



3 1761 06839978 1

JX
428
C6
S2
1916



BEFORE THE
CENTRAL AMERICAN
COURT OF JUSTICE

DECISION AND OPINION OF THE COURT
ON THE COMPLAINT OF

THE REPUBLIC OF COSTA RICA
AGAINST
THE REPUBLIC OF NICARAGUA

GROWING OUT OF A CONVENTION ENTERED INTO BY THE
REPUBLIC OF NICARAGUA WITH THE UNITED STATES OF
AMERICA FOR THE SALE OF THE SAN JUAN RIVER AND
OTHER MATTERS.

(SEPTEMBER 30, 1916)

Translation Published by the Costa Rican Legation

WASHINGTON
PRESS OF GIBSON BROS., INC.

1916

8

16



JX
428
CuS₂
1914

Central American Court of Justice*

San José de Costa Rica, on the thirtieth day of September, nineteen hundred and sixteen, at seven o'clock, p. m.

In the action commenced and maintained by the Government of the Republic of Costa Rica against the Government of the Republic of Nicaragua, arising out of the conclusion of a treaty between the latter and the Government of the United States of North America, relating to the construction of an interoceanic canal, the Court, having considered the proceedings had herein, hereby renders its decision thereof.

PRELIMINARY CHAPTER.

It appears:

That on the 24th of March of the current year the Licentiate don Luís Castro Ureña, appearing in the name, and as the representative, of the Government of Costa Rica, in accordance with powers to that end duly exhibited, brought before this Court a complaint against the Government of Nicaragua wherein was set forth the arguments of fact and law in support of his claims, together with the evidence he considered pertinent to the action.

*Translated by Harry W. Van Dyke, of the Washington, D. C. Bar, from the official text of the decision contained in *La Gaceta*, (the official gazette of the Costa Rican Government) Year xxxviii, No. 83, October 7, 1916.

SECTION I.

The Court being without a full bench because of the absence therefrom of the member from Nicaragua, and being thereby disqualified to pass upon the first step in the proceedings invoked by the complaint, the Permanent Committee proceeded to prescribe the measures necessary for the immediate completion of the Court and to that end dispatched an urgent telegram to the absent member requesting him to forego the enjoyment of the balance of his vacation in view of the fact that the Government of Costa Rica had presented a complaint against the Government of his country. Anticipating, however, that the Judge might not be able to return immediately to his place on the bench, the Permanent Committee also addressed itself to His Excellency the Minister of Foreign Relations of Nicaragua calling his attention to the situation and asking him to make the necessary dispositions for the completion of the Court by sending the substitute Justice.

It appears:

That the absent Justice, in reply to these urgent appeals, stated that he would make an effort to return to Costa Rica on the next steamer, and that, should this be impossible, he would immediately so notify the Minister of Foreign Relations of his country. That high functionary, on his part, in a telegraphic dispatch of April 1, stated that he had been advised of the complaint brought before the Court and that the telegraphic communication addressed to him by the Secretary of the Permanent Committee was answered by the reply he had given to His Excellency the Costa Rican Secretary of Foreign Relations when the latter, in his turn, had notified him of the presentation of the complaint and of the

reasons that prompted the Costa Rican Government to bring that action.

In the reply alluded to, the Nicaraguan Chancellor stated, among other things, that his Government, in entering into the treaty with the United States, had confined itself exclusively to the territorial limits of Nicaragua that belonged to her as an independent State, seeking only to promote her welfare and progress and respecting in all ways the integrity and legitimate rights of the other Central American Republics;

That Nicaragua had been at all times perfectly qualified to enter into contracts of the character of the Chamorro-Bryan treaty, and that she was by no means disposed to consent to a discussion of private rights pertaining to the inherent sovereignty of the State;

That with respect to Costa Rica all questions that had been rife with Nicaragua at other periods relating to the frontier and to participation in the interoceanic canal had been decided once and forever by the award of President Cleveland;

That Nicaragua had strictly complied with that award, as she stood ready to do when the time should come for granting concessions for the construction of the interoceanic canal; but that, with respect to the rights which that award insured to Nicaragua as sole sovereign over the territory in which said canal was to be constructed, and as absolute owner of the benefits that she might derive in compensation for the favors and privileges to be conceded by her Government, she would not permit them to be made the subject of judicial determination, since the award, by its very nature, is not subject to revision or interpretation by any arbitral tribunal;

That the Central American Court of Justice was not competent to admit such a complaint as the one brought

before it by the Government of Costa Rica, because, according to Article I of the Convention of Washington creating that Court, it could only be clothed with the character of an arbitral tribunal having jurisdiction over controversies or questions arising between the signatory parties when their respective chancelleries are unable to reach a settlement, and when, in conformity with the article cited, resort to that Court alone remains, in cases in which any settlement between the parties has become impossible after the failure of the requisite courses of diplomacy;

That the Costa Rican Secretary of Foreign Relations has at no time expressed to the Nicaraguan Foreign Office, either directly or indirectly, a single thought that would reveal his Government's opposition to the conclusion of the Bryan-Chamorro treaty;

That for these reasons the Government of Nicaragua considers the complaint presented to be futile and outside the competency of the Central American Court of Justice, and, in the full security of its rights, believes it can count on complete concurrence in this viewpoint by the Court and on the refusal of that tribunal to entertain the proceeding; and—

That, since consideration of the action by the Central American Court of Justice would be without effect and a violation of the Convention of Washington of 1907, the Government of Nicaragua trusts that the Court will adhere to the clear, explicit, and positive letter of that pact and withhold its consideration of the case.

SECTION II.

In its telegram dated the 26th of April of the present year, the Nicaraguan Chancellery transmitted to this Court a copy of its reply to another dispatch from the

Costa Rican Chancellery. In that reply it confirmed and amplified the arguments contained in the document referred to in the preceding paragraphs, and added that Costa Rica prays the Central American Court of Justice to declare the legal incapacity of Nicaragua to enter into conventions of the nature of that which was signed on the 5th of August, 1914, between the latter Republic and the United States of America;

That on this point the Government of Nicaragua hastens to declare again that Nicaragua not only has always been, and will always be, possessed of full legal capacity to enter into and fulfill conventions of this character, but holds as offensive to her dignity as a free and independent nation any discussion of acts pertaining to her sovereignty—acts which in no case could become the subject of arbitrament;

That, with respect to the Cleveland award, as to the interpretation of which Costa Rica believes differences exist that should be taken into account by the Central American Court in order to determine which of the two Governments is right, the Nicaraguan Chancellery asserts that that award, having once and forever resolved the differences that formerly existed between the two countries in relation to frontiers and to participation in the interoceanic canal, precludes absolutely and by its very nature the claim that it is subject to interpretation by any tribunal whatsoever, for if arbitral awards could be the subject of revision at the will of either of the parties, a decision of that kind could never be definitive in character and conflicts between nations would never end;

That the power possessed in certain cases by the Central American Court of Justice to act as an arbitral tribunal is confined expressly to those questions which may arise between States from and after the date on

which the organic convention went into force among the contracting parties, but that under no conception could that power, even by violating the letter and spirit of the compact, extend to matters decided prior to the conclusion of that organic convention;

That, on the other hand, there has been no disagreement between the two Governments respecting the manner of interpreting the award of President Cleveland; and that, supposing the Costa Rican Government should come to have doubts as to the validity and scope of that arbitral decision, this Court would not, in any case, be the forum charged with its interpretation, nor would those doubts affect the Chamorro-Bryan treaty, which is wholly foreign to the matter;

And, finally, that for these reasons the complaint is wholly unreasonable and groundless, and that, in view of the foregoing, and of the points set forth in the telegram of April 1, the Central American Court of Justice should reject the complaint presented by the Government of Costa Rica; otherwise, it would flagrantly violate the convention that gave it life and its action in the case would be an absolute nullity.

SECTION III.

Upon the return of the Justice from Nicaragua, the Court regained its legal quorum on the 24th of April, and at its session of the 1st of May, following, took under consideration the complaint presented, which complaint contains the following elements set forth in two parts in Chapters I and II of this decision.

FIRST PART.**CHAPTER I.****Arguments of Fact.**

It appears:

That the representative of the High Party Complainant has set forth in his complaint the following arguments of fact:

SECTION I.

That in the beginning of April, 1913, his Government learned, through private sources, that the Legislative Assembly of Nicaragua had just given its approval, in secret session, to a treaty (also covered by secrecy) that had been concluded between the Government of the Republic of Nicaragua and the Government of the United States of America, among other things, for the opening of an interoceanic canal through Nicaraguan territory. That this news, the first it had received on the subject, moved the Costa Rican Government to instruct its Minister in Nicaragua to present to the Government of that Republic a formal diplomatic protest against the execution of the canal pact referred to, on the ground that the Government of Costa Rica conceived, and would continue to conceive, such an act to constitute a flagrant violation of existing treaties between the two countries and of the Cleveland award.

SECTION II.

That at the same time that that diplomatic protest was being made, the Costa Rican Plenipotentiary at Washington, following instructions from his Government, brought before the Government of the United States

of America a similar diplomatic protest against the conclusion, on the part of Nicaragua, of the canal convention above mentioned, setting forth, as was done in the protest before the Nicaraguan Government, the conviction that the pact could only, at best, be held to be a nullity if account were taken of Nicaragua's legal incapacity to negotiate in the premises because of her failure previously to consult the opinion of Costa Rica regarding those negotiations and even to ask her acquiescence in the matter.

SECTION III.

That His Excellency the Nicaraguan Minister of Foreign Relations, in his note of June 12, 1913, replied to the protest of the Costa Rican Minister, informing him that "the Government of Nicaragua exercised a right of incontestable sovereignty when it entered into the convention of February 8, 1913, with the United States, which convention has been kept secret for reasons of an international character that affect not it alone; but declares in the most positive manner that, in entering into that pact, it has not ignored any right that belongs to Costa Rica; nor has it committed any violation of the treaties existing between the two nations"; that "that convention * * * tends towards procuring, as far as possible, the construction of an interoceanic canal through a route exclusively Nicaraguan"; that the convention "merely deals with a preferential right, granted to the United States, to open an interoceanic passageway through a route to be designated out of national territory when it shall be decided, by agreement between the two Governments, to undertake the construction thereof, at which time the conditions under which the canal shall be constructed, operated, and maintained will be deter-

mined by a further treaty or convention between the contracting parties"; that "therefore, dealing with a simple option for a canal concession, Nicaragua, as sole sovereign over the territory that will be the site of the great undertaking, is wholly within her incontestable rights in entering singly and alone into that engagement"; and that "in view of the foregoing, * * * the ideas expressed in the note to which this is an answer are in every regard unreasonable, for, as has been shown by an abundance of reasons and arguments, when the convention in question was entered into there was on the part of Nicaragua no violation of existing treaties nor discourtesy to Costa Rica, nor any disregard or forgetfulness of her legitimate rights."

SECTION IV.

That *La Republica*, an independent newspaper of this city, in its issue No. 8810 of July 4, 1913, published the text of the treaty which, according to that paper, had been signed by the Governments of Nicaragua and the United States of America, relating to the opening of the canal just referred to; and that, although the Government of Costa Rica did not attribute authenticity to the publication, it desires to make known the fact that Nicaragua, who was aware of the publication, did not disavow it either through the press or otherwise; and that *La Republica* was a journal violently opposed to the Government of Costa Rica.

That the Minister of Costa Rica in Nicaragua, in obedience to the instructions of his Government, placed in the hands of the Nicaraguan Government a copy of the issue of the newspaper referred to, together with a note in which he requested to be informed "categorically whether the text of said convention as therein published is authen-

tic, as well generally as in each of its paragraphs, and, if not, that you make the appropriate corrections."

That His Excellency the Nicaraguan Secretary of Foreign Relations, in his note of August 4, 1913, replied to the communication of the Costa Rican Minister, informing him, "in confirmation of the statements contained in my note of the 12th of last June, that for considerations of an international character that involve not alone my own Government, the latter is keeping secret the convention entered into with the United States on the 8th of last February; and that, since it relates to a pact not yet perfected, it is not proper for the Government of Nicaragua, on its part, for the reasons contained in its said note, to make any official declaration regarding any of the steps in such negotiations."

SECTION V.

That later, through the medium of the North American press, and not officially, his Government learned that the Senate of that country was considering a treaty which the Costa Rican Government assumed was the same that had been reproduced in the newspaper *La Republica*, to which reference has already been made, and the same alluded to by His Excellency the Nicaraguan Secretary of Foreign Relations, in his notes of June 12 and August 4, 1913, as having been signed by the Governments of Nicaragua and the United States of America, relating to the opening of a canal through Nicaraguan territory, and to other matters then unimportant to his Government; and his Government also learned of certain steps undertaken by private individuals, interested in behalf of Costa Rica, before different Senators, to the end that when the treaty should be debated in the Senate and the treaty ratified, the rights of that country in relation to the construction

of any interoceanic canal should not only not be lost sight of but should be respected and guaranteed.

SECTION VI.

That, unofficially, towards the middle of August, 1914, the Government of Costa Rica was assured that the treaty for a canal across Nicaragua had been in fact tacitly withdrawn from consideration by the Senate of the United States of America, but that that body had before it at the time another pact similar in groundwork at least (if not identical) as to a canal across Nicaragua and negotiated by the same high contracting parties that had concluded the first, that is, the one bearing date of February 8, 1913; but that the Government of Costa Rica received no official notice of the new pact, nor advices respecting the signature and contents of the other agreement; nor was it informed respecting the then status of the negotiations in progress, because these were consummated in the strictest secrecy, as well on the part of the United States of North America as on the part of Nicaragua.

SECTION VII.

That for these reasons the Government of Costa Rica was unable to formulate exact objections against the treaty of February 8, 1913, relating to an interoceanic canal across Nicaraguan territory; nor could it attack, except in the most general way, *any analogous compact* entered into later by the same parties, for, against the solemn and explicit promises of Nicaragua, her first care on that occasion was to conceal at all hazards from Costa Rica her negotiations relating to the canal.

SECTION VIII.

That the balance of the year 1914 and all of 1915 passed without action by the North American Senate in the matter of the Nicaraguan canal, or at least, the

Government of Costa Rica never heard anything to the contrary; and that while Costa Rica's mind was at rest on the subject, *The Evening Star* of February 2, of the present year, announced that the Committee on Foreign Relations of the North American Senate had recommended to that body the ratification of the treaty that had been concluded more than a year before by the Government of the United States with the Government of Nicaragua, among other objects, for the construction of an inter-oceanic canal through Nicaraguan territory.

SECTION IX.

That on reading the advices published in the *Washington Star*, the Costa Rican Legation at Washington hastened to dispatch to the State Department of North America a carefully thought out note in which the Government of the latter country was appealed to to prevent the ratification by the Senate of the pact in question, on the ground that it was openly opposed to existing treaties between Costa Rica and Nicaragua, to the Cleveland award, and to the harmonious sentiments that animated His Excellency the Chief Executive of the United States towards all the peoples of the Americas according to the then recent public and official declarations that had been made by him before over a thousand delegates from different nations that make up the American continent; and that with the same object in view the attorney for the Costa Rican Legation at Washington, Harry W. Van Dyke, Esquire, published a memorandum addressed to the American Senate; but that effort failed as did the efforts of Costa Rica's Diplomatic Representative at Washington, for the *Congressional Record* of the 18th of February of that year recorded the news that the United States Senate, in executive session of the same day, had

ratified a convention between the said Republic and that of Nicaragua, which had been subscribed at Washington on the 5th of August, 1914, and which, with additions adopted by that body, as translated into Spanish by the personal attorney of Costa Rica (because it has been impossible for that Government to secure a copy of the original Spanish text), reads as follows:

“The Government of the United States of America and the Government of Nicaragua being animated by the desire to strengthen their ancient and cordial friendship by the most sincere cooperation for all purposes of their mutual advantage and interest and to provide for the possible future construction of an interoceanic ship canal by way of the San Juan River and the great Lake of Nicaragua, or by any route over Nicaraguan territory, whenever the construction of such canal shall be deemed by the Government of the United States conducive to the interests of both countries, and the Government of Nicaragua wishing to facilitate in every way possible the successful maintenance and operation of the Panama Canal, the two Governments have resolved to conclude a convention to these ends, and have accordingly appointed as their plenipotentiaries:

“The President of the United States, the Hon. William Jennings Bryan, Secretary of State; and

“The President of Nicaragua, Señor General Don Emiliano Chamorro, Envoy Extraordinary and Minister Plenipotentiary of Nicaragua to the United States:

“Who, having exhibited to each other their respective full powers, found to be in good and due form, have agreed upon and concluded the following articles:

“ARTICLE I. The Government of Nicaragua grants in perpetuity to the Government of the United States, forever free from all taxation or other public charge, the exclusive proprietary rights necessary and convenient for the construction, operation, and maintenance of an interoceanic canal by way of the San

Juan River and the great Lake of Nicaragua or by way of any route over Nicaraguan territory, the details of the terms upon which such canal shall be constructed, operated, and maintained to be agreed to by the two Governments whenever the Government of the United States shall notify the Government of Nicaragua of its desire or intention to construct such canal.

“ART. II. To enable the Government of the United States to protect the Panama Canal and the proprietary rights granted to the Government of the United States by the foregoing article, and also to enable the Government of the United States to take any measure necessary to the ends contemplated herein, the Government of Nicaragua hereby leases for a term of 99 years to the Government of the United States, the islands in the Caribbean Sea known as Great Corn Island and Little Corn Island; and the Government of Nicaragua further grants to the Government of the United States for a like period of 99 years the right to establish, operate, and maintain a naval base at such place on the territory of Nicaragua bordering upon the Gulf of Fonseca as the Government of the United States may select. The Government of the United States shall have the option of renewing for a further term of 99 years the above leases and grants upon the expiration of their respective terms, it being expressly agreed that the territory hereby leased and the naval base which may be maintained under the grant aforesaid shall be subject exclusively to the laws and sovereign authority of the United States during the terms of such lease and grant and of any renewal or renewals thereof.

“ART. III. In consideration of the foregoing stipulation and for the purposes contemplated by this convention and for the purpose of reducing the present indebtedness of Nicaragua, the Government of the United States shall, upon the date of the exchange of ratification of this convention, pay for the benefit of the Republic of Nicaragua the sum of \$3,000,000

United States gold coin, of the present weight and fineness, to be deposited to the order of the Government of Nicaragua in such bank or banks or with such banking corporation as the Government of the United States may determine, to be applied by Nicaragua upon its indebtedness or other public purposes for the advancement of the welfare of Nicaragua in a manner to be determined by the two high contracting parties, all such disbursements to be made by orders drawn by the minister of finance of the Republic of Nicaragua and approved by the Secretary of State of the United States or by such person as he may designate.

“ART. IV. This convention shall be ratified by the high contracting parties in accordance with their respective laws, and the ratifications thereof shall be exchanged at Washington as soon as possible.

“In witness whereof the respective plenipotentiaries have signed the present treaty and have affixed thereunto their seals.

“Done at Washington, in duplicate, in the English and Spanish languages, on the 5th day of August, in the year 1914.

“WILLIAM JENNINGS BRYAN. [SEAL.]

“EMILIANO CHAMORRO.” [SEAL.]

SECTION X.

That as soon as the ratification of the Bryan-Chamorro treaty by the United States Senate appeared in the *Congressional Record*, the Costa Rican Legation at Washington gave careful study to the document, and, having become convinced that its contents were notoriously contradictory of the unquestionable rights of Costa Rica established in the Cañas-Jerez treaty, the Cleveland award and the Central American Treaty of Washington, hastened to lay before the North American Foreign Office, under date of the 21st of February, of the present

year, a protest, respectful but vigorous, against the action of the Senate—the only step which, at the moment, could have been taken by a country possessed of no forces or defense but the law.

That even up to this time, although the matter is no longer a secret of state, Nicaragua has not deigned to make any communication to Costa Rica concerning the great problem. Meanwhile His Excellency, the United States Minister Plenipotentiary in Costa Rica, did have the goodness, under instructions from his Government, to send to the Costa Rican Secretary of Foreign Relations a courteous note, in which, supposing evidently that Costa Rica was fully informed concerning all that had taken place, he advised him that the United States Senate, on the 18th of that month, had, by a vote of 55 to 18, consented to the ratification of the Nicaraguan Canal treaty, and had made two amendments, copy of which he enclosed, together with copy of a resolution of the Senate that reads as follows:

“Provided, That whereas Costa Rica, Salvador, and Honduras have protested against the ratification of said Convention in the fear or belief that said Convention might in some respect impair existing rights of said States, therefore it is declared by the Senate that in advising and consenting to the ratification of the said Convention as amended, such advice and consent are given with the understanding to be expressed as part of the instrument of ratification that nothing in said Convention is intended to affect any existing rights of any of the said named States.”

The complaint adds that at the moment of receiving that communication from His Excellency the American Minister, the Government of Costa Rica was completely in the dark as to the language of the treaty in question.

CHAPTER II.

Legal Bases.*It appears:*

That the High Party Complainant relies for support of its action upon the following legal antecedents:

SECTION I.

The treaty of limits entered into between Costa Rica and Nicaragua on the 15th of April, 1858, and known as the Cañas-Jerez treaty, stipulates in its conducive part as follows:

“ART. 6. The Republic of Nicaragua shall have exclusive dominion and the highest sovereignty over the waters of the San Juan River from their issue out of the lake to their discharge into the Atlantic; but the Republic of Costa Rica shall have in those waters perpetual rights of free navigation from the said mouth of the river up to a point three English miles below Castillo Viejo, for purposes of Commerce, whether with Nicaragua or with the interior of Costa Rica, over the San Carlos or Sarapiquí rivers or any other course starting from the part which has been established as belonging to that republic on the banks of the San Juan. The vessels of either country may touch at any part of the banks of the river where the navigation is common without paying any dues except such as may be established by agreement between the two Governments.

* * * * *

“ART. 8. If the contracts for canalization or transit entered into before the Nicaraguan Government had knowledge of this convention should for any cause cease to be in force, Nicaragua agrees not to conclude any others relating to the objects above stated with-

out first hearing the opinion of the Costa Rican Government respecting the disadvantages that may result to the two countries, provided that opinion be given within thirty days after the request therefor shall have been received, in case that the Nicaraguan Government should indicate that a decision is urgent; and in the event that the enterprise should cause no injury to the natural rights of Costa Rica, that opinion shall be advisory."

SECTION II.

By the Esquivel-Román Convention, entered into by Costa Rica and Nicaragua on the 24th of December, 1886, both Republics submitted to the unappealable arbitral decision of His Excellency, the President of the United States of America, the question that had long been rife between the two Republics above mentioned concerning the validity of the Cañas-Jerez boundary treaty, Article VII of which first-named treaty provides as follows:

"The arbitral award, whatever it may be, shall be held by the contracting parties to be a perfect and obligatory treaty, it shall admit of no recourse whatsoever and its execution shall commence thirty days after having been notified to the two Governments or their representatives."

SECTION III.

The Cleveland award rendered on the 22nd of March, 1888, as the outgrowth of the agreement contained in the Esquivel-Román Convention, contains the following definite findings respecting the Cañas-Jerez treaty of limits and especially respecting the two articles transcribed from that pact:

"*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:

* * * * *

"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 interoceanic 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 concession 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."

SECTION IV.

That the Cañas-Jerez treaty (The Treaty of Limits) has preserved its full obligatory force and effect down to the present day, as well by virtue of the categorical holdings in the Cleveland award, which are set forth in the complaint, as by virtue of the permanent character of its stipulations. Wherefore, in the absence of mutual consent by the Contracting Parties, the treaty cannot be lawfully denounced or held to be dead, nor can the agreements therein stipulated be avoided so long as Costa Rica and Nicaragua continue as free nations, and this chiefly because the force and validity of that pact has been recognized and proclaimed absolutely and without restriction as to any fixed or determined period by the arbitral decision of one of the most honorable and most influential chiefs of state in the entire world.

That it therefore seems inexplicable to his Government that Nicaragua should have negotiated in relation to a canal through its territory unmindful of Costa Rica, and

with the very nation whose Government, as such, and by the choice of both contending parties, rendered the award which, in harmony with the Cañas-Jerez treaty, incapacitated it from proceeding in the matter without obtaining the consultative, indeed the *decisive*, opinion, of the Republic of Costa Rica.

Because it would seem to be impossible to the Government he represents that a third government should construct a navigation canal by way of the San Juan river without infringing by the operations, or indirectly as a result thereof, the contractual and natural rights of Costa Rica which had been fixed by the Cañas-Jerez treaty and confirmed by the Cleveland award.

That there can be no possible doubt about the matter, for if the United States of America, or an assignee of her rights, should adopt for the canal the San Juan river route, it is obvious that the United States and Nicaragua, not having made any express reservations whatsoever that would guarantee to Costa Rica the enjoyment of the advantages conferred upon the latter by the Cañas-Jerez treaty, that enjoyment must be subject in the future, to a greater or less extent, to the good will of the United States.

That, in a word, Nicaragua has placed under the control of the United States, or sold to her, the San Juan river, unreservedly, just as though the former were the absolute owner of that stream and of its banks, and Costa Rica, who possesses the unquestionable right to navigate freely throughout the greater part of those waters, and who is the owner of the greater part of the southern banks of that river, has not been taken into account.

SECTION V.

That Article IX of the general Treaty of Peace and Amity, concluded the 20th of December, 1907, between the five Republics that formerly constituted the Federal Republic of the Center of America, contained the following stipulation:

“The merchant ships of the signatory countries shall be considered upon the sea, along the coasts, and in the ports of said countries as national vessels, they shall enjoy the same exceptions, immunities, and concessions as the latter, and shall not pay other dues nor be subject to further taxes than those imposed upon and paid by the vessels of the country.”

It is evident, then, says the complainant, that in matters relating to navigation, any prior treaty or convention that Nicaragua may have signed, or may sign in the future, which neglects to reserve to merchant vessels of Costa Rica, Salvador, Guatemala and Honduras, plying her waters, privileges and advantages identical with those enjoyed by her own vessels, openly violates the article above quoted from the treaty of peace and amity.

That the treaty and conventions of Washington of 1907 having furthermore been conceived, debated and concluded through the friendly intervention of the Government of the United States of America, those pacts carry with them the moral guaranty of that great Republic.

CHAPTER III.

Allegations of the High Party Complainant.

It appears:

That the attorney for the High Party Complainant, analyzing the bases of fact and law on which he relies to support the action he has brought, conceives the present legal situation of Costa Rica and Nicaragua to be the following:

From the examination and comparison of the Bryan-Chamorro treaty with the Cañas-Jerez treaty and the Cleveland award, he says, it is apparent that the first is frankly repugnant to the others in the following points:

(a) *Navigation of the San Juan River.*

The Cañas-Jerez treaty, explained by the Cleveland award, concedes to Costa Rica the perpetual right to free navigation in the waters of the San Juan River from its outlet in the Atlantic up to a point within three English miles of Castillo Viejo, for the purposes of commerce, whether with Nicaragua or the interior of Costa Rica, through any of the waterways of that country that flow or may flow into the San Juan; it also gives to Costa Rican vessels the right, exempt from imposts of any class, to touch at points on the Nicaragua banks of that river along the part thereof in which navigation is common, and puts Costa Rican vessels of the revenue service on the same footing with the merchant vessels of the same country (Costa Rica) in order that they may protect its rights or for the said purposes of commerce.

That, with regard to the San Juan River, the conventional rights of Costa Rica are, in a certain aspect, less than the corresponding rights of co-ownership (*condominio*): Costa Rica, for example, cannot ply that stream

with war vessels as, of course, Nicaragua can do; but, on the other hand, those rights are greater than those of a mere co-owner (*copropietario*) because the Costa Rican vessels, as well merchantmen as revenue cutters, in the zone in which navigation is common, have a free course over the whole river, throughout its length and breadth, and free access, exempt from imposts, to any point on the Nicaraguan shore.

That, if the United States, under the authority of the Bryan-Chamorro treaty, should construct the inter-oceanic canal over the San Juan River route—the absolute ownership of which has been unreservedly ceded to her by Nicaragua—it is easy to imagine the destiny in store for Costa Rica's rights to navigation of the San Juan River.

That, this being the case, Nicaragua forgot completely, in executing the treaty, that she could not dispose unrestrictedly of the San Juan River because in and to that gift of nature Costa Rica also possesses perfectly clear rights of a practical importance perhaps equal to that of Nicaragua's rights; this all the more so since she sought to cancel them absolutely by means of a conveyance that is a nullity in every aspect, insofar as it covers the rights of a third party—Costa Rica. A sale of a thing that does not belong to the seller is null. This is an eternal axiom of law, and, it may be said, of organic justice, among all peoples who hold themselves to be civilized.

That the canal, looking at the matter from another viewpoint, would result, in fact, in causing a diminution of Costa Rican territory that today reaches in reality, in a certain sense, from the Nicaraguan bank of the San Juan River, from a point three English miles below Castillo Viejo, following the current, as far as the Atlantic

Ocean; and that, notwithstanding this, Costa Rica's opinion has not even been consulted in the matter.

(b) *Costa Rica's Assent.*

That by virtue of the Cañas-Jerez treaty and the Cleveland award, Costa Rica has a *consultative* voice which Nicaragua *must* invoke in order to enter into any agreement that purposes to carry through a project for the construction of a canal on her soil; but that, if by the undertaking the natural rights of Costa Rica should be injured, that voice ceases to be consultative and becomes converted into a *decisive* voice. That is to say, he adds, if the work should portend any injury to Costa Rica, the latter must be brought in as a *party* to the undertaking.

That, even had there been no Cañas-Jerez treaty or Cleveland award, the last-stated conclusion would stand, since it is no more than a maxim of equity; but that this time Nicaragua was entirely led astray, and that in spite of the protests of Costa Rica, and against them, she permitted herself to contract alone with the United States in a canal project, thereby unquestionably trampling upon the rights of Costa Rica, which she more than any other was under obligation to safeguard.

That Nicaragua did not even invoke Costa Rica's consultative voice, which was mandatory in this emergency, and that the canal convention, which was guarded so carefully and for so long a time kept secret by the United States and Nicaragua, being now known in all its details, Costa Rica cannot remain quiet and speechless, because that pact, from the moment in which it virtually attacks her rights of navigation of the San Juan River and the integrity of her national territory in that direction, cannot pass unnoticed by Costa Rica, who, armed

with her right, maintains that that convention cannot be a law to any party without her acquiescence in such clauses as gravely menace her interests.

(c) *Navigation of Nicaragua's Maritime Waters.*

That the Central American Treaty of Washington provides that the merchant vessels of any of the signatory nations shall have equal rights with the national vessels of each of the other contracting parties when in another's seas, coasts, or ports.

That Nicaragua thus limited, in favor of her sisters of the former Federation of the Center of America—as they in their turn did for her benefit—her enjoyment of her maritime waters, coasts, and ports, for the period of ten years, which period has not yet elapsed and which is prorogueable indefinitely from year to year.

That in consequence Nicaragua had not the power to give to the United States for a term of years a valid conveyance of any part of her littoral and waters in the Gulf of Fonseca and of her Corn Islands in the Caribbean Sea, without the obligation stipulated in Article IX of the Treaty of Washington; nor could she kill the said treaty in fact without the concurrence of the will of the other contracting parties.

That an impediment of equal force exists to the sale of the territory that may be occupied or needed by the interoceanic canal whilst that section covers parts of Nicaraguan land or water affected by the Central American Treaty of Washington, since *no one can transfer more rights than he has nor those that he does not possess.*

That by Article IV of the Cañas-Jerez treaty, Salinas Bay on the Pacific Ocean, and the Bay of San Juan del Norte in the Atlantic, are common to Costa Rica and Nicaragua; and that, in consequence, if the United States

should elect the two bays mentioned as the heads or entrances of her canal, the rights of Costa Rica in those bays would vanish down the horizon of history unless right and justice should retain their sway over the conscience of the North American people.

That from the foregoing it is indisputable that in all that relates to a canal across her territory, and, in general, in what concerns the navigation of her waters, Nicaragua's sovereignty is limited by the treaties and conventions cited, which pacts necessarily modify her personality and restrict it within the limits prescribed by her solemn agreements.

That the complainant refrains from specially invoking any principles of international law because of the fact that, Costa Rica's rights being based upon perfect contracts signed with and by Nicaragua, it is to those instruments alone that she must have recourse for the solution of the difference that has arisen, for the contract is the supreme law between the parties whether they be simple individuals or collective political entities. That the case now before the Court is one of pure civil law, and the legislation of Nicaragua as well as that of Costa Rica and all nations on the globe recognize the commanding status of the contract as the legal bond between the parties. That as between States, the contract is something more than an obligatory tie: "respect for what has been agreed upon, and the faithful fulfillment thereof, are the cornerstones of national honor and there is no defense effective enough to justify an evasion of that canon."

CHAPTER IV.

Complaint and Evidence.

It appears:

That with the complaint, the contents of which have been set forth, the attorney for the High Party Complainant files duly legalized copies of the following documents:

- A.—Attorney's credentials.
- B.—Cañas-Jerez treaty.
- C.—Esquivel-Román convention.
- CH.—The Cleveland award.
- D.—General Treaty of Peace and Friendship between the Republics of Central America.
- E.—Convention creating the Central American Court of Justice.
- F.—Costa Rica's protest lodged with Nicaragua on the 27th of April, 1913.
- G.—Costa Rica's protest lodged with the United States on the 17th of April, 1913.
- H.—Nicaragua's reply of June 12, 1913.
- I.—Inquiry addressed by Costa Rica to Nicaragua July 30, 1913.
- J.—Nicaragua's reply of August 4, following.
- K.—Report on the Foreign Relations of Nicaragua, 1914.
- L.—*La República*, No. 8810, containing Chamorro-Weitzel Treaty signed at Managua, February 8, 1913.
- LL.—Statement of Mr. John N. Popham before the Committee on Foreign Relations of the United States Senate.
- M.—Costa Rica's note of February 2, 1916, to the United States.
- N.—Memorandum of Harry W. Van Dyke, Esquire, before the United States Senate.

- Ñ.—*Congressional Record*, No. 49, of Washington, containing Senate resolution ratifying Bryan-Chamorro treaty.
- O.—Costa Rica's protest of February 21, 1916, lodged with the United States.
- P.—Note of same day from the United States Legation at San José de Costa Rica to the Costa Rican Government.
- Q.—The Cleveland award (same as appendix CH).
- R.—Reply of the United States to the protests of Costa Rica.

And, after invoking Article 1st of the *General Treaty of Peace and Amity and of the Convention for the establishment of a Central American Court of Justice*, concluded on the 20th of December, 1907, by the five Central American Republics, for the purpose of showing the jurisdiction of this Court, the attorney for the High Party Complainant, for the reasons set forth in his complaint, and the resources of diplomacy having been exhausted, prays this Court to render final judgment after due legal procedure in this action which he has brought against the Government of the Nicaraguan Republic, as follows:

“*First.*—That the Bryan-Chamorro treaty, to which paragraph 15 of the foregoing ARGUMENTS OF FACT relates, violates the rights of Costa Rica that were acquired under the Cañas-Jerez treaty, the Cleveland award, and the Central American Treaty of Washington, in that—

“(a) Costa Rica was not consulted by Nicaragua in order to enter into that convention;

“(b) The execution of that pact may deprive Costa Rica of her rights of free navigation in the San Juan River from its outlet in the Atlantic, up stream to within three English miles of Castillo Viejo, and may prevent Costa Rican vessels in the merchant or fiscal service from touching at points on the northern banks of that river along the line indicated;

“(c) The execution of the pact may also damage and diminish the Costa Rican shores of the said river along that line, as well as the mouths of the Costa Rican rivers that empty into the San Juan, and the lands about said shores and river mouths;

“(d) The execution of the pact may also prejudice the co-ownership of Costa Rica in San Juan del Norte Bay and Salinas Bay, and may nullify that co-ownership entirely;

“(e) Because of the potential injuries indicated in (b), (c), and (d) the decisive opinion of Costa Rica is necessary and indispensable to the perfecting of the pact, and that opinion has neither been given or asked for; and

“(f) The pact, with regard to the leasing to the United States of Nicaraguan territory for a naval base in the Gulf of Fonseca, and of Great Corn Island and Little Corn Island which Nicaragua possesses in the Caribbean Sea, makes no reservation whatever in favor of Costa Rica, whose vessels possess, in all the maritime waters, coasts and ports of Nicaragua, the right to be treated as national vessels of Nicaragua—an omission which *ipso facto* renders nugatory Article IX of the Central American Treaty of Washington.

“*Second.*—That the violation of Costa Rica’s rights in the particulars above set forth, or in any one of them, renders the said Bryan-Chamorro pact void, particularly in view of the fact that when it was signed both contracting parties well knew of Nicaragua’s lack of legal capacity to sign unrestrictedly; that is, they knew of Nicaragua’s incapacity to sign without holding harmless the rights which Costa Rica possesses in the waters and territories that are involved in the convention, and

“*Third.*—That the acts and omissions set forth in the two preceding points render the said Bryan-Chamorro treaty null and void and without effect, especially with respect to Costa Rica, and that the Court declare and adjudge said treaty to be null and void and without effect.”

Finally, in an interlocutory petition, Complainant's attorney prays the Court that, under the authority of Article XVIII of the convention creating this tribunal, in order to prevent damages and conflicts that may perhaps be irreparable later, and pending the final decision in the case, the Court will issue an appropriate decree—

“(A) Ordering, with relation to a canal across Nicaraguan territory, and with relation to anything that may interfere generally with the navigation of the waters of that republic, that the *status quo* of the right that existed in Costa Rica prior to the Bryan-Chamorro treaty, which gives rise to this action, be maintained, and

“(B) Directing that, in view of the urgency of the matter, a communication be sent by telegraph to the Most Excellent, the Governments of Nicaragua and the United States of America, to be followed immediately by confirmation by mail, notifying them, with all due formality, of the institution of this action and of the decree prayed for in the preceding paragraph (A), if, as I venture to hope, my prayer for such precautionary measure shall be acceded to.”

SECOND PART.

Procedure in the Case and Answer of the High Party Defendant.

It appears:

That this Court, in an act signed herein on the 1st day of May, 1916, recognized the Licentiate don Luís Castro Ureña as the representative of the complainant Government, admitted the complaint presented, notified the Nicaraguan Government and called upon it to answer the complaint within sixty days from the date of notification, ordered that copies of the complaint, evidence, and of the interlocutory act of this Court be also sent, by note, to that Government, decreed the precautionary

measure (*medida precautoria*) asked for, and, finally, ordered that this act be notified to the defendant Government and the other signatories of the treaty creating this Court.

It appears:

That the Government of Nicaragua, not having answered the complaint within the term prescribed, the Court, by its act of August 16, last, granted an extension of twenty days as provided in Article XV of the organic convention.

It appears:

That on the 25th of the same month of August, the Court received an official communication dated the 1st of that month, from the Minister of Foreign Relations of Nicaragua, setting forth the following:

That, in acknowledgment of the notification ordered by the Central American Court of Justice in its act of May 1 last, to be given to the Government of Nicaragua, calling upon the latter to answer the complaint brought on the 24th of March by the Government of Costa Rica relating to the conclusion of the Chamorro-Bryan convention for an option to contract for the opening of an interoceanic canal, the following is submitted:

That the statements contained in the introduction to the complaint have caused much surprise to his Government, for it would seem that they were only made to mislead public opinion by juggling with the meaning of words or distorting the groundwork of facts to conceal the truth.

That after the opening of the complaint, one reads that the Republic of Costa Rica, in the action against the Government of Nicaragua, is brought before the Central American Court of Justice on the grounds that a conven-

tion was concluded by the latter with the Republic of the United States *for the sale of the San Juan River and other purposes*. That the language in the convention is clear and explicit: absolutely nothing, the Minister says, refers to a sale; an option only is stipulated for the conclusion of a treaty at the appropriate time.

That it is impossible even to know where and when it will be arranged to build the canal—whether it will be built on the Costa Rican frontier or over some other course distant therefrom.

That when the matter shall have been studied, and all the advantages discussed and weighed in order to select, locate, and construct the waterway, then, and then only, can we proceed to enter into the canal treaty or contract.

That, meanwhile, the idea of a sale of the San Juan River, attributed to the Chamorro-Bryan convention, is without foundation, and is, furthermore, offensive and harmful.

That, wishing to be understood by the foregoing as implying nothing more than a demonstration of courtesy towards this Court, he is constrained also to express the surprise of his Government in noting that the Central American Court of Justice should have admitted the complaint, the incompetency of the Court being so manifest, as he then undertakes to show: The convention that created the Court, he said, is a fundamental code. It cannot be ignored, and the Court must subject itself to the provisions of that convention or its proceedings will be null and void. That in the present case the question must first be asked, "What is the basis of the complaint, what gives rise to the action?" Is it the Chamorro-Weitzel treaty or the Chamorro-Bryan? The first pact never went into effect, and, therefore, must be dismissed

from the discussion; had it given occasion for a complaint based on an allegation by Costa Rica that it violated her rights—and this the Nicaraguan Government does not admit—that treaty stands in the category of an instrument of no value and, therefore, can not be made the subject of consideration.

That the complaint, then, can only have been inspired by the Chamorro-Bryan treaty; but that with respect to that pact, the Party Complainant confesses that it had not initiated, much less pursued and brought to an end, any steps through diplomatic channels. How, then, he continues, could it be said that it was impossible to reach a settlement between the Foreign Offices of the two countries if not a single effort thereto was made—a requisite *sine qua non* (Article 1 of the Convention)—so that the claim could be established, once tentative diplomatic negotiations had been exhausted?

That this being so, it is idle to attempt deductions, since they could be based only on conjecture. The truth of the allegations of fact must be demonstrated by *acts* or other classes of authentic documents (Article XVII of the Rules of the Court); it is useless to say that the complaint relates to a similar convention. The Rules prescribed under the authority of a treaty require proofs, not mere pretext that may be availed of by one party to elude the obligation imposed. That as those proofs do not exist, nothing has been adduced to establish the competency of the Central American Court of Justice. That tribunal cannot hold itself above the constituted law; it bears no legal mission in this affair.

That, even on the supposition that the Chamorro-Bryan treaty were, not similar, but identical, in language with the Chamorro-Weitzel pact, the latter not having had any legal existence, is relegated to the category of a

mere rejected project, and so true is this that it can be stated in all veraciousness that the effects produced with respect to Nicaragua and the United States by the Chamorro-Bryan pact arose or sprang into being from the exchange of ratifications of the latter. That, consequently, what should be, and must be, proven is that which has relation to the Chamorro-Bryan treaty.

That the Central American Court of Justice could not, and cannot, legally prescind from that legal requirement without overstepping its powers, or, what amounts to the same thing, without bringing about the absolute nullity of all its acts; and that everything it shall decide, if it should reach the stage of decision, will be absolutely null and void for want of jurisdiction.

His Excellency the Nicaraguan Minister of Foreign Relations then refutes the votes of four of the members of the tribunal that were cast for the admission of the complaint; and afterwards he alleged that the other important element that must be considered in this matter—and this throws into bold relief the incompetency of the Central American Court of Justice to take cognizance of the complaint—is that which is prayed in the complaint itself: "That therein, as though it were a matter that arose out of the relations between two States signatory to the convention that created this Court, the Court is requested to render a decision in a matter which in no way, and in none of its points, could be submitted to its cognizance." "We bid you enter," says the Party Complainant to the Central American Court of Justice, "we bid you enter upon a forbidden road which no one has opened to you; plunge your scythe into another's wheat; break an agreement signed by one who has entrusted to you no mission to take cognizance of his affairs." This and nothing else, he says, is what is asked

when a decision in the following terms is prayed for: "That the violation of the rights of Costa Rica in the particulars heretofore imputed, or by any one of them considered by itself alone, nullifies the said Chamorro-Bryan pact, particularly because both contracting parties knew of Nicaragua's relative incapacity to execute the pact without restrictions—that is, without safeguarding the rights Costa Rica possesses in the waters and lands involved in the Convention."

That, even limiting the viewpoint to the simple approval of a treaty by the Nicaraguan Congress—an approval given under the authority of the powers conferred upon that body by the political constitution—such pact could not come under the jurisdiction of the Central American Court, and even less a decision as to the validity of that act, emanating as it did from a governmental power exercising the sovereignty of the Republic. That the hypothesis might perhaps be admitted that sometimes the right exists to complain because of a violation, or for damages, or on some similar ground, but never could the legal impossibility of nullification of sovereignty be asked, much less the nullification of those acts in which a third High Contracting Party participates.

After other observations relating to this point, His Excellency the Nicaraguan Minister of Foreign Relations sets forth that his "Government believes, and, through him, so declares, that it is under no obligation to reply to the complaint of the Costa Rican Government because it cannot admit, even conditionally, the competency of the Court to take cognizance of, and to decide, that complaint." He sets up the incompetency and utter lack of the Central American Court of Justice as the sole point that is to be determined in the final decision, and continues: "That not for a moment could Nicaragua con-

sider—except for the purpose of rejecting them—the baseless statements, nor the proceeding attacking her sovereignty and dignity.” And finally, “that if the Court insists upon taking cognizance of the cause in violation of the provisions of the General Treaty of Peace and Amity and the convention that brought it into existence, the Government of Nicaragua protests in most solemn manner that Nicaragua has proceeded within her rights, that the Central American Court is without jurisdiction, and, in the event of a decision adverse to her, Nicaragua declares that she will be unable to abide by it.”

It appears:

That the Court, in view of the answer made by the Government of Nicaragua, passed an act, on the 31st of August last, in which it held as having been acknowledged, the extension of time that had been allowed for the answer to the complaint, and that consequently the new term of thirty days granted in the act of the 16th of the same month of August was extinguished; that the High Party Defendant having failed in its answer to designate any person or office in this city to receive notices, such notices are to be considered, with respect to the Defendant, as tacitly waived in conformity with Articles 59 and 60 of the Rules of Procedure, and all notices are to be considered as effective after the expiration of forty-eight hours from the time the acts they refer to have been passed; that the cause was then ready to be taken under consideration, and that, for presenting the final arguments of the High Parties, the 11th day of the present month (September) was set for the hearing.

It appears:

That the attorneys, Don Lu s Castro Ure a and Don Jos  Ast a Aguilar (the latter appointed on the 7th of the said month as representative of the Government of Costa Rica and associate counsel with the Licentiate Castro Ure a), appeared at the hearing set and submitted their arguments in support of the interests of the High Party Complainant. The representative, Ast a Aguilar, confined himself in his argument of the prayers of the High Party Complainant, to the following:

“That the indisputable rights of Costa Rica established and confirmed in the Ca as-Jerez treaty, the Cleveland award, and the General Treaty of Peace and Amity of Washington have been violated by the High Party Defendant in the Bryan-Chamorro treaty, and that according to the text of the said conventions and arbitral award, that Defendant was legally incapable of concluding that pact without the intervention and consent of my Government.”

It appears:

That, at the session held by this Court on the 22d of this month, the questions submitted were fully discussed and the points contained in the questionnaire heretofore approved were voted upon in the manner set forth in the act passed at that session, which act reads as follows:

Act recording the votes of the Court in the case.—The Central American Court of Justice, San Jos  de Costa Rica, at ten o’clock on the night of the 22d of September, nineteen hundred and sixteen.

The Court, having concluded its deliberations preparatory to a final decision of the action brought by the Government of Costa Rica against the Government of Nicaragua, proceeded to take a vote on the fourteen points comprised in the questionnaire heretofore approved and accepted for consideration, with the following result:

First Question.—(Submitted by the High Party Defendant, as a peremptory exception.) “Has the Court jurisdiction and is it competent?”

This exception was considered notwithstanding the decision rendered herein on the 1st of May last, and all the Judges answered in the affirmative.

Second Question.—“In the opinion of the Court are the two diplomatic instruments known by the names of the Chamorro-Weitzel and Bryan-Chamorro treaties two aspects of the same international transaction, the object of which is the construction of an interoceanic canal, within the purview of this proceeding?”

Answered affirmatively by the Judges Medal, Oreamuno, Castro Ramírez, and Bocanegra, and negatively by Judge Gutiérrez Navas.

Third Question.—“Is it the opinion of the Court that both negotiations, relating to an interoceanic canal, were entered into and concluded by the Government of Nicaragua without official notice to Costa Rica?”

Answered affirmatively by all of the Judges.

Fourth Question.—“Is it the opinion of the Court that the Government of Costa Rica pursued all reasonable efforts, through diplomatic channels, to effect an adjustment?”

Answered affirmatively by Judges Medal, Oreamuno, Castro Ramírez, and Bocanegra, and negatively by Judge Gutiérrez Navas.

Fifth Question.—“Is it the duty of the Court, in view of the foregoing questions and decisions thereof, to declare the competency and jurisdiction of this Court to take cognizance of the complaint?”

Answered affirmatively by Judges Medal, Oreamuno, Castro Ramírez, and Bocanegra, and negatively by Judge Gutiérrez Navas.

Sixth Question.—"Is it the duty of the Court to declare its competency to take cognizance of and decide this cause on the merits?"

Answered affirmatively by all of the Judges, Judge Gutiérrez Navas concurring, however, only insofar as that the merits relate to differences between the Government of Costa Rica and the Government of Nicaragua.

Seventh Question.—"Is the Court in duty bound to declare its competency to take cognizance of, and decide, this cause notwithstanding it relates to contractual interests of a nation not subject to the jurisdiction of this Court?"

Answered affirmatively by Judges Medal, Oreamuno, Castro Ramírez, and Bocanegra, and negatively by Judge Gutiérrez Navas.

Eighth Question.—"Was the Government of Nicaragua, by virtue of the eighth article of the Cañas-Jerez treaty, under the obligation to consult, in advance, the opinion of the Government of Costa Rica respecting injuries that might result to the latter in connection with the concessions contained in the Bryan-Chamorro treaty?"

Answered affirmatively by Judges Medal, Oreamuno, Castro Ramírez, and Bocanegra, and negatively by Judge Gutiérrez Navas.

Ninth Question.—"In the Bryan-Chamorro treaty does Costa Rica possess the right to be heard decisively respecting the concession for a canal by way of the San Juan River and the Great Lake Nicaragua?"

Answered affirmatively by Judges Medal, Oreamuno, Castro Ramírez, and Bocanegra, and negatively by Judge Gutiérrez Navas, who maintained that no evidence on this point appeared in the case.

Tenth Question.—"In the Bryan-Chamorro treaty does Costa Rica possess the right to be heard decisively respecting the canal concession in connection with any other point in Nicaraguan territory, provided the rights of Costa Rica specified in Point 10 of the Cleveland Award are not affected?"

Answered negatively by all of the Judges.

Eleventh Question.—"Must it be taken as proven that in the said Bryan-Chamorro treaty nothing is stipulated in protection of the rights of Costa Rica?"

Answered affirmatively by Judges Medal, Oreamuno, Castro Ramírez, and Bocanegra, and negatively by Judge Gutiérrez Navas, who stated that in his opinion such stipulation was not necessary since the rights of a third party, which had not taken part in the treaty, nor assented to its negotiation, could not be affected; and that his opinion is based upon the doctrine of generality set up by the text writers on international law.

Twelfth Question.—"Is it the duty of the Court to hold that the Bryan-Chamorro treaty violated Costa Rica's rights to free navigation by the cession of a naval base in Fonseca Bay, and the cession of the islands known as Great Corn Island and Little Corn Island?"

The Court, in view of the fact that it has agreed to the revision of the previous decision, accepted the proposition of Judge Oreamuno to substitute for the question immediately preceding, the following:

"Shall it be understood that the Bryan-Chamorro treaty violates the rights accorded to Costa Rica by Article Nine of the Treaty of Peace and Amity, of 1907?"

Answered affirmatively by Judges Medal, Oreamuno, Castro Ramírez, and Bocanegra, and negatively by Judge Gutiérrez Navas.

Thirteenth Question.—"Is it, consequently, the duty of the Court to hold and decide that the treaty that gives occasion for this complaint violates provisions of the Cañas-Jerez boundary treaty, the Cleveland award, and the Treaty of Peace and Amity signed at Washington in 1907?"

Answered affirmatively by Judges Medal, Oreamuno, Castro Ramírez, and Bocanegra, and negatively by Judge Gutiérrez Navas.

Fourteenth Question.—"Can this Court decide the prayers contained in the second and third points of the complaint?"

Answered negatively by all of the Judges.

The cause is, therefore, decided as follows:

First.—The Court declares itself competent to decide the complaint presented.

Second.—The Court declares that the Government of Nicaragua has violated, to the injury of Costa Rica, the rights conferred upon the latter by the Cañas-Jerez Treaty of Limits of April 15, 1858, the Cleveland award of March 22, 1888, and the Central American Treaty of Peace and Amity of December 20, 1907.

Third.—Respecting the prayer for the nullification of the Bryan-Chamorro treaty, contained in the complaint, this Court can make no declaration whatsoever, because of the fact that the Government of the United States of North America is not subject to the jurisdiction of this Court.

THIRD PART.

Examination of Facts and Law.

CHAPTER I.

Concerning the Peremptory Exception as to the Jurisdiction of the Court.

Whereas:

The Government of Nicaragua, in its communication of August 1, last, answering the notification of the presentation of the complaint, having interposed a peremptory exception to the jurisdiction of the Court, and having also addressed itself to that point in its telegraphic despatches of the 1st and 26th of April, and 7th and 9th of September, instant, it is the duty of the Court to analyze the fundamentals of that exception and the evidence in support thereof, as well also the legal dispositions that govern the point, in order to determine whether or not this Court has the power to take cognizance of the cause.

Whereas:

It appears from the telegraphic despatches and the answer to the notification as to the complaint that the Nicaraguan Government rests its denial of the jurisdiction and competency of this Court on three grounds, to wit:

First.—That the negotiations with the Government of the United States concerning the interoceanic canal were conducted in the exercise of Nicaragua's unquestionable rights of sovereignty;

Second.—That she conducted those negotiations with a nation foreign to the jurisdiction of this Court, and

Third.—That although the Government of Costa Rica took certain diplomatic steps when the Chamorro-Weitzel

treaty was concluded—which instrument never went into effect—on the other hand it took absolutely no steps before the Nicaraguan Foreign Office in connection with the Chamorro-Bryan treaty which gave rise to the present complaint, and that, consequently, the necessary prerequisite to the assumption of jurisdiction by this Court, prescribed by the organic convention, has not been fulfilled by the Complainant Government.

Whereas:

With regard to the first of the foregoing allegations it is sufficient to observe that Article I of the convention that created this Court, and which constitutes its fundamental code, does not exclude from its cognizance any class of questions or differences that may arise between Central American States, whatever may be their origin and whatever their nature. Nothing exists to limit the jurisdiction of the Court by reason of the substance of the question in dispute, and it is, therefore, obvious that no Central American nation can exempt itself from the obligation to answer before this Court all actions brought by the other signatories to that convention, on the pretext that the injuries complained of are based upon acts performed in the exercise of sovereignty.

Whereas:

With regard to the allegation that the transaction out of which this complaint arose was concluded with a Power foreign to the jurisdiction of the Court, and that, consequently, the Court cannot decide the action brought by the Government of Costa Rica without entering a field foreign to it, and, therefore, forbidden ground, the Court is of opinion that, were that allegation sufficient to prevent the exercise of its function "to guarantee

efficaciously the rights of the Central American Republics and maintain inalterably peace and harmony in their relations without being obliged to resort in any case to the employment of force"—the mission entrusted to it by the organic convention—a considerable number of controversies could arise amongst us that would have no other possible solution than through the resort to arms, and thus the most important element of finality sought to be fixed by the signatory States in instituting the Court, would be rendered nugatory. The Court can unquestionably carry out its functions without venturing upon forbidden ground, limiting itself, however, as in duty is bound to do, to a determination of the juristic relations existing between Central American States engaged in controversy and to a declaration of the law with respect to them; but refraining absolutely from cognizance conditions of fact and law which their acts have created with respect to other nations not under the jurisdiction of this Court.

Whereas:

With regard to the allegation by the High Party Defendant that this Court is incompetent because "there is no consistent evidence, in *acts or other classes of authentic documents*, that, in order that the complaint might be admitted, the High Party Complainant had initiated—much less pursued and exhausted without reaching settlement—the diplomatic steps required by Article I of the convention creating the Court and its Seventeenth Rule," this Court, for its purposes in reaching a decision on this point, has before it the following facts:

First.—It appears in the record of this case, according to the statement of the High Party Complainant, that in April, 1913, it received private information that the Legislative Power of the Republic of Nicaragua had

secretly approved a treaty, concluded also in secrecy, between the Government of that Republic and the Government of the United States of America relating to the opening of an interoceanic canal through Nicaraguan territory, and that the Government of Costa Rica, acting on this information, instructed its diplomatic representatives at Managua and Washington to lodge protests against the conclusion of a convention which it conceived to be in violation of the rights vested in it by existing treaties between Costa Rica and Nicaragua and also by the Cleveland award of March 22, 1888; and that, according to the evidence contained in the record, such protests were duly presented.

Second.—That the Government of Nicaragua, in its note of June 12, 1913, replied to the protest of Costa Rica, invoking the prerogatives of its sovereignty in justification of its conclusion of the treaty referred to and the necessity, for diplomatic reasons, of maintaining secrecy regarding the contents of that pact.

Third.—That the Government of Costa Rica, upon noting the text of the treaty as it appeared in a newspaper of this capital—which text was said to have been the same as that of the pact that prompted the protests referred to—repeated its demands upon the Nicaraguan Foreign Office and the latter replied insisting upon the necessity of maintaining secrecy regarding its diplomatic agreement with the United States of America; and that, with respect to its contents, it was impossible to make any statements whatever because the agreement had not yet been perfected.

Fourth.—That, having had notice that, although the treaty then in question had been withdrawn from the United States Senate, a new canal treaty was already under consideration by that body for ratification, and,

considering, thereupon, that the road to a direct settlement with the Nicaraguan Foreign Office was already closed, the Government of Costa Rica undertook, before the Foreign Office of the United States of America and before the Senate itself, certain steps calculated to prevent the perfecting of the treaty; and that, finally, the pact received the supreme approval of the American Senate on the 18th of February of the present year.

Fifth.—That the High Party Defendant, in asserting that the necessary steps between the Foreign Offices had not been previously taken, seized upon the circumstance that the negotiations undertaken before it by the Costa Rican Foreign Office were prompted by the conclusion of the Chamorro-Weitzel treaty which never reached the stage of perfection, and not by the Bryan-Chamorro pact, which is the one that brought about the presentation of the complaint.

The calm examination this Court has made of the foregoing allegations enables it to avoid passing over unnoticed the dialectic error into which the High Party Defendant has fallen in mistaking the basis of the complaint; the Government of Costa Rica has not grounded its action specifically on the name by which the pact that gave rise to the complaint is known, but, instead, on the point that said pact refers to concessions for the construction of an interoceanic canal across Nicaraguan territory, with respect to which concessions it has consistently persisted in its protests ever since the year 1913.

This Court holds that it cannot accept as sufficient to support the exception respecting its competency to try this case the argument of the Nicaraguan Government that the Chamorro-Weitzel and Chamorro-Bryan treaties are two distinct negotiations and that Costa Rica's opposition to the first is of no avail against the second, because the

negotiations being identical in their ultimate purpose to bring about the construction of an interoceanic canal—which is the desideratum against which, fundamentally, Costa Rica is complaining—it is impossible to avoid consideration of both negotiations as stages of the same transaction, for the arguments based exclusively on sovereignty and the necessity to safeguard a diplomatic secret, wherein the Nicaraguan Foreign Office takes refuge in its answer to the protests lodged by the Government of Costa Rica against the first pact, necessarily govern in respect to the other; and, therefore, the Court must be, and is, of the opinion that the Costa Rican Government did exhaust the requisite Foreign Office steps available to it for the purpose of reaching a settlement with the Republic of Nicaragua relating to the negotiations undertaken by the latter with the Government of the United States with the object of procuring the construction of an interoceanic canal; and, in view of the round affirmation of the Nicaraguan Foreign Office that its negotiations were covered by the attributes of national sovereignty, any new undertaking in the premises by the Costa Rican Government could with much more reason have been logically looked upon as futile.

The Court is furthermore of the opinion that it cannot under any theory admit as a correct interpretation the allegation that the final requisite of Article I of the Convention that gave life to this Court should be understood in the sense that the High Parties here contending are under the obligation to persist in steps which, besides being futile with respect to reaching the conclusion of a settlement, are subversive of their dignity and convenience.

Whereas:

The Chamorro-Weitzel and Bryan-Chamorro treaties having, as above set forth, been held by this Court to be two stages in the same diplomatic negotiation, the evidence regarding the unsuccessful exhausting of Foreign Office proceedings looking to a settlement, which is required by the Convention and the Rules of Court in order to establish the competency of this tribunal, and which the High Party Defendant denies, is constituted by the notes addressed by the Nicaraguan Foreign Office to the diplomatic representative of Costa Rica at Managua on the 12th of June and the 4th of August, 1913, and these documents are authentic.

Whereas:

The allegations on which the High Party Defendant bases its peremptory exception have been, and are hereby, rejected; and since this Court is the sole power on which, by the will of the nations that created it, has been conferred the right to decide, in each case, whether all possible proper steps looking to an amicable settlement have in fact been exhausted, as well in conformity with the precept contained in Article XXI of the same convention that empowers it to render judgment on the points of fact brought out, according to its free opinion, as in conformity with the power to determine its own competency, conferred upon it by Article XXII, wherein is manifested the will of the nations that subscribed to that fundamental code of this Court that its competency shall not be submitted to the arbitrament of the parties in controversy, this Court must make the declarations that logically develop, to wit, that the High Party Complainant has fulfilled the sole requisite prescribed by Article I of the said convention in order that the complaint may be ad-

mitted, and that as the peremptory exception interposed by the High Party Defendant is without merit, this Court is competent to decide the complaint brought before it.

CHAPTER II.

Analysis of the Action.

Whereas:

The Court has studied, in the first place, the legal construction of the Bryan-Chamorro treaty in order to ascertain its true international bearing, as well in its reference to the contractual relations between the High Signatory Parties as with respect to the situation in which third parties in interest, foreign to that pact, find themselves.

The Government of Nicaragua, according to Article I of that instrument, granted in perpetuity to the United States, forever free from all imposts or other public charge, the rights of exclusive ownership necessary and convenient for the construction, operation, and maintenance of an interoceanic canal by way of the San Juan River and the Great Lake of Nicaragua, or by any other route in Nicaraguan territory. The details of the terms on which the canal shall be constructed, operated, and maintained are to be agreed upon by the two Governments whenever the Government of the United States shall notify the Government of Nicaragua of its desire or intention to construct such canal.

With variations of form and attenuations of style, but with the same capital thought always predominating, the withdrawn Chamorro-Weitzel pact, which this Court holds to be the first stage in the diplomatic negotiation that

culminated in the Bryan-Chamorro treaty, provides in Article I as follows:

“The Government of Nicaragua hereby cedes in perpetuity to the Government of the United States the unincumbered and exclusive rights necessary and convenient for the construction, operation, and maintenance of an interoceanic canal by way of the San Juan River and the Great Lake of Nicaragua, or by any other route in Nicaraguan territory; the details of the terms on which such canal shall be constructed, operated, and maintained to be fixed by mutual understanding between the two Governments whenever the construction of the said canal shall be decided upon.”

To facilitate a logical interpretation of their articles, both documents are paged and arranged alike; they give birth to the same idea, and the same purpose is embodied in each. One uses the word “cedes” and the other the word “grants;” the phrase “exclusive right” was changed to “rights of exclusive ownership,” and “functioning” to “service” [to translate literally the Spanish words “*funcionamiento*” and “*servicio*” which are here given in the translator’s version as “operation” and “maintenance” in his rendition of both Spanish texts] and variations appear in the preamble and in other parts of the canal stipulations. If any real innovation is to be noted in the later pact, it would be that which leaves the construction of the canal to the free volition of the Government of the United States, whereas the first draft of a convention did not contain such an explicit right, but, on the contrary, left the details and terms of the undertaking to the mutual understanding of the two Governments “whenever the construction of the canal shall be decided upon,” and remained silent as to whether, when that time arrived, the will of either or both should be necessary.

With these historic antecedents, essential as they are to a precise establishment of the international legal effect of the first article of the pact known as the Bryan-Chamorro treaty, it is possible to approach with intelligence a solution of the problem. "Is a simple option conveyed or is a sale consummated?" The doubt arises from the divergence in the opinions of the High Parties Litigant. On the one hand, counsel for the Costa Rican Government maintain that the contract constitutes a perfect sale, whereas, His Excellency the Nicaraguan Minister of Foreign Relations, in his communications to this Court, upholds the theory that a simple option was stipulated, calling for consummation in the future, when the preliminary studies for the location of the canal shall have been made and agreement shall have been reached as to where and when it would be most advantageous to begin operations.

There can be no doubt whatever that the Bryan-Chamorro treaty effects a perfect sale of the ownership rights necessary for the construction of an interoceanic canal by way of the San Juan River and the Great Lake of Nicaragua, or by any other route over Nicaraguan territory. "To grant in perpetuity" is to alienate, to transfer ownership; it is a full manifestation of the will to divest with complete renunciation of all the incidents and elements that define and constitute ownership. Here also is present the *animus adquirendum* on the part of the purchaser who undertakes to pay the price of the sale. The indispensable legal conditions exist, therefore, to sustain the fact that the Bryan-Chamorro treaty constitutes a sale, and, further, a conveyance of title and ownership with a certain and determined object, at least in relation to the real rights which Nicaragua alienates in the San Juan River and the Great Lake of Nicaragua in connection with the construction of an interoceanic canal.

The concept of an *option*, on the other hand, involves a wholly different idea. Here there is no actual alienation of ownership, but a mere expectancy, realizable only upon the fulfillment of certain stipulated circumstances and conditions. And in the Bryan-Chamorro treaty, which is of an onerous and commutative character, there is a perfect obligation on the part of the Nicaraguan Government, subject simply to the determination of the United States Government as to the practical execution of the contract. The conveyance might be described as an alternative alienation, but not an option in the legal sense of the word. To concrete: by that diplomatic contract, Nicaragua alienated once and forever the necessary rights for the construction of an interoceanic canal by way of the San Juan River and Great Lake of Nicaragua or by any other route whatever through Nicaraguan territory, and she thereby made it impossible to recover those rights for herself or to make them the subject of other contracts.

Whereas:

With respect to the legal effects of the treaty in so far as they concern Costa Rica, a third party that took no part in its negotiation, consideration must be given to the situation existing between that country and Nicaragua in the sphere of territorial rights prior to the date on which the canal treaty was raised to the category of a law for the High Signatory Parties, in order to judge the full effect and scope of the violation of rights that is the subject of Costa Rica's action before this Court. The Cañas-Jerez treaty, a perfectly valid contract still in force, contains, in the concrete, the following stipulations fixing the rights of both Republics in the said river:

“ART. 6. The Republic of Nicaragua shall have exclusive dominion and the highest sovereignty over the waters of the San Juan River from their issue out of the lake to their discharge into the Atlantic; but the Republic of Costa Rica shall have in those waters perpetual rights of free navigation from the said mouth of the river up to a point three English miles below Castillo Viejo, for purposes of commerce, whether with Nicaragua or with the interior of Costa Rica, over the San Carlos or Sarapiquí rivers or any other course starting from the part which has been established as belonging to that republic on the banks of the San Juan. The vessels of either country may touch at any part of the banks of the river, where the navigation is common without paying any dues except such as may be established by agreement between the two Governments.”

As a result of concessions granted by Nicaragua for the construction of a canal, against the opposition of Costa Rica, the boundary disputes were revived and brought about the arbitration by President Cleveland, who, on the 22d of March, 1888, rendered his award interpreting and revalidating the Cañas-Jerez treaty. That pact now stands as authority for the solution of all pending doubts respecting boundaries and the canal in question.

The award, after holding that the Cañas-Jerez treaty was in full force and effect, declared that the Republic of Costa Rica “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 her in said article, or as may be necessary to the protection of said enjoyment.”

These two public documents, to which both High Parties Litigant accord full legal effect and probative value, serve

as a guide to this Court in establishing the following propositions:

(a) The Republic of Nicaragua possesses exclusively the ownership and highest sovereignty over the San Juan River throughout its entire course; that is to say, she exercises over it the rights of ownership and it forms a part of the national territory subject to her sovereignty.

(b) That right, however, is not absolute, but is subject to the restrictions imposed by the treaty itself, to wit: First, the Bay of San Juan del Norte and Salinas Bay are common to the two Republics, and, consequently, the legal principle of co-ownership is perpetuated as to both those terminal points of a possible canal; second, Costa Rica, equally with Nicaragua, is under the obligation to guard and defend the river in the event of foreign aggression—a stipulation that demonstrates effectively the high degree of solidarity in the moral and material interests of the two peoples entertained by the negotiators; and, third, Costa Rica possesses in the San Juan River, for purposes of commerce, permanent rights of free navigation from its outlet as far up as three miles below Castillo Viejo, and the right for her vessels to moor at all points along either bank, exempt from the imposition of any charges, in that part of the stream in which navigation is common.

It is clear, therefore, that the ownership which the Republic of Nicaragua exercises in the San Juan River is neither absolute or unlimited; it is necessarily restricted by the rights of free navigation, and their attendant rights, so clearly adjudicated to Costa Rica—the more so if it is considered that such rights, exercised for revenue and defensive purposes are, according to the opinion of statesmen, usually confounded in their development with the sovereign powers of the *imperium*, such a concession is equivalent to a real right of use, perpetual and unalter-

able, that establishes the Republic of Costa Rica in the full enjoyment of practical ownership of a large part of the San Juan River without prejudice to the full ownership reserved to Nicaragua as sovereign over the territory.

By virtue of the decisions contained in the Cleveland award, and what is held therein relating to the territorial boundaries, the following points are evident:

(a) The perfect validity of the Cañas-Jerez treaty, which validity is given by that instrument, if possible, even greater moral and legal vigor;

(b) The proposition that the rights of navigation on the San Juan River that were confirmed in Costa Rica do not extend to vessels of war, but simply to vessels devoted to revenue and defensive purposes—an interpretation that in no way detracts from the doctrine set forth concerning the practical ownership pertaining in great part to Costa Rica over the San Juan River because navigation with vessels of war, aside from constituting a cause for disquiet, would imply a function appropriate to territorial sovereignty;

(c) The physical demarcation of the divisionary line between the two countries on the Atlantic side, as a means to a solution of the doubtful points of interpretation raised by the Republic of Nicaragua.

In relation to the possible construction of an interoceanic canal the Cañas-Jerez treaty and the Cleveland award specify the following categorical stipulations, and on them this Court will rest its decision, since they are absolutely pertinent to the case before it:

Article VIII of the Cañas-Jerez treaty provides:

“If the contracts for canalization or transit entered into before the Nicaraguan Government had knowledge of this convention should for any cause cease to be in force, *Nicaragua agrees not to conclude*

any others relating to the objects above stated without first hearing the opinion of the Costa Rican Government respecting the disadvantages that may result to the two countries, provided that opinion be given within thirty days after the request therefor shall have been received, in case that the Nicaraguan Government should indicate that a decision is urgent; and in the event that the enterprise should cause no injury to the natural rights of Costa Rica, that opinion shall be advisory."

Article X of the Cleveland award provides:

"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."

These concomitant dispositions restrict Nicaragua's right to dispose freely of her ownership over the waters of the San Juan River, since it is indispensable to the legality of the contractual act first to consult the decisive opinion of Costa Rica in consideration of the fact that both Republics maintain perfect rights in that river, which, since ancient times, has been looked upon as the artery that would some day be availed of to give life to the long projected canal.

Whereas:

Examining the existing *statu juris* between the Republics of Costa Rica and Nicaragua in the light of the clear and positive provisions of the Cañas-Jerez treaty and the Cleveland award, declaration will now be made as to how the Bryan-Chamorro treaty affects that legal status.

That treaty was concluded without official notice to the Government of Costa Rica, notwithstanding a solemn agreement imposed upon Nicaragua, the unescapable obligation to consult the opinion of the former before granting any concession for an interoceanic canal. This solemn agreement was enacted by the Cañas-Jerez treaty hereinbefore reproduced in its pertinent parts, in the preceding whereas; and it was confirmed by the arbitral award of President Cleveland as shown in its declaratory paragraph No. 10, also reproduced in the same whereas.

Costa Rica should have been consulted; and her voice could have been consultative or decisive as the case may be. If the concession is one that violates her "natural rights," "it would seem that her consent is necessary," says the Cleveland award; and, in the event, continues the award, "that the concession does not affect such rights, her voice must be purely consultative."

In the case of the Bryan-Chamorro treaty, the essential consultation was not had. This Court unanimously decided this point, supported by the Nicaraguan Government's own statement, wherein it explained that failure by attributing to itself sufficient power and authority to execute concessions of that kind in the exercise of its sovereignty unrestricted within its proper jurisdictional limits.

The Court, however, entertains a different opinion in deciding this point. The canal concession executed in favor of the Government of the United States of North America has two aspects: the alienation of the rights necessary for the construction of an interoceanic canal by way of the San Juan River, and the power conferred upon the purchaser to locate that passageway in any other point in Nicaraguan territory. In the first case Costa Rica ought to have been consulted and her voice would have been decisive in character, because any concession covering the San Juan River involves a violation of her "natural rights" specified in paragraph 10 of the Cleveland award.

Costa Rica possesses undisputed title to the right bank of the river, to the land situated within her jurisdictional limits; she has joint ownership in the ports of San Juan del Norte and in Salinas Bay; she possesses the contractual right of perpetual navigation in the river, beginning at a point three miles below Castillo Viejo, accompanied by the full privilege of transit and commerce, and Nicaragua is impressed with the duty not to interfere with navigation, but, on the contrary, to keep the course of the river open; Costa Rica enjoys also the right to moor her vessels on both banks throughout the entire zone in which navigation is common, and the rights involved in guarding and defense "with all means within her reach."

The Bryan-Chamorro concession, in prescribing the rights necessary for the construction of a canal by way of the San Juan River, ignored the legitimate rights of the High Party Complainant, since the realization of that work over that route necessarily implies the occupation of the Costa Rican shore or the consequent inundation of her territory as well as the use of the Costa Rican affluents, etc., and in case for canal purposes, the waters of the San Juan River should be diverted, Costa Rica's right to navigate that river and its affluents wherever Costa Rica enjoys the joint rights above specified, would be rendered nugatory. At least that is the conviction that flows from the letter and spirit of the Cañas-Jerez treaty and the Cleveland award when those instruments subordinate all concessions of that kind to the duty of consulting and considering the decisive opinion of Costa Rica.

Without doubt the fact that it was practically impossible to construct an interoceanic canal by way of the San Juan River without affecting Costa Rican lands and waters, which, should they serve as the site of the great undertaking, would have to be respected, weighed heavily in the minds of the illustrious negotiators of 1858 and in that of the Honorable Arbitrator. Perhaps also the consideration had weight that Costa Rica possessed the right to demand due compensation for the use of elements subject to her jurisdictional power. And, finally, perhaps they were swayed by considerations of a moral and political order, consistent in that, aside from material interests, the two Republics are tightly bound together in their past, their present, and their future—to say nothing of other reasons of greater import—because united by nature in the enjoyment of such an important fluvial highway.

This explains the fact that that Article VIII of the Cañas-Jerez treaty stipulates that the opinion of the Costa Rican Government shall be consulted "respecting the inconveniences which the undertaking may occasion to the two countries." That pact does not concede to Costa Rica the right to be consulted solely in regard to her own exclusive interests; the high prerogative is conferred to point out the inconveniences that the canal concession might occasion to either country. The moral accord that this signifies confirms the judicial opinion of the Court respecting the conclusion that the natural rights of Costa Rica are affected by the alienation of the inherent power to construct an interoceanic canal by way of the San Juan River. In regard to the power conferred on the Government of the United States to locate the canal route at any other point in Nicaraguan territory, Costa Rica should also be consulted, but its opinion in such case would be only consultative in character. That prerogative having been conceded by way of homage to high political and moral interests, the opinion of Costa Rica, in this case, possesses only the character of a simple consultative opinion.

In order to penetrate into the spirit and extent of that right, one must look back to the period in which the Cañas-Jerez boundary treaty was concluded. A filibustering invasion of Nicaraguan territory had just taken place that profoundly stirred Costa Rica and the latter aided in the reestablishment of constitutional order in the neighboring Republic.

It is natural, therefore, that, there being a strong desire for union, they should link together their destinies by means of such an important work—a work that will set new standards for their future.

The diplomatic history of the two countries, as set forth in public documents, shows that repeatedly in the past the Republic of Nicaragua complied with the obligation to consult the Costa Rican Government, thereby giving occasion for an exchange of impressions and ideas relating to canal concessions. Thus, when in 1868 Nicaragua's representative signed at Paris a canal contract with Mr. Miguel Chevalier, it was especially stated in the instrument that "if the Republic of Costa Rica should decline to adhere, the present contract by that fact shall become a nullity." This is equivalent to saying that Nicaragua's interpretation of her contractual obligations with Costa Rica, derived from the Cañas-Jerez treaty, is the same as that declared by the Cleveland award and by the present decision of the Central American Court of Justice. At that time that Republic believed, with entire justice, that her territorial ownership was charged with an obligation in favor of Costa Rica, limiting, in the judgment of this Court, her contractual power respecting interoceanic canal projects; and there is no sufficient reason to believe that that obligation has ceased, for, at the present time, the Cañas-Jerez treaty, far from having expired, stands ratified in its full vigor by the arbitral award of President Cleveland, to which decision the High Parties concede the legal value of a perfect and obligatory treaty.

Whereas:

Due account should be taken of the allegations of the Nicaraguan Foreign Office, that its Government, in concluding the Bryan-Chamorro treaty, acted within its sovereign powers in contracting with relation to its exclusive territorial circumscription. The particular and general terms of that contract, however, go to establish the contrary.

From the face of Article 1 the conviction arises that the alienation affects lands and waters of the San Juan river, fluvial territory over which both countries are impressed with rights and obligations, and that neither is capable of contracting effectively with respect thereto independently of the other, and, even without a violation of the natural rights of Costa Rica, the contract would still lack the indispensable requisite of counting upon the consultative voice of that Republic, respecting "the disadvantages that may result to the two countries" from the convention.

From the tenor of the dispositions so many times invoked in this action, not a single case of concession for canal purposes could be considered that should not be submitted—to the cognizance of Costa Rica always—and to her decision when her rights are injured or affected.

The argument that it would be necessary to perfect the canal contract by means of a subsequent convention between the United States and Nicaragua, in order thereby to fulfill the unescapable requisite of consulting Costa Rica and to obtain, in that case, her consent, also fails to serve as a pretext in giving a just concordant interpretation to the Bryan-Chamorro treaty in connection with the Cañas-Jerez treaty of 1858. It has already been said that in the former is conveyed a perfect alienation, a transfer, in consideration of a fixed price, of the rights of ownership necessary and convenient for the canal route, of which route the Republic of the United States of North America is made owner in perpetuity and without limitation.

Neither the Cañas-Jerez treaty nor the decision of its authorized interpreter favors that thesis. Those diplomatic instruments impose the obligation to consult Costa Rica as an act preliminary to all canal contracts, and they even prescribe the term within which that consulta-

tion shall take place in cases wherein an urgent decision may be necessary. Otherwise Costa Rica's right to be heard and to give her decisive opinion would be wholly lacking in efficacy. This should be exercised on an occasion propitious for obtaining some practical result, not only in order to guarantee her territorial and contractual rights, but to lend to the common interest of both peoples the concurrence of her opinion and counsel.

To wait until the projected work shall have been located, until the "natural rights" of Costa Rica shall have suffered concrete and material injury, in order then to be able to determine whether the voice of the High Party Complainant must be consulted, is equivalent to ignoring that there are any acts, of nations or individuals, which, short of material realization, possess inherent powers to injure. The civil law provides a remedy against those acts that carry with them a menace to the rights of a private owner, and the same principle governs in interstate relations, which abound with cases wherein a state demands redress, in the name of its fundamental rights of existence and preservation, for an act that involves a simple menace or danger to the development of those rights.

Whereas:

The High Party Complainant is justified in impugning the Bryan-Chamorro treaty as violative of its rights, compromised in an alienation made without its concurrence or consent, in order to convey material and moral interests that did not belong exclusively to the grantor, but were derived from a solemn contract that marked out the line of conduct that must be followed in the future in canal projects. And it is of no avail to allege that the

American Senate, in ratifying the said treaty, enacted an additional amendment that contained the provision:

“Provided, That whereas Costa Rica, Salvador, and Honduras have protested against the ratification of said convention in the fear or belief that said convention might in some respect impair existing rights of said States, therefore it is declared by the Senate that in advising and consenting to the ratification of the said convention as amended, such advice and consent are given with the understanding, to be expressed as a part of the instrument of ratification, that nothing in said convention is intended to affect any existing right of any of the said named States.”

The intention here indicated is most noble and of high importance, since it establishes an obligation upon the United States; but it is without efficacy insofar as it deals with the legal relations between the nations in litigation, for the injury to the rights of Costa Rica had been consummated and the amendment did not produce the effect of restoring things to the legal status created by the Cañas-Jerez treaty.

Besides, it appears from the Official Gazette of the Nicaraguan Government of August 24th of the present year, that the Nicaraguan Congress, in giving its approval to the Bryan-Chamorro treaty, excluded the amendment of the American Senate, thus destroying the concert of action of the two Governments on a point of first importance and leaving to the Senate amendment only such moral force as it may have.

Whereas:

Article IX of the General Treaty of Peace and Amity subscribed at Washington stipulates as follows:

“The merchant ships of the signatory countries shall be considered upon the sea, along the coasts, and in the ports of said countries as national vessels, they

shall enjoy the same exceptions, immunities, and concessions as the latter, and shall not pay other dues nor be subject to further taxes than those imposed upon and paid by the vessels of the country."

The Bryan-Chamorro treaty, in granting to the United States a lease of a naval base in the Gulf of Fonseca and of the islands known as Great Corn Island and Little Corn Island in the Caribbean Sea, did not reserve to the High Party Complainant the rights that are above set forth, and which, reciprocally, were granted by Nicaragua and Costa Rica, for a term of ten years, with an option of extension for a further term. That omission makes those rights uncertain, since those leased territories and the naval base that may be established will be exclusively subject to the laws and sovereign authority of the United States, a nation with which Costa Rica does not maintain the same legal relations, in the matter of navigation, as she does with Nicaragua.

Whereas, finally:

The moment has arrived in which to enter upon an examination of the prayers in the complaint, which are comprised in points second and third, and in which it is prayed that the Bryan-Chamorro pact be declared null and void, not only for the violation of Costa Rica's rights embodied in that treaty, but also on the ground that "when it was signed both contracting parties well knew of Nicaragua's lack of legal capacity to sign unrestrictedly." The Court, in considering this point in the complaint, declared, upon the unanimous concensus of opinion of its members, that it could not render a decision thereon because of the fact that the Republic of the United States of North America was not subject to the jurisdiction of the Central American Court of Justice, a tribunal called

upon exclusively to pass upon the laws enforceable among the Central American States in cases brought before it for the settlement of their conflicting interests and their controversies.

To judge of the validity or invalidity of the acts of a contracting party not subject to the jurisdiction of the Court; to make findings respecting its conduct and render a decision which would completely and definitely embrace it—a party that had no share in the litigation, or legal occasion to be heard—is not the mission of the Court, which, conscious of its high duty, desires to confine itself within the scope of its particular powers.

This doctrinary opinion is strengthened by the valuable opinion of the High Party Complainant as given forth by one of its counsel, the Licentiate don José Astúa Aguilar, who, in formulating his final argument at the public hearing on the 11th of the present month, presented a resumé and concrete statement of the concluding part of the complaint for the purposes of the final decision, as follows:

“That the unquestionable rights of Costa Rica, established by the Cañas-Jerez treaty, the Cleveland award, and the General Treaty of Peace and Amity of Washington, have been violated by the High Party Defendant in the Bryan-Chamorro treaty, and that, according to the texts of the said conventions and arbitral award, that party was legally incapacitated from concluding that pact without the intervention and consent of my Government.”

The Court considered, discussed, and decided that all and each of those violations of right had occurred. As a faithful interpreter of the contractual obligations that bind the countries in dispute, and inspired by the universal doctrine that controls the harmonious existence of States, it declared that the Government of the Republic

of Nicaragua committed upon the Government of Costa Rica the violations of legal rights claimed by the latter. Its decision could not be more fully stated, because such decision could have no binding force against a state foreign to the institutional system created by the Treaties of Washington.

Therefore:

This Court of Justice, in the name of the Republics of Central America, in the exercise of the jurisdiction that has been conferred upon it by the Convention of Washington of 1907, to which it owes its existence, and in conformity with the provisions of Articles I, XIII, XXI, XXII, XXIV and XXV of the said Convention, and 6, 38, 43, 56, 76 and 81 of the Rules of Court, and also in accordance with the conclusions voted at the session of the 22nd of the present month, and by a majority of four votes against the vote of Mr. Justice Gutiérrez Navas, who was not present, hereby renders the following

Decision:

First.—It is declared that the peremptory exception interposed by the High Party Defendant is denied, and that, in consequence, this Court is competent to decide the complaint brought by the Government of the Republic of Costa Rica against the Government of the Republic of Nicaragua.

Second.—It is declared that the Government of Nicaragua has violated, to the injury of Costa Rica, the rights granted to the latter by the Cañas-Jerez Treaty of Limits of April fifteen, eighteen hundred and fifty-eight, by the Cleveland award of March twenty-second, eighteen hundred and eighty-eight, and by the Central American Treaty of Peace and Amity of December twentieth, nineteen hundred and seven; and

Third.—That, respecting the prayer in the complaint asking that the Bryan-Chamorro treaty be declared null and void, this Court can make no declaration whatsoever.

Let this decision be notified to the High Parties in interest and to the other Central American Governments.

ANGEL M. BOCANEGRA,

DANIEL GUTIÉRREZ,

M. CASTRO R,

NICOLÁS OREAMUNO,

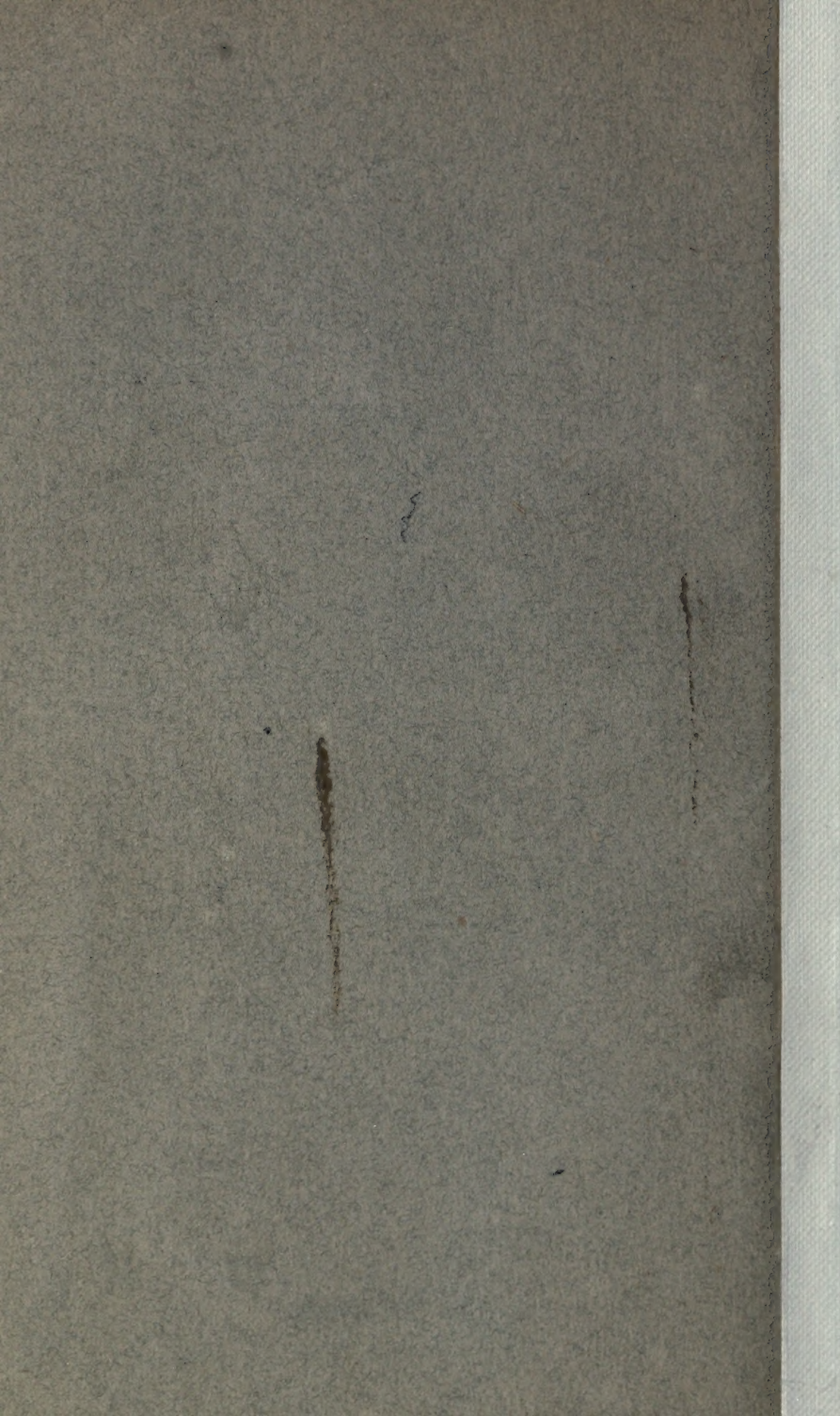
SATURNINO MEDAL.

MANUEL ECHEVERRÍA,

Secretary.







**PLEASE DO NOT REMOVE
CARDS OR SLIPS FROM THIS POCKET**

UNIVERSITY OF TORONTO LIBRARY

