

CR 2009/5

**International Court
of Justice**

**Cour internationale
de Justice**

THE HAGUE

LA HAYE

YEAR 2009

Public sitting

held on Friday 6 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 6 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-Alvarez, 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-Alvarez, 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, Chair 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. Brillembourg, Attorney at Law, 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), président 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 Brotóns, 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. Brillembourg, avocat au 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 Nicaragua. Now, this morning I am going to invite Mr. Reichler to take the floor as the first speaker.

Mr. REICHLER:

**NICARAGUA'S LAWFUL REGULATION OF NAVIGATION ON
THE SAN JUAN RIVER**

1. Mr. President, distinguished Members of the Court, it is always an honour for me to appear before this great Court. I am especially privileged today to speak on behalf of the Republic of Nicaragua.

2. It is my role to discuss Nicaragua's regulation of navigation on the San Juan River, and to demonstrate that it has been lawful in all respects, and in particular that it has not violated Costa Rica's rights under the Treaty of Limits of 1858.

3. I will make three fundamental points. *First*, the Treaty of Limits, which by its express language recognizes that Nicaragua *exclusively* has "dominio" and "sumo imperio" over the San Juan River, necessarily bestows upon Nicaragua, as the exclusive holder of sovereign authority over the river, the police power to regulate activities on or pertaining to the river, including the manner in which navigation is conducted.

4. *Second*, there is no inherent contradiction between Nicaragua's right to regulate navigation, in her capacity as sovereign over the river, and Costa Rica's right to free navigation "con objetos de comercio". Nicaragua's regulation of navigation, far from negating or diminishing Costa Rica's freedom of navigation, is fully compatible with it under long-established principles of international law and practice.

5. *Third*, the evidence proves that, in practice, Nicaragua has regulated navigation on the river, including navigation by Costa Rica, in a reasonable and non-discriminatory manner. As a consequence, Costa Rica's claim that Nicaragua's regulations violate her right of free navigation "con objetos de comercio" must fail.

A. The 1858 Treaty establishes Nicaragua’s exclusive sovereignty over the San Juan River, which necessarily endows her with the power to regulate navigation

6. I begin with the first point: Nicaragua’s power to regulate navigation on the San Juan River. Article VI of the Treaty of Limits states that Nicaragua “shall have exclusively the dominion and sovereign jurisdiction” over the waters of the river San Juan “but that the Republic of Costa Rica shall have the perpetual right of free navigation on the said waters . . . said navigation being for the purposes of commerce [con objetos de comercio]”. Now, the term “objetos de comercio” has been the subject of sustained debate. I will not revisit it. Instead, I will proceed from the premise that regardless of the meaning that the Court ultimately attributes to the phrase “con objetos de comercio”, and even if for purposes of argument “con objetos de comercio” means “for commercial purposes”, Nicaragua still has the right to regulate Costa Rican navigation on the San Juan River.

7. Costa Rica’s argument that Nicaragua does not have this right is a simple one: she claims that under Article VI she has the right to *free* navigation. And according to Costa Rica, “free” means free in the most absolute sense possible. This is what she says in her Memorial:

“Costa Rica’s perpetual right of free navigation is the right to navigate freely, without impediments, conditions, restrictions or charges or duties of any kind. Any interference, whether in the form of *regulations*, impediments, charges or restrictions or any condition that might be imposed is a violation of that right.”¹

At these hearings, Professor Caflisch expressed the view that Costa Rica’s right of free navigation is “absolute” and “unconditional”².

8. The problem with Costa Rica’s argument is that it is based on a highly selective reading of the text of Article VI. In particular, Costa Rica treats the language pertaining to her right to navigate on the San Juan in complete isolation from the rest of the Article, and, indeed, she divorces it from the rest of the same sentence of the Article that includes her right of navigation. It is as if, for Costa Rica, the entire sentence, if not all of Article VI, exists solely and exclusively to confer upon her an absolute and unconditional right of free navigation on the river. But that view is not consistent with the Treaty language. The key sentence of Article VI — the one in which Costa Rica’s right of navigation is found — *begins* with the declaration that Nicaragua has

¹Memorial of Costa Rica (MCR), para. 4.16.

²CR 2009/3, para. 35; p. 23, para. 7; p. 30, para. 23; p. 31, para. 26; p. 33, para. 33.

“exclusively the dominion and sovereign jurisdiction [exclusivamente el dominio y sumo imperio] over the waters of the San Juan River”. The sentence then continues with the word “but” (“pero” in Spanish), which introduces the dependent clause that “the Republic of Costa Rica shall have the perpetual right of free navigation on the said waters . . . said navigation being for the purposes of commerce [con objetos de comercio]”.

9. Nicaragua recognizes, of course, and has never denied, that Article VI gives Costa Rica a right of free navigation on the San Juan River “con objetos de comercio”. But Article VI makes it clear that this right of Costa Rica exists within the overall context of Nicaragua’s exclusive dominion and sovereign jurisdiction over the river. The real difference between the two Parties in this case is that Nicaragua recognizes Costa Rica’s right to navigate “con objetos de comercio”, but Costa Rica effectively disregards Nicaragua’s exclusive dominion and sovereign jurisdiction over the river, paying it no more than lip service at best. When Professor Caflisch argues that Costa Rica’s right of free navigation under Article VI is “absolute” and that “it exists for Costa Rica independently of the rights of others”, such that her navigation is exempt from regulation by Nicaragua, he is in effect reading out of the Treaty Nicaragua’s exclusive dominion and sovereign jurisdiction over the river³.

10. The words in Spanish, which the drafters of the 1858 Treaty used to express the power that Nicaragua was to have “exclusively” are “dominio”, dominion, and “sumo imperio”⁴. One need not be a famous Latin scholar, like my good friend Professor Pellet, to recognize that “sumo imperio” is a classical formulation derived from the Latin *summum imperium* or *imperium summum*. It connotes the very highest level of sovereign authority. According to a contemporary Spanish source, the *Enciclopedia Moderna — Modern Encyclopedia* — published in Madrid in 1855:

“[T]he state, designated with the generic names *civitas* and *republica*, whether monarchical, aristocratic or democratic in government, once constituted is not subjected to any other person, nor any other state; it could freely do anything necessary for its conservation, without anyone having the right to prevent it from

³CR 2009/3, p. 23, para. 7.

⁴1858 Treaty of Limits, Art. VI.

exercising its rights, being accountable only to God . . . This is what is called *imperium summum*.”⁵

11. If Nicaragua’s exclusive “sumo imperio” over the river is given its natural and ordinary content, especially as it was understood by the authors of the Treaty in 1858, it must *necessarily* include the right to issue laws and regulations regarding activities on the river, including, especially, navigation. To be sure, in exercising her sovereign regulatory power over river navigation, Nicaragua may not deprive Costa Rica of her right of free navigation “con objetos de comercio” under the Treaty, either directly, or by imposing requirements that are unreasonable, arbitrary or discriminatory. In this way, the rights of both States under the Treaty are preserved, and given their full measure of expression.

12. In her written pleadings, Costa Rica has argued: “Article VI makes Nicaragua’s dominion and sovereign jurisdiction over the River conditional upon the Costa Rican perpetual rights of free navigation.”⁶ To Costa Rica, Nicaragua’s sovereignty is “conditional”, while her own right is, as Professor Caflisch described it, “unconditional”. In this manner Costa Rica turns the logic and the language of Article VI on its head. The plain language of that Article makes it clear that Nicaragua’s sovereignty, her “sumo imperio”, is not conditioned on Costa Rica’s navigational rights. To the contrary, Costa Rica’s right of free navigation exists within the context of Nicaragua’s exclusive *summum imperium*.

13. Professor Caflisch accuses Nicaragua of advocating a so-called “hierarchy of rights” in which Costa Rica’s rights are subordinated to those of Nicaragua⁷. But, with respect, that misses the point. What Nicaragua seeks is recognition and full expression of the Article VI rights of *both* Parties, including her own express right to exclusively exercise the power of “dominio” and “sumo imperio” over the river. To deny Nicaragua the police power to regulate navigation would be to diminish her sovereignty, her *summum imperium*, which the Treaty has given to her exclusively. In

⁵Francisco de Paula Mellado, *Enciclopedia Moderna: Diccionario Universal de Literatura, Ciencias, Artes, Agricultura, Industria, y Comercio*, Tomo 32 (Madrid, 1855), p. 513, available at http://books.google.com/books?id=3qfK1Adqlm8C&pg=RA3-PA508-IA1&dq=Mellado+Enciclopedia+moderna+imperium+summum&lr=lang_es&num=30&as_brr=0&as_pt=ALLTYPES&ei=WACrSdLFNoPwMJze5M0I (Original Spanish text: “Segun ellos [los escritores eminentes del siglo pasado], el estado que designaban con los nombres genéricos *civitas* y *republica*, y fuese monárquico, aristocrático ó democrático su gobierno, una vez constituido no está sujeto á ninguna persona, ni á ningun otro estado; puede hacer libremente cuanto sea necesario para su conservacion, sin que nadie tenga derecho á impedirselo ni á residenciarle por el ejercicio de sus derechos, siendo justiciable para Dios, pero de ningun modo para los hombres. Esto es lo que se llamaba *imperium summum*.”)

⁶MCR, para. 4.06.

⁷CR 2009/3, p. 22, paras. 2-6; p. 33, para. 33.

effect, this would establish the very hierarchy of rights that Professor Caflisch says is unacceptable, except in the opposite direction; it would subordinate Nicaragua's sovereignty over the river to Costa Rica's right of navigation. By contrast, recognizing Nicaragua's sovereign right of regulation does not diminish Costa Rica's Treaty rights, provided that Nicaragua exercises her power to regulate navigation in a reasonable, non-arbitrary and non-discriminatory manner. To state the matter succinctly, the only way to give proper recognition and complete expression to the rights of both Parties is to acknowledge Nicaragua's right to regulate navigation on a river over which she is the unchallenged and exclusive sovereign, subject to the proviso that she may not deny Costa Rica's right of free navigation "con objetos de comercio" by imposing upon her any requirements that are unreasonable, arbitrary or discriminatory.

B. Costa Rica's right to "free" navigation is not exempt from regulation by Nicaragua

14. I come now to my second point, which is that there is no inherent contradiction, in doctrine or practice between Nicaragua's right to regulate navigation as the sovereign power over the river, and Costa Rica's right under the 1858 Treaty to freedom of navigation "con objetos de comercio". My esteemed colleague and friend, Ian Brownlie, addressed this subject yesterday, and I will not go over ground he has already covered; however, I will cite some additional authorities for the purpose of further disproving Costa Rica's argument that her right to freedom of navigation "con objetos de comercio" necessarily excludes or negates Nicaragua's power to regulate that navigation. The sources are clear: there is nothing incompatible between navigation that is "free" and regulation of that navigation. In fact, this is the norm in State practice. While Professor Caflisch insisted several times that Costa Rica's right of free navigation necessarily renders any attempt by Nicaragua to regulate it unlawful, he did not explain why this must be so. The relevant authorities are to the contrary. They confirm that the right of a State to "free" navigation does not entitle it to escape or avoid regulation — reasonable regulation — by the State that is sovereign over the watercourse.

15. I should mention that I invoke these authorities *not* to argue that any of them has the force of law or is otherwise directly applicable in this case which, both Parties agree, turns on the interpretation to be given to the terms of the Treaty of 1858 and the Cleveland Award. Instead,

their relevance lies in disproving the core premise of Costa Rica's argument: that navigation that is "free" is, by definition, exempt from all regulation.

16. I start with a reference drawn from the frequently cited treatise by Professors Lowe and Churchill, *The Law of the Sea*, which captures the point succinctly. In a section describing navigation on a State's *internal* waters, the authors write:

"Treaties or unilateral declarations allowing free navigation, *subject always to regulations imposed by riparian States*, have at various times been made in respect of many major rivers around the world and a multilateral treaty to this effect — the Barcelona Convention on the Regime of Navigable Waterways of International Concern — was concluded in 1921, although it has not been widely ratified."⁸

17. The Barcelona Convention is, indeed, a good example⁹. Article 3 of the Statute on the Regime of Navigable Waterways of International Concern, which is annexed to and made part of the Convention, creates a right of "free exercise of navigation"¹⁰. Article 6 then provides that each of the Contracting States nevertheless maintains its existing rights regarding the navigable waterways under its sovereignty:

"to enact the stipulations and to take the measures necessary for policing the territory and for applying the laws and regulations relating to customs, public health, precautions against the diseases of animals and plants, emigration or immigration, and to the import or export of prohibited goods, it being understood that such stipulations and measures must be reasonable, must be applied on a footing of absolute equality between the nationals, property and flags of any one of the Contracting States, including the State which is their author, and must not without good reason impede the freedom of navigation".

18. This is but one of many examples that could be given that the right to the "free exercise of navigation" does not exclude regulation by the State that is sovereign over the watercourse, provided that the pertinent regulations are both reasonable and non-discriminatory, and applicable with equal force to the State promulgating the regulations. The principle was already well-established in the nineteenth century. The Resolution of Heidelberg for example, adopted by the Institut du Droit International, in 1887, provided in Article 3 that: "The navigation on the whole course of international rivers, from the point where each of them becomes navigable, to the

⁸R. R. Churchill & A. V. Lowe, *The Law of the Sea* (1983), p. 48.

⁹Barcelona Convention, available at, <http://www.fao.org/DOCREP/005/W9549E/w9549e02.htm#bm02.2> (last visited 26 February 2009).

¹⁰Art. 3: "Subject to the provisions contained in Articles 5 and 17, each of the Contracting States shall accord free exercise of navigation to the vessels flying the flag of any one of the other Contracting States on those parts of navigable waterways specified above which may be situated under its sovereignty or authority."

sea, is entirely free, and cannot, as regards commerce, be forbidden to any flags.”¹¹ At the same time, Article 20 provided for the collection of customs duties by the State with sovereignty over the waters, Article 23 provided for quarantine and sanitary controls “by the initiative of the riparian States”, and Article 30 provided for a riparian Commission “to elaborate the regulations for river police”¹². The 1936 Montreux Convention, which remains in force and governs navigation through Turkish waters in the Bosphorus and the Dardanelles, provides in Article I: “The High Contracting Parties recognize and affirm the principle of freedom of transit and freedom of navigation by sea in the Straits.”¹³ That sentence is followed immediately by this one: “*The exercise of this freedom — the exercise of this freedom — shall henceforth be regulated by the provisions of the present Convention.*”¹⁴ No contradiction is perceived between the exercise of the freedom of navigation and its regulation.

19. The International Law Association’s 2004 revisions to the 1966 Helsinki Rules on International Water Resources (known as the “Berlin Rules”) are a recent affirmation of the same principle: that freedom of navigation does not mean freedom from reasonable regulation. According to Article 43 (1) of the Berlin Rules:

“Subject to the limitations or qualifications in this Chapter, each riparian State is entitled to freedom of navigation on the entire watercourse to which they are riparian on a basis of equality and nondiscrimination.”¹⁵

Then, Article 45, which is captioned “Regulating Navigation”, states:

“In order to achieve good order in the navigable portion of a watercourse within its jurisdiction, a riparian State may regulate, limit, or suspend navigation, as appropriate for the purposes of protection of public safety, health, or the environment, over that portion of the watercourse within its jurisdiction, provided the State does not discriminate against the shipping of another riparian State and does not unreasonably interfere with the enjoyment of the rights of freedom of navigation . . .”¹⁶

¹¹Resolution of Heidelberg, Art. 3. English translation in Kaeckenbeeck, *International Rivers: A Monograph Based on Diplomatic Documents* (1920), pp. 46-58.

¹²*Ibid.*

¹³Montreux Convention Regarding the Regime of the Turkish Straits (1936), Art. I.

¹⁴*Ibid.*

¹⁵International Law Association, *Berlin Rules on Water Resources Law* (2004), available at http://www.waterlaw.org/documents/intldocs/ILA_Berlin_Rules-2004.pdf.

¹⁶*Ibid.*

20. It is true that the instruments I have just discussed, which resulted from lengthy processes of multilateral negotiation or detailed discussion by learned bodies, provide expressly for regulation of navigation by the sovereign, as well as freedom of navigation for other States. It is also true that the 1858 Treaty between Nicaragua and Costa Rica does not explicitly mention regulation. But it says all it needs to say to fully endow Nicaragua with the power to regulate navigation on the San Juan River, when it provides Nicaragua *exclusively* with dominion and “sumo imperio”, *summum imperium*, over the river. By this language, Nicaragua alone is empowered to exercise the functions of a State with regard to the river. Those functions necessarily include the exercise of her police power to regulate activities on the river, including navigation, to ensure safety on the river, to prevent criminal trafficking in drugs or weapons, to prevent illegal immigration, and of course to protect the natural environment and prevent pollution of the river and adjacent shore area. The instruments, resolutions, and rules I have just discussed demonstrate that there is nothing inconsistent in recognizing a State’s authority to regulate navigation in her sovereign waters — even in cases, unlike this one, involving international rivers that flow through the sovereign territory of more than one State — and the right of other States to enjoy freedom of navigation in the same waters. The inconsistency only arises if the sovereign attempts to regulate navigation in an unreasonable, arbitrary or discriminatory manner, and thereby renders nugatory the right of free navigation enjoyed by neighbouring States. As I will now discuss, this is *not* the case with the regulations adopted by Nicaragua.

C. Nicaragua’s regulations are reasonable and necessary to protect important State interests; they are neither arbitrary nor discriminatory

21. I come now to the third and final part of my presentation, in which I address the reasonableness of Nicaragua’s regulations pertaining to the San Juan River. Nicaragua submits that her regulations are indeed reasonable, that they further legitimate and important national interests, and they are not arbitrary or discriminatory in any way. As such, they do not violate Costa Rica’s navigation rights under the 1858 Treaty.

22. The evidence shows, the evidence shows, that the laws and regulations adopted by Nicaragua with regard to the San Juan River promote and protect the following interests: *first*, the preservation of the natural environment, including endangered animal and plant species, and the

prevention of pollution; *second*, the control and prevention of crime, especially the illegal poaching of animals and trees from protected forests and waters, and the interdiction of trafficking in drugs and arms; *third*, the promotion of navigational safety on a river that is notoriously difficult and at times extremely dangerous to navigate, especially after nightfall; *fourth*, the control of borders and immigration; and *fifth* the manifestation and preservation of Nicaragua's sovereignty over the river.

23. It cannot be disputed that all of these are legitimate and important national and, in some cases, international interests. They are also precisely the public interests that sovereign States are entitled to promote and protect by reasonable regulation of navigation in their sovereign waters, without transgressing the rights of free navigation afforded to other States. Article 6 of the Barcelona Statute and Article 45 of the Berlin Rules, from which I read earlier, for example, list these specific interests among those justifying a State's regulation of navigation even as those instruments provide the right of freedom of navigation.

24. In this case, Costa Rica challenges five particular exercises of Nicaragua's regulatory power. Nicaragua has already demonstrated in her written pleadings that all five of these exercises of her police power are reasonable, and that they are not arbitrary or discriminatory against Costa Rica. For this reason, I will only summarize this evidence, so that I may focus more on responding to the criticisms voiced by Costa Rica's representatives at these oral proceedings.

(a) *The requirement to stop and register*

25. *First*, Costa Rica challenges Nicaragua's requirement that all vessels stop and register at Nicaraguan border posts upon entering and exiting the San Juan River. This regulation applies to all vessels, including Nicaraguan vessels¹⁷. It requires boat operators to stop at the first Nicaraguan security post that they pass and identify themselves, their passengers and their cargoes. That is all. No fees or tolls are charged by Nicaragua for entering or exiting the river. Nicaragua promulgated this regulation in order to ensure that the river is used only for lawful purposes, and in particular to ensure that it is used in a manner consistent with environmental protection and preservation.

¹⁷See Rejoinder of Nicaragua (RN), paras. 4.61, 4.71, 4.80.

26. In her written pleadings, Nicaragua presented extensive evidence, none of which has been disputed by Costa Rica, that the San Juan River itself, and the Nicaraguan shore adjacent to it, are extremely important and gravely threatened natural preserves¹⁸. Since 1990, when peace returned to the area, Nicaragua has dedicated herself to the protection of three extensive botanic and wildlife preserves on or adjacent to the San Juan: (1) the Indio Maíz Biological Reserve; (2) the San Juan River Wildlife Refuge; and (3) the San Juan River-Nicaragua Biosphere Reserve¹⁹. A sketch-map is included in your judges' folder, and projected on the screen in front of you and behind me is that map.

27. The Indio Maíz Biological Reserve was first created in 1990 and included the entire San Juan River. It now encompasses more than 3,000 sq km²⁰. In 1999, the San Juan Wildlife Refuge, made up of the river itself and a 2 km strip along the Nicaraguan bank, was carved out of the Indio Maíz Reserve and constituted as a separate reserve²¹. The San Juan Wildlife Refuge has since been designated a wetland of international importance under the Ramsar Convention²². In 2003, Unesco's Man and the Biosphere Programme designated both the San Juan Wildlife Refuge and the Indio Maíz Biological Reserve as part of the greater international biosphere reserve known as the San Juan River-Nicaragua Biosphere Reserve which covers more than 18,000 sq km — or fully 14 per cent of Nicaragua's entire territory²³. These areas are home to an impressive, and unfortunately in many cases, endangered, diversity of flora and fauna, as described in detail in Nicaragua's Rejoinder²⁴.

28. The evidence shows that Nicaragua has invested major resources in protecting these particular reserves. The Nicaraguan Ministry of Environment and Natural Resources has established four posts along the Nicaraguan bank of the river opposite Costa Rica, in addition to inland posts scattered throughout the Indio Maíz Reserve²⁵. The distance between these posts can

¹⁸See Counter-Memorial of Nicaragua (CMN), paras. 1.1.18-1.1.25; RN, pp. 179-197.

¹⁹See CMN, Vol. II, Anns. 59-61; RN, Vol. II, Anns. 39, 44-45.

²⁰See RN, paras. 4.37-4.45; CMN, Vol. II, Ann. 59; RN, Vol. II, Ann. 47.

²¹See RN, para. 4.40; CMN, Vol. II, Ann. 60.

²²See RN, para. 4.41; *ibid.* Vol. II, Ann. 44.

²³See *ibid.*, paras. 4.44-4.45; *ibid.*, Vol. II, Ann. 39.

²⁴See *ibid.*, paras. 4.39-4.43, 4.51-4.59.

²⁵See *ibid.*, paras. 4.49-4.50.

be up to 40 km, which makes it extraordinarily difficult to monitor activities along the river or the adjacent shore area. The challenge is compounded by the fact that illegal loggers and poachers who operate in the area are often armed. As a result, the Environment Ministry and the Nicaraguan army have joined efforts to co-operate in the task of protecting the river²⁶.

29. The main threats to the flora and fauna of the river and its shore come from people, and most of the people who threaten the protected species come from the Costa Rican side. This is a proven fact, and it is not an accusation against Costa Rica or her people. The simple truth is that the people who violate the protected areas for illicit purposes can only come from the Costa Rican side because that is where people live. Nicaragua does not allow any settlements on her side of the river where the protected areas are, and it strictly limits and regulates even temporary entry into the reserves by any person²⁷. Projected before you, and included in your judges' folder, is a sketch-map prepared by Costa Rica — not Nicaragua —, prepared by Costa Rica, and included in her Memorial, showing the location of the settlements on her bank of the river across, directly across, from Nicaragua's protected areas. As set forth in Nicaragua's Rejoinder, illegal logging, illegal hunting and fishing, and illegal poaching of rare and endangered animals in the river or on the adjacent shore by local residents of Costa Rica are serious, on-going problems that require constant vigilance²⁸. My friend Professor Kohen told the Court on Tuesday that this simply cannot be true because, if it were, Nicaragua would have presented evidence of arrests or prosecutions of these persons, and she did not. "Not one case", Professor Kohen intoned with some emphasis²⁹. In fact, Nicaragua did present this evidence, and we respectfully refer Professor Kohen, who must have overlooked it, and the Court, which we trust will not, to Annex 43 of Nicaragua's Rejoinder, which is the criminal complaint filed by Nicaragua's Public Prosecutor against 20 poachers "originating from the sister Republic of Costa Rica"³⁰.

30. There are no bridges across the river. The only way to get from the Costa Rican side to the Nicaraguan side is by navigating across the river. Similarly, because there are no roads on the

²⁶See *ibid.*, para. 4.50; *ibid.*, Vol. II, Ann. 3.

²⁷See RN, para. 4.60.

²⁸See RN, paras. 4.51-4.60.

²⁹CR 2009/3, p. 42, para. 32.

³⁰RN, Vol. II, Ann. 43.

Nicaraguan side, the only way to access the reserves from there is also by boat. By requiring all persons — Nicaraguans as well as Costa Ricans — who enter the river to stop and register, Nicaragua is able to monitor traffic, and to control access to the reserves, including the river itself, and thereby protect them³¹. By requiring vessel operators to register their boats and their passengers upon entering *and* exiting the river, Nicaragua can assure that all who enter the river also leave it, and that no one remains behind unlawfully in any of the densely forested protected areas, where he could easily fell trees or capture or kill rare animals without fear of detection.

31. Now unfortunately both Professors Kohen and Caflisch were rather sarcastic in describing what they called Nicaragua's "sudden" concern for the environment³². Professor Kohen called it a "last minute argument" that "suddenly appeared in the Rejoinder"³³. In fact, Nicaragua cited environmental protection of the San Juan River and its environs as a major concern in her Counter-Memorial, at pages 14 through 16. And, as the evidence shows, Nicaragua has been continuously protecting the San Juan and the adjacent shore area as endangered natural preserves since at least 1990. While they complain that Nicaragua supplied extensive additional evidence in her Rejoinder, which she did, they offer nothing to undermine or refute that evidence; their main complaint is about its timing, even though they have now had an opportunity to study and respond to it for more than eight months. To dismiss such evidence on grounds of its supposed "suddenness" is a way to sweep away unfavourable facts when there is no other defence against them.

32. The requirement to stop and register also serves Nicaragua's interests in preventing criminal activity other than environmental crimes. Aside from illegal logging and poaching of animals, common criminal activities on the river include arms and drug trafficking. Having to stop and register upon entering and exiting the river has an obvious deterrent effect on these activities. The requirement is especially important given the geography of this river, which winds its way through 140 km of remote territory that is either heavily vegetated on the Nicaraguan side or intermittently populated on the Costa Rican side. Especially since Nicaragua's checkpoints are

³¹See RN, para. 4.61.

³²See CR 2009/3, p. 25, para. 10; p. 35, para. 4; p. 42, para. 35; p. 43, para. 37.

³³CR 2009/3, p. 35, para. 4; p. 42, para. 35; p. 43, para. 37.

widely spread out, it is only by keeping track of vessels as they enter and leave the river that Nicaraguan authorities can effectively protect against unlawful activity.

33. Professor Caflisch cavalierly dismisses this justification for the regulation on the ground that “criminals do not turn up at Nicaraguan army posts prior to perpetrating crimes”³⁴. But that is precisely the point. The requirement that all vessels stop and register at one of these posts upon entering the river discourages would-be criminals from turning up and having to register; were they to attempt to navigate past the post without stopping, they would be spotted, pursued and detained.

(b) *Departure clearance certificates*

34. *Second*, Costa Rica challenges the requirement to obtain a departure clearance certificate. This requirement serves Nicaragua’s interest in assuring navigational safety on the San Juan River, as well as her interests in environmental protection and criminal law enforcement. The issuance of departure clearance certificates by riparian or coastal States is a common practice worldwide. Nicaragua is no exception. Neither is Costa Rica. In both States, as in many others, vessels must be inspected to ensure their seaworthiness, and their compliance with anti-pollution requirements. When vessels stop at Nicaraguan security posts to register their entry into the river, they are inspected by the authorities there to ensure that they are sufficiently seaworthy to safely navigate the river, and that they are free of fuel leaks that might pollute the waters. The inspection also ensures that no vessels are loaded with illegal cargo, such as protected plants or animals, including fish, illegally taken from Nicaragua’s reserves, or drugs or firearms. These are legitimate public interests. And in fact, prior to filing this case Costa Rica expressly approved of Nicaragua’s practice in this regard. This is reflected in the Final Minutes of a 1997 meeting of the Binational Nicaragua-Costa Rica Commission, located in your judges’ folder and projected in front of you. These Minutes state:

“Faced with the problem presented by the Costa Rican delegation regarding the existence of sites that require the presence of authorities with competency in the matter, it was agreed that Nicaragua will make efforts to establish posts at determined sites, so as to extend coverage in the fight against this crime . . .

³⁴CR 2009/3, p. 28, para. 19.

With respect to the movement of vessels, 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.”³⁵

Professor Caflisch attempts to dismiss this agreement on the ground that Costa Rica approved of Nicaragua’s registration and departure clearance requirements only because she considered them necessary to prevent drug trafficking³⁶. Guilty as charged. Even if he is correct, this still proves Nicaragua’s point: that Costa Rica herself agreed that there was good reason for both the registration and departure clearance requirements imposed by Nicaragua, and that she approved of them on that basis.

35. Professor Caflisch and Professor Kohen complain about the small charge Nicaragua collects to cover her costs of inspection. Boat operators are charged US\$5 for this service. The charge applies to all nationalities, including Nicaraguans³⁷. There is an exception, however, for local Costa Rican residents who live on the right bank of the river. Strictly as a courtesy to these Costa Rican neighbours, Nicaragua regularly issues them departure clearance certificates free of charge³⁸.

36. The evidence before you does not support Costa Rica’s claim that the departure clearance certification process infringes on her navigation rights under the 1858 Treaty. Costa Rica has introduced no evidence of any kind that any of her vessels has ever been arbitrarily denied a certificate, or has been prevented from navigating on the river on this basis. Nor has Costa Rica produced evidence that the payment of the \$5 fee has discouraged navigation. It is difficult in any event to believe that such a minimal payment would have such an effect, and Costa Rica makes no such argument.

37. There is nothing in the Treaty of 1858 to prohibit Nicaragua from charging this small fee for the service of conducting the inspection. Article VI, in its Spanish original and only authoritative text, prohibits Nicaragua from requiring Costa Rica to pay “impuestos”, in English, “imposts”, or duties, on the merchandise carried by Costa Rican commercial vessels. The minimal fee charged by Nicaragua is not, by any definition, an “impost”. It is a fee for service, in French a

³⁵RN, Vol. II, Ann. 4.

³⁶See CR 2009/3, p. 29, para. 22.

³⁷RN, paras. 4.62-4.63; 4.72; 4.81; RN, Vol. II, Ann. 48, Ann. 70, p. 436, and Ann. 77, p. 487.

³⁸RN, paras. 4.74, 4.88, 5.110; RN, Vol. II, Anns. 70, 72, 73, 77, 78.

“redevance”, not a tax. As such it is not prohibited by the Treaty. The instruments I discussed earlier, including the Barcelona Statute, among others, draw a clear distinction between customs and other taxes on the one hand and fees for services on the other. Fees for services are considered lawful exercises of a sovereign State’s police powers, even when customs and other taxes are prohibited. Moreover, even with regard to imposts, Article VI provides that they shall not be collected “unless when levied by mutual consent of both Governments”. Such consent has been given numerous times since 1858, in tax and customs treaties between the two States, and in regional treaties, including the Central American Uniform Customs Code³⁹. Professor Caflisch impugns Nicaragua’s motives. He says “the objective of these [departure clearance] certificates is not one of promoting safety but one of levying a tax”⁴⁰. He is, of course, entitled to his opinions. But this one is contradicted by all the evidence.

38. Professor Kohen claims that Nicaragua has violated her obligation under Article VI, which is also an obligation of Costa Rica, to permit the vessels of both countries “to land indiscriminately on either side of the river, at the portion thereof where the navigation is common”⁴¹. The landing right that is provided is for Costa Rican vessels engaged in navigation under Article VI, that is, navigation “con objetos de comercio”. The only place on the Nicaraguan side where commerce can be conducted is San Juan del Norte, because it is the only Nicaraguan settlement, and Costa Rican vessels have always been and remain free to land there. There is no evidence that they have ever been prevented from landing, and Professor Kohen cites none. Two additional points could be made in response to Professor Kohen, although no more is required. Under Article VI, indiscriminate landing rights are linked to the absence of imposts. But imposts are no longer absent, by mutual agreement. Under current arrangements, landing is permitted by both States only where there are customs or border posts. If it were otherwise, smugglers could invoke indiscriminate landing rights to avoid payment of duties by landing where there are no customs or border facilities. And, in fact, neither Costa Rica nor Nicaragua really understands Article VI to require indiscriminate landing rights for the other’s nationals. As I will discuss in my

³⁹Central American Uniform Customs Code [Código Aduanero Uniforme Centroamericano (CAUCA)], 13 Dec. 1963. Published in *La Gaceta* of Nicaragua No. 339, 18 Feb. 1966.

⁴⁰CR 2009/3, p. 29, para. 23.

⁴¹Costa Rica-Nicaragua Treaty of Limits (Cañas-Jerez), 15 Apr. 1858, Art. VI. MCR, Vol. II, Ann. 7 (c).

next speech, Costa Rica does not allow Nicaraguan boats to land indiscriminately on her bank; instead, she arrests the passengers as illegal aliens.

(c) *The prohibition on navigation after nightfall*

39. *Third*, Costa Rica challenges Nicaragua's prohibition of navigation on the river after nightfall. Nicaragua makes exceptions, of course, for cases of medical and other emergency. The most important reason for this regulation is navigational safety. The evidence shows that it is not safe to navigate on this river after dark. Very few of the boats that transit the river have even the most rudimentary navigation lights⁴². Not only can they not see the water in front of them, but other boats cannot see them, risking collision. Nocturnal navigation is particularly dangerous in parts of the river where the waters are shallow, and boats frequently run aground on the numerous sand bars that are invisible at night. The wide range of hazards includes rapids, many fallen trees and yes, even crocodiles⁴³. None of this evidence is disputed by Costa Rica. Professor Caflisch, who apparently has never been to the river — as Nicaragua's counsel have — tells us that Nicaragua can promote the legitimate objective of navigational safety by requiring “that boats travelling at night shall carry lights”⁴⁴. As the distinguished Agent of Nicaragua pointed out yesterday, such a proposal could only be made by someone, well intentioned, but unfamiliar with both the river and the extreme poverty that characterizes most of the local population. We say that, as the sovereign, it is up to Nicaragua in any event to determine what safety measures are required, limited only by the obligation to assure that they are reasonable and not applied against Costa Rica in an arbitrary or discriminatory manner. The prohibition on night-time navigation, given the nature of this particular river and the specific hazards that are present, meets this test.

40. The prohibition is applied to all navigation after dark, including Nicaraguan navigation⁴⁵. Professor Caflisch attempts to show that Nicaragua employs a double standard, allowing night-time navigation for her own vessels but not those of Costa Rica⁴⁶. To support this charge he cites a

⁴²RN, paras. 4.80, 4.83-4.85.

⁴³*Ibid.*

⁴⁴CR 2009/3, p. 32, para. 26 (v).

⁴⁵RN, para. 4.65.

⁴⁶CR 2009/3, p. 31, para. 26 (iv).

timetable for a Nicaraguan ferry service that travels between, in his words, “Grenada and San Carlos overnight”⁴⁷. I am afraid Professor Cafilisch’s geography is a bit off. As shown in the map on the screen in front of you and in your judges’ folder, ferry transport between Grenada and San Carlos traverses Lake Nicaragua, not the San Juan River.

(d) *Border and immigration requirements*

41. *Fourth*, Costa Rica challenges the requirement that foreign nationals who enter the river, and thereby enter Nicaraguan territory, pass through Nicaraguan immigration facilities and the same procedures that are followed at all other entry points into Nicaragua. Just as all non-nationals are required to obtain a tourist card when entering Nicaragua at the Managua International Airport or at other points of entry, so too when they enter Nicaragua via the San Juan. Depending on the traveller’s country of origin, entry into Nicaragua may also require a valid visa. Surely Costa Rica’s right to navigate freely on the river “con objetos de comercio” does not mean she is free to bring undocumented aliens into Nicaraguan territory at her pleasure.

42. In practice, the visa requirement affects very few of the tourists who enter Nicaragua on Costa Rican tour boats. The undisputed facts, compiled from Nicaragua’s immigration records, show that *almost all of the tourists* on these boats are from the United States of America, Canada, the European Union or Australia, none of whom are required to have visas to enter Nicaragua⁴⁸. The evidence also shows that, as a courtesy extended by Nicaragua, local Costa Rican residents and operators of Costa Rican commercial vessels are permitted to transit the river without tourist cards or visas⁴⁹.

43. The Court needs no reminding that visa and tourist card requirements are common throughout the world, as a means by which States exercise their inherent right to regulate the entry of foreign nationals into their territory and protect their borders. Costa Rica complains about the fees associated with these requirements. This is a difficult argument for Costa Rica to sustain, in light of the near universal practice of States to charge foreign nationals for the issuance of visas and tourist cards. Nicaragua charges Costa Rican nationals, other than local riparians, \$20 for a visa,

⁴⁷*Ibid*, footnote 91.

⁴⁸RN, paras. 4.33, 4.90; RN, Vol. II, Ann. 71.

⁴⁹RN, para. 4.88-4.89; RN, Vol. II, Anns. 70, 73, and 78.

about the same amount that Costa Rica charges Nicaraguans who apply for a Costa Rican visa. The charge for a tourist card is \$5. Immigration processing, including both entry and exit, amounts to \$4. Has Costa Rica really brought her case to this great Court over the grand sum of \$9 per tourist, which is no more than it costs to take a guided tour of the Peace Palace? If so, the evidence is against her. Costa Rica has not produced evidence of a single case of a tourist who was discouraged from travelling to the San Juan by the cost of Nicaragua's tourist card and immigration processing. These are not, to quote Professor Kohen, "transit charges" for using the river to navigate between points in Costa Rica, although his characterization is quite revealing of an underlying difference between the Parties⁵⁰. What Professor Kohen, and more importantly, Costa Rica, ignore, or refuse to accept, is that the river is part of Nicaragua's sovereign territory. To enter it is to enter Nicaragua. Nicaragua has the right to apply her non-burdensome immigration regulations.

44. It is worth emphasizing that there is no evidence to support Costa Rica's claim that any of Nicaragua's regulations, including her immigration requirements, impose a burden on her tourist industry sufficient to cause a decline in tourist traffic⁵¹. Nowhere has Costa Rica produced any actual data, as opposed to conjecture, to support her assertion. The only hard evidence before the Court comes instead from Nicaragua's immigration records, and it shows the opposite of what Costa Rica contends. In particular, the evidence demonstrates that between 1998 — which is the year Costa Rica says Nicaragua began violating her rights in a systematic way — and 2004, the last full year before these proceedings were commenced, the number of tourists travelling per year on the San Juan in Costa Rican tour vessels grew from 711 in 1998 to 2,590 in 2004⁵². Nicaragua respectfully submits that it is impossible to base on these figures an argument that her regulations have adversely affected Costa Rica's tourism excursions on the San Juan, even if that kind of navigation could rightly be included in the definition of navigation "con objetos de comercio".

⁵⁰CR 2009/3, p. 37, para. 17.

⁵¹See Reply of Costa Rica (RCR), para. 4.12 (iii).

⁵²See RN, para. 4.33, table 1; RN, Vol. II, Ann. 71.

(e) *The requirement to fly the Nicaraguan flag*

45. *Fifth and finally*, Costa Rica complains about the requirement that larger boats fly the Nicaraguan flag while navigating the San Juan. This too is an appropriate and non-burdensome incident of Nicaragua's exclusive *summum imperium* over the river. The requirement only applies to those vessels that have masts or turrets at the stern, a distinction which renders the regulation inapplicable to the vast majority of Costa Rican boats that use the river, which are almost all small wooden "pangas", or simple boats with a small outboard motor, which have no means to display flags⁵³.

46. The expectation that larger vessels will fly her flag while navigating on her waters, in a minimal gesture of respect for Nicaragua's sovereignty, is a matter of international practice, at least in the territorial sea⁵⁴. Nicaragua sees no reason it may not require *a fortiori* the same courtesy on her sovereign internal waters, especially as Nicaragua permits Costa Rican vessels to continue flying the Costa Rican flag alongside Nicaragua's⁵⁵. Professor Caflisch, though he objects to the regulation, admits that "there may also be a practice, inspired by *international courtesy*, to show the flag of the country whose waters are being navigated in"⁵⁶. For Nicaragua, as the sovereign over these waters, she has a right to insist on this courtesy. In terms of the evidence before you, Costa Rica has not identified a *single incident* in which Nicaraguan authorities have prevented a Costa Rican vessel from navigating on the San Juan because of a failure or refusal to display the Nicaraguan flag. There is no serious argument that this regulation has done anything to impede Costa Rican navigation on the San Juan River.

47. Mr. President, Members of the Court, I have now addressed each of the five sovereign exercises of Nicaragua's police power that Costa Rica finds objectionable. I respectfully submit that the Treaty of 1858 empowers Nicaragua to regulate navigation on the San Juan River, provided she does so reasonably, and the evidence demonstrates, indeed it leaves no doubt of the reasonableness of her exercise of this right, as well as the absence of any violation of Costa Rica's right to enjoy free navigation "con objetos de comercio".

⁵³See RN, para. 4.92.

⁵⁴See CMN, para. 5.3.3; RN, para. 4.93.

⁵⁵See RN, para. 4.93; RN, Ann. 77, p. 488.

⁵⁶CR 2009/3, p. 33, para. 30.

48. Before concluding my presentation, I would like to say a very few words about fishing. Nicaragua stands by her written pleadings, which explain why Costa Rica's fishing claim is inadmissible⁵⁷. Having said this, however, there is no reason why fishing should be a matter of contention between the Parties here. Nicaragua does not prohibit subsistence fishing by local Costa Rican residents⁵⁸. While Nicaragua does not agree that there is a customary right to fish in her territorial waters, she has absolutely no intention of preventing Costa Rican residents from engaging in subsistence fishing activities. Only non-subsistence fishing, such as commercial and sport fishing in the protected waters of the San Juan River Wildlife Refuge, is prohibited⁵⁹. In practice, subsistence fishing on this particular river of not too great width is conducted from the Costa Rican shore, and without interference by Nicaragua. Commercial fishing, by contrast, is generally conducted from boats in the middle of the river, casting wide nets that trap large quantities of fish, crustaceans and marine mammals. Nicaragua does not understand Costa Rica to claim a customary right, or any other right, for her nationals to engage in commercial fishing.

49. Mr. President, Members of the Court, this brings me to the end of my presentation. I thank you for your patience and kind attention, and I ask that you now call on Professor McCaffrey. Thank you very much.

The PRESIDENT: I thank Mr. Reichler for his presentation. I now invite Professor Stephen McCaffrey to take the floor.

Mr. McCAFFREY:

1. Mr. President, Members of the Court, it is an honour to appear before you today on behalf of the Republic of Nicaragua, and a great privilege to appear before this distinguished Court again.

⁵⁷See CMN, pp. 197-204; RN, paras. 4.67-4.68.

⁵⁸See CMN, 5.1.6, 5.1.15; RN, para. 4.67; RN, Vol. II, Anns. 67, 72, 73.

⁵⁹See RN, para. 4.67; RN, Vol. II, Ann. 73.

**COSTA RICA'S NAVIGATION ON THE SAN JUAN RIVER WITH PUBLIC VESSELS:
THE TREATY OF LIMITS AND THE CLEVELAND AWARD**

Introduction

2. Mr. President, my task this morning is to address the question of navigation by Costa Rica with public vessels, other than those of the revenue service, under the 1858 Treaty of Limits and the 1888 arbitral award rendered by President Grover Cleveland. I will show that neither the Treaty nor the arbitral award provides any foundation whatsoever for Costa Rica's alleged right to navigate on the San Juan with her public vessels for almost unlimited purposes, including to resupply her border posts, to exchange personnel at those posts with their official equipment, including service arms and ammunition, for "purposes of protection" as Costa Rica understands that expression, and to discharge a number of other public functions.

3. In showing that Costa Rica has no such rights of navigation with public vessels on the San Juan, I will cover three points: *first*, Costa Rican public vessels have no right of navigation on the San Juan under Article VI of the 1858 Treaty; *second*, the Cleveland Award provides no basis for the rights Costa Rica claims to navigate with her public vessels; and *third*, Costa Rica's very narrow right of protection under the Cleveland Award and her obligations of defence under Article IV of the Treaty of Limits provide no support for her alleged rights to navigate with armed or other public vessels.

**I. COSTA RICAN PUBLIC VESSELS HAVE NO RIGHT OF NAVIGATION ON
THE SAN JUAN UNDER ARTICLE VI OF THE 1858 TREATY**

4. Mr. President, beginning with my first point, contrary to the sweeping contentions of Costa Rica, her public vessels enjoy no right of navigation on the San Juan River under Article VI of the 1858 Treaty itself. That Article simply does not mention any right of Costa Rica to navigate on the river with public vessels. Of course, President Cleveland interpreted the Treaty to permit restricted navigation by Costa Rican *revenue* vessels. But unless Costa Rica's public vessels navigate "con objetos de comercio", which would be highly unusual, however that expression is translated, Article VI gives them no right to operate on the San Juan.

5. And indeed, this is a point that Costa Rica seems determined to overlook. Time and again in these hearings, counsel for Costa Rica have stated that under Article VI, Costa Rica enjoys a

“perpetual right of free navigation” — full stop⁶⁰. By thus decoupling this phrase from the rest of the Article, Costa Rica makes the “perpetual right of free navigation” a free-standing right. Obviously, this wrenching of the phrase from its textual context does great violence to the meaning of the Article. If counsel had read on, they would have found that the Costa Rica’s “perpetual rights . . . of free navigation” apply only to navigation “for the purposes of commerce”, or navigation “con objetos de comercio”. Thus, putting the relevant elements of the phrase together, the English translation submitted to President Cleveland reads: “the Republic of Costa Rica shall have perpetual rights . . . of free navigation . . . for the purposes of commerce”. These so-called perpetual rights thus apply only to navigation “con objetos de comercio”.

6. And incidentally, Mr. President, the Parties could not in fact have envisaged that Costa Rica’s rights of navigation would necessarily be “perpetual”. They were well aware of the interest at the time in an interoceanic canal making use of the San Juan River, and both the 1858 Treaty (in Articles VII and VIII) and the Cleveland Award (in paragraphs 10 and 11 of its *Third* Article) contemplate such a canal. Moreover, Costa Rica did not object to any of the transit concessions and canal contracts signed by Nicaragua prior to 1858⁶¹. So, while Costa Rica might be entitled to compensation for any injury to her “natural rights”, her perpetual right of free navigation would effectively cease with the conversion of the river into a canal.

7. On Tuesday, counsel for Costa Rica made the novel argument, apparently for the first time, that: “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.”⁶² He combined this surprising idea — which flies in the face not only of reason but also of the background and context of the 1858 Treaty — with one that Costa Rica invented in its written pleadings and has repeated here before the Court — namely, that “commerce” is really “communication”. And by “communication” Costa Rica does not limit herself to the exchange of information by post, or even telephone or the Internet. Instead, as she does with “commerce,” she redefines “communication” — in this case, to mean the sum total of all

⁶⁰E.g., CR 2009/02, p. 22; CR 2009/03, pp. 8, 12, 22, 23 (twice), 26, 31, 32, 33, 34, 44, 50, 51.

⁶¹See especially CMN, Chap. 1, Sects. 1.2.31-34 and 1.3.

⁶²CR 2009/3, p. 8 (Crawford).

kinds of contacts by boat between one point and another. By doing so, she renders even her translation of “con objetos de comercio” — for purposes of commerce — completely meaningless. The effect of Costa Rica’s interpretation of Article VI, then, is to excise the expression “con objetos de comercio” from the Article, and to permit all kinds of public vessels — presumably except for warships — to navigate on the San Juan for any purpose whatsoever. When the absurdity of this result is combined with Nicaragua’s “exclusive dominion and supreme control” of the San Juan, it is obvious that the Court should reject Costa Rica’s contention that her public vessels enjoy the same right of navigation “con objetos de comercio” as her private vessels.

II. COSTA RICA’S RIGHT OF NAVIGATION WITH PUBLIC VESSELS UNDER THE CLEVELAND AWARD

8. Mr. President, I turn to my *second* point. Perhaps sensing that an argument based on Article VI alone does not hold water, counsel for Costa Rica attempts to find support for broad rights of navigation by public vessels in the Cleveland Award⁶³. According to this argument, made on Tuesday, President Cleveland did not address navigation by any kind of Costa Rican public vessel other than warships and revenue vessels; therefore, navigation by other kinds of public vessels is permitted. The most obvious problem with this argument is that President Cleveland was interpreting the 1858 Treaty, which only permits navigation on the San Juan by Costa Rica “con objetos de comercio”. His award cannot be construed to create rights that are greater than those established by the Treaty he was interpreting.

9. What is inconvenient for Costa Rica is that rights of navigation “con objetos de comercio” — or even “for purposes of commerce” — are virtually never exercised by public vessels, either today or in the mid-nineteenth century. Perhaps realizing this, Costa Rica then adds: “This was recognized by the Second Article of the Cleveland Award . . .”⁶⁴ The Court will, of course, by now be well aware that the Second Article of the Cleveland Award, which we have practically examined under a microscope, says nothing at all about free navigation on the San Juan with public vessels. Moreover, by restricting the types of public vessels that *could* navigate on the San Juan to vessels of the revenue service, and by further restricting navigation by those craft to

⁶³CR 2009/3, p. 10 (Crawford).

⁶⁴*Ibid.*

that which was “related to and connected with” navigation “con objetos de comercio” or that was necessary to the protection thereof, President Cleveland rejected Costa Rica’s request that it be allowed to navigate with public vessels “to carry orders to the authorities of the bordering districts”⁶⁵. Yet Costa Rica is before the Court today making virtually the same request.

10. Mr. President, as we have just seen, the 1858 Treaty itself said nothing about a right of Costa Rica to navigate on the river with any kind of public ship, including vessels of the revenue service.

11. But as the Court is aware, in his award of 1888, President Cleveland ruled on the question whether Costa Rica has a right to navigate on the San Juan with its warships or other public vessels. He said Costa Rica did not have a right to navigate on the San Juan with warships but that she did have a right, one which he carefully circumscribed, to navigate on the river with vessels of the revenue service. Some background on this latter right will help place it in its proper context.

12. As Nicaragua has noted in her written pleadings⁶⁶, in 1886 Costa Rica had in fact navigated on the San Juan with a national steamship carrying Costa Rican armed forces. According to a decree issued by the Government of Costa Rica in March of that year, one of the tasks of the steamship was to conduct reconnaissance at least once a week of the entire extent of the San Juan that was navigable by Costa Rica. The Nicaraguan Foreign Minister understandably characterized this as “an outright violation of Nicaragua’s sovereign rights”⁶⁷, since nothing in the 1858 Treaty permitted it. But Costa Rica obviously had great difficulty accepting the limited navigational rights in Nicaragua’s sovereign waters accorded her in the 1858 Treaty. She therefore followed a strategy she has pursued ever since the 1858 Treaty was concluded — namely, to try to create new rights to navigate on the San Juan River (graphic SMcC-1).

13. Thus in her pleadings before President Cleveland, Costa Rica quoted Article VI of the Treaty then posed the following rhetorical question regarding that provision, already referred to by my colleague Professor Pellet and shown on the screen:

⁶⁵Argument of Costa Rica, p. 155, RN, Vol. II, Ann. 5, at p. 30.

⁶⁶CMN, p. 113, para. 3.1.32, *et seq.*

⁶⁷*Ibid.*, p. 116, para. 3.1.37.

“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?”⁶⁸

14. This question indicates that in 1888 Costa Rica presumed that she had the same navigational rights she claims today: broad rights to navigate with public vessels “for any . . . purpose not exactly within the meaning of transportation of merchandise”. And as Professor Pellet pointed out, by the way, Costa Rica in this passage betrayed her understanding of the critical expression, “objetos de comercio”, as meaning “merchandise”. In case there is any doubt about how Costa Rica conceived of her navigational rights, she added: “It seems to be beyond discussion that Costa Rica can navigate in the San Juan with public vessels, which are not properly men-of-war.”⁶⁹

15. Mr. President, President Cleveland was quite clear in answering Costa Rica’s question regarding a right to navigate with public vessels for a wide variety of purposes. The answer he gave was “no” — subject only to one narrow exception (graphic SMcC-2).

16. In the *Second* Article of his Award, President Cleveland stated that Costa Rica:

“has *not* the right of navigation of the river San Juan with vessels of war; but she may navigate said river with *such* vessels of the revenue service *as may be related to and connected with* her enjoyment of the ‘purposes of commerce’ [those are President Cleveland’s quotes around “purposes of commerce”] accorded to her in said article, or as may be *necessary to the protection* of said enjoyment”⁷⁰.

17. Thus President Cleveland rejected Costa Rica’s argument that she should have broad rights to navigate the San Juan with public vessels for the purposes her question indicates. He said explicitly that she did *not* have a right to navigate on the river with warships. By expressly confining Costa Rica’s right to navigate on the San Juan with public ships to those *revenue* vessels that were “related to and connected with” navigation “con objetos de comercio” or “necessary to the protection” of such navigation, President Cleveland *excluded* a right in Costa Rica to navigate not only with other kinds of public vessel, but also with revenue vessels that were performing any function other than the ones he specified. Yet Costa Rica now claims a right to navigate on

⁶⁸Argument of Costa Rica, p. 155; RN, Vol. II, Ann. 5, p. 30.

⁶⁹*Ibid.*, p. 156.

⁷⁰MCR, Vol. II, Ann. 16, p. 98; emphasis added.

Nicaragua's sovereign waters with armed and other public vessels that have *nothing* whatsoever to do with customs enforcement or protection of trade.

18. Mr. President, the *travaux préparatoires* of President Cleveland's Award are helpful in understanding why he would have felt it necessary to prohibit navigation of most kinds of Costa Rican public vessels and to impose so many conditions on the one kind — revenue vessels — he did permit.

19. As discussed in Nicaragua's Counter-Memorial⁷¹, President Cleveland asked Assistant Secretary of State George L. Rives to prepare draft recommendations for the arbitral award. On the question whether Costa Rican warships or other public vessels should be permitted to navigate on the San Juan, Mr. Rives took an approach similar to that advocated by Costa Rica in the arbitration: namely, to assimilate Costa Rica's right to navigate with public vessels on the San Juan to the right of public vessels of one State to navigate in the territorial sea of another State. Rives found that coastal States "impose no restriction upon the friendly visit of foreign men-of-war in time of peace . . ."⁷². He therefore recommended that President Cleveland answer the second question put to him, regarding the right of Costa Rica to navigate on the San Juan with vessels of war or of the revenue service, in the following way:

"[V]essels of war and of the revenue service belonging to Costa Rica have the same privilege[s] of navigating the river San Juan as are usually accorded in their territorial waters by civilized nations to the public vessels of friendly powers in time of peace, — but no other, or greater privileges."⁷³

20. Mr. Rives thus recommended that the Award recognize rather broad rights of navigation by Costa Rican public vessels on the San Juan — rights similar to those claimed by Costa Rica in the Cleveland arbitration, and not dissimilar to the ones she claims today. President Cleveland, however, rejected Rives's recommendation entirely (graphic SMcC-3).

21. So thoroughgoing was his disagreement with Rives that President Cleveland, in his own hand, struck out Rives's entire recommended answer and substituted his own, much more restrictive ruling as can be seen on the screen⁷⁴. That is paragraph, or Article *Second* of his Award.

⁷¹CMN, pp. 120 *et seq.*, paras. 3.1.46 *et seq.*

⁷²*Ibid.*, Ann. 71.

⁷³*Ibid.*

⁷⁴CMN, Vol. 2, Ann. 72, pp. 258-259.

Insight into why President Cleveland may have done this is provided by his repeated references to the 1858 Treaty in the *Second* Article of his Award. He doubtless had in mind that the Treaty effected a territorial settlement in which Nicaragua ceded to Costa Rica the large district of Nicoya in return for full sovereignty over the San Juan River. A waterway that, in so far as Costa Rica's navigational rights are concerned, is obviously *not* an international river as contended by Costa Rica most recently in these hearings. President Cleveland's determination to cause the least possible impairment of Nicaragua's sovereignty is clear from his sharp curtailment of the navigational rights proposed by Rives for Costa Rica. Thus for each of the two kinds of vessels mentioned in the second question put to him, President Cleveland gave a markedly different answer than had been recommended by Rives: where Rives would have permitted navigation by Costa Rican warships, President Cleveland found no right at all to engage in such navigation; where Rives would have similarly permitted unrestricted navigation by Costa Rican revenue vessels, President Cleveland *strictly* limited Costa Rica's right to navigate with them.

22. It is further revealing to note what President Cleveland did not do. First, having prohibited Costa Rican warships, he could have allowed navigation by police and lesser military vessels on the river. He did not. And second, having responded in the negative concerning vessels of war, President Cleveland could then have simply responded in the affirmative, in general terms, as to vessels of the revenue service. But this he also did not do. Instead, President Cleveland permitted navigation on the San Juan by such Costa Rican vessels only when they were serving a very specific purpose — namely, only when their navigation is “related to and connected with her enjoyment of ‘the purposes of commerce’ . . . or as may be necessary to the protection of said enjoyment”. Thus, President Cleveland did not even recognize a right in Costa Rica to navigate on the San Juan with any and all revenue vessels, whatever the purpose of their voyage. Rather he took pains to confine Costa Rica's right to navigate with such vessels quite narrowly and specifically, adding restrictions that had not been recommended by Mr. Rives.

23. Clearly, President Cleveland did not wish to negate his own ruling that Costa Rica did not have the right to navigate on the San Juan with warships. Indeed, as acknowledged by

Costa Rica on Tuesday⁷⁵, Nicaragua had argued in her Reply in the arbitration: “Vessels of the revenue service are akin to vessels of war. . . . [T]hey are armed vessels, capable of enforcing their demands by force . . .”⁷⁶ This assessment was echoed by George Rives in his report to President Cleveland⁷⁷. That the two kinds of vessels may be indistinguishable is especially the case on a relatively small river like the San Juan, on which an armed public vessel takes on even greater proportions.

24. Because it was actually argued in the arbitration and recognized by Rives, this feature of revenue vessels could not have been lost on President Cleveland— and Costa Rica gave us touching additional evidence of this on Tuesday, in the form of President Cleveland’s courtesies to Miss Folsom⁷⁸. But how to prevent, or at least contain, a metamorphosis from cutter to warship? President Cleveland’s solution was to place clear restrictions on what Costa Rican revenue vessels could do. They could only navigate on the San Juan in so far as they were “related to *and* connected with” navigation “con objetos de comercio” or were necessary to the protection of such navigation. This formula all but requires a physical connection between Costa Rican revenue vessels and her boats carrying “objetos de comercio”. Certainly, without navigation “con objetos de comercio” there is no right of navigation by Costa Rican revenue vessels— and it bears emphasis that these are the only kinds of public vessels that Costa Rica is permitted to operate on the river.

25. In light of this history it seems safe to say that President Cleveland would have been quite surprised to learn that Costa Rica is now claiming sweeping rights to navigate on the San Juan with public vessels, including navigation to re-supply her border posts, and to exchange personnel at those posts with their official equipment, including service arms and ammunition.

26. Mr. President, as I recalled earlier, on Tuesday Costa Rica’s counsel argued that all that was before President Cleveland was the permissibility of navigation by Costa Rican warships and

⁷⁵CR 2009/3, p. 13 (Crawford).

⁷⁶CMN, Ann. 69. Reply of the Republic of Nicaragua submitted to H.E. Hon. President Cleveland, p. 49. See discussion in CMN, paras. 4.2.14-15.

⁷⁷Rives Report (Second), CMN, Ann. 70, p. 4.

⁷⁸CR 2009/3 p. 13, para. 23 (Crawford).

revenue vessels⁷⁹. But this argument ignores the pleadings in the case I have just discussed. Clearly, Costa Rica placed the issue of broad rights of navigation by public vessels before the arbitrator, and, just as clearly, President Cleveland rejected the idea of such rights.

Mr. President, this would be a convenient time for me to break my presentation if you wish to pause for coffee? Otherwise, I could go on?

The PRESIDENT: Thank you, Professor McCaffrey. I think that if your presentation is not going to be too long, you had better continue. Thank you.

Mr. McCAFFREY: I should continue? Fine, thank you, Mr. President.

III. COSTA RICA'S RIGHT OF PROTECTION UNDER ARTICLE VI AND HER ALLEGED RIGHT TO DEFEND THE RIVER UNDER ARTICLE IV

27. This then brings me to my *third* point, which is that neither Article VI of the 1858 Treaty as interpreted by President Cleveland nor Article IV of that agreement has anything at all to do with rights of protection and defence as now claimed by Costa Rica. In her submissions, Costa Rica requests the Court to find that Nicaragua has violated:

“the obligation to allow Costa Rican official vessels the right to navigate the San Juan, including for the purposes of re-supply and exchange of personnel of the border posts along the right bank of the River with their official equipment, including service arms and ammunition, and for the purposes of protection as established in the relevant instruments, and in particular the Second article of the Cleveland Award . . .”⁸⁰.

28. By this submission, Costa Rica asks the Court to create out of whole cloth a right she tried unsuccessfully to obtain from President Cleveland in the nineteenth century.

29. The answer to Costa Rica's claim in this regard is a straightforward one. As has already been seen, President Cleveland carefully restricted what Costa Rican revenue vessels could do. Thus, the beginning and end of Costa Rica's right to protection is navigation with such vessels of the revenue service “as may be necessary to the protection of” navigation “con objetos de comercio”⁸¹. Yet Costa Rica claims a broad array of rights that are unrelated to, and unconnected with, her navigation “con objetos de comercio”, effectively treating the San Juan as if the boundary

⁷⁹CR 2009/3, p. 9 (Crawford).

⁸⁰RCR, p. 211, Submission 2 (g).

⁸¹Cleveland Award, MCR, Ann. 16, p. 98; emphasis added.

followed the median line rather than the right bank, thus negating the *quid pro quo* reflected in the 1858 Treaty and, with it, Nicaragua's sovereignty over the river. However, Costa Rica has failed to rebut the detailed answers to her claims given in Nicaragua's Counter-Memorial and in her Rejoinder.

30. Chafing under the restrictions on navigation with public vessels in President Cleveland's interpretation of Article VI of the 1858 Treaty, Costa Rica seizes upon Article IV, conflating the obligation of defence under that Article with the restricted right of protection found by President Cleveland under Article VI. Article IV refers to the obligation of the two States to "unite in [the] defense" of the *bays* of San Juan del Norte and of Salinas, on the Atlantic, or Caribbean, and Pacific ends of the border between the two countries. However, Article IV says nothing about having to do this by boat. According to Article IV, this obligation is consequent upon, and closely tied to, the fact that the two bays, as Article IV puts it, "shall be common to both Republics . . .".

31. Costa Rica attempts to build on this slender reed an entire edifice of rights to navigate on the *river*. Indeed, she argued in the Cleveland arbitration itself that according to Article IV, she "must be permitted to maintain her vessels on the *San Juan* in order to guard and defend it with all the efficiency within her reach"⁸². President Cleveland did not accept this argument; Costa Rica nonetheless attempts to resurrect it in the present case.

32. The reason President Cleveland did not accept this argument is clear from the text of Article IV on its face. After granting Costa Rica the right to unite with Nicaragua in the defence of the bays in its first sentence, Article IV proceeds in its second sentence to provide for defence of the river. Except in this case, since the river is *not* "common to both Republics," Costa Rica must participate in its defence from her bank of the river, her land territory. Specifically, according to the second sentence of Article IV, Costa Rica is obligated with respect to "the portion belonging to her on the shores of the river San Juan" to "unite in its defense in [the] case of attack from without . . .". The text of this provision could not be clearer: Costa Rica has no right to unite in the defence of the river by boat; her obligation extends only to "the portion belonging to her on the shores of the river . . .".

⁸²Rives Report, CMN, Vol. II, Ann. 71, p. 253; emphasis added.

33. Mr. President, as discussed at length in Nicaragua's written pleadings, the second report of Assistant Secretary of State Rives confirms that Costa Rica may not "defend" or "protect" the river using public vessels. In that report, Mr. Rives, speaking of Article IV, pointed out:

"All that article requires is that Costa Rica should repel foreign aggression on the river with all the efficiency *within her reach* . . . [and he underlined 'within her reach'] Costa Rica would only be bound to contribute to the defence of the stream by land [he says], a mode of defence, it may be added, which seems better adapted to a River of the size and character of the San Juan."⁸³

34. Indeed, Mr. President, the San Juan River, while not of course an unimportant stream, is hardly the Amazon, the Rhine, the Nile, or the Mississippi. Moreover, nothing in President Cleveland's Award disagrees with Rives's interpretation.

35. For the foregoing reasons Nicaragua respectfully urges the Court to reject Costa Rica's contention that Article IV of the 1858 Treaty has "implications for Costa Rica's navigation on the San Juan".

36. Mr. President, even though the Parties agree that the scope of Costa Rica's navigational rights with public vessels is to be determined by reference to the 1858 Treaty of Limits and the 1888 arbitral award⁸⁴, Costa Rica invokes four other agreements and communiqués⁸⁵ that she characterizes as part of the "applicable law"⁸⁶. As Nicaragua has shown, both in her Counter-Memorial⁸⁷ and in her Rejoinder⁸⁸, these instruments are not helpful to Costa Rica's case. In both her written and oral pleadings, Costa Rica — unaccountably — seems to place most store in the so-called Cuadra-Lizano Joint Communiqué of 30 July 1998 — despite the fact that this failed arrangement in fact destroys her case. Costa Rica mistakenly characterizes the communiqué as a "conventional rule[]"⁸⁹. But however it is characterized, the reason this communiqué is so harmful to Costa Rica's case is that it shows that Costa Rica recognizes that she requires the permission of Nicaragua to navigate on the river with public, armed vessels to resupply her border

⁸³CMN, Vol. II, Ann. 71, p. 251; emphasis in original.

⁸⁴See, e.g., RCR, para. 1.18.

⁸⁵RCR, para. 3.81.

⁸⁶These documents are discussed in CMN, paras. 3.2.1-3.2.14.

⁸⁷See *ibid.*

⁸⁸See RN, Chap. II, Sec. II, and paras. 5.94-5.99.

⁸⁹RCR, para. 3.81.

posts. Specifically, the communiqué would have provided that in order to navigate on the San Juan River with public vessels for the purpose of bringing supplies and relief staff to her police posts along the river, Costa Rica's Guardia Civil would have to obtain Nicaragua's *permission* in each case — in each case — *and* that this permission was subject always to three important conditions: first, that requests for authorization would be made prior to each voyage; second, that Nicaraguan authorities could accompany the Costa Rican vessels if Nicaragua wished; and third, that the Guardia Civil vessels would stop and report at all Nicaraguan army posts en route.

37. Counsel for Costa Rica stated on Monday that this text establishes a perfectly acceptable balance between the interests of the two Parties⁹⁰. This may well be so, but it certainly does not support the general right for which Costa Rica argues. On the contrary, the text shows that Costa Rica's so-called "right" to engage in this navigation is entirely dependent on Nicaragua's authorization on a case-by-case basis. More importantly, the very fact that Costa Rica felt she had to obtain Nicaragua's agreement on the establishment of these procedures in the communiqué, and her disappointment that they were not implemented, demonstrates beyond doubt that Costa Rica did not have — nor did she herself believe she had — a general right to navigate on the river with public vessels to bring supplies and relief staff to police posts along the river. In any event, as Nicaragua has pointed out and as noted by Costa Rica on Monday, this communiqué was never implemented.

38. Costa Rica then returns to the actual applicable law, citing four reasons for finding "a right of navigation on the San Juan by Costa Rican public vessels carrying police with normal arms"⁹¹. Her first reason is that "the re-supply of [border] posts is covered by the right of free navigation for purposes of commerce in Article VI of the 1858 Treaty"⁹². I have already shown that an interpretation of Article VI allowing an unrestricted right to navigate with public vessels carrying armed police would render that provision meaningless, wiping out all of President Cleveland's careful restrictions upon *even* Costa Rican revenue vessels.

⁹⁰CR 2009/2, p. 42, para. 39 (Caflisch).

⁹¹RCR, para. 3.86.

⁹²*Ibid.*

39. Again in these hearings Costa Rica brings up the case of the ill-fated voyage of the *Adela* in an attempt to show that her alleged right to navigate on the lower part of the San Juan with public vessels carrying arms is supported by subsequent practice⁹³. As Nicaragua has pointed out in her written pleadings⁹⁴, this incident actually proves the contrary. If the Costa Rican officer believed he had the right to navigate on the lower San Juan with arms, why did he feel the need to — and I quote his report — “hide in Costa Rican territory the arms and ammunitions that I carried”⁹⁵ before requesting permission to proceed? This inconvenient but crucial fact is ignored by Costa Rica. What the incident proves is not at all that Costa Rica had a right to navigate on the lower San Juan with arms, but rather, simply, that Costa Rica breached her obligation not to navigate there with armed public vessels unrelated to navigation “con objetos de comercio”, and *knew* she had breached it.

40. Costa Rica’s second reason for finding a right of navigation on the San Juan for her public vessels carrying armed officers is that “navigation under Article VI of the 1858 Treaty cannot be effectively protected without the use of such boats”⁹⁶. But the only kind of navigation permitted by Article VI is navigation “con objetos de comercio”. Even if Costa Rica were using the San Juan to transport merchandise — which she is not⁹⁷ — the only kind of vessel she is permitted to use to protect navigation “con objetos de comercio” under the *Second* Article of the Cleveland Award is a vessel of the revenue service. And even these vessels may only be used to the extent they are “necessary to the protection of” such navigation. It is obvious that Costa Rica cannot show this if she is not navigating “con objetos de comercio”. Even if she were, a showing of necessity would be required, in light of President Cleveland’s *Second* Article. Except for the restricted right of navigation by Costa Rican revenue vessels, tied to navigation “con objetos de comercio”, it is thus Nicaragua that has both the right and the responsibility to provide police protection of navigation on the river.

⁹³CR 2009/3, p. 16 (Crawford).

⁹⁴E.g., CMN, paras. 4.2.19-4.2.23.

⁹⁵MCR, Vol. 6, Ann. 209.

⁹⁶RCR, para. 3.86.

⁹⁷RN, paras. 5.63 *et seq.*

41. The third reason given by Costa Rica for finding a right of navigation on the San Juan for her public vessels carrying armed police is “for the defence of the common border and the common bays under Article IV of the Treaty”⁹⁸. Mr. President, I will not repeat my earlier discussion of why it is neither permitted by Article IV nor necessary for Costa Rica to navigate on the river to defend the “common border [or] the common bays”.

42. Costa Rica’s fourth and final reason for finding a right of navigation on the San Juan for her public vessels carrying armed police is that “it would be impossible, without adequate re-supplying of the border posts, to prevent or deter unlawful activities in the (land) border area — smuggling, trafficking in persons. It would also be impossible to fulfil official acts such as police investigations in a timely manner.”⁹⁹ Mr. President, this is effectively an argument that needs, or perhaps even wishes, create rights. But in this case, in light of the evidence, what Costa Rica actually seems to be saying is that it would be easier for her to perform these tasks via Nicaraguan sovereign territory, the river, not that it would be impossible to perform them unless she were allowed to navigate with her public vessels on the San Juan. If roads are muddy or even non-existent, it is the responsibility of Costa Rica, not Nicaragua, to maintain or construct them. Policing the river, after all, is a function reserved to the sovereign, Nicaragua. This is not Costa Rica’s right or responsibility. Even if, purely hypothetically, it would be impossible for Costa Rica to perform these functions without using the river, this obviously does not create a right for her to do so. If she wished to complement the policing of the river by Nicaragua, she would of course be free to seek permission from Nicaragua for such navigation.

43. Costa Rica then turns to the one kind of public vessel that President Cleveland did permit to navigate on the San Juan: vessels of the revenue service. Seizing upon the second condition placed by President Cleveland upon navigation by Costa Rican revenue vessels, namely, that it must be “necessary to the protection of” navigation “con objetos de comercio”, Costa Rica asserts that “this clearly points to defence matters”. On the contrary, nothing could be less clear. President Cleveland, having banned Costa Rican warships from the San Juan, would hardly have allowed Costa Rica to use revenue vessels as a kind of naval Trojan horse to permit navigation on

⁹⁸RCR, para. 3.86.

⁹⁹RCR, para. 3.86.

the river by her warships. Costa Rica simply cannot point to anything in either the 1858 Treaty or the 1888 Arbitral Award that permits navigation on the San Juan by Costa Rican revenue vessels carrying armed personnel that have nothing to do with her navigation “con objetos de comercio”.

44. Mr. President, Members of the Court, this concludes my intervention this morning. I thank you for your courtesy, patience and kind attention and I ask that after the break you call once again upon my colleague, Mr. Paul Reichler. Thank you very much.

The PRESIDENT: I thank Professor McCaffrey for his presentation. Before calling on Mr. Reichler to make his presentation, the Court will have a short coffee break.

The Court adjourned from 11.45 a.m. to 11.55 a.m.

The PRESIDENT: Please be seated. I now invite Mr. Reichler to take the floor.

Mr. REICHLER:

**COSTA RICA’S NAVIGATION ON THE SAN JUAN RIVER WITH PUBLIC VESSELS:
THE PRACTICE OF THE PARTIES**

1. Thank you again, Mr. President, Members of the Court. I am doubly honoured today, to appear twice before this distinguished Court. However, I do promise to be shorter this time.

2. My task now is to discuss the evidence that the Parties have placed before you on the practice with regard to navigation by Costa Rican public vessels. As Professor McCaffrey demonstrated, under the 1858 Treaty of Limits and the 1888 Cleveland Award, Costa Rica has no right to navigate on the river with any public vessels other than revenue vessels, and no right to navigate on the river even with revenue vessels unless it is related to and connected with navigation “con objetos de comercio”.

3. Because the Treaty of 1858 and the Cleveland Award are clear as well as controlling on these points, there really is no need for the Court to look beyond the language of these legal instruments to discern their meaning. However, *Costa Rica* argues that she has rights to navigate the San Juan River, in public vessels other than her revenue vessels, and in particular, in police vessels bearing arms and engaged in police functions, and in other governmental vessels carrying out typical governmental functions, based on what she claims is the practice of the Parties. It is

Costa Rica's argument that the Parties have mutually manifested such consistent conduct since the Treaty of Limits was adopted that, under the principles of general international law governing the law of treaties, their subsequent practice reflects the existence of an agreement on an interpretation of the 1858 Treaty that would allow a general right of navigation by all Costa Rican public vessels. Mr. President, Members of the Court, Costa Rica fails to hit her mark.

4. Put simply, Costa Rica has not produced evidence that would establish the existence of a mutual course of conduct by the Parties that could be considered, as a matter of law, to reflect an agreement on the interpretation of the 1858 Treaty. The evidence that is before you, especially the evidence submitted by Costa Rica herself, actually disproves her argument about the practice of the Parties. What this evidence shows is: *first*, Nicaragua has never denied or interfered with Costa Rica's right to navigate on the San Juan River with her revenue vessels for purposes related to and connected with commerce. Costa Rica has presented no evidence that she ever actually sought to exercise this particular right, but, more to the point, no evidence that Nicaragua has ever interfered with it.

5. *Second*, the practice of the Parties does not sustain Costa Rica's claim for a right to navigate with police vessels or other governmental vessels to carry out police or governmental functions. In this regard, the evidence shows in particular that Nicaragua has never by her words or her conduct acknowledged, accepted or acquiesced in a right of Costa Rica to navigate on the San Juan River with police vessels or other public vessels carrying government officials engaged in governmental functions. To the contrary, the evidence shows that Nicaragua did not allow any navigation by Costa Rican police or other public vessels, unless Costa Rica first sought and obtained Nicaragua's express authorization prior to the voyage. The evidence further shows that Costa Rica actually complied with Nicaragua's requirements, and sought Nicaragua's authorization prior to her attempts to navigate on the river with her public vessels. And the evidence shows that when Nicaragua refused to authorize the navigation, Costa Rica refrained from navigating. As a consequence, the correct conclusion to be drawn from the evidence regarding the practice of the Parties is that it demonstrates that Costa Rica has *no* right to navigate on the San Juan River with her public vessels, except in the limited circumstance of her revenue vessels navigating in a manner

related to and connected with navigation “con objetos de comercio”. And this limited right of navigation has never been denied or abused by Nicaragua.

A. THE EVIDENCE REGARDING NAVIGATION BY COSTA RICAN REVENUE VESSELS

6. Turning to the first of my two points, it is that Costa Rica has not actually exercised her right to navigate on the San Juan River with public revenue vessels, and that Nicaragua, in any event, has never interfered with this right. It is fair to assume that if Costa Rican revenue vessels regularly plied the waters of the San Juan, Costa Rica would have the records to prove it. Similarly, if Nicaragua had ever interfered with this right, by for example, denying a Costa Rican revenue vessel access to the river, it could be assumed that some official records would exist and that Costa Rica would produce them. It is significant then, that Costa Rica has failed to present the Court with any official documentation, or for that matter, any other evidence, establishing either Costa Rica’s actual exercise of this right, or again more importantly, Nicaragua’s denial of it. Costa Rica’s main evidence consists of a very few contemporaneous reports from her fiscal or revenue guards, stationed on land near the San Juan River, between 1893 and 1909. She claims in her written pleadings: “Reports from 1893 to 1909 refer to the substantial activities of the fiscal guards in the region of the border of the San Juan.”¹⁰⁰ The Court will note the lack of specificity in the language “in the region of the border of the San Juan”, rather than “on the San Juan”. The next sentence is equally revealing: “Undoubtedly these fiscal guards used the San Juan to perform their duties.”¹⁰¹ The use of the adverb “undoubtedly” fills the place the Court might expect to find occupied by actual proof of the point that is proclaimed to be undoubtable. There is no such proof. In fact, *none* of the reports from this period that Costa Rica presents make any reference to actual navigation on the San Juan by her revenue vessels. As Nicaragua demonstrated in her Rejoinder, at paragraphs 5.68 to 5.70, and sketch-map 8, at page 256, all of the rivers, police posts and communities mentioned in these reports are located within Costa Rica and were accessible to the fiscal guards from Costa Rica’s own rivers, without having to traverse the San Juan. Professor Crawford said on Tuesday that the evidence showed that Costa Rican revenue guards

¹⁰⁰MCR, para. 4.89.

¹⁰¹*Ibid.*

reconnoitred the San Juan on a weekly basis, but he cited only to a single document in his speech on Tuesday, and that is from 1886, and that document does not say that¹⁰². The document to which he referred is simply a decree by the Costa Rican Government establishing the revenue guards and their duties, which do pertain in part to the San Juan; but it says nothing about their actual conduct¹⁰³.

7. From there, the documentary evidence submitted by Costa Rica leaps all the way forward to 1968, with no evidence of practice by her fiscal guards or revenue vessels during the intervening period. The 1968 reports, like the earlier ones say nothing, demonstrating actual navigation by fiscal guards or revenue vessels *on the San Juan*¹⁰⁴.

8. Subsequent to these inconsequential documents from 1968, there are no other public or official records submitted by Costa Rica regarding the activities of her fiscal guards on or near the San Juan River. Thus, for the entire period from the 1858 Treaty to the present, there is really no official report or record demonstrating any actual physical navigation on the San Juan by any revenue vessel of Costa Rica.

9. Now, there is an explanation for this evidentiary void. The international trade that Costa Rica hoped to conduct via the San Juan at the time of the 1858 Treaty never materialized. This was explained in considerable detail yesterday by my esteemed colleagues Professor Remiro Brotóns and Professor Alain Pellet. For the reasons described by my dear friends, Costa Rican trade on the river became so insignificant that Costa Rica eventually closed down her customs posts along the San Juan, and even closed down the customs posts at the headwaters of the internal rivers that connected to the San Juan¹⁰⁵. Thus, while Costa Rica most definitely retained, and retains to this day, the right to navigate on the San Juan with revenue vessels related to and connected with navigation “con objetos de comercio”, in fact she has found no or extremely little need to exercise this right because there simply *has been no* Costa Rican navigation “con objetos de comercio” of any consequence, and thus nothing that has required the

¹⁰²See CR, 2009/3, p. 17, para. 33.

¹⁰³MCR, Ann. 206, Art. 5.

¹⁰⁴See RN, para. 5.72.

¹⁰⁵See RN, paras. 3.53, 4.10-4.11; RN, Vol. II, Ann. 50.

presence of customs posts or the deployment of her revenue vessels to the San Juan. Costa Rica cannot blame her failure to exercise this right on Nicaragua. There is no evidence to support such an accusation. In particular, there is no evidence that Nicaragua discouraged Costa Rica from exercising her right, or violated it in any way. To the contrary, even if Costa Rica were able to present evidence of some actual use of the river by her revenue vessels, Nicaragua has always acknowledged and respected this treaty right, and continues to do so. There has been no violation.

B. THE EVIDENCE REGARDING NAVIGATION BY COSTA RICAN POLICE VESSELS

10. The second of my two points on the practice of the Parties concerns the evidence offered by Costa Rica of her navigation on the San Juan with public vessels other than revenue vessels, and for purposes unrelated and unconnected to “objetos de comercio”.

11. Costa Rica has presented only two official records showing navigation by her police vessels on the San Juan. The earliest of these is from May of 1992. That is, 134 years after the 1858 Treaty entered into force. There are no official records of any such practice during those first 134 years. Professor Crawford referred to the May 1992 report on Tuesday. He said that the document, and I quote him, “indicates that it was usual for them to patrol the San Juan River”¹⁰⁶. Actually, this is a bit of an overstatement. Once every 134 years should not count as “usual”. What the document actually describes is a single Costa Rican patrolling exercise on the San Juan, in a single abbreviated sentence¹⁰⁷. There is no indication of the purpose of the exercise, or whether prior authorization was sought or given by Nicaragua.

12. Costa Rica has submitted only one other document from her official records showing that her police vessels navigated on the San Juan River. This is a record kept by the senior police official at Costa Rica’s Sarapiquí border post, and it covers the period 1994 to 1998¹⁰⁸. It is rather remarkable that Costa Rica claims a right based on the prolonged, consistent and uninterrupted practice of the Parties, but can do no better than produce a single public record, covering only a four-year period (save for a single isolated episode in 1992), evidencing that this practice occurred. Evidently, there are no other official records supporting this so-called practice during the entire

¹⁰⁶See CR 2009/3, p. 17, para. 33.

¹⁰⁷See RCR, Vol. 2, Ann. 38.

¹⁰⁸MCR, Vol. VI, Ann. 227.

history of the Treaty's existence. This in itself attests to the weakness of Costa Rica's claim. The document covering the period between 1994 and 1998 does make reference to some 60 occasions, around one occasion per month, when Costa Rican police vessels traversed the San Juan to bring personnel or supplies to border posts or to engage in law enforcement activities¹⁰⁹. It makes no mention whether authorization from Nicaragua was sought, or was not sought, prior to these activities.

13. This information is supplied in another contemporaneous, official record, produced by Nicaragua as an Annex to her Rejoinder. This is an aide-memoire of a meeting that took place in July 2000 between Costa Rica's Minister of Public Security and the Commander of Nicaragua's army, and other senior security officials of both States, in which they discussed navigation on the river by Costa Rican vessels during the same pre-1998 period that is covered by Costa Rica's official report¹¹⁰. The aide-memoire is located in your judges' folder, and the pertinent portion is projected on the screen. In that meeting, the International Legal Adviser to Costa Rica's Ministry of Public Security, Colonel Carlos Alvarado Valverde, stated that, prior to July 1998 when Nicaragua stopped authorizing use of the river by Costa Rican police vessels, those vessels navigated "with prior permission from the Nicaraguan Army, which also verified the personnel and the contents of the vessel at each post that the boat passed"¹¹¹. Costa Rica's Minister of Public Security, Mr. Rogelio Ramos Martínez, then proposed the re-establishment of the same conditions, which he described as the "*status quo* before 1998"¹¹². The document sustains Nicaragua's position that Costa Rican police vessels only navigated on the San Juan after seeking and obtaining prior permission from Nicaragua.

14. Subsequent to the close of the written pleadings, Costa Rica sought and obtained from the Court permission to submit additional documents. One of these is an affidavit from her Colonel Walter Navarro, who declared that he was the Director of the Costa Rican police from May 1998 until February 2006. Colonel Navarro was present, as one of Costa Rica's three

¹⁰⁹See RN, para. 5.78.

¹¹⁰RN, Vol. II, Ann. 68.

¹¹¹*Ibid.*, pp. 423-424.

¹¹²*Ibid.*, p. 423.

representatives, at the July 2000 meeting that is recorded in the aide-memoire. It is significant, then, that he makes no mention whatsoever of that meeting in his affidavit, no mention of the aide-memoire, and offers no specific denial of the statements attributed to the Costa Rican Minister of Public Security or the Ministry's International Legal Adviser whom the aide-memoire recorded as acknowledging that Costa Rican police vessels never navigated on the San Juan except "with prior permission from the Nicaraguan Army, which also verified the personnel and the contents of the vessel at each post that the boat passed". Colonel Navarro's failure to respond directly or even mention the aide-memoire, in an affidavit submitted more than four months after Costa Rica received it as part of Nicaragua's Rejoinder, in which it was prominently discussed, confirms both the authenticity and the reliability of the document. Equally revealing is the failure of Costa Rica to produce affidavits from either of the other two of her senior officials who attended the July 2000 meeting. It can be presumed that if either the Minister of Public Security, Mr. Ramos Martínez, or the International Legal Adviser, Colonel Alvarado Valverde, were prepared to contradict the statements attributed to them in the aide-memoire, Costa Rica would have submitted their affidavits along with that of Colonel Navarro. The fact that Costa Rica did not do so further confirms that the statements attributed to her senior officials in the aide-memoire were made.

15. The responses of Costa Rica's counsel to this document, on Monday and Tuesday, have only served to underscore its reliability. Ms Parlett chose to ignore it. She said that the evidence that supports Nicaragua's assertion that Costa Rican police only navigated on the San Juan after requesting and obtaining Nicaragua's authorization consists entirely of affidavits from Nicaraguan army officers, which, she said, should not be believed. She insisted that, apart from these affidavits no documentary evidence supports this¹¹³. She made no mention of the July 2000 aide-memoire. Professor Crawford knew better than to ignore it completely. But his approach was no more successful than Ms Parlett's. He suggested that the Court should dismiss it because "there is no indication it was approved or even seen by anyone from the Costa Rican side"¹¹⁴. Well, we know they saw it eight months ago, when it was submitted to the Court as an annex to Nicaragua's Rejoinder; we know that that they had every opportunity to discredit it in the intervening period, as

¹¹³CR 2009/3, p. 51, para. 27.

¹¹⁴CR 2009/3, p. 19, para. 40.

part of their post-pleading submission of documents, including affidavits; we know that Colonel Navarro made no reference to it in his recent affidavit; and we know that no denials or disavowals were submitted by either of the two other Costa Rican officials whose words were recorded in it. Put simply, we know that Costa Rica has had every opportunity to present evidence contradicting the aide-memoire, and has failed to do so.

16. And Professor Crawford knows this, as well, which is perhaps why he falls back to the argument that the document simply “should be given no weight” because it does not bear the authentication of its author, Colonel Molina. It is actually this *argument* that should be given no weight. The aide-memoire is authenticated by the affidavit of General Javier Carrión, the Nicaraguan Army Commander who headed Nicaragua’s delegation to the meeting. His affidavit is in turn authenticated by the same Colonel Molina, who notarized it. He was bound by law to assure that it contained no untrue statements before notarizing it. In any event, if the Court requires further confirmation of the authenticity of the aide-memoire, its author, Colonel Molina, is here with us in The Hague as part of Nicaragua’s official delegation, and he is available to respond to any questions from the Court.

17. The affidavits Nicaragua has presented provide further confirmation of the practice of the Parties prior to 1998. Nicaragua has submitted affidavits from five different military commanders who were each responsible for maintaining security on the San Juan River between 1979 and 2007. Their testimony confirms that, prior to the middle of 1998, Costa Rican police vessels did not navigate on the river unless they had obtained prior authorization from the Nicaraguan army¹¹⁵, and that they engaged in law enforcement activities on the river when they were invited to do so by Nicaragua as part of a joint law enforcement exercise¹¹⁶. The procedure for the supply missions was as follows¹¹⁷: a Costa Rican police official would request authorization to navigate on the San Juan to resupply posts. This was done verbally. Nicaragua, also verbally, would grant it. The Costa Rican vessel reported to Nicaraguan military posts upon entering and exiting the river.

¹¹⁵See RN, paras. 5.80-5.85; *ibid.*, Vol. II, Anns. 68, 69, 72, 73, 77, and 78.

¹¹⁶See RN, paras. 5.102-5.108.

¹¹⁷See *ibid.*, paras. 5.80-5.85; *ibid.*, Vol. II, Anns. 68, 69, 72, 73, 77, and 78.

While transiting on the river, all service arms were stowed on the floor of the Costa Rican vessel. A Nicaraguan soldier remained on board throughout the journey on the San Juan.

18. The documentary evidence submitted by *Costa Rica* confirms that on those few occasions when Costa Rican police have conducted law enforcement activities on the river, it was *always* with Nicaragua's express permission. Costa Rica has introduced only three documents addressing law enforcement activities on the river, one from 1892, one from 1995, and one from 1998. The 1892 document was mentioned by Professor Crawford¹¹⁸. It does not support his argument that Costa Rica has unilateral rights to navigate on the river for law enforcement purposes. It is a report from the Chief of the Guard at the Colorado River in Costa Rica in which he expressly states that the Nicaraguan authorities granted him the power to seize contraband and criminals "along the coasts of Nicaragua", on the condition that he permit Nicaragua to enter Costa Rican territory to do the same¹¹⁹. The document tends to disprove the existence of the right Costa Rica claims, not to prove it.

19. Similarly, the 1995 document is a joint communiqué issued by the Nicaraguan Army and the Costa Rican Ministry of Public Security, reflecting the Parties' agreement to undertake joint law enforcement activities throughout the border area¹²⁰. Obviously, such joint activities, wherever they might take place, could only occur with the agreement of Nicaragua. The final document Costa Rica invokes, which is dated 1998, mentions law enforcement operations in 1995 and 1996 carried out "in co-ordination with" or "to co-operate with" Nicaraguan authorities¹²¹. Again, by definition, co-ordination and co-operation with Nicaragua can only occur with Nicaragua's authorization. In sum, none of the documents submitted by Costa Rica shows that Costa Rican police vessels ever unilaterally, or without prior permission from Nicaragua, navigated on the river to bring personnel and supplies to border posts, or to conduct law enforcement activities, or for any other purpose. The Parties' practice is inconsistent with the claim advanced by Costa Rica in these proceedings that she has a right of free navigation with her police vessels.

¹¹⁸See CR 2009/3, p. 17, para. 32.

¹¹⁹See MCR, Vol. VI, Ann. 210.

¹²⁰See *ibid.*, Vol. II, Ann. 27.

¹²¹*Ibid.*, Vol. VI, Ann. 227.

**C. THE WITHDRAWAL OF NICARAGUA'S AUTHORIZATION OF NAVIGATION
BY COSTA RICA'S POLICE VESSELS**

20. The evidence establishes what the practice of the Parties was in this regard until the middle of 1998. The evidence also establishes that this “status quo”, to quote Costa Rica’s Minister of Public Security, was disturbed in July of 1998¹²². In the words of Costa Rica’s Memorial, projected on the screen and located in your judges’ folder: “[I]n the period after July 1998, Nicaragua adopted a policy which involved systematic and permanent violations of Costa Rica’s rights, which continue to the present day”¹²³, in the period *after* July 1998. Costa Rica’s reference to July 1998 is significant. That is when Nicaragua advised Costa Rica that Costa Rican police vessels would no longer be authorized to navigate on the San Juan River, and, as a consequence, all such police navigation terminated. Costa Rica’s statement that Nicaragua’s alleged systematic violations of her rights began in July 1998 effectively admits that her rights were not systematically violated by Nicaragua prior to that date: and that whatever the status quo was prior to that date did not constitute a systematic violation of her rights. In other words, the principal violation of her rights for which Costa Rica seeks redress in this Court is Nicaragua’s refusal, after July 1998, to authorize Costa Rican police vessels to carry out armed navigation on the San Juan River for police purposes wholly unrelated to navigation “con objetos de comercio”. It would seem that this is why we are in court today.

21. The circumstances leading up to Nicaragua’s decision in July 1998 to prohibit further navigation on the river by Costa Rican police vessels have been detailed in Nicaragua’s Rejoinder. To summarize, the evidence presented there shows that Costa Rica’s newly-elected President and his Public Security Minister, Juan Rafael Lizano, adopted a new policy in May of 1998, in response to what *they* perceived as an increase in illegal immigration from Nicaragua across the San Juan, as reflected in Annex 19 of Nicaragua’s Rejoinder. Thereafter, for the first time, Costa Rica began to send her armed police vessels onto the San Juan, without requesting prior authorization from Nicaragua, for the purpose of intercepting Nicaraguans thought to be illegally bound for Costa Rica. According to the documentary evidence Costa Rica submitted to the Court before the close of the written pleadings — the documentary evidence that *Costa Rica* submitted to the Court

¹²²RN, Vol. II, Ann. 68, p. 423.

¹²³MCR, para. 3.02.

before the close of the written pleadings — her police vessels transported detained Nicaraguans at gunpoint on the San Juan River in June of 1998¹²⁴.

22. According to the same Costa Rican Annex, Nicaragua protested immediately. In particular, the Costa Rican police commander at Sarapiquí recorded that Nicaragua's commander, Colonel — now Brigadier General — Talavera, protested Costa Rica's actions¹²⁵. This, however, did not deter Costa Rica from continuing to execute her new policy, and the Costa Rican police commander's record shows further Costa Rican incursion onto the river, and detention and transport of Nicaraguan nationals on 14 June 1998¹²⁶. The same Costa Rican official record says that, in response to these detentions, on 14 July 1998, Nicaragua, in the person of Colonel, now General Talavera, prohibited any further navigation by the Costa Rican police on the San Juan¹²⁷. Nicaragua submitted an affidavit from General Talavera confirming these facts as reflected in Costa Rica's own documents. But what is most significant about them is that they are contained in Costa Rica's own documents, submitted to the Court as part of her written pleadings.

23. However, apparently, Costa Rica now takes issue with her own contemporaneous official record. Costa Rica attempts to rewrite history belatedly via the affidavit of Colonel Walter Navarro, submitted after the close of the written pleadings. According to Colonel Navarro, "neither he personally nor any of his subordinates issued instructions for the detention of Nicaraguan citizens on the San Juan River, and that he is not aware that it ever happened . . ."¹²⁸. It will not escape the Court's notice that this statement is directly contradicted by Costa Rica's own official police report. As I have just mentioned, Costa Rica's documentary evidence, recorded by the police commander at the Sarapiquí border post — who, by the way, was directly under Colonel Navarro's command after 8 May 1998 — states that apprehensions of Nicaraguans occurred during June 1998. Also contradicted by that Costa Rican police report is Colonel Navarro's statement that "the Nicaraguan Government never issued any formal protest"

¹²⁴See *ibid.*, Vol. VI, Ann. 227, p. 963.

¹²⁵See *ibid.*

¹²⁶See *ibid.*

¹²⁷See *ibid.*, p. 964.

¹²⁸Costa Rica late submissions (*d*), para. Fifth.

about the detentions of Nicaraguan citizens on the San Juan¹²⁹. But according to the 14 June 1998 entry in the Costa Rican police report:

“Colonel Talavera [of the Nicaraguan Army] complained that no one navigating the San Juan should be detained, since according to [Colonel] Talavera, some days ago some officers from Delta Zero [that is another Costa Rican police post on the bank of the river] had forced some persons to get off the boat.”¹³⁰

The report further records that on 14 July, Nicaragua, based on these and other detentions of her nationals by the Costa Rican police, announced that she would no longer authorize Costa Rican police vessels to navigate on the San Juan¹³¹. Nicaragua submits that, as between the contemporaneous official police record submitted by Costa Rica with her written pleadings, and the affidavit generated by Colonel Navarro more than ten years after the fact and in the context of litigation, it is the former that should be given credence.

24. It was this decision by Nicaragua to stop authorizing navigation by Costa Rican police vessels that led, ultimately, to the meeting between Costa Rica’s Minister of Public Security and Nicaragua’s army commander, and other senior security officials of both States in July 2000, that is recorded in the aide-memoire that I previously discussed and displayed to the Court. Costa Rica sought the meeting to persuade Nicaragua to reinstate “the *status quo* from before 1998”, which her officials described in the manner that I read out to the Court. In that meeting, both Parties recognized that it was Costa Rica’s breach of the status quo — and in particular her unauthorized navigation on the San Juan River for the purpose of detaining and transporting, under force of arms, Nicaraguan nationals thought to be planning to migrate unlawfully into Costa Rica — that prompted Nicaragua to stop authorizing navigation by Costa Rican police vessels. It must be noted that Colonel Navarro of Costa Rica, in his affidavit, denies that he personally ever asked permission of Nicaragua for his forces to navigate on the San Juan and never discussed the question of permission with any Nicaraguan army officers. Well, it is precisely this behaviour by Colonel Navarro, after he was appointed to his post in May 1998, which led to the difficulty and Nicaragua’s decision to stop authorizing navigation by the Costa Rican police two months later.

¹²⁹*Ibid.*

¹³⁰MCR, Vol. VI, Ann. 227, p. 963.

¹³¹See *ibid.*, p. 964.

But whatever reason for deciding to stop authorizing navigation by the Costa Rican police, it was within Nicaragua's right to do so as sovereign over the river, because Costa Rica's right of free navigation "con objetos de comercio" does not include a right of her police vessels to navigate on the San Juan in the exercise of police functions. These are the facts, and they all point in one direction: That the practice of the Parties does not support — indeed it thoroughly refutes — Costa Rica's contention that she has a right to navigate on the San Juan River with her police vessels.

D. THE EVIDENCE REGARDING NAVIGATION BY OTHER GOVERNMENT VESSELS

25. The same conclusion that applies to navigation with police vessels applies to navigation with other Costa Rican public vessels engaged in carrying out governmental functions unrelated to "objetos de comercio". Costa Rica has no right of navigation with those other public vessels under the Treaty of 1858 or the Cleveland Award. Even so, Nicaragua does not — as would be her sovereign right — prohibit Costa Rica from navigating on the river for purposes of delivering medical, educational or other social services to Costa Rican citizens on the right bank of the river. Nicaragua requires only that Costa Rican public vessels and officials register with Nicaraguan authorities upon entering and exiting the river and comply with any applicable visa requirements¹³². I discussed the lawfulness and reasonableness of these regulations in my earlier speech and need not repeat that here. Since there is no right of Costa Rica to navigate with public vessels for ordinary governmental purposes, unrelated to "objetos de comercio", Nicaragua cannot be properly accused of violating a right that Costa Rica does not possess, especially when Nicaragua consents to the navigation subject only to the reasonable requirements I have mentioned.

26. Now, I would be less than candid if I did not admit that I was impressed by the very powerful emotional content of Ms Parlett's presentation on Tuesday. After all, who would not be moved by the picture she painted of 450 Costa Ricans, including 200 children, deprived of basic health services, including inoculation against screw worm and other diseases? But as is often the case with such appeals to the heart, the law gets redesigned or ignored entirely in order to provide a remedy for the compelling set of facts depicted by counsel. Thus, Ms Parlett tells us that

¹³²See RN, paras. 5.109-5.112.

Costa Rica's right under the 1858 Treaty "includes navigation by government officials to provide essential services to local communities"¹³³. Ms Parlett nowhere explains how or why this statement is justified. She merely states her conclusion and moves on to her version of the facts, which she finds more felicitous to her argument. I trust by now that it is clear that no such legal right can be found in the 1858 Treaty, the Cleveland Award or the practice of the Parties. There is no right of navigation with public vessels for the purpose of delivering governmental services.

27. Furthermore, the facts are not as felicitous as Ms Parlett very skilfully portrays them. She overreaches when she contends that subsequent to 1998 Nicaragua has "prevented" Costa Rica from delivering "services to the local population, including health, education and security"¹³⁴. There is no evidence to support this sweeping statement. It is true that Nicaragua requires Costa Ricans, who are not residents of the right bank, including Costa Rican officials, to obtain a visa before entering Nicaraguan territory, but there is no evidence that this requirement has had anything close to what Ms Parlett described as "detrimental consequences" for the local residents¹³⁵. Much attention was paid to the solitary case of Dr. Ching, whose efforts to obtain a Nicaraguan visa were described at some length. What Ms Parlett neglected to mention was that Dr. Ching in fact received a Nicaraguan visa¹³⁶.

28. It is a fact, and Nicaragua acknowledges it, that there have been bureaucratic inefficiencies which have resulted in delays in the issuance of some visas. Ms Parlett has identified two or three such instances, which Nicaragua regrets. However, these are isolated cases and they do not prove that it was Nicaragua's policy to deny or delay visas for Costa Ricans or access to the river. It was not. Moreover, Costa Rica herself acknowledges, in her Reply, that by May of 2007, Nicaragua was indeed expeditiously granting visas so that Costa Rican officials could deliver governmental services to local residents via navigation on the San Juan¹³⁷.

¹³³CR 2009/3, p. 49, para. 19; emphasis added. See also *ibid.*, p. 44, para. 6; p. 45, para. 8.

¹³⁴CR 2009/3, p. 44, para. 3.

¹³⁵CR 2009/3, p. 44, para. 4.

¹³⁶RN, para. 5.112; CMN, paras. 6.2.14-6.2.15.

¹³⁷RCR, paras.4.36-4.37 ; RN, para. 5.112.

E. CONCLUSION

29. Mr. President, Members of the Court, this brings me to my conclusion. I can state it simply. Costa Rica has no right of navigation on the San Juan River with her public vessels for the purpose of carrying out police or other governmental functions. The 1858 Treaty of Limits and the Cleveland Award carved out a right beyond, but inextricably connected to, the right of navigation “con objetos de comercio”. That is the right of vessels of Costa Rica’s revenue service, and *only* her revenue service, to navigate on the river when it is related to and connected with navigation “con objetos de comercio”, and *only* when it is related to and connected with navigation “con objetos de comercio”. Professor McCaffrey has demonstrated that the 1858 Treaty and the Cleveland Award are susceptible of no other interpretation. It has been my purpose to show that the practice of the Parties, likewise, permits no other interpretation.

30. Mr. President, Members of the Court, I thank you once again for your patience and your kind attention. I ask you to please call upon Professor Pellet as Nicaragua’s next, and final, speaker of this round.

The PRESIDENT: I thank Mr. Reichler for his presentation. I now invite Professor Alain Pellet to take the floor.

M. PELLET : Thank you very much, Mr. President. I am afraid, I have to beg your kind indulgence, but my presentation will last 20 minutes.

REMÈDES — UNE RÉPONSE AU PROFESSEUR CRAWFORD

1. Monsieur le président, Messieurs les juges, le professeur Crawford s’est félicité d’être admirablement concis («commendably brief»)¹³⁸ au sujet des remèdes demandés par le Costa Rica. Je vais essayer de le concurrencer sur ce terrain de la brièveté ... aussi peu familier qu’il nous soit à l’un comme à l’autre !

2. Sans m’employer à faire un tour complet des problèmes relatifs aux «remèdes» dans cette affaire¹³⁹, je répondrai à mon contradicteur — mais toujours aussi ami — en distinguant la question

¹³⁸ CR 2009/3, p. 63, par. 4.

¹³⁹ Contre-mémoire du Nicaragua (CMN), p. 239-249, par. 7.1.1-7.2.6 ; Duplique du Nicaragua (DN), p. 299-327, par. 6.1-6.49.

des déclarations, que les deux Parties vous demandent de faire, des autres demandes en réparation, aussi nombreuses que variées, formulées par le Costa Rica.

I. LES DEMANDES DE DÉCLARATIONS ADRESSÉES À LA COUR

3. Monsieur le président, comme l'a rappelé James Crawford, les deux Parties prient la Cour de mettre fin, par une ferme déclaration, aux incertitudes qui subsistent sur la portée de leurs droits et obligations respectifs en vertu du traité Cañas-Jérez de 1858. Et nous avons noté avec intérêt, de ce côté-ci de la barre, que la Partie costa-ricienne semble avoir renoncé à mettre en doute la recevabilité de la demande formulée à cette fin par le Nicaragua. Ceci me semble à la fois avisé et juridiquement équitable : parce qu'il paraîtrait pour le moins étrange, Messieurs de la Cour, que vous acceptiez de vous interroger, comme la Partie costa-ricienne vous y presse sur les prétendues «violations, par le Nicaragua, des obligations qui sont les siennes envers le Costa Rica» en vertu du traité de limites de 1858, ce qui constitue l'objet premier de la requête¹⁴⁰, et que, dans le même mouvement, vous refusiez de vous prononcer sur la portée des obligations du défendeur en vertu de ce même instrument.

a) *La déclaration demandée par le Nicaragua*

4. Le Nicaragua prie donc la Cour de bien vouloir énoncer clairement le contenu et la portée des différents droits et obligations établis par le traité de 1858 (tels qu'interprétés par la sentence du président Cleveland), qui continuent à poser problème en matière de navigation. Ce n'est que de cette manière que sera complètement résolu le différend soumis à la Cour, conformément d'ailleurs au vœu que Monsieur l'agent du Costa Rica a lui-même formulé lundi matin¹⁴¹. Comme nous l'avons indiqué dans notre duplique¹⁴², il ne s'agit pas là d'une requête reconventionnelle, ni même d'une demande autonome, mais, simplement d'une démarche visant à obtenir que la Cour rejette l'interprétation inacceptable de ses droits et obligations que le Costa Rica la prie d'entériner et qu'elle précise, une fois pour toutes, quels sont les droits et obligations respectifs des Parties en

¹⁴⁰ Requête, p. 7, par. 1.

¹⁴¹ CR 2009/2, 2 mars 2009, p. 14, par. 10 (Ugalde-Alvarez)

¹⁴² DN, p. 300-301, par. 6.4.

vertu du traité de Lima de 1858. Ceci peut être fait dans le dispositif de l'arrêt qu'elle est appelée à rendre ou dans ses motifs.

5. La raison de cette demande est simple : comme mes collègues l'ont démontré tout au long de notre présentation, l'objectif principal de la Partie costa-ricienne consiste, pas seulement en plaidoiries, mais aussi par son comportement constant, à rechercher par tous les moyens l'élargissement du droit de libre navigation *con objetos de comercio* que lui reconnaît le traité de 1858 et qu'elle voudrait diluer en quelque chose de tout à fait différent : la reconnaissance pure et simple d'un droit de libre navigation *tout court*, inconditionnel et absolu accompagnée de toute une théorie de droits accessoires. Une telle dilution, qui est au cœur du différend que le Costa Rica a soumis à la Cour, n'est pas acceptable pour le Nicaragua et constitue une source de frictions constantes entre les deux pays riverains du fleuve. Or, il est à peine besoin de le rappeler, «la Cour possède un pouvoir inhérent qui l'autorise à prendre toute mesure voulue ... pour assurer le règlement régulier de tous les points en litige...» (*Essais nucléaires (Australie c. France)*, arrêt, C.I.J. Recueil 1974, p. 25, par. 23 ; *Essais nucléaires (Nouvelle-Zélande c. France)*, arrêt, C.I.J. Recueil 1974, p. 463, par. 23. Voir aussi, par exemple : *Plateau continental (Jamahiriya arabe libyenne/Malte)*, arrêt, C.I.J. Recueil 1985, p. 23, par. 19.)

6. Monsieur le président, je ne puis me livrer à un long commentaire du bien-fondé de chacune des demandes du Nicaragua. Tous ces points ont été déjà présentés dans nos écritures¹⁴³ et par mes collègues :

- M^e Reichler a montré que le Nicaragua est indiscutablement en droit de réglementer les activités menées sur le fleuve, et en particulier la navigation, et qu'il peut exiger le paiement de redevances pour les services rendus ayant un lien avec ceux-ci ; et
- le professeur McCaffrey a, pour sa part, rappelé que les activités des bateaux du service des douanes costa-riciennes doivent être strictement liées et limitées à la navigation *con objetos de comercio* ;
- en ce qui concerne le droit du Nicaragua d'entretenir le fleuve et de procéder à l'amélioration de sa navigabilité, nous avons longuement établi dans notre duplique¹⁴⁴ que ce droit existe et

¹⁴³ Voir DN, p. 306-308, par. 6.17.

peut être mis en œuvre sans que le consentement du Costa Rica soit nécessaire, comme l'a reconnu d'ailleurs expressément la sentence Cleveland¹⁴⁵ ; et

— il paraît assez évident que le dragage, qui favoriserait (et permettrait de rétablir) la navigabilité du San Juan, est inclus dans l'exercice de ce droit fondamental — qui serait d'ailleurs à l'avantage du Costa Rica si, comme il le prétend, il a un intérêt quelconque à naviguer sur le San Juan avec des marchandises (je veux dire : *con objetos de comercio...*). Nous avons d'ailleurs noté que le professeur Crawford a expressément déclaré l'accord du Costa Rica sur ce point¹⁴⁶.

7. Telles sont donc les raisons, Monsieur le président, pour lesquelles le Nicaragua entend maintenir, dans les conclusions finales qu'il déposera la semaine prochaine, une demande tendant à ce que la Cour déclare formellement qu'il a droit à ce que la pleine souveraineté (*dominium et imperium*) qui lui est reconnue par l'article VI du traité frontalier de 1858 soit effectivement respectée par le Costa Rica.

8. En revanche, le Nicaragua ne demande pas à la Cour de se prononcer directement sur les «réserves» qu'il a formulées au sujet du statut juridique du Colorado ou de la pollution existante ou potentielle (liée notamment à la mise en exploitation de la mine d'or de Las Crucitas)¹⁴⁷ : il lui est simplement apparu utile et juste d'informer la Cour de l'existence (regrettable) d'autres différends qui touchent le San Juan et ne sont pas dépourvus de tout lien avec la présente instance.

b) *La déclaration demandée par le Costa Rica*

9. Monsieur le président, pour sa part, le Costa Rica a inclus dans les conclusions de sa duplique une longue liste de prétendues violations à ses obligations relatives au régime du fleuve San Juan qu'il impute au Nicaragua¹⁴⁸. Nous ne contestons pas la recevabilité de ces demandes et il ne me paraît ni utile ni possible de les reprendre une à une en tout cas pour l'instant : toutes nos

¹⁴⁴ DN, p. 302-305, par. 6.08-6.16.

¹⁴⁵ MCR, vol. II, annexe 16, p. 99.

¹⁴⁶ CR 2009/3, 3 mars 2009, p. 68, par. 25.

¹⁴⁷ Voir CMN, p. 251, ou DN, p. 325-326, par. 6.49.

¹⁴⁸ RCR, p. 211-212, par. 2.

plaidoiries de ces deux jours ont démontré combien elles étaient infondées. Je me bornerai à deux remarques.

10. La première sera pour mettre respectueusement la Cour en garde contre l'apparente innocuité de ces demandes, peut-être contre leur «bonhomie», qui, sous leur allure technique, veulent vous conduire en réalité, Messieurs les juges, à remettre profondément en cause le régime du fleuve tel qu'il résulte du traité de 1858 interprété par la sentence Cleveland de 1888. Juste un exemple : je ne sais pas quelles ont été vos réactions lors de la projection par James Crawford du garde-côtes le *Forward*¹⁴⁹. En tout cas, pour moi, cet imposant bâtiment a bien davantage évoqué l'idée d'un navire de guerre justement, que d'un bateau dont l'anodine et sympathique fonction aurait été l'accompagnement des noces du président Cleveland et de Miss Folsom. Or, si vous veniez à faire droit à sa demande, le Costa Rica ne manquerait pas de se prévaloir de cette projection (et de ses plaidoiries sur les bateaux de douane et autres navires officiels) pour envoyer sur le fleuve *nicaraguayen* San Juan des bâtiments qui seraient l'équivalent moderne du *Forward* ou du *Chandler* — je signale d'ailleurs qu'avant d'escorter la future First Lady, le *Chandler* a servi en tant que bâtiment de la marine de guerre américaine et a même, durant la guerre de Sécession, capturé une corvette espagnole¹⁵⁰. La formulation minimaliste de la conclusion du Costa Rica figurant sous la lettre «g» (et ce n'est qu'un exemple parmi d'autres) doit être appréciée dans cette perspective. Il en va de même, par exemple, de celle énoncée sous la lettre «i», sur la pêche de subsistance. Je n'y reviens pas, M^e Reichler en a parlé tout à l'heure.

11. Ma seconde remarque est plus globale. Supposons, Monsieur le président, que la Cour fasse droit aux conclusions du Costa Rica — *visio horribilis* ... mais supposons-le un instant ! Que resterait-il du *dominium* et de l'*imperium* exclusifs du Nicaragua sur le fleuve au regard du droit absolu de navigation revendiqué par le Costa Rica ? Rien — ou pratiquement rien, si ce n'est l'interdiction faite à la Partie costa-ricienne d'y faire naviguer des navires ouvertement «de guerre», tant une telle demande aurait été en contradiction trop flagrante avec la sentence Cleveland. Et encore... : le Costa Rica a une conception tellement extensive de ses soi-disant droits de «protection» et de défense du fleuve, que, conformément à sa tactique constante depuis

¹⁴⁹ Voir CR 2009/4, p. 16, par. 32 (Gómez) ; voir aussi CR 2009/3, p. 13-14, par. 23.

¹⁵⁰ Voir http://www.uscg.mil/history/webcutters/Jasmine_1866.pdf.

cent cinquante ans, la conclusion figurant sous la lettre «g») constitue à l'évidence, je viens de le montrer, une nouvelle tentative de «grignotage» qui, dans les faits, remet en cause ce que l'on pensait acquis depuis 1888. Dans cette perspective inquiétante, le Nicaragua se trouverait réduit à n'être qu'un *imperator* privé de toute compétence ; un *dominus* qui ne pourrait ni réglementer le tourisme sur le fleuve, ni édicter de règles propres à assurer la sécurité de la navigation sur le fleuve, ni tenter d'en préserver l'environnement ou d'en rétablir la pleine navigabilité, et dont les forces armées (beaucoup plus modestes que celles du Costa Rica : le Nicaragua ne dispose pas de garde-côtes dont le gabarit serait l'équivalent contemporain de celui du *Chandler*) en seraient réduites à assister depuis la rive aux démonstrations de force de la police et des garde-côtes costa-riciens.

12. Le Nicaragua vous prie, Messieurs de la Cour, de rejeter toutes les demandes contenues dans le paragraphe 2 des conclusions du Costa Rica, qui remettent profondément en cause, l'équilibre réalisé par le traité de 1858 tel que la sentence Cleveland l'a interprété.

II. LES AUTRES CONCLUSIONS DU COSTA RICA

13. Monsieur le président, pour le reste, les conclusions du Costa Rica sont «attendues» et le rejet des allégations de violations qu'aurait commises le Nicaragua doit, de toute façon, Messieurs les juges, vous conduire à les rejeter : ce n'est pas au professeur Crawford que je vais apprendre que la responsabilité de l'Etat est engagée — mais n'est engagée que — si un fait internationalement illicite peut lui être attribué. Pas de violation ; pas de responsabilité — ni bien sûr de cessation, d'assurances ou de garanties de non-répétition, ou de dédommagement.

14. Permettez-moi cependant, Monsieur le président, de répondre en quelques phrases aux allégations de mon contradicteur en ce qui concerne la question des injonctions, d'une part ; celle des dommages-intérêts, d'autre part (sans bien sûr que ces réponses constituent de quelque manière que ce soit une reconnaissance de responsabilité de la part du Nicaragua).

15. *Les injonctions* d'abord. Je ne conteste évidemment pas que «[t]he Court gives decisions in its contentious jurisdiction which are binding on States»¹⁵¹. Mais ce n'est pas ce dont il s'agit ici

¹⁵¹ CR 2009/3, p. 64, par. 8.

— et l'exemple de l'affaire du *Mandat d'arrêt*, opportunément citée par le professeur Crawford¹⁵², illustre parfaitement notre objection : certes, dans cette affaire, la Cour a constaté l'illicéité du mandat d'arrêt délivré à l'encontre de M. Yerodia mais, conformément à sa jurisprudence constante¹⁵³, elle s'est gardé d'annuler elle-même le mandat en question et a laissé à la Belgique le soin de le mettre à néant «par les moyens de son choix» («by means of its own choosing») (*Mandat d'arrêt du 11 avril 2000 (République démocratique du Congo c. Belgique)*, arrêt, C.I.J. Recueil 2002, p. 32, par. 76 et p. 33, par. 78 C.3). C'est tout ce que voulait dire le Nicaragua : si, par impossible, la Cour en venait à juger que certaines des mesures qu'il a prises pour la protection du fleuve San Juan et la sécurité de la navigation étaient illicites — *quod non !* — il ne lui appartiendrait pas de procéder elle-même à leur «abrogation» comme le demande le Costa Rica¹⁵⁴. Au surplus, que cela doive être fait par votre haute juridiction ou reconnu comme relevant de la compétence du Nicaragua, de toute manière, il est rigoureusement impossible, à la Cour comme au Nicaragua, de donner suite à cette demande (tout à fait exorbitante) faite pour l'Etat demandeur d'avoir spécifié les mesures législatives et réglementaires dont il réclame l'«abrogation»¹⁵⁵.

16. En ce qui concerne la demande de *dommages-intérêts*, nous ne contestons nullement que ceux-ci pourraient faire l'objet d'une seconde phase de la procédure¹⁵⁶ — *si* les violations alléguées par le Costa Rica étaient avérées — *quod non* à nouveau — *et si* celui-ci apportait la preuve d'un préjudice qu'il n'invoque — également — que de manière si vague et si floue que l'on voit mal comment la Cour pourrait, sur cette base, constater même le principe du droit à réparation du Costa Rica pour, dans une seconde phase, fixer le montant de l'indemnisation réclamée, bien à tort,

¹⁵² *Ibid.*, p. 64-65, par. 9.

¹⁵³ Voir, par exemple, *Concessions Mavrommatis à Jérusalem*, arrêt n° 5, 1925, C.P.J.I. série A n° 5, p. 50 ; *Haya de la Torre (Colombie/Pérou)*, arrêt, C.I.J. Recueil 1951, p. 79 ; *LaGrand (Allemagne c. Etats-Unis d'Amérique)*, arrêt, C.I.J. Recueil 2001, p. 516, par. 128 7) ; *Avena et autres ressortissants mexicains (Mexique c. Etats-Unis d'Amérique)*, arrêt, C.I.J. Recueil 2004, p. 32, par. 31. Voir aussi *CEDH*, arrêt du 18 décembre 1986, requête n° 9697/82, *Johnston et autres c. Irlande*, série A n° 112, par. 77.

¹⁵⁴ Voir MCR, p. 141, par. 6. 13 ; RCR, p. 198, par. 5.15 ; CR 2009/3, p. 64, par. 6 (Crawford).

¹⁵⁵ *Certains intérêts allemands en Haute-Silésie polonaise, fond*, arrêt n° 7, 1926, C.P.J.I. série A n° 7, p. 34-35 ; *Essais nucléaires (Australie c. France)*, arrêt, C.I.J. Recueil 1974, p. 262, par. 29 ; *ibid.*, p. 466, par. 30 ; et *Compétence en matière de pêcheries (République fédérale d'Allemagne c. Islande)*, fond, arrêt, C.I.J. Recueil 1974, p. 204, par. 76.

¹⁵⁶ Cf. CR 2009/3, p. 66, par. 17 (Crawford).

par le demandeur. Qu'il s'agisse de fixer ce montant dans une phase ultérieure ou de constater — comme dans l'affaire de la *Compétence en matière de pêcheries*, dont le professeur Crawford récuse à tort la pertinence¹⁵⁷ — le principe d'une obligation d'indemniser, le problème se pose de la même manière : même si les preuves de la consistance et de l'étendue des dommages subis peuvent être différées dans le premier cas et non dans le second, «la Cour ne peut formuler une constatation générale de responsabilité sur des questions au sujet desquelles elle ne possède que des renseignements limités et des preuves insuffisantes» («the Court is prevented from making an all-embracing finding of liability which would cover matters as to which it has only limited information and slender evidence») (*Compétence en matière de pêcheries (République fédérale d'Allemagne c. Islande)*, fond, arrêt, C.I.J. Recueil 1974, p. 205, par. 76)¹⁵⁸. Or le Costa Rica demande à la Cour de prononcer, dans ce premier temps, une constatation générale de responsabilité. J'ajoute que si, par impossible, la Cour constatait que le Nicaragua avait manqué à l'une quelconque de ses obligations en vertu du traité de 1858 correctement interprété — décision que nous n'envisageons pas ... — une telle constatation constituerait à l'évidence une réponse amplement appropriée¹⁵⁹.

17. Monsieur le président, j'ai peut-être eu tort de «défier» James Crawford sur le terrain qu'il avait choisi, celui de la brièveté, car — mon ordinateur a compté pour moi — j'ai utilisé un tout petit peu plus de mots et de caractères que lui — mais mes notes sont plus fournies et le français est une langue plus fleurie que l'anglais. Donc, me semble-t-il, à cet égard, «match nul». Par contre, sur le terrain, autrement plus sérieux, du régime juridique applicable à la navigation sur le fleuve San Juan, nous ne pouvons laisser dire ou sous-entendre qu'il s'agirait d'une question mineure¹⁶⁰. Pour le Nicaragua, c'est un problème de principe qui met en cause sa souveraineté.

Ainsi s'achève, Monsieur le président, Messieurs de la Cour, les plaidoiries du Nicaragua pour ce premier tour. Au nom de toute notre délégation, et au mien, je vous remercie de votre patience et je vous souhaite, ainsi qu'à nos amis costa-riens, un très bon week-end.

¹⁵⁷ CR 2009/3, p. 66, par. 17.

¹⁵⁸ Voir aussi la jurisprudence citée dans DN, p. 322-324, par. 6.45.

¹⁵⁹ *Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria; Guinée équatoriale (intervenant))*, arrêt, C.I.J. Recueil 2002, p. 452, par. 319.

¹⁶⁰ CR 2009/3, p. 69, par. 27 (Crawford).

The PRESIDENT: I thank Professor Pellet for his presentation.

This marks the end of the first round of oral argument of the Republic of Nicaragua. The Court will meet again on Monday 9 March at 10 a.m. to hear the second round of oral argument of the Republic of Costa Rica.

I would like to insist that the second round of oral argument should focus on the points raised in the first round of oral pleadings and on replies to those questions that have not been answered. I would like to ask for your co-operation.

The meeting is adjourned.

The Court rose at 1.05 p.m.
