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**International Court
of Justice**

**Cour internationale
de Justice**

THE HAGUE

LA HAYE

YEAR 2009

Public sitting

held on Tuesday 3 March 2009, at 10 a.m., at the Peace Palace,

President Owada presiding,

*in the case concerning the Dispute regarding Navigational and Related Rights
(Costa Rica v. Nicaragua)*

VERBATIM RECORD

ANNÉE 2009

Audience publique

tenue le mardi 3 mars 2009, à 10 heures, au Palais de la Paix,

sous la présidence de M. Owada, président,

*en l'affaire du Différend relatif à des droits de navigation et des droits connexes
(Costa Rica c. Nicaragua)*

COMPTE RENDU

Present: President Owada
Judges Shi
Koroma
Al-Khasawneh
Buergenthal
Abraham
Keith
Sepúlveda-Amor
Bennouna
Skotnikov
Caçado Trindade
Yusuf
Greenwood
Judge *ad hoc* Guillaume
Registrar Couvreur

Présents : M. Owada, président
MM. Shi
Koroma
Al-Khasawneh
Buergenthal
Abraham
Keith
Sepúlveda-Amor
Bennouna
Skotnikov
Cançado Trindade
Yusuf
Greenwood, juges
M. Guillaume, juge *ad hoc*

M. Couvreur, greffier

The Government of the Republic of Costa Rica is represented by:

H.E. Mr. Edgar Ugalde, Ambassador, Vice-Minister of Foreign Affairs of Costa Rica,

as Agent;

Mr. James Crawford, S.C., F.B.A., Whewell Professor of International Law, University of Cambridge, member of the Institute of International Law,

Mr. Lucius Caflisch, Emeritus Professor of International Law, Graduate Institute of International and Development Studies, Geneva, member of the International Law Commission, member of the Institute of International Law,

Mr. Marcelo G. Kohen, Professor of International Law, Graduate Institute of International and Development Studies, associate member of the Institute of International Law,

Mr. Sergio Ugalde, Senior Adviser to the Ministry of Foreign Affairs of Costa Rica, member of the Permanent Court of Arbitration,

Mr. Arnaldo Brenes, Senior Adviser to the Ministry of Foreign Affairs of Costa Rica,

Ms Kate Parlett, Special Adviser to the Ministry of Foreign Affairs of Costa Rica, Solicitor (Australia), PhD candidate, University of Cambridge (Jesus College),

as Counsel and Advocates;

H.E. Mr. Francisco José Aguilar-de Beauvilliers Urbina, Ambassador of Costa Rica to the Kingdom of the Netherlands,

Mr. Ricardo Otarola, Chief of Staff to the Vice-Minister of Foreign Affairs of Costa Rica,

Mr. Sergio Vinocour, Minister and Consul General of Costa Rica to the French Republic,

Mr. Norman Lizano, Consul General of Costa Rica to the Kingdom of the Netherlands,

Mr. Carlos Garbanzo, Counsellor at the Permanent Mission of Costa Rica to the United Nations Office at Geneva,

Mr. Fouad Zarbiev, PhD candidate, Graduate Institute of International and Development Studies, Geneva,

Mr. Leonardo Salazar, National Geographic Institute of Costa Rica,

as Advisers;

Mr. Allan Solis, Third Secretary at the Embassy of Costa Rica in the Kingdom of the Netherlands,

as Assistant Adviser.

Le Gouvernement de la République du Costa Rica est représenté par :

S. Exc. M. Edgar Ugalde, ambassadeur, vice-ministre des affaires étrangères du Costa Rica,

comme agent ;

M. James Crawford, S.C., F.B.A., professeur de droit international à l'Université de Cambridge, titulaire de la chaire Whewell, membre de l'Institut de droit international,

M. Lucius Caflisch, professeur émérite de droit international de l'Institut de hautes études internationales et du développement de Genève, membre de la Commission du droit international, membre de l'Institut de droit international,

M. Marcelo G. Kohen, professeur de droit international à l'Institut de hautes études internationales et du développement de Genève, membre associé de l'Institut de droit international,

M. Sergio Ugalde, conseiller principal auprès du ministère des affaires étrangères du Costa Rica, membre de la Cour permanente d'arbitrage,

M. Arnaldo Brenes, conseiller principal auprès du ministère des affaires étrangères du Costa Rica,

Mme Kate Parlett, conseiller spécial auprès du ministère des affaires étrangères du Costa Rica, Solicitor (Australie), doctorante à l'Université de Cambridge (Jesus College),

comme conseils et avocats ;

S. Exc. M. Francisco José Aguilar-de Beauvilliers Urbina, ambassadeur du Costa Rica auprès du Royaume des Pays-Bas,

M. Ricardo Otarola, chef d'état-major auprès du vice-ministre des affaires étrangères du Costa Rica,

M. Sergio Vinocour, ministre et consul général du Costa Rica en République française,

M. Norman Lizano, consul général du Costa Rica au Royaume des Pays-Bas,

M. Carlos Garbanzo, conseiller à la mission permanente du Costa Rica auprès de l'Office des Nations Unies à Genève,

M. Fouad Zarbiev, doctorant à l'Institut de hautes études internationales et du développement de Genève,

M. Leonardo Salazar, Institut géographique national du Costa Rica,

comme conseillers ;

M. Allan Solis, troisième secrétaire à l'ambassade du Costa Rica au Royaume des Pays-Bas,

comme conseiller adjoint.

The Government of the Republic of Nicaragua is represented by:

H.E. Mr. Carlos José Argüello Gómez, Ambassador of Nicaragua to the Kingdom of the Netherlands

as Agent and Counsel;

Mr. Ian Brownlie, C.B.E., Q.C., F.B.A., member of the English Bar, former Chairman of the International Law Commission, Emeritus Chichele Professor of Public International Law, University of Oxford, member of the Institut de Droit International; Distinguished Fellow, All Souls College, Oxford,

Mr. Stephen C. McCaffrey, Professor of International Law at the University of the Pacific, McGeorge School of Law, Sacramento, United States of America, former member of the International Law Commission,

Mr. Alain Pellet, Professor at the University of Paris Ouest, Nanterre-La Défense, member and former Chairman of the International Law Commission,

Mr. Paul Reichler, Attorney at Law, Foley Hoag LLP, Washington D.C., member of the Bar of the United States Supreme Court, member of the Bar of the District of Columbia,

Mr. Antonio Remiro Brotóns, Professor of International Law, Universidad Autónoma, Madrid,

as Counsel and Advocates;

Ms Irene Blázquez Navarro, Doctor of Public International Law, Universidad Autónoma, Madrid,

Ms Clara E. Brillenbourg, Foley Hoag LLP, member of the Bars of the District of Columbia and New York,

Mr. Lawrence H. Martin, Attorney at Law, Foley Hoag LLP, Washington D.C., member of the Bar of the United States Supreme Court, member of the Massachusetts Bar, member of the Bar of the District of Columbia,

Mr. Walner Molina Pérez, Juridical Adviser, Ministry of Foreign Affairs of Nicaragua,

Mr. Daniel Müller, Researcher at the Centre de droit International de Nanterre (CEDIN), University of Paris Ouest, Nanterre-La Défense,

Ms Tania Elena Pacheco Blandino, Counsellor, Embassy of Nicaragua in the Kingdom of the Netherlands,

Mr. Julio César Saborio, Juridical Adviser, Ministry of Foreign Affairs of Nicaragua,

Mr. César Vega Masís, Director of Juridical Affairs, Sovereignty and Territory, Ministry of Foreign Affairs of Nicaragua,

as Assistant Counsel.

Le Gouvernement de la République du Nicaragua est représenté par :

S. Exc. M. Carlos José Argüello Gómez, ambassadeur du Nicaragua auprès du Royaume des Pays-Bas,

comme agent et conseil ;

M. Ian Brownlie, C.B.E., Q.C., F.B.A., membre du barreau d'Angleterre, ancien président de la Commission du droit international, professeur émérite de droit international public (chaire Chichele) de l'Université d'Oxford, membre de l'Institut de droit international, *Distinguished fellow* au All Souls College d'Oxford,

M. Stephen C. McCaffrey, professeur de droit international à la McGeorge School of Law de l'Université du Pacifique à Sacramento (Etats-Unis d'Amérique), ancien membre de la Commission du droit international,

M. Alain Pellet, professeur à l'Université de Paris Ouest, Nanterre-La Défense, membre et ancien président de la Commission du droit international,

M. Paul S. Reichler, avocat au cabinet Foley Hoag LLP, Washington D.C., membre des barreaux de la Cour suprême des Etats-Unis d'Amérique et du district de Columbia,

M. Antonio Remiro Brotons, professeur de droit international à l'Universidad Autónoma de Madrid,

comme conseils et avocats ;

Mme Irene Blázquez Navarro, docteur en droit international public, Universidad Autónoma de Madrid,

Mme Clara E. Brillenbourg, cabinet Foley Hoag LLP, membre des barreaux des districts de Columbia et de New York,

M. Lawrence H. Martin, avocat au cabinet Foley Hoag LLP, Washington D.C., membre des barreaux de la Cour suprême des Etats-Unis d'Amérique, du Massachusetts et du district de Columbia,

M. Walner Molina Pérez, conseiller juridique au ministère des affaires étrangères du Nicaragua,

M. Daniel Müller, chercheur au Centre de droit international de Nanterre (CEDIN), Université de Paris Ouest, Nanterre-La Défense,

Mme Tania Elena Pacheco Blandino, conseiller à l'ambassade du Nicaragua au Royaume des Pays-Bas,

M. Julio César Saborio, conseiller juridique au ministère des affaires étrangères du Nicaragua,

M. César Vega Masís, directeur, direction des affaires juridiques, de la souveraineté et du territoire, ministère des affaires étrangères du Nicaragua,

comme conseils adjoints.

The PRESIDENT: Please be seated. The sitting is open. The Court meets today to hear the continuation of the first round of oral argument of the Republic of Costa Rica. The first person to take the floor is Professor Crawford. Professor Crawford, you may take the floor.

Mr. CRAWFORD: Mr. President, Members of the Court, it is an honour to appear before you on behalf of Costa Rica and before the Court in its new composition.

RIGHT OF NAVIGATION OF PUBLIC VESSELS

Introduction

1. My purpose is to outline Costa Rica's rights of navigation for public vessels. Article VI of the Treaty of Limits, which recognizes a perpetual right of free navigation for Costa Rica, does not distinguish between public and private vessels. I will outline the implications of this in the first part of my presentation.

2. The second part will address Costa Rica's rights of public navigation as they were affirmed in the Cleveland Award. Cleveland acknowledged that Article VI of the Treaty of Limits recognized a right of navigation for Costa Rican public vessels. This included navigation by armed public vessels.

3. The third part of my presentation will explain the right of Costa Rican public vessels to navigate on the San Juan in order to fulfil Costa Rica's obligation under Article IV of the Treaty of Limits to safeguard the river, and to defend the common Bay of San Juan del Norte.

Costa Rican public vessels enjoy the perpetual right of free navigation under Article VI

4. I turn to my first point. Under Article VI Costa Rican public vessels enjoy the same right of navigation for purposes of commerce as Costa Rican private vessels—there is no relevant distinction based on ownership of the vessel.

5. As Professor Kohen has explained, Costa Rica's treaty rights of navigation for the purpose of commerce includes navigation for the purposes of communication between villages and towns, or any point of the Costa Rican bank to any other point on both banks of the river where navigation is common, or to the interior of Costa Rica. Commerce includes communication. This navigation

may be by Costa Rican government officials or social service providers for the purpose of providing essential services to the local population. Normally these people would travel on public vessels.

6. Nicaragua contends that Costa Rican public vessels are not entitled to any right of navigation under Article VI, that the only right of navigation is that circumscribed by the Cleveland Award¹. Nicaragua does not point to the text of Article VI to support its argument; there is nothing in Article VI which suggests such a distinction. The only evidence Nicaragua offers is a rhetorical question posed by Costa Rica in its argument before Cleveland, which formed part of its argument for a broad right of navigation for revenue vessels². Nicaragua argues that the entire question of navigation by public vessels should be considered closed on the basis of the Cleveland Award³.

7. Nicaragua's contention is based on two misrepresentations. First, the issue before Cleveland was not the extent of Costa Rica's rights to navigate with public vessels in general. It was carefully stated as: "whether Costa Rica has the right to navigate the River San Juan with ships of war or revenue boats"⁴. The fourth point of doubtful interpretation submitted by Nicaragua essentially repeated this language. It read: "If Costa Rica, who, according to Article VI of the treaty, has only the right of free navigation for the purposes of commerce . . . can also navigate with men-of-war or revenue cutters in the same waters?"⁵ This fourth question was duplicative and was treated as such by Cleveland. Having answered the question in the second paragraph of his Award, he merely referred to that determination in response to the fourth question⁶.

8. The issue arose because Nicaragua had objected to Costa Rica's attempts to exercise its rights under the Treaty of Limits by establishing a revenue guard based on the Colorado River⁷.

¹RN, para. 2.140.

²RN, para. 2.138.

³RN, para. 2.143.

⁴Art. VI, Costa Rica-Nicaragua, Convention to submit to the arbitration of the Government of the United States the question in regard to the validity of the treaty of 15 April 1858 (Esquivel-Roman), Guatemala, MCR, Ann. 16; CMN, Ann. 11. See also Cleveland Award: MCR, Ann. 26 p. 457 (p. 98).

⁵MCR, Ann. 207, p. 10.

⁶Third paragraph, point 8, President Cleveland Award, MCR, Ann. 26, p. 458 (p. 99).

⁷CMN, Ann. 28.

The revenue guard was established to reconnoitre the San Juan at least once a week, with the primary purpose of preventing contraband⁸. Nicaragua protested and in reply the Costa Rican Foreign Minister argued that Costa Rica, having the obligation to contribute to the custody and defence of the river, had “the right to make use of the indispensable means to comply with that duty”; he added that Costa Rica could “not exercise any jurisdictional act over” the waters of the river⁹. Against this background the Convention of 24 December 1886 asked Cleveland to decide on Costa Rica’s right to navigate with revenue cutters and ships of war. The dispute concerned not the right to navigate with public vessels in general, but only navigation with those two types of vessel.

9. Nicaragua’s second misrepresentation is that Costa Rica’s pleading before Cleveland somehow put in issue the broader question of navigation by public vessels¹⁰. There are two answers to this.

10. First, as I have said, Costa Rica’s arguments were limited to the specific question put to the arbitrator. Second, it would have been beyond President Cleveland’s remit under the Convention of 1886 to decide the broader point.

11. Before Cleveland, Costa Rica’s arguments dealt with navigation for revenue vessels and ships of war separately. Before turning to the specific arguments relevant to each type of vessel, Costa Rica asked a general rhetorical question in the following terms:

“Does this mean that Costa Rica cannot under any circumstances navigate with public vessels in the said waters, whether the said vessel is properly a man-of-war, or simply a revenue cutter, or any other vessel intended to prevent smuggling, or to carry orders to the authorities of the bordering districts, or for any other purpose not exactly within the meaning of transportation of merchandise?”¹¹

Costa Rica then turned to its specific arguments, dealing first with revenue vessels and then with ships of war.

12. In respect of revenue vessels, Costa Rica asserted as “beyond discussion that [it] can navigate in the San Juan river with public vessels, which are not properly men-of-war”. Referring

⁸MCR, Anns. 205, 206.

⁹MCR, Ann. 31.

¹⁰RN, paras. 2.142-3.

¹¹MCR, Ann. 207, p. 155.

specifically to its revenue police, Costa Rica argued that the rights of Nicaragua under the 1858 Treaty to bring cargo to the Costa Rican banks presupposed the necessary, correlative right of Costa Rica “to watch its own banks by the only practicable means”, otherwise Costa Rica would be at the mercy of smugglers¹².

13. The pleading then dealt with the right of navigation for ships of war, which Costa Rica supported by analogy with other situations. It argued again that its duty to defend its own bank under the Treaty implied a necessary correlative right to use regular men-of-war on the river¹³.

14. Costa Rica made no further mention of other public vessels, stating “This is neither the proper time nor the proper place to make any declaration whatsoever, affecting questions not at issue, and neither debated nor submitted . . .”¹⁴

15. Cleveland evidently took heed of this statement, and his Award was carefully circumscribed. The second paragraph, which addresses the question included in Article VI of the 1886 Convention, holds that Costa Rica “has not the right of navigation of the river San Juan with vessels of war”, but “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 [or] as may be necessary to the protection of said enjoyment”¹⁵. Cleveland’s language is not exclusive of other vessels. It is simply directed at the question he was asked to decide. In point 8 of the third paragraph, which addressed the fourth point of doubtful interpretation, Cleveland stated “The right of the Republic of Costa Rica to the navigation of the river . . . with men-of-war or revenue-cutters is determined and defined in the second article of this award.”¹⁶ If he had thought that he was determining the entire scope of Costa Rica’s right to navigate with public vessels of any kind, he would have said that the second paragraph of his Award defined and determined that question. He did not say that, neither did he imply it.

¹²MCR, Ann. 207, p. 156.

¹³MCR, Ann. 207, at pp. 158-160.

¹⁴MCR, Ann. 207 (b), p. 90.

¹⁵MCR, Ann. 16, p. 457 (p. 98), second paragraph.

¹⁶MCR, Ann. 16, p. 458 (p. 99), third paragraph, point 8.

16. Moreover, if Nicaragua had thought that Cleveland was addressing all navigation by public vessels, its pleadings would have been directed accordingly—but it did not discuss navigation by public vessels other than those specified in the question¹⁷.

17. In these circumstances to argue that the scope of navigation by public vessels is *res judicata* and that Costa Rica asks this Court to “reverse” the Cleveland Award¹⁸, is absurd.

18. By tying navigation by public armed vessels to the circumstances set out in Article VI of the Treaty, Cleveland rejected his assistant Rives’ suggestion that any right of navigation for public vessels would only exist by some general rule and could not derive from the Treaty¹⁹. This is confirmed by Cleveland’s formulation, which refers to the right of navigation for revenue service vessels as being “under” the Treaty and its stipulations in Article VI specifically mentioned²⁰. Rives’ suggestion had been that Costa Rica would have only have those privileges actually extended to other friendly nations, what Cleveland decided was that Costa Rican revenue service vessels had their own specific treaty right of navigation.

19. Costa Rica’s consistent position has been that its public vessels enjoy the same perpetual right of free navigation under Article VI as private vessels. This is entirely consistent with Cleveland’s approach.

**Costa Rica’s treaty right of navigation on the river, affirmed by the Cleveland Award,
includes navigation by armed public vessels**

(a) The Cleveland Award affirmed a right of navigation for revenue vessels which are armed public vessels

20. I turn now to Cleveland’s Award in relation to armed public vessels, specifically revenue service vessels.

21. As I have already explained, Cleveland’s treatment of this question was carefully phrased to reflect the terms of his grant of jurisdiction. His Award stated:

¹⁷MCR, Ann. 208 (b), pp. 48-49.

¹⁸RN, para. 2.142.

¹⁹Cf. Rives Report (Second), CMN Ann. 70, p. 1, “The foregoing article, it will be observed, is silent as to the right of navigation by public vessels. If such a right exists, it must be by virtue of some general rule and not affected by the Treaty . . .”

²⁰MCR, Ann. 26, p. 457 (p. 98), second paragraph.

“The Republic of Costa Rica under said treaty and the stipulations contained in the sixth article thereof, has not the right of navigation on 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.”²¹

22. It is beyond dispute that these vessels of the revenue service were armed public vessels. Costa Rica’s argument in respect of revenue service vessels referred to the need to protect its commerce and its banks of the river, which protection implied the carrying of arms²². Nicaragua referred to vessels of the revenue service as “armed vessels, capable of enforcing their demands by force”²³. Rives’ report suggested that revenue service vessels were indistinguishable from vessels of war²⁴. But Cleveland’s Award distinguished between the two, referring to the functions of revenue service vessels as “protection” of Costa Rican navigation for purposes of commerce. “Protection” would be futile without the capacity to carry arms.

23. President Cleveland was certainly aware of the uses of revenue cutters, which were lightly armed vessels used for customs, quarantine and revenue enforcement and for a range of other purposes²⁵. In May 1886, President Cleveland personally arranged for a revenue cutter to meet the ship carrying his fiancée, Frances Folsom, to New York. The cutter *William E Chandler* brought Miss Folsom and her party into the harbour, followed by a boatload of reporters keen on a glimpse of the President’s young bride²⁶. The *Chandler* measured 99 feet and carried one 20-pounder gun²⁷. Its characteristics are similar to those of the cutter, the *Forward*, shown on the screen²⁸ (tab 32 in the judges’ folder). Despite extensive archival research we were not able to find

²¹MCR, Ann. 26, p. 457 (p. 98), second paragraph.

²²MCR, Ann. 207 (b), p. 156.

²³MCR, Ann. 208 (b), p. 49.

²⁴Rives Report (Second), CMN, Ann. 70, p. 4.

²⁵MCR, 4.81.

²⁶“The President’s Wedding”, *Washington Post*, 29 May 1886 (available at <http://pqasb.pqarchiver.com/washingtonpost/search.html>). See also “Miss Folsom’s Return”, *New York Times*, 28 May 1886 (available at <http://query.nytimes.com/mem/archive-free/pdf?res=9C0CE2DC1738E533A2575BC2A9639C94679FD7CF>); “Miss Folsom’s Homeward Trip”, *New York Times*, 29 May 1886 (available at <http://query.nytimes.com/mem/archive-free/pdf?res=9500E0DC1738E533A2575AC2A9639C94679FD7CF>); Stephen F. Robar, *Frances Clara Folsom Cleveland* (Nova History Publications: New York, 2002), p. 20.

²⁷See http://www.uscg.mil/history/webcutters/Jasmine_1866.pdf; D. L. Canney, *US Coast Guard and Revenue Cutters 1790-1935* (Naval Institute Press, Annapolis, 1995), p. 38.

²⁸http://www.coastguardpics.com/imagelib/sitebuilder/misc/show_image.html?linkedwidth=actual&linkpath=http://www.coastguardpics.net/sitebuildercontent/sitebuilderpictures/usrcfoward_resize.jpg&target=tlx_new; see D. L. Canney, *US Coast Guard and Revenue Cutters 1790-1935* (Naval Institute Press, Annapolis, 1995), p. 45.

a photograph of the *William E. Chandler*. The *Chandler* was still in service at the time of the Cleveland Award, two years after Cleveland's marriage to Miss Folsom²⁹. So when Cleveland referred to revenue cutters he knew what he was talking about! In these circumstances, Nicaragua's argument that the Cleveland Award did not affirm a right of navigation for public armed vessels other than men-of-war cannot be sustained³⁰.

24. The Cleveland Award specified the scope of Costa Rica's right of armed navigation by revenue service vessels under two heads: (1) "as may be related to and connected with her enjoyment of the 'purposes of commerce' accorded to her in Article VI"; or (2) "as may be necessary for the protection of said enjoyment"³¹. In its familiar attempt to limit Costa Rica's rights of navigation to the extent that they become meaningless, Nicaragua argues that these requirements are cumulative rather than alternative³². But clearly that is wrong: Cleveland used the conjunction "or" and not "and". In a further alternative, Nicaragua argues that the concept of necessity applies to navigation by revenue vessels under any circumstances³³. This is not the case, since only navigation for the protection of Costa Rica's enjoyment of its right of navigation was subject to this requirement.

25. Nicaragua also seeks to limit Costa Rica's treaty rights of navigation by reference to later negotiations which did not result in a concluded agreement. It claims that the Soto-Carazo Treaty of 26 July 1887³⁴, which was ratified by Costa Rica but not by Nicaragua, indicated that Costa Rica's right of navigation did not comprise any right to navigate with revenue service vessels. But unratified treaties do not change the law or the meaning of earlier treaties in force. And even if the 1887 Treaty could be said to reflect Costa Rica's understanding of its existing rights and obligations, it affirms Costa Rica's right of navigation for purposes of re-supply of police posts and relief of personnel³⁵. Today Nicaragua denies that that right exists. I would add

²⁹D. L. Canney, *US Coast Guard and Revenue Cutters 1790-1935* (Naval Institute Press, Annapolis, 1995), xiii.

³⁰Cf CMN, 4.2.15.

³¹MCR, Ann. 26, p. 457 (p. 98), second paragraph.

³²For example, RN, 3.1.54-55.

³³Cf RN, para. 5.45.

³⁴MCR, Ann. 15.

³⁵MCR, Ann. 15, Art. VIII.

that the unratified 1887 Treaty would have given Costa Rica the right of navigation over the whole length of the San Juan River and the Lake of Nicaragua³⁶. In these circumstances it cannot serve as an aid to the interpretation of the treaty of limits.

26. In its 1916 decision, the Central American Court of Justice acknowledged the extent of Costa Rica's rights of navigation with revenue service vessels. Costa Rica's argument was as follows:

“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 . . . 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 . . . 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 . . . and free access, exempt from imposts, to any point on the Nicaraguan shore.”³⁷

27. In its Judgment, the Court agreed in principle with this argument, holding 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”³⁸.

28. The revenue vessels used at the time of the Cleveland Award were engaged in fiscal control, border protection and other police tasks, and the relevant personnel carried service arms. Now these tasks are performed by the National Coastguard Service, the Fiscal Control Police, the Border Police and the Rural and Civic Guards³⁹. Thus Costa Rica's treaty right of navigation affirmed in the Cleveland Award covers navigation by public vessels carrying police with service arms for purposes of re-supply of police posts and revenue personnel, and you can see the boats, formidable as they are, on the screen (tab 33 in the judges' folder).

29. That Costa Rican police may navigate with service arms is also consistent with the 1956 Agreement. That Agreement requires the Parties to “arrange for the supervision of their common border as a means of preventing the illegal entry of either weapons or armed groups from the

³⁶MCR, Ann. 15, Art. IV.

³⁷MCR, Ann. 21, p. 197.

³⁸MCR, Ann. 21, p. 220.

³⁹See MCR, App. B.

territory of one of the Parties into the territory of the other”⁴⁰. That task could only be performed by Costa Rica, either by navigating on the San Juan with service arms or through its police posts on the bank, which in turn implies navigation for the purposes of re-supply and relief of personnel. There is no other way those tasks can be performed.

(b) *This right is confirmed by subsequent practice*

30. The right for public vessels to navigate on the lower part of the San Juan with arms is consistent with subsequent practice. On the one hand, Costa Rica respected Cleveland’s prohibition on navigation with vessels of war. On the other hand, it continued to navigate with armed personnel on revenue cutters or other — mostly very much smaller — public vessels and Nicaragua respected that right.

31. The pleadings in the present case refer to the incident of the *Adela* in 1892. The journey of the *Adela* is explained in sketch-map 1, which is in your folder at tab 35.

The PRESIDENT: Professor Crawford, could you speak a little more slowly.

Mr. CRAWFORD: Yes, of course, Sir.

The Costa Rican steamer the *Adela* travelled with arms from the mouth of the San Carlos River along the San Juan to the point 3 miles below Castillo Viejo — which, you will recall, is the limit of the sector of the San Juan in which Costa Rica has rights of navigation. Its mission was to install guards at the fiscal post at Terrón Colorado, Los Chiles, which is within Costa Rican territory near the source of the San Juan in Lake Nicaragua. It stopped 3 miles below Castillo Viejo and left its arms and ammunition on the Costa Rican bank. Beyond that point, Costa Rica has no right of navigation at all. The Commander of the *Adela* then continued to the Nicaraguan post at Castillo Viejo to request permission to navigate with arms for the remainder of the journey. That permission was refused, and the Costa Rican Commander was obliged to transport the arms and ammunition by land⁴¹. But the point here is that the *Adela* travelled with arms and ammunition

⁴⁰MCR, Ann. 24, Art. II.

⁴¹MCR, Ann. 209.

on the lower San Juan, where Costa Rica has a treaty right of navigation, and did so without any specific grant of permission.

32. Later that year, authorization was given for Costa Rica to navigate with armed vessels in the upper part of the river. The Nicaraguan Customs Administrator in San Juan del Norte authorized the Costa Rican guard of El Colorado to pass beyond Castillo Viejo, for the purpose of any mission in Rio Frio, which is west of Castillo Viejo towards Lake Nicaragua⁴². Consistent with Costa Rica's treaty right of navigation, there was no need for authorisation on the lower part of the San Juan and no authorization was given in relation to that part.

33. Costa Rica has also submitted documentary evidence of the navigation of its revenue and fiscal guards on the river⁴³ supported by affidavits and correspondence. The evidence suggests that the revenue guard fulfilled the functions it was required to perform under the Decree of 1886, which included reconnoitring the river on a weekly basis⁴⁴. In more recent times, these functions were fulfilled by the Costa Rican police and the annual reports of these police indicate that it was usual for them to patrol the San Juan⁴⁵. There is also documentary evidence of the practice of supplying and relieving Costa Rican border posts on the river⁴⁶ until 1998, when Nicaragua prohibited all navigation by Costa Rican public vessels⁴⁷, in breach of the Treaty and the Cleveland Award.

34. Nicaragua argues that Costa Rica has inflated the number of journeys on the river since not every entry in the report expressly mentions the river⁴⁸. But it is physically impossible to travel from one specified place to another by boat without transiting the river: for example, from the border post at Sarapiquí to Remolinito, Tigra or La Cureña⁴⁹, or from the Sarapiquí to Delta Costa Rica⁵⁰, you have to go on the river (tab 34 in the judges' folder).

⁴²MCR, Ann. 210.

⁴³MCR, Anns. 211, 212, 213, 214, 215 and 216; RCR Anns. 31 to 38.

⁴⁴MCR, Ann. 206, Art. 5th.

⁴⁵RCR, Ann. 38.

⁴⁶MCR, Ann. 227.

⁴⁷MCR, Anns. 240, 131, 132.

⁴⁸RN, para. 5.78.

⁴⁹RCR, Ann. 36, p. 252; RCR, Ann. 37, p. 253.

⁵⁰MCR, Ann. 227, p. 934.

35. Costa Rica's practice of navigating with arms in this case demonstrates that there is a necessity for such navigation. Indeed, the police post at La Cureña had to be closed due to a lack of alternative access, and other posts on the river are operating at a lower level of efficiency⁵¹. But Costa Rica's rights are perpetual and unconditional; they are not dependent on the existence of a need.

36. To its Rejoinder, Nicaragua attached affidavits of officers of its army and other individuals, including one who was a member of two successive revolutionary movements — for him the revolution was indeed permanent⁵²! Five of these affidavits are from commanders who were responsible for security on the river between 1979 and 2006⁵³. Nicaragua claims that this supports its argument that Costa Rica “routinely requested and obtained prior authorization from Nicaraguan authorities before sending its vessels on missions to supply the Costa Rican border posts”⁵⁴. No documentary evidence supports any of these affidavits. My colleague, Sergio Ugalde, has discussed the affidavit of Mr. Walter Navarro Romero⁵⁵, which the Court kindly allowed us to produce in rebuttal. Mr. Navarro emphatically denies that he or his predecessors requested permission to navigate on the San Juan⁵⁶.

37. Indeed, one of Nicaragua's own affidavits confirms that there was a practice of the Costa Rican civil guard vessels navigating on the river in the 1960s and 1970s⁵⁷.

38. In addition, the Cuadra-Lizano Joint Communiqué suggests that the *status quo ante* did not involve a requirement of authorization, as distinct from giving notice.

39. Costa Rica's position has been consistent — before 1998, Costa Rican public vessels would notify Nicaraguan authorities of their navigation but would not obtain prior authorization because they were exercising an existing right. This is expressly stated in the note of the

⁵¹RCR, para. 3.94.

⁵²RN, Ann. 68 (Carrión affidavit); RN, Ann. 69 (Centeno affidavit); RN, Ann. 73 (Membreño affidavit); RN, Ann. 72 (Largaespada affidavit); RN, Ann. 78 (Talavera affidavit); RN, Ann. 77 (Sánchez affidavit), Ann. 70 (García affidavit); and RN, Ann. 75 (Pastora affidavit).

⁵³RN, Ann. 69 (Centeno); RN, Ann. 78 (Talavera); RN, Ann. 73 (Membreño); RN, Ann. 72 (Largaespada); and RN, Ann. 77 (Sánchez).

⁵⁴RN, para. 5.80.

⁵⁵Ann. IV to letter filed 27 Nov. 2008.

⁵⁶Ann. IV to letter filed 27 Nov. 2008, para. 4.

⁵⁷RN, Ann. 65, p. 404, para. 6.

Costa Rican President of June 2000 to his Nicaraguan counterpart: he suggested that the system of notification which applied before 1998 be reinstated⁵⁸.

The PRESIDENT: Excuse me, the translator finds it very difficult to catch up with you.

Mr. CRAWFORD: I am sorry, I will go even slower, Sir.

40. Nicaragua has produced — again in its Rejoinder — what it calls a “contemporaneous aide-memoire” of a meeting held between delegates from the Costa Rican Minister of Public Security and the Nicaraguan army in July 2000⁵⁹. This aide-memoire is annexed to an affidavit of General Carrión of the Nicaraguan army⁶⁰. There is no indication that it was approved or even seen by anyone from the Costa Rican side. The aide-memoire suggests that Colonel Alvarado, a member of the delegation from the Ministry of Public Security of Costa Rica, stated that the practice prior to 1998 was a system of authorization⁶¹. This suggestion is not corroborated, not even in the affidavit of Major Molina⁶², said to have been the author of the aide-memoire. In the circumstances it should be given no weight.

41. In summary, Costa Rica has provided the Court with substantial documentary evidence, corroborated by affidavit evidence, supporting its claim of a consistent practice of navigating on the San Juan in exercise of its right of navigation for public vessels with service arms, on the basis of prior notification but without any requirement of authorization.

Costa Rican public vessels have a right to navigate on the San Juan which corresponds to its obligations to safeguard (*guarda*) the river and to contribute to its defence, as well as defence of the common bays pursuant to Article IV of the 1858 Treaty

42. I turn to my third point, which is that Costa Rica has a right of navigation corresponding to its obligations under Article IV of the Treaty concerning defence of the common bays, safeguarding the river and defence of the river in case of aggression.

43. These obligations are clear from the text of Article IV itself, which reads:

⁵⁸MCR, Ann. 64.

⁵⁹RN, Ann. 68.

⁶⁰RN, Ann. 68, p. 421, para. 11.

⁶¹RN, Ann. 68, aide-memoire, p. 423, para. 2.

⁶²RN, Ann. 74.

“The Bay of San Juan del Norte, as well as the Salinas Bay, shall be common to both Republics, and therefore, both the advantages of the use and the obligation to contribute to their defence shall also be common. Costa Rica shall be bound, as far as the portion of the banks of the San Juan river which correspond to it is concerned, to contribute to its custody in the same way as the two Republics shall contribute to the defence of the river in case of external aggression; and this they shall do with all the efficiency within their reach.”⁶³

44. The Central American Court of Justice, in its 1916 judgment, recalled the right and obligation of Costa Rica under Article IV in the following terms:

“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’.”⁶⁴

45. The first two obligations expressed in Article IV are permanent and continuing: they are to contribute to the defence of the common bays and to contribute to the custody of the river.

46. Safeguarding the river requires navigation. In the twentieth century, this obligation was understood as taking action to prevent trafficking and smuggling, and to counter threats to security such as the passage of insurgents or of weapons from one country to the other. Safeguarding the river was particularly important in the context of the tensions between the two States during 1948 and 1955. This led to the Treaty of Amity of 1949⁶⁵ and the further Agreement of 1956⁶⁶.

47. Nicaragua argues that Article IV should to be construed as requiring Costa Rica to discharge its obligations to safeguard and defend the river “only from her own banks”⁶⁷. This is not the language used in Article IV, which requires Costa Rica to “contribute to [the river’s] custody . . . with all the efficiency within [its] reach”⁶⁸. Rives suggested that this phrase implied that Costa Rica’s obligation could be fulfilled by “defence of the [river] by land”⁶⁹. But again,

⁶³MCR, Ann. 7 (b).

⁶⁴MCR, Ann. 21, p. 222.

⁶⁵MCR, Ann. 23.

⁶⁶MCR, Ann. 24.

⁶⁷RN, para. 5.10.

⁶⁸MCR, Ann. 7 (b).

⁶⁹MCR, Ann. 71, p. 251.

President Cleveland took a broader view, and no such limitation was contained in the Cleveland Award. The words “within their reach” could equally mean “as far as possible”, a reference to available resources and not physical location. Even if a physical limitation was to be implied into Article IV, given that much of the Costa Rican bank is inaccessible except via the river, Costa Rica’s obligation to safeguard — whether from the bank or the river — necessarily entails a right to navigate on the river.

Conclusions

48. Mr. President, Members of the Court, Costa Rica has rights of navigation for public vessels which I have categorized under three heads. First, its public vessels enjoy the right of navigation recognized in Article VI. Second, its public vessels have a right of navigation with arms as recognized in the Cleveland Award, for navigation which is related to and connected with the enjoyment of the “purposes of commerce”; *or* navigation which may be necessary for the protection of its enjoyment of that right of navigation. This right is consistent with the practice of both States. Third, its public vessels have a right to navigate on the San Juan which corresponds and is the correlative of the obligations under Article IV of the Treaty, to safeguard and defend the river; these are affirmed by the 1956 Agreement, by which both States committed to common surveillance of the border for specified purposes.

Mr. President, I would ask you now to call upon Professor Caflisch, who will explain the unreasonableness of Nicaragua’s purported regulation of Costa Rican navigation on the river.

The PRESIDENT: Thank you, Professor Crawford, for your statement. I now invite Professor Caflisch to take the floor.

Mr. CAFLISCH:

UNREASONABLENESS AND UNLAWFULNESS OF NICARAGUA’S REGULATIONS APPLIED TO NAVIGATION ON THE SAN JUAN RIVER

1. Nicaragua’s right to regulate the river and its uses: the problem

1. Mr. President, Members of the Court, my intervention today will deal with the unreasonableness and unlawfulness of Nicaragua’s regulations and measures related to the

navigation on the San Juan River by Costa Rican vessels. I shall first address the general issue of Nicaragua's right to regulate the river and its uses. The present status of the regulations applied and the measures taken by Nicaragua will be examined next. And finally, a few general conclusions will be drawn.

2. Mr. President, Members of the Court, as has been explained already in the present hearings, under the 1858 Treaty, the 1888 Cleveland Award and the 1916 judgment, the San Juan River is governed by a relatively complex régime. One element of that régime is the sovereignty exercised by Nicaragua over the waters and bed of the river. Another element is the perpetual right of free navigation enjoyed by Costa Rica. It has been shown already that there is no subordination between the two; in particular, the sovereignty of Nicaragua cannot be used to rob Costa Rica's right of navigation of all or part of its substance.

3. Regarding navigation on international watercourses, several systems are in use in Latin America. A first system is that of the "special concession" ("concesión especial"): the State exercising sovereignty over part of an international watercourse may, on the basis of its domestic law, allow the vessels of the other riparian or even non-riparian States to sail ships on that watercourse. Such permission, having been granted by *domestic law*, can be withdrawn or modified unilaterally according to the terms of that law. In that case, navigation by ships of the other States concerned amounts to a *privilege* rather than a right on the international level and, in that sense, is subordinated to the riparian State's sovereignty.

4. Under a second system, a State exercises full sovereignty over the waters of the river by virtue of a treaty but *subsequently*, again by treaty, grants a right of navigation to another State. This is, essentially, how Nicaragua views the present situation, this view leading her to assert that her sovereignty has precedence over Costa Rica's right of navigation when it comes to regulating the use of the San Juan River.

5. Finally, in a third system, one State exercises sovereignty over the waters of the river on the basis of *treaty provisions*, while another State, on the basis of a right deriving from that same treaty, is entitled to navigate on the river. Here there is a *treaty right* of navigation benefiting that other State which is on *an equal footing* with the sovereignty exercised by the first State. That

right cannot be modified or terminated unless otherwise provided in the treaty itself or agreed on by the States concerned, neither of which is the case here.

6. It is evident that the situation of the San Juan falls into the third rather than the second category: Nicaragua's sovereignty over the river and Costa Rica's perpetual right of free navigation flow from a single conventional source, the 1858 Treaty. This being so, the two elements are placed on an equal footing, and there is no presumption of supremacy of the one over the other.

7. Mr. President, Members of the Court, it is not the Court's task to engage in theoretical exercises such as elaborating a general definition of the attributions of Nicaragua as the territorial sovereign over the San Juan River. The Court's task is very specific: it has to determine what Nicaragua is and is not entitled to do if Costa Rica's right of navigation is to remain meaningful and effective instead of becoming an empty shell. Such a pragmatic approach could move along the following lines:

- *First*, Nicaragua enjoys territorial sovereignty over the waters and the bed of the San Juan River. The exercise of that sovereignty is, however, subject to Costa Rica's rights under the 1858 Treaty, as interpreted by the 1888 Cleveland Award and the 1916 judgment of the Central American Court of Justice.
- *Second*, the right to sail Costa Rican ships on part of the San Juan is perpetual and unconditional. No admission or permission by Nicaragua is required, and no measures substantially diminishing that right, or turning it into a mere privilege, can be tolerated.
- *Third*, Costa Rica's perpetual right of free navigation is absolute in that it exists for Costa Rica independently of the rights of others. It would exist even if Nicaragua, the territorial sovereign, were to refuse it to its own boats.
- *Fourth*, Costa Rica's right to sail ships on the San Juan River, while minimized by Nicaragua, was, is and will be of vital importance for both international and domestic purposes. Together with Costa Rica's main internal waterways — the San Carlos, the Sarapiquí and the Colorado —, it forms a communication network between points in inland Costa Rica, between Costa Rica and Nicaragua, and between Costa Rica and the sea via the San Juan and the Colorado. Accordingly, much more than movement on the main river to gain access to and

from the sea is at stake: “comercio” on an inland water system in a country parts of which may be difficult of access, especially during the rainy season. This is one of the reasons why the right secured in 1858 is of such central importance to Costa Rica.

- *Fifthly*, it is basically up to Costa Rica to regulate and control the navigation of her ships on the San Juan, as it is up to Nicaragua to do so for her own vessels. This is one of the reasons why the presence of Costa Rican public vessels on the river is appropriate and necessary, as was indeed recognized by President Cleveland when, in his Award, he used the words “as may be related to and connected with her enjoyment of ‘the purposes of commerce’ accorded to her in said article [Article VI] or as may be necessary to the protection of said enjoyment”⁷⁰.
- *Sixth and finally*, the treaty régime of 1858 contains a series of other provisions showing that, in more ways than one, managing the San Juan River is a business transcending territorial barriers. That business should be transacted on the basis of co-operation between riparians; there is little point in constant references to the “sister republic” as long as there is friction instead of co-operation.

8. Mr. President, Members of the Court, the time has now come to turn to specifics, i.e., the question of whether the regulations in fact enacted and the measures in fact taken by Nicaragua may be regarded as reasonable and lawful when confronted with Costa Rica’s right of navigation as recognized by the Cañas-Jerez Treaty of 1858.

2. Nicaragua’s right to regulate the river and its uses: the present status

(a) Introduction

9. Mr. President, Members of the Court, let me, then, turn to the present status of the regulations applied and the measures taken by the defendant State in respect of navigation on the San Juan River. In her Rejoinder Nicaragua discusses at length the “reasonableness” of her navigation measures and regulations from the angles of: environmental protection and illegal logging; of prevention and control of criminal activities; of safety of navigation; and of border protection and security⁷¹.

⁷⁰MCR, Vol. 2, Ann. 16, p. 98.

⁷¹RN, Vol. I, 4.34-4.98.

10. Before examining these regulations and measures one by one, one will note with interest the central place suddenly attributed to environmental issues in Nicaragua's arguments, especially as these issues were certainly not, in 1858, or even in 1888 and 1916, essential factors of the river's legal régime and as Nicaragua, when examining the general issue of interpreting the 1858 Treaty, resists attempts at doing so in an evolutionary manner⁷².

11. One is delighted to note Nicaragua's satisfaction with her environmental performance in the San Juan River area, as one is gratified to learn how well the poison dart frog is faring on the northern shore of the river as well. One is less happy, however, with the avalanche of criticism heaped by Nicaragua on its neighbour: Costa Rica is alleged to have destroyed the environment on her side of the San Juan area by unbridled attacks on nature and natural resources and to have allowed human settlement on parts of her shore.

12. Mr. President, Members of the Court, I am aware of no rule of international law — treaty or other — precluding the settlement of the river's banks; and settlements can be found on the Nicaraguan side as well. That part of the river's Costa Rican shore has been populated — sparsely populated — is certainly no ecological crime, nor a violation of an international obligation, but — perhaps — a harbinger of economic progress. Furthermore, as a photograph reprinted in the Nicaraguan Rejoinder⁷³ fails to show, the Costa Rican shoreline is not cleared everywhere, nor are the Nicaraguan banks wooded throughout.

13. In addition, it is simply not true that Costa Rica has done little or nothing to protect the environment in the San Juan River area. She has, in fact, established four protected areas, on and around the right bank of the San Juan River. These areas, shown in the projection, are the corridor of the river (1), the Caño Negro (2), the Laguna Maquenque (3) and the Barra del Colorado area (4). On its banks of the river, Costa Rica applies policies for the protection of the environment and for preserving biodiversity.

14. Finally, it can certainly not be said that Nicaragua herself is ecologically pristine and blameless, witness the pollution of Lake Nicaragua or the sewer contamination in the town of

⁷²*Ibid.*, 2.56-2.57.

⁷³RN, Vol. I, p. 193.

San Carlos⁷⁴. The truth of the matter would seem to be that, to justify its campaign to reduce and erode the exercise of Costa Rica's perpetual right of free navigation under Article VI of the 1858 Treaty, the defendant State mainly relies on ecological arguments for lack of anything better.

15. Another preliminary point to be made is that while in certain areas where Costa Rica finds her right of navigation to be breached, this has been the consequence of the extension of the scope of *general regulations*, such as those on tourist cards and visas, and to the transit of Costa Rican ships on the San Juan River. On other issues, such as the imposition of timetables and of the prohibition of travelling on the San Juan River by night, there seem to be *specific regulations or instructions* emanating from the Nicaraguan army and setting the duty to hoist the Nicaraguan flag when transiting the San Juan River as well as a prohibition to travel by night⁷⁵. There are finally measures for which there seem to be no legal basis at all, such as the requirement to stop at every Nicaraguan border post in the course of transit, except, of course, for the extension to the river of the general rules on visas and tourist cards. This shows that, when taking measures restricting Costa Rican navigation, Nicaragua paid little attention even to her own laws, the main objective of her actions being to hamper Costa Rican navigation on the San Juan.

16. I shall now turn to some of the regulations applied or measures enacted by Nicaragua to determine whether they are compatible with Costa Rica's right of navigation, that is: *first*, the obligation to stop and register, including immigration control and control of visa requirements; *second*, the obtaining of a departure clearance certificate; *third*, the prohibition to travel at night; and *fourth*, the obligation to carry the Nicaraguan flag.

The obligation to stop and register

17. Let me then turn to the obligation to stop and register. According to an affidavit presented by Nicaragua⁷⁶, the obligation to stop and register originated in the 1960s, Costa Rica having enacted similar rules on her domestic rivers connected with the San Juan⁷⁷. It imposes on

⁷⁴See "Contaminación al lago fue anunciada", *El Nuevo Diario* (Managua), 31 Dec. 2005, <http://impreso.elnuevodiario.com.ni/2005/12/31/nacionales/92/6>.

⁷⁵Points 6 and 7 of the Nicaraguan army's "Action Plan for Departure Clearance and Certificates in the San Juan river", RN, Vol. II, Ann. 48.

⁷⁶RN, Vol. II, Ann. 65.

⁷⁷*Ibid.*, Vol. I, 4.71.

Costa Rican ships the duty, upon entering the San Juan River, to stop and register at the first Nicaraguan border post. That duty is, according to the defendant State, “very minimal” and “non-intrusive”⁷⁸ and makes it possible to collect the names of passengers and to identify the cargo at the beginning and the end of every journey. In addition, stopping at every Nicaraguan border post is required unless the post is satisfied with a mere notice of passage. Regarding the protection of its environment, this will allow Nicaragua, so she says, to make sure, at the end of the day, that all those who were on the river have departed from it. The duty to stop and register applies, across the board, to all navigators, Costa Ricans and Nicaraguans alike, even Costa Rican children being carried to school or back home, every time they pass, the reason given being that they could fall off the boat⁷⁹. Another objective to be achieved by the duty to stop and register is, according to Nicaragua⁸⁰, the prevention of the illegal occupation of land by persons coming from the Costa Rican side. It is further contended, on the basis of an affidavit⁸¹, that the registration of departure at the end of a journey will help in making sure that no one has unlawfully entered the Indio Maíz Reserve.

18. According to Nicaragua, stopping and registering makes it possible to control immigration, to issue tourist cards and to ascertain the fulfillment of visa requirements⁸². These requirements are allegedly waived for “local” residents and boatmen, except for the duty to register. The waiver does not, however, appear to be systematic and seems to depend on the discretion of the official in charge. Finally, much is being made by the other Party of the fact that if Costa Ricans have to obtain a Nicaraguan consular visa, this is based on reciprocity: Costa Rica requires visas from Nicaraguans entering Costa Rican territory⁸³.

19. Mr. President, Members of the Court, there are several things wrong with these arguments. One really fails to see what this type of obligation brings in terms of environmental protection or, at least, what is achieved by them that could not be accomplished by other, less

⁷⁸*Ibid.*, 4.61.

⁷⁹*Ibid.*, 4.80.

⁸⁰*Ibid.*, 4.60.

⁸¹Largaespada affidavit, § 9, RN, Vol. II, Ann. 72.

⁸²RN, Vol. I, 4.87, 4.90.

⁸³*Ibid.*, 4.91.

radical measures. Thus, intentions of illegal entry and of unlawful occupation of the Indio Maíz Reserve are certainly not carved on the faces of those who stop and register and can only be thwarted *in situ*. Criminals do not turn up at Nicaraguan army posts prior to perpetrating crimes in that country. To control every child travelling to and from school on each and every day borders on obsession, and it is difficult to see how this could *prevent* accidents. Stopping as a device to control immigration and visa requirements is based on the misapprehension that individuals travelling on the San Juan on board Costa Rican vessels enter Nicaraguan territory in the same way as a tourist does when landing at Managua airport. This is simply not true: such individuals benefit from Costa Rica's right of navigation under Article VI of the 1858 Treaty; and most of them are only transiting without entering Nicaragua with the intention to stay. The position may be different where they subsequently moor on the Nicaraguan side and proceed on land. Another misapprehension is the idea that if Costa Rica herself requires visas and collects fees from tourists entering her territory, Nicaragua may do the same in respect of individuals sailing on the San Juan River on ships flying the Costa Rican flag. The defendant State seems to forget that it enjoys no perpetual treaty right of navigation on Costa Rica's national waterways, whereas Costa Rica does have such a right on the San Juan River. Finally, the measures in question are most cumbersome and have the practical effect of rendering near impossible the exercise of Costa Rica's conventionally granted rights of navigation.

20. The inevitable conclusion is that the requirements of stopping and registering do not have much of a preventive effect. Their main virtue consists in making navigation more difficult. They cannot, therefore, be regarded as either "reasonable" or lawful. By contrast, patrolling the river more often would be reasonable, lawful and effective.

Requirement of departure clearance certificates

21. I now come, Mr. President, Members of the Court to the requirement of departure clearance certificates. According to the defendant State, departure clearance certificates, which I shall refer to as DCCs, are required from all those planning to sail on the San Juan River. The issuance of such documents is said to be contingent on an inspection conducted, *before every journey*, by a Nicaraguan border post, that inspection seeming to be intended to disclose the

identity of the passengers and the nature of the cargo carried. Further objectives are, according to Nicaragua: the enforcement of customs regulations, the prevention of the carrying of illegal cargo such as drugs and other items determined *ad hoc* by the Nicaraguan authorities, of illicit traffic of persons, of navigation by unseaworthy boats, of unlawful discharge of pollutants, of the unlawful removal of animals and plants, of crimes and threats against border security, and of illegal entering of the Indio Maíz Reserve; and, for tourist boats, the verification that these dangerous individuals do not carry weapons, explosives or other flammable substances⁸⁴.

22. According to Nicaragua, the requirement reported here was accepted by Costa Rica herself at a binational meeting held in 1997⁸⁵, where it had allegedly been agreed that all ships travelling on the San Juan River should obtain DCCs and subsequently report to *all* Nicaraguan army posts in the course of their journey⁸⁶. But the Final Minutes of the 1997 binational meeting only refer to drug trafficking. The delegation of Costa Rica to the meeting had stressed, *in that particular matter*, the need for greater presence of the authorities, and Nicaragua had agreed to make an effort to establish posts at determined sites to intensify the fight against this particular crime. “With respect to the movement of vessels,” the Minutes continue, “it was considered necessary that they navigate only if duly registered by the posts that issue corresponding navigation certificates; in this case, the posts at San Juan del Norte, San Carlos and Sarapiquí”. This passage does not refer to the practice of DCCs as conceived of today by Nicaragua, but exclusively to a practice to fight drug traffic; and it only means that DCCs should be obtained by vessels *from their respective countries*.

23. In reality, the objective of these certificates is not one of promoting safety but one of levying a tax. One wonders, moreover, considering Costa Rica’s right of navigation secured by the 1858 Treaty, whether Nicaragua could not and should not simply accept and recognize DCCs delivered by Costa Rica to Costa Rican boats. What is more, a fee of US\$10 is currently being charged for every certificate and every journey. This is unacceptable on two grounds: first, such a fee is not authorized by the 1858 Treaty, the Cleveland Award, or anything else; second, it

⁸⁴Sanchez affidavit, § 9, RN., Vol. II, Ann. 77.

⁸⁵RN, Vol. I, 4.75.

⁸⁶RN, Vol. II, Ann. 4.

amounts to charging a tax for the exercise of a conventionally guaranteed right of navigation. Costa Rica's right of navigation is of an absolute character, and the fact that Nicaraguans also have to obtain such a certificate⁸⁷ is irrelevant. Nicaragua further argues that Costa Rica too requires DCCs for the use of her internal watercourses; certificates which, incidentally, are delivered free of cost. This is both untrue and immaterial: on such waterways navigation is possible, not on the basis of an internationally guaranteed right of navigation, as is the case for Costa Rica regarding the San Juan River, but at the discretion of the Costa Rican authorities; and the situation is, of course, exactly the same for Costa Rican boats desirous of using Nicaragua's *internal* waterways. The San Juan River is, not, however, an internal waterway of Nicaragua but an international river on which Costa Rican ships enjoy the right of free navigation.

24. In view of these arguments, the requirement of Departure Clearance Certificates in their present form is "unreasonable" and unlawful, as it purports to transform a conventionally guaranteed right of free navigation into one the exercise of which is entirely placed into Nicaragua's hands.

(d) *Prohibition of travelling by night*

25. Now, if you will, a few words about the prohibition of travelling by night. Nicaragua unilaterally prohibits navigation on the San Juan by night and explains this measure at some length⁸⁸. Poaching is singled out as being the greatest danger of nocturnal navigation⁸⁹. Also, Colonel Sánchez asserts, navigation at night is prohibited "since navigation after dark is extremely dangerous and unwise". Brigadier General Membreño adds that the river "is treacherous to navigate, since there are no lights, and fallen logs and sand bars, invisible in the dark, are prevalent, as are crocodiles".

26. The cloak of darkness also favours unsavoury activities such as hunting, poaching, fishing and environmental depredation, as well as illegal occupation. This is why Nicaragua has pronounced a unilateral ban on navigation by night, an additional justification *appearing* to be that

⁸⁷García affidavit, § 4, *ibid.*, Ann. 70; RN., Vol. I, 4.73.

⁸⁸RN, Vol. I, 4.65-4.66.

⁸⁹Sánchez affidavit, § 6, RN., Vol. II, Ann. 77; Membreño affidavit, § 9, *ibid.*, Ann. 73.

the prohibition applies to Nicaraguans and Costa Ricans alike. These reasons raise a long series of objections:

- (i) the 1858 Treaty and the related texts make no mention of the possibility of any such limitation. It is true that Costa Rica herself, in the presentation made by her to President Cleveland in 1887, recognized that navigation on the San Juan River “encounters many obstacles, not only on account of its shallowness at certain places, but also owing to its rapids and other dangers”⁹⁰. This statement, however, relates to navigation on the river generally and not to travelling by night; moreover, the Cleveland Award is silent on the issue.
- (ii) In fact, shallowness and rapids characterize the upper part of the San Juan. Further down, particularly after having received the waters of the San Carlos, the San Juan becomes a large waterway allowing for navigation around the clock.
- (iii) As conceded by Nicaragua herself, the preventive effects of the measure are not particularly encouraging, and most of the events the prohibition is intended to avert could also be prevented during the day. Intrusions into reserves, for instance, could be handled most effectively by arresting and expelling the individuals concerned by daylight.
- (iv) Another argument made by the defendant State is that the prohibition of navigation by night decreed by it applies across the board and includes its own nationals. In this connection too, it may be recalled that the perpetual right of free navigation, stipulated in 1858, is of an absolute character, which means that Costa Rica’s right exists independently of whether Nicaraguans have such a right too. More importantly, the argument is misleading. A timetable entitled “Regional Lake Services”⁹¹ reveals that the National Port Enterprise of Nicaragua runs a service from Granada to San Carlos which leaves Granada at 2.00 p.m. on Mondays and Thursdays, takes 16 hours and returns to Granada on Tuesdays and Fridays at 2.00 p.m. It seems obvious that part of that service is operated by night, that is, after 5.00 p.m., on the San Juan River. Thus, some navigators

⁹⁰RN, Vol. II, Ann. 5, p. 33.

⁹¹To be found on the website of the Empresa Portuaria Nacional de Nicaragua, www.epn.com.ni.

seem more equal than others. And, while there are dangers for some, they do not appear to exist for others.

- (v) Lastly one should examine whether Nicaragua's unilateral measures, when confronted with the perpetual right of free navigation of Costa Rica, are reasonably proportional to the objective they seek to achieve. This raises the further question of whether that objective could not be met by other means. The answer will have to be in the affirmative: the objective could be reached by prescribing that boats travelling at night shall carry lights and that dangerous places should be marked by lights as well — this is a standard requirement in rivers. It would seem that the display of a minimum of co-operation between the two sides could readily produce a viable régime of navigation by night.

(e) *Duty to fly the Nicaraguan flag*

27. Now, the last type of measure, the duty to fly the Nicaraguan flag. According to the defendant State, “[t]he requirement to fly her flag during navigation on her waters, including the San Juan, is an attribute of Nicaragua’s sovereignty, and is a matter of international custom and practice”⁹².

28. Nicaragua alleges that that requirement is limited to larger foreign vessels having masts or turrets at the stern⁹³; she further contends that ships may also, in addition, show the Costa Rican flag. Flying the Nicaraguan flag is described as “a gesture of respect for the sovereignty of the host State”⁹⁴. Nicaragua “finds it disturbing that Costa Rica objects to this reasonable and non-burdensome requirement”⁹⁵. I find it disturbing, for my part, that Nicaragua tends to speak of “courtesy” when *rights* are at stake, such as Costa Rica’s rights of navigation; and that, conversely, she refers to “custom” wherever international practice shows that mere *courtesy* is involved, as when it comes to showing the flag of the State in whose waters a foreign vessel moves.

29. Under general *international law*, and in situations where there are conventionally guaranteed rights of navigation, there is unquestionably a rule to the effect that in foreign waters

⁹²RN, Vol. I, 4.93.

⁹³*Ibid.*, 4.94. See also RN, Vol. II, Ann. 48.

⁹⁴RN, Vol. I, 4.93.

⁹⁵*Ibid.*

ships must fly their *national* flag. The territorial State — Nicaragua in our case — certainly has an interest in being able to identify the foreign ships navigating in waters over which it exercises its sovereignty. That would appear to be the *legal* rule, and a sensible and useful one at that.

30. There may also be a practice, inspired by *international courtesy*, to show the flag of the country whose waters are being navigated in. This is a ceremonial element rather than an international obligation.

31. In addition, no legislation other than an “Action Plan” of its army⁹⁶ has been submitted by the defendant State to justify the requirement for foreign vessels to fly the flag of Nicaragua when navigating in Nicaraguan maritime waters, nor, *a fortiori*, a requirement to do so when sailing in waterways such as San Juan River.

(f) Conclusion

32. Mr. President, Members of the Court, my conclusion on the specific measures taken by the defendant State to regulate navigation on the San Juan River is that they are inconvenient, unreasonable and unlawful, since their combined effect has led to transforming the navigation régime established in 1858 into an obstacle course.

3. General conclusions

33. Mr. President, Members of the Court, the general conclusions which may be drawn from my intervention would seem to be the following.

- First, according to *Nicaragua*, the restrictions imposed by her on navigational activities on the San Juan River are “reasonable”. For *Costa Rica*, they are both unreasonable and unlawful.
- Second, it has been pointed out time and again that there is no hierarchy between Nicaragua’s sovereignty over the river and Costa Rica’s perpetual right of free navigation. That right is intended to be real and effective, and one that cannot be regulated out of existence by Nicaragua. It is, furthermore, of an absolute character and will endure even if it ceases to exist for Nicaraguans themselves — I hope that will never be the case, of course. It cannot, in other words, be made to disappear by refusing rights of navigation to Nicaragua’s own citizens.

⁹⁶RN, Vol. II, Ann. 48.

- Third, the measures taken and the regulations enacted by Nicaragua, invoking her sovereignty, might be unobjectionable for an exclusively internal waterway. Thus, they would not be contrary to international law, for example, if they were enacted by Nicaragua, in Nicaraguan internal waterways, for Costa Rican nationals and/or third-State users. This is due to the fact that such individuals do not benefit from an internationally guaranteed right of navigation in those waters.
- Fourth, the measures and regulations in question are unreasonable and unlawful in that they turn Costa Rica's conventionally guaranteed perpetual right of free navigation into a mere privilege which Nicaragua can, at any moment, limit or take away by unilateral action.
- Fifthly and finally, for Costa Rica, the situation created by the gradual erosion of the exercise of her right is not only unlawful and unreasonable, it is also highly cumbersome and impractical because, instead of facilitating relations between two neighbouring States, it makes them more difficult. This is regrettable.

Mr. President, Members of the Court, I thank you for your attention and your patience and should like you to invite Professor Kohen to take the floor.

The PRESIDENT: Thank you, Professor Caflisch, for your statement. I now invite Professor Kohen to take the floor.

M. KOHEN :

**LES VIOLATIONS NICARAGUAYENNES DU DROIT PERPÉTUEL DE LIBRE NAVIGATION
AUX FINS DU COMMERCE**

1. Monsieur le président, Messieurs les juges, l'*objet* de ma première plaidoirie ce matin est la *violation* par le Nicaragua du droit perpétuel de libre navigation du Costa Rica aux fins du commerce.

2. Ma tâche se voit facilitée, vu que le Nicaragua ne nie pas les faits qui constituent autant de violations du droit en question. L'Etat défendeur se contente d'avancer comme justification principale l'interprétation de l'article VI que nous avons repoussée hier.

3. En réalité, le Nicaragua ne respecte même pas la navigation costa-ricienne «avec des articles de commerce de marchandises», pour utiliser sa terminologie en lui imposant des obstacles divers et variés allant jusqu'à la saisie des bateaux ou des biens qu'ils contiennent⁹⁷.

4. Une deuxième et tardive justification avancée par la duplique, à savoir son droit d'imposer une réglementation jugée raisonnable, vient d'être réfutée par Lucius Caflisch il y a quelques instants. Arrivent enfin en troisième lieu les prétendues justifications basées sur des considérations de sécurité et de protection de l'environnement.

5. Dans un premier temps, j'aborderai les violations nicaraguayennes. J'examinerai dans un second temps les prétendues justifications exposées en dernier lieu par le Nicaragua.

A. Les violations commises par le Nicaragua sont amplement prouvées

6. Les violations actuelles du droit costa-ricien de libre navigation aux fins du commerce trouvent leur racine à l'époque de la guerre civile qui sévissait au Nicaragua. L'armée sandiniste a commencé à imposer des restrictions à la navigation à ce moment-là.

7. En 1982, cette armée interdit la navigation à la compagnie touristique costa-ricienne *Swiss Travel Services*⁹⁸. Face aux protestations du Costa Rica⁹⁹, le Nicaragua a reconnu que les mesures de ses autorités locales n'étaient pas conformes au traité et qu'elles seraient abrogées¹⁰⁰.

8. Au cours de la même période le Nicaragua a commencé à exiger des bateaux costa-riciens de s'arrêter à leurs postes frontière sur la rive nicaraguayenne et de payer un «droit d'appareillage». Suite à des protestations costa-riciennes¹⁰¹, cette pratique fut abandonnée en 1983¹⁰², pour être reprise en 2001, comme je l'expliquerai dans un instant.

⁹⁷ Mémoire du Costa Rica (MCR), par. 5.142-5.143 ; Réplique du Costa Rica (RCR), par. 4.56-4.58 ; RCR, vol. 2, annexe 50.

⁹⁸ Lettres adressées par la direction de *Swiss Travel Services* au ministère de la sécurité publique et au ministère des affaires étrangères du Costa Rica, MCR, vol. 6, annexes 223, 224 et 225.

⁹⁹ Notes adressées le 8 juin 1982, le 16 juillet 1982 et le 20 juillet 1982 par le ministre costa-ricien des affaires étrangères, Fernando Volio Jiménez, au chargé d'affaires du Nicaragua au Costa Rica, Oscar Ramón Téllez, MCR, vol. 3, annexes 41, 42, 43.

¹⁰⁰ Note adressée le 2 août 1982 par le chargé d'affaires du Nicaragua au Costa Rica, Oscar Ramón Téllez, au ministre costa-ricien des affaires étrangères, Fernando Volio Jiménez, MCR, vol. 3, annexe 44 (dossier de plaidoiries, onglet n° 38).

¹⁰¹ Voir la note adressée le 16 juillet 1982 par le ministre costa-ricien des affaires étrangères, Fernando Volio Jiménez, au chargé d'affaires du Nicaragua au Costa Rica, Oscar Ramón Téllez, MCR, vol. 3, annexe 42.

¹⁰² MCR, par. 3.13-3.14.

9. Il est intéressant de comparer la position du Gouvernement nicaraguayen en 1982 et celle qu'il adopte aujourd'hui. Le ministre nicaraguayen des affaires étrangères de l'époque expliquait la situation de la manière suivante :

«les Costariciens ont un droit de navigation sur le San Juan conformément au traité Cañas-Jerez. Toutefois, du fait de la présence de bandes contre-révolutionnaires dans la zone, nous avons demandé aux Costa-riens de nous notifier quand ils vont par le San Juan».

Et il a ajouté :

«ce n'est pas que nous voulons ignorer leur droit de naviguer le fleuve, mais simplement nous voulons qu'ils nous le notifient, comme le font les Honduriens quand ils naviguent le fleuve Coco, afin d'éviter des incidents comme celui de mardi dernier»¹⁰³.

10. Lors de ce mardi, dont fait mention le ministre, l'armée sandiniste avait ouvert le feu sur un navire costa-ricien transportant du personnel du ministère de la santé. La notification — *pas la permission* — était requise à l'époque par le Nicaragua, se fondant sur la situation exceptionnelle générée par le conflit armé interne.

11. La guerre civile nicaraguayenne est terminée depuis longtemps, fort heureusement. Mais les restrictions ont fait leur réapparition en 1994. Cette fois-ci elles ne se limitent pas à l'exigence de notification.

12. Ces restrictions sont toutes incompatibles avec le droit perpétuel de libre navigation du Costa Rica. Je vais maintenant vous les exposer très brièvement.

a) Les restrictions incompatibles avec le droit de *libre navigation*

i) Les cartes touristiques

13. Depuis mars 1994, un montant de 5 dollars américains est perçu sous la forme de «carte touristique» de chaque passager naviguant sur un bateau costa-ricien¹⁰⁴. Suite aux protestations du

¹⁰³ Traduction en anglais: «Costa Ricans have a right of navigation on the San Juan according to the Cañas-Jerez Treaty. But because in that area there are counterrevolutionary bands, we have asked the Costa Ricans to notify when they are going to cross the San Juan». He added that: «it is not that we want to ignore their right to navigate the river, but simply that they notify us, as the Hondurans do when they navigate on the Coco River, so as to avoid accidents like the one of the previous Tuesday.» (MCR, par. 5.10 ; *La Nación*, San José, 8 novembre 1980, MCR, vol. 5, annexe 111). (Dossier de plaidoiries, onglet n° 43.)

¹⁰⁴ MCR, par. 5.107-5.108 ; RCR, par. 4.09-4.11.

Costa Rica¹⁰⁵, le Nicaragua a cessé d'exiger cette carte des ressortissants costa-riens, mais a continué à l'imposer aux ressortissants des Etats tiers¹⁰⁶.

ii) Les «droits d'appareillage»

14. A partir de mars 2001, un paiement de 25 dollars américains est exigé par bateau costa-ricien à titre de «droit d'appareillage». Malgré les protestations répétées du Costa Rica¹⁰⁷, ces mesures continuent à être appliquées.

15. Le montant de cette taxe s'élève actuellement à 10 dollars américains par bateau pour chaque course simple¹⁰⁸. En fait, il varie au gré de circonstances que le Nicaragua n'a pas jugées utile d'expliquer. Vous voyez à l'écran deux reçus datés du même jour et correspondant au même bateau, l'un de 5 dollars pour la course aller *Sarapiqui-San Juan del Norte* et l'autre de 10 dollars pour le retour *San Juan del Norte-Sarapiqui*.

16. Cette taxe est appelée «zarpe internacional», c'est-à-dire «appareillage international», et elle est perçue des navires costa-riens, quelle que soit leur destination¹⁰⁹. Appareillage «international» : difficile alors pour le Nicaragua d'affirmer — comme il le fait¹¹⁰ — que cette mesure s'applique également aux bateaux nicaraguayens navigant le San Juan.

iii) La taxe d'immigration

17. Depuis mars 2001, 5 dollars sont exigés par personne comme «taxe d'immigration» pour l'entrée et la sortie du territoire nicaraguayen. En 2002, la «taxe d'immigration» a été augmentée à deux reprises. Depuis lors, tous les passagers des navires costa-riens navigant sur le San Juan sont obligés de payer 9 dollars, même lorsqu'ils se déplacent entre deux points du territoire du

¹⁰⁵ Note adressée le 15 mars 1994 par le ministre des affaires étrangères du Costa Rica, Bernd Niehaus Quesada à l'Ambassadeur du Nicaragua au Costa Rica, Alfonso Robelo, contre-mémoire du Nicaragua (CMN), vol. II, annexe 41 ; Note adressée le 9 mai 2001 par le ministre des affaires étrangères du Costa Rica, Roberto Rojas López au ministre des affaires étrangères du Nicaragua, Francisco Xavier Aguirre Sacasa, MCR, vol. 3, annexe 71. *La República*, San José, 5 mars 1994, MCR, vol. 5, annexe 123.

¹⁰⁶ *La Nación*, San José, 13 avril 1994, MCR, vol. 5, annexe 129.

¹⁰⁷ Note datée 18 avril 2001 du ministre adjoint des affaires étrangères du Costa Rica, Elayne Whyte au ministre des affaires étrangères du Nicaragua, Francisco Xavier Aguirre Sacasa, MCR, vol. 3, annexe 70, note datée 9 mai 2001 du ministre des affaires étrangères du Costa Rica, Roberto Rojas López, au ministre des affaires étrangères du Nicaragua, Francisco Xavier Aguirre Sacasa, MCR, vol. 3, annexe 71.

¹⁰⁸ RCR, par. 4.07.

¹⁰⁹ Dossier de plaidoiries, onglet n° 41.

¹¹⁰ Duplique du Nicaragua (DN), par. 4.25.

Costa Rica, 4 dollars à titre de «despacho migratorio», des opérations de migration, d'entrée et de sortie du Nicaragua¹¹¹, et 5 dollars perçus à titre de — je lis encore en espagnol — «permiso de tránsito en los punto[s] fronterizo[s]», «permis de transit par des points frontaliers»¹¹². En clair, non seulement le Nicaragua impose illicitement à tout navire costa-ricien l'obligation de s'arrêter à chaque poste frontalier nicaraguayen, mais en plus, il exige de toute personne qui circule — batelier ou passager — de payer pour cela !

b) Les restrictions incompatibles avec le droit *perpétuel de libre navigation*

i) Interdiction générale de naviguer de 17 h 30 à 6 heures

18. M. Calfisch s'est déjà référé à l'exigence des visas et à la pratique systématique de fouilles, il s'est également référé à l'obligation de hisser le pavillon nicaraguayen, il a également parlé de l'interdiction générale de naviguer de 17 h 30 et 6 heures et j'ajouterai qu'il s'agit d'une violation flagrante d'un droit qui est qualifié de «perpétuel» — donc permanent, ininterrompu — et «libre»¹¹³. C'est un étrange droit perpétuel que celui qui cesse tous les jours et qui ne peut être exercé que moins de la moitié de chaque jour.

ii) Interdictions spécifiques

19. La navigation costa-ricienne a été interdite lors de certaines journées spécifiques, comme par exemple le 3 août 1998 entre 9 heures et 17 heures — c'est-à-dire pendant la journée —, sous prétexte d'une visite du président nicaraguayen¹¹⁴. Même la visite du plus haut fonctionnaire public ne justifie l'interruption durant pratiquement toute la journée de l'exercice d'un droit conventionnel de navigation tout au long des 141 kilomètres du fleuve «où la navigation est commune». Monsieur le président, je ne sais pas si vous souhaitez que l'on fasse une pause à ce moment là, ou si vous le préférez, je peux continuer encore une dizaine de minutes.

¹¹¹ Dossier de plaidoiries, onglet n° 39.

¹¹² Dossier de plaidoiries, onglet n° 40.

¹¹³ MCR, par. 5.68-5.77 ; RCR, par. 4.19-4.21.

¹¹⁴ MCR, par. 5.73.

The PRESIDENT: Thank you, Professor Kohen. I think it is a good suggestion, so we'll have a coffee break for about 10 minutes. Thank you.

The Court adjourned from 11.25 a.m. to 11.40 a.m.

The PRESIDENT: Please be seated. Professor Kohen, please continue.

Mr. KOHEN: Thank you, Mr. President.

B. Aucune justification invoquée par le Nicaragua n'est fondée

20. Le Nicaragua prétend n'avoir jamais empêché les navires costa-riens transportant des passagers d'entrer ou de naviguer sur le San Juan, sauf pendant 1982¹¹⁵. Le problème qui se pose ici sont les conditions contraires au traité que le Nicaragua impose à cette navigation, qui la restreignent significativement et qui privent le droit costa-ricien de toute substance.

a) Aucun pouvoir réglementaire ne peut dénaturer le droit perpétuel de libre navigation

21. Lucius Calfisch s'est référé, il y a quelques instants, à la réglementation de la navigation sur le San Juan et a démontré qu'aucun pouvoir réglementaire ne doit dénaturer le droit perpétuel de libre navigation.

22. Le Nicaragua prétend que les mesures qu'il a prises s'appliquent sans discrimination à tous les navires, y compris aux navires nicaraguayens¹¹⁶ ou encore à tout étranger entrant dans son territoire¹¹⁷. Mon professeur et aujourd'hui collègue et ami a déjà démonté cette justification.

22. Nous l'avons précédemment vu, ce n'est pas même du traitement national dont il est question. La réalité est que le zèle nicaraguayen est unidirectionnel : toutes ces entraves s'appliquent à la seule partie du fleuve San Juan où la navigation est commune et, à l'exception de l'horaire de navigation, avec les commentaires que M. Calfisch a faits, uniquement aux navires costa-riens.

¹¹⁵ DN, par. 4.30.

¹¹⁶ DN, par. 4.25.

¹¹⁷ DN, par. 4.87.

23. Selon le Nicaragua, l'ensemble de ces mesures constituerait tout au plus des inconvénients *de minimis* dont la nature «raisonnable» et «nécessaire» contrebalancerait ces intrusions mineures¹¹⁸. Parler de simples «inconvénients» semble être une plaisanterie. Prises isolément ou dans leur intégralité, ces exigences, imposent en fait de lourdes conditions supplémentaires au droit de libre navigation aux fins du commerce. Elles visent à restreindre l'exercice de ce droit et, de ce fait, sont illicites.

24. En imposant des conditions supplémentaires à la navigation qui ne résultent pas du traité, le Nicaragua entrave l'exercice du droit costa-ricien découlant de l'article VI et agit donc de manière illicite. Ce que votre Cour a affirmé dans un autre contexte est ici parfaitement applicable. Je cite : «La disposition perdrait sa signification et sa valeur si d'autres conditions, étrangères à celles qui sont prescrites, pouvaient être exigées.» (*Conditions de l'admission d'un Etat comme Membre des Nations Unies (article 4 de la Charte), avis consultatif, 1948, C.I.J. Recueil 1947-1948, p. 62.*)

b) Le Costa Rica n'a jamais consenti aux «règlementations» nicaraguayennes

25. Conscients de la faiblesse de leurs arguments, nos amis de l'autre côté de la barre font valoir que le Costa Rica aurait accepté le prétendu pouvoir de réglementation à l'égard de sa navigation «touristique». Ils mentionnent à ce propos le mémorandum d'entente signé le 5 juin 1994 entre les ministres du tourisme des deux pays¹¹⁹.

26. Déformant le texte, le Nicaragua fait valoir que, selon ce mémorandum, le Costa Rica aurait l'obligation d'acheter au Nicaragua des cartes touristiques et d'enregistrer les entreprises touristiques.

27. En réalité, le texte du mémorandum indique que les opérateurs de tourisme devraient se faire enregistrer et obtenir des cartes touristiques auprès des autorités de leurs pays respectifs¹²⁰. A aucun moment, il ne mentionne une quelconque obligation pour les opérateurs costa-riciens d'obtenir des cartes touristiques du Nicaragua, ni de se faire inscrire sur le registre nicaraguayen.

¹¹⁸ DN, par. 4.34.

¹¹⁹ CMN, par. 1.3.41.

¹²⁰ Voir le texte du mémorandum, MCR, vol. 2, annexe 26.

Les touristes qui transitent par le San Juan se déplacent d'un point à un autre du territoire costa-ricien : ils ne font aucun séjour touristique au Nicaragua.

c) *Les arguments de la sécurité de la navigation, de la prévention du crime et du contrôle des frontières ne permettent pas de limiter le droit perpétuel de libre navigation*

28. De manière extrêmement tardive, le Nicaragua est allé puiser des prétextes supplémentaires pour justifier son comportement illicite dans de prétendus besoins liés à la prévention du crime¹²¹, à la sécurité de la navigation¹²² et au contrôle des frontières¹²³.

29. La duplique nous explique que le fait que des soldats de l'armée nicaraguayenne arrêtent quotidiennement les navires transportant des enfants vers des écoles costa-riciennes vise à protéger ceux-ci des crocodiles¹²⁴. Je sais bien que l'armée nicaraguayenne est puissante et aguerrie, mais j'ignorais sa puissance dissuasive à l'égard des crocodiles. Et je suppose que le but de ces mêmes militaires, qui arrêtent tous les jours ces enfants pour les enregistrer, est de vérifier si tout le monde est présent et, donc, si leur pouvoir dissuasif vis-à-vis des crocodiles reste intact.

30. En revanche, je n'ai trouvé aucune explication au fait que les sacs de ces mêmes écoliers contenant leurs fournitures scolaires soient soigneusement examinés par l'armée du Nicaragua¹²⁵.

31. Et soit dit en passant : les coupures de presse annexées à la duplique se référant à des attaques de crocodiles subies par des enfants en train de se baigner — et non de naviguer — ne concernent aucunement le San Juan¹²⁶.

32. La duplique consacre de longs passages à de prétendues actions de braconnage¹²⁷, de destruction des forêts¹²⁸, de pollution du fleuve¹²⁹ et d'autres méfaits qui, naturellement, ont tous leur origine sur la rive costa-ricienne du fleuve. Encore une autre bizarrerie de cette procédure : comment se fait-il que des actes d'une pareille gravité aient pu passer inaperçus au Nicaragua lors

¹²¹ DN, par. 4.69-4.77.

¹²² DN, par. 4.78-4.85.

¹²³ DN, par. 4.86-4.91.

¹²⁴ DN, par. 4.80.

¹²⁵ Déclaration sous serment de Diane Gómez Bustos, 16 février 2006, MCR, vol. 4, annexe 101.

¹²⁶ DN, vol. II, annexes 25 et 26.

¹²⁷ DN, par. 4.56-4.59.

¹²⁸ DN, par. 4.53-4.55.

¹²⁹ DN, par. 4.48.

de la rédaction du contre-mémoire ? Comment se fait-il qu'aucun résident costa-ricien, pas un seul, n'ait été jugé et condamné pour de tels actes ? Encore une fois, ces allégations ne sont étayées par aucune preuve concluante.

33. Quoi qu'il en soit, il s'agit là d'une pure diversion. Revenons au vrai sujet de cette affaire. Le traité Cañas-Jerez est clair¹³⁰, le Nicaragua lui-même l'a rappelé devant le président Cleveland : le droit costa-ricien de libre navigation ne peut pas être restreint même face au plus grave danger à la sécurité du Nicaragua, à savoir une situation de guerre¹³¹. Oui, Monsieur le président, conformément au traité, même en cas d'hostilités entre les deux pays, le droit costa-ricien de libre navigation aux fins du commerce doit être respecté. Cela suffit pour apprécier à leur juste valeur les arguments nicaraguayens relatifs aux restrictions à la navigation costa-ricienne fondés sur la sécurité ou sur la prévention du crime.

34. Enfin j'ajouterai que, conformément au traité et à son interprétation par le président Cleveland, il appartient au Costa Rica, et non au Nicaragua, de s'assurer que ses navires et leur navigation soient sûres. Passons vite à l'environnement.

d) *L'excuse «écologique» est un autre argument de dernière minute totalement infondé*

35. A nouveau très tardivement, le Nicaragua s'est découvert une soudaine passion écologique dans sa duplique. Jamais une seule protestation nicaraguayenne n'a été émise contre le Costa Rica en raison d'une quelconque atteinte à l'environnement du fait de sa navigation sur le San Juan. Pas un mot dans le contre-mémoire non plus. Mais voilà que la duplique s'adonne à de longs développements, visant à démontrer que l'obligation de s'arrêter à chaque poste frontière, de se faire enregistrer et d'obtenir un «droit d'appareillage», ainsi que la prohibition de naviguer durant la nuit répondent à l'exigence de protéger l'environnement¹³².

36. Imaginez-vous les dommages à l'environnement que des canoës et autres bateaux utilisés par les Costa-riens peuvent causer, y compris aux espèces ichtyologiques. Je dis bien «imaginer», car le Nicaragua n'a évidemment pas produit la moindre preuve pour démontrer que la

¹³⁰ Article IX.

¹³¹ Texte anglais original: «Even if war is flagrant, her commerce on this river could not be interfered with.» MCR, vol. 6, annexe 208, p. 844 (dossier de plaidoiries, onglet n° 44).

¹³² DN, par. 4.61-4.66.

navigation costa-ricienne porte atteinte à l'environnement du fleuve ou qu'elle est même en mesure de le faire.

37. Imaginez maintenant ce que signifierait pour les espèces et pour l'environnement dont le Nicaragua se soucie tant, que les travaux de dragage du San Juan projetés par la Partie adverse deviennent une réalité¹³³. Imaginons-nous encore qu'un jour le Nicaragua accomplisse son rêve historique : la construction du canal interocéanique à travers le San Juan et le lac Nicaragua. Que resterait-il de cette superbe réserve naturelle nicaraguayenne où personne ne peut s'installer, où pas un seul arbre ne peut être coupé et où la pêche d'un seul poisson est interdite ? Tout cela, Monsieur le président, ressemble à un argument de dernière minute d'une partie qui ne sait plus que dire pour essayer de justifier une conduite manifestement illicite.

C. Conclusion

38. Monsieur le président, Messieurs les juges, je viens d'illustrer les violations au droit perpétuel du Costa Rica de libre navigation aux fins du commerce que M. Sergio Ugalde a énumérées hier¹³⁴ et l'absence de toute justification valide au comportement du Nicaragua.

39. Je vous remercie de votre attention Monsieur le président et vous prie de donner la parole à Mme Kate Parlett, membre du barreau d'Australie.

The PRESIDENT: I thank Professor Kohen for his statement and I invite Ms Parlett to take the floor.

Ms PARLETT:

NICARAGUA'S BREACHES OF THE RIGHT OF NAVIGATION OF PUBLIC VESSELS

Introduction

1. Mr. President, Members of the Court, it is a great honour to make my first appearance before you on behalf of the Government of Costa Rica.

¹³³ CMN, par. 7.2.6 ; DN, par. 6.5-6.16.

¹³⁴ CR 2009/2, p. 29-30, par. 22 (Ugalde).

2. It is my task to outline Nicaragua's breaches of Costa Rica's rights of navigation with public vessels. The evidence shows that Nicaragua has engaged in a series of violations of Costa Rica's rights, and that these have intensified since Costa Rica filed the present Application.

3. In the first part of my presentation I will show that Nicaragua has breached Costa Rica's rights by prohibiting navigation with public vessels. In 1998 Nicaragua prohibited navigation by Costa Rican police vessels, and subsequently it has prevented other public vessels and government officials from navigating in order to provide essential services to the local population, including health, education and security.

4. In the second part I will show that Nicaragua has breached Costa Rica's rights by requiring Costa Ricans to obtain a visa. This was a retaliatory measure imposed after Costa Rica filed the Application in the present case and it has had detrimental consequences for the provision of health and social welfare services to the local communities along the Costa Rican bank of the river, many of which cannot be reached by roads accessible throughout the seasons.

5. Nicaragua has failed to respond to the evidence of breaches which Costa Rica has presented in its written pleadings. It has merely denied the existence of Costa Rica's treaty rights. Nicaragua also alleges that Costa Rica recognizes a need to obtain permission to navigate on the San Juan. This allegation appears to be based on a Nicaraguan policy of compelling Costa Rican individuals and institutions to request written permission to navigate on the San Juan, a policy which appears to have been intended to provide belated documentary support for these allegations.

Nicaragua's prohibition of navigation with public vessels

6. I now come to my first point: that Nicaragua has breached Costa Rica's rights by unilaterally prohibiting navigation with public vessels. As Professor Crawford explained, public vessels enjoy the perpetual right of free navigation under Article VI of the 1858 Treaty. This includes navigation by officials providing essential services to the communities on the Costa Rican bank.

7. On 14 July 1998 Nicaragua unilaterally prohibited navigation by Costa Rican police vessels¹³⁵. Prior to this date, police had regularly navigated on the river, in uniform and carrying their normal arms, and had even carried out joint operations with the Nicaraguan army¹³⁶.

8. Nicaragua's prohibition of police navigation breaches Costa Rica's rights in four separate ways. First, the prohibition is a breach of the treaty right to protect Costa Rica's navigation for purposes of commerce. This right includes navigation with armed personnel, in accordance with the 1858 Treaty and the Cleveland Award. Second, it violates Costa Rica's treaty right to navigate for purposes of commerce, which includes the use of the river as a means of communication. This covers navigation for the purpose of resupplying and relieving personnel at border posts and for the purpose of providing essential health, education and security services to the local population. Third, it prevents Costa Rica from exercising its right to safeguard the San Juan as established in Article IV of the 1858 Treaty. Fourth, it hinders Costa Rica from complying with its obligation to defend the common Bay of San Juan del Norte. Since the bay is effectively closed to the ocean, the San Juan is the only means by which Costa Rica may access the bay.

9. Nicaragua's prohibition of navigation has not only prevented police vessels from navigating, but has also prevented other public vessels and officials from navigating on the San Juan in exercise of Costa Rica's treaty rights of navigation. In its written pleadings, Costa Rica has documented three examples:

- on 4 August 1998, officials from the Nicaraguan army prevented judicial officers from navigating on the San Juan in a public vessel, on a journey to Fátima de Sarapiquí to investigate the death of an 11-month-old child¹³⁷;
- in September 1998 Nicaraguan officials prevented Costa Rican technicians from the Programme of the Eradication of Screwworms from Cattle from navigating to implement the programme in the Costa Rican border zone¹³⁸; and

¹³⁵MCR, Anns. 240, 131, 132.

¹³⁶MCR, Anns. 88, 89, 90, 94, 103 and 105.

¹³⁷MCR, Ann. 150; MCR, para. 5.97; RCR, para. 4.25.

¹³⁸MCR, Anns. 52 and 53; MCR, para. 5.98; RCR, para. 4.25.

— on 26 September 2000, two officials from the Costa Rican Bureau of Judicial Investigation and a police officer were prevented from navigating to investigate a cattle robbery that had taken place in the Caño Río Jardín area¹³⁹.

10. Nicaragua's prohibition has adversely affected the capacity of Costa Rican police to combat trans-border crime¹⁴⁰. Additionally, it has resulted in a reduction of the level of human security and an increase in illegal immigrants¹⁴¹. There are particular concerns about drug trafficking¹⁴² and arms trafficking¹⁴³ in the region. From Costa Rica's border posts it may take a long time to reach local communities; in some cases it is impossible to reach remote villages during the wet season¹⁴⁴.

11. Nicaragua claims that Costa Rica has adequate roads and landing strips and aircraft to deliver these services by land, and consequently has no need to navigate on the San Juan¹⁴⁵. These allegations are not true — and constant repetition does not make them true. There are no adequate roads in the region. But even if there were, Costa Rica has treaty-established rights of navigation on the San Juan, and it is no answer to say that there is no need for Costa Rica to exercise those rights.

12. Nicaragua's prohibition of police navigation, and in particular of police navigating to resupply and relieve personnel at its border posts, has resulted in the closure of one of Costa Rica's police posts. In 1999 the Costa Rican post at La Cureña had to be closed because it was impossible to access it by land and Nicaragua had prevented access to it by the San Juan River¹⁴⁶. In consequence there is no border post between Rio San Carlos and Rio Sarapiquí. This has had a negative impact on security in the region: residents of the local communities have repeatedly

¹³⁹MCR, Anns. 166, 167, 168; MCR, para. 5.100; RCR, para. 4.25.

¹⁴⁰MCR, Anns. 164, 165 and 177.

¹⁴¹MCR, Anns. 155, 177 and 164.

¹⁴²MCR, Anns. 154 and 181.

¹⁴³MCR, Ann. 165.

¹⁴⁴MCR, Ann. 177.

¹⁴⁵CMN, para. 5.2.9; RN, para. 5.98.

¹⁴⁶RCR, para. 3.94.

expressed concerns about their personal safety and the level of human security in the region has in fact deteriorated (tab 45 in the judges' folder)¹⁴⁷.

13. Nicaragua's restrictions on the navigation of Costa Rican officials and public vessels resulted in the suspension of the provision of basic health services to riparian communities in November 2005¹⁴⁸. This has resulted in the loss of primary health care to around 450 people including 200 children¹⁴⁹. In fact, around 50 per cent of them are Nicaraguan¹⁵⁰.

14. It was in these circumstances that Dr. Ching, Director of the Social Security's Health Area of Puerto Viejo de Sarapiquí, approached the Nicaraguan authorities. Before May 2006, health workers travelled on the San Juan to reach communities located along the bank of the river and they never required permission. But on 10 May 2006, the Nicaraguan military informed health workers that they needed the approval of the Nicaraguan Vice-Consul in Sarapiquí to navigate on the San Juan¹⁵¹. Dr. Ching sent a Note to the Vice-Consul in Sarapiquí, "requesting the collaboration" to transit on the San Juan to provide basic health services¹⁵². The Vice-Consul in Sarapiquí replied that he was not able to grant navigation permits¹⁵³. Dr. Ching then wrote to the Vice-Consul in Ciudad Quesada in similar terms¹⁵⁴; the Vice-Consul directed her to the Nicaraguan Embassy¹⁵⁵. When she visited the Nicaraguan Ambassador, she was told that "in order to analyze the request, she had to change the term 'Request for collaboration' to 'Request of Authorization to navigate the San Juan River', otherwise her request would not be processed"¹⁵⁶. Dr. Ching explains these events in an affidavit annexed to Costa Rica's Reply. In particular, she says that "she wrote the note under the terms demanded by the Ambassador, all done as a result of the urgent state of necessity . . . to safeguard the health and lives of people, particularly of children"

¹⁴⁷MCR, paras. 5.123-124; MCR, Anns. 155, 164 and 177.

¹⁴⁸MCR, Anns. 236, 237, 239, 98, 99 and 100; MCR, para. 5.101; RCR, para. 4.25.

¹⁴⁹RCR, Ann. 44.

¹⁵⁰*Ibid.*, p. 268.

¹⁵¹*Ibid.*, p. 267.

¹⁵²RCR, Ann. 55, p. 292.

¹⁵³CNS014/05/06, cited in RCR, Ann. 44, p. 267.

¹⁵⁴RCR, Ann. 55, p. 292.

¹⁵⁵*Ibid.*

¹⁵⁶*Ibid.*

in the region¹⁵⁷. Nicaragua did not respond to Dr. Ching's explanation of these events in its Rejoinder.

15. This is not the only health service to the San Juan border area which has been affected by Nicaragua's prohibition of navigation by public vessels¹⁵⁸. Before mid-2006, personnel from two agencies overseen by the Costa Rican Ministry of Health navigated on the San Juan twice a month to provide basic health care services and to deliver food, education and other services to communities along the Costa Rican bank of the river. Since the middle of 2006 they have been impeded in navigating; and those restrictions remain in force¹⁵⁹.

16. Another Costa Rican government institution, whose work has been adversely affected by Nicaragua's breaches of Costa Rica's rights, is the Joint Institute for Social Assistance, a social welfare agency. In May 2007 the Institute was compelled to request authorization to navigate on the San Juan to participate in a regional environmental and health fair and to bring financial and other assistance to poor families in the communities of Boca San Carlos and La Cureña¹⁶⁰. Nicaragua's response purported to limit the places in Costa Rica that those officials could visit¹⁶¹, that is to say, Nicaragua limited the capacity of Costa Rican authorities to attend places in their own territory at a time of their own choosing.

17. Nicaragua's conduct has also had a detrimental effect on the provision of educational services in the region. In addition to making it extremely difficult for teachers in the region to attend training and meetings¹⁶², government officials have been prevented from assisting in the provision of education to children. Officials from the Joint Institute for Social Assistance were "placed in a position where they needed to request the authorization demanded by the Nicaraguan authorities to navigate the river, as there [was] no other means to reach those communities"¹⁶³. The

¹⁵⁷*Ibid.*

¹⁵⁸RCR, para. 4.31.

¹⁵⁹See RCR, Ann. 45; RCR, para. 4.32.

¹⁶⁰RCR, Anns. 46 and 57.

¹⁶¹*Ibid.*, Ann. 47.

¹⁶²MCR, para. 5.103; MCR, Ann. 101; RCR, para. 4.25.

¹⁶³RCR, Ann. 56, p. 296.

Institute requested permission on 14 August 2007¹⁶⁴, but Nicaragua never responded and the Institute has been unable to deliver those services¹⁶⁵.

18. Rather than denying the facts Nicaragua embraces them, arguing that it “has consistently required that those from Costa Rica obtain authorization to cross into her territory, whether on the San Juan or elsewhere” and that “Costa Rica has repeatedly recognized this need to obtain permission”¹⁶⁶. But it claims that since permission is normally given in the result it “does not prohibit Costa Rica from navigating on the San Juan River, with her public vessels, for the purpose of providing medical and other social services to the residents of the riparian communities on Costa Rica’s side of the river”¹⁶⁷.

19. The fact remains that Costa Rica has a treaty right of navigation for the purposes of commerce, which includes navigation by government officials to provide essential services to local communities. There is no requirement that these officials obtain prior authorization to navigate on the San Juan; that navigation is a treaty right and not a simple privilege to be granted or refused by Nicaragua. In the circumstances Costa Rica has established that Nicaragua has breached its rights of navigation for public vessels.

Nicaragua’s imposition of a requirement that Costa Rican officials obtain a visa

20. I turn to the issue of visas. Before December 2005, no Costa Rican required a consular visa to travel to Nicaragua. As a retaliatory measure taken by the Nicaraguan Government, a requirement that Costa Ricans obtain a consular visa was imposed in December 2005, and it has been maintained to the present day. Revenue from the visa has apparently been directed to finance the costs of Nicaragua’s defence in the present case¹⁶⁸.

21. The charge for a consular visa is US\$20, plus an additional \$5 administrative charge. It is required each and every time any Costa Rican transits on the river, including Costa Rican officials. In addition to the cost, any Costa Rican who needs to travel on the San Juan, including

¹⁶⁴RCR, Ann. 49.

¹⁶⁵RCR, Ann. 56.

¹⁶⁶CMN, para. 6.2.11.

¹⁶⁷RN, para. 5.109.

¹⁶⁸RCR, Ann. 70.

health and social service officials, must attend a Nicaraguan consulate to obtain a visa. In 2006, Nicaragua opened a new consulate in Puerto Viejo de Sarapiquí, but this consulate did not operate regularly and in March 2007 it was closed. In consequence, Costa Ricans who need to transit on the San Juan are forced to travel to either Ciudad Quesada or San José to visit a consulate, for which they inevitably incur additional expenses (tab 46 in the judges' folder).

22. Again Nicaragua does not deny that these charges are imposed on Costa Rica's navigation on the river; nor does it make any statement or produce any evidence in respect of the fact that the requirements are a retaliatory measure in response to Costa Rica's filing of the present case. In these circumstances, it is clear that Nicaragua has breached Costa Rica's perpetual right of free navigation in respect of public vessels.

Nicaragua's responses to Costa Rica's evidence of breaches

23. Mr. President, Members of the Court, my final point addresses Nicaragua's pleas in response to Costa Rica's evidence of the breaches of its right of navigation.

24. First, Nicaragua argues that it has permitted navigation by Costa Rican police vessels carrying their arms only as a matter of "border courtesy"¹⁶⁹. This argument amounts to a denial of the existence of rights of navigation with armed police vessels.

25. Second, Nicaragua makes a plea of acquiescence: it argues that "Costa Rica has repeatedly recognized [the] need to obtain permission" from Nicaragua to navigate on the San Juan¹⁷⁰. In support of its allegation, Nicaragua refers to two incidents, both of which occurred in 2006, well after the institution of proceedings in the present case. The first of these is the request from Dr. Ching¹⁷¹. As I have explained, Dr. Ching was put in the position of having to change her "request for collaboration" to a "request for authorization"¹⁷²; otherwise health service officials would be denied permission to transit on the San Juan. It appears that the intention behind forcing her to request written permission in these terms was to produce evidence to support Nicaragua's claim in the present proceedings.

¹⁶⁹CMN, para. 1.3.43.

¹⁷⁰CMN, para. 6.2.11.

¹⁷¹CMN, para. 6.1.12; CMN, Ann. 51.

¹⁷²RCR, Ann. 55, p. 292.

26. The second incident Nicaragua refers to in support of its plea of acquiescence is a note from “the Christian and Missionary Alliance of Horquetas” relating to its missionary work¹⁷³. This was a request made by a private entity and as such, its views and actions cannot be imputed to the State of Costa Rica.

27. In respect of police navigation, Nicaragua claims in its Rejoinder that Costa Rican police “routinely requested and obtained prior authorization from the Nicaraguan authorities before sending its vessels on missions to supply the Costa Rican border posts”¹⁷⁴. The only evidence Nicaragua submits is affidavit evidence from Nicaraguan army officers, annexed to its Rejoinder; it has already been pointed out that none of these affidavits are supported by a single piece of documentary evidence. The affidavit and documentary evidence Costa Rica has been able to produce in the short time available demonstrates that there was no practice of requesting prior authorization for public navigation¹⁷⁵, and these Nicaraguan affidavits cannot be relied upon¹⁷⁶.

28. Costa Rica affirms its rejection of any and all allegations by Nicaragua that it has acquiesced in Nicaragua’s breaches of its perpetual right of free navigation on the river and its related rights.

Conclusions

29. Mr. President, Members of the Court, the evidence I have addressed today leads to the conclusion that Nicaragua has breached Costa Rica’s rights of navigation with public vessels. By prohibiting Costa Rican public vessels from navigating on the San Juan, Nicaragua has breached Costa Rica’s treaty right to navigate on the San Juan, its right to protect its navigation for purposes of commerce, its right to safeguard the San Juan and its obligation to defend the common bays. By the imposition of a requirement to obtain a consular visa in advance, Nicaragua has also breached Costa Rica’s perpetual right of free navigation. These violations have prevented Costa Rican government officials from navigating on the San Juan to provide essential health, social and

¹⁷³CMN, Ann. 52; CMN, para. 6.2.13.

¹⁷⁴RN, para. 5.80.

¹⁷⁵See, Ann. IV and Ann. V to letter filed on 27 Nov. 2008 by Costa Rica.

¹⁷⁶See case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 203, para. 65 ; pp. 218-219, para. 129 ; case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 43, para. 70.

security services to riparians. Local communities along the San Juan have suffered as a result, and in particular Costa Rica has been unable to provide basic health services to 450 people, including 200 children.

Mr. President, that concludes my submission. I would ask you to call on Professor Kohen.

The PRESIDENT: I thank Ms Parlett for her presentation and I invite Professor Kohen to take the floor.

M. KOHEN :

LES DROITS CONNEXES DU COSTA RICA ET LEURS VIOLATIONS PAR LE NICARAGUA

1. Monsieur le président, Messieurs les juges, il m'incombe maintenant de vous présenter les droits connexes du Costa Rica sur le fleuve San Juan, ainsi que leurs violations par le Nicaragua. James Crawford et Kate Parlett vous ont déjà parlé des droits de protection du commerce, de protection du San Juan et de défense du fleuve et de la baie de San Juan del Norte, ainsi que des droits d'approvisionnement des postes frontière. Je vais aborder les droits suivants :

- A. droit d'accoster sur la partie de la rive nicaraguayenne où la navigation est commune ;
- B. droit d'obtenir du Nicaragua qu'il s'acquitte de son obligation de faciliter et d'accélérer la circulation sur le fleuve ;
- C. droit d'exercer la libre navigation en battant uniquement le pavillon costa-ricien ;
- D. droit de pêche des résidents de la rive costa-ricienne à des fins de subsistance.

A. Droit d'accoster sur la partie de la rive nicaraguayenne où la navigation est commune

2. Dans sa dernière partie, l'article VI du traité de 1858 reconnaît un second droit, connexe à celui de la libre navigation : «Les bateaux des deux pays auront le droit d'accoster indistinctement sur l'une ou l'autre rive de la portion du fleuve où la navigation est commune sans qu'aucune taxe ou droit ne soit perçu, sauf accord entre les deux Gouvernements.»¹⁷⁷

¹⁷⁷ Traduction anglaise : «The vessels of both countries shall have the power to land indiscriminately on either side of the river, at the portion thereof where the navigation is common; and no charges of any kind, or duties, shall be collected unless when levied by mutual consent of both Governments.» (MCR, vol. II, annexe 7 b.) Original en espagnol : «Las embarcaciones de uno u otro país podrán indistintamente atracar en las riberas del río; en la parte en que la navegación es común, sin cobrarse ninguna clase de impuestos, a no ser que se establezca entre ambos Gobiernos.» (MCR, vol. II, annexe 7 a.) (Dossier de plaidoires, onglet n° 47.)

a) L'interprétation nicaraguayenne du droit d'accostage est inadmissible

3. Le droit nicaraguayen d'accoster sur la rive costa-ricienne est scrupuleusement respecté. Des riverains et des fonctionnaires nicaraguayens traversent régulièrement le San Juan pour faire leurs achats au Costa Rica¹⁷⁸.

4. Le Nicaragua pour sa part tente de vider de sa substance le droit costa-ricien d'accoster. Il prétend qu'il existe uniquement pour les navires transportant des marchandises — articles de commerce —, mais que cela ne signifie pas un droit de libre commerce avec ces marchandises sur la rive nord, car le traité de 1858 — nous disent-ils toujours — n'est pas un traité de libre-échange¹⁷⁹. La position de l'Etat défendeur s'écroule finalement en raison de ses propres contradictions : à quoi bon alors la navigation «avec des articles de commerce» ? A quoi bon un droit d'accoster exempté des taxes ? A en croire le défendeur, ce que le Costa Rica aurait obtenu en 1858 serait le droit de promener des marchandises sur le San Juan ou de les vendre en territoire costa-ricien.

5. Que ceci ne soit pas le cas est, entre autres, démontré par la preuve apportée par la Partie adverse, selon laquelle la navigation «avec des articles de commerce» s'exerce en bonne partie en vue de leur vente à San Juan del Norte¹⁸⁰.

b) L'exigence de l'accostage et du paiement d'un droit d'appareillage est incompatible avec l'article VI du traité

6. La violation du droit d'accostage commise par le Nicaragua est patente. *Primo*, les bateaux costa-riciens ont le droit d'accoster quand ils le décident et non quand le Nicaragua l'ordonne. *Secundo*, ils ont le droit de le faire exemptés des taxes. Or, cet Etat impose d'abord d'accoster et ensuite de payer un «droit d'appareillage» pour continuer à naviguer. A cela s'ajoute l'exigence du visa et de toutes les autres taxes que nous avons déjà examinées.

7. Le Costa Rica a apporté la preuve des agissements du Nicaragua¹⁸¹, que celui-ci n'a d'ailleurs pas démentie.

¹⁷⁸ Déclaration sous serment du colonel Ricardo Sánchez, 7 décembre 2006, CMN, vol. II, annexe 91.

¹⁷⁹ CMN, par. 4.1.48.

¹⁸⁰ Déclaration sous serment de M. Rigoberto Acevedo Ledezma, 27 mai 2008, DN, vol. II, annexe 66 ; déclaration sous serment du lieutenant-colonel Juan Bosco Centeno Arostegui, 9 mars 2008, DN, vol. II, annexe 69, p. 430.

¹⁸¹ MCR, par. 5.06-5.53 ; RCR, par. 4.05.-4.11.

B. Droit d'obtenir du Nicaragua qu'il s'acquitte de son obligation de faciliter et d'accélérer la circulation sur le fleuve San Juan

a) De nouvelles obligations de moyens

8. Selon le Nicaragua, l'accord de 1956 n'ajoute rien au régime juridique du fleuve San Juan établi par le traité de 1858¹⁸². Cette vision prive l'article premier de l'accord de 1956 de tout effet utile, cet article contient deux nouvelles obligations de moyens bien précises : *primo*, celle de *faciliter et d'accélérer* la circulation sur le San Juan ; *secundo*, celle de *faciliter* le fonctionnement des services de transport des entreprises d'un Etat sur le territoire de l'autre¹⁸³.

b) Tout le comportement nicaraguayen comporte un manquement flagrant aux obligations découlant de l'accord de 1956

9. L'ensemble des agissements du Nicaragua, que nous avons décrit au cours de ces deux jours, montre, non seulement que le Nicaragua ne fait rien pour faciliter et accélérer la circulation et l'opération des services de transports costa-riciens sur le San Juan, mais au contraire, qu'il fait tout pour les entraver, violant ainsi les obligations stipulées dans l'accord de 1956.

C. Droit d'exercer la libre navigation en battant uniquement le pavillon costa-ricien

10. Passons maintenant au droit d'exercer la libre navigation en battant uniquement le pavillon costa-ricien.

a) Subordonner la navigation à l'exigence de porter le pavillon nicaraguayen revient à nier le droit de libre navigation du Costa Rica

11. Entre 1998 et 2001, le Nicaragua a de manière intermittente interdit aux bateaux costa-riciens d'arborer leur pavillon¹⁸⁴. Après des échanges diplomatiques, le Nicaragua avait cessé d'imposer cette exigence¹⁸⁵, qu'il a pourtant renouvelée aussitôt après l'introduction de la

¹⁸² CMN, par. 6.2.1-6.2.9 ; DN, par. 2.116.

¹⁸³ Accord complémentaire à l'article IV du pacte d'amitié, 9 janvier 1956, NURT, vol. 1465, p. 227 (MCR, vol. 2, annexe 24) (dossier de plaidoiries, onglet n° 48).

¹⁸⁴ *La Nación*, San José, 4 août 1998, MCR, vol. 5, annexe 147; *La Nación*, San José, 27 septembre 1998, MCR, vol. 5, annexe 152. Voir aussi, déclaration sous serment de Sergio Gerardo Ugalde Godínez, 5 mai 2001, MCR, vol. 4, annexe 83.

¹⁸⁵ Note du ministre des affaires étrangères du Costa Rica, Roberto Rojas López, au ministre des affaires étrangères du Nicaragua, Francisco Xavier Aguirre Sacasa, 9 mai 2001, MCR, vol. 3, annexe 71 ; note du ministre des affaires étrangères du Nicaragua, Francisco Xavier Aguirre Sacasa, au ministre des affaires étrangères du Costa Rica, Roberto Rojas López, 3 août 2001, MCR, vol. 3, annexe 72 ; note du ministre des affaires étrangères du Costa Rica, Roberto Rojas López, au ministre des affaires étrangères du Nicaragua, Francisco Xavier Aguirre Sacasa, 26 septembre 2001, MCR, vol. 3, annexe 73.

présente instance en septembre 2005. Ce comportement perdure à ce jour, malgré les demandes de cessation du Costa Rica¹⁸⁶. En réponse à cette demande, le Nicaragua a invoqué le droit souverain d'exercer un tel pouvoir sur son territoire¹⁸⁷. Nous en avons déjà démontré l'absence de fondement juridique¹⁸⁸.

b) L'attitude du Nicaragua contredit sa propre position de principe exprimée il y a cent quarante ans

12. Ce comportement est d'autant plus regrettable que le Nicaragua lui-même, il y a cent quarante ans, protestant contre la présence de navires sur le San Juan battant pavillon des Etats-Unis, a expliqué au secrétaire d'Etat américain que le Gouvernement du «Nicaragua ne se sent pas disposé à consentir à ce qu'un autre pavillon que *le sien et celui du Costa Rica, Etat frontalier*, soit utilisé dans la navigation de ses eaux intérieures»¹⁸⁹.

D. Le droit de pêche à des fins de subsistance

a) La recevabilité de la demande costa-ricienne relative au droit de pêche

13. Permettez-moi de traiter maintenant de la question du droit de pêche à des fins de subsistance des habitants de la rive costa-ricienne du San Juan. C'est seulement dans sa duplique que le Nicaragua a invoqué l'irrecevabilité de la demande du Costa Rica y relative, sous prétexte qu'elle n'avait pas été formulée dans la requête¹⁹⁰.

14. Cette démarche est surprenante, car le Nicaragua est directement entré en matière dans son contre-mémoire¹⁹¹. De ce fait, il a implicitement accepté la recevabilité de la demande relative aux droits de pêche. On se trouve ici dans une situation semblable à celle décrite par la Cour

¹⁸⁶ Note du ministre des affaires étrangères du Costa Rica, Roberto Tovar Faja, au ministre des affaires étrangères du Nicaragua, Norman Caldera Cardenal, 20 octobre 2005, MCR, Vol. 3, annexe 81.

¹⁸⁷ Note du ministre des affaires étrangères du Nicaragua, Norman Caldera Cardenal, au ministre des affaires étrangères du Costa Rica, Roberto Tovar Faja, 9 novembre 2005, MCR, Vol. 3, annexe 82.

¹⁸⁸ Plaidoirie de M. Cafilisch du 3 mars 2009, par. 28-32.

¹⁸⁹ Texte en anglais: «Nicaragua does not feel disposed to consent that any other flag, except *her own and the one of Costa Rica, as bordering state*, should float in the navigation of her interior waters.» Lettre du ministre nicaraguayen à Washington, Luis Molina, au Secrétaire d'Etat des Etats-Unis d'Amérique, M. Seward, du 7 octobre 1868, in P. Perez Zeledón, *Argument on the Question of the Validity of the Treaty of Limits between Costa Rica and Nicaragua* (Washington DC: Gibson Breos, 1887), p. 100, MCR, vol. 6, annexe 207, p. 829 (dossier de plaidoiries, onglet n° 49).

¹⁹⁰ DN, par. 4.68.

¹⁹¹ CMN, par. 5.1.2- 5.1.16.

permanente dans l'affaire des *Ecoles minoritaires en Haute-Silésie* : «Le contre-mémoire lui-même démontre que l'agent du Gouvernement polonais avait déjà porté son attention sur ce fait et qu'il aurait fort bien pu poser la question de compétence dans son contre-mémoire s'il l'avait voulu.» (*Droits de minorités en Haute-Silésie (écoles minoritaires)*, arrêt n° 12, 1928, C.P.J.I. série A n° 15, p. 25.)

15. Se fiant à la position de l'Etat défendeur exprimée dans le contre-mémoire, le Costa Rica a répondu dans sa réplique aux arguments de fond développés par le Nicaragua dans sa première pièce écrite. On est dans une situation semblable à celle dans laquelle «un Etat défendeur a, par sa conduite devant la Cour ou dans ses relations avec la partie demanderesse, agi de manière telle qu'il a accepté la compétence de la Cour» (*Certaines questions concernant l'entraide judiciaire en matière pénale (Djibouti c. France)*, arrêt du 4 juin 2008, par. 61). Clairement, le Nicaragua est ainsi forclos d'invoquer l'irrecevabilité de cette demande. Par conséquent, nous demandons respectueusement à la Cour de ne pas entrer en matière à propos de cette exception nicaraguayenne.

16. Du reste, même si la Cour acceptait d'examiner l'exception d'irrecevabilité, celle-ci serait dépourvue de fondement et devrait ensuite être rejetée. Les considérations qui suivent et qui démontrent le caractère infondé de cette exception d'irrecevabilité sont donc présentées à titre purement subsidiaire.

17. La raison de l'invocation du droit de pêche dans le mémoire est évidente : la violation par le Nicaragua de ce droit s'est produite après l'introduction de l'instance par le Costa Rica¹⁹². Le Costa Rica s'est réservé le droit de compléter ou de préciser sa requête¹⁹³. C'est ce qu'il a fait dans sa première pièce écrite en réaction aux nouveaux agissements illicites de l'Etat défendeur, actes directement liés à la requête et constituant même une conséquence de son dépôt.

18. La Cour a déclaré qu'une demande introduite en cours d'instance est recevable si elle est «implicitement contenue ... dans [l]a requête» (*Temple de Préah Vihéar (Cambodge c. Thaïlande)*, *fond*, arrêt, C.I.J. Recueil 1962, p. 38) ou découle «directement de la question qui fait l'objet de

¹⁹² MCR, par. 5.142. Voir aussi déclaration sous serment de Víctor Julio Vargas Hernández, 6 juillet 2006, MCR, vol. 4, annexe 105 ; déclaration sous serment de Leonel Morales Chacón, 6 juillet 2006, MCR, vol. 4, annexe 106 ; déclaration sous serment de Erick Maikol Martínez López, 6 juillet 2006, MCR, vol. 4, annexe 107 ; déclaration sous serment de José Moreno Rojas, 6 juillet 2006, MCR, vol. 4, annexe 108 ; déclaration sous serment de Josefa Alvarez Aragón, 6 juillet 2006, MCR, vol. 4, annexe 109.

¹⁹³ Requête, par. 12.

cette requête» (*Compétence en matière de pêcheries (République fédérale d'Allemagne c. Islande)*, fond, arrêt, C.I.J. Recueil 1974, p. 203, par. 72)¹⁹⁴. La demande du Costa Rica tombe sous le coup de l'une et de l'autre de ces formules, pourtant alternatives.

19. En effet, dans sa requête, le Costa Rica a affirmé sous la rubrique «Nature du différend» que, «[p]our le cas où le Nicaragua prendrait les sanctions économiques visées ci-dessus [celles que l'Assemblée nationale du Nicaragua avait menacé d'imposer en cas de saisine de la Cour par le Costa Rica], ou toute autre sanction illicite, ou toute autre mesure propre à aggraver ou à étendre le présent différend, le Costa Rica demande en outre la cessation de ce comportement et la réparation intégrale des pertes subies»¹⁹⁵.

20. Incontestablement, l'interdiction du droit de pêche à des fins de subsistance constitue, soit une «autre sanction illicite», soit une «autre mesure propre à aggraver ou à étendre le présent différend». De ce fait, la demande relative aux violations du droit de pêche est parfaitement recevable car elle peut être incluse dans la demande originale.

21. Enfin, la prétention nicaraguayenne selon laquelle l'inexistence d'un droit de pêche dans le traité de 1858 rendrait la demande irrecevable n'est aucunement fondée. Sous la rubrique «Droit applicable» de la requête, on trouve : «e) d'autres règles et principes applicables du droit international»¹⁹⁶.

22. C'est par conséquent la demande tardive d'irrecevabilité du Nicaragua qui est irrecevable. Et même si elle était jugée recevable, elle devrait être ensuite rejetée.

b) L'existence du droit de pêche à des fins de subsistance

23. Venons-en donc à l'existence de ce droit de pêche à des fins de subsistance. Le Costa Rica a invoqué une règle coutumière locale, ainsi qu'un droit datant de l'époque coloniale¹⁹⁷.

¹⁹⁴ *Certaines terres à phosphates à Nauru (Nauru c. Australie)*, exceptions préliminaires, arrêt, C.I.J. Recueil 1992, p. 266, par. 67 ; *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras)*, arrêt du 8 octobre 2007, par. 110.

¹⁹⁵ Requête, par. 10. Original en anglais : «In the event that Nicaragua imposes the economic sanctions referred to above, or any other unlawful sanctions, or otherwise takes steps to aggravate and extend the present dispute, Costa Rica further seeks the cessation of such conduct and full reparation for losses suffered.» (Dossier de plaidoiries, onglet n° 50.)

¹⁹⁶ Requête, par. 1. Original en anglais : «(e) other applicable rules and principles of international law».

¹⁹⁷ MCR, par. 2.08, 4.124-4.128, 5.141 ; RCR, par. 3.115-3.119.

24. Plusieurs éléments permettent d'affirmer l'existence d'un droit de pêche. En effet, un tel droit appartenant aux riverains des deux rives du fleuve San Juan avait déjà été explicitement reconnu au tout début de la période coloniale et n'a jamais été révoqué¹⁹⁸. Le Nicaragua ne nie pas l'existence de ce droit selon l'ordonnance royale du 29 novembre 1540, mais considère que la question ne mérite pas d'être discutée car cette ordonnance aurait été abrogée par une charte royale de 1573¹⁹⁹. Ceci n'est pas pertinent, comme il a été expliqué hier par M. Arnoldo Brenes²⁰⁰. Du reste, le fait de la succession d'Etats n'est pas en soi une raison pour mettre fin à ce régime territorial, pour reprendre l'expression de l'article 12 de la convention de Vienne sur la succession d'Etats en matière de traités, que votre Cour a reconnue comme l'expression du droit coutumier²⁰¹.

25. Le traité Cañas-Jeréz n'aborde pas la question, mais son silence ne saurait être interprété comme une abrogation de ce droit traditionnel, qui peut donc être considéré comme ayant survécu à la période coloniale.

26. La pêche visée se pratique à des fins de subsistance²⁰². Le Nicaragua ne le conteste pas²⁰³. Cette activité obéit donc à une *nécessité* des habitants qui la pratiquent, en tant que moyen de subvenir à leurs besoins alimentaires.

27. Le Comité des droits économiques, sociaux et culturels des Nations Unies, dans son commentaire de l'article 11 du Pacte international de droits économiques, sociaux et culturels (auquel le Nicaragua est partie), affirme que «[l']obligation qu'ont les Etats parties de *respecter* le droit de toute personne d'avoir accès à une nourriture suffisante leur impose de *s'abstenir de prendre des mesures qui aient pour effet de priver quiconque de cet accès*»²⁰⁴. Le Nicaragua a dû prendre en considération cette obligation, qui existait sans nul doute avant l'entrée en vigueur du Pacte. En fait, depuis l'établissement des premières habitations et des premiers villages sur la rive costa-ricienne, l'Etat défendeur n'a jamais privé leurs habitants de l'accès à la pêche de subsistance

¹⁹⁸ MCR, par. 2.08 et 5.141 ; MCR, vol. 2, annexe 1. (Dossier de plaidoiries, onglet n° 51.)

¹⁹⁹ CMN, par. 5.1.12 et 5.1.13.

²⁰⁰ CR 2009/2, p. 19-21, par. 15-21 (Brenes).

²⁰¹ *Projet Gabčíkovo-Nagymaros (Hongrie/Slovaquie)*, arrêt, C.I.J. Recueil 1997, p. 72, par. 123.

²⁰² MCR, par. 4.128 ; RCR, par. 4.56-4.58.

²⁰³ CMN, par. 5.1.6.

²⁰⁴ Comité de droits économiques, sociaux et culturels, *Observation générale 12*, 12 mai 1999, doc. E/C.12/1999/5, par. 15.

sur le fleuve San Juan. Malheureusement, le Nicaragua a modifié sa conduite après le dépôt de la requête. Bien entendu, ce changement de comportement est trop tardif pour prétendre à l'inexistence du droit de pêche.

28. Le Nicaragua admet donc l'existence d'une pratique de pêche par les habitants de la rive costa-ricienne²⁰⁵. Il conteste seulement l'existence d'une *opinio iuris* rendant cette pratique obligatoire et, de plus, prétend que celle-ci est récente²⁰⁶. Pour le Nicaragua, il s'agit d'une simple courtoisie²⁰⁷. Toutefois, le Nicaragua n'a pas présenté le moindre élément prouvant qu'il agissait à titre de courtoisie.

29. La Partie adverse ne peut pas s'abriter derrière l'argument selon lequel il appartiendrait au Costa Rica de prouver l'existence de la coutume²⁰⁸. Du moment qu'il reconnaît l'existence d'une pratique constante sur son territoire qui va à l'encontre de sa souveraineté, il lui appartient de réagir. Pour l'exprimer avec les mots que vous avez employés dans l'affaire du *Temple de Préah Vihéar* : «les circonstances étaient de nature à appeler dans un délai raisonnable une réaction de la part des autorités» (*Temple de Préah Vihéar (Cambodge c. Thaïlande)*, fond, arrêt, C.I.J. Recueil 1962, p. 23). L'absence de réaction paraît très étrange de la part d'un Etat aussi soucieux de protéger sa souveraineté que le Nicaragua.

30. Le Nicaragua n'a rien dit, rien empêché, rien revendiqué, n'a émis aucun avertissement, alors que des individus en provenance d'un territoire étranger se sont adonnés à la pêche dans des eaux relevant de sa souveraineté. Cela ne correspond pas au comportement d'un Etat qui estime que les individus en question ne possèdent aucun droit d'agir comme ils le font. Jusqu'à la fin de l'année 2005, les autorités nicaraguayennes n'ont ni empêché les riverains résidant au Costa Rica de pêcher dans les eaux du San Juan, ni leur ont donné l'autorisation de le faire²⁰⁹.

31. La situation est donc semblable à celle décrite par votre Cour dans l'affaire du *Droit de passage sur territoire indien* à l'égard des personnes privées, des fonctionnaires civils et des

²⁰⁵ CMN, par. 5.1.6.

²⁰⁶ CMN, par. 5.1.7-5.1.8 ; DN, par. 4.68.

²⁰⁷ CMN, par. 5.1.6.

²⁰⁸ CMN, par. 5.1.5.

²⁰⁹ MCR, par. 5.142.

marchandises en général : une pratique constante et uniforme de pêche à des fins de subsistance, acceptée comme étant le droit²¹⁰.

32. La situation ressemble aussi à celle des droits de pacage et d'agriculture des habitants d'un Etat sur les terres des Etats voisins, comme vous l'avez constaté dans l'affaire de l'*Ile de Kasikili/Sedudu*²¹¹. La sentence arbitrale *Erythrée/Ethiopie* se réfère également aux droits coutumiers des populations locales d'avoir accès au fleuve²¹².

33. Le Nicaragua a prétendu que l'existence d'une telle coutume en Afrique «est une pure invention du Costa Rica» et que les situations décrites dans l'arrêt *Kasikili/Sedudu* et la sentence arbitrale *Erythrée/Ethiopie* n'ont rien à voir avec la situation dans la présente affaire²¹³. Ce sont pourtant là des situations semblables où des populations frontalières ont un droit d'accès au territoire des Etats voisins et même un droit d'exploiter certaines ressources, certes de manière très limitée, tout comme c'est le cas de la pêche de subsistance dans le San Juan.

34. L'attitude radicalement contraire que le Nicaragua affirme avoir adoptée s'agissant de la navigation des bateaux de la force publique, même si elle ne correspond pas à la réalité, est révélatrice du type du comportement que le Nicaragua croit devoir observer pour préserver ses prétendus droits. Or, le Nicaragua n'a rien fait de pareil au sujet de la pêche de subsistance des habitants de la rive costa-ricienne.

35. J'imagine l'objection : on me dira que la présence des navires de la police costa-ricienne sur les eaux du San Juan est beaucoup plus importante que la pêche à des fins de subsistance. Je rétorquerai en mentionnant le zèle extrême dont a aussi fait preuve le Nicaragua relativement à d'autres questions bien plus mineures que la pêche, comme par exemple celle du pavillon des navires costa-riciens. C'est un zèle totalement injustifié, certes, mais un zèle qui démontre la façon dont le Nicaragua estime devoir agir lorsqu'il considère que sa souveraineté est en cause.

²¹⁰ *Droit de passage sur territoire indien (Portugal c. Inde)*, fond, arrêt, C.I.J. Recueil 1960, p. 40.

²¹¹ *Ile de Kasikili/Sedudu (Botswana/Namibie)*, arrêt, C.I.J. Recueil 1999 (II), p. 1094, par. 74.

²¹² Eritrea-Ethiopia Boundary Commission, *Decision Regarding Delimitation of the Border between the State of Eritrea and the Federal Democratic Republic of Ethiopia*, 13 avril 2002, 41 ILM 1057, 1116 (par. 7.3).

²¹³ CMN, par. 5.1.9.

36. Un autre élément pertinent est l'aveu du Nicaragua selon lequel sa réglementation interne ne s'applique pas à la pêche à des fins de subsistance des résidents de la rive costa-ricienne²¹⁴.

37. Le contre-mémoire affirme que «le Nicaragua a généralement toléré une utilisation limitée du San Juan par des riverains costa-riciens pour la pêche non commerciale» ou qu'il «a accepté, à titre de courtoisie, la pêche de subsistance ou de loisir par les riverains costa-riciens»²¹⁵. Aucune distinction n'est faite entre la pêche depuis la rive et la pêche en canoë sur le fleuve. La duplique prétend en revanche que seule la pêche depuis la rive est permise²¹⁶.

38. L'objectif du Nicaragua est double. D'une part, nos amis nicaraguayens se sont rendu compte qu'ils n'avaient rien objecté dans leur contre-mémoire contre cette navigation «sans articles de commerce», du moins avant que les poissons ne soient pêchés... D'autre part, il s'agit d'une tentative pour justifier d'une manière ou d'une autre la saisie des canoës des résidents costa-riciens s'adonnant à la pêche. Il paraît même que le Nicaragua aurait découvert, au moment de la rédaction de sa duplique, que plusieurs espèces de poissons seraient menacées d'extinction du fait de leur pêche illégale par des riverains costa-riciens²¹⁷. Naturellement, le Costa Rica rejette toutes ces allégations infondées de dernière minute.

39. Le mémoire et la réplique du Costa Rica ont fourni plusieurs déclarations sous serment des riverains costa-riciens. Il en découle qu'aucune distinction n'est faite entre la pêche depuis la rive costa-ricienne et celle depuis des canoës dans le fleuve²¹⁸.

40. Dans le sillage des nouvelles explications écologistes de l'Etat défendeur, la duplique nous informe que le Nicaragua interdit la pêche à ses propres riverains, mais la permet à ceux de la rive costa-ricienne²¹⁹. Décidemment, la courtoisie nicaraguayenne atteint ici des sommets : le

²¹⁴ Original en anglais : «the internal regulations of Nicaragua are naturally applicable and are generally enforced» (CMN, par. 5.1.16).

²¹⁵ Original en anglais : «Nicaragua has usually tolerated a limited use of the San Juan for non-commercial fishing by Costa Rican riparians» ; «Nicaragua has accepted, as a matter of courtesy, subsistence or leisure fishery by Costa Rican riparians» (CMN, par. 5.1.6).

²¹⁶ DN, par. 4.67.

²¹⁷ DN, par. 4.58.

²¹⁸ Voir déclaration sous serment de Leonel Morales Chacón, 6 juillet 2006, MCR, vol. 4, annexe 106 ; déclaration sous serment de Erick Maikol Martínez López, 6 juillet 2006, MCR, vol. 4, annexe 107 ; déclaration sous serment de José Moreno Rojas, 6 juillet 2006, MCR, vol. 4, annexe 108 ; déclaration sous serment de Josefa Alvarez Aragón, 6 juillet 2006, MCR, vol. 4, annexe 109. Voir aussi les déclarations sous serment de Víctor Julio Vargas Hernández, Marleny Rojas Vargas, Mario Salas Jiménez and Leonel Morales Chacón, 29 juillet 2007, RCR, vol. 2, annexe 54.

²¹⁹ DN, par. 4.67.

Nicaragua passe outre sa propre législation et discrimine ouvertement ses propres habitants pour permettre gracieusement à ceux du Costa Rica de pêcher sur le San Juan ! En réalité, cette attitude s'explique, mieux que par la courtoisie, par la conviction qu'elle revêt un caractère obligatoire.

41. Le Costa Rica est convaincu que cette pratique, doublée de l'inapplication totale de la réglementation interne à son égard et d'une absence totale de réaction négative du Nicaragua, a donné naissance à une règle coutumière locale. Peu importe au fond que l'on parle de coutume locale, d'acquiescement, d'accord tacite²²⁰, de régime territorial ou encore de subsistance d'un droit traditionnel datant de l'époque coloniale auquel il n'a jamais été dérogé. Le résultat est le même : les résidents de la rive costa-ricienne ont un droit de pêche à des fins de subsistance dans les eaux du San Juan.

c) La violation par le Nicaragua du droit de pêche à des fins de subsistance

42. Depuis l'introduction de la présente instance, le Nicaragua a interdit aux riverains costa-riciens toute activité de pêche dans les eaux du San Juan. Ceux d'entre eux qui tentent de pêcher risquent de voir leurs instruments de pêche ainsi que leurs bateaux saisis²²¹. De telles mesures punitives ont été effectivement prises vis-à-vis des riverains qui, toute leur vie durant, ont pêché dans le San Juan pour assurer leur subsistance²²².

43. Le Nicaragua a affirmé de manière générale qu'il n'a jamais donné l'ordre d'empêcher ce type de pêche²²³. Mais il n'a pas contesté la véracité des témoignages fournis par le Costa Rica, se bornant à signaler qu'il s'agit seulement d'«une poignée de témoignages sous serment»²²⁴. Qui plus est, il n'a pas non plus produit des preuves qui contredisent les allégations du Costa Rica.

²²⁰ Cf. *Droit de passage sur territoire indien (Portugal c. Inde), fond, arrêt, C.I.J. Recueil 1960*, p. 39-40 ; *Souveraineté sur Pedra Branca/Pulau Batu Puteh, Middle Rocks et South Ledge (Malaisie/Singapour), arrêt du 23 mai 2008*, par. 120-121.

²²¹ Déclaration sous serment de Josefa Alvarez Aragón, 6 juillet 2006, MCR, vol. 4, annexe 109.

²²² Voir déclaration sous serment de Víctor Julio Vargas Hernández, 6 juillet 2006, MCR, vol. 4, annexe 105 ; déclaration sous serment de Leonel Morales Chacón, 6 juillet 2006, MCR, vol. 4, annexe 106 ; déclaration sous serment de Erick Maikol Martínez López, 6 juillet 2006, MCR, vol. 4, annexe 107 ; déclaration sous serment de José Moreno Rojas, 6 juillet 2006, MCR, vol. 4, annexe 108 ; déclaration sous serment de Josefa Alvarez Aragón, 6 juillet 2006, MCR, vol. 4, annexe 109. Voir aussi les déclarations sous serment de Víctor Julio Vargas Hernández, Marleny Rojas Vargas, Mario Salas Jiménez and Leonel Morales Chacón, 29 juillet 2007, RCR, vol. 2, annexe 54.

²²³ CMN, par. 5.1.15.

²²⁴ CMN, par. 5.1.8.

Conclusion

44. Monsieur le président, Messieurs de la Cour, j'arrive à ma conclusion, à la triste conclusion que les droits costa-riens ont non seulement été violés, mais également niés ou vidés de leur contenu par le Nicaragua.

45. Je vous remercie de votre attention et vous prie de donner la parole à mon collègue et ami James Crawford.

The PRESIDENT: I thank Professor Kohen for his statement and I now invite Professor Crawford to take the floor.

Mr. CRAWFORD:

REMEDIES SOUGHT

Introduction

1. Mr. President, Members of the Court, it is my final task to outline the remedial issues in this case. In doing so, I will be, if I say so myself, commendably brief.

Costa Rica's request for a declaration of violations of Nicaragua's obligations

2. First, Costa Rica requests the Court to adjudge and declare that Nicaragua is in breach of its international obligations in denying the exercise of the right of free navigation and related rights on the San Juan.

3. Nicaragua does not dispute that it would be appropriate for you to issue a declaration in the present case although, of course, it disagrees as to the content of that declaration. I will return shortly to the declaration Nicaragua would have you make²²⁵.

4. As your predecessor, the Permanent Court, noted in 1926, a declaration serves "to ensure recognition of a situation at law, once and for all and with binding force as between the Parties; so that the legal position thus established cannot again be called in question in so far as the legal effects ensuing therefrom are concerned" (*Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)*, Judgment No. 11, 1927, P.C.I.J. Series A, No. 13, p. 20). Costa Rica might be forgiven

²²⁵CMN, 7.1.10; RN, 6.3.

for feeling that it needs one of these definitive statements every 50 or so years but certainly that is what we seek in this case.

Costa Rica's request for cessation of continuing breaches

5. Secondly, Nicaragua is obliged to cease all internationally wrongful conduct having a continuing character, which is the case with, in effect, all of the Nicaraguan conduct of which we complain.

Restitution, including abrogation of all legislative and administrative measures infringing Costa Rica's rights

6. Thirdly, Costa Rica seeks restoration of the situation prior to the breaches of the obligations. This includes the abrogation of all legislative and administrative measures taken by Nicaragua in breach of the Treaty of Limits.

7. Nicaragua argues that this request is "abusively vague" and, more importantly, that

"it goes far beyond the inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore. Among these limitations [says Nicaragua] the most fundamental is the one which prompts the Court to refrain from issuing orders to sovereign States."²²⁶

8. Now, of course it is true that "[t]here are inherent limitations on the exercise of the judicial function" by this Court, as you noted in the *Northern Cameroons* case (*Northern Cameroons, Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 29). But issuing orders to States is not excluded by any such inherent limitation. The Court gives decisions in its contentious jurisdiction which are binding on States and to describe those States as "sovereign", which they are, is not to the purpose. Nicaragua recites a number of cases in support of its alleged proposition that the Court must refrain "from issuing orders to sovereign States"²²⁷, but none of those cases are apposite.

9. I will take simply one for present purposes, the *Arrest Warrant* case. In that case, having found that the existing arrest warrant was unlawful, you held "Belgium must, by means of its own choosing, cancel the warrant in question and so inform the authorities to whom it was circulated" (*I.C.J. Reports 2002*, para. 76). Now, it is true that the means by which Belgium was to cancel the

²²⁶RN, 6.40.

²²⁷RN, 6.40.

warrant were left to Belgium to decide, but the Court in that passage made two orders to Belgium: (1) to cancel the warrant, and (2) to inform the authorities of the other States to whom it was circulated. There is no trace of any inherent limitation in that decision. And we say that the same thing is true for the other cases on which Nicaragua relies.

10. In short, the request that you order restitution in the form of abrogation of all legislative and administrative measures which are in breach of Nicaragua's international obligations to Costa Rica is legitimate and is fully within your authority.

Compensation

11. Mr. President, Members of the Court, Costa Rica also seeks pecuniary compensation for all damage caused by the unlawful acts committed by Nicaragua.

12. In its Rejoinder, Nicaragua makes three arguments against the claim for compensation.

13. The first is that claims for losses caused for charges, visas and permits required for Costa Rican vessels and citizens are diplomatic protection claims to which the requirement to exhaust local remedies applies. But, of course, Costa Rica's claim is for navigational rights of Costa Rica as a State under the 1858 Treaty²²⁸.

14. The losses caused to Costa Rica or to Costa Rican individuals for charges, visas and permits are a direct result of Nicaragua's breaches of Costa Rica's treaty rights. They have been caused by Nicaragua's internationally wrongful acts in violation of an interstate bilateral treaty.

15. I note in passing that a similar claim was made by Nicaragua in its applications against the United States and Costa Rica in the 1980s, seeking compensation "both on its own behalf and in respect of wrongs inflicted upon its nationals"²²⁹. Nicaragua made no suggestion then that these claims involved elements of diplomatic protection; nor did this Court do so when it upheld those claims in respect of freedom of navigation under the bilateral treaty of 1956 (*Military and Paramilitary Activities in and against Nicaragua*, I.C.J. Reports 1986, p. 140, paras. 279-280;

²²⁸MCR, 4.16; RCR, 5.05.

²²⁹*Military and Paramilitary Activities in and against Nicaragua*, Judgment, I.C.J. Reports 1986, p. 20, para. 17. See also, MN, p. 112, para. 3.

dispositif (7), (11) and (14)). Yet again, Nicaragua is very happy to come here as Applicant. When it comes here as Respondent, it seems to play by a different set of rules!

16. Finally, even if Costa Rica's claims for compensation could be characterized as diplomatic protection claims, they are incidental to the Costa Rican claim for breach of its own treaty rights. Any element of diplomatic protection is merely incidental and secondary: they are certainly *not*, as Nicaragua alleges, clearly distinct²³⁰. They are expressed in the same provision of the same treaty. To repeat, Costa Rica's claims in respect of compensation are analogous to the claims made by Nicaragua in its earlier applications where no local remedies were pursued, much less exhausted.

17. Nicaragua's second argument against the claim for compensation is that these are "entirely unsubstantiated claims" with no sufficient specification of the character of the injury and its quantum²³¹. This argument is based upon a misconception of the circumstances in the *Fisheries Jurisdiction* case (*Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, *Merits, Judgment, I.C.J. Reports 1974*, para. 76). There, Germany requested "a declaration of principle that Iceland is under an obligation to make compensation to [Germany] in respect of all unlawful acts of interference with the fishing vessels of [Germany]" (*I.C.J. Reports 1974*, p. 204, para. 74). Germany did not request in that case that compensation be assessed in a subsequent phase of the proceedings (*ibid.*, pp. 204-205, para. 76). The Court noted that Germany's request would have been appropriate "provided the claimant asks the court to receive evidence and to determine, in a subsequent phase of the same proceedings, the amount of damage to be assessed" (*ibid.*, pp. 204-205, para. 76). That is the crucial point. Costa Rica *has* asked the Court to reserve determination of the amount of damage payable to a subsequent phase of these proceedings. Precisely the same request was made by Nicaragua in the *Military and Paramilitary Activities* case against the United States and accepted by the Court.

²³⁰RN, para. 6.34.

²³¹RN, paras. 6.41-6.43.

Costa Rica's request for assurances and guarantees of non-repetition

18. Costa Rica also requests the Court to determine that Nicaragua provide assurances and guarantees against repetition of its internationally wrongful acts. It is fair to say that the subject of assurances and guarantees against repetition has had something of a rocky ride in the Court. But in the context of Nicaragua's continuing denial of the existence of Costa Rican rights and its continuing violations of these rights despite repeated decisions and commitments to the contrary, Costa Rica, to quote the words of the Commentary to the ILC Articles "has reason to believe that the mere restoration of the pre-existing situation does not protect it satisfactorily"²³². That is a situation in which assurances and guarantees of non-repetition are appropriate.

Nicaragua's request for a declaration

19. Mr. President, Members of the Court, Nicaragua itself seeks what I might call a counter-declaration on sundry questions. I will briefly address each of these requests.

20. The first is a counter-declaration that Costa Rica is required to comply with the regulations Nicaragua has imposed on navigation and on landing in the San Juan²³³. But as we have shown, these regulations are contrary to the treaty and to the applicable instruments. That excludes any possibility of a declaration in the contrary sense.

21. The second request is for a counter-declaration that Costa Rica "has to pay for any special services provided by Nicaragua in the use of the San Juan either for navigation or landing on the Nicaraguan banks"²³⁴. As a matter of fact, no such services are provided. There are no navigational aids, there are no aids on the bank. You clamber up a muddy bank. There is no evidence of the expenditure of any money. But even if they were, compulsory payment for services on a river which is subject to a right of free navigation, perpetual as it is in this case, is excluded by the Treaty of Limits.

22. Third, Nicaragua asks for a counter-declaration that Costa Rica must comply with all reasonable charges for improvements in navigation on the river²³⁵. Again, as a matter of fact, there

²³²United Nations, Report of the International Law Commission on the work of its Fifty-third session, *General Assembly Official Records, Fifty-sixth session, Supplement No. 10 (A/56/10, 2001)*, 219; MCR, 6.19.

²³³RN, 6.5; see also 6.17.

²³⁴RN, 6.5.

²³⁵RN, 6.5, see also 6.17.

are no such improvements. But in any event Nicaragua cannot subject Costa Rica's perpetual and free right of navigation to charges of any kind. This point was directly addressed in the Cleveland Award. Answering the fifth point of doubtful interpretation, President Cleveland expressly stated that "[t]he Republic of Costa Rica is not bound to contribute any proportion of the expenses that may be incurred by the Republic of Nicaragua for any of the purposes above mentioned", and this was true even when they included improvement of the river "for the common benefit"²³⁶.

23. Fourth, Nicaragua asks you to declare that "[r]evenue service boats may only be used during and with special reference to actual transit of the merchandise authorized by Treaty"²³⁷. But we have shown that Nicaragua's claim to limit Costa Rican public navigation by reference to articles of merchandise is without foundation²³⁸.

24. Finally, Nicaragua asks you to declare that it has the right to dredge the San Juan to return the flow of water to that obtaining in 1858, even if this would affect the flow of water in the Colorado River²³⁹.

25. Nicaragua's claim is without merit and without incidence for the present case. In the first place, there is no dispute between the Parties on the issue of dredging. In 2006, the Foreign Minister of Costa Rica, Mr. Tovar, expressed support in principle for improvement works on the San Juan²⁴⁰. Costa Rica has not changed its position since then. Second, the issue of dredging bears no relationship to the issues before the Court, which relate exclusively to rights of navigation and related rights. Improvement works may fall within Nicaragua's rights affirmed by President Cleveland. He said that Nicaragua is entitled "to execut[e] at her own expense and within her own territory such works of improvement", but he added the following proviso "*provided* such works of improvement do not result in the occupation or flooding or damage to Costa Rican territory; or in the destruction or serious impairment of the navigation of the said river

²³⁶MCR, Ann. 16, p. 99, third paragraph.

²³⁷RN, 6.5.

²³⁸RCR, 5.30.

²³⁹RN, 6.5.

²⁴⁰See Costa Rican Foreign Minister, Roberto Tovar Faja, to Nicaraguan Foreign Minister, Norman Caldera Cardenal, Note No. DM-187-06, 5 May 2006: RCR, Anns., Vol. 2, Ann. 42.

or any of its branches at any point where Costa Rica is entitled to navigate the same”²⁴¹, so there are significant limitations. But these issues are completely abstract. They do not arise in the absence of specific plans for particular dredging notified to Costa Rica. In short, this is not the place or time to deal with these questions: the parameters of the dispute before the Court are clearly defined.

Nicaragua’s reservations

26. Finally I should refer to Nicaragua’s so-called reservations. These relate to a claim that the Colorado River is an international waterway, and to potential claims against Costa Rica for ecological damage and even for diversion of the San Juan²⁴². These reservations are not counter-claims nor do they relate to or arise from any relief sought by Costa Rica. They are entirely without incidence for the present case and it would not be appropriate for you to take them into account in any way. If Nicaragua wishes to present these claims or to sustain any argument based upon them, they ought to have been presented properly in these proceedings or in a new Application.

Conclusions

27. Mr. President, Members of the Court, there are no minor cases before the Court but there are sometimes compressed cases. I hope I may be forgiven, in that respect, one closing remark. In the time we have had to present our case, we have sought to do so as economically as possible and perhaps more quickly than desirable. We have not been able in the time available to deal with every issue raised in the pleadings — a situation exacerbated by the fact that Nicaragua’s Rejoinder was far more substantial than its Counter-Memorial and that it contained additional evidence that *could* and *should* have been produced earlier. Any Nicaraguan assertions against us that we have not had time to deal with are firmly and categorically denied!

28. Mr. President, Members of the Court, that concludes Costa Rica’s first round presentation. We thank you for your patient attention.

²⁴¹MCR, Anns., Vol. 2, Ann. 16. See also Costa Rican Foreign Minister, Roberto Tovar Faja, to Nicaraguan Foreign Minister, Norman Caldera Cardenal, Note No. DM-187-06, 5 May 2006: RCR, Anns., Vol. 2, Ann. 42.

²⁴²CMN, p. 251; RN, 6.49.

The PRESIDENT: Thank you, Professor Crawford.

This marks the end of the first round of oral argument of the Republic of Costa Rica. Oral argument in the case will resume on Thursday 5 March 2009 at 10 a.m. in order for the Republic of Nicaragua to present its first round of oral argument. The sitting for the first round of oral argument of the Republic of Costa Rica is closed.

The Court rose at 1 p.m.
