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COSTA RICA – NICARAGUA: ANALYSIS OF THE INTERNATIONAL COURT OF JUSTICE PRACTICE



Costa Rica – Nicaragua: analysis of the International Court of Justice practice

For a long period of time relationship between Costa Rica and Nicaragua were characterized by conflict. These circumstances resulted in a considerations of problematic issues by international agencies, such as the International Court of Justice, Organization of American States.

For instance, in 1998, when Nicaragua banned transit of Costa Rican police vessels on the river, it was considered it to be infringement of sovereignty, and unilaterally introduced a 25 USD \$ tax for any Costa Rican tourists coming to San Juan River, as the persons were not the objects of trade but the subject of trade and, therefore, were not subject to the existing agreements of free movement along the river. This case was adjudicated by the International Court of Justice, and the key points of this judgement are as follows:

1. As to the Costa Rica navigation rights over San Juan River in accordance with the Treaty of 1858: Costa Rica has the right to free commercial navigation along the San Juan River, including passenger and tourist transportation. People travelling San Juan River on Costa Rican vessels, exercising the right of Costa Rica to free navigation, should not get Nicaraguan visas or buy tourist cards. Costa Rica does not have the navigation rights over San Juan River for vessels performing police functions.
2. With regards to the right of Nicaragua to regulate navigation on San Juan River in the area where the navigation is of general character: Nicaragua has the right to demand from Costa Rican vessels and their passengers to stop at the first and last Nicaraguan posts along their routes.
3. With regards to the natural fishery: fishing by the Costa Rican residents of San Juan River area to ensure their subsistence should be considered by Nicaragua as customary law;
4. Nicaragua does not act in accordance with its obligations with regards to the Treaty of 1858, when it demands from people travelling San Juan River by Costa Rican vessels, exercising the right of Costa Rica to free navigation, to get Nicaraguan visas.

However, it is more interesting from the point of environmental law to consider resolution of these cases related to certain measures taken by Nicaragua in transboundary region (*Costa-Rica vs. Nicaragua*), and road construction in Costa Rica along the banks of San Juan River (*Nicaragua vs. Costa-Rica*).

Costa Rica instituted proceedings against Nicaragua, in particular, in respect of the Nicaragua's incursion into Costa Rican territory and its occupation. The case also concerned the construction of a canal (hereinafter "caño"), drainage works on the Colorado River causing damage to the environment of Costa Rica, violation of international obligations, violation of provisional measures applied by the International Court of Justice (in 2011 and 2013), and violation of Costa Rica's navigation rights over the San Juan River.

The International Court of Justice first of all considered the issue what state had sovereignty over the territory in dispute. For this end, the Court, in particular, considered the provisions of the Border Treaty of 1858. The International Court of Justice considered that sovereignty over the disputed territory in this case belongs to Costa Rica, Nicaragua's activities in the disputed territory carried out since 2010 violate the territorial sovereignty of Costa Rica. Nicaragua violated territorial sovereignty of Costa-Rica by excavating three canals and establishing its military presence in the disputed territory.

The next issue was the violation by Nicaragua during its activities on the Colorado River (in the territory of the State of Nicaragua) of the obligations imposed on it in accordance

with the international environmental law. The International Court of Justice stated that the activities carried out by Nicaragua did not involve the risk of causing significant transboundary harm, the obligation to conduct environmental impact assessment, the obligation to notify Costa Rica about the measures taken, to consult Costa Rica about such activities. According to the International Court of Justice, Nicaragua did not act in breach of its procedural obligations. The court also stated that the available evidence did not prove that the defendant, namely Nicaragua, had caused damage to the territory of Costa Rica, violated the obligation to prevent transboundary damage during drainage works on the Colorado River.

On March 8, 2011 the International Court of Justice held to apply a number of provisional measures, which binding character was not been disputed by the parties. The Court found that Nicaragua violated these obligations.

The International Court of Justice also indicated that Nicaragua breached Costa Rica's navigation rights over the San Juan River under the Border Treaty of 1858.

With respect to the aforementioned, the International Court of Justice indicated that Costa Rica has the right to be compensated for the material damages, the states should enter negotiations to make an agreement on compensation, if the parties fail to agree on the matter within 12 months since the judgement, the Court would settle on the amount of compensation at the request of one of the parties.

The next issue was consideration of a case on road construction in Costa Rica along the banks of San Juan River (*Nicaragua vs. Costa Rica*). Nicaragua complained of breach of Nicaragua's sovereignty and significant environmental damage in its territory. It was stated that Costa Rica in breach of international obligations between the two states carried out construction works in transboundary territory causing significant environmental consequences.

The International Court of Justice held that the road construction project, carried out by Costa Rica, is related to the risk of causing significant transboundary damages, therefore, there were grounds for the obligation of environmental impact assessment.

The International Court of Justice stressed that the obligation to conduct environmental impact assessment requires a preliminary assessment of the risk of significant transboundary damage. Such an assessment should be made prior to the construction activities. In turn, the studies conducted by Costa Rica are the assessments that determined the environmental impact of the previously constructed road sections. In the end, the Court concluded that Costa Rica had failed to perform its obligation to conduct an environmental impact assessment with regards to the road construction.

It should be stressed that the Court concluded that Nicaragua had failed to prove significant transboundary damages caused due to the road construction. On the basis of such conclusion the International Court of Justice dismissed the Nicaragua's claim that Costa Rica breached its material and legal obligations under the international common law in relation to causing transboundary damage. The court dismissed other claims of Nicaragua with respect to potential violations by Costa Rica of fundamental obligations under a number of other agreements and treaties.

With respect to discharge of sedimentary deposits due to road construction and creation of sedimentary deltas in the river as violation of Nicaragua's territorial integrity and

sovereignty on San Juan River the International Court of Justice indicated that Costa Rica does not have any authority over the territory of Nicaragua and did not carry out any activities thereon. Due to this fact the Nicaragua claims on this point were dismissed.

The Court also awarded compensatory damages for the benefit of Nicaragua. This decision was also grounded on Costa Rica's breach of its obligations to conduct environmental impact assessment.

Ukraine can use this precedent, particularly, in the following cases:

1. *Submitting the application to the International Court of Justice regarding russia's construction in the Crimea of the motorway "Tavrida", the dam near Bulganak, Beshkek-Zuisk water intake area, water supply system at Belbek, etc.*

As to their status and characteristics, construction of these facilities is actually similar to the construction of canals by Nicaragua in the territory of Costa Rica. Similar to Costa Rica case, Ukraine has a number of international agreements recognizing the Crimea as the territory of sovereign Ukraine, there are russian military men in the territory of the Ukrainian Crimea, and that presents a case of aggressor's infringement of the sovereignty of Ukraine and such construction is another manifestation of it.

2. *Application to the International Court of Justice regarding breaching the navigation rights of Ukraine over the Sea of Azov.*

Monitoring group of the editorial team BlackSeaNews and "The Black Sea Strategic Research Institute" indicate that in November 2021 the average duration of Russia's artificial delay in the Kerch Strait of the ships going from Mariupol and Berdiansk with export cargo constituted 36,8 hours (on average for 2020 – 29,6; in October – 37,9), in 2018 – 79,5 hours; in 2019 – up to 37,4 hours; in 2020 – 29,6 hours per one vessel. The average duration of the artificially created waiting period for permit to go through the Kerch Strait was 39,1 hours per vessel, for vessels related to the EU countries this time was almost the same – 36,8 hours/vessel. russia does not provide any reasonable explanations of the actions of its representatives.

In the judgement in question the court ruled: "The court considers that Nicaragua failed to provide a reasonable explanation to the behaviour of its authorities in two incidents regarding navigation of Costa Rican bank of the river. The court concludes that these two incidents show that Nicaragua infringed Costa Rican right to navigation over San Juan River according to the Treaty of 1858".

3. *Application to the International Court of Justice regarding the transboundary damage caused by the construction and dismantling of the pontoon bridge across Prypiat' (in the territory of Belarus)*

The bridge was constructed and dismantled by the military men having no special knowledge and skills. The distance from the construction site to the Ukrainian border is 6 km, apart from it, the river over which the bridge was built, flows to the territory of our state and is a Dnieper tributary. The environmental impact assessment has not been carried out.

It is evident that after the full-scale invasion of the russian federation in the territory of Ukraine the number of cases that can and should be considered by the International Court of Justice has increased tenfold.