureau of the American Republics*, 1899, vol. VII, p. 877.