

CR 2011/2

**International Court
of Justice**

**Cour internationale
de Justice**

THE HAGUE

LA HAYE

YEAR 2011

Public sitting

held on Tuesday 11 January 2011, at 3 p.m., at the Peace Palace,

President Owada presiding,

*in the case concerning Certain Activities carried out by Nicaragua in the Border Area
(Costa Rica v. Nicaragua)*

VERBATIM RECORD

ANNÉE 2011

Audience publique

tenue le mardi 11 janvier 2011, à 15 heures, au Palais de la Paix,

sous la présidence de M. Owada, président,

*en l'affaire relative à Certaines activités menées par le Nicaragua dans la région frontalière
(Costa Rica c. Nicaragua)*

COMPTE RENDU

Present: President Owada
Vice-President Tomka
Judges Koroma
Al-Khasawneh
Simma
Abraham
Keith
Sepúlveda-Amor
Bennouna
Skotnikov
Caçado Trindade
Yusuf
Greenwood
Xue
Donoghue
Judges *ad hoc* Guillaume
Dugard

Registrar Couvreur

Présents : M. Owada, président
M. Tomka, vice-président
MM. Koroma
Al-Khasawneh
Simma
Abraham
Keith
Sepúlveda-Amor
Bennouna
Skotnikov
Cançado Trindade
Yusuf
Greenwood
Mmes Xue
Donoghue, juges
MM. Guillaume
Dugard, juges *ad hoc*

M. Couvreur, greffier

The Government of Costa Rica is represented by:

H.E. Mr. René Castro Salazar, Minister for Foreign Affairs and Worship of Costa Rica;

H.E. Mr. Edgar Ugalde Álvarez, Ambassador of Costa Rica to the Republic of Colombia,

as Agent;

H.E. Mr. Jorge Urbina, Ambassador of Costa Rica to the Kingdom of the Netherlands,

as Co-Agent;

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

as Co-Agent, Counsel and Advocate;

Mr. James Crawford, S.C., F.B.A., Whewell Professor of International Law, University of Cambridge, member of the Institut de droit international, Barrister,

Mr. Marcelo Kohen, Professor of International Law at the Graduate Institute of International and Development Studies, Geneva; associate member of the Institut de droit international,

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Mr. Christian Guillermet, Ambassador and Deputy Chief of Mission of Costa Rica to the United Nations Office at Geneva,

Mr. Ricardo Otarola, Minister and Consul General of Costa Rica to the Republic of Colombia,

Mr. Gustavo Campos, Minister and Consul General of Costa Rica to the Kingdom of the Netherlands,

Ms Shara Duncan, Counsellor at the Costa Rican Embassy in the Kingdom of the Netherlands,

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

Mr. Alain Pellet, Professor at the University Paris Ouest, Nanterre-La Défense, Member and former Chairman of the International Law Commission, associate member of the Institut de droit international,

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comme conseils adjoints.

The PRESIDENT: Please be seated. The sitting is now open. The Court meets this afternoon to hear the first round of oral observations of Nicaragua on the Request for the indication of provisional measures submitted by Costa Rica. I now call upon His Excellency Mr. Carlos Argüello Gómez, Agent of the Republic of Nicaragua.

Mr. ARGÜELLO GÓMEZ:

1. Mr. President, Members of the Court, good afternoon. As always, it is a great honour to be before this highest tribunal of the United Nations representing my country.

2. The Nicaraguan delegation is composed of the Agent, counsel and advocates indicated in the written list provided to the Court. It is honoured with the presence of the Minister of the Environment and Natural Resources of Nicaragua, Mrs. Juana Argeñal.

3. Mr. President, the sequence of events that has brought the Parties again before the Court can be explained briefly. It is a repetition of what has been happening for nearly two centuries: every time Nicaragua attempts to make any substantial use of the San Juan river, Costa Rica finds a reason for dispute. So it was in 1884 when Nicaragua signed the first canalization treaty with the United States, Costa Rica decided to navigate the river with a ship of war that led to the Arbitration of President Cleveland; and so it was a 100 years later when there was again talk of an inter-oceanic canal through Nicaragua, Costa Rica decided that it was going to navigate the river with armed guards that led to the first recourse to this Court. And now, as soon as Nicaragua begins a modest dredging and cleaning effort in order to recover part of the original water flow of the San Juan river and improve navigation, Costa Rica finds reasons to start an international scandal.

4. The ostensible reason is a dispute over a swamp of under 3 sq km located at the mouth of the San Juan river. But let there be no mistake, the real objective of this dispute is to stop any attempt by Nicaragua to even moderately dredge and clean up the San Juan river.

5. If Nicaragua is not permitted to continue with its dredging project, which is really scarcely more than a minor cleaning operation, then Nicaragua will be denied any right at all to dredge and maintain the flow of the San Juan river. Without even minor cleaning, the river's mouth will be dried up in a matter of decades. Then not only will navigation be impossible, but the extensive

wetlands of Nicaragua along the lower San Juan that depend on the waters of this river, will be destroyed.

6. During the previous case brought by Costa Rica, Nicaragua pointed out that there were more important questions involving the San Juan river than the rights of commercial navigation granted to Costa Rica. In fact, what is involved is the survival of the San Juan river. It was pointed out that the river was being heavily silted and polluted through Costa Rican operations that included a then recently-authorized gold mine operation close to the river that involved serious risk of polluting the river with cyanide. Furthermore, Nicaragua pointed out that at present almost 90 per cent of the waters of the San Juan flow out through the Colorado branch in Costa Rican territory leaving a largely unnavigable trickle of water on the side of Nicaragua.

7. When the dispute with Costa Rica arose, and Costa Rica had recourse to the Organization of American States (OAS), the President of Nicaragua stated that the issues involved in this case were of a legal nature and could not be resolved by international political organizations. He further publicly announced, on 2 November 2010, that Nicaragua would file a case against Costa Rica before this Court since it was the appropriate institution for resolving questions of a legal nature. President Ortega indicated that the issues to be brought before this Court would involve precisely the questions that Nicaragua had already anticipated in the previous case with Costa Rica; that is, the pollution and sedimentation of the San Juan river and the deviation of its waters to the Colorado branch of the San Juan. Furthermore, he indicated that Nicaragua would also claim the right to navigate out to the Caribbean Sea via the branch of the Colorado river at least until Nicaragua was able to clean the San Juan river from the sedimentation provoked by the Costa Rican deforestation of its territory and recover the possibility of navigating it out to sea.

8. The reaction of Costa Rica to this announcement was to anticipate the inevitable and bring a case before the Court. This it has done on its own terms which limit the questions in dispute to those of interest to Costa Rica. Nicaragua takes this opportunity to confirm that it is preparing a case against Costa Rica along the lines announced by President Ortega that involve the real issues that are at the heart of this dispute.

9. Mr. President, it is important to bring to the attention of the Court that, following the announcement made by President Ortega, Costa Rica has cut off the possibility of any Nicaraguan

vessels entering the Colorado or any other tributaries of the San Juan river. They are installing chains and other mechanisms to impede any attempts of navigation by Nicaraguan vessels. If there is any need for a call to not aggravate the situation, this would certainly merit serious consideration.

10. Mr. President, it is evident that the Nicaraguan team cannot adequately address the presentation made by Costa Rica two hours ago and for which it had nearly two months time to prepare. Some of these issues will be addressed in this round of the pleadings and others will be left for the second round. Furthermore, Nicaragua reserves its rights generally on all the statements of fact and law made by Costa Rica on questions relating to the merits of this case which will be addressed in due course.

11. In this phase of the case relating to the request made by Costa Rica for interim measures, two main issues are before the Court. One is whether Nicaragua is causing irreparable damage to Costa Rica by its attempts to clean and dredge parts of the San Juan river and the other is related to a presumed occupation by Nicaragua of Costa Rican territory and the cessation of this occupation and all operations inside this territory.

12. The first request, although not correct nor based on true facts, is, at least from a juridical point of view, a question that may properly be addressed during this phase involving the request for provisional measures. On the other hand, the second request can only be addressed in the merits phase of this case, since any decision on sovereignty over that area may only be resolved after a complete review of the questions of law and fact relating to these issues. However, it clearly appears *prima facie* that Costa Rica's alleged rights are not infringed nor threatened. These questions will be addressed by Professor Pellet.

13. Notwithstanding this, it is important to point out the following facts. Firstly, on the issue of sovereignty over the small wetland at the mouth of the San Juan river.

14. Since most of the Members of the Court are more or less familiar with these issues from the previous case brought by Costa Rica against Nicaragua, allow me, Mr. President, to jump without much preamble into the heart of the matter.

15. The Nicaragua/Costa Rica border is regulated by the delimitation Treaty of 1858, the Arbitral Award of President Cleveland of 1888 and the five Arbitral Awards of General Alexander dating from 1897 to 1900. Professor McCaffrey will spell out the law and the legal instruments

that are relevant to this question and illustrate the location of the borderline. For the moment some brief points.

16. The Awards of Umpire-Engineer Alexander decided all questions related to the demarcation of the borderline. This demarcation had one particularity since a considerable part of the border runs along the right bank of the San Juan river; no markers could be affixed to a naturally movable borderline. For this reason General Alexander, in his first Award, determined the location of the starting-point to the border at Punta Castilla but from that point in the Caribbean Sea the next fixed marker is located at a distance of more than 100 km upriver.

17. It is true that General Alexander authorized the tracing of the line along the margin of the river, but with a clarification that any boundary so demarcated would be subject to the changes of the river bank and the river channels. Professor McCaffrey will read in full the appropriate paragraphs of these Awards. At present, I will anticipate part of these quotes. General Alexander noted in his second Award:

“(a)“Today’s boundary line must necessarily be affected in future by all these gradual or sudden changes . . .

(b) The fact that the line has been measured and demarcated will neither increase nor decrease any legal standing that it might have had it not been measured or demarcated.” (Second Arbitral Award of 20 December 1897.)

18. This line measured and demarcated 113 years ago, and that has not been verified in the field in all the intervening years, is what Costa Rica alleges continues to exist. For Costa Rica, and I quote Alexander: “The fact that the line has been measured and demarcated” increased its legal standing and made it invariable.

19. Mr. President, Members of the Court, river mouths are in a continual flux. When General Alexander began his work as umpire he noted that the original Punta Castilla, to which the Treaty of 40 years earlier referred, had disappeared and was now located somewhere in the Caribbean Sea.

20. All the maps that have been produced since the time of General Alexander have not been verified on the ground. Nicaraguan maps have the legend stating “this map has not been verified in the field”. It is on the basis of these unverified maps that Costa Rica bases the international scandal

it has made over the issue of sovereignty over 2.5 sq km of swampland at the mouth of the San Juan river.

21. A Nicaragua/Costa Rica Bilateral Commission is in existence: it has been meeting on and off for the last 20 years. In several of these meetings the question of determining the location of the first marker fixing the starting-point of the delimitation line has been discussed. No agreement was ever reached in these meetings on this question. The last such meeting in which border questions were discussed met in San José on 18 and 19 October 2006. Point 3 of the minutes of that meeting, which is in document 19, reflects the subjects discussed by the Sub-Commission of Border Affairs. Among these other questions that were still unresolved was the fixing of the starting-point of the boundary.

22. Mr. President, Members of the Court, if Nicaragua and Costa Rica have over the years been unable to determine even the starting-point of the border line, how can Costa Rica insist that there is a clear border line between both countries? If this border line has not been verified in the field for over 100 years, how can they claim that maps made in their government offices reflect the reality on the ground? For their part, as I have just stated, Nicaraguan maps have carefully excluded any certainty in this respect.

23. Mr. President, apart from the text of the Arbitral Awards of General Alexander, the reality on the ground has been that Nicaragua has been constantly exercising sovereignty over this small area in dispute. There has not been any open official presence of Costa Rica in the area since these Awards have been rendered. On the other hand, Nicaraguan officials have been continually exercising jurisdiction in the area. We have filed with the Court several affidavits from military and police officials indicating how they continually patrolled and exercised vigilance over the area of Harbor Head, they have especially paid attention to the different channels going from the San Juan river to Harbor Head since they are used as hideaways by criminals and specially drug traffickers.

24. Although it is difficult if not impossible to prove a negative, there is a very clear presumption that Costa Rica has had no presence in the area in one small detail within the recent memory of the Court. One of the main contentions in the former case brought by Costa Rica against Nicaragua was that it had a right to patrol the River San Juan and to supply its security

posts along the river. If those records are checked the Court will find no mention of any post at the mouth of the San Juan or of any need to send patrols to the area. On the other hand, Nicaraguan troops have always been based one kilometre away from the area, in the town of San Juan del Norte.

25. Mr. President, Nicaragua is not occupying Costa Rican territory. It is simply exercising the sovereignty over this small area that it has always exercised. The last exercise of public jurisdiction over this area before the present dispute erupted came about on 2 October 2010. This episode is described in the affidavit of the Sub-Commander of the National Police of Nicaragua, Mr. Farle Isidro Roa Traña, in document 5. He states that while patrolling the area of Harbor Head and its channels, two suspicious speed boats (*pangas*) were sighted. When the patrol boat approached the criminals fled south, that is, towards Costa Rica. One of the fleeing men, Agustin Reyes Aragon, was recognized as a well-known criminal and drug trafficker. The location was checked and clear evidence of criminal activities was found. Although these events took place in the area Costa Rica claims, no immediate claim of so-called “illegal” invasion of its territory was made by Costa Rica. It was only after the dredger started operations on 17 October that Costa Rica suddenly claimed on 21 October that Nicaragua had invaded its territory and had captured law-abiding citizens of Costa Rica. The true story is that these were well-known criminals and had Nicaraguan nationality and were perpetrating their crimes in Nicaraguan territory.

26. In sum, Mr. President, Nicaragua is the State that actually exercises jurisdiction in the area, to use a phrase of Professor Oscar Schacter, quoted this morning by Professor Kohen.

27. Mr. President, Members of the Court, the first four requests for provisional measures made by Costa Rica are in reality requests for the Court to decide on the merits of the case. It is only by deciding that the area belongs to Costa Rica that the Court may order the withdrawal of troops and the cessation of the construction of a so-called canal and of the felling of trees and the dumping of sediment in this area. But apart from this fundamental consideration, these four requests have no present purpose.

28. Costa Rica’s first request calls for “the immediate and unconditional withdrawal of all Nicaraguan troops”. There are no troops presently in the swampland. There is no permanent military post in the area. The statement quoted by Professor Crawford of the Organization of

American States official, Mr. Caputo, who visited the area on 26 November, confirms that there were no Nicaraguan troops in the area. The patrol of the area is presently done as it has always been done by boat along the waters of the river which are indisputably Nicaraguan. The Court cannot order Nicaragua to cease patrolling the area. The area cannot become a no-man's land for the benefit of criminals, especially drug traffickers.

29. The presence of Nicaraguan troops in this very difficult area during the months of October and November of last year was for the purpose of protecting the workers who were cleaning the channel connecting the river proper with Harbor Head. The presence of these troops in the area has not been a cause of violence. Not one single Costa Rican citizen has been attacked. The only violence that has occurred during this incident was against Nicaragua when a bomb was thrown at its Embassy in San José on 12 November 2010. The attitude of the Nicaraguan troops to approaching Costa Rican helicopters as portrayed in the pictures filed by Costa Rica was only logical. Costa Rican government officials had threatened the use of armed force to, so-called, "retake" the swampland. The real threats can be appreciated in the following statement.

30. The Costa Rican newspaper *La Nacion* in its 2 November 2010 edition published that the Security Minister of Costa Rica, Jose Maria Tijerino, had stated that morning to AND News that he trusts international organisms will work to resolve military presence in the northern border of the country and quoted him as saying:

“(c) These people will withdraw either through reason or by force because international law is on our side, through the mechanisms provided by international law which include the use of force.” (<http://www.nacion.com/2010-11-02/ElPais/UltimaHora/ElPais2576464.aspx>.)

31. This statement by a Minister that handles a budget for security — in fact military expense — of over US\$240 million, an amount that is five times higher than the military budget of the Nicaraguan forces, must certainly be taken seriously. Furthermore it must be noted that, with the excuse of the present events, the Government of Costa Rica last December authorized an increase of this military budget by over \$100 million.

32. One of the first uses of this new budget has been announced. In a note published on 8 January 2011 in the Costa Rican newspaper *La Nacion* it is stated:

- “(d) In order to install a defense system for Costa Rica’s territory, the government began in late December, a series of construction work in the vicinity of Calero’s island in Lemon Pococí.
- (e) Yesterday, it showed the field where the government is building Costa Rica’s Delta helipad, near the Colorado river.
- (f) The work includes the construction of a heliport, the installation of fences to control access to the three rivers in the border area and the opening of roads, which, for the first time will give access by road to the northern Caribbean region.
- (g) This was confirmed yesterday by Security Minister, Jose Maria Tijerino, who noted that all the works are underway.”

33. Mr. President, Members of the Court, Costa Rica’s second request is for “the immediate cessation of the construction of a canal across Costa Rican territory”. No canal was being constructed or is planned to be constructed in this area. What was being done — and it is now over — was the cleaning of the main channel that flows from the San Juan proper to Harbour Head. The clearing of this channel and its environmental impact will be addressed more fully by Mr. Reichler. For the present, it must be emphasized that this operation of cleaning the channel was done exclusively by manpower. No dredging machine was involved or even roadwork equipment. The first cannot navigate the channel and the second type of equipment would sink in the swamp. The work was basically done by human labour. It was only in the time of the Egyptians that we could conceive of anyone cutting a canal in this fashion and obviously not in dense forest. In any case the important thing for present purposes is that the work is over. This was announced by the President of Nicaragua on 1 December 2010.

34. Costa Rica’s third request is for “the immediate cessation of the felling of trees, removal of vegetation and soil from Costa Rican territory, including its wetlands and forests”. Although, as indicated before, these environmental issues will be addressed by Mr. Reichler, it must be noted that Costa Rica has given a list of 197 trees with their species, sizes and GPS locations supposedly based on field work. It is at least surprising that in a swampland with thick clouds and heavy rains where it is very difficult to move around — of necessity by foot — and where a GPS seldom is functional, and where there were Nicaraguan workers cleaning a channel, that Costa Rica had been able to saunter around and measure tree trunks and obtain site co-ordinates. It is certainly surprising that a country that did not know that the criminal that escaped from the Nicaraguan police on 2 October 2010 called Agustin Reyes Aragon was not a Costa Rican citizen but, rather,

Nicaraguan, should on the other hand know every single tree in the area including their age. Now we even have been informed of their relative value vis-à-vis the International Court of Justice. Nicaragua does not accept the validity of such information.

35. In any case, the affidavit of the Nicaraguan Deputy Minister for the Environment indicates that after an inspection — in which dozens of people were involved and helped — it was established that 180 trees were cut in the area around the channel and he further identifies the type of trees involved. In any case, Nicaraguan law disposes that all felled trees must be replaced by a larger proportion of new trees and this is already being done in the area where the Nicaraguan authorities cut down trees necessary for the cleaning operation, but it is also being done in those areas where there had been trees felled by other unknown persons. These trees were located in Nicaragua and Nicaragua takes much better care of its forests than Costa Rica.

36. The fourth request calls for “the immediate cessation of the dumping of sediment in Costa Rican territory”. In so far as this so-called dumping refers to any operations during the cleaning of the channel, these are over and finished. Besides all the debris from the cleaning of the channel was set on Nicaragua’s side of the border and the branches and fertile sediments are being used in the process of replanting the trees.

37. Finally, on all questions of provisional measures relating to the cleaning of the channel, it must not be lost sight of that an investment was made in the area. It is not a question of wanton destruction of property. If Costa Rica were to prevail on the merits phase on the question of sovereignty over this area, the clean channel would be of use for Costa Rica. Of course it could clog it up again, but I suspect that the tourist industry of Costa Rica would not accept that.

38. Mr. President, Members of the Court, the fifth request involves the real object of these proceedings instituted by Costa Rica. It calls for

“the suspension of Nicaragua’s ongoing dredging programme, aimed at the occupation, flooding and damage of Costa Rican Territory, as well as at the serious damage to and impairment of the navigation of the Colorado River, giving full effect to the Cleveland Award and pending the determination of the merits of the dispute”.

39. The present day dredging project was carefully planned by the Government agency responsible for river transportation and ports, the Empresa Portuaria Nacional de Nicaragua (EPN), in the year 2004 and the Environmental Impact Assessment was submitted for approval to the

Ministry of the Environment in 2006, and after nearly three years of studies of these environmental questions the project was finally approved in December 2008. This protracted process of approval permitted that two different governments in Nicaragua had a chance to input and review the project. There is no question by anyone in Nicaragua that the project fulfils all the extensive requirements of Nicaraguan law, which is entirely up to date on all matters pertaining to the environment.

40. In all, the budget for the dredging project is \$7.5 million. It turns out that the budgeted sum does not allow the implementation of the original project that envisioned the removal of over 1.5 million metres of sediment of the San Juan river so this has been reduced to around 942,000 cubic metres. If the project is completed successfully it would imply that under 2 per cent of the waters that presently flow from the San Juan into the branch of the Colorado would continue to the mouth of the San Juan. This is a reality of which Costa Rica is well aware.

41. The Minister of Foreign Affairs and Worship of Costa Rica, Mr. René Castro Salazar, in a public address to the Environmental Commission of the Costa Rican Legislative Assembly on 8 September 2010 on the question of the possible impact of the announced dredging project by Nicaragua, stated that studies had been made in order to analyse the impact, and that these studies showed that the dredging programme would have a minor impact. He stated that it “would not have the alarming environmental and economic impact suggested by some media”. This was on 8 September 2010.

42. If there has been any change in the dredging programme from October to the present since the Foreign Minister made that statement, it has been to lower the scope of the original project on which Minister Castro based his assertions. There is no reason for “the alarming environmental and economic impact” that Costa Rican authorities have now apparently taken over from the media.

43. Mr. President, Members of the Court, the sixth and final request of Costa Rica is “that Nicaragua shall refrain from any other action which might prejudice the rights of Costa Rica, or which may aggravate or extend the dispute before the Court”. If there were merit in this request it should properly be addressed to Costa Rica. Since the beginning of the dispute Nicaragua has been open to and has offered to participate in unconditional bilateral negotiations with Costa Rica.

44. The dispute over a 2.5 sq km area at the mouth of the river is something that could easily be resolved by negotiations and not by bringing it before political organizations like the Organization of American States. This question could appropriately have been settled by means of the Bilateral Commission that has been in place for many years. Costa Rica for her own reasons has chosen to magnify the issue out of all proportions.

45. This, by the way, was understood by the members of the Organization of American States. In the meeting of Foreign Ministers that had been called for 7 December 2010, the only Foreign Minister in attendance was the Foreign Minister of Costa Rica.

46. Mr. President, for the reasons stated, and as will be further elaborated by counsel, Nicaragua requests that the Court deny the request for interim measures. This completes my presentation. Thank you for your kind attention. Mr. President, may it please you to call Professor McCaffrey to the podium.

The PRESIDENT: I thank His Excellency Dr. Carlos José Argüello Gómez, Agent of the Republic of Nicaragua, for his presentation. I now invite Professor Stephen McCaffrey to take the floor to give his presentation.

Mr. McCaffrey: Thank you, Mr. President.

1. Mr. President, distinguished members of the Court, it is a great honour and pleasure to appear before you once again on behalf of the Republic of Nicaragua. Mr. President, Members of the Court, on 18 November 2010, Costa Rica brought a case against Nicaragua before this Court seeking to stop activities Nicaragua is entitled, indeed obligated, to engage in under the relevant instruments and customary international law. On the same day, Costa Rica filed a Request for the Indication of Provisional Measures in the case. This Request must fail, for the same reason that the case in chief must fail: it is entirely without legal or factual foundation.

2. The provisional measures requested by Costa Rica are based on two false assumptions: *First*, that Nicaragua's acts of which Costa Rica complains occurred in Costa Rican territory; and *second*, that Nicaragua is not entitled to dredge the San Juan river, over which she has full sovereignty, so as to remove navigational obstructions and restore access to the sea. Both of these false assumptions involve questions that go to the merits of this dispute and should be dealt with in

that phase of the proceedings. Indeed, this is at its core a dispute about sovereignty, which cannot be resolved at the interim measures phase without prejudicing the rights of one of the parties. Moreover, as my colleagues will show, there is no imminent risk of irreparable prejudice to the rights of Costa Rica in dispute before the Court that would justify the indication of provisional measures¹. This is all the more the case since the cleaning of the small channel, or “caño”, of which Costa Rica complains was completed in late November of last year as we just heard from the Agent of Nicaragua.

3. Mr. President, in this intervention I will outline the legal framework governing the rights and obligations of the parties in respect of the matters in dispute. I will show that according to the applicable legal instruments, the actions of Nicaragua of which Costa Rica complains took place in Nicaraguan territory and were fully consistent with those instruments. My friend and colleague Mr. Reichler will then show that there is no actual or threatened injury to Costa Rica as a result of Nicaragua’s cleaning of the “caño” or the river proper.

Nicaragua’s sovereignty over the San Juan river

4. Mr. President, the wellspring of the parties’ rights and obligations in this case is, of course, the 1858 Treaty of Limits between Costa Rica and Nicaragua². As the Court noted in the *Navigational and Related Rights* case, Article 6 of that agreement provides in part that: “The Republic of Nicaragua shall have the exclusive dominion and sovereignty [in Spanish: *exclusivamente el dominio y sumo imperio*] over the waters of the River San Juan from their issue out of the lake to their discharge into the Atlantic Ocean.” (The Court referred to this authority as Nicaragua’s “dominion and sovereign jurisdiction” in the *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* case, Judgment of 13 July 2009, para. 19.) This case involves the latter portion of that provision, in particular, the question of the location of the boundary in the area where the river “discharge[s] into the Atlantic Ocean”, more commonly referred to today as the Caribbean Sea.

¹See, e.g., *Passage through the Great Belt (Finland v. Denmark)*, Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991, p. 17, para. 23; *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Provisional Measures, Order of 17 June 2003, I.C.J. Reports 2003, p. 107, para. 22; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Provisional Measures, Order of 23 January 2007, I.C.J. Reports 2007, p. 11, para. 32.

²Treaty of Limits between Costa Rica and Nicaragua, San José, 15 Apr. 1858, 48 BFSP 1049.

The boundary at the mouth of the river

5. The 1858 Treaty of Limits describes the boundary between the Parties in the following terms:

“II. The boundary line between the two Republics, setting out from the Northern Ocean [the Caribbean], shall commence at the extremity of Punta de Castilla, in the mouth of the River San Juan de Nicaragua, and shall continue, always following the right bank of said river, up to a point distant from Castilla Viejo 3 English miles, measured from the outer fortifications of the said Castilla to the said point.”³

6. Mr. President, like most significant watercourses, the San Juan de Nicaragua river discharges into the sea through a delta, its mouth undergoing changes over time due to such factors as changes in flow and deposition of sediment. Between the conclusion of the Treaty in 1858 and its interpretation by United States President Grover Cleveland in 1888, the mouth of the river had already changed significantly. Taking this characteristic of the San Juan into account, President Cleveland, in his Arbitral Award of 22 March 1888, decided as follows with respect to the location of the boundary:

“1. The boundary line between the Republics of Costa Rica and Nicaragua, on the Atlantic side, begins at the extremity of Punta de Castilla at the mouth of the San Juan de Nicaragua River, as they both existed on the 15th day of April, 1858. The ownership of any accretion to said Punta de Castilla is to be governed by the laws applicable to that subject.”⁴

7. In order to demarcate that boundary line, the parties in 1896 concluded the Convention on Border Demarcation⁵. This Convention provided for the appointment by the parties of Commissions charged with “defining and marking out” the boundary⁶ and the appointment by the President of the United States of an engineer tasked with resolving disputes between the Commissions and demarcating the border line⁷. The United States President appointed as Engineer-Umpire General E. P. Alexander, who rendered a total of five awards concerning the location of the boundary.

³Treaty of Limits, *op cit. supra*, Art. II.

⁴Award of the President of the United States in regard to the Validity of the Treaty of Limits between Costa Rica and Nicaragua of 15 July 1858, Decision of 22 Mar. 1888, United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. 28, p. 209 (“Cleveland Award”).

⁵El Salvador, 27 Mar. 1896, 28 *RIAA*, p. 211.

⁶*Ibid.*, Art. I.

⁷*Ibid.*, Arts. II and IV.

8. In his First Award, General Alexander concluded as follows concerning the point at which both the 1858 Treaty and the Cleveland Award state that the boundary begins, Punta de Castilla:

“A careful study of all available maps and comparisons between those made before the treaty and those of recent date . . . makes very clear one fact: The exact spot which was the extremity of the headland of Punta de Castillo [Castilla] April 15, 1858, has long been swept over by the Caribbean Sea, and there is too little concurrence in the shore outline of the old maps to permit any certainty of statement of distance or exact direction to it from the present headland . . . Under these circumstances it best fulfills the demands of the treaty and of President Cleveland’s award to adopt what is practically the headland of to-day, or the northwestern extremity of what seems to be the solid land, on the east side of Harbor Head Lagoon.”⁸

General Alexander accordingly declared the initial line of the boundary to run as follows, to wit, and his words are shown on the screen:

“Its direction shall be due northeast and southwest, across the bank of sand, from the Caribbean Sea into the waters of Harbor Head Lagoon. It shall pass, at its nearest point, 300 feet on the northwest side from the small hut now standing in that vicinity. On reaching the waters of Harbor Head Lagoon the boundary line shall turn to the left, or southeastward, and shall follow the water’s edge around the harbor until it reaches the river proper by *the first channel met*. Up this channel, and up the river proper, the line shall continue to ascend as directed in the treaty.”⁹

Mr. President, I will return to the latter portion of this description presently. But at this point I would ask the Court to note the uncertainty as to the very beginning of the boundary — an uncertainty that remains to the present day, as the Agent of Nicaragua has explained.

9. Earlier in his First Award, General Alexander stated that: “The natural terminus of [the boundary] line is the right-hand headland of the harbor mouth.”¹⁰ This may have made sense in the nineteenth century, when a harbour existed at the outlet of the San Juan river, but it does not today, since changes in the river’s mouth and delta have long since eliminated the harbour. This is clear from the Second Report of George L. Rives, United States Assistant Secretary of State, who was asked by President Cleveland to prepare a report on the matters before the arbitrator. Writing in 1888, 11 years before General Alexander rendered his First Award, Assistant Secretary Rives observed as follows:

⁸E.P. Alexander, First Award of the Engineer-Umpire, under the Convention between Costa Rica and Nicaragua of 8 April 1896 for the Demarcation of the Boundary between the Two Republics, Decision of 30 Sep. 1897, 28 *RIAA*, p. 220.

⁹*Ibid.*, p. 220; emphasis added.

¹⁰*Ibid.*, p. 217.

“In 1858 there was still a good entrance to the Harbor, and one side of this entrance was formed by the extremity of the Punta de Castilla . . .

Since 1858 that state of things has entirely changed. There is now no such thing as a fixed Harbor entrance or a fixed Harbor mouth. The waters of the river enter the sea at any place where they can easily break through the sand heaped up by the sea; and where there was a single tongue of land, there is now a chain or group of shifting islands.”¹¹

10. In addition, today, up to 90 per cent of the flow of the San Juan follows the Colorado branch of the river through Costa Rican territory to the sea, the San Juan’s mouth having become occluded by sediment. The contrast can be seen on the screen, which shows a map from 1851 above and a satellite image from 2010 below.

11. Mr. President, General Alexander recognized the likelihood of continued changes at the mouth of the San Juan in his Second Award. In ruling on a dispute between the parties as to whether to proceed with the demarcation of the boundary line, General Alexander stated as follows — the quotation is now on the screen, and I apologize to the Court in advance for the length of this quotation, but I believe I should read it out in full because it is vital to the Court’s understanding of the case:

“It should be noted, for a clearer understanding of the question at hand, that the San Juan river runs through a flat and sandy delta in the lower portion of its course and that it is obviously possible that its banks will not only gradually expand or contract but that there will be wholesale changes in its channels. Such changes may occur fairly rapidly and suddenly and may not always be the result of unusual factors such as earthquakes or major storms. Examples abound of previous channels now abandoned and banks that are now changing as a result of gradual expansions or contractions.

Today’s boundary line must necessarily be affected in future by all these gradual or sudden changes. But the impact in each case can only be determined by the circumstances of the case itself, on a case-by-case basis in accordance with such principles of international law as may be applicable.

The proposed measurement and demarcation of the boundary line will not have any effect on the application of those principles.

The fact that the line has been measured and demarcated will neither increase nor decrease any legal standing that it might have had if not been measured or demarcated.

The only effect obtained from measurement and demarcation is that the nature and extent of future changes may be easier to determine.”¹²

¹¹George L. Rives, Report to the Arbitrator, the President of the United States, Second, 2 Mar. 1888, National Archives of the United States, 1934, p. 206.

¹²*Ibid.* p. 224; emphasis added.

12. General Alexander further elaborated on the effect of changes in the banks or channels of the river in his Third Award, in which he stated that

“in the practical interpretation of the 1858 Treaty, the San Juan river must be considered a navigable river . . .

Fluctuations in the water level will not alter the position of the boundary line, but changes in the banks or channels of the river will alter it, as may be determined by the rules of international law applicable on a case-by-case basis.”¹³

13. Thus, as recognized clearly by General Alexander, the boundary line in the area of the river’s delta of necessity changes over time. Therefore, contrary to what we heard this morning, an indication on a particular map is only at best a reflection of conditions prevailing when the map was made; it is *not* a definitive definition of the boundary.

14. Mr. President, indeed, the general principle that a boundary indicated on a map is subject to a textual description of the boundary is well-established and has been recognized by the Court and other international tribunals¹⁴. This principle, together with the rulings of General Alexander just referred to, show that the great emphasis placed by Costa Rica on various maps is misplaced¹⁵. It is the text contained in the relevant instruments, as applied to the ever-changing physical situation, that must control.

15. This is especially true in the present case, because despite General Alexander’s sage observations about its fluidity, the boundary in the region of the river’s mouth has not been reviewed by the Parties in more than a hundred years, as noted by the Agent of Nicaragua a few moments earlier. Reflecting this fact, the official maps of Nicaragua— the very maps to which Costa Rica refers in support of her case — bear the caveat that the data on which they are based “has not been verified in the field”.

16. In the area in dispute, where the river’s channels undergo constant change, such verification would obviously be required to determine the actual location of the boundary. The

¹³E. P. Alexander, Third Award of the Engineer-Umpire, under the Convention between Costa Rica and Nicaragua of 8 April 1896 for the Demarcation of the Boundary between the Two Republics, Decision of 30 September 1897, 28 *RIAA*, p. 230.

¹⁴See, e.g., case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)*, *I.C.J. Reports 1986*, pp. 582-583, paras. 54-56; case concerning *Sovereignty Over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, *I.C.J. Reports 2002*, p. 667, para. 88; and the *Island of Palmas Arbitration*, 2 *Int’l Arb. Awards* p. 853 (1949), 22 *AJIL*, p. 891 (1928).

¹⁵See Application of Costa Rica, para. 8.

mouth of the river that General Alexander inspected in the late nineteenth century would be almost unrecognizable to him today. What General Alexander described as a “flat and sandy delta” is now a wetland, a swamp if you will, whose waters barely move at all for much of the year.

“The First Channel Met”

17. Mr. President, with this background, let us return to the decision of General Alexander regarding the determination of the boundary from the Caribbean Sea to the San Juan de Nicaragua river. The Court will recall that after describing the course of the boundary beginning in the Caribbean Sea and proceeding into the waters of the Harbor Head Lagoon, General Alexander stated that “the boundary line . . . shall follow the water’s edge around the harbor *until it reaches the river proper by the first channel met*. Up this channel, and up the river proper, the line shall continue to ascend as directed in the treaty.”¹⁶ So a question of crucial importance in this provisional measures phase of the case, and indeed in the case as a whole, is, where is the “first channel met” today? The answer can be seen in the graphic on the screen. This natural channel, or “caño”, which connects Harbor Head Lagoon with the San Juan de Nicaragua river, is well-established and supports navigation, as can be seen in the slides now on the screen — which are taken from the video deposited with the Court and shown as slides to save time. The slides begin where the *caño* takes off from the San Juan river, and end up at Harbor Head Lagoon, which you see in the picture now. The cleaning operation undertaken by Nicaraguan workers, using shovels and pickaxes, is the “invasion” complained of by Costa Rica. It will be readily apparent to the Court that these workers were in fact in Nicaraguan territory, not that of Costa Rica: pursuant to General Alexander’s First Award, the boundary follows the right bank of Harbor Head Lagoon, the channel, and thereafter, the river.

18. This boundary is not only in keeping with General Alexander’s award, read in light of contemporary physical realities that have been produced by the kinds of changes anticipated and referred to by the General; it is also far more rational than a boundary that would follow Harbor Head Lagoon all the way around to the sea, and then follow the coast until it reaches the remnants of the channel of the San Juan river, as the boundary claimed by Costa Rica would do and as is

¹⁶E. P. Alexander, First Award, *op cit. supra*, p. 220; emphasis added.

shown on the screen. Surely, General Alexander cannot have intended this — or, if he did, he would have referred to the “mouth of the San Juan de Nicaragua River” or the like, not the “first channel met”; and his description would surely not have stated “[u]p this channel, and *up the river proper*, the line shall continue to ascend as directed in the treaty”. General Alexander drew a clear distinction between the “first channel met” and the “river proper” — a distinction which is utterly at odds with Costa Rica’s view of where the boundary is located.

19. Mr. President, the application of General Alexander’s rulings to the facts on the ground shows clearly that far from it being Nicaragua that is encroaching upon Costa Rican territory, it is in fact Costa Rica that is seeking to divest Nicaragua of *her* sovereign territory. That Costa Rica would make the radical charges found in her Application, especially in respect of a piece of territory in which she has hitherto shown absolutely no interest, utterly failing to display any incidents of sovereignty as will be shown presently, may appear paradoxical on the surface. But when Costa Rica’s complaints are seen through the lens of her aversion to Nicaragua’s dredging of the river, their *raison d’être* becomes clear: Costa Rica feels she must do whatever she can to prevent Nicaragua from exercising her sovereign right, and indeed her responsibility, to dredge the San Juan de Nicaragua river and thereby to restore the navigability of the river to the Caribbean Sea. Fortunately for Nicaragua, law and reason are on her side.

Nicaragua’s right to dredge the river

20. Mr. President, the right of Nicaragua to dredge the San Juan river — a watercourse over which she enjoys “exclusive dominion and sovereignty” and which carries a heavy sediment load — was clearly recognized by President Grover Cleveland in his 1888 Award. In the Third Article of his award, President Cleveland states as follows, as shown on the screen:

“4. The Republic of Costa Rica is not bound to concur with the Republic of Nicaragua in the expenses necessary to prevent the Bay of San Juan del Norte from being obstructed; to keep the navigation of the River or Port free and unembarrassed, or to improve it for the common benefit.

.....

6. The Republic of Costa Rica cannot prevent the Republic of Nicaragua from executing at her own expense and within her own territory such works of improvement, *provided* such works of improvement do not result in the occupation or flooding or damage of Costa Rica territory, or in the destruction or serious impairment

of the navigation of the said River or any of its branches at any point where Costa Rica is entitled to navigate the same. The Republic of Costa Rica has the right to demand *indemnification* for any places belonging to her on the right bank of the River San Juan which may be occupied without her consent, and for any lands on the same bank which may be flooded or damaged in any other way in consequence of works of improvement.”¹⁷

21. The Court will note that not only does President Cleveland’s award recognize Nicaragua’s right to execute works of improvement designed to “keep the navigation of the River or Port free and unembarrassed”; but the award also declares that should such works result in damage to Costa Rica of the kinds mentioned, Costa Rica’s remedy is indemnification, not halting Nicaragua’s works of improvement. This flatly contradicts Costa Rica’s fifth request for provisional measures, which asks the Court to order “the suspension of Nicaragua’s ongoing dredging programme, aimed at the occupation, flooding and damage of Costa Rican territory, as well as at the serious damage to and impairment of the navigation of the Colorado River . . .”¹⁸. This ruling by President Cleveland demonstrates that, as my friend and colleague Professor Pellet will show, any harm sustained by Costa Rica as a result of Nicaragua’s dredging would not be irreparable, thus precluding the need for provisional measures.

22. Furthermore, Nicaragua has not only a *right* to dredge the river but also an *obligation* to do so. It has long been recognized that, as stated by the 1966 Helsinki Rules, “Each riparian State is, to the extent of the means available or made available to it, *required* to maintain in good order that portion of the navigable course of a river or lake within its jurisdiction.”¹⁹ The San Juan river is, by definition, within Nicaragua’s jurisdiction. Dredging is one of the means available to a State to maintain in good order its navigability. Thus Costa Rica’s request that the Court order Nicaragua to suspend her dredging programme is a request that you order Nicaragua not to do something that she is obligated to do.

23. The Court will also note that Costa Rica, in her enthusiasm to trump up a parade of horrors resulting from Nicaragua’s modest dredging activities, not only invents non-existent structures but also seemingly contradicts herself. Assistant Secretary Rives sheds light on the meaning of “occupation” in his Second Report when he says of Costa Rica: “She has also the right

¹⁷Cleveland Award, *op cit. supra*, pp. 209-210; emphasis added.

¹⁸Request of Costa Rica, p. 7.

¹⁹Helsinki Rules on the Uses of the Waters of International Rivers, Art. XVIII, International Law Association, *Report of the Fifty-Second Conference, Helsinki, 1966*, p. 484; emphasis added.

of demanding indemnity in case that a portion of her soil is occupied without her consent by structures, such as dikes or dams, or is flooded by a rising of the level of the river.”²⁰ It perhaps belabours the obvious, Mr. President, to note that Nicaragua’s cleaning of the riverbed will most certainly not entail any structures on Costa Rican soil. Costa Rica then contends both that Nicaragua’s dredging will cause “flooding and damage of Costa Rican territory” and that it will cause “serious damage to and impairment of the navigation of the Colorado River”. In reality, neither of these imagined consequences will eventuate from Nicaragua’s works of improvement, as my colleague Mr. Reichler will demonstrate. And most importantly for present purposes, as Professor Pellet will show, there is no conceivable threat of imminent harm to Costa Rican rights involved in this case in the form of flooding or impairment of navigation in her territory as a result of dredging by Nicaragua. Nor is there any threat to a Costa Rican presence in the area in question because, simply put, Costa Rica is not present there, nor has she ever been.

Nicaragua’s consistent exercise of authority over the disputed area and Costa Rica’s failure to exercise any elements of Government authority or to take the territory into its possession

24. Mr. President, Costa Rica’s complete absence from the disputed area — which consists of some 2.5 sq km of wetlands — and her failure to exercise normal elements of governmental authority there, further support Nicaragua’s claim of sovereignty over it. The utter lack of such *effectivités* on the part of Costa Rica, and their corresponding peaceable exercise by Nicaragua, eliminate any possible doubt of Nicaragua’s sovereignty over the area. While fundamentally a question for the merits phase, the stark facts of Costa Rica’s complete failure to even attempt to assert governmental authority in the area, let alone the absence of any vestige of possession thereof by Costa Rica or her nationals, reinforce Nicaragua’s sovereignty over it and defeat Costa Rica’s request for provisional measures to protect it.

25. Evidence of Nicaragua’s *effectivités* in the area is abundant. At this stage of the proceedings Nicaragua will confine herself to noting a few examples of evidence attesting to her display of sovereign authority in the disputed area, and Costa Rica’s utter failure to do so. All of

²⁰Rives Second Report, *op cit. supra*.

these facts are supported by affidavits filed with the Court and referred to in footnotes to this speech.

- (a) *First*, Nicaraguan Army and Police authorities have always patrolled the Harbour Head Lagoon and in so doing have navigated through the *caño* and other small channels connecting the San Juan river with the Harbor Head Lagoon during the winter and sometimes during the summer, as well when the water level permitted navigation²¹;
- (b) *second*, at least as early as the 1970s, a detachment of the Army's Borderline Guard Troops, or TGF, was headquartered in what one affiant describes as a "rustic construction . . . in the Harbor Head swamp"²²;
- (c) *third*, for decades the Nicaraguan Police has had a permanent presence in the Harbor Head zone and has carried out regular patrol activities there²³;
- (d) *fourth*, during the past 30 years or more, Nicaraguan Police, Army and Naval forces have conducted joint operations in the disputed area against counter-revolutionaries, narcotics traffickers, fugitives, and wildlife traffickers, and the Police have conducted joint patrols with the Ministry of Natural Resources and Environment (MARENA) to prevent trafficking in natural resources²⁴;
- (e) *fifth*, when the President of Nicaragua visits the town of San Juan de Nicaragua, police have been stationed in the disputed area, which has also been over-flown by helicopters²⁵;
- (f) *sixth*, none of the Nicaraguan Police or Army officers interviewed had ever seen any Costa Rican public forces or civil authorities in the Harbor Head zone²⁶; and
- (g) *seventh*, communications between the Nicaraguan National Police and the Costa Rican Public Force have been regular and unproblematic, and Costa Rican Public Force officials have been

²¹See, e.g., affidavits of Major Police Commissioner Gregorio de Jesús Aburto Ortiz (doc. No. 1); Major Police Commissioner Douglas Rafael Pichardo Ramírez (doc. No. 4); and Army officer Juan Francisco Gutiérrez Espinoza (doc. No. 7).

²²Affidavit of Major Police Commissioner Gregorio de Jesús Aburto Ortiz (doc. No. 1).

²³*Ibid.*

²⁴*Ibid.*; and affidavit of Major Police Commissioner Luis Fernando Barrantes Jiménez (doc. No. 2).

²⁵Affidavit of Major Police Commissioner Luis Fernando Barrantes Jiménez (doc. No. 2).

²⁶See, e.g., *ibid.*; and affidavits of Major Police Commissioner Gregorio de Jesús Aburto Ortiz (doc. 1); Major Police Commissioner José Magdiel Pérez Solís (doc. No. 3); and Major Police Commissioner Douglas Rafael Pichardo Ramírez (doc. No. 4).

informed of the presence of Nicaraguan National Police throughout the south-east zone of Nicaragua, including the Harbor Head zone, without any protest from the Costa Rican authorities²⁷.

26. In sum, Mr. President, Costa Rica has not conducted herself as though the area in question were part of her sovereign territory, at least until the commencement of Nicaragua's programme of improvement of the lower San Juan river. That is, Costa Rica has not exercised jurisdiction in the disputed area, as contended this morning by Professor Kohen. Conversely, Nicaragua has exercised elements of governmental authority in the area of the San Juan river delta, in particular law-enforcement authority, one of the most basic governmental functions. This conduct by Nicaragua is consistent with her sovereignty over the disputed area and entirely inconsistent with that of Costa Rica, which has an unbroken record of absolutely no *effectivités* there. Thus, Costa Rica should be entitled to none of the provisional measures listed in points 1 through 4 of her Request (Part F, "The Measures Requested"). Granting such provisional measures would be prejudicial to the outcome of the case and would thus prejudice the Court's adjudication of it.

Conclusions

27. Mr. President, Members of the Court, the foregoing analysis leads to the following conclusions:

- (a) *first*, Nicaragua enjoys full sovereignty over the San Juan river, which is part of her territory as provided in the 1858 Treaty of Limits and recognized both by President Cleveland in his 1888 Award and the Court in the *Navigational and Related Rights* case;
- (b) *second*, in the exercise of her sovereignty and as the Cleveland Award specifically recognizes, Nicaragua has the right to dredge the San Juan river to "keep the navigation of the River or Port free and unembarrassed". She also has an international legal obligation to do so. The lower San Juan and the former port now being neither free nor unembarrassed, Nicaragua is only doing what a responsible State should do, and what is well within her sovereign rights, including those specifically mentioned by President Cleveland;

²⁷Affidavit of Major Police Commissioner José Magdiel Pérez Solís, Chief of the Departmental Delegation of the National Police in the Río San Juan Department (doc. No. 3).

(c) *third*, of particular relevance to this phase of the proceedings, President Cleveland's Award declares that should such works of improvement of the river result in damage to Costa Rica in the form of occupation or flooding, or damage to or impairment of navigation of the San Juan river "or any of its branches at any point where Costa Rica is entitled to navigate the same"²⁸, Costa Rica's remedy is indemnification, *not* halting Nicaragua's works of improvement. The amount of such indemnification would be a matter to be determined at the merits phase or subsequent proceedings;

(d) *fourth*, the *caño* linking Harbor Head Lagoon with the San Juan river is part of Nicaraguan territory under the First Alexander Award, as the "first channel met" when following the southern shore of Harbor Head Lagoon. The line of the boundary follows the right bank of the *caño* until it joins the San Juan river "proper", where it follows the right bank up the river "as directed in the 1858 treaty"²⁹;

(e) *fifth* and finally, contrary to what Professors Kohen and Crawford said this morning, Costa Rica's complete absence from the disputed area and her failure to exercise normal elements of governmental authority there, remove any possible doubt concerning Nicaragua's claim of sovereignty over it. The utter lack of such *effectivités* on the part of Costa Rica, and their corresponding peaceable exercise by Nicaragua, reaffirm Nicaragua's sovereignty over the area.

28. Mr. President, distinguished Members of the Court, that concludes my presentation this afternoon. Mr. Reichler will now show that none of the activities of Nicaragua will cause any injury to Costa Rica, let alone irreparable injury

29. Mr. President, distinguished Members of the Court, I thank you for your kind attention. Mr. President, I would be grateful if you would now invite Mr. Reichler to the podium.

The PRESIDENT: I thank Professor Stephen McCaffrey for his presentation. I now call upon Mr. Paul Reichler to make his presentation.

²⁸Cleveland Award, *op cit. supra*, Third article, para. 6.

²⁹First Alexander Award, *op cit. supra*, 28 RIAA, p. 220 (all quotations in this paragraph are from that page).

Mr. REICHLER:

THE EVIDENCE REGARDING ALLEGED HARM TO COSTA RICA

1. Good afternoon Mr. President, Members of the Court. As always, it is an honour for me to appear before you. And it is a privilege to again represent the Republic of Nicaragua. My task today is to review the evidence that the Parties have submitted to you on the question of harm.

2. In these preliminary proceedings, Costa Rica emphasizes two types of harm: (1) diminution of the flow of the Colorado river, allegedly caused by Nicaragua's dredging of the lower portion of the San Juan river; and (2) cutting of trees and flooding on swampland near the mouth of the San Juan river, allegedly caused by Nicaragua's clearing of a channel that connects the river proper to the Harbor Head Lagoon.

3. When the Court looks at the actual evidence, not the distorted characterization of it we heard this morning, it will see that Costa Rica has failed to make its case on harm. It certainly has not shown anything resembling irreversible or irreparable harm.

4. In regard to the alleged harm to the Colorado river, the evidence shows that Nicaragua conducted an extensive environmental review process over a three-year period, including a comprehensive trans-boundary Environmental Impact Study (EIS), which concluded that the impact on the Colorado river and its flow would be negligible³⁰. Costa Rica's own technical study, which the Court received last Friday, confirms this³¹. In September 2010, relying on this study, the Foreign Minister of Costa Rica declared to the Costa Rican legislature that Nicaragua's dredging of the San Juan would have no adverse impact on the Colorado river³². That was only two months before this lawsuit was filed.

³⁰Doc. No. 13, affidavit of Hilda Espinoza Urbina (hereafter "document 13: Espinoza affidavit" and provided in the judges' folders behind slide PSR3), para. 20 (*f*); doc. No. 15, declaration of Virgilio Silva Mungía (hereafter "document 15: Silva declaration"), paras. 2-3; doc. No. 16, declaration of Lester Antonio Quintero Gómez (hereafter "document 16: Quintero declaration" and provided in the judges' folders behind slide PSR2), para. 7, as well as corresponding pages of Ann. 3 thereto. These documents, like all other declarations, affidavits, certifications, and additional non-public documents cited below, were submitted to the Court by the Agent of the Republic of Nicaragua on 5 Jan. 2011.

³¹Área de Ingeniería Hidráulica, C.S. Diseño, ICE, "*Estudio de comportamiento de caudales en la bifurcación Río San Juan – Río Colorado*" (hereafter "Costa Rican Flow Report"), p. 5. Spanish version submitted to the Court by Costa Rica on 7 Jan. 2011; English translation provided in the judges' folders behind slide PSR6.

³²Doc. No. 19: statement by Mr. René Castro Salazar, Costa Rican Minister of Foreign Affairs and [Worship], to the Environmental Commission of Costa Rica's Legislative Assembly, on 8 Sep. 2010 (hereafter "document 19: Castro statement" and provided in the judges' folders behind slides PSR5), paras. 17-20.

5. Now they are telling us a different story. In their written Request for the indication of provisional measures, they charge that “the intention of Nicaragua is to deviate some 1,700 cubic metres per second . . . of the water that is currently carried by the Colorado River”³³. That is the entire volume of the Colorado river at its peak. Nicaragua’s exhaustive EIS concluded that the dredging project would result in less than a 5 per cent diminution in the Colorado’s flow³⁴. Costa Rica’s own technical study, cited by the Foreign Minister, puts the diminution at less than 4.5 per cent, not enough to even remotely affect navigation³⁵. In his speech to the Costa Rican Parliament, the Foreign Minister said that even a deviation of as much as 12 per cent would not adversely impact the Colorado river or Costa Rica³⁶.

6. In regard to the manual clearing of the channel between the San Juan river proper and the Harbor Head Lagoon, Costa Rica today offered another example of hyperbole masquerading as evidence. What the actual evidence shows is that for 30 days Nicaraguan labourers using manual equipment — picks, shovels, buckets, and handsaws — cleared the channel of vegetation, accumulated sediments and other debris to make it navigable by small boats³⁷. The project was completed last month³⁸. There is no ongoing clearing activity.

7. This part of the project was also the subject of environmental reviews by Nicaragua before it was authorized, including the potential trans-boundary impacts³⁹. Vegetation was cleared only on the Nicaraguan side of the channel; and, in compliance with the environmental permit, felled trees have been replaced at the rate of ten new trees planted for every one removed, so that there is no lasting environmental impact⁴⁰.

³³Request for the indication of provisional measures filed by Costa Rica on 18 Nov. 2010, para. 6.

³⁴Doc. No. 15: Silva declaration, paras. 2-3; doc. No. 16: Quintero declaration, para. 7, as well as corresponding pages of Ann. 3 thereto; see also doc. No. 13: Espinoza affidavit, para. 20 (*f*).

³⁵Costa Rican Flow Report, p. 5.

³⁶Doc. No. 19: Castro statement, para. 17.

³⁷Doc. No. 14: statements of Elsa María Vivas Soto (hereafter “document 14: Vivas statements”), paras. 7, 10 and 17-18; see also doc. No. 13: Espinoza affidavit, paras. 22, 24 (*a*), 26, 29, 30 (*b*) and 31.

³⁸Doc. No. 12: Certification of Roberto Araquistain Cisneros (hereafter “document 12: Cisneros certification”), para. 2; doc. No. 13: Espinoza affidavit, para. 31.

³⁹Doc. No. 13: Espinoza affidavit, paras. 23-29; see also doc. No. 14: Vivas statements, paras. 11-13.

⁴⁰Doc. No. 14: Vivas statements, paras. 20-22; doc. No. 13: Espinoza affidavit, paras. 30 (*b*) and 31; doc. No. 12: Cisneros certification, para. 4.

8. In an effort to make its case, Costa Rica completely changes the character of the channel and the clearing project. This is not, as Costa Rica claims, “the construction of an artificial canal”⁴¹. This is the simple clearing of vegetation and sediments from a previously existing channel that had become so filled up with debris that navigation was no longer possible. Furthermore, and this is the biggest flaw in Costa Rica’s argument, Costa Rica’s case for harm from the clearing of the channel presumes the deviation through the channel of all or most of the lower San Juan river⁴². Costa Rica’s argument about flooding of the channel, erosion of the banks, and change in water levels and quality in the Harbor Head Lagoon, is based on this presumption: that the water volume in the channel will be so excessively high that it will cause flooding because all or most of the San Juan will be diverted through the channel.

9. The facts, however, show that this is entirely false. The flow of the San Juan as it approaches the channel has been measured at well over 100 m³/s⁴³. The flow in the channel — after the clearing was completed in December — was measured at less than 3 m³/s⁴⁴. In other words, less than 3 per cent of the San Juan’s waters now pass through the cleared channel, not the 100 per cent, or majority of the water, postulated by Costa Rica. And this is at the end of the rainy season, when the water is at its peak flow. The evidence shows that the resulting water volume which actually flows through the channel is a mere 2.38 m³/s, and that this is nowhere near enough to cause flooding or the other dire consequences Costa Rica has hypothesized.

10. Costa Rica relies heavily on a report by a Ramsar Advisory Mission published last week, just in time for these hearings. Costa Rica’s reliance on this report is misplaced. The report does not address the consequences of dredging the San Juan river, its focus is on those of clearing the channel. On this matter, the report itself states that it is based entirely on information provided by

⁴¹Request for the indication of provisional measures, *op cit. supra*, para. 14.

⁴²*Ibid.*, para. 5, (indicating that Nicaragua intends “to deviate the waters of the San Juan River from its natural historic course into Laguna los Portillos (the Harbor Head Lagoon)”).

⁴³See doc. No. 16: Quintero Declaration, Ann. 3: Excerpts from Project Design Final Revised Report, pp. 16-17 and 22.

⁴⁴Doc. No. 17: Certification of Lester Antonio Quintero Gómez (hereafter “Doc. 17: Quintero Certification”), paras. 1-2.

Costa Rica⁴⁵. There was no attempt at independent fact finding. The Ramsar Advisory Mission did not visit the site of the activity, or even the region⁴⁶. It did not take its own measurements of water flow, volume or quality. It did not collect or analyse its own samples of sediments. It spent three days in late November — after the lawsuit was filed — in San Jose, being briefed by Costa Rican Government officials and experts⁴⁷. That was, by its own admission, the only source of the information on which its findings were based⁴⁸. It did not seek, or take into account, any information from Nicaragua.

11. It did not have to be that way. Nicaragua invited the Ramsar Secretariat to send the Advisory Mission to Nicaragua to meet with officials and experts there, and to visit the sites of the dredging and channel clearing to make their own observations, collect their own data. It offered its fullest co-operation in this regard. Inexplicably, Nicaragua's invitation was refused. I will return to some particular deficiencies in this report later in my speech, but it is already apparent that it is not the kind of independent and impartial fact-finding exercise that the Court has found useful in prior cases. This is the Costa Rican Government's own argument printed on Ramsar letterhead.

12. With the Court's permission, I will now review the most pertinent facts in greater detail, starting with the object and scope of the San Juan river dredging and channel clearing project, and the comprehensive environmental review process that led to its approval. Then I will return to Costa Rica's allegations regarding harm, and show more fully why they are not supported by the evidence.

⁴⁵*Informe Final, Misión Ramsar de Asesoramiento No. 69: Humedal de Importancia Internacional Caribe Noreste, Costa Rica*, 3 Jan. 2011, (hereafter "Ramsar Report"), pp. 4 and 35 of English translation; "According to the analysis of the technical information received from the Government of Costa Rica . . .; Ann. 2; "The photographs and images used were provided by the Government of Costa Rica". Spanish original available on the Ramsar website, entry No. 69, at http://www.ramsar.org/cda/en/ramsar-documents-rams/main/ramsar/1-31-112_4000_0 (last visited 10 Jan. 2011); English translation available on the website of Costa Rica's Ministry of Foreign Relations at <http://www.rree.go.cr/index.php?stp=04&id=221> (last visited 10 Jan. 2011).

⁴⁶*Ibid.*, p. 14 of English translation; "The Mission intended to conduct an overflight in the Humedal Caribe Noreste area but, due to weather conditions and safety reasons, it was not possible to do so."

⁴⁷*Ibid.*, Ann. 1; i.e., pp. 38-39 of English translation for the Work Programme of the Ramsar Mission.

⁴⁸*E.g., ibid.*, pp. 4, 14 and 35 of English translation.

A. The object and scope of the project

13. The object of this project is simple and straightforward: to restore the navigability of the lower stretch of the San Juan river⁴⁹. In this portion of the river, sediments carried downstream have settled in the channel, reducing the depth of the water, creating islands and sand bars, and generally restricting navigation to very small boats⁵⁰. In the dry season, the water is so shallow that even small boats cannot use the river⁵¹. When the project was designed and submitted for approval five years ago, it was given a name: the project for Improvement of Navigation on the San Juan river⁵². That is exactly what it is.

14. [PSR1] The area is depicted on the screen. The river flows from its source in Lake Nicaragua to its mouth in the Caribbean Sea, generally in a west to east direction. As you can see, the waters divide. Approximately 89 per cent of the flow turns to the southeast, and forms the Colorado river in Costa Rica. The remaining 11 per cent constitutes the continuation of the San Juan river. It is from this point on the river for the next 42 km to its mouth that sediments have built up to the point of impeding navigation⁵³.

15. There are two reasons why it is a priority for Nicaragua to make this portion of the river navigable. First, to facilitate commerce between the town of San Juan de Nicaragua on the Caribbean coast and the rest of Nicaragua; because of the accumulation of sediments in the river, the town and its inhabitants are physically cut off from the rest of the country⁵⁴. Second, to facilitate tourism to the area. There is a huge tourist potential here. The entire lower portion of the river is part of the San Juan River Wildlife Refuge, and much of the left bank is in the Indio-Maíz Biosphere Reserve. Nicaragua has diligently protected the pristine natural environments of these areas. The Court will recall from the case concerning *Navigational Rights on the San Juan River* that Nicaraguan authorities strictly enforce environmental laws and regulations pertaining to these protected areas for what the Court then called “the legitimate purpose of protecting the

⁴⁹Doc. No. 16: Quintero declaration, para. 2.

⁵⁰*Ibid.*; see also doc. No. 16: Quintero declaration, Ann. 1.

⁵¹*Ibid.*

⁵²Doc. No. 16: Quintero declaration, paras. 1-2.

⁵³*Ibid.*, Ann. 1: Excerpt from Project Design Final Revised Report, p. 9 and Ann. 3: Excerpt from Project Design Final Revised Report, pp. 16-17 and 22.

⁵⁴Doc. No. 13: Espinoza affidavit, para. 20 (b).

environment” (*Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment of 13 July 2009, para. 89).

16. The Court will also recall from that case that Costa Rica has a flourishing ecotourist industry based on scenic cruises down the San Juan river, and then down the Colorado river. Nicaragua believes it has as much or more to offer ecotourists in terms of natural beauty because, as Ambassador Argüello pointed out, it has been more successful than Costa Rica at protecting its side of the river against human settlement and development. This is only possible, however, if tourist boats are able to navigate on the lower portion of the San Juan river.

17. Since ecotourism is one of the principal objectives of the dredging project, it follows that the project must be carried out in a way that protects and preserves the natural environment that is the source of tourist attraction. Nicaragua is well aware of this. That is why it only authorized the project after an intensive study and analysis of the potential environmental impacts over a three-year period, and subjected it to strict conditions — including ongoing monitoring of environmental effects — to assure that there would be no significant or irreversible impacts.

Mr. President, at this point would it be convenient for the Court to take its customary afternoon break or would you like me to continue?

The PRESIDENT: Thank you, Mr. Reichler, indeed I agree that this is an appropriate moment for us to have a short break for coffee. Thank you.

The Court adjourned from 4.20 p.m. to 4.35 p.m.

The PRESIDENT: Please be seated. Now, Mr. Reichler, you can resume your presentation.

B. The environmental review process

18. Thank you, Mr. President. The dredging project was first developed by the Empresa Portuaria Nacional de Nicaragua (EPN), the Nicaraguan Government Agency responsible for river transport, in 2004⁵⁵. In January 2006, after more than a year of preparation, EPN submitted an application to the Ministry of Environment for authorization to carry out the project⁵⁶. Under

⁵⁵Doc. No. 16: Quintero declaration, para. 2.

⁵⁶*Ibid.*, para. 3; *see also* doc. 13: Espinoza affidavit, para. 12.

Nicaraguan law, because of the potential environmental impacts of the project, especially in a protected area, EPN was required to submit a comprehensive Environmental Impact Study before the Ministry's authorization could be given⁵⁷. The Ministry can only grant a permit when, after reviewing the EIS and conducting its own technical analyses, it determines that the project will not cause any significant change to the environment⁵⁸.

19. After receiving EPN's request, the Ministry convened an intra-governmental team of technical experts to review it⁵⁹. In March 2006, after inspecting the site of the proposed dredging project, the technical team sent EPN very detailed "Terms of Reference" spelling out the contents of the required EIS, these consumed eight, single-spaced typewritten pages⁶⁰. The EIS was required to "emphasize the following aspects, without limiting the analysis to them"⁶¹.

- *First*, impact on hydraulic dynamics of the San Juan river;
- *second*, impacts on water quality caused by the re-suspension of sediments in the water column;
- *third*, ecosystem losses, the alteration of aquatic habitats, and harm to fishing;
- *fourth*, impact on emblematic endangered and economically important species; and
- *fifth*, impacts stemming from the deposition of dredged sediments.

20. Based on these Terms of Reference, EPN prepared an EIS for the dredging project and submitted it to the Environment Ministry in July 2006. It was deemed insufficient by the intra-governmental technical team. As explained by Ms Hilda Espinoza Urbina, the Head of the Ministry's Department of Environmental Quality:

"On 27 July 2006, I informed EPN that the documentation provided was incomplete, as it did not present sufficient substantive technical information to support the conclusions reached regarding the environmental impacts the project might cause."⁶²

⁵⁷See doc. No. 13: Espinoza Affidavit, paras. 4-11 for an overview of the relevant Nicaraguan environmental laws.

⁵⁸*Ibid.*, para. 9 (c).

⁵⁹*Ibid.*, para. 13.

⁶⁰*Ibid.*, para. 14; doc. 13: Espinoza affidavit, Ann. 5.

⁶¹Doc. No. 13: Espinoza affidavit, Ann. 5, p. 6.

⁶²*Ibid.*, para. 15.

21. In September 2006, EPN submitted a revised EIS, together with voluminous technical annexes supporting the conclusions reached. After reviewing the revised EIS and analysing the technical data, and conducting what was then its fourth site inspection visit, the intra-governmental technical team requested still more information⁶³.

22. The final EIS, which consisted of 225 pages plus hundreds of pages of technical annexes, reached the following conclusions in regard to environmental impacts [PSR2]:

- in regard to hydraulic flow, that the proposed dredging of the San Juan river would have a minimal impact on the flow of the Colorado river, of less than 5 per cent⁶⁴;
- in regard to water quality, that it would be unaffected by the dredging project because most of the sediments from the bottom of the river released into the water column would quickly resettle, and the remainder would be of such character and composition as not to present any risk of environmental harm⁶⁵;
- in fact, the study found, the increased flow of water downstream would actually be beneficial to aquatic species by increasing oxygen levels in the water⁶⁶; and
- in regard to deposition of extracted sediments, that these would be placed exclusively on the Nicaraguan side, in designated and secure locations at least 50 m from the river bank, in order to assure against runoff back into the river⁶⁷.

23. There followed a lengthy and detailed technical review and analysis of all the data that had been received. At its conclusion, in November 2008, the intra-governmental team issued its technical opinion which “concluded that the project would cause no significant, irreversible impact on the environment and provided recommendations for mitigation measures”⁶⁸. On this basis, in December 2008, nearly three years after the initial request from EPN, the Environment Ministry issued the permit for the project to proceed⁶⁹. [PSR3] According to the Environment Ministry

⁶³*Ibid.*, para. 17

⁶⁴Doc. No. 16: Quintero declaration, para. 7 and corresponding pages of Ann. 3 thereto.

⁶⁵*Ibid.*, para. 8 and corresponding pages of Ann. 3 thereto.

⁶⁶*Ibid.*

⁶⁷*Ibid.*, para. 9 and corresponding pages of Ann. 3 thereto

⁶⁸*Ibid.*, para. 18; *see also* doc. No. 13: Espinoza affidavit, Ann. 7 for technical opinion.

⁶⁹Doc. No. 13: Espinoza affidavit, Ann. 8.

official who signed the formal resolution granting the permit, it had been satisfactorily demonstrated that:

“the dredging project was not likely to have any significant adverse impact on the environment, let alone any significant irreversible impact. This included any harmful impacts on the people, property, or environment of Costa Rica, as EPN had adequately established that the dredging itself would not significantly affect the San Juan River or the flora, fauna or abiotic characteristics of its zone of influence — whether on the Nicaraguan or Costa Rican side — and that none of the byproducts of the dredging work were to be deposited on the Costa Rican side of the River.”⁷⁰

24. Specifically in regard to the impact of the dredging project on the flow of the Colorado river, there was:

“convincing evidence in [the] Environmental Impact Study and supporting documentation — including substantial bathymetrical data and flow calculations — that the dredging of the San Juan River would not significantly affect the flow of the Colorado River in Costa Rica, which would be reduced by a few percentage points at most, and even less in the rainy season . . . [and] would not harm the navigability of the Colorado River”⁷¹.

C. Alleged impacts on the flow of the Colorado river

25. This is a key point. In its Request for the Indication of Provisional Measures, Costa Rica alleges that “the intention of Nicaragua is to deviate some 1,700 m³/sec of the water that currently is carried by the Colorado River” which “demonstrate[s] the likelihood of damage to Costa Rica’s Colorado River, and to Costa Rica’s lagoons, rivers, herbaceous swamps and woodlands,” as well as “wildlife refuges”, downstream⁷².

26. The evidence does not support these allegations. In the first place, the voluminous technical data submitted as part of the EIS demonstrate that the impact on the Colorado river will be minimal, affecting less than 5 per cent of its flow, not enough to be noticeable, let alone to affect navigation or the Costa Rican wetlands and wildlife reserves fed by the Colorado river⁷³. This conclusion was not only Nicaragua’s. When the same data were submitted for independent analysis by Dutch experts on river dredging and its environmental consequences — something the Dutch know plenty about — they reached the same conclusion. I refer the Court to the Report on

⁷⁰Doc. No. 3: Espinoza affidavit, para. 20 (*d*).

⁷¹*Ibid.*, para. 20 (*f*).

⁷²Request for the indication of provisional measures, *op cit. supra*, para. 6.

⁷³Doc. No. 16: Quintero declaration, para. 7 and corresponding pages of Ann. 3 thereto; doc. 13: Espinoza affidavit, para. 20 (*f*).

Morphological Stability of the San Juan River Delta, authored by Professors van Rhee and de Vriend of the Delft University of Technology, which is in your judges' folder⁷⁴. Applying established mathematical formulae for calculating river flow volume, they determined that dredging the lower portion of the river to obtain a navigable depth of 2 m over a bottom width of 20 m, as planned, would increase the flow in the lower San Juan river by 20 m³/sec, and decrease the flow of the Colorado river by the same amount. [PSR4] Here is what they wrote:

“In the EIS, it was calculated that the proposed dredging project [would] decrease the flow of the Colorado River by less than 5 per cent . . . In this chapter, it is explained that the EIS conclusion was correct and that, conservatively estimated, the proposed dredging project is likely to decrease no more than 20 cubic meters per second of the flow in the Colorado River (which is of the order of 1400-1700 m³/s).”⁷⁵

Twenty cubic metres per second is, therefore, less than 2 per cent of the maximum flow in the Colorado river.

27. Costa Rica reached the same conclusion, as recently as September 2010, only two months before they filed this lawsuit. [PSR 5] This is what the Foreign Minister of Costa Rica, the Honourable René Castro Salazar, reported to the Legislative Assembly of Costa Rica on 8 September 2010. It is in your judges' folder. It is a significant admission against interest by a senior Government official that merits the Court's attention:

“[T]he Government [of Costa Rica] is vigilant of the situation and monitoring the [Nicaraguan dredging] project. In relation to this surveillance work, I should also note that the Foreign Ministry set up an inter-institutional working group in 2009 to monitor the Colorado River . . . As part of the work of this inter-agency group, a trip was made in November 2009 to take measurements in the Colorado River. Among the work carried out, an appraisal was made to measure its flow and basic equipment was installed to regularly measure the water level. An analysis of the sedimentation of the river and the water quality was also made. *Costa Rican experts even developed a flow calculation model to project the impact on the flow of the Colorado River of the different scaled projects and dredging works in the San Juan. Without going into details, I can say that the results of these studies are tranquilizing for the country in general since all the models analyzed calculate flow reductions of less than 12%. Moreover, in relation to the \$7 million investment announced, the flow reduction would be even less and therefore would not have the alarming environmental and economic impact suggested by some media . . .* [The Foreign Minister continues] During the meeting held with Foreign Minister Santos in Managua, [he] gave verbal assurances that the current dredging project will not have an impact on the flow of the

⁷⁴Doc. No. 18: Expert Report of Professors van Rhee and de Vriend of Delft University of Technology (4 Jan. 2011) (hereafter “Document 18: Report of Dutch Experts” and provided in the judges' folders behind slides PSR4 and PSR7).

⁷⁵*Ibid.*, p. 4.

Colorado River because it is a rather modest work to clean the San Juan River that seeks to improve navigation over the river from its mouth up to the delta of the Colorado . . . This verbal assurance is sufficient for us to have peace of mind that no damage will be caused to the national territory. Actually there are no reasons to doubt the words of the Foreign Minister of Nicaragua or its President. In addition, *our own studies suggest something similar . . .*⁷⁶

About this statement, at least two important points are worth noting.

28. First, the Foreign Minister stated that Costa Rica made its own study which shows that Nicaragua's dredging project will have no material impact on the flow of the Colorado river. This study was not included in the documents Costa Rica initially submitted to the Court last week. In a letter dated 4 January, the Agent of Nicaragua, citing to the Costa Rican Foreign Minister's recent speech, requested the Court to exercise its authority under Article 62 of the Rules by asking Costa Rica to produce the study. In response, Costa Rica produced a report last Friday. [PSR6] It is in your judges' folder. And it confirms what the Foreign Minister — and Nicaragua — have said. It concludes that dredging the San Juan river to a width of 120 m — that is, 100 m wider than Nicaragua plans to do — would diminish the flow of the Colorado river by only 4.5 per cent⁷⁷. The 12 per cent reduction, which the Costa Rican Foreign Minister said still would not materially affect the flow of the Colorado, would only result from dredging the San Juan to a width of 180 m⁷⁸, that is, nine times wider than Nicaragua plans to do.

29. Second, Costa Rica's Request for the Indication of Provisional Measures is impossible to reconcile with the statement, two months earlier, by its Foreign Minister. An example is the assertion at paragraph 6 of the Request, that "the intention of Nicaragua is to deviate some 1,700 cubic meters per second" of water from the Colorado river. As indicated the flow rate of the Colorado river is between 1,400 and 1,700 m³/s⁷⁹. Costa Rica in effect asserts as the basis for its Request for provisional measures, that Nicaragua's dredging project will divert the entire flow of the Colorado river — 100 per cent — and leave it completely dry. That is a far cry from the Foreign Minister's statement to the Costa Rican Parliament that, based on Costa Rica's own study

⁷⁶Doc. No. 19: Castro Statement, paras. 17-20; emphasis added.

⁷⁷Costa Rican Flow Report, p. 5.

⁷⁸*Ibid.*; Castro statement, para. 17.

⁷⁹Doc. No. 18: Report of Dutch Experts, Executive summary, p. 4, para. 1; see also 15: Silva declaration, para. 2 ("the flow of the Colorado is 1,600-1,700 m³/second"); doc. No. 16: Quintero declaration, Ann. 3, Excerpts from Project Design Final Revised Report, p. 22 (calculating that the San Juan takes only 178 m³/s of the 1,665 m³/s flow at Delta, leaving some 1,487 m³/s flowing to the Colorado); doc. No. 19: Castro speech, para. 12 ("the waters of the Colorado River average 1,400-1,600 m³/s . . .").

of various dredging models, in the worst case the reduction in flow of the Colorado would be less than 12 per cent, not enough to produce a harmful impact.

30. In the Request for provisional measures, Costa Rica cites media reports, published in August 2010, that attribute to Virgilio Silva, the Executive President of EPN, and Edén Pastora the statement that the dredging project would divert 1,700 m³/s of water from the Colorado to the San Juan⁸⁰. Mr. Silva has submitted a sworn declaration denying that he ever made such an absurd statement⁸¹. Costa Rica's Foreign Minister has himself dismissed these patently erroneous media reports: "The statements made by Messrs. Silva and Pastora do not constitute sufficient proof in and of themselves that this damage will occur . . ." ⁸² Nonetheless, Costa Rica has chosen to revive them for purposes of its Request for provisional measures. Even my good friend Professor Crawford, to my astonishment, spoke about Nicaragua's supposed intention to deprive the Colorado river of 100 per cent of its waters.

31. The major deviation here is not in the waters of the Colorado river, but in the flow of Costa Rica's argument. In September, the impact of the dredging project was negligible. Since November, the impact of the same project is catastrophic, requiring urgent measures. It is not the dredging that caused Costa Rica to drastically change its position. It is the political decision to file this lawsuit.

32. As the evidence shows, Costa Rica simply has no case in regard to the likelihood of harm, let alone irreparable harm, to the Colorado river, or to the wetlands and other downstream features that are dependent on its water supply.

33. I will now turn to the evidence regarding the clearing of the channel which connects the San Juan proper to the Harbor Head Lagoon.

D. The clearing of the channel

34. In August 2009, nine months after EPN received the permit from the Environment Ministry to carry out the dredging project, it submitted an application to expand the permit to allow

⁸⁰Request for the indication of provisional measures, *op cit. supra*, para. 6.

⁸¹Doc. No. 15: Silva declaration, paras. 1-2.

⁸²Doc. No. 19: Castro statement, para. 15.

for the manual clearing of one of the many small channels that characterize the San Juan river delta, close to the mouth⁸³.

35. EPN's application for expansion of its permit explained that it was necessary to clear "the caño that connects the San Juan River to the Harbor Head Lagoon" in order to assure the year-round navigability of the entire river, and that this would provide a "more direct navigation route, thereby reducing the time required to travel between different sites along the River", which would "reduce not only the cost of transportation, but also the consumption of fuel"⁸⁴. Providing a more direct navigation route to Harbor Head Lagoon also serves the purpose of facilitating police surveillance of the area, which has become a clandestine depot for drug traffickers, as explained by Ambassador Argüello.

36. EPN's application was supported by an Environmental Management Plan, which not only described the proposed work, but also "identified and evaluated its potential environmental impacts, established how such impacts would be prevented, mitigated, and reversed, if necessary, and outlined the supervision that would be provided to ensure proper environmental management"⁸⁵. As part of its environmental review, the Ministry dispatched a technical team to the site to make an inspection and prepare a report⁸⁶. After inspecting the site, the technical team concluded that the manual clearing of the *caño* of vegetation, accumulated sediments and other debris would be "environmentally viable" for these reasons:

- *first*, the volume of water that would flow through the *caño* after clearing would be "insignificant compared to the volume of water that flows through the San Juan River" and "does not represent any risk, either to the river or to the lagoon"⁸⁷;
- *second*, the impacts on water quality would be low-intensity; and they would only temporarily affect parameters such as transparency, colour, and turbidity⁸⁸;

⁸³Doc. No. 13: Espinoza affidavit, para. 22.

⁸⁴*Ibid.*, para. 24 (a).

⁸⁵Doc. 13: Espinoza affidavit, para. 24(b).

⁸⁶*Ibid.* paras. 25-26; see also Doc. 13: Espinoza Affidavit, Ann. 9 for Technical Report.

⁸⁷Doc. 14: Vivas Statements, para. 12.

⁸⁸*Ibid.*, para. 11.

- *third*, the sediments extracted from the *caño* would be deposited exclusively on the Nicaraguan side, and would not harm the natural species because the sediment is silty, the plant material is organic, and its deposit would aid in the natural regeneration of plant species⁸⁹; and
- *fourth*, the plentiful rain year-round and type of ecosystem would allow for the natural regeneration of the plant life on the banks of the *caño*⁹⁰.

37. The inspection team recognized that the primary environmental impact of the clearing project would be the felling of trees. Accordingly, to mitigate and reverse this impact, the team included this recommendation in its report: “If it is not possible to avoid cutting vegetation, the affected vegetation must be replaced and offset through the planting of ten trees for every one that is cut, with species that are native to the area. This will promote the natural regeneration of species.”⁹¹

38. This recommendation was then made a condition of the permit for the clearing of the *caño*, which was issued by the Environment Ministry in October 2009⁹².

39. The actual work of clearing the *caño* commenced a year later, in November 2010. It was fully completed in December 2010⁹³. There has been no *caño* clearing activity since then, and no further activity is planned. In late November, shortly before the clearing activities were completed, the Environment Ministry sent a monitoring mission to the site to investigate whether the project was being carried out in conformity with the conditions of the permit, and whether there were any unexpected environmental impacts. To these questions, the mission answered Yes and No. Yes, all of the conditions of the permit were being satisfied. And No, there were no unexpected environmental impacts⁹⁴.

40. On 22 and 23 December 2010, EPN conducted measurements to monitor the flow rate of the water in the newly-cleared *caño*. The average depth of the *caño* was one metre. The average velocity was extremely slow, less than ½ a metre per second. In terms more familiar to me, and

⁸⁹Doc. 14: Vivas Statements, para. 11.

⁹⁰*Ibid.*

⁹¹Doc. 13: Espinoza Affidavit, Ann. 9, last page.

⁹²*Ibid.*, Ann. 10, permit requirement no. 35.

⁹³Doc. 12: Cisneros Certification, para. 2; Doc. 13: Espinoza Affidavit, para. 31.

⁹⁴Doc. 13: Espinoza Affidavit, para. 30.

perhaps the Court, that is less than 2 km/hr. The flow volume was a miniscule 2.38 m³/s⁹⁵. According to Professors van Rhee and de Vriend, the Dutch dredging experts, whose report is in your judges' folder,

“there would seem to be little reason to believe that any permanent environmental impact would result from the caño clearing work . . . [T]he manual clearing of debris and vegetation with shovels is unlikely in this circumstance to produce the type of dramatic increase in the flow in the caño that might cause a permanent impact. Indeed, after the caño clearing work was completed, the flow in the caño was measured at only 2.38 m³/s, which means the water is barely moving at all.”⁹⁶

E. Costa Rica's allegations regarding the clearing of the *caño*

41. Costa Rica alleges in its Request for provisional measures that

“Nicaragua is currently destroying an area of primary rainforests and fragile wetlands on Costa Rican territory . . . for the purpose of facilitating the construction of a canal through Costa Rican territory, intended to deviate the waters of the San Juan River from its natural historical course into Laguna los Portillos (the Harbor Head Lagoon).”⁹⁷

42. As the Court will appreciate from this allegation, Costa Rica's complaints about the clearing of the *caño* are premised on the proposition that Nicaragua has performed acts on Costa Rican territory. This is disputed by Nicaragua, and this dispute is at the heart of this case. Which State has sovereignty over this remote and uninhabited swamp is a fundamental issue that can only be resolved at the merits stage. Professor Pellet will have more to say about this a little later.

43. What is important here is that the allegedly wrongful conduct cited in the Request for Provisional Measures — the felling of trees, the removal of vegetation and the deposit of extracted sediments — has occurred on the left bank of the *caño*, the side that Nicaragua considers its own. No trees were felled on the right bank, which both Nicaragua and Costa Rica agree belongs to Costa Rica.

44. In any event, Costa Rica cannot show that Nicaragua's actions in connection with the clearing of the *caño* will produce significant or irreversible environmental impacts on either side. The environmental reviews conducted by Nicaragua show that they will not. To be sure, trees were

⁹⁵Doc. 17: Quintero Certification, paras. 1 and 2.

⁹⁶Doc. 18: Report of Dutch Experts, p. 9.

⁹⁷Request for the Indication of Provisional Measures, *op cit. supra*, para. 5.

felled. Nicaragua itself reported the felling of 180 trees⁹⁸. Costa Rica puts the number at 197⁹⁹. But the felling is over with, and the replanting of ten times as many new trees to replace them has begun¹⁰⁰. The long-term impact on the ecology of the area will be positive, not negative.

45. Costa Rica attempts to support its case by reference to the Ramsar Advisory Mission report dated 3 January 2010. This is the same report I mentioned earlier in my speech. As the report itself states in two places, it is based entirely — 100 per cent — on “the technical information received from the Government of Costa Rica”¹⁰¹. According to the report itself, the Ramsar representatives spent all of their time in Costa Rica in Government offices in San José¹⁰². They made no attempt to collect their own data, or even to verify independently the information that was spoon-fed to them in San José. Although a fly-over of the area was planned, it was cancelled due to bad weather¹⁰³. So there was no visit of any kind to the site, and no collection of any evidence there. The report was submitted to Costa Rica in draft form in mid-December, and published only after receiving Costa Rica’s approval¹⁰⁴. It is nothing more than an uncritical acceptance of Costa Rica’s own positions, based on the assumption that everything Costa Rica and its experts told the mission was correct. By its own admission, the report contains no independently-obtained data or analyses of any kind.

46. It is a mystery why the Ramsar mission conducted itself in such an unorthodox manner. On 30 November, after Nicaragua learned that Costa Rica invited a Ramsar mission to San Jose to assess the impacts of the *caño* clearing project, it wrote to the Ramsar Secretariat in Geneva, and invited the mission to come to Nicaragua as well, so that Nicaragua could provide complete

⁹⁸Doc. 12: Cisneros Certification, para. 3.

⁹⁹E.g., Miguel Araya Montero, “*Estimación de edad máxima aproximada de los árboles cortados en áreas de bosque primario en el sector de Punta Castilla, Colorado, Pococí, Limón, Costa Rica a raíz de la ocupación de ejército nicaragüense para el aparente restablecimiento de un canal existente*” (December 2010), p. 1, English translation submitted to the Court by Costa Rica on 5 Jan. 2011.

¹⁰⁰Doc. 12: Cisneros Certification, para. 4; Doc. 13: Espinoza Affidavit, para. 31.

¹⁰¹Ramsar Report, pp. 4 and 35 of English translation (“According to the analysis of the technical information received from the Government of Costa Rica...”).

¹⁰²*Ibid.*, Ann. 1 (i.e., pp. 38-39 of English translation) for the Work Programme of the Mission.

¹⁰³*Ibid.*, p. 14 of English translation (“The Mission intended to conduct an overflight in the Humedal Caribe Noreste area but, due to weather conditions and safety reasons, it was not possible to do so”).

¹⁰⁴See 17 Dec. 2010 Letter from Ramsar Secretary General, Anada Tiega to Costa Rican Foreign Minister René Castro Salazar, attached as the first page of the English translation of the Ramsar report available on the website of Costa Rica’s Ministry of Foreign Relations at <http://www.rree.go.cr/index.php?stp=04&id=221> (last visited 10 Jan. 2011).

information on the project, answer all questions, and take the Ramsar representatives to explore for themselves the area in question. The invitation was delivered while the advisory mission was still in Costa Rica, less than one hour by plane from Managua. The invitation was issued again on 2 December, when Nicaragua requested that no report be issued until Nicaragua's views had been received. The response from the Ramsar Secretariat was disappointing. It wrote back stating: "the Secretariat will be pleased to send a Ramsar Advisory Mission to Nicaragua as soon as possible when the members and consultants of the present mission are available to carry out this expertise". Apparently, they were not "available" to go to Nicaragua before they published their report or at any time since; because, despite the fact that Nicaragua's invitation remains open, it has heard nothing further from Ramsar.

47. So what we have here is a report that refused to consider anything from Nicaragua. This is reflected on every page. It is revealed in the way the report repeatedly refers to the *caño* clearing project as the "construction of an artificial canal", which is word-for-word Costa Rica's characterization of it, as distinguished from the manual cleaning of a pre-existing channel, which is Nicaragua's. The report even refers to the Harbor Head Lagoon, which is in Nicaragua, as "Laguna Los Portillos", which is Costa Rica's name for it. This is not, it cannot be, the kind of unbiased report of expert, independent fact-finders that the Court has found worthy of weight in prior cases. Not when the reporters took information at face value only from one side, and turned down the invitation to receive it from the other. It is as if the Court would have closed these hearings at 1.00 p.m. today, after Costa Rica had spoken, without allowing Nicaragua to speak, and then went off to decide the matter.

48. Just a few examples from the report will suffice to show the folly of the drafters in relying solely on the self-interested account of one of the Parties to this dispute.

49. First, after a general call for co-operation and collaboration between the two States, the principal recommendation of the report is this: "It is important to carry out rigorous environmental impact assessments for any project or activity that could have an effect on the hydrology and hydrodynamics of the Northeast Caribbean Ramsar Site and the San Juan River Wildlife Refuge

Ramsar Site.”¹⁰⁵ In this statement, the authors of the report recognize that no reliable determination of the environmental impacts of the project could be made in the absence of what they called “rigorous environmental impact studies” — which they did not perform — and at the same time they reveal that they are completely unaware of the comprehensive environmental impact studies already carried out by Nicaragua. They issued their report without even knowing about — let alone reviewing — Nicaragua’s EIS, because they refused to go to Nicaragua.

50. Second, the same recommendation recognizes that there are two Ramsar wetlands that are supplied with water by the San Juan river and its various *caños*. By far the largest of these is the one in Nicaragua, the San Juan River Wildlife Refuge. This protected area comprises more than 430 sq km¹⁰⁶. Its principal source of water — its lifeline — is the San Juan river itself, especially the lower portion. By contrast, the entire area contested by Nicaragua and Costa Rica, and supposedly affected by the *caño* clearing project comprises a mere 2.25 sq km¹⁰⁷. The Ramsar report, which assumes that this is Costa Rican territory — since that is what Costa Rica told them — acknowledges that this is only 0.3 per cent of Costa Rica’s Northeast Caribbean Ramsar Site¹⁰⁸. In fact, by dredging the lower portion of the San Juan river and increasing the water supply, Nicaragua will assure that both of these Ramsar wetlands continue to receive enough water to sustain them. If Nicaragua were to stop dredging, and wait for the San Juan river to dry up entirely, which is inevitable given the yearly accumulation of sediments that now make navigation all but impossible, the survival of these wetlands would be threatened.

51. Third, the Ramsar report finds that the main environmental impacts of the *caño* clearing project will be in the Harbor Head Lagoon, which is not in Costa Rica, but entirely within Nicaragua. The report itself acknowledges this when it says that “the Laguna los Portillos, located in the *Refugio de Vida Silvestre* Rio San Juan Ramsar Wetland in Nicaragua, would be the most

¹⁰⁵Ramsar report, pp. 5 and 36 of English translation.

¹⁰⁶See the Annotated Ramsar List of Wetlands of International Importance: Nicaragua, available on the Ramsar website at http://www.ramsar.org/cda/en/ramsar-pubs-annolist-annotated-ramsar-16106/main/ramsar/1-30-168%5E16106_4000_0__ (last visited 10 Jan. 2011) (indicating that the *Refugio de Vida Silvestre Río San Juan* is comprised of 43,000 ha, which is equivalent to 430 sq km).

¹⁰⁷Ramsar report, p. 5 of English translation (“According to the analysis of the technical information received from the Government of Costa Rica, there are changes in the ecological characteristics of the Humedal Caribe Noreste in the area of direct influence involving around 225 ha (2.25 km²) or 0.3% of the total wetland area (75,310 hectares, or 753 km²)” (emphasis in original)).

¹⁰⁸*Ibid.*

affected” by the clearing of the *caño*¹⁰⁹. Professor Crawford read a lengthy excerpt from the report this morning, but its focus was precisely on potential harms to the Harbor Head Lagoon. As my friend confirmed, the most significant environmental impact cited in the report, even if it were accurate *quod non*, is in Nicaragua not Costa Rica. This is not the type of harm for which Costa Rica can seek relief in this Court.

52. Fourth, not only the alleged impact on Harbor Head Lagoon, but all of the alleged environmental impacts mentioned in the Ramsar report — all of them — are premised on the assumption, stated in the report in two separate places, that Nicaragua is “prioritizing the water flow of the San Juan River, which currently discharges into the Caribbean Sea, towards the artificial canal”¹¹⁰. As Professor Crawford quoted from the report this morning, the diversion of all or most of the San Juan river through the *caño* could lead to “flooding of the wetland” and “water stress caused by excess water”¹¹¹. Significantly, there are no measurements or calculations — or even approximations — of what the water volume in the *caño* is or will be in this report. There are no measurements or numbers of any kind in this regard. Professor Crawford cited none. The report simply assumes that the water volume will be too high, and will cause flooding, based on the diversion of all or most of the San Juan river’s water through the *caño* to the lagoon. Where does this assumption in the report come from?

53. From Costa Rica. It is in the Request for provisional measures, at paragraph 5. And it comes from a report on the Costa Rican Foreign Ministry website accusing Nicaragua of planning to divert all or most of the water from the lower San Juan through the *caño* to the Harbor Head Lagoon¹¹². The author of this report is the same Costa Rican expert who spent three days briefing the Ramsar mission in San Jose, and fed this information to them¹¹³. But the evidence — the actual

¹⁰⁹*Ibid.*, pp. 5 and 36 of English translation.

¹¹⁰*Ibid.*, pp. 34-35 of English translation.

¹¹¹*Ibid.*, pp. 29-30 of English translation.

¹¹²Dr. Allan Astorga Gättgens, “*Grave riesgo de daños ambientales irreversibles por el trasvase del Río San Juan en la Isla Calero, Caribe Norte, Costa Rica: Modelo Sedimentológico Predictivo de la Construcción del Canal*” (i.e., “Serious risk of irreversible environmental damage due to the diversion of the San Juan River into Isla Calero, North Caribbean, Costa Rica: Predictive Sedimentological Model of the Canal Construction”), 18 Nov. 2010, attached as Ann. 4 to “*Incurción, Ocupación, Uso Y Daño del Territorio Costarricense Por Parte de Nicaragua*”, a document published on the website of Costa Rica’s Ministry of Foreign Affairs, available at <http://www.rree.go.cr/index.php?stp=04&id=191> (last visited 10 Jan. 2011).

¹¹³Ramsar report, Ann. 1 (i.e., p. 38 of English translation) (indicating that “Dr. Allan Astorga” was a participant in the Ramsar briefings on Sunday, 28 Nov. 2010).

measurements of water flow and volume — show that the San Juan has not been diverted in whole or in significant part to pass through the *caño*, as Costa Rica and the Ramsar report presume, but that less than 3 per cent of the river's waters are now passing through the *caño*, not enough to cause flooding or any other environmental impacts. We heard a lot this morning about flooding. We heard a lot, but we saw no evidence of it. There is no evidence that this is likely. The actual measurements show that the water flow in the *caño* is too low for flooding to occur.

54. Fifth, and finally, the only actual, as opposed to hypothetical, harm mentioned in the Ramsar report is the felling of what Costa Rica has calculated as 197 trees¹¹⁴. Unsurprisingly, the report takes Costa Rica's number as gospel. Nicaragua acknowledges that 180 trees were felled in carrying out the project. This is indeed an impact. But it is over and done with. Costa Rica's talk of ongoing devastation of a forest is pure hyperbole. In fact, as indicated, Nicaragua is in the process of mitigating or reversing this impact by planting 1,800 new trees, all native species, to replace the ones that were felled.

55. In sum, Costa Rica can only make out a case for harm in regard to the *caño* clearing project by turning it into something it is not. This is not an artificial canal constructed for the purpose of redirecting all or most of the San Juan river, as Costa Rica presumes. It is a very small-scale work, done manually with picks and shovels, that produced a minimal flow of water through the channel that causes no significant or irreversible environmental impacts. The actual measurements confirm this. As regards this, the actual project, Costa Rica has produced no evidence of harm, let alone irreparable harm.

56. Mr. President, Members of the Court, this concludes my presentation today. I thank you for your courtesy and kind attention, and ask that you give the floor to Professor Pellet.

The PRESIDENT: I thank Mr. Paul Reichler for his presentation. Now I invite Professor Alain Pellet to give his presentation.

¹¹⁴*Ibid.*, p. 26 of English translation.

M. PELLET : Thank you very much, Mr. President.

1. Monsieur le président, Mesdames et Messieurs de la Cour, le Nicaragua est un «bon client» de la Cour qu'il a souvent saisie. Mais, en l'occurrence, s'il se présente à nouveau devant vous, c'est en tant que défendeur puisque, pour la seconde fois, le Costa Rica a dirigé une requête contre lui au sujet du statut juridique du fleuve San Juan. Cette instance est superflue : elle porte sur des faits qui ont été forgés de toute pièce par l'Etat requérant, ou qu'il interprète de façon fantaisiste, et elle soulève des problèmes juridiques artificiels et, en grande partie, déjà tranchés par la Cour.

2. Mes collègues Stephen McCaffrey et Paul Reichler ont établi le cadre juridique et factuel dans lequel s'inscrit la demande en indication de mesures conservatoires dont le Costa Rica a cru devoir accompagner sa requête. Il m'appartient de montrer plus précisément que cette demande ne remplit pas les conditions lui permettant de prospérer, conditions qu'ont précisées le Statut et le Règlement de la Cour et votre jurisprudence :

- les demandes formulées par l'Etat requérant sont dépourvues de tout lien avec des droits plausibles lui appartenant (I) ;
- le comportement dont se plaint le Costa Rica ne lui a causé aucun préjudice et certainement pas le moindre préjudice irréparable (II) ;
- dès lors et *a fortiori*, les mesures qu'il vous demande d'indiquer ne revêtent aucun caractère d'urgence (III) ; et,
- au demeurant, si vous les prononciez, vous préjugeriez le fond même de l'affaire dont il vous a saisie (IV).

I. DES DEMANDES SANS LIEN AVEC DES DROITS PLAUSIBLES

3. Monsieur le président, interprétant l'article 41 de son Statut, la Cour considère, le professeur Kohen l'a rappelé ce matin, que lorsqu'elle ordonne des mesures conservatoires, elle «doit se préoccuper de sauvegarder ... les droits que l'arrêt qu'elle aura ultérieurement à rendre pourrait éventuellement reconnaître, soit au demandeur, soit au défendeur ... ; [et] qu'un lien doit donc être établi entre les [droits allégués que les mesures conservatoires sollicitées visent à protéger et] l'objet de l'instance pendante devant la Cour sur le fond de l'affaire» (*Questions concernant*

*l'obligation de poursuivre ou d'extrader (Belgique c. Sénégal), mesures conservatoires, ordonnance du 28 mai 2009, par. 56*¹¹⁵.

4. Ces précisions figurent, tout comme je l'ai dit, dans la dernière ordonnance en indication de mesures conservatoires que vous avez rendue, celle du 28 mai 2009, dans l'affaire *Hissène Habré* ; mais elles ne font que reprendre des formules que vous aviez fréquemment utilisées auparavant. Précisant ces énoncés traditionnels, vous avez, dans cette même ordonnance, considéré en outre «que le pouvoir de la Cour d'indiquer des mesures conservatoires ne devrait être exercé que si les droits allégués par une partie apparaissent au moins plausibles» (*Obligation d'extrader ou de poursuivre (Belgique c. Sénégal), mesures conservatoires, ordonnance, C.I.J. Recueil 2009, par. 57*)¹¹⁶. Ce faisant vous avez consacré une condition qui figurait en pointillés dans votre jurisprudence antérieure, mais que vous n'aviez jamais formulée aussi clairement auparavant¹¹⁷.

¹¹⁵ Voir aussi : *Statut juridique du territoire du sud-est du Groënland, ordonnances des 2 et 3 août 1932, C.P.J.I. série A/B n° 48, p. 285 ; Réforme agraire polonaise et minorité allemande, ordonnance du 29 juillet 1933, C.P.J.I. série A/B n° 58, p. 177 ; Anglo-Iranian Oil Co. (Royaume-Uni c. Iran), mesures conservatoires, ordonnance du 5 juillet 1951, C.I.J. Recueil 1951, p. 93 ; Interhandel (Suisse c. Etats-Unis d'Amérique), mesures conservatoires, ordonnance du 24 octobre 1957, C.I.J. Recueil 1957, p. 111 ; Compétence en matière de pêcheries (Royaume-Uni c. Islande), mesures conservatoires, ordonnance du 17 août 1972, C.I.J. Recueil 1972, p. 15, par. 12 ; Plateau continental de la mer Egée (Grèce c. Turquie), mesures conservatoires, ordonnance du 11 septembre 1976, C.I.J. Recueil 1976, p. 11, par. 34 ; Personnel diplomatique et consulaire des Etats-Unis à Téhéran (Etats-Unis d'Amérique c. Iran), mesures conservatoires, ordonnance du 15 décembre 1979, C.I.J. Recueil 1979, p. 19, par. 36 ; Sentence arbitrale du 31 juillet 1989 (Guinée-Bissau c. Sénégal), mesures conservatoires, ordonnance du 2 mars 1990, C.I.J. Recueil 1990, p. 69, par. 24 ; Passage par le Grand-Belt (Finlande c. Danemark), mesures conservatoires, ordonnance du 29 juillet 1991, C.I.J. Recueil 1991, p. 16, par. 16 ; Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslavie), mesures conservatoires, ordonnance du 8 avril 1993, C.I.J. Recueil 1993, p. 19, par. 34-35 ; Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslavie), mesures conservatoires, ordonnance du 13 septembre 1993, C.I.J. Recueil 1993, p. 342, par. 35-36 ; Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria), mesures conservatoires, ordonnance du 15 mars 1996, C.I.J. Recueil 1996 (I), p. 21-22, par. 35 ; Convention de Vienne sur les relations consulaires (Paraguay c. Etats-Unis d'Amérique), mesures conservatoires, ordonnance du 9 avril 1998, C.I.J. Recueil 1998, p. 257, par. 35-36 ; LaGrand (Allemagne c. Etats-Unis d'Amérique), mesures conservatoires, ordonnance du 3 mars 1999, C.I.J. Recueil 1999 (I), p. 14-15, par. 22-23 ; Activités armées sur le territoire du Congo (République démocratique du Congo c. Ouganda), mesures conservatoires, ordonnance du 1^{er} juillet 2000, C.I.J. Recueil 2000, p. 127, par. 39-40 ; Mandat d'arrêt du 11 avril 2000 (République démocratique du Congo c. Belgique), mesures conservatoires, ordonnance du 8 décembre 2000, C.I.J. Recueil 2000, p. 201, par. 69 ; Activités armées sur le territoire du Congo (nouvelle requête : 2002) (République démocratique du Congo c. Rwanda), mesures conservatoires, ordonnance du 10 juillet 2002, C.I.J. Recueil 2002, p. 241, par. 58 ; Certaines procédures pénales engagées en France (République du Congo c. France), mesures conservatoires, ordonnance du 17 juin 2003, C.I.J. Recueil 2003, p. 107-108, par. 22-29 ; Avena et autres ressortissants mexicains (Mexique c. Etats-Unis d'Amérique), mesures conservatoires, ordonnance du 5 février 2003, C.I.J. Recueil 2003, p. 89, par. 49 ; Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), mesures conservatoires, ordonnance du 13 juillet 2006, C.I.J. Recueil 2006, p. 129, par. 61.*

¹¹⁶ Voir aussi les paragraphes 60-61.

¹¹⁷ Voir notamment, *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), mesures conservatoires, ordonnance du 13 juillet 2006*, opinion individuelle du juge Abraham, C.I.J. Recueil 2006, p. 139, par. 6 ; voir aussi : opinion individuelle du juge Bennouna, C.I.J. Recueil 2006, p. 145, par. 11 et CR 2006/47, p. 32, par. 2 et p. 37-38, par. 14 (Condorelli) ; voir également *Passage par le Grand-Belt (Finlande c. Danemark), mesures conservatoires, ordonnance du 29 juillet 1991*, opinion individuelle du juge Shahabuddeen, C.I.J. Recueil 1991, p. 28.

5. En d'autres termes, il est maintenant clair que cette première condition, se subdivise en deux branches. Pour que vous puissiez faire droit à une demande en indication de mesures conservatoires, il faut

- d'une part, que les mesures sollicitées présentent un lien — «un lien suffisant» avez-vous dit dans votre ordonnance du 15 octobre 2008 dans l'affaire *Géorgie c. Russie* — avec les droits invoqués par l'Etat demandeur ; et
- d'autre part, que ces droits aient un caractère plausible¹¹⁸.

a) *Le fumus boni juris*

6. Commençons par la plausibilité des droits en cause — le *fumus boni juris*, si l'on veut¹¹⁹.

7. Selon la demande en indication de mesures conservatoires du 18 novembre 2010, que je cite en anglais «Costa Rica's rights which are subject of the dispute and of this request for provisional measures are its right to sovereignty, to territorial integrity and to non-interference with its rights over the San Juan River, its lands, its environmentally protected areas, as well as the integrity and flow of the Colorado River.»¹²⁰

8. Le premier groupe de droits invoqués par le Costa Rica (ses droits prétendus «à la souveraineté, à l'intégrité territoriale et à la non-ingérence dans les droits qui sont les siens sur le San Juan») constitue un amalgame destiné à entretenir la confusion : il n'est pas contesté que l'article VI du traité de limites du 15 avril 1858, cité tout à l'heure par mon collègue et ami le professeur McCaffrey, confère au Nicaragua, «la pleine et exclusive souveraineté («exclusivamente el dominio y sumo imperio») sur la totalité du San Juan, depuis sa source dans le lac jusqu'à son embouchure dans la mer»¹²¹. On ne voit dès lors pas très bien comment des activités menées par le Nicaragua sur un fleuve sur lequel il a «pleine et exclusive souveraineté» pourraient porter atteinte à la souveraineté ou à l'intégrité territoriale du Costa Rica.

¹¹⁸ *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), ordonnance, C.I.J. Recueil 2008, p. 392, par. 126.*

¹¹⁹ Voir l'opinion individuelle du juge Abraham et la plaidoirie de M. Condorelli, préc. note n° 3.

¹²⁰ Demande en indication de mesures conservatoires, 18 novembre 2010, p. 3, par. 10.

¹²¹ *Différend relatif à des droits de navigation et des droits connexes (Costa Rica c. Nicaragua), arrêt, C.I.J. Recueil 2009, par. 37 ; voir aussi, par exemple, le paragraphe 31.*

9. De plus, l'opération de police qui, en apparence, aurait suscité la requête et la demande en indication de mesures conservatoires costa-riciennes, relève de la pure routine comme l'a montré Steve McCaffrey¹²² : dans cette zone marécageuse et inhabitée (sauf lorsqu'un «fermier» s'y installe fort opportunément ... un fermier dans une réserve naturelle protégée, bizarre d'ailleurs), donc dans une zone propice à la contrebande, les effectivités territoriales sont forcément réduites. Il n'empêche que le Nicaragua peut lui invoquer¹²³ des effectivités nombreuses — et fort significatives — alors que les revendications costa-riciennes relèvent de l'abstraction, fermiers mis à part, et sont fondées (et non fondées serait plus exact...) sur un château de cartes, des cartes trompeuses toutes copiées sur un schéma unique ne correspondant pas au texte de la sentence Alexander. La présence et la connaissance costa-riciennes de la région sont d'ailleurs tellement limitées que le Costa Rica en est réduit à fonder ses accusations d'intervention sur les témoignages de narcotrafiquants¹²⁴ qui ont échappé à la police nicaraguayenne, et pour l'arrestation desquels le Nicaragua a requis la coopération du Costa Rica¹²⁵.

10. Le conte du canal (que le Nicaragua serait d'ailleurs parfaitement en droit de creuser) n'a pas davantage de vraisemblance que la fable de l'occupation. Il est tout à fait exact qu'une équipe nicaraguayenne a procédé, manuellement¹²⁶, pendant quelques semaines, au débroussaillage et au nettoyage du *caño* qui relie le fleuve San Juan avec Harbor Head. Comme l'a montré mon autre collègue et ami Paul Reichler, il ne s'est agi que de rétablir la navigabilité (d'ailleurs limitée) de cette branche du fleuve — dont la rive droite correspond à la frontière entre les deux Parties, telle que l'a précisée le général Alexander dans la sentence du 30 septembre 1897¹²⁷.

¹²² Voir note *supra*, S. McCaffrey, par. 25 d) et affidavits soumis à la Cour, Aburto Ortiz, Gregorio de Jesús (doc. 1), p. 2 et Roa Traña, Farle Isidro (doc. 5), p. 4-6.

¹²³ Voir note *supra*, S. McCaffrey, par. 24-25 A.M. A.V. et affidavits soumis à la Cour, Aburto Ortiz, Gregorio de Jesús (doc. 1); Barrantes Jiménez, Luis Fernando (doc. 2); Pérez Solís, José Magdiel (doc. 3); Gutiérrez Espinoza, Juan Francisco (doc. 7); Membreño Rivas, Denis (doc. 9).

¹²⁴ *La Nación. El País*, 21 octobre 2010, «Familia denuncia invasión de jerarca nica».

¹²⁵ Affidavit soumis à la Cour, Roa Traña, Farle Isidro (doc. 5), p. 9-10.

¹²⁶ Déclaration soumise à la Cour, Vivas Soto, Elsa Maria (doc. 14), par. 18; affidavit, Espinoza Urbina, Hilda, par. 30 b) et son annexe 11 (doc. 13); certification, Araquistain Cisneros, Roberto (doc. 12).

¹²⁷ Voir traité de limites (Cañas-Jerez), 15 avril 1858, art. II (annexe 1 à la requête introductive d'instance, 18 octobre 2010) et première sentence rendue par l'arbitre E. P. Alexander à San Juan del Norte le 30 septembre 1897 sur la question de la frontière entre le Costa Rica et le Nicaragua, *H. La Fontaine, Pasicrisie Internationale 1794-1900 : Histoire documentaire des arbitrages internationaux* (1902, réimprimé en 1997, M. Nijhoff, La Haye), p. 529 (annexe 3 à la requête introductive d'instance, 18 octobre 2010).

11. Monsieur le président, le lien entre les faits qu'invoque le Costa Rica et les droits qu'il revendique sont tout sauf plausibles. Mais, si ce n'est pas plausible, cela s'explique sans doute. Comme l'a montré tout à l'heure le professeur McCaffrey, la fable de l'invasion et de l'«occupation» d'un territoire costa-ricien par les troupes nicaraguayennes et le conte du creusement d'un nouveau canal ont été forgés de toutes pièces par le Costa Rica pour tenter de donner une apparence de fondement à son opposition à l'opération (modeste au demeurant) de dragage du fleuve entreprise par le Nicaragua. Car tel semble être le véritable objet tant de la requête que de la demande en indication de mesures conservatoires.

12. Il n'y a pas de soldat nicaraguayen en territoire costa-ricien ; il n'y a pas de «zone occupée» par le Nicaragua au Costa Rica ; il n'existe pas de projet de canal artificiel entre le San Juan et la mer ; il n'y a pas de remise en cause du traité de limites par le Nicaragua — si ce n'est dans l'imagination des dirigeants costa-riciens. Ou, peut-être, dans leur rêve, qui est d'empêcher le Nicaragua de procéder aux opérations de dragage du fleuve conformément à ses droits — un dragage qui pourrait à terme permettre le *rétablissement* de la situation telle qu'elle existait en 1858. Et, pour cela, ils ont inventé de toutes pièces les accusations qu'ils portent maintenant contre la Partie nicaraguayenne.

13. Car si tout le scénario militaro-pharaonique présenté par le Costa Rica est totalement fictif, en revanche, le dragage qu'il reproche au Nicaragua est, pour sa part, tout ce qu'il y a de plus réel. Il est parfaitement exact, comme l'a expliqué tout à l'heure l'agent du Nicaragua, que ce pays a entrepris une opération de dragage des derniers 42 kilomètres de la rivière San Juan, sur la base d'un projet envisagé dès 2006 et rendu public dès cette époque¹²⁸. Ce projet est conduit exclusivement sur la rivière San Juan de Nicaragua¹²⁹ et son ampleur est limitée : il est, à ce jour, le fait d'une seule drague d'une capacité fort modeste¹³⁰ ; et son impact sur le volume de la rivière Colorado est très peu significatif¹³¹. De l'avis des experts costa-riciens eux-mêmes, le projet de

¹²⁸ Affidavit, Espinoza Urbina, Hilda, p. 6, par. 16 (doc. 13).

¹²⁹ Affidavit, Espinoza Urbina, Hilda, p. 5, par. 12 (doc. 13).

¹³⁰ Déclaration, Quintero Gómez, Lester Antonio (doc. 16, annexe 4).

¹³¹ Déclaration Silva Munguía, Virgilio (doc. 15) ; voir aussi documents soumis par le Nicaragua, Statement by Mr. Rene Castro Salazar, Costa Rican Minister of Foreign Affairs and Culture, to the Environmental Commission of Costa Rica's Legislative Assembly, 8 septembre 2010 (doc. 19).

dragage, qui représenterait pour le Nicaragua une entreprise «titanesque» — je reprends leur propre qualificatif¹³² ; cela rejoint mon pharaon —, ne pourrait entraîner, selon leurs estimations les plus pessimistes, qu'une diminution de 12 % au grand maximum du volume du Colorado¹³³. Au demeurant, 5 % est une évaluation plus réaliste¹³⁴ — et, qui plus est, dans une perspective de toute manière très lointaine.

14. Alors que les atteintes au premier droit — ou ensemble de droits — invoqué par le Costa Rica sont dépourvues de tout début de réalité, dans le cas du dragage, c'est le droit lui-même qui manque. Selon l'Etat demandeur : il s'agirait du «Costa Rica's right corresponding to Nicaragua's obligation not to dredge the San Juan if this affects or damages Costa Rica's lands, its environmentally protected areas and the integrity and flow of the Colorado River.»¹³⁵ Ce n'est plus ici, un problème de plausibilité, mais d'existence : dans les termes limpides du point 6.3 de la sentence Cleveland, qu'a citée aussi Steve McCaffrey tout à l'heure, «[t]he Republic of Costa Rica cannot prevent the Republic of Nicaragua from executing at her own expense and within her own territory such works of improvement»¹³⁶. «La République du Costa Rica ne peut pas empêcher» de tels travaux, Monsieur le président ; elle ne le peut pas ! Elle n'a pas un droit ; elle a une obligation de ne pas empêcher. Votre arrêt de 2009 a pleinement confirmé cela¹³⁷. Nos contradicteurs ont, ce matin, beaucoup cité la sentence Cleveland — pas ce point ; et on les comprend ! Et pourtant «empêcher», c'est très exactement ce que le Costa Rica vous demande de faire en essayant de vous convaincre d'ordonner la suspension provisoire de ces travaux qui sont, je le répète, bien modestes et ne lui causent, de toute façon, pas le moindre dommage. De plus — je vais y revenir mais je souhaite le rappeler d'ores et déjà : quand bien même il y aurait préjudice

¹³² Document soumis à la Cour par le Costa Rica le 7 janvier 2011, *Estudio de comportamiento de caudales en la bifurcación del río San Juan-Rio Colorado*, p. 1.

¹³³ *Ibid.*, p. 5.

¹³⁴ Document soumis à la Cour par le Nicaragua, *Expert Report of Professors Dr. ir. C. van Rhee and Dr. H.J. de Vriend of Delft University of Technology* (doc. 18), p. 2-3.

¹³⁵ Demande en indication de mesures conservatoires, 18 novembre 2010, par. 13.

¹³⁶ Sentence Cleveland rendue le 22 mars 1888 à Washington au sujet de la validité du traité de limites conclu en 1858 entre le Costa Rica et le Nicaragua, *RIAA*, vol. XXVIII, p. 210, point 6 (annexe 2 à la requête introductive d'instance, 18 octobre 2010).

¹³⁷ *Différend relatif à des droits de navigation et des droits connexes (Costa Rica c. Nicaragua)*, arrêt, *C.I.J. Recueil 2009*, par. 155.

(*quod non*), le Costa Rica ne pourrait pas empêcher le dragage ; tout au plus pourrait-il prétendre à une indemnisation, conformément aux termes tout aussi exprès et tout aussi ignorés par les avocats du Costa Rica du même point 3.6 de la sentence Cleveland.

15. Ainsi, Monsieur le président, outre que le Costa Rica n'a pas apporté le moindre commencement de preuve à l'appui de ses accusations rocambolesques d'invasion, d'occupation ou de creusement d'un nouveau canal, il vous demande de lui reconnaître un droit qu'il n'a pas et qui lui a été expressément dénié par une sentence dont pourtant il fait grand cas. Le *fumus* n'est plus *boni*, mais il est *mali juris* !

b) Le «lien suffisant»

16. Du même coup, Monsieur le président, il me semble que j'ai établi que la condition du «lien suffisant» entre les droits prétendus que les mesures conservatoires sollicitées par le Costa Rica visent à protéger et l'objet de l'instance dont il a saisi la Cour sur le fond n'est pas remplie.

17. Au paragraphe 18 de sa demande en indication de mesures conservatoires, la Partie costa-ricienne invoque l'ordonnance de la Cour dans l'avis du *Passage par le Grand-Belt (Finlande c. Danemark)* — une décision par laquelle, du reste, la Cour a refusé de faire droit à une telle demande. Mais, dans cette affaire, elle avait observé «qu'il n'est pas contesté qu'il existe, pour la Finlande, un droit de passage par le Grand-Belt, le différend qui oppose les Parties ayant trait à la nature et à l'étendue de ce droit...»¹³⁸ (*Passage par le Grand-Belt (Finlande c. Danemark)*, mesures conservatoires, ordonnance du 29 juillet 1991, C.I.J. Recueil 1991, p. 17, par. 22 ; les italiques sont de nous).

18. C'est le contraire qui est vrai ici : il n'est pas douteux qu'il *n'existe pas*, pour le Costa Rica, de droit d'empêcher le dragage du San Juan. Le professeur Crawford a raison : les deux affaires, sur ce point en tout cas, ne sont pas comparables.

19. Le problème se pose différemment en ce qui concerne les autres droits dont l'Etat requérant se prévaut. Mais le résultat est le même : non seulement accorder les mesures

¹³⁸ Voir aussi *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay)*, mesures conservatoires, ordonnance du 13 juillet 2006, opinion individuelle du juge Bennouna, C.I.J. Recueil 2006, p. 143, par. 3.

conservatoires demandées reviendrait à tenir pour acquis que le Nicaragua a violé ces droits — je reviendrai à ceci dans quelques instants ; non seulement ces demandes reposent sur des allégations entièrement invraisemblables ; mais elles sont aussi sans fondement en ce sens qu'elles ne sont pas de nature à protéger les droits prétendus dont le Costa Rica se prévaut. Reprenons-les rapidement, Monsieur le président, si vous le voulez bien :

- 1) «the immediate and unconditional withdrawal of all Nicaraguan troops from the unlawfully invaded and occupied Costa Rican territories» ; il n'y a pas d'occupation ; mais, quand bien même occupation il y aurait, les droits du Costa Rica à la souveraineté, à l'intégrité territoriale et à la non-occupation seraient évidemment rétablis par l'arrêt au fond si, par impossible, la Cour en venait à décider que le Nicaragua y porte atteinte de quelque manière que ce soit ;
- 2) «the immediate cessation of the construction of a canal across Costa Rican territory» ; il n'y a pas de percement ; comme le professeur Crawford l'a dit ce matin : «The canal is an artifice newly created» — yes indeed, newly invented by Costa Rica for the purpose of their case... ; mais, quand bien même percement il y aurait, on serait, au pire, dans le cas de figure du Grand-Belt¹³⁹ ou de la première ordonnance rendue dans l'affaire des *Usines de pâte à papier*¹⁴⁰ : il reviendrait au Nicaragua, qui est informé de la position du Costa Rica, de prendre le risque de persister dans le projet que lui prête (à tort) le demandeur et d'assumer «nécessairement l'ensemble des risques liés à toute décision au fond que la Cour pourrait rendre à un stade ultérieur»¹⁴¹ ;
- 3) «the immediate cessation of the felling of trees, removal of vegetation and soil from Costa Rican territory, including its wetlands and forests» ; and
- 4) «the immediate cessation of the dumping of sediment in Costa Rican territory» ; il n'y a pas d'abattage d'arbres, d'enlèvement de végétation, de travaux d'excavation ou de déversements de sédiments en territoire costa-ricien ; mais quand bien même ce serait une réalité (*quod non*),

¹³⁹ *Passage par le Grand-Belt (Finlande c. Danemark), mesures conservatoires, ordonnance du 29 juillet 1991, C.I.J. Recueil 1991, p. 19-20, par. 31-34.*

¹⁴⁰ *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), mesures conservatoires, ordonnance du 13 juillet 2006, C.I.J. Recueil 2006, p. 133, par. 78.*

¹⁴¹ *Ibid.*

on retrouve ici la situation que j'ai déjà évoquée concernant le dragage : si ces faits étaient avérés, conformément aux termes exprimés du point 3.6 de la sentence Cleveland :

«The Republic of Costa Rica [would have — and would only have] the right to demand indemnification for any places belonging to her on the right bank of the River San Juan which may be occupied without her consent, and for any lands on the same bank which may be flooded or damaged in any other way in consequence of works of improvement.»¹⁴²

Voilà la réponse.

20. Pour me résumer sur ce point, les droits invoqués par le Costa Rica sont, pour certains clairement inexistantes ; et, dans tous les cas, les atteintes qui y seraient portées par le Nicaragua sont totalement chimériques et les mesures demandées ne sont pas de nature à les sauvegarder. Ceci suffit amplement, Mesdames et Messieurs de la Cour, à exclure que vous puissiez les indiquer. En tout état de cause, le comportement du Nicaragua n'a pu entraîner aucun dommage pour le Costa Rica — encore moins un préjudice irréparable.

II. L'ABSENCE DE PRÉJUDICE

21. Monsieur le président, une autre des conditions les plus fermement établies par la jurisprudence de la Cour pour que celle-ci puisse faire droit à une demande en indication de mesures conservatoires tient au caractère irréparable du préjudice qui pourrait résulter de l'absence de l'indication des mesures demandées : ce «pouvoir de la Cour d'indiquer des mesures conservatoires ne peut être exercé que s'il y a nécessité urgente d'empêcher que soit causé un préjudice irréparable à de tels droits, avant que la Cour n'ait eu l'occasion de rendre sa décision définitive» (*Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), mesures conservatoires, ordonnance du 23 janvier 2007, C.I.J. Recueil 2007 (I), p. 11, par. 32*)¹⁴³.

¹⁴² Sentence Cleveland rendue le 22 mars 1888 à Washington au sujet de la validité du traité de limites conclu en 1858 entre le Costa Rica et le Nicaragua, *RIAA*, vol. XXVIII, p. 210, point 6 (annexe 2 à la requête introductive d'instance, 18 octobre 2010).

¹⁴³ Voir aussi les affaires citées : *Passage par le Grand-Belt (Finlande c. Danemark), mesures conservatoires, ordonnance du 29 juillet 1991, C.I.J. Recueil 1991, p. 17, par. 23* ; *Certaines procédures pénales engagées en France (République du Congo c. France), mesures conservatoires, ordonnance du 17 juin 2003, C.I.J. Recueil 2003, p. 107, par. 22* ; voir aussi : *Convention de Vienne sur les relations consulaires (Paraguay c. Etats-Unis d'Amérique), mesures conservatoires, ordonnance du 9 avril 1998, C.I.J. Recueil 1998, p. 257, par. 37* ; *Demande en interprétation de l'arrêt du 31 mars 2004 en l'affaire Avena et autres ressortissants mexicains (Mexique c. Etats-Unis d'Amérique) (Mexique c. Etats-Unis d'Amérique), mesures conservatoires, ordonnance du 16 juillet 2008, C.I.J. Recueil 2008, p. 330, par. 72* ; *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), mesures conservatoires, ordonnance du 13 juillet 2006, C.I.J. Recueil 2006, p. 131, par. 70*.

22. Or, en la présente espèce, le Costa Rica ne peut invoquer aucun préjudice irréparable ; davantage même : il ne peut se plaindre d'aucun préjudice «tout court».

23. Je ne pense pas qu'il soit nécessaire que je m'y attarde longuement : je ne pourrais que répéter ce que Paul Reichler a excellemment démontré. Je rappelle donc seulement que :

- aussi bien pour le dragage que pour le nettoyage du canal, le Nicaragua a pris les plus grandes précautions en vue d'assurer la préservation de l'environnement, à laquelle il a au moins autant intérêt que le Costa Rica : une étude d'impact soignée a été effectuée avant que le dragage soit entrepris et une étude environnementale approfondie a précédé le nettoyage du *caño* ; les arbres abattus à cette occasion (moins de 200 selon les estimations concordantes des Parties¹⁴⁴) sont en voie d'être remplacés dans la proportion d'au moins dix arbres replantés pour un abattu (en réalité, nettement plus) ; soit dit en passant, j'ai été surpris ce matin d'entendre le professeur Crawford vous comparer à des arbres centenaires — je ne pense pas en tout cas que si la Cour venait à disparaître — *horresco referens* !, vous pourriez être remplacés même à raison de dix pour un !
- le dragage n'a (et n'aura, dans un avenir prévisible de nombreuses années,) qu'un effet très limité sur le débit du Colorado (ainsi d'ailleurs que sur celui du *caño* et du San Juan lui-même)¹⁴⁵, et ces modifications insignifiantes ne peuvent avoir aucun impact préjudiciable ni sur l'environnement de la région ni sur la navigabilité du Colorado ;
- l'étude technique commandée par le Costa Rica à ses propres experts et tardivement soumise à la Cour à la demande du Nicaragua établit que l'impact du dragage serait peu significatif¹⁴⁶, ce qui contredit crûment les prévisions apocalyptiques alléguées en plaidoirie par le demandeur ; quant à l'analyse Ramsar, elle se fonde exclusivement sur des données costa-riciennes et n'a, en tout état de cause, pas la portée que lui prêtent nos contradicteurs ; au surplus, les

¹⁴⁴ Costa Rica, Ministry of Environment, Energy and Telecommunications, Informe de Inspección Preliminar, 22 octobre 2010 (document soumis à la Cour, p.11) ; voir aussi l'affidavit de Roberto Araquistain Cisneros (doc. 12).

¹⁴⁵ Document soumis à la Cour par le Nicaragua, *Expert Report of Professors Dr. ir. C. van Rhee and Dr. H.J. de Vriend of Delft University of Technology* (doc. 18), p. 1.

¹⁴⁶ Document soumis à la Cour par le Costa Rica le 7 janvier 2011, *Estudio de comportamiento de caudales en la bifurcación del río San Juan- Rio Colorado*, p. 5.

affirmations alarmistes de ceux-ci sont démenties par le rapport technique établi par des experts neutres et particulièrement compétents, de l'Université de Delft¹⁴⁷ ;

— du reste, par la voix de son ministre des affaires étrangères, le Costa Rica a expressément admis que les travaux entrepris par le Nicaragua «would not have the alarming environmental and economic impact suggested by some media»¹⁴⁸. Dans ce discours, déjà cité, prononcé le 8 septembre 2010, M. Castro Salazar a indiqué qu'il se fondait sur des études costa-riciennes. Il s'agit sans doute de l'«Etude du comportement des écoulements à la bifurcation des rivières San Juan et Colorado», que le Costa Rica a produite *in extremis*¹⁴⁹. Si c'est le cas, et bien que cette étude repose sur des données erronées, il n'y a, en effet, pas de quoi s'alarmer¹⁵⁰.

24. Puisqu'il n'y a *aucun* préjudice, il ne fait pas grand sens de se demander si ce dommage qui n'existe pas est ou non irréparable... Qu'il me soit seulement permis de rappeler que, même si le Costa Rica pouvait établir, lors de l'examen de l'affaire au fond, que les travaux d'entretien et d'amélioration contestés sont illicites et lui auraient causé un dommage quelconque — ce qui est hautement improbable — la seule forme de réparation à laquelle il pourrait prétendre, aux termes du point 3.6 de la sentence Cleveland, serait une indemnisation. Dès 1927, dans son ordonnance dans l'affaire de la *Dénonciation du traité sino-belge*, la Cour permanente a considéré qu'un préjudice est irréparable s'il «ne saurait être réparé moyennant le versement d'une simple indemnité ou par une autre prestation matérielle»¹⁵¹. Or, en l'espèce, le préjudice qu'invoque le demandeur ne peut être réparé *que*, seulement, moyennant le versement d'une indemnité. Et il va de soi, Monsieur le président, que le Costa Rica ne saurait obtenir par le biais de mesures conservatoires ce que, de toute façon, il ne peut espérer de votre arrêt sur le fond.

¹⁴⁷ Document soumis à la Cour par le Nicaragua, *Expert Report of Professors Dr. ir. C. van Rhee and Dr. H.J. de Vriend of Delft University of Technology* (doc. 18), p. 1-2 et 9-10.

¹⁴⁸ Document soumis à la Cour par le Nicaragua, *Statement by Mr. René Castro Salazar, Costa Rican Minister of Foreign Affairs and Culture, to the Environmental Commission of Costa Rica's Legislative Assembly, on 8 September 2010* (doc. 19).

¹⁴⁹ Document soumis à la Cour par le Costa Rica le 7 janvier 2011, *Estudio de comportamiento de caudales en la bifurcación del río San Juan- Rio Colorado*.

¹⁵⁰ *Ibid.*, voir notamment p. 1 et 5.

¹⁵¹ *Dénonciation du traité sino-belge du 2 novembre 1865, ordonnances des 8 janvier, 15 février et 18 juin 1927, C.P.J.I. série A n° 8, p. 7 ; Usine de Chorzów, ordonnance du 21 novembre 1927, C.P.J.I. série A n° 12, p. 6.*

III. L'ABSENCE D'URGENCE

25. Mesdames et Messieurs de la Cour, toujours selon votre jurisprudence bien établie, «le pouvoir de la Cour d'indiquer des mesures conservatoires ne sera exercé que s'il y a urgence, c'est-à-dire s'il existe un réel risque qu'une action préjudiciable aux droits de l'une ou de l'autre Partie ne soit commise avant que la Cour n'ait rendu sa décision définitive» (ordonnance, 15 octobre 2008, (*Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie)*, mesures conservatoires, C.I.J. Recueil 2008, p. 392, par. 129)¹⁵². Vous aimez décidément beaucoup les doubles négations.

26. Pour qu'il en aille ainsi, il faut que le Costa Rica démontre que, «quand bien même il existerait un tel risque de préjudice aux droits [qu'il allègue], celui-ci serait imminent» (*Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay)*, mesures conservatoires, ordonnance, C.I.J. Recueil 2007, p. 13, par. 42). Or il n'a rien fait de tel et il ne peut rien faire de tel :

- on voit mal quel fait nouveau explique le revirement du Costa Rica qui, après s'être dit, en septembre, tout à fait rassuré sur l'absence de risque, non seulement imminent, mais même de risque tout court réel, dramatise les dangers environnementaux ou autres, liés à une situation qui n'a pas changé en ce qui concerne le dragage, et qui est terminée pour ce qui est du nettoyage du *caño* ;
- les arbres abattus à cette occasion sont plus que remplacés — dans une région où, comme le proclame le Costa Rica, la capacité de régénération de la forêt est très dynamique¹⁵³ ; et
- les travaux de dragage pour leur part procèdent, faute de moyens, avec beaucoup de lenteur et ne peuvent avoir, à ce rythme, aucun impact significatif sur le fleuve Colorado (ni malheureusement d'ailleurs sur le San Juan) avant de nombreuses années.

27. Pas de préjudice ; *a fortiori*, pas de préjudice indemnisable ; et, du même coup, pas d'urgence.

¹⁵² Voir aussi *Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria)*, mesures conservatoires, ordonnance du 15 mars 1996, C.I.J. Recueil 1996 (I), p. 22, par. 35 ; *LaGrand (Allemagne c. Etats-Unis d'Amérique)*, mesures conservatoires, ordonnance du 3 mars 1999, C.I.J. Recueil 1999 (I), p. 15, par. 22 ; *Mandat d'arrêt du 11 avril 2000 (République démocratique du Congo c. Belgique)*, mesures conservatoires, ordonnance du 8 décembre 2000, C.I.J. Recueil 2000, p. 201, par. 69.

¹⁵³ Costa Rica, Ministry of Environment, Energy and Telecommunications, Informe de Inspeccion Preliminar, 22 octobre 2010 (document soumis à la Cour, p. 12-13). Voir aussi documents soumis à la Cour par le Nicaragua, Vivas Soto, Elsa Maria, par. 11 (doc. 14).

28. Cela fait justice, Monsieur le président, des demandes n^{os} 2 à 5 du Costa Rica. Il reste tout de même, j'en suis conscient, la première et la dernière.

29. En formulant la première («the immediate and unconditional withdrawal of all Nicaraguan troops from the unlawfully invaded and occupied Costa Rican territories»), le Costa Rica tente, à l'évidence, d'obtenir au stade des mesures conservatoires cela même qu'il veut obtenir de la Cour au fond. Cela ne se peut et je vais y revenir en terminant.

30. Quant à la sixième (et dernière) demande costa-ricienne, elle est formulée ainsi : «that Nicaragua shall refrain from any other action which might prejudice the rights of Costa Rica, or which may aggravate or extend the dispute before the Court». La position que vous avez prise dans votre ordonnance de 2007 concernant les *Usines de pâte à papier* s'y applique pleinement. Certes, comme vous l'avez rappelé dans cette décision : «la Cour a indiqué à plusieurs reprises des mesures conservatoires ordonnant aux parties de s'abstenir de tous actes de nature à aggraver ou étendre le différend ou à en rendre la solution plus difficile» (*Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay)*), mesures conservatoires, ordonnance du 23 janvier 2007, *C.I.J. Recueil 2007*, p. 16, par. 49)¹⁵⁴ ; mais, comme vous l'avez également noté : «dans ces affaires, des mesures conservatoires autres que celles ordonnant aux parties de s'abstenir de tous actes de nature à aggraver ou étendre le différend ou à en rendre la solution plus difficile ont également été indiquées» (*ibid.*). Etant donné que ce n'était pas le cas dans l'affaire des *Usines*, vous avez estimé ne pouvoir indiquer une mesure de non-aggravation, fût-elle adressée aux deux Parties¹⁵⁵ ; James Crawford l'a d'ailleurs rappelé ce matin. Et si je puis me permettre de porter un jugement (même s'il est audacieux de «juger la Cour» !), je pense que vous avez eu raison : décider autrement serait encourager les Etats à utiliser davantage encore la procédure des mesures conservatoires — dont ils ont déjà tendance à faire un usage que l'on peut trouver abusif : la présente affaire en porte un nouveau témoignage.

¹⁵⁴ Voir par exemple *Personnel diplomatique et consulaire des Etats-Unis à Téhéran (Etats-Unis d'Amérique c. Iran)*, mesures conservatoires, ordonnance du 15 décembre 1979, *C.I.J. Recueil 1979*, p. 21, par. 47, point B ; *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslavie)*, mesures conservatoires, ordonnance du 8 avril 1993, *C.I.J. Recueil 1993*, p. 24, par. 52, point B ; *Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria)*, mesures conservatoires, ordonnance du 15 mars 1996, *C.I.J. Recueil 1996 (I)*, p. 24, par. 49, point 1) ; *Activités armées sur le territoire du Congo (République démocratique du Congo c. Ouganda)*, mesures conservatoires, ordonnance du 1^{er} juillet 2000, *C.I.J. Recueil 2000*, p. 129, par. 47, point 1).

¹⁵⁵ Voir *ibid.*, par. 50-51.

31. Vous n'avez, Mesdames et Messieurs les juges, aucune raison d'indiquer les mesures plus précises que le Costa Rica vous demande de prendre et, faute d'autonomie de ce que l'on pourrait appeler les «mesures de non-aggravation», vous ne sauriez non plus ordonner celle qui fait l'objet de sa sixième et dernière demande. Du reste, vous n'avez pas non plus de raison de suspecter le Nicaragua de vouloir «aggraver le différend», ce n'est pas son intention et on ne voit pas quel intérêt il aurait à le faire.

IV. L'IMPOSSIBILITÉ DE PRÉJUGER LE FOND DE L'AFFAIRE

32. Il y a, au demeurant, Monsieur le président, une dernière raison — tout aussi décisive, pour laquelle, la Cour ne saurait faire droit aux demandes du Costa Rica. Il est en effet également de jurisprudence qu'un Etat ne peut utiliser la procédure incidente des mesures conservatoires pour obtenir en quelque sorte un «pré-jugement» en faveur de ses conclusions sur le fond de l'affaire. Comme l'a dit la Cour permanente dans son ordonnance du 21 novembre 1927 dans l'affaire de l'*Usine de Chorzów*, une ordonnance en indication de mesures conservatoires n'est pas un «jugement provisionnel» par lequel le demandeur pourrait se voir adjuger tout ou partie des conclusions de sa requête¹⁵⁶. Or c'est très évidemment l'objectif que poursuit le Costa Rica dans notre affaire.

33. Le problème ne tient pas tellement à l'identité des mesures demandées¹⁵⁷ avec les remèdes faisant l'objet de la requête¹⁵⁸ — encore que cette identité soit très frappante — mais je reconnais qu'il peut y avoir des cas dans lesquels des mesures conservatoires «suspensives» sont admissibles (je pense aux affaires dans lesquelles la licéité de condamnations à la peine de mort était en jeu¹⁵⁹). Mais ce n'est pas du tout la situation dans l'affaire qui nous occupe : en dépit de la curieuse dramatisation à laquelle se livre le Costa Rica, la question centrale est de savoir de qui relève le territoire (inhabité) où ont pris place les actions qu'il reproche au Nicaragua (ou sur lequel

¹⁵⁶ *Usine de Chorzów*, ordonnance du 21 novembre 1927, C.P.J.I. série A n° 12, p. 10.

¹⁵⁷ Demande en indication de mesures conservatoires, par. 19.

¹⁵⁸ Requête introductive d'instance, par. 41.

¹⁵⁹ Voir *Convention de Vienne sur les relations consulaires (Paraguay c. Etats-Unis d'Amérique)*, mesures conservatoires, ordonnance du 9 avril 1998, C.I.J. Recueil 1998, p. 248 ; *Avena et autres ressortissants mexicains (Mexique c. Etats-Unis d'Amérique)*, mesures conservatoires, ordonnance, C.I.J. Recueil 2003, p. 77 ; *Demande en interprétation de l'arrêt du 31 mars 2004 en l'affaire Avena et autres ressortissants mexicains (Mexique c. Etats-Unis d'Amérique)* (Mexique c. Etats-Unis d'Amérique), mesures conservatoires, ordonnance, C.I.J. Recueil 2008, p. 311.

il prétend que ces actions auraient un effet préjudiciable). Ceci ne peut être ni décidé, ni présumé à l'occasion de la présente procédure — or toutes, je dis bien *toutes*, les six mesures demandées (enfin les cinq premières) supposent que ce le soit.

34. Du reste comme la Chambre l'a noté dans son ordonnance de 1986 dans *Burkina/Mali*, lorsque la souveraineté sur un territoire est contestée — et elle l'est ; n'en déplaise au Costa Rica, c'est l'objet de l'affaire qui est soumis à la Cour ; lorsque c'est le cas, vous ne vous reconnaissez pas le pouvoir, au stade des mesures conservatoires de «modifier la situation antérieure aux actions armées qui ont conduit au dépôt des demandes des Parties ; et ... il convient en tout état de cause de ne pas préjuger à cet égard l'existence d'une ligne quelconque» (*Différend frontalier (Burkina Faso/République du Mali), mesures conservatoires, ordonnance du 10 janvier 1986, arrêt, C.I.J. Recueil 1986, p. 11, par. 29*). En l'espèce, ce serait d'autant plus mal venu, que, depuis plus d'un siècle, les Parties n'ont pu parvenir à un accord sur la démarcation précise de la frontière résultant du traité de 1858 et des sentences Cleveland et Alexander.

35. En fait, s'agissant des pseudo-droits que le Costa Rica prétend vouloir faire respecter, nous sommes, *mutatis mutandis*, en dépit de ce qu'affirment nos contradicteurs, dans la même situation que celle dans laquelle se trouvait la Cour dans l'affaire *Cameroun c. Nigéria*. Le Cameroun vous avait demandé de constater que le défendeur avait engagé sa responsabilité du fait de l'occupation de la péninsule de Bakassi et d'autres territoires camerounais. Dans sa sagesse (et là aussi, je me permets d'approuver la solution — bien que j'eusse perdu !), la Cour a décidé que chacune des Parties devait évacuer les portions de territoires reconnues comme appartenant à l'autre et que, si préjudice il y avait, celui-ci était suffisamment pris en compte par votre décision concernant le tracé de la frontière¹⁶⁰. Bien entendu, de telles constatations ne peuvent être effectuées que dans un arrêt au fond ; en vous demandant de les faire dans une ordonnance en indication de mesures conservatoires, le demandeur met la charrue avant les bœufs ; vous ne sauriez, Mesdames et Messieurs de la Cour, vous accommoder d'un tel attelage ! — encore moins depuis que vous avez proclamé que les mesures conservatoires que vous indiquez sont obligatoires.

¹⁶⁰ *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 ; voir aussi Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), arrêt, C.I.J. Recueil 2010, par. 156.*

36. Monsieur le président, l'ensemble des conditions que j'ai mentionnées au long de ma plaidoirie sont cumulatives. Il suffit qu'une seule ne soit pas satisfaite pour qu'il ne vous soit pas possible d'indiquer les mesures conservatoires demandées. En l'espèce, *aucune* ne l'est :

- les droits que le Costa Rica vous demande de protéger soit n'existent pas, soit ne sont, à l'évidence, pas menacés de façon plausible ;
- il n'existe pas de lien suffisant et raisonnable entre les mesures demandées et les droits lui appartenant ;
- les actions du Nicaragua dont il se plaint ne lui ont causé aucun préjudice et donc, *a fortiori*, aucun préjudice irréparable ; et aucun ne se profile ;
- dès lors aussi, l'idée même d'urgence est saugrenue ; et,
- de toute manière, vous ne sauriez préjuger le fond à l'occasion de la présente procédure or c'est, très exactement, ce que le Costa Rica vous demande de faire.

37. Il me semble d'ailleurs que c'est bien toute la stratégie de l'Etat demandeur : tenter de se donner un avantage sur le fond en recourant à la procédure incidente des mesures conservatoires. Nous sommes convaincus, Mesdames et Messieurs de la Cour, que vous ne serez pas dupes.

Je vous remercie d'avoir écouté ma présentation avec attention malgré l'heure tardive. Elle clôt le premier tour des plaidoiries du Nicaragua et une journée chargée. Merci, Monsieur le président.

The PRESIDENT: I thank Professor Alain Pellet for his presentation. Now that is the first round of oral observations of the Republic of Nicaragua. The Court will meet again tomorrow at 4.30 p.m. to hear the second round of oral observations of Costa Rica. The sitting is closed.

The Court rose at 6.00 p.m.
