

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

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

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

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

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

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

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

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

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

“Without engaging in a detailed discussion as to the meaning of a river bed or channel, which is the entire area of a territory through which a watercourse flows, I do wish to recall the doctrine of experts on public international law, which is summed up by Mr. Carlos Calvo in his work ‘Le droit international théorique et pratique’, [book 40, para. 295, page 385] thus: — ‘Frontiers delimited by watercourses are subject to change when the beds of such watercourses undergo changes...’

I note that present-day codes are consistent with that doctrine in providing that land that a river or lake submerges and uncovers periodically does not accrue to the adjoining land because it is the watercourse bed. According to article 728 of the Honduran Civil Code, land submerged or uncovered by a watercourse from time to time during periods of ebb and flow in water level does not accrue to adjoining land.

It is therefore obvious that the mathematical line obtained and which continues to be obtained in the form to which reference is made, shall be used for illustrative purposes and as a possible reference point; however, that line is not the accurate measurement of the border line, which is and always shall be the right bank of the river as it may stand at any point in time.”

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

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

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

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

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

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

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

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

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

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

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

Fluctuations in the water level will not alter the position of the boundary line, but changes in the banks or channels of the river will alter it, as may be determined by the rules of international law applicable on a case-by-case basis.