Non-Corrigé
Uncorrected

CR 2009/6

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2009

Public sitting

held on Monday 9 March 2009, at 10 a.m., at the Peace Palace,

President Owada presiding,

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

VERBATIM RECORD

ANNÉE 2009

Audience publique

tenue le lundi 9 mars 2009, à 10 heures, au Palais de la Paix,

sous la présidence de M. Owada, président,

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

COMPTE RENDU

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

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

M. Couvreur, greffier

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

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

as Agent;

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

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

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

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

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

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

as Counsel and Advocates;

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

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

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

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

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

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

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

as Advisers;

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

as Assistant Adviser.

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

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

comme agent ;

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

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

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

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

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

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

comme conseils et avocats ;

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

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

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

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

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

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

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

comme conseillers ;

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

comme conseiller adjoint.

The Government of the Republic of Nicaragua is represented by:

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

as Agent and Counsel;

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

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

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

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

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

as Counsel and Advocates;

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

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

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

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

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

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

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

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

as Assistant Counsel.

Le Gouvernement de la République du Nicaragua est représenté par :

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

comme agent et conseil ;

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

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

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

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

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

comme conseils et avocats ;

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

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

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

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

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

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

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

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

comme conseils adjoints.

The PRESIDENT: Please be seated. The sitting is open. I note initially that Judge Shi, for reasons made known to me, is unable to take his seat on the Bench today.

The Court meets today to hear the second round of oral argument of the Republic of Costa Rica. I now give the floor to Professor Crawford.

Mr. CRAWFORD:

I. GENERAL ISSUES OF INTERPRETATION

Introduction

1. Mr. President, Members of the Court, in this opening, I will deal with three issues of a general character, under each of which I will subsume arguments made by different counsel for Nicaragua last week.

A. Sovereignty and the perpetual right of free navigation

2. The first issue is the relationship between sovereignty and a perpetual right of free navigation. Professor Brownlie dealt with this at length[1] — without, however, always avoiding caricaturing our actual position. For example, he attributed to us the view "that the right of navigation referred to in the 1858 Treaty is in some sense absolute or peremptory"[2]. In fact the word "peremptory" appears nowhere in our pleadings. The word "absolute" appears four times. Three times it is used to quote the Central American Court of Justice judgment which says that Nicaragua's ownership of the river is "neither absolute nor unlimited"[3]. It is used once to say that Nicaragua's sovereignty is not absolute but is subject to limitations established by treaty[4]. The paragraphs of the Reply actually cited by Professor Brownlie state that Nicaragua cannot limit Costa Rica's right of navigation, but they do not suggest that Costa Rica's treaty right is superior to Nicaragua's sovereignty. The two coexist, as they coexist in Article VI of the Treaty.

3. But I would note now that Professor Brownlie has suggested it that the word "peremptory" could be justified — not peremptory in the sense of Article 53 of the Vienna Convention, but

---

[1]CR 2009/4, pp. 19-20, paras. 4-9 and pp. 29-35, paras. 46-67.

[2]CR 2009/4, p. 30, para. 53, citing RCR, paras. 3.13.-3.25.

[3]MCR, para. 2.46; RCR, para. 2.10; RCR, para. 3.33.

[4]RCR, para. 3.09.

peremptory in the sense of something required or demanded as of right; something not to be interfered with. The Permanent Court in the *S.S. "Wimbledon"* case used the phrase "general and peremptory" of Article 380 of the Treaty of Versailles, which required the Kiel Canal to be "maintained free and open to the vessels of commerce and war of all nations at peace with Germany" (*Judgments, 1923, P.C.I.J., Series A, No. 1*, p. 21): evidently in Article 380 vessels of commerce included passenger ships. Article VI of the Treaty of Limits is bilateral rather than general, but it is equally peremptory in the sense used by the Permanent Court.

4. (Tab 52) In 1858 Costa Rica expressly recognized Nicaragua's sovereignty over the waters of the San Juan. But this sovereignty is conditioned by the rights of free navigation granted to Costa Rica. Nicaragua made the point itself in its Counter-Memorial:

> "The right of free navigation appears as a *qualification* of the sovereignty of Nicaragua and is introduced by the term 'pero' (but). Thus a *particular* right of Costa Rica is presented as a qualification of the *general* grant of rights (in the form of title (dominio) and sovereignty ('sumo imperio') to Nicaragua."[5]

As you will see from the projection (tab 52 in your folders), the emphasis "qualification" was Nicaragua's itself. Its "dominio y sumo imperio" is qualified in the very same sentence by the rights of free navigation of Costa Rica.

5. Costa Rica agrees with the analysis in these passages of the Counter-Memorial, but it seems that Nicaragua does not. Now it is sovereignty which overrides rights; the general trumps the particular. Thus according to Professor Brownlie:

> "whatever the precise nature and extent of Costa Rica's rights . . . Nicaragua must have the exclusive competence to exercise the following regulatory powers:
>
> . . . . . .
>
> *(e)* the maintenance of the treaty provisions prescribing the conditions of navigation in accordance with the Treaty; that is to say, the maintenance of the discipline of the Treaty as such, together with the terms of the Cleveland Award"[6].

6. This is, with all respect, an extraordinary statement. Nicaragua is apparently to have "*exclusive* competence" with regard to "the maintenance of the discipline of the Treaty as such". That sounds to me like auto-interpretation — a recipe for indiscipline, not discipline; and certainly not respect for international law.

---

[5]CMN, para. 2.1.48.

[6]CR 2009/4, pp. 35-36, para. 67.

7. That is not how the Permanent Court, your predecessor, saw the relationship between sovereignty and obligation in the context of transit rights. In the *S.S. "Wimbledon"* case, Germany argued that the terms of a treaty should be restrictively interpreted because it impinged on Germany's sovereignty. The Court — in one of its most famous passages —

> "decline[d] to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State . . . But the right of entering into international engagements is an attribute of State sovereignty." (*Judgments, 1923, P.C.I.J., Series A, No. 1*, p. 21.)

8. Professor Brownlie cited another famous passage, this time of this Court in the *Temple* case, on the finality of boundary settlements *(Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment, I.C.J. Reports 1962*, p. 34)[7]. He added:

> "In the present case, the analogy with the *Temple of Preah Vihear* case arises not from the line of the boundary as such but from the danger of permitting a régime of navigation which would introduce an element of legal porosity and instability into the otherwise lucid attribution of territory."[8]

9. But it is the 1858 Treaty itself which explicitly permits a perpetual right of free navigation, navigation which is itself a "continuously available process", or should be. Professor Brownlie invites you to give effect to the boundary defined in the first part of Article VI but to restrictively interpret, if not eviscerate, the régime of free navigation introduced with the word "pero" and set out in the second part of Article VI and elsewhere in the Treaty. It is Nicaragua that thereby seeks to revise, as distinct from interpreting, the settlement of 1858.

B. The Character of the Treaty of Limits

10. This brings me to my second general point — the character of the Treaty of Limits. As to this, Nicaragua made three main arguments.

(a) *Nicaragua's "cloud of duress"*

11. The first point was made by Nicaragua's distinguished and experienced Agent, who said: "During the next 30 years after the signing of the Treaty of Limits, it caused great resentment in

---

[7] CR 2009/4, p. 20, para. 7.

[8] CR 2009/4, p. 20, para. 8.

Nicaragua that this Treaty had been signed under a cloud of duress."[9] It is true that the circumstances surrounding the conclusion of the Treaty of Limits demonstrate the existence of a serious conflict over canalization issues, but they do not come close to establishing duress, or even a cloud of duress — I am not sure what I would prefer, duress or a cloud. Three quick facts refute this claim . . .

12. *First*, the negotiations were mediated and countersigned by a representative of a neutral State, Salvador. I invite the Court to read the Additional Act accompanying the Treaty of Limits, in which the negotiators expressed their "feelings of gratitude" for the "estimable" and "impartial" assistance provided by the mediator[10]. There is no trace of duress.

13. *Secondly*, the decree of the President of Nicaragua, approving and ratifying the Treaty of Limits specifically confirmed that it had been concluded by General Jerez firmly "in accordance with the bases which, for that purpose, were transmitted to him by way of instructions", a finding which the Nicaraguan Congress later endorsed[11].

14. *Thirdly*, not even Nicaragua pleaded duress before President Cleveland. Instead it relied on constitutional arguments which George Rives rejected as "untenable"[12].

15. Incidentally, it was implied last week that Rives shared the assessment of the Treaty as unfair and unequal so far as Nicaragua is concerned[13]. He certainly did not. In the one passage of his report which might be taken as a comment on the Treaty, he noted:

> "that Costa Rica had for nearly the same period of twenty years [viz., 1838-1858] laid claim to more territory than she obtained under the Treaty of Limits, fully appears from her decree of 'Basis and Guarantees' of the 8th March, 1841 — which asserts as the boundaries of Costa Rica the line of the River La Flor, the shore of Lake Nicaragua and the River San Juan."[14]

---

[9]CR 2009/4, p. 11, para. 13 (Argüello).

[10]MCR, Ann. 7, pp. 52-53.

[11]MCR, Complete Annexes, Ann. 207, p. 53.

[12]First Report of George L. Rives, 2 March 1888, CMN, Complete Annexes, Ann. 70, pp. 13, 15, 17.

[13]CR 2009/5, p. 34, para. 21 (McCaffrey).

[14]First Report of George L. Rives, 2 March 1888, CMN, Complete Annexes, Ann. 70, p. 7.

(b) ***The "Nicoya theory" is wrong — but anyway it is irrelevant to the interpretation of the Treaty***

16. The second point made under this head by Nicaragua is what I call the "Nicoya theory". It was put forward principally by Professor Brownlie, but with loyal support from Ambassador Argüello and Professor McCaffrey.

17. Nicaragua presented a map attributed to Fermin Ferrer presenting an inflated extension of the Costa Rican province of Guanacaste, mistakenly equated to Nicoya[15]. What Nicaragua failed to mention was that Mr. Ferrer was an associate of William Walker, the notorious Filibuster. Ferrer acted successively as Walker's Provisional President and Minister for Foreign Affairs. Considering Walker's well-known intentions of taking over not merely Nicaragua but the canal route and eventually the rest of Central America, it is no surprise his map portrays Guanacaste as reaching east to the Caribbean and south to the Colorado River[16].

18. (Tab 53) You can see on the screen Professor Brownlie's own graphic, based on Ferrer's map. The area shown in green was labelled by him "Department of Nicoya prior to Treaty". There is almost nothing about this map which is accurate. Nicaragua's case is that this vast area was "usurped"[17] from it in 1824 in violation of the *uti possidetis* principle, and that its cession or relinquishment by Nicaragua was the key feature in the unequal bargain of the Treaty of Limits[18].

19. The first point to note is that there was no breach of *uti possidetis*. This was not the first time in Latin American practice that an administrative unit was detached from one territory to be integrated into another or to be treated as separate. Other examples include Chiapas. On the principle of *uti possidetis* I refer the Court to our pleadings[19].

20. The incorporation of Nicoya in Costa Rica was by free decision of its people, it was not a usurpation. It was ratified by the people of Nicoya no less than seven times[20]. It was confirmed by the Central American Congress in 1825[21]. Professor Brownlie[22] made much of the expression "For

---

[15]CR 2009/4, p. 24, paras. 22-23, (Brownlie).

[16]On Ferrer see http://es.wikipedia.org/wiki/Ferm%C3%ADn_Ferrer.

[17]CR 2009/4, p. 10, para. 8, (Argüello).

[18]CR 2009/4, p. 28, paras. 40-41, (Brownlie).

[19]RCR, para. 1.23, and App. 1, paras. A15-A28.

[20]RCR, para. A.17.

[21]CMN, Ann. 55; RCR Ann. 5; RCR, para. A.17.

[22]CR 2009/4, p. 25, paras. 25-26.

the time being" in Article 1 of the Congress's Decree. In fact the same article explains the reason: "For the time being, and until the demarcation of the territory of each State provided by Article VII of the Constitution is made . . ." Article VII provided for the demarcation of the interior States to be carried out by special law once the data were available[23]. That demarcation was never carried out, but the process envisaged by Article VII was one of demarcation, not the retransfer of an unwilling people to an unruly province. As Rives said in his report: "in 1858 Costa Rica had been continuously in possession of the District of Nicoya, under a claim of title, for more than thirty-two years"[24].

21. The Nicoya question became a question for President Cleveland in the following way. If Nicoya was part of Nicaragua before 1858, its cession without the approval of successive Congresses was unconstitutional and on that basis the Treaty of Limits would have been invalid. Rives's First Report thus examined the question in detail.

22. According to Rives:

> "The District of Nicoya lies on the Pacific side of the Continent and — roughly speaking — is triangular in shape, its apex lying towards the South. It is bounded on the Westwards by the Pacific Ocean and on the Eastwards by the Gulf of Nicoya and the Rio del Salto . . . a small stream entering into the head of the Gulf and having its sources not far from the Southerly shore of Lake Nicaragua."[25]

The northern boundary of the district was the lake and (according to Costa Rica) the La Flor River, though Rives did not need to decide that. Nor did he need to decide what line joined the source of the Rio del Salto with "the mouth of the San Juan River at the port of San Juan del Norte", but he did say that he had "no reason for thinking that it should have been a straight line"[26], let alone a straight line shown by Professor Brownlie.

23. (Tab 54) What is clear is that Nicoya could not have extended to the mouth of the Colorado River as Nicaragua portrays it. "The District of Nicoya lies on the Pacific side of the Continent", as Rives said; and even when Nicoya was part of the Captaincy-General of Guatemala, maps showed its boundary extending north from the Rio del Salto to the lake. An example is in

---

[23] www.asamblea.gob.ni/opciones/constituciones/1824-11-22.doc; First Rives Report, CMN, Complete Annexes, Ann. 70, p. 4.

[24] First Rives Report, CMN, Complete Annexes, Ann. 70, p. 5.

[25] *Ibid.*, p. 3.

[26] *Ibid.*, p. 6.

tab 54 in your folders[27]. Quite independently of Nicoya, the northern boundary of Costa Rica ran along the Desaguadero, as stated in the 1573 Royal Charter[28].

24. Professor Brownlie asserted once more that "the San Juan de Nicaragua River belonged exclusively to the Province of Nicaragua from 1573"[29]. That is not the case. Formally Nicaragua did not gain a territorial claim on the Caribbean coast until 1745 and even then it was occupied by the Moskito Indians under a British protectorate that did not end until 1860. In 1858 Nicaragua did not have possession of the port of San Juan del Norte. This is mentioned in Article 5 of the Treaty of Limits.

25. In the event, Rives concluded that the 1838 Constitution of Nicaragua "did not definitely fix the boundaries of the State"[30], and that the 1858 Treaty was "a mere treaty of limits, settling disputed boundaries, and not one involving a cession of territory and an amendment to the Constitution"[31]. It followed that the Treaty of Limits was valid — a conclusion upheld by President Cleveland and part of the *res judicata* in this case.

26. Thus in 1858 Nicaragua abandoned its claim to Nicoya, but it got the area south of the La Flor River, a strip along the southern shore of the lake, giving it complete control of the lake for the first time, as well as the whole course of the San Juan River. This was not an unequal settlement.

(c) ***The true object and purpose of the Treaty of Limits***

27. That brings me to the third point — the object and purpose of the Treaty of Limits. Professor Brownlie, consistently with the Nicoya thesis, treated it as entirely about territorial sovereignty.

28. But that is to ignore the elephant in the room. The elephant in the room — the obvious purpose of the Treaty — was the interoceanic canal. This was why the common defence of the common bays at each end of the proposed route of the canal was necessary, and the

---

[27]See http://books.google.nl/books?id=iACOaiasV1oC&printsec=frontcover&dq=rio+san+juan+clotilde+obregon&hl=fr

[28]Royal Charter to Diego de Artieda, CMN, Ann. 86.

[29]CR 2009/5, p. 25, para. 29.

[30]First Rives Report, CMN, Complete Annexes, Ann. 70, p. 12, para. 29.

[31]*Ibid.*, p. 11.

demilitarization along that route effected by Article IX. This was why the completely new boundary south of the lake was so important. This is why the boundary of the two States lay along the left bank of the San Juan. And this is why the *quid pro quo* of freedom of navigation on the common course of the river was given: it was the only highway in the region — it still is — and if sovereignty over the highway belonged to one State, a broad right of use was in the very same article in the "pero" clause conceded to the other.

29. (Tab 55) George Rives understood the situation perfectly well when, in response to the tenth question of doubtful interpretation, he defined the "natural rights" of Costa Rica referred to in Article VIII. Article VIII defined Costa Rica's *droit de regard* in relation to a future canal: if Costa Rica's "natural rights" were not affected by the canalization project, its vote was only advisory. You will see on your screen, and in your folders, how Rives defined those natural rights. And the crucial phrase is at the end. The natural rights of Costa Rica are those rights which *inter alia* she owns: "in that part of the delta of the River San Juan which she owns or of the portion of the River itself in which she has perpetual rights of free navigation and other riparian rights"[32]. This is how Rives expressed the subject-matter of the Treaty of Limits from a Costa Rican point of view. Cleveland's Award was to the same effect, though he added the words "and perhaps other rights not here particularly specified"[33], an indication of the extensive approach to the interpretation of the Treaty of Limits which Cleveland took.

30. I stress: Costa Rica's natural rights according to Rives extended to "the portion of the River itself in which she has perpetual rights of free navigation and other riparian rights". It was not that the Treaty of Limits was not a territorial settlement — the view foisted on us by Professor Brownlie. It *was* a territorial settlement, but it entailed the river, and it did so on a perpetual basis. If ever there was a treaty establishing "obligations and rights . . . relating to the regime of a boundary" within the meaning of Article 12 of the 1978 Vienna Convention[34], this was it.

---

[32]Second Rives Report, CMN, Complete Annexes, Ann. 71, p. 15.

[33]Cleveland Award, point 10: MCR Ann. 16, p. 99.

[34]Vienna Convention on Succession of States in respect of Treaties, 23 May 1978, 1946 *UNTS* 3, Art. 11 *(b)*.

C. The perpetual right of free navigation

31. I turn to what Rives was happy to call — *tout court* — Costa Rica's "perpetual rights of free navigation". Here I need to make three short points.

(a) *The right is permanent in character*

32. In another of its exercises in revisionism, Nicaragua suggests "that Costa Rica's rights of navigation would [not] necessarily be 'perpetual'". Professor McCaffrey stated these rights would effectively cease with the conversion of the river into a canal"[35]. Now this is a further hypothetical, like the large-scale dredging, and the Court does not need to pronounce on this issue any more than on dredging. But you will understand that the issue, having been raised by Nicaragua, requires a response. In fact the Treaty of Limits expressly provides for consultation with Costa Rica in respect of all future canalization schemes: it was Nicaragua's failure to comply with this obligation which led to the case before the Central American Court. I have referred already to Article VIII which provides that "if the [canal] transaction does not injure the natural rights of Costa Rica, the vote asked for shall be only advisory". I have already quoted Rives's conclusion on what these natural rights are, including the "perpetual rights of free navigation and other riparian rights". Rives added that where these natural rights were engaged "Costa Rica would have a right of veto, and, her assent being essential to the validity of the agreement, she would in effect become a party to any complete grant for inter-oceanic transit", though without being entitled to share in "the profits reserved for Nicaragua"[36]. President Cleveland answered the eleventh question accordingly[37]. So the Treaty of Limits provided for the eventuality of canalization, in a form which would preserve the reality of Costa Rica's "perpetual rights of free navigation and other riparian rights".

(b) *Even if Article VI referred to "articles of trade", these would be words of extension*

33. My second point concerns the dreaded "articles of trade" to which our colleagues say our freedom is limited. Professor Kohen will deal with the interpretation of the phrase "objetos de comercio". In what I say I am going to assume, *quod non*, that Nicaragua is right in interpreting

---

[35]CR 2009/5, p. 29, para. 6 (McCaffrey).

[36]Rives Second Report, CMN, Complete Annexes, Ann. 71, p. 15 (response to point 11).

[37]Cleveland Award, point 11: MCR, Ann. 16, pp. 99-100.

this phrase as "articles of commerce". My point is that even if it means "articles of commerce" or "articles of trade" these are words of extension, not limitation.

34. Mr. President, Members of the Court, if I gave you a right to transit my river — a perpetual right of free navigation — and I later add the phrase "with articles of trade" I am not qualifying, limiting or reducing my grant — I am clarifying and extending it. We are talking about free navigation — amongst other things, free of taxes, imposts and charges including customs duties. I might grant a right of navigation to you but exclude the goods you are carrying. A very important aspect of the word "free" is the exemption from customs duties. Article VI extends that freedom even to goods landed on the opposite side of the river, and Article V gave Nicaraguan goods customs exemption at Punta de Castilla for as long as the then independent port of San Juan del Norte was not recovered and remained a "*free* port". The additional phrase "with articles of trade" is not there as a limitation of the right of free navigation; it makes it clear that the freedom extends to trade goods you may be carrying with you. The words are, quite simply, not words of limitation at all.

35. What would a right of free navigation with articles of trade look like — how would it work — if the phrase "articles of trade" involved a limitation or a restriction, as Nicaragua now contends? I would start off in the morning with my eggs for market, eggs produced by my riparian hens: obvious articles of trade. I would be free on the river — no visas, no taxes, no charges. I arrive with my eggs, intact I hope, at the busy local market of Sarapiquí and in a trice all my eggs are sold. But now I have no more eggs, no more articles of trade: *how do I get back to my hens*? In selling my articles of trade I have sold my freedom on the river for the day. I am stuck; I have to go to San José to get a visa, in the course of doing which I spend all the profits I have made from selling my eggs! This one-way freedom is no freedom at all — the freedom to leave the river with no right of return. And it is no answer for Mr. Reichler to say that riparians are exempt from visas[38]: that is a mere concession. Article VI makes no distinction between riparians and non-riparians.

[38]CR 2009/4, p. 24, para. 43 (Reichler).

36. (Tab 56) Let me issue a formal challenge to colleagues opposite. Find me a treaty providing for freedom of navigation for persons if, and only if, they are carrying trade goods. This is what such a provision should look like: "but the Republic of Costa Rica shall have the perpetual right of free navigation on the said waters, if and only if *[si y sólo si]* such navigation is with articles of trade . . ."[39] That is not what Article VI says. The Nicaraguan argument based on "articles of trade" is, with great respect, obvious nonsense.

(c) ***Nicaragua's argument based on "articles of trade" is inconsequential***

37. But there is a further problem with Nicaragua's distinction between voyagers with and without trade goods — blankets and beads. It is entirely inconsequential in terms of the régime applied in practice. I confess, Ambassador Argüello, that I have been to the river: I went there without any articles of trade. But it made no difference whether I had articles of trade or not. No one *asked* if I was carrying articles of trade; no one checked the boat for safety, or for articles; we stopped, I paid, the boatman paid — though he was local —, we stopped repeatedly at army posts; no services were performed, no checks were carried out; we stopped, we paid, we stopped some more, eventually we left. We were wiser for the experience, no doubt — but poorer and completely unserviced by Nicaragua.

38. Again the point is a short one. The lawyer's argument based on "objetos de comercio" bears no relation to the actual régime of reporting, certification, payment, imposts, applied on the river. It is entirely inconsequential. Trade goods have nothing to do with it.

Outline of Costa Rica's reply

39. Mr. President, Members of the Court, this concludes my initial general remarks. With your permission, Mr. President, Professor Kohen will now deal in more detail with the interpretation of Article VI; Professor Caflisch will deal with the right of regulation and the individual Nicaraguan measures; I will return to discuss public navigation, related rights and remedies, and Ambassador Ugalde will conclude.

Mr. President, I would ask you now to call on Professor Kohen.

---

[39]Spanish version: "pero la República de Costa Rica tendrá el derecho perpetuo de libre navegación en dichas aguas, entre la desembocadura de río indicada y el punto, a tres millas inglesas de distancia de Castillo Viejo, si y sólo si, esta navegación es con artículos de comercio . . ."

The PRESIDENT: Thank you, Professor Crawford, for your presentation. I now give the floor to Professor Marcelo Kohen.

M. KOHEN :

II. L'ARTICLE VI DU TRAITÉ DE LIMITES SE RÉFÈRE «AUX FINS DU COMMERCE»

1. Monsieur le président, Messieurs les juges, lors du premier tour de plaidoiries, la Partie adverse a maintenu son interprétation de l'expression «con objetos de comercio» comme signifiant uniquement «marchandises». Il est vrai que ses conseils ont suivi des pratiques différentes. Antonio Remiro, et par la suite Alain Pellet, ont préféré la formule «avec des objets de commerce». D'ailleurs, le premier a aussi employé «avec des choses faisant l'objet de commerce». Antonio Remiro a employé «avec des choses faisant l'objet d'activités commerciales»[40]. Certes, il a aussitôt affirmé que cela voulait dire, en bon français, «avec des marchandises»[41]. Paul Reichler et Steven McCaffrey ont, quant à eux, choisi de ne pas s'aventurer dans des traductions et ont employé directement l'espagnol tout au long de leurs exposés, et ceci alors même que Cleveland a utilisé l'expression «purposes of commerce»[42]. Ian Brownlie, pour sa part, après avoir cité correctement l'article VI du traité Cañas-Jerez a ajouté : «the words «for the purposes of commerce» are not accepted by Nicaragua as an accurate translation into English»[43]. M. Brownlie n'a pas pour autant indiqué depuis quand le Nicaragua refuse cette traduction et comment cet Etat l'a fait savoir.

2. Il doit être troublant pour une partie qui se présente devant votre Cour et qui conteste l'interprétation et la traduction d'un traité, de ne pas être capable de produire une version du traité allant dans son sens. D'autant plus que la Cour dispose de la seule version que la Partie a produite et qui exprime exactement le contraire de ce qu'elle prétend devant votre prétoire.

3. L'objet de mon exposé sera de réfuter les arguments avancés par le Nicaragua la semaine dernière relativement à l'expression controversée. Conformément à vos instructions, je ne

---

[40] CR 2009/4, p. 36-37, par. 2, 5 et 6.

[41] CR 2009/4, p. 46, par. 42 (Brotóns).

[42] CR 2009/5, p. 9-12, par. 6, 9, 11, 13, 14 (Reichler) , CR 2009/5, p.28-31, par. 4, 5, 7, 8, 9 (McCaffrey).

[43] CR 2009/4, par. 19 (Brownlie).

reviendrai pas sur les questions que nous avons soulevées lors du premier tour et au sujet desquelles nos contradicteurs ont gardé un silence éloquent.

4. Le plan de mon exposé est le suivant : *premièrement*, j'aborderai les arguments de la Partie adverse sur le sens des termes «con objetos de comercio» en général. *Deuxièmement*, la pertinence pour cette affaire de la traduction identique faite par les parties à l'occasion de l'arbitrage du président des Etats-Unis d'Amérique. *Troisièmement*, la conception très étroite que le Nicaragua adopte relativement à la notion de «comercio», démontrant que cette notion inclut le transport de passagers en général et de touristes en particulier. *Quatrièmement*, je me référerai à la pratique subséquente, qui confirme l'interprétation que nous avons faite de l'article VI du traité Cañas-Jerez. *Cinquièmement*, je viendrai sur les digressions temporelles d'Alain Pellet relatives à l'interprétation évolutive des traités.

A. L'interprétation du membre de phrase «con objetos de comercio»

5. Antonio Remiro nous a accusé d'avoir transformé — je cite — «l'acception courante et naturelle de l'expression *objetos de comercio*, à laquelle l'article VI du traité lie le droit de libre navigation, en un concept «finaliste», selon lequel *objets de commerce* ne représenterait pas des *choses*, des *marchandises*, mais des *fins*, des *objectifs* commerciaux»[44].

6. *Primo*, mon ami et contradicteur suppose bien rapidement et, ceci sans preuves à l'appui, qu'il n'existe qu'une seule acception courante et naturelle de l'expression «objetos de comercio» et que celle-ci est «marchandises». *Secundo*, nous n'avons pas transformé quoi que ce soit. Si quelqu'un a modifié ce qui a été l'interprétation communément acceptée, il s'agit bien du Nicaragua ! Monsieur le président, l'interprétation «finaliste», comme l'appelle Antonio Remiro, le Nicaragua l'a adoptée devant Cleveland en traduisant «for the purposes of commerce» et l'a même explicitée dans ses publications officielles de 1954 et 1974 en parlant de la navigation costa-ricienne «con fines de comercio y fiscales»[45]. Franchement, Monsieur le président, je ne comprends pas ce procès que nous fait la Partie adverse, alors qu'elle-même a indiqué dans son

[44] CR 2009/4, p. 36, par. 3.

[45] Nicaragua, ministère des affaires étrangères, *Situación juridica del Rio San Juan*, Managua 1954, mémoire du Costa Rica (MCR), vol. 6, annexe 219 ; Nicaragua, ministère des affaires étrangères, *Situación juridica del Rio San Juan*, Managua, 1974, MCR, vol. 6, annexe 222. Dossier de plaidoiries, onglet n° 18.

contre-mémoire que, je cite, «the right of free navigation is articulated in the form of a careful statement of purposes»[46].

7. M. Argüello n'a pas apprécié que je soutienne qu'il a traduit à l'espagnol l'expression française «sous le rapport du commerce» de la manière suivante : «con fines comerciales»[47]. Il ne m'a pas contredit jeudi dernier, bien au contraire. Le distingué agent du Nicaragua vous a aussi donné sa traduction anglaise de «con fines comerciales», traduction qu'il a utilisée pour expliquer ce que «sous le rapport du commerce» veut dire en espagnol. Sans surprise, cela donne «for commercial purposes»[48]. Le tour est fait : voilà qu'il arrive à une variante équivalente de la traduction de «con objetos de comercio» en anglais à laquelle tout le monde adhérait avant la naissance de ce différend, y compris le Nicaragua!

a) ***Le débat linguistique confirme l'interprétation costaricienne***

8. Antonio Remiro a prétendu que le rapport Moreno de Alba n'a pas apporté des preuves documentaires à l'appui de ses conclusions[49]. Mais chacun des commentaires de l'académicien hispano-américain est étayé par des références concrètes aux utilisations des termes examinés. De plus, un appendice est joint au rapport. C'est un rapport complet, concret, fouillé et pertinent.

9. Comme M. Seco, Antonio Remiro Brotóns a écarté d'un revers de la main tous les exemples du tableau n° 1 de la réplique du Costa Rica[50] dans lesquels le singulier «objeto» signifie «fin»[51]. Ce sont soixante-deux exemples, un nombre assez impressionnant en effet, face à une thèse qui affirme que le terme «objetos» au pluriel ne peut *jamais* signifier «fins»[52] ! Et ces exemples ne sont pas tirés de la littérature ou de journaux n'ayant aucun lien avec la situation : il

---

[46] Contre-mémoire du Nicaragua (CMN), par. 2.1.51.

[47] Carlos J. Argüello Gomez, *Algunos aspectos jurídicos sobre el Tratado Jerez-Cañas y el Laudo Cleveland*, ministère des affaires étrangères, Managua, 26 août 1998. Disponible sur : http://www.joseacontreras.net/dirinter/america/Nicaragua_Rio_San_Juan.pdf (visité le 1er mars 2009). Jusqu'au 27 février 2009 aussi *in* : http://www.euram.com.ni/pverdes/articulos/aspectos_juridicos_rio_san_juan.htm. Dossier de plaidoiries, onglet n° 27.

[48] CR 2009/4, p. 12, par. 16 (Argüello).

[49] CR 2009/4, p. 39, par. 14 (Brotóns).

[50] Réplique du Costa Rica (RCR), tableau 1, «Use of the term «objetos» as meaning «purposes» in 19th Century documents», p. 99-126.

[51] RCR, tableau 1, documents, 1, 2, 3, 4, 5, 6, 7, 8, 9, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31.

[52] CMN, par. 4.1.27; DN, par. 3.12.

s'agit uniquement de l'emploi du terme «objeto» comme «fin», au singulier ou au pluriel, dans des traités et des contrats publics conclus au cours du XIX[e] siècle par l'un ou l'autre des pays. Le rapport Moreno de Alba a expliqué pourquoi la prétention selon laquelle «objetos» au pluriel ne peut signifier «fins» n'est pas correcte. Je vous y renvoie[53].

10. Il restait tout de même dix-huit autres exemples d'utilisation du terme «objetos» (au pluriel) dans le sens de «fins». Le conseil nicaraguayen en a compté seize, mais le fait est que dans un seul et même texte le terme apparaît deux fois dans le sens de «fins». Peu importe. Le professeur Remiro essaye d'écarter une dizaine de cas sous prétexte que le terme «objetos» (au pluriel) apparaît seul[54]. Est-ce là une bonne raison ? Le Nicaragua ne nous avaient-il pas dit que «objetos» au pluriel ne voulait *jamais* dire «fins» ?[55]

11. Le conseil nicaraguayen pense que, au vu des cas mentionnés dans le «Corpus diachronique de l'espagnol» dans lesquels l'expression «objetos de comercio» est employée comme — je le cite — «choses faisant l'objet d'activités commerciales», la seule signification possible de l'expression «con objetos de comercio» à l'article VI est «marchandises»[56]. Je remarque que dans aucun de ces cas l'expression est précédée de la préposition «con», tel qu'elle figure à l'article VI. Le conseil de la Partie adverse oublie trop vite l'importance du contexte afin de déterminer le sens des termes qui comportent plusieurs significations. Son expert l'a affirmé et le professeur Remiro l'a lui-même cité[57]. C'est vrai que M. Seco ne dit pas ce qu'il fait, mais cela est une tout autre question.

12. Pour trouver une analyse sémantique et — syntactique, il faut se référer au rapport de M. Moreno de Alba. Il procède à l'exercice suivant. Allégé de tous les éléments non nécessaires à l'analyse en question, la phrase se résume à ce qui suit : «La République du Costa Rica aura … un droit … de libre navigation … aux fins du commerce … avec le Nicaragua…» Il montre que le seul sens que le syntagme «con objetos de comercio» peut revêtir est «aux fins du commerce». En effet, si on lit «con objetos de comercio» comme signifiant «marchandises», le résultat auquel on

---

[53] Documents annexés à la lettre de l'agent du Costa Rica du 27 novembre 2008, annexe I, III.

[54] CR 2009/4, p. 40, par. 18 (Brotóns).

[55] CMN, par. 4.1.27, duplique du Nicaragua (DN), par. 3.12.

[56] CR 2009/4, p. 39-40, par. 15.

[57] CR 2009/4, p. 37-38, par. 8.

parvient est un non-sens, aussi bien par rapport au terme «navigation» que par rapport au syntagme «avec le Nicaragua». Relativement au premier de ces termes, cela fonctionnerait comme un complément, qui signifierait «navigation accompagnée de marchandises» ou «navigation en cohabitation avec de marchandises» ou «navigation au moyen de marchandises». En ce qui concerne le second groupe de mots, cela donnerait la phrase suivante : «La République du Costa Rica aura … un droit … de libre navigation … avec des marchandises … avec le Nicaragua». Et M. Moreno de Alba de conclure : «Navigation avec le Nicaragua ? Des marchandises avec le Nicaragua ? Impossible. Il s'agit là encore d'une ineptie car, dans la reformulation, le nom *commerce* perd son sens *déverbal* (issu d'un verbe) et donc, laisse le syntagme *avec le Nicaragua* sans aucun lien sémantique ni syntactique[58].

b) ***Les traités d'amitié, de commerce et de navigation conclus par les parties à la même époque que le traité Cañas-Jerez***

13. L'analyse linguistique se voit d'ailleurs confirmée par la pratique précédente ou contemporaine à la conclusion du traité Cañas-Jerez. Je voudrais me servir d'exemples non seulement intéressants du point de vue linguistique, mais aussi et surtout juridique. Car ce sont des traités conclus par les deux Parties. Et pas n'importe quels traités, puisqu'il s'agit de traités qui concernent deux termes qui sont essentiels à l'interprétation de l'article VI du traité de 1858 : «navigation» et «commerce».

14. Mon ami Antonio Remiro s'est référé aux traités de commerce et de navigation qui, depuis le traité Jay utilisent l'expression «para los objetos de su comercio» en espagnol et «for the purposes of their commerce» en anglais. Au sujet des Parties à cette affaire, il a cité le traité d'amitié, de commerce et de navigation Costa Rica/Etats-Unis (Molina-Webster) de 1851, et les trois traités d'amitié, de commerce et de navigation Etats-Unis/Nicaragua de 1857 (Cass-Irrisari), de 1859 (Lamar-Zeledón) et de 1867 (Ayon-Dickinson)[59].

15. Voici à l'écran un exemple de la formule type employée dans tous ces traités, l'article II du traité Cass-Irrisari de 1857, dans ses versions espagnole et anglaise, également authentiques[60].

---

[58] Documents annexés à la lettre de l'agent du Costa Rica du 27 novembre 2008, annexe I, VIII.2.

[59] CR 2009/4, p. 41, par. 21 (Brotóns).

[60] Dossier de plaidoiries, onglet n° 58.

Le conseil du Nicaragua ne s'est pas donné la peine d'appliquer sa théorie linguistique à l'expression «para los objetos de su comercio». Manifestement, traduire «para los objetos de su comercio» en français en disant «pour les objets de son commerce» et prétendre ensuite que cela signifie «pour les marchandises» aurait dépassé les limites de la témérité. Il a pourtant conclu avec beaucoup de courage que ces traités ne prouvent pas que le terme «objetos» signifie «fins»[61].

16. Le conseil nicaraguayen, contrairement à ses habitudes, du moins dans cette affaire, se livre à un exercice qu'il aurait pu appeler «finaliste», pour justifier son interprétation selon laquelle, «para los objetos de su comercio» veut dire des marchandises et uniquement des marchandises. Il nous dit : «Leur commerce porte évidemment sur les marchandises qu'ils achètent et qu'ils vendent et logiquement qu'ils entreposent et emmagasinent dans des bâtiments et des entrepôts»[62]. Je me pose les questions suivantes : comment viennent-ils, les citoyens qui, selon les termes de ces traités, ont le droit d'arriver sur le territoire de l'autre partie ? Ont-ils le droit de venir, au regard de l'interprétation nicaraguayenne, «sans articles de commerce» ? Je peux croire que la fonction d'un entrepôt est en effet d'emmagasiner des marchandises, mais ce n'est pas celle d'une maison. Le professeur Remiro pourra-t-il m'expliquer quel type de marchandise l'*Accessory Transit Company* de Cornelius Vanderbilt achetait et vendait lorsqu' à l'époque elle commerçait sur le fleuve San Juan, transportant environs 68 000 passagers entre 1848 et 1869[63] ?

17. Par ailleurs, la thèse du professeur Remiro doit faire face à un problème insurmontable. Le texte authentique anglais de ces traités utilise la formule «for the purposes of their commerce». Comme il est établi au paragraphe 3 de l'article 33 de la convention de Vienne sur le droit des traités, «[l]es termes d'un traité sont présumés avoir le même sens dans les divers textes authentiques»[64]. Aucun doute n'est donc possible : «*objetos*» et «*purposes*» ont le même sens. «Objetos de comercio» et «objetos de su comercio» ont été traduits à la même époque par «purposes of commerce» et «purposes of their commerce». Je pense qu'il ne vaut plus la peine de

---

[61] CR 2009/4, p. 42, par. 26 (Brotóns).

[62] CR 2009/4, p. 42, par. 25 (Brotóns).

[63] http://en.wikipedia.org/wiki/Accessory_Transit_Company ; http://www.bruceruiz.net/PanamaHistory/argonauts.htm (visités le 8 mars 2009)

[64] «The terms of the treaty are presumed to have the same meaning in each authentic text» Cf., *Ile de Kasikili/Sedudu (Botswana/Namibie), arrêt, C.I.J. Recueil 1999 (II)*, p. 1062, par. 25.

s'appesantir sur le point de savoir si «*objetos*» au pluriel peut indiquer ou non «fins» lorsque ce terme est associé à celui de «comercio». A ce stade, la réponse va de soi.

c) *Les traités de l'époque utilisaient d'autres expressions pour se référer aux marchandises*

18. Je passe maintenant à la pratique de l'époque pour désigner des marchandises. M. Remiro s'est seulement contenté de voir dans le tableau n° 2 de la réplique du Costa Rica la preuve de la richesse de notre langue commune[65]. Dommage qu'il ne s'y soit pas arrêté un peu plus en détails. Parce qu'il n'existe pas un seul texte qui emploie l'expression *objetos de comercio* pour définir des marchandises.

19. En effet que découvrons-nous ? Que sur 218 cas cités, 43 emploient «artículos», suivis ou non d'une qualification, 32 «mercancías», 19 «mercaderías», 26 «efectos», 28 «productos», 16 «manufacturas», 13 «géneros/jéneros» et 13 «objetos», dans un contexte sans équivoque possible. Il y a encore d'autres expressions employées[66].

20. Le conseil du Nicaragua aurait pu apprécier que lorsqu'on voulait évoquer des marchandises, on utilisait des expressions dépourvues d'ambiguïté. Il aurait aussi pu constater — puisqu'il a été longuement question du transport du café dans les plaidoiries de la Partie nicaraguayenne —, que quand on voulait se référer concrètement à des articles d'importation ou d'exportation, on le faisait explicitement[67], de même que lorsqu'on voulait parler des articles naturels ou de production nationale[68]. L'article VI du traité Cañas-Jerez se trouve loin, très loin, de l'une et de l'autre de ces hypothèses.

d) *L'approche du Costa Rica devant Cleveland mène à une interprétation de l'article VI qui va bien au-delà du transport de marchandises*

21. Alain Pellet et Steven McCaffrey ont cru trouver un argument en faveur de l'interprétation nicaraguayenne dans un passage de la plaidoirie du Costa Rica devant Cleveland[69], en lui faisant dire ce qu'il ne dit pas et en oubliant en passant de mentionner la réponse du

---

[65] CR 2009/4, p. 43, par. 27 (Brotóns).

[66] RCR, p. 127-151.

[67] RCR, tableau n° 2, documents n° 1, 2, 3, 5, 8, 9, 11, 12, 14, 15, 16, 17, 18, 20, 21, 22, 24, 25, 26.

[68] RCR, tableau n° 2, documents n° 5, 9, 10, 15, 22.

[69] CR 2009/4, p. 58-59, par. 20-21 (Pellet) ; CR 2009/5, p. 31-32, par. 13 (McCaffrey).

Costa Rica. Il s'agit d'un passage qui pose une question rhétorique d'ordre général traitant de l'étendue du droit de libre navigation découlant de l'article VI[70]. Vous voyez à l'écran la réponse complète, que vous avez aussi dans vos dossiers à l'onglet n° 59. Je cite quelques extraits importants relativement à notre question :

> «La réponse semble être très simple … Il semble être indiscutable que le Costa Rica peut naviguer sur le San Juan avec des bateaux publics qui ne sont pas des vrais navires de guerre … Le sens de l'expression «navigation commerciale» inclut nécessairement la police douanière, l'acheminement du courrier ainsi que tout autre service public de même nature»[71].

22. La réponse du Costa Rica à sa propre question rhétorique est donc dépourvue de toute ambiguïté. Elle est bien évidemment négative. Il est simplement impossible de déduire de ce texte que pour le Costa Rica «objetos de comercio» voulait dire «marchandises» ou que la seule «fin du commerce» équivalait au transport de marchandises. Bien au contraire. «Navigation commerciale» et non pas «navigation avec des marchandises», voilà comment le Costa Rica interprétait l'expression «navegación con objetos de comercio» à cette époque.

e) ***Si le Nicaragua avait des doutes au sujet de la traduction présentée à Cleveland, il aurait mis les mots équivalents espagnols entre parenthèses***

23. Voyons maintenant ce qu'il en a été du côté du Nicaragua. Dans la traduction du traité de 1858 produite par cet Etat et présentée au président Cleveland, les mots originaux en espagnol apparaissent entre parenthèses lorsque le Nicaragua a considéré que la traduction exigeait une clarification. Vous voyez à l'écran l'article VI tel que présenté par le Nicaragua à l'arbitre. Comme vous pouvez l'observer à l'onglet n° 60 de vos dossiers, la Partie adverse a recouru à cette clarification à quatre reprises, pour les mots ou expressions «atracar», «canalización», «este voto será consultivo» et «crédito activo» respectivement aux articles VI, VII, VIII et XI. Sans surprise, le Nicaragua n'a pas trouvé nécessaire d'insérer entre parenthèses «con objetos de comercio» au regard de sa traduction «for the purposes of commerce».

---

[70] MCR, vol. 6, annexe 207, p. 831 [p. 155].

[71] *[Traduction du Greffe.]* Texte anglais original: «The answer seems to be very simple … It seems to be beyond discussion that Costa Rica can navigate in the San Juan river with public vessels, which are not properly men-of-war. Within the meaning of the words, commercial navigation, both the revenue police, the carrying of the mails, and all other public services of the same kind are necessarily included». *Ibid.*, p. 831-832 [p. 155-156]. Dossier de plaidoiries, onglet n° 59.

f) ***La sentence Cleveland devient illisible si l'on suit l'interprétation nicaraguayenne***

24. Dans sa plaidoirie du 5 mars, Alain Pellet a semblé semer la confusion en lisant la sentence Cleveland et — en passant — a fait preuve d'une d'imagination débordante en m'attribuant des propos que je n'ai pas tenus relativement à la sentence[72]. Mon contradicteur et cher ami affirme de manière des plus légères : «Comme l'a relevé le professeur Kohen, cette phrase ne fait pas grand sens en français, que l'on traduise «con objetos de comercio» par «avec des marchandises» ou «à des fins commerciales»»[73]. La réalité est que, après avoir lu la sentence dans la partie qui utilise l'expression «purposes of commerce», j'avais affirmé que «[l]a lecture nicaraguayenne aboutirait au résultat absurde de l'exercice d'un droit d'usage du fleuve aux «articles de commerce»»[74]. Donc, seule une lecture conforme *à l'approche du Nicaragua* serait absurde. De plus, Monsieur le président, dans la sentence Cleveland, rien n'est à traduire de l'espagnol parce que l'arbitre rend sa sentence en anglais et utilise «purposes of commerce» dans le passage en question. Ceci fait beaucoup de sens, aussi bien en anglais que dans la traduction en français du Greffe par ailleurs.

25. Les choses ne se sont pas arrêtées là. Il s'agissait sans doute d'un moment de fébrilité. Alain Pellet a ensuite décidé de se plonger dans des eaux troubles et très agitées, bien plus agitées que celles du San Juan. Il a lancé une attaque contre la sentence Cleveland, affirmant que la référence faite à la jouissance des «fins du commerce» n'était peut-être qu'«une simple inadvertance de l'arbitre», ou que ce dernier, et je cite mon ami,

> «a préféré ne pas se lancer dans une interprétation de l'expression «con objetos de comercio» (traduite par «for purposes of commerce» par les Parties) et a délibérément choisi de recourir aux guillemets, afin de signifier qu'il utilisait cette expression sans se prononcer sur un problème d'interprétation que les Parties ne lui avaient pas soumis et sur lequel elles ne s'étaient pas exprimées»[75].

26. Alain Pellet nous démontre ici toute l'étendue de son imagination. Bien sûr, je comprends que l'article 2 de la sentence Cleveland mette le Nicaragua dans une situation très embarrassante. Les guillemets s'expliquent tout simplement par le fait que Cleveland était en train

---

[72] CR 2009/4, p. 59, par. 21 (Pellet).

[73] CR 2009/4, p. 59, par. 21 (Pellet) ; note de bas de page omise.

[74] CR 2009/2, p. 64, par. 58 (Kohen).

[75] CR 2009/4, p. 59, par. 21 (Pellet).

de citer les termes de l'article VI tels que traduits par les deux Parties[76]. Alain Pellet crée par ailleurs «un problème d'interprétation» qu'il sait inexistant, puisqu'il avait affirmé auparavant qu'il n'y avait pas de désaccord entre les Parties sur le sens et la portée de l'article VI[77].

27. Le texte de l'article 2 de la sentence est clair et dépourvu d'ambiguïté : «l'exercice du droit d'usage de ce fleuve «aux fins du commerce» que lui reconnaît ledit article», ceci fait pleinement sens ; «l'exercice du droit d'usage de ce fleuve «avec des marchandises» que lui reconnaît ledit article ne fait pas sens du tout.

g) ***La première sentence Alexander : une approche large du commerce***

28. Alain Pellet a également cru pouvoir trouver dans la première sentence arbitrale, rendue par l'ingénieur Alexander, un appui à la thèse nicaraguayenne. Dans cette sentence, l'arbitre indique que, «throughout the treaty, the river is treated and regarded as an outlet of commerce»[78]. Aux yeux de mon éminent contradicteur, cette expression «vise clairement le commerce «avec des marchandises»»[79]. A mon avis, cette affirmation rejoint plutôt l'interprétation costa-ricienne. Alexander utilise «commerce» et non «trade» et, comme le Nicaragua l'a affirmé devant la Cour, en anglais «commerce» est un concept plus large que «trade», et va au-delà de l'achat et la vente de marchandises[80]. Cela inclut donc les diverses acceptions, y compris le transport des personnes.

B. La traduction identique des parties devant Cleveland entraîne des conséquences juridiques

29. Je passe maintenant aux conséquences juridiques de la traduction identique des parties devant Cleveland. A en croire Antonio Remiro, «le Costa Rica prétend remplacer l'interprétation du seul texte authentique rédigé en espagnol par l'interprétation d'une traduction anglaise faite à l'occasion de l'arbitrage Cleveland qu'il considère mieux adaptée à ses prétentions»[81]. Pas du tout, Monsieur le président. Nous ne prétendons pas remplacer quoi que ce soit.

---

[76] RCR, par. 3.66-3.68.

[77] CR 2009/4, p. 57, par. 19 (Pellet).

[78] Sentence arbitrale n° 1, 30 septembre 1897, *Pasicrisie Internationale 1794-1900* (Berne : Stampfli,1902, réimpr. par P.-M. Eisemmann, La Haye : M. Nijhoff, La Haye, 1997), p. 531, MCR, vol. 2, annexe 18. MCR, par. 4.24. Traduction : «partout dans le traité, le fleuve est considéré comme un débouché pour le commerce».

[79] CR 2009/4, p. 60, par. 22 (Pellet).

[80] *Memorial of Nicaragua (Questions of Jurisdiction and Admissibility), I.C.J. Pleadings, Military and Paramilitary Activities in and against Nicaragua*, vol. I, p. 403-404.

[81] CR 2009/4, p. 40, par. 16 (Brotóns).

30. Il va de soi que le texte du traité est en espagnol. Nous soutenons simplement que les deux Parties ont traduit l'article VI de la même manière : «for the purposes of commerce».

31. Le professeur Pellet me concède qu'il n'existait pas de désaccord entre les Parties au sujet de l'interprétation des termes «con objetos de comercio» devant Cleveland. Mais il ajoute qu'«il n'y a eu aucun accord pour l'excellente raison qu'il n'y avait aucun désaccord»[82]. Franchement, j'ai un peu de mal à suivre le raisonnement de mon collègue. Apparemment, pour Alain Pellet, pour que deux Etats se mettent d'accord sur quelque chose, il faut nécessairement qu'ils aient été auparavant en désaccord. C'est une étrange manière de concevoir les relations internationales. Non, Monsieur le président. Les Etats se mettent heureusement d'accord sur beaucoup de questions dans le but de poursuivre des fins communes, sans qu'il soit obligatoire qu'il y ait préalablement des différends ou des divergences relativement aux objets de ces accords.

32. Allons un peu plus loin sur la question concrète qui nous occupe : l'attitude des parties devant Cleveland. Il n'y avait pas de désaccord sur la portée de l'expression «con objetos de comercio». Personne n'a soulevé de point d'interprétation douteuse, C'est tout ? Non, ce n'est pas tout. Sur quoi portait l'accord devant Cleveland ? Sur la façon de traduire cette expression en anglais.

33. J'avais constaté lundi dernier que les deux parties ont traduit la phrase présentement controversée exactement de la même manière, pas un iota de différence[83]. Alain Pellet l'a reconnu[84]. Pour moi, cela démontre non seulement qu'il n'y avait pas de désaccord, mais aussi que les parties étaient d'accord sur la façon de traduire «con objetos de comercio» en anglais.

34. Monsieur le président, toute traduction a une signification. Il s'agit de la manière d'exprimer une idée dans une autre langue. Alain Pellet ne veut tirer aucune conclusion de cette remarquable coïncidence intervenue devant l'arbitre appelé à trancher toute question d'interprétation douteuse du traité. Pour notre part, nous tirons celle qui s'impose.

---

[82] CR 2009/4, p. 57, par. 19 (Pellet).

[83] CR 2009/2, p. 50, par. 9 (Kohen).

[84] CR 2009/4, p. 57, par. 19 (Pellet).

35. Et à ce stade avancé de la procédure je me permets le commentaire suivant : j'ai attendu en vain que la Partie adverse nous explique pourquoi le Nicaragua a traduit «con objetos de comercio» en 1887 de la manière qu'il rejette avec véhémence aujourd'hui.

C. Le terme «comercio» ne se limite pas à l'achat et à la vente de marchandises

36. Le Nicaragua a déployé beaucoup d'efforts pour constater une évidence : à savoir que le transport de marchandises tombe sous le coup de la navigation aux fins du commerce[85]. Contrairement à ce que nos adversaires et amis affirment[86], le Costa Rica n'a aucune difficulté à accepter la première acception du terme «commerce». Nous sommes même prêts à reconnaître que l'achat et la vente de marchandises constitue l'activité commerciale la plus emblématique. Mais ce n'est pas la seule ! Ni au XIX^{e} siècle, ni aujourd'hui.

37. Par contre, mes collègues Remiro et McCaffrey ont beaucoup de difficultés avec la seconde acception du terme commerce, celle signifiant communication[87]. Nous avons cité cette acception dès notre mémoire[88] et le Nicaragua ne s'y est jamais référé durant la phase écrite !

38. Aux annexes 59 et 60 de la duplique, le Nicaragua a présenté l'entrée «comercio» contenue dans deux dictionnaires bilingues anglais-espagnol, l'un datant de 1809, l'autre de 1858. Vous les voyez à l'écran. Il est question non seulement de «commerce» and «trade», mais aussi de «communication», et ceci au regard des deux dictionnaires.

39. Au fond, Messieurs les juges, votre Cour a déjà examiné en détail la portée du mot «commerce» dans l'affaire des *Plates-formes pétrolières*[89]. Je n'oserais pas abuser de votre patience en vous rappelant cette analyse exhaustive qui s'avère pertinente pour les besoins de cette affaire et dont vous trouverez un extrait à l'onglet n^{o} 61 de vos dossiers.

---

[85] *Ibid.*, p. 43- 46, par. 28-42 (Brotóns).

[86] *Ibid.*, p. 44, par. 34 (Brotóns).

[87] *Ibid.*, p. 44-45, par. 33-35 (Brotóns) ; CR 2009/5, p. 29-30, par. 7 (McCaffrey).

[88] MCR, par. 4.52-4.72.

[89] *Plates-formes pétrolières (République islamique d'Iran c. Etats-Unis d'Amérique), exception préliminaire, arrêt, C.I.J. Recueil 1996 (II)*, p. 818-819, par. 45-46, 48-49. Dossier de plaidoiries, onglet n^{o} 61.

a) ***La navigation commerciale inclut le transport des passagers***

40. Le conseil du Nicaragua a affirmé en ne s'appuyant sur aucune référence concrète que «[t]ous les documents diplomatiques et les traités avortés antérieurs au traité Jerez-Cañas rapportent la navigation sur le fleuve San Juan au transport de fruits, de produits, de marchandises, notamment de café»[90]. Ceci est faux et je vous renvoie à nos plaidoiries qui traitent de ces questions[91].

41. Nous avons fourni la preuve démontrant que le transport de passagers est compris dans le droit costa-ricien de libre navigation découlant de l'article VI du traité Cañas-Jerez et je n'y reviendrai pas[92].

42. Le silence du Nicaragua, en particulier par rapport aux traités qu'il a conclus en 1857 avec les Etats-Unis, en 1859 avec la France et en 1860 avec la Grande-Bretagne, est assourdissant. Tous trois se réfèrent explicitement au San Juan, au Costa Rica et à la navigation avec des personnes et des marchandises, aussi bien du gouvernement que des citoyens[93]. Même en adoptant la lecture la plus favorable au Nicaragua, ces trois traités sonnent le glas de l'interprétation nicaraguayenne de l'article VI qui limite ce dernier exclusivement au transport de marchandises et aux navires privés.

43. J'ajouterai que l'interprétation nicaraguayenne excluant les passagers aboutit à un résultat absurde et déraisonnable. Imaginons un producteur du café costa-ricien du XIX^{e} siècle. S'il voulait aller en Europe pour promouvoir et vendre son café, il devrait partir par le Pacifique et faire le tour du cap Horn. Une fois revenu au Costa Rica avec son carnet de commandes par la même route, il pourrait toutefois envoyer son café par le San Juan. Et s'il partait avec sa cargaison de café en Europe par le San Juan, il devrait rentrer en faisant le tour du cap Horn car il rentrerait «sans articles de commerce» ! Peut-on sérieusement imaginer un instant que telle était la perception des négociateurs du traité Cañas-Jerez ?

---

[90] CR 2009/4, p. 47, par. 48 (Brotóns).

[91] RCR, par. 2.53-2.54 ; CR 2009/2, p. 66-67, par. 64-68 (Kohen).

[92] MCR, par. 4.58-4.72 ; RCR, par. 3.76-3.78.

[93] United States-Nicaragua Treaty of Friendship, Commerce and Navigation, 16 novembre 1857, RCR, vol. 2, annexe 10 (article XX, dossier de plaidoiries, onglet n° 30) ; traité d'amitié, de commerce et de navigation conclu le 11 avril 1859 entre la France et le Nicaragua, RCR, vol. 2, annexe 14 (article XXXIII, dossier de plaidoiries, onglet n^{o} 28) ; Treaty of Friendship, Commerce and Navigation between Great Britain and Nicaragua, 11 février 1860, RCR, vol. 2, annexe 15 (article XXVI, dossier de plaidoiries, onglet n^{o} 29).

b) ***Le transport de touristes tombe sous le coup de l'article VI du traité de 1858***

44. Alain Pellet est allé jusqu'à invoquer que le droit de libre navigation ne pourrait inclure le transport de touristes pour la simple raison que le tourisme n'avait pas l'importance économique qu'il a aujourd'hui et qu'il aurait été, à l'en croire, sans rapport aucun avec le commerce à l'époque de la conclusion du traité[94].

45. Il ne fait aucun doute que le tourisme existait à l'époque de la conclusion du traité Cañas-Jerez, certes pas avec la dimension qu'il a aujourd'hui. Alain Pellet a soigneusement évité d'affirmer le contraire[95].

46. En effet, de nombreux éléments témoignent de l'existence de cette activité. Il est intéressant de relever que le premier emploi que l'on trouve du mot «turista» en espagnol fait référence à un adjectif qualifiant une activité précise — l'excursion —, et qui, de plus, date de la décennie précédant le traité Cañas-Jerez[96]. Mark Twain a sans doute été le voyageur le plus célèbre qui a navigué sur les eaux du San Juan peu après la conclusion du traité, en 1863[97].

47. «Le tourisme — c'est-à-dire le voyage d'agrément — est apparu à la fin du XVII^{e} siècle en Angleterre», nous dit un auteur qui explique que cette activité est passée d'un luxe de riches à un loisir de masse[98]. Même à l'époque où il était exclusivement réservé aux riches, le tourisme exigeait une organisation : en effet, il fallait se déplacer, naviguer, acheter de la nourriture et autres «marchandises» — l'obsession de nos contradicteurs — et se loger ailleurs : tous ces agissements, Monsieur le président, n'englobent-ils pas des activités commerciales ? En fait, je m'étonne de la position élitiste prise par Alain Pellet. Apparemment, si c'était l'œuvre d'une poignée de riches, il serait prêt à l'admettre pour le San Juan, mais non lorsqu'il s'agit d'une activité ouverte à une large partie de la population.

---

[94] CR 2009/4, p. 53, par. 9 (Pellet).

[95] *Ibid.*, p. 53-54, par. 9-10 (Pellet).

[96] Juan Valera, *Correspondencia 1847-1857*. Disponible dans : http://corpus.rae.es/cordenet.htm (visité le 8 mars 2009).

[97] http://www.maritimeheritage.org/vips/marktwain.html (visité le 8 mars 2009).

[98] Stéphane Lecler, «Une histoire du tourisme. D'un luxe de riches à un loisir de masse» dans *Alternatives Economiques* — n^{o} 271 — juillet 2008 (http://www.alternatives-economiques.fr/une-histoire-du-tourisme-d_un-luxe-de-riches-a-un-loisir-de-masse_fr_art_735_38022.html) (visité le 8 mars 2009).

48. Je ferai un bref commentaire sur l'interprétation de l'affaire *Kasikili/Sedudu* faite par mon contradicteur. Dans le communiqué de Kasane du 24 mai 1992, qu'il a cité[99], les présidents des deux pays ont noté que «la navigation devait *rester* sans entrave et, entre autres, les touristes devaient pouvoir se déplacer librement» (*Ile de Kasikili/Sedudu (Botswana/Namibie), arrêt, C.I.J. Recueil 1999 (II),* p. 1107, par. 102 ; les italiques sont de nous). «Rester» : c'est là la manifestation du maintien de quelque chose qui existe déjà, et non celle d'un accord constitutif. Or, aucun texte conventionnel n'attribuait un droit spécifique lié à la navigation touristique. J'insiste : l'intérêt essentiel de l'arrêt *Kasikili/Sedudu* est celui de l'interprétation de la liberté de navigation comme incluant la navigation touristique.

49. Au fond, Monsieur le président, la question fondamentale n'est pas celle de savoir si le tourisme existait ou non à l'époque de la conclusion du traité Cañas-Jerez, mais si des gens qui se dirigent d'un point à un autre du territoire costa-ricien devraient être exclus du bénéfice de la notion de libre navigation à des fins du commerce, pour la seule raison qu'ils sont des touristes.

50. Ces touristes vont d'un point du territoire costa-ricien à un autre : de Sarapiquí à Tortuguero notamment. Les touristes sont aussi des passagers. Et ils sont en transit. Va-t-on demander à chaque passager se trouvant sur des bateaux costa-riciens s'il ou elle voyage par loisir ou pour d'autres raisons, en vue de savoir s'il peut ou non bénéficier du droit de libre navigation aux fins du commerce ?

D. La pratique subséquente existe et confirme l'interprétation costa-ricienne

51. Alain Pellet s'est employé à minimiser la portée de la pratique suivie par les parties dans l'application du traité, allant même jusqu'à en nier purement et simplement l'existence[100]. Je lui répondrai qu'il existe un faisceau très large d'éléments de la pratique, qui inclut non seulement les bateaux, les marchandises, les bateliers, les passagers et les agents publics, mais aussi les traités et les prises de position des parties. Ces vrai que c'est plus facile de nier l'existence de la pratique que de répondre aux exemples concrets de cette pratique que nous avons donnés[101]. Cela ne facilite pas pour autant la situation procédurale du Nicaragua.

---

[99] CR 2009/4, p. 5, par. 12 (Pellet).

[100] *Ibid.*, p. 55-62, par. 13-26 (Pellet).

[101] CR 2009/2, p. 61-63, par. 49-55 (Kohen) ; CR 2009/3, p. 36, par. 9 (Kohen).

52. Je vais ajouter d'autres références relatives aux deux décennies qui ont précédé la naissance du différend. Le Costa Rica a présenté la preuve que son droit a davantage été exercé pour le transport de personnes (privées ou fonctionnaires publics) que pour celui des marchandises, sans que le Nicaragua n'ait manifesté la moindre opposition, sauf à partir de la naissance de ce différend[102]. Il s'agit, pour reprendre les termes du professeur Pellet, de «la pratique ouverte et constante de l'une des parties» qui «ne se heurte pas à une objection de la part de l'autre»[103].

53. Des déclarations sous serment de certains professionnels du transport et autres individus démontrent que le transport des touristes était pratiqué depuis les années 1970[104]. Une déclaration sous serment d'un fonctionnaire militaire nicaraguayen confirme qu'il en était ainsi[105].

E. Les contradictions nicaraguayennes sur l'interprétation évolutive

54. Alain Pellet nous a invités à discuter de l'interprétation évolutive des traités[106]. La Partie défenderesse est consciente de la faiblesse de son interprétation relative à l'article VI et cherche à minimiser la portée de l'étendue des fins de commerce auxquelles l'article se réfère.

55. Le raisonnement adopté par le conseil nicaraguayen comporte plusieurs lacunes. S'il rappelle que le critère ultime pour trancher le problème de l'interprétation évolutive est l'intention des parties[107], il ne développe pas la question de savoir en quoi consistait cette intention sur le point précis qui nous intéresse.

56. Son argumentation est pour le moins curieuse. Il accepte que les «articles de commerce» et les moyens de navigation constituent des notions par définition évolutives[108]. Donc, tout ce qui

---

[102] Voir, entre autres : déclaration sous serment de Carlos Lao Jarquin, 27 janvier 2006, MCR, vol. 4, annexe 84 ; déclaration sous serment de Geovany Navarro Garro, 27 janvier 2006, MCR, vol. 4, annexe 85 ; déclaration sous serment de Pablo Gerardo Hernández Varela, 27 janvier 2006, MCR, vol. 4, annexe 86 ; déclaration sous serment de Santos Martin Arrieta Flores, 27 janvier 2006, MCR, vol. 4, annexe 87 ; déclaration sous serment de Carlos Luis Alvarado Sánchez, 27 janvier 2006, MCR, vol. 4, annexe 88 ; déclaration sous serment de Daniel Soto Montero, 27 janvier 2006, MCR, vol. 4, annexe 89 ; déclaration sous serment de Luis Ángel Jiron Angulo, 28 janvier 2006, MCR, vol. 4, annexe 90 ; déclaration sous serment de Marvin Hay Gonzalez, 28 janvier 2006, MCR, vol. 4, annexe 91 ; Armando Perla Pérez, 28 janvier 2006, MCR, vol. 4, annexe 92.

[103] CR 2009/4, p. 55-56, par. 14 (Pellet).

[104] Voir, entre autres : déclaration sous serment de Santos Martin Arrieta Flores, 27 janvier 2006, MCR, vol. 4, annexe 87 ; déclaration sous serment de Marvin Hay Gonzalez, 28 janvier 2006, MCR, vol. 4, annexe 91 ; déclaration sous serment de Ruben Lao Hernández, 17 février 2006, MCR, vol. 4, annexe 103.

[105] Déclaration sous serment du brigadier général Denis Membreño Rivas, 10 mars 2008, DN, vol. II, annexe 73.

[106] CR 2009/4, p. 49-55, par. 3-12 (Pellet).

[107] *Ibid.*, p. 50, par. 3 (Pellet).

[108] *Ibid.*, p. 51-52, par. 6 (Pellet).

est marchandise ou navire aujourd'hui tombe sous le coup de l'article VI. Par contre, selon lui, le terme «commerce» devrait garder la signification qu'il avait en 1858[109]. Si l'on suit le professeur Pellet, son coéquipier Antonio Remiro aurait tort, puisque d'après ce dernier, la deuxième acception du terme «comercio», celle de «communication», ne devrait pas être prise en considération aujourd'hui, car elle serait tombée en désuétude[110]. Je crois, Monsieur le président, que la Partie adverse devrait d'urgence accorder ses violons…

57. La référence qu'Alain Pellet a faite à la sentence arbitrale rendue dans l'affaire du *Sheikh d'Abu Dhabi* est loin d'appuyer la thèse du Nicaragua. Il est dit dans cet extrait, qu'il convient de «présumer qu'une personne qui cède des droits de propriété de grande valeur n'entend disposer que des droits qu'elle possède au moment de la cession». D'après le professeur Pellet, tel serait le cas du Nicaragua dont «on ne peut présumer qu'il ait cédé au Costa Rica des droits dont personne n'envisageait l'existence en 1858»[111]. *Primo*, il est inutile de chercher dans le traité de limites la cession ou l'octroi par le Nicaragua de droits au Costa Rica. La reconnaissance de la souveraineté nicaraguayenne et le droit de navigation costa-ricien vont de pair à l'article VI. *Secundo*, le transport des passagers sur le fleuve San Juan existait déjà à l'époque de la conclusion du traité et c'est le Nicaragua qui l'a qualifié d'activité lucrative[112]. Le parallèle établi avec l'affaire du *Sheikh d'Abu Dhabi* est donc tout simplement fallacieux.

58. La réponse juridique correcte à la question est simple. Pour paraphraser les formules employées par votre Cour dans l'affaire du *Plateau continental de la mer Egée*, le «commerce» est un terme générique englobant toutes pratiques «de nature à être légitimement considérées comme se rapportant» (*Plateau continental de la mer Egée (Grèce c. Turquie), arrêt, C.I.J. Recueil 1978*, p. 31, par. 74) à cette activité et comme «revêt([ant) à tout moment la signification que pourraient lui donner» (*ibid.*, p. 32, par. 77) les circonstances qui prévalent au moment de l'interprétation. Sinon, va-t-on prétendre que pour chaque traité de commerce et de navigation, il faudra figer leur portée à l'égard des activités commerciales uniquement au moment de leur conclusion ?

---

[109] *Ibid.*, p. 52, par. 7 (Pellet).

[110] *Ibid.*, p. 44, par. 35 (Brotóns).

[111] *Ibid.*, p. 54, par. 10 (Pellet)

[112] CMN, par. 4.1.37 ; DN, par. 3.91.

59. Que telle ait été l'intention des parties est de surcroît confirmé par la qualification de «perpétuel» du droit de navigation reconnu au Costa Rica. Pour reprendre à nouveau ce que votre Cour a dit sur un point tout à fait comparable où il était question d'un instrument sans limite de durée, «il ne semble guère concevable que dans un instrument semblable on ait voulu donner à [ce terme] … un contenu invariable quelle que soit l'évolution ultérieure» (*ibid.*, p. 32, par. 77)[113].

60. Cette réponse s'impose avec d'autant plus de force que la pratique ultérieure suivie par les parties dans l'application du traité a *enregistré cette compréhension du terme* «commerce»[114]. C'est le ministre du tourisme du Nicaragua lui-même qui a reconnu que le droit costa-ricien de libre navigation incluait la navigation touristique car le tourisme — selon lui, est une forme moderne de commerce[115].

Conclusion

61. Monsieur le président, Messieurs les juges, l'interprétation que le Costa Rica donne de l'article VI est appuyée par les règles d'interprétation que votre Cour a toujours suivies. Elle est confortée par tous les éléments pertinents. Ces éléments ne laissent aucun doute quant au sens qu'il convient de donner à l'expression «con objetos de comercio». Il s'agit d'un droit de libre navigation qui englobe tant le transport de passagers que celui de marchandises, exercé tant par des navires publics que privés.

62. Monsieur le président, je vous remercie de votre attention et vous prie, sans doute après la pause, de donner la parole à mon collègue et ami le professeur Lucius Caflisch.

The PRESIDENT: Thank you, Professor Kohen, for your presentation. As you suggest, the Court can have a short coffee break for about 10 minutes and we will resume the session.

The Court adjourned from 11.20 to 11.30 a.m.

The PRESIDENT: Please be seated. I now give the floor to Professor Caflisch.

---

[113] *Affaire concernant le Filetage à l'intérieur du golfe du Saint-Laurent entre le Canada et la France, sentence du 17 juillet 1986, RSA*, vol. XIX, p. 247, par. 37.

[114] *Ibid.*, *sentence du 17 juillet 1986, RSA*, vol. XIX, p. 247, par. 37.

[115] MCR, par. 4.69 et vol. 5, annexes 138 et 139 (dossier de plaidoiries, onglet n° 24).

Mr. CAFLISCH: Thank you, Mr. President.

III. NICARAGUA'S SOVEREIGNTY OVER THE SAN JUAN RIVER AND COSTA RICA'S PERPETUAL RIGHT OF FREE NAVIGATION

1. Introduction

1. Mr. President, Members of the Court, my observations today will bear on two matters: first, the relation between Nicaragua's sovereignty over the waters and bed of the San Juan River and Costa Rica's perpetual right of free navigation; and second, the reasonableness and lawfulness of Nicaragua's regulations and measures relating to the portion of the river where navigation is common.

2. Before broaching these issues, I should like to respond briefly to four points made by Ambassador Argüello Gómez in his introductory presentation[116].

3. *First*, Mr. Argüello Gómez stated that, in making her claims, Costa Rica pretended in fact to be the river's co-sovereign. Quoting the great Latin American jurist Andres Bello on the content of *sumo imperio*, he asked what would remain of that *imperio* if Costa Rica's claims were found acceptable. That question could, with at least equal justification, be turned around: what would remain of Costa Rica's "right" of navigation if its exercise were entirely subordinated to Nicaragua's *summum imperium*?

4. *Second*, the distinguished Agent of Nicaragua contended that Costa Rica aspires to an unlimited right of navigation: as Costa Rica's written pleadings and oral arguments show, this is not the case: Costa Rica objects to crippling, disproportionate, ineffective and discriminatory regulations and measures. As pointed out during the first round of oral argument, Costa Rica would not object, for instance, to frequent and attentive patrolling, for instance to curb drug traffic and smuggling[117]. What she does object to are measures substantially narrowing her right of navigation, for instance by insisting on *Nicaraguan* Departure Clearance Certificates and by controlling every Costa Rican boat, on every journey and return journey, at every Nicaraguan army post, and by levying fees and taxes.

---

[116]CR 2009/4, pp. 12-14.

[117]CR 2009/3, p. 28.

5. Ambassador Argüello Gómez concluded that Nicaragua holds all police powers, and Costa Rica none. One wonders how this is supposed to tally with what President Cleveland had to say when, in paragraph 2 of his award in 1888, he ruled that:

> "Costa Rica may navigate said river with such vessels of the revenue services as may be related to and connected with her [Costa Rica's] enjoyment of the 'purposes of commerce' accorded to her in said Article [Article VI of course] or as may be necessary to the protection of said enjoyment"[118].

6. A last observation to be made here relates to the assertion that, at the meeting point of the San Juan and the Colorado, 90 per cent of the waters go into the Colorado. What does this have to do with the present case? One could assert, with equal justification, that Costa Rica contributes about 70 per cent of its waters to the San Juan, while the contribution of Nicaragua amounts to 30 per cent.

2. Nicaragua's sovereignty over the San Juan River and Costa Rica's perpetual right of free navigation

7. Allow me now, Mr. President, Members of the Court, to deal with the relationship between sovereignty and the perpetual right of free navigation. Mr. Brownlie has rightly pointed out that stability is the main objective of boundary treaties. I would go so far as to say that the instrument in point, the 1858 Cañas-Jerez Treaty, also had the object of achieving stability, which does not mean, however, that it is an ordinary treaty establishing a boundary. As Nicaragua has remained remarkably discreet on the issue, I should like to recall that the Treaty of 1858 establishes a comprehensive legal régime for the area of the San Juan River: establishment of the international boundary on the Costa Rican bank on the lower San Juan (Art. II); right of both riparian States to sail ships on the part of the river open to common navigation, and right of the ships of both States to accost on the banks of the other State (Art. VI); establishment of the waters at each end of the boundary (the waters of the Salinas Bay and San Juan del Norte) as *condominia* (Art. IV); common defence of the river in the event of external aggression (Art. IV); prohibition of acts of war on the river, on Lake Nicaragua or in the port of San Juan del Norte (Art. IX) and duty for Nicaragua to consult Costa Rica if it plans to canalise the river area are in the offing (Art. VIII).

---

[118] MCR, Vol. 2, p. 18.

8. I find it difficult indeed to accept that we are in the presence of a simple boundary treaty. It is, rather, a combination of different pieces which are constitutive of a boundary and a régime. To borrow from the language used by my friend and colleague Ian Brownlie, the amalgamation of these elements produces a sort of legal "porosity" — a porosity incidentally to be found in other, similar treaty instruments.

9. The characterization of the 1858 Treaty as a boundary treaty, and little else, has led Nicaragua to claim that that Treaty's main element is her sovereignty over the waters and the bed of the river, whereas in Costa Rica's view, as perceived by Nicaragua, her navigation rights predominate. It is this point which forms the main bone of contention between the Parties.

10. According to Nicaragua, her own sovereignty must be paramount, and exceptions to it must, pursuant to this Court's case law, be construed restrictively. I have already attempted to show that that case law becomes relevant only if there is a doubt over the meaning to be attributed to the provision under consideration[119]. In the absence of such doubt, the interpretation must follow the canons of treaty interpretation set by the 1969 Vienna Convention, including the principle *ut magis valeat quam pereat*: the concept of free navigation cannot be rendered nugatory by subordinating it to the will of the territorial sovereign. It cannot be left to unilateral determination by that State.

11. Costa Rica's view of the matter is quite different. As is true for most concepts of international law, sovereignty is not absolute; it is affected by the relevant State's specific rights and duties. In other words, as was pointed out in the first round of oral argument, there is no hierarchy sovereignty/right of navigation but sovereignty tempered by international obligations inherent in the Treaty régime[120]. There is nothing extraordinary to this.

12. This reasoning seems to be confirmed by the defendant Party itself. Indeed, in her Rejoinder[121], Nicaragua takes care to demonstrate that the regulations issued and measures taken by her are "reasonable". According to Costa Rica, they are not; but the very fact that Nicaragua tries to justify them as such amounts to an admission that Nicaragua's sovereignty is indeed limited

---

[119]CR 2009/2, pp. 43-44.

[120]CR 2009/3, pp. 32-33, 36 and 45.

[121]RN, Vol. II, 4.34 – 4.98.

by the obligations imposed through the Cañas-Jerez Treaty, in particular those resulting from Costa Rica's perpetual right of free navigation.

13. In the conclusion to this first part of my intervention, I will stress the following points:

(i) The instrument of 1858 is a treaty establishing a boundary and a multifaceted international régime governing a waterway.

(ii) This being the case, sovereignty and the right of navigation are pieces of one and the same picture. They are on a par in the sense that it cannot be said, simplistically, that the one dominates the other. And

(iii) For the present case, this means that Nicaragua cannot exercise her sovereignty via measures and regulations that are unlawful, discriminatory or unreasonable in the sense that Costa Rica's navigational interests are disproportionately affected. These regulations and measures must also be effective ones, that is, be capable of preventing and curbing undesirable activities such as smuggling and drug traffic.

14. These conclusions bring me to the second theme I propose to deal with, namely, the lawfulness and reasonableness of Nicaragua's regulations and measures curtailing Costa Rica's perpetual right of free navigation.

3. Lawfulness and reasonableness of Nicaragua's regulations and measures

(a) *General issues*

15. Mr. President, Members of the Court, I therefore now come to the question of the right to regulate the uses of international watercourses such as the San Juan. The defendant State has invoked a series of authorities and precedents to buttress that right. Mr. Brownlie has cited a number of authorities to establish that there is no general right or freedom of river navigation in Latin American practice[122]; we did not say that there was. Nor did we express the "extravagant" opinion[123] that that right of navigation, stipulated and not merely "referred to" by the 1858 Treaty, was, and I cite Mr. Brownlie, "in some sense absolute and peremptory". What we did say and what we maintain is that a treaty right to free navigation cannot be regulated out of existence by

[122] CR 2009/4, p. 30.

[123] *Ibid.*

invoking Nicaragua's sovereignty. This observation is also valid for the passages quoted from Wheaton and O'Connell.

16. There remains the case of *MacMahan* (USA) v. *United Mexican States*, quoted extensively by Mr. Brownlie[124]. The case related to the Rio Grande forming the boundary between Mexico and the United States, on which freedom of navigation prevailed, and to American citizens navigating on it. The majority of the US/Mexico General Claims Commission found that Mexico was "entitled to exercise police powers, *some* police powers at least, over the course of the Rio Grande", without, however, defining them. In that same decision, one finds the following caveat:

> "It is reasonable to think that the right of local jurisdiction shall not be exercised in such a manner *as to render nugatory the innocent passage through the waters* of the river, particularly if established by treaty."[125] (Emphasis added.)

This observation is very pertinent for the present case. Another observation which needs to be made is that, unlike the present situation, the Río Grande is a river whose waters are divided between the two riparians, probably in the middle of the thalweg, and where, consequently, the navigators could always try to pass on the side of their national State. Costa Ricans do not have such an opportunity.

17. In his intervention of 6 March 2009, Mr. Reichler referred to three further texts dealing with the regulatory power of States[126]. Article 6 of the Barcelona Statute on the Regime of international waterways of 1921 enables riparians to enact laws and regulations on public health, control of diseases, movement of persons, and customs,

> "it being understood that such stipulations must be reasonable, must be applied on a footing of absolute equality between the nationals, property and flags of any one of the Contracting States, including the State which is their author, *and must not without . . reason impede the freedom of navigation*" (emphasis added).

18. The "Projet de règlement international de navigation fluviale" adopted in 1887 by the Institute of International Law is essentially a set of general international regulations, not containing anything specific on *national* regulations. All it says in its Article 28 is that each riparian preserves

---

[124]*Ibid*., p. 32.

[125]United Nations, *Reports on International Arbitral Awards (RIAA)*, Vol. IV, p. 490.

[126]CR 2009/4, pp. 13-14.

its sovereign rights over its portion of the rivers, but "dans les *limites établies par les stipulations de ce règlement et les traités ou conventions*" (emphasis added).

19. Another text cited by Mr. Reichler are the Berlin Rules on Water Resources adopted in 2004 by the International Law Association, not without some dissent, however. Article 45 of those Rules allows a riparian State to

> "regulate, limit or suspend navigation as appropriate for the purpose of public safety, health, or the environment, over that portion of the watercourse within its jurisdiction, provided the State does not discriminate against the shipping of another riparian State and does *not unreasonably interfere* with the enjoyment of the rights of navigation . . ."[127] (emphasis added).

20. Finally, one really fails to see what the 1936 Montreux Convention on the Turkish Straits[128] has to do with this case. The Straits Convention pertains to the law of the sea, not to watercourses. One is under the impression that Nicaragua amalgamates the law of sea with that of international watercourses whenever convenient. Moreover, the Article cited states that there is freedom of transit and of passage in the Straits and that that freedom is regulated — that means governed — by the provisions of the Convention. I fail to see what this could prove in the context of the present case.

21. The Court will note that none of these texts relate to boundary treaties conferring a right of navigation. None of them take into account the special situation where the boundary follows the bank of the river. One can nonetheless deduce from them that, when mentioning regulations, they specify that they must be reasonable, non-arbitrary, non-discriminatory. This has been, and also is, the position of Costa Rica: riparian States may regulate if they respect these conditions. Mr. President, Members of the Court, the time has now come to turn to Nicaragua's regulations and measures.

(b) *Regulations applied and measures taken by Nicaragua*

(i) General observation

22. Before examining these regulations and measures one by one, I shall make two preliminary observations — one of a specific and one of a general character. First, it has to be

---

[127] RN, Vol. II, Ann. 72.

[128] League of Nations, *Treaty Series*, Vol. 173, p. 215.

noted that Nicaragua's environmental engagement has certainly acquired momentum as a result of the present case, although some caveat may have to be entered on account of the failings referred to earlier in the present oral argument[129]. In the general area of environmental protection, on the basis of the Molina affidavit[130], Nicaragua has, among other things, tried to make a point on logging. There is no evidence, however, that the wood mentioned in that affidavit was indeed cut in Nicaragua by Costa Ricans. This could just as well have been done on the Costa Rican side. How, by whom, when and where the picture reprinted in Nicaragua's Rejoinder was taken[131], no one knows.

23. The second observation, the condition of *reasonableness* for regulations and measures includes the need for them to be effective, so as to achieve the purpose for which they are adopted. If they are not effective, they are of no use and, therefore, unreasonable. The condition of *non-discrimination* is, in my view at least, disregarded, if fees collected are not the same for everyone or if they change all the time. Finally, the prohibition of *arbitrariness* serves to prevent, *inter alia*, that regulations are adopted, and measures taken, without a proper legal basis and without being communicated to those to which they are intended to apply, Costa Rica in the event. Legal certainty and transparency are the surest means to avoid arbitrariness.

(ii) Obligation to stop and register

24. Let me now turn to the first specific measure, which is the obligation to stop and register. The duty of stopping and registering allegedly serves a multitude of purposes which have been reviewed in great detail. Its preventive virtues have been praised. One of Costa Rica's main objections is that for each and every journey a fee of US$5 plus a handling fee of US$2 for entering the country and another handling fee of US$2 for leaving it have to be paid. While this sum may seem trifling to lawyers litigating before this Court, it is a lot for the inhabitants of a poor area of Costa Rica whose daily lives depend on the river. One also wonders what the services rendered really are, since their contribution to crime and accident prevention appears to be slim. Finally, one may well ask whether these incessant controls — twice a day, for every journey, at every border

[129]CR 2009/3 , pp. 25-26.

[130]RN, Vol. II, Ann. 72.

[131]RN, Vol. I, p. 93.

post — remain within the purview of what is reasonable? Do they not, rather, amount to a form of harassment?

(iii) Departure clearance certificates (DCC)

25. I come next to the departure clearance certificates. We were told, at the end of last week, that the issue of such certificates by Nicaragua is primarily aimed at making sure that vessels are safe and seaworthy, and also at verifying who and what is on board[132]. The fees charged, which are meant to pay for services rendered, have varied, as is shown in an annex to the Costa Rican Memorial[133], between US$5 and 25 — you will find a US$25 receipt in your folders at tab 62 (projection) — and they are levied for every journey. For the boatmen in the area, US$25 is a considerable sum if measured against local salaries and profits. Having myself travelled in the area, as all of Costa Rica's counsel have, *et ergo* in Arcadia, I have witnessed both the handling of the stopping and registering requirements and the inspection of the boats to check their seaworthiness and the identity of the cargo and passengers. I was unlucky; though a fee was paid, I saw no inspection of the boat. There was no service rendered for which a fee could be collected.

26. Here again, Mr. President, one wonders about where the legal basis for this requirement lies, as no supporting legislation has been supplied, except for visas and tourist cards. The claimed preventive value of the measure is minimal as it is not applied methodically. The varying fees suggest arbitrariness.

27. It is alleged, however, by the other side, that local Costa Rican residents are "regularly" issued departure clearance certificates free of charge, "strictly as a courtesy" as was said by Mr. Reichler[134]. Just how "regular" that practice was is shown by the evidence presented by Costa Rica in her Memorial and in her Reply: out of six local residents, four testified that they were charged[135].

28. Mr. Reichler justifies the imposition of a fee for the departure clearance certificates on the ground that it is not an "impost", which would breach Article VI, but "a fee for service, a

---

[132]CR 2009/5, p. 20.

[133]MCR, Vol. 6, Ann. 241.

[134]CR 2009/5, p. 21.

[135]MCR, Vol. IV, Anns. 92, 96, 103 and 108; RCR, Vol. II, Anns. 50 and 51.

'redevance', not a tax"[136]. He insisted on this point, suggesting that my characterization of the fee as a tax[137] was "contradicted by all the evidence". Mr. Reichler cites no evidence in support of his assertion that[138] services are provided: and that assertion is contradicted by evidence in the record, namely, evidence from Costa Rican boatmen that no inspection, no service has ever been provided in exchange for a departure clearance certificate[139]. This evidence is not acknowledged in Nicaragua's Rejoinder, which merely asserts, without reference, that an inspection is performed. Nor is it acknowledged by Mr. Reichler, who did the same.

29. Whatever Nicaragua may call the charge for the departure clearance certificates, in the absence of the provision of a service, and no matter how small the charge, it is properly characterized as a tax[140]. Furthermore, if a service is provided, the charge must not exceed the actual cost of the inspection[141]: it cannot be varied at will by the Nicaraguan army officer on duty. The distinction between a tax and a fee for services rendered[142] is well known in international law and practice, and there is no reason to suggest that it is not applicable in the present case. The references in support of this proposition are set out in the footnotes to my intervention.

30. There is, finally, the alleged recognition by Costa Rica of the departure clearance certificate procedure practised by Nicaragua. The meeting of the Binational Commission, in 1997, dealt with drug traffic and was intended to draw the attention of the Nicaraguan authorities to that issue. The measure discussed at the meeting was that each State should see to it that vessels "navigate only if duly registered by the posts that issue corresponding navigation certificates; in

---

[136]CR 2009/5, pp. 21-22.

[137]CR 2009/5, p. 22.

[138]CR 2009/3, p. 29.

[139]RCR, Ann. 51, pp. 281-282; Ann. 52, p. 283.

[140]See for example case 24/68 *Commission* v. *Italy* [1969] ECR 193; case 18/71 *Eunomia* v. *Italy* [1971] ECR 811; case 39/73 *REWE-Zentralfinanz* v. *Direktor der Landwirtschaftskammer Westfalen-Lippe* [1983] ECR 1039; case 314/82 *Commission* v. *Belgium* [1984] ECR 1543.

[141]See for example case 18/87 *Commission* v. *Germany* [1988] ECR 5427; case 132/82 *Commission* v. *Belgium* [1983] ECR 1649; case 24/68 *Commission* v. *Italy* [1969] ECR 192; *Commission* v. *Belgium* [1984] ECR 1543; case 46/76 *Bauhuis* [1977] ECR 5. See also Art. II.2 *(c)* GATT 1994; Art. VIII.1(a) GATT 1994; WTO Panel Report, India — Additional and Extra Additional Duties on Imports from the United States, 9 June 2008, paras. 7.301-7.394; WTO Panel Report, United States — Import Measures on Certain Products from the European Communities, 17 July 2000, para. 6.70; GATT Panel Report, United States — Customs User Fee, 2 February 1988, paras. 68-117; GATT Panel Report, European Community — Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetable, 4 October 1978, para. 4.6.

[142]Art. II.2 *(c)*, GATT, 1994.

this case, the posts at San Juan del Norte, San Carlos and Sarapiquí"[143]. What this means is a registration requirement with a — Costa Rican or Nicaraguan — border post entitled to deliver such certificates. It is nowhere said that vessels have to obtain, from Nicaragua, departure clearance certificates which have to be issued for every journey, nor, *a fortiori*, that Costa Rica had condoned such a practice. This is a far cry from finding, as Mr. Reichler did, that "Costa Rica herself agreed that there was good reason for both the registration and departure clearance requirements imposed by Nicaragua and that she approved of them on that basis"[144]. The developments in the Costa Rican Memorial show that the requirement of departure clearance certificates has been objected to continuously from 1980 to this day[145].

(iv) The prohibition of travel at night

31. I now come to the prohibition to travel at night. As pointed out, earlier[146], navigation in the upper part of the San Juan may be dangerous; it is much less so in the portion of the river open to common navigation: here the river is wide and, apart from fallen branches and some banks, as they are found in most other navigable waterways, there are few major obstacles. In the past, no prohibition of travelling by night existed; but perhaps our friends from the Nicaraguan side will tell us that the San Juan has become dangerous as a result of the army's "Action Plan"[147]. That Plan is the sole basis of the measure, so far as we are aware, and it was not communicated by Nicaragua to the Costa Rican Government. This is certainly a most extraordinary way of conducting neighbourly relations, due perhaps to an over-optimistic view of what "sovereignty" means in the context of the 1858 Treaty.

32. In my previous intervention on this point, I ventured to suggest that, maybe, a better and less intrusive way to reduce or obviate the hazards of night travel would be to co-operate and to install some lights on the river's banks and, also, to oblige embarkations sailing at night to carry lights. This is a standard requirement for nocturnal travel both on international rivers and in the

---

[143]RN, Vol. II, Ann. 4.

[144]CR 2009/5, p. 21.

[145]MCR, Vol. I, 5.11-5.26.

[146]CR 2009/3, p. 31.

[147]RN, Ann. 48.

coastal waters of all States, rich or poor. Mr. Argüello Gómez has credited me with being well intentioned but unfamiliar with the river and unaware of the extreme poverty characterizing most of the local population[148]. I let him be the judge of my unawareness but one thing is certain: the use of lights, especially on the basis of a common agreement, would serve the safety of navigation at least as well, and probably better, than the highly intrusive measure taken by Nicaragua to prohibit navigation for 12 out of 24 hours every day.

33. Relating to the nocturnal activities by Nicaraguan vessels, Mr. Reichler states that my "geography is a bit off"[149]. That may be so. It is a fact, however, that nocturnal movements by Nicaraguan ships do take place in the upper parts of the San Juan River. This fact is attested to by two illustrations, which are being projected right now[150]. These illustrations, indicating the places and times of departure and arrival, can be seen on the screen, as I said, and also under tab 63 of your folders. This is unquestionably a matter of domestic concern. But it does show that what may be considered dangerous for some — and the upper reaches of the river *are* dangerous — is not judged dangerous for others.

34. In short, the prohibition complained of is unlawful, unreasonable, arbitrary and lacks any legal basis other than the army's "Action Plan".

(v) The duty to fly the Nicaraguan flag

35. I now come to the duty to fly the Nicaraguan flag. I shall be very brief on this. Despite my peregrinations on the San Juan, I am not certain whether the hoisting of the Nicaraguan flag is required of every Costa Rican vessel or only of those equipped with masts and turrets as asserted by Mr. Reichler[151]; the small boat in which I travelled carried a flag on one of its sides, as it had neither mast nor turret, perhaps this was a gesture of courtesy by the owner; perhaps, as is more likely, this was done for fear of sanctions. This leads me to Mr. Reichler's further assertion that there has not been a single incident of a Costa Rican boat being prevented from navigating without

[148]CR 2009/5, p. 23.

[149]CR 2009/5, p. 24.

[150]See http://www.nicatour.net/en/nicaragua/orario_lanchas_rio_san_juan.asp and http://www.visitariosanjuan.com/elcastillo/elcastillo-comollegar-es.html

[151]CR 2009/5, p. 26.

displaying the Nicaraguan flag[152] — of course not, as the boatmen did not wish to provoke such incidents.

36. In my earlier intervention on this point I did mention the possibility of there being a practice, inspired by international courtesy, to show the territorial State's flag in addition to that of the flag State[153]. This statement led Mr. Reichler to conclude that "Nicaragua, as the sovereign over these waters . . . has the right to insist on this courtesy"[154]. I very much doubt this conclusion; how can one try to turn international courtesy into binding internal regulations relating to the exercise of a conventionally guaranteed right of navigation? These regulations are, incidentally, another fruit of the Nicaraguan army's "Action Plan" and, to my mind, serve very little purpose.

(vi) Immigration and visa requirements

37. I now come to the last series of measures, immigration and visa requirements. Mr. Reichler argues that in practice the visa requirement affects but few of the persons cruising on the river in tourist boats, as most of them need no visa. Moreover, "as a courtesy", local Costa Rican residents and boatmen are permitted to operate without visas or tourist cards[155] and, hence, have no financial burden to bear.

38. Costa Rica has shown, however, that *boatmen* were in fact required to secure visas to carry on their activities[156]: and some tourists were unable to complete their tour because their boatmen had no visa[157]. One boatman was detained by the Nicaraguan army for not carrying his passport and subsequently had to travel to San José twice and to purchase two visas[158]. This shows that sometimes exemptions are granted, sometimes not. Moreover, when Nicaragua argues that, as a matter of courtesy, local residents and boatmen are exempted from visa or tourist card requirements, this means, of course, that the exemption can be withdrawn whenever Nicaragua opts to do so.

---

[152]*Ibid.*

[153]CR 2009/3, p. 33.

[154]CR 2009/5, p. 26.

[155]*Ibid.*, p. 25.

[156]MCR, Anns. 85, 87, 91, 92, 93, 95 and 189; RCR, Anns. 51 and 52.

[157]MCR, Ann. 86.

[158]MCR, Anns. 84, 238 and 244.

39. Inasmuch as these requirements are effectively applied, and are allowed to remain, they will have a considerable financial impact on boatmen: US$25 per visa, travel expenses to and from San José, US$5 per tourist, plus US$4 for immigration charges, also per tourist, and US$5 to US$25 for the Departure Clearance Certificate. Thus, if a boatman were to transport tourists on the San Juan River once a week throughout the year, he would have to spend over 100 days at the Embassy of Nicaragua in San José for the purpose of processing visas. This would amount to a total approximate sum of US$2,800. So much for Mr. Reichler's "non-burdensome immigration regulations"[159].

40. In legal terms, the measures in question are highly objectionable. As I have explained earlier, in most cases, boatmen and their passengers transit on the river *without* entering Nicaragua for any length of time[160]. This means that there should be no visa and tourist card requirements at all. I have also tried to explain why the need for *Nicaraguans* to obtain a visa when entering *Costa Rican territory* is irrelevant in this connection. The distinguishing factor is that Costa Rica has conventionally protected rights of transit passage on the river, whereas Nicaraguans entering Costa Rica are protected by no such right. As a result, the measures in question are unlawful in addition to being unreasonable.

4. CONCLUSIONS

41. Mr. President, Members of the Court, I have now come to the end of my intervention: my general conclusions hold in three points:

(i) Costa Rica maintains that Nicaragua's sovereignty over the San Juan must be seen as a part — an important part — of the fluvial régime established in 1858.

(ii) The regulations enacted by Nicaragua must not infringe Costa Rica's perpetual right of free navigation. In particular, they must be lawful, public, non-arbitrary and non-discriminatory. Furthermore, they must be adapted to fulfil a legitimate public purpose.

---

[159]CR 2009/5, p. 25.

[160]CR 2009/3, p. 28.

(iii) None of the measures applied by Nicaragua meet these conditions; they are in breach of the 1858 Treaty, the Cleveland Award and the 1916 decision of the Central American Court of Justice.

Thank you, Mr. President, Members of the Court, for your kind attention and forbearance. May I suggest that you now invite Professor Crawford to the floor.

The PRESIDENT: Thank you, Professor Caflisch, for your presentation. Now, I give the floor to Professor Crawford.

Mr. CRAWFORD:

IV. PUBLIC VESSELS, RELATED RIGHTS AND REMEDIES

Introduction

1. Mr. President, Members of the Court, in this presentation I will deal first with the issue of public vessels, secondly with related rights, especially subsistence fishing, and third with remedies. Given the positions taken by Nicaragua on the latitude points I can be happily brief.

Costa Rica's rights of navigation with public vessels

2. As to rights of navigation with public vessels, Professor Kohen has already demonstrated that Costa Rican State vessels enjoy the same rights of navigation for purposes of commerce as Costa Rican privately owned vessels. I will not come back on this, except to make one important point. This is that an official — a health worker, for example — can be transported on the river by way of commercial navigation. The Costa Rican health service does not possess its own boats. When they need to take medicines or provide other forms of health care to riparian communities, they do what any private person does who has to travel on the river and does not have a boat: they take one of the local boats at Sarapiquí or another riverine port which is for daily hire and travel in that. But these Costa Rican vessels are exercising the right of free navigation for commercial purposes. The fact that some of the passengers may be going to deliver medicines or treat a screwworm epidemic is irrelevant. The navigation is still commercial on any meaning of the term "commercial". London taxi cabs may not ply for hire without a licence. They ply for hire — they engage in commercial activity — even if they are carrying late Cabinet Ministers to meetings at

10 Downing Street. The same would be true of river taxis. The exercise by Costa Rican private boats of the perpetual right of free navigation is not dependent on the motivations of the passengers. Otherwise we will have a distasteful form of selection on the river bank: the public health personnel who are going to give drugs to local communities will be excluded (unless they have gone to San José, on each and every occasion, to apply for Nicaraguan Government permission for their mission and to get a visa); by contrast, the representative of foreign drug companies who propose to sell the same drugs as articles of trade are free to travel. The selection is to be carried out by junior military personnel on the Nicaraguan side. That is the Nicaraguan version of a perpetual right of free navigation.

3. But in what follows I am dealing with public vessels not exercising Article VI rights in the way that I have just described.

(a) ***The Cleveland Award did not determine Costa Rica's rights to navigate with any and all public vessels***

4. Professor McCaffrey claimed that President Cleveland "ruled on the question whether Costa Rica has a right to navigate on the San Juan with its warships *or other public vessels*"[161]. According to him, the Cleveland Award prohibited navigation by all public vessels other than vessels of the revenue service[162].

5. This is not what the Cleveland Award says. The issue before Cleveland was carefully circumscribed: "whether Costa Rica has the right to navigate the River San Juan with ships of war or revenue boats"[163]. The fourth point of doubtful interpretation put by Nicaragua was similarly limited[164]. Nicaragua leaves out these words of limitation. The issues raised were in fact formulated to reflect the actual dispute between the Parties at the time. This can be confirmed by reference to the correspondence prior to the referral to arbitration: which refers only to navigation on the San Juan by the revenue guard[165].

---

[161]CR 2009/5, p. 31, para. 11 (McCaffrey); emphasis added.

[162]CR 2009/5, p. 31, para. 11; p. 33 para. 18 (McCaffrey)

[163]Art. VI, Esquivel-Roman Convention, MCR, Ann. 16; see also Cleveland Award, MCR, Ann. 26, p. 457 (p. 98).

[164]MCR, Ann. 207, p. 10.

[165]CMN, Anns. 28, 29, 30, 31 and 32.

6. Nicaragua argues, on the basis of one hypothetical question posed by Costa Rica which takes up four lines out of a pleading of 181 pages, that "Costa Rica placed the issue of broad rights of navigation by public vessels before the arbitrator"[166]. That is not true. Costa Rica was making an incidental point in the course of argument, not reformulating the question asked. For its part in argument, Nicaragua made no reference to any vessels other than vessels of war, and vessels in the revenue service before President Cleveland. Neither the Parties nor the arbitrator debated the issue of navigation by public vessels in general[167]. Correspondingly, the terms of the award addressed the limited question of Costa Rica's right of navigation with vessels of war and vessels of the revenue service. Cleveland did not "[reject] the idea" of broad rights of navigation by public vessels[168], either expressly or by implication. What did he decide?

(b) ***The Cleveland Award recognized a specific treaty right of navigation for revenue vessels***

7. Professor McCaffrey argued that Cleveland was determined to cause "the least possible impairment to Nicaragua's sovereignty", and that this can be seen "from his sharp curtailment of the navigational rights proposed by Rives for Costa Rica"[169]. Professor McCaffrey went to great pains to show the Court that Cleveland modified Rives's draft "in his own hand" and "substituted his own, much more restrictive ruling"[170]. In fact the drafts show exactly the opposite: Cleveland substituted for Rives's proposal of a mere "privilege", a specific treaty right of navigation for vessels of the revenue service.

8. (Tab 64) In its original version, Rives's draft proposed that Costa Rica's privileges would be the same as any other nation in time of peace. He referred to "general usage . . . [which] constitute[s] an *imperfect right* entitling such vessels to claim hospitality"[171]. Rives's proposal was simply that Costa Rica's vessels of war and of the revenue service should receive the treatment extended to those of any other nation. He derived from general international law, not from the Treaty, a practice of granting privileges — privileges — to foreign ships in territorial waters. For

---

[166]CR 2009/5, p. 36, para. 26 (McCaffrey).

[167]See MCR, Ann. 208, pp. 48-49.

[168]CR 2009/5, p. 36, para. 26 (McCaffrey).

[169]CR 2009/5, p. 34, para. 21 (McCaffrey).

[170]CR 2009/5, p. 33, para. 21 (McCaffrey).

[171]CMN, original documents deposited within the Registry, Part II, Ann. 71, p. 217; emphasis added.

Rives, Costa Rica had no treaty right of navigation for vessels of its revenue service, only an imperfect right or privilege derived from general international practice. Costa Rica's treaty rights of navigation were, according to Rives, limited to rights of commercial navigation, and were not in any respect rights of public navigation. On this basis, Rives suggested the following text in response to the second question:

> "The Republic of Costa Rica has the same *privileges* of navigating the River San Juan with vessels of war or of the revenue service as civilized nations usually accord in their territorial waters to the public vessels of friendly powers in time of peace; *but no other or greater privileges*."[172]

9. Cleveland disagreed, considering that Costa Rica had more than simply a "privilege" enjoyed contingently by any other State. Costa Rican revenue vessels were entitled to a specific and perpetual treaty right of navigation. That is to say, Cleveland, like it or not, found a treaty right of navigation for the public vessels he was asked about — revenue vessels. His decision stated:

> "The Republic of Costa Rica *under said treaty and the stipulations contained in the sixth article thereof*, has not the right of navigation of the river San Juan with vessels of war; but [he would have said "pero"] she may navigate said river with such vessels of the Revenue Service as may be related to and connected with her enjoyment of the 'purposes of commerce' accorded to her in said article, or as may be necessary to the protection of said enjoyment."[173]

10. Cleveland authoritatively decided that Costa Rican revenue vessels held a treaty right to navigate "as may be related to and connected with her enjoyment of the purposes of commerce", or as may be necessary to protect the enjoyment of that right. Both Professor McCaffrey and Mr. Reichler quoted Cleveland as saying "related to and connected with navigation 'con objetos de comercio'"[174]. But Rives, though he understood Spanish, wrote in English, and he wrote "purposes of commerce" — because that was what both Parties had written, and because it reflected their understanding of Costa Rica's rights. Cleveland decided that Costa Rican revenue vessels had a right to navigate *for purposes of commerce* and a right to navigate to protect Costa Rican navigation for purposes of commerce. This was the main point — of all the points that

---

[172]CMN, Vol. II, Ann. 72; emphasis added.

[173]MCR, Anns., Vol. 2, Ann. 16; emphasis added; see also CMN,, Vol. II, Ann. 72.

[174]CR 2009/5, p. 31, para. 9 (McCaffrey); p. 42, para. 2 (Reichler); see also p. 32, para. 17 (McCaffrey); p. 35, para. 24 (McCaffrey); p. 45, para. 9 (Reichler); p. 46, para. 10 (Reichler); p. 51, para. 20 (Reichler); p. 54, para. 25 (Reichler); p. 56, para. 29 (Reichler).

were canvassed in the arbitration — this was the main point on which he disagreed with Rives — and it reflected a broader, not a narrower, view of Costa Rica's treaty rights.

11. In particular, whereas Rives had taken the position that Costa Rica must exercise its duties of protecting commerce entirely from its own bank of the river — the guards must run up and down amongst the trees, looking for things to protect apparently — Cleveland's formulation, already quoted, entailed a broader view. In the same context, Professor McCaffrey asserted that "Article IV says nothing about having to do this by boat"[175]: that is slightly strange. In practice, then and now, the only way to protect commerce on the river was by boat. I take it Professor McCaffrey is not suggesting that Costa Rica protects commerce on the river and in the common bays by, let us say, synchronized swimming!

12. Costa Rica explained in its written pleadings that the functions performed by the revenue guard at the time of the Cleveland Award are now performed by the National Coastguard Service, the Fiscal Control Police, the Border Police and the Rural and Civic Guards[176]. Nicaragua has produced no evidence and made no statement to the contrary. Mr. President, Members of the Court, I reiterate, this is *res judicata.* Professor Pellet may be apprehensive at the sight of a revenue vessel, but he strikes me as a man of more than ordinary courage. But that is what President Cleveland decided.

(c) ***Both Parties agree that Cleveland affirmed rights of navigation for armed public vessels***

13. (Tab 65) In the first round I gave an overview of the practice of Costa Rican navigation on the San Juan with armed vessels. I did so because Nicaragua had refused to admit that revenue vessels were armed vessels, and that Cleveland had confirmed the existence of Costa Rican treaty rights of navigation with armed public vessels. For example, in its Counter-Memorial Nicaragua stated: "no armed navigation by Costa Rican vessels is permitted by the Treaty, as interpreted by the Award, without the prior authorization of Nicaragua"[177]. Nicaragua maintained this position in its Rejoinder[178], defending the 2005 Presidential Decree which stated: "The Government of

---

[175]*Ibid.*

[176]CR 2009/3, p. 15, para. 28 (Crawford); MCR, App. B.

[177]CMN,, para. 3.1.56 *(d);* see also *ibid.*, para. 3.1.9.

[178]See, for example, RN, para. 5.33.

Nicaragua will not allow Armed Navigation of Foreign Forces in Nicaraguan Territorial Waters."[179] Now this has always been a difficult point, given that Nicaragua argued before Cleveland that revenue vessels "are armed vessels, capable of enforcing their demands by force"[180], and given that the Rives Report reflected that fact[181]. But it seems that the tale of the *Chandler* and its fulsome reward for the President finally did the trick[182]! Costa Rica has a treaty right of navigation for its armed revenue service vessels, affirmed by the Cleveland Award and Nicaragua has now admitted it[183].

14. Now once that point is established, the issue of practice becomes an entirely subordinate one. The state of the dossier as to whether Costa Rica exercised its treaty right to navigate with revenue service vessels is irrelevant. I might add that the written records on both sides of the question are limited, and on Nicaragua's side, positively exiguous. But my point is that, once a right arises under a valid and subsisting treaty, interpreted by a competent arbitrator with the force of *res judicata*, the right survives independently of its exercise.

15. While I am, so to speak, on the *Chandler*, I should note that Professor Pellet has given the Court a further insight into the kind of vessel Cleveland was envisaging. As he pointed out, and it is true, the *Chandler* was formerly commissioned in the navy and it engaged in active service during the American Civil War[184]. Professor Pellet — looking over his shoulder — expressed a concern that Costa Rica immediately commission vessels of the same size and the same attributes as the *Chandler* or the *Forward*, and send them onto the San Juan[185]. This was not my purpose in using the example of the *Chandler*, and Costa Rica has better things to do with its limited budget than commission new revenue cutters on this scale. I simply use it to demonstrate two things. First, that President Cleveland was perfectly aware — and if he had not already been aware the parties had told him — that revenue vessels were armed. Secondly, that it would be utterly

---

[179]RCR, Ann. 69; RN, paras. 5.30-5.32.

[180]MCR, Ann. 208, p. 49.

[181]CMN, Ann. 70, p. 4.

[182]CR 2009/3, pp. 13-14, para. 23 (Crawford).

[183]See, for example, CR 2009/5, pp. 34-35, paras. 23-24 (McCaffrey); *ibid.*, p. 60, para. 10 (Pellet).

[184]http://www.uscg.mil/history/webcutters/Jasmine_1866.pdf cited in CR 2009/5, p. 60, para. 10 (Pellet).

[185]CR 2009/5, p. 60, paras. 10-11 (Pellet).

paradoxical if Cleveland had permitted armed revenue service vessels to navigate on the San Juan without infringing his prohibition of vessels of war, while at the same time prohibiting navigation by these humble Costa Rican public vessels, which perform the same tasks, including necessary tasks of resupply of border posts guarding the river from the Costa Rican side.

16. As I have said, in light of Nicaragua's admission that Cleveland expressly permitted navigation by armed revenue vessels on the San Juan, the consistency of Costa Rica's subsequent practice of armed navigation assumes less significance. Nevertheless, Mr. Reichler said "Costa Rica has failed to present . . . any official documentation, or for that matter, any other evidence, establishing . . . Costa Rica's actual exercise" of its right of navigation with revenue vessels[186]. This is not true. On Tuesday I directed you to the documentary evidence[187] which suggests that the revenue guard was engaged in the activities it was directed to perform under the Decree of 1886[188]. The very fact that Nicaragua pressed the point before Cleveland suggests that those vessels were actually navigating — otherwise the point would have been moot.

17. (Tab 66) Mr. Reichler's claim that there is no evidence of Costa Rica's exercise of the right in more recent times can be disproved by reference to only one example. The Report of the Revenue Guard at the Mouth of the San Carlos River, dated 26 July 1968, states that the Guard received a complaint regarding the noxious plant Ipecac — I gather the Ipecac comes from the root of the plant — at a place called Infiernito (considering that it had a noxious plant there, perhaps aptly named Infiernito), a community on the San Juan River, and that they "went to said place" and made an inventory of the Ipecac they found there[189]. As you can see on the screen, from Boca San Carlos to Infiernito the distance along the San Juan is about 26 km, a journey which would take rather less than an hour by boat. Now Nicaragua notes that the Report does not say explicitly "we travelled on the San Juan River", and asserts that Infiernito is accessible by land from Boca San Carlos[190]. It does not reference or produce any map to support that claim; the only map it

---

[186]CR 2009/5, p. 44, para. 6 (Reichler).

[187]MCR, Anns. 211, 212, 213, 215, 215 and 216; RCR, Anns. 31 to 38.

[188]MCR, Ann. 206, Art. 5th.

[189]RCR, Ann. 33, p. 245.

[190]RN, para. 5.72.

produced was the Ecomapas map[191], which we have dealt with, which does not mark Infiernito or show any relevant road. In fact there is no direct road between Boca San Carlos and Infiernito, there are some circuitous unpaved tracks accessible during the dry season. But the incident occurred in July, in the middle of the wet season. This is only one example; I have referred the Court to further documentary evidence[192]. The practice is corroborated by Nicaragua's own affidavit evidence, which confirms that Costa Rican civil guard boats navigated on the river during the 1960s and the 1970s[193].

(d) ***The Cuadro-Lizano Joint Communiqué establishes the* status quo ante *practice of notification, not authorization***

18. (Tab 67) I turn to Professor McCaffrey's characterization of the Cuadro-Lizano Joint Communiqué which, he said, "shows that Costa Rica recognizes that she requires the permission of Nicaragua to navigate on the river with public, armed vessels to resupply her border posts"[194]. Professor McCaffrey did not cite the text of the Communiqué, and that is understandable since nowhere in the text do the words "permission" or "authorization" appear. The operative paragraph is on the screen and in tab 67 in your folders. I will not read the whole of it, I simply highlight the key words:

> "Third: Both Ministers manifest their willingness to resolve this regrettable inconveniences that occurred over the past few days and, for this purpose, they are establishing the following orders for their respective subordinates:
>
> 1. The crew of the vessels of the Public Force of Costa Rica that carry out relief of police and the supply of the border posts located on the right bank of the San Juan River *will navigate [will navigate] along the aforementioned river after having given the required notice [aviso]* carrying only their normal arms, and the Nicaraguan authorities may accompany the Costa Rican vessels making this journey along the San Juan River in their own separate means of transportation. Should the Nicaraguan vessel not accompany the Costa Rican vessels, the latter may carry out their rounds in keeping with the corresponding border post reports as indicated in this agreement.
>
> 2. *The Costa Rican authorities must report [reportarse]* to the Nicaraguan posts throughout their journey along the San Juan River." (Emphasis added.)

---

[191] *Ibid.*, p. 280.

[192] See for example CRM, Anns. 88, 90, 94 and 103.

[193] RN, Ann. 65, p. 404, para. 6 (Espinoza).

[194] CR 2009/5, pp. 38-39, para. 36 (McCaffrey).

A very carefully drafted balance.

19. Nicaragua claims that the Communiqué requires Costa Rica to "obtain Nicaragua's permission in every case" and that requests for authorization were made prior to each voyage[195]. Well, you can read it for yourself. It only requires *notice*; it allows Nicaraguan authorities navigating in their own vessels to accompany the Costa Rican vessel on the San Juan, but it is clear that Costa Rican vessels are not prevented from navigating if the Nicaraguan authorities choose not to accompany them; the Costa Rican vessels must *report* to any Nicaraguan post but there is no indication that they can be turned back if they comply with the terms of the Communiqué. This system reflected the *status quo ante*, which was one of notification and reporting, not authorization. This balanced practice has now been outlawed by Nicaragua.

(e) ***Nicaragua's claim that the* status quo ante *for police navigation was a system of Nicaraguan authorization***

20. Mr. Reichler devoted much energy on Friday to his argument that Costa Rica had provided no evidence that it re-supplied its border posts on the San Juan. But even he was forced to concede that "Costa Rican police traversed the San Juan to bring personnel or supplies to border posts or to engage in law enforcement activities" between 1994 and 1998, this in light of a detailed police report in Annex 227 of the Memorial[196]. In respect of this evidence, he reverts to Nicaragua's familiar and unsupported claim that the navigation must have been with express Nicaraguan permission, even though the document does not say this[197].

21. (Tab 68) You will recall that in its Rejoinder, Nicaragua claimed that Costa Rica had sent its vessels onto the San Juan to detain Nicaraguans, relying on a segment of this same report[198]. But as Mr. Sergio Ugalde pointed out, the detention occurred at Boca Tapada, some 25 km inland in Costa Rica's own territory[199]. Nicaragua has not reverted to that claim. But now Mr. Reichler argues that "Costa Rica began to send her armed police vessels onto the San Juan . . . for the purpose of intercepting Nicaraguans thought to be illegally bound for Costa Rica". He

---

[195]CR 2009/5, p. 39, para. 36.

[196]CR 2009/5, p. 47, para. 12; see MCR, Ann. 227.

[197]CR 2009/5, p. 47, para. 12.

[198]RN para. 5.88.

[199]CR 2009/2, p. 27, para. 12 (Ugalde).

referred to the same page of the same report and claimed that Costa Rica's own documentary evidence showed that Costa Rican police vessels "transported detained Nicaraguans at gunpoint on the San Juan River in June of 1998"[200]. The relevant entry is on the screen and is in tab 68 of your folder. I won't read it again, I will simply summarize what it says.

22. First, the Nicaraguans were detained on a farm — not a fish farm —, a farm of Gerardo Miranda-Alvarez not on the river. It is not true that the detention occurred on the San Juan River. Further, it appears they were not transported on the river at all. The report refers to them being picked up by "vehicle No. 711". The report consistently uses the term "vessel" to refer to boats, and "vehicle" to refer to motor vehicles. There is no reference to the San Juan in this extract, and no reference to anyone being transported by any means at "at gunpoint".

23. Mr. Reichler criticizes the affidavit of Mr. Navarro for failing to refer to the July 2000 aide-memoire annexed to the Rejoinder[201]. It will not have escaped the Court, but we have had to spend quite a lot of these oral arguments responding to evidence in the Rejoinder, which could, and should have been produced in the Counter-Memorial. And this is a further example. For his part the Nicaraguan Agent criticized the Court for allowing *any* further Costa Rican evidence after the repleaded Rejoinder[202]. By contrast Mr. Reichler — good trial lawyer that he is — wanted so *more and more* evidence[203]! The Court's response to our limited filing shows that we got the balance right.

24. Turning to the substance, I have already stated that there is no evidence that this aide-memoire of July 2000 was ever seen or approved by anyone from the Costa Rican side. Nicaragua did not produce any handwritten minutes of the meeting, any tape recording, which would have permitted verification of their authenticity and of any signatures, if indeed they were signed. Moreover, Mr. Reichler too hastily dismisses the Navarro affidavit: Mr. Navarro expressly states that after Nicaragua's prohibition of police navigation "in meetings with the Nicaraguan Army personnel, in which he personally participated" — we know from the record that the

---

[200]CR 2009/5, p. 52, para. 22 (Reichler).

[201]RN, Ann. 68.

[202]CR 2009/4, p. 17, para. 38 (Argüello).

[203]CR 2009/5, pp. 47-48, para. 14.

July 2000 meeting was one of these — "it was *never* stated or anticipated that there existed an obligation or practice of requesting permission from the Nicaraguan authorities for the navigation of Costa Rican police on the San Juan River"[204]. The statement is clear and it refutes Colonel Molina's Minutes — or rather General Carrión's "authentication"[205] of Colonel Molina's Minutes.

25. Mr. Navarro's affidavit, supported by documentary evidence[206], puts into question the five Nicaraguan army affidavits filed late with Nicaragua's Rejoinder, which constitute the only evidence of the alleged "practice" of requesting prior authorization. In these circumstances, Nicaragua's claim that there was consistent practice on the San Juan of public vessels requesting authorization should be rejected.

(f) ***Nicaragua has breached Costa Rica's rights of navigation with public vessels to deliver health, social and other essential services to the riparians of the Costa Rican bank***

26. My final point on this topic relates to the right of navigation to deliver essential health, social and other services to riparian communities on the Costa Rican bank. Mr. Reichler asserted that there was no such right of navigation[207]; but he said "Nicaragua does not . . . prohibit Costa Rica from navigating on the river for purposes of delivering medical, educational or other social services to Costa Rican citizens on the right bank of the river" all it requires is for vessels and officials to "register" and to "comply with applicable visa requirements"[208]. He dismissed the evidence of breaches as "bureaucratic inefficiencies" — apparently a new circumstance precluding wrongfulness — resulting in delays in the issuing of "some visas", in "isolated cases"[209].

27. In fact however Nicaragua *has* prohibited Costa Rica from navigating on the river for the purposes of delivering health, social, educational and security services to riparians. Costa Rica has produced evidence of this prohibition[210]. For example, Mrs. Laura Navarro, who works for a

---

[204]CR Ann. IV to letter dated 27 November 2008, para. 5.

[205]CR 2009/5, p 49, para. 17 (Reichler).

[206]CR Ann. V to letter dated 27 November 2008.

[207]CR 2009/5, p. 55, para. 26 (Reichler).

[208]CR 2009/5, p. 54, para. 25 (Reichler).

[209]CR 2009/5, p. 55, para. 28 (Reichler).

[210]See, for example, MCR, Anns. 150, 52, 53, 166, 167, 168, 236, 237, 239, 98, 99, 100, 101; RCR, Anns. 45, 47, 55, 57, 56, 49.

social welfare agency in Costa Rica, states that Nicaragua imposed "a prohibition . . . upon Costa Rican public workers . . . navigating the San Juan River"[211]. Similarly Mr. Marvin Chaves, another social welfare worker, says that Nicaraguan authorities "requir[ed] that Costa Rican officials request *permission*" to visit Costa Rican communities[212]. The uncontroverted evidence of Dr. Ching is that the Nicaraguan Ambassador told her personally that she had to request "authorization to navigate on the San Juan River"[213]. Her evidence was filed in July 2008. In the circumstances it is, with respect, disingenuous to suggest that Nicaragua "does not . . . prohibit Costa Ricans from navigating on the river for the purposes of delivering medical . . . services", and that it only requires registration[214]. A demand for authorization entails a right to prohibit. The prohibition is quite separate from the issue of visas, which Professor Caflisch has dealt with.

28. Nicaragua's prohibition of this form of public navigation has had a detrimental effect on the provision of essential services. This is clear from Costa Rica's evidence, which states that "Primary Care activities" were suspended in communities close to the San Juan "due to the increasing restrictions on free navigation on the river"[215]. Costa Rican health workers attest that the services were suspended "due to the problems being encountered regarding navigation" and "with the purpose of protecting the physical integrity of the health workers . . ."[216]. They also attest to the effect on the local population: vaccinations cannot be provided to children, adults cannot receive basic health services[217], healthcare provided to persons in the region has in general been negatively affected[218].

29. This evidence cannot be dismissed as "bureaucratic inefficiencies which have resulted in delays in the issuance of some visas"[219]. What was provided to Dr. Ching was not a visa. It was

---

[211]RCR, Ann. 57, p. 297.

[212]RCR, Ann. 56, p. 295 (emphasis added).

[213]RCR, Ann. 55, p. 292.

[214]CR 2009/5, p. 54, para. 25 (Reichler).

[215]MCR, Ann. 239, p. 1047. See also CRM, Anns. 236, 237, 98, 99, 100.

[216]MCR, Ann. 99, p. 527. See also CRM, Anns. 98 and 100.

[217]MCR, Ann. 100, pp. 531-532.

[218]MCR, Ann. 99, p. 527. See also RCR, Ann. 55, p. 292; Ann. 59, p. 304.

[219]CR 2009/5, p. 55, para. 28 (Reichler).

an "authorization . . . to navigate on the San Juan River"[220]. She was not applying for a visa, nor even for visas for the employees who were going to carry out the journey; she was compelled by the Nicaraguan Ambassador to apply for "authorization" for the programme itself[221]. Mr. Reichler alleges that since May 2007, Nicaragua has "expeditiously grant[ed] visas so that Costa Rican officials could deliver governmental services"[222]. Well first, this confuses the requirement of visas with the requirement of authorization for the programme. In Costa Rica's Reply, it was noted that in some cases Nicaragua had provided authorization within a reasonable time[223], but it was also noted that other requests had been ignored[224] and the practical effect of this was a prohibition on navigation by these government officials.

Fishing

30. Mr. President, Members of the Court, I turn — something I am not used to doing — to subsistence fishing, but after the raising of hens, I suppose fishing comes next. Professor Kohen has explained why the claim to subsistence fishing is admissible[225], and Mr. Reichler, while preserving Nicaragua's position on admissibility, did not respond to his arguments at all[226]. As to the substance of the claim, Mr. Reichler said that Nicaragua had not prohibited subsistence fishing on the river and that Nicaragua "has absolutely no intention of preventing Costa Rican residents from engaging in subsistence fishing activities"[227] — has absolutely no intention of preventing Costa Rican residents from engaging in subsistence fishing activities. He stressed, however, that commercial including sport fishing is not permitted[228]. So there are three points. As to the first — the facts — we produced affidavit evidence that fishing by riparians has been prohibited and that

[220]CMN, Ann. 53, p. 193.

[221]CMN, Ann. 51, p. 189.

[222]CR 2009/5, p. 55, para. 28 (Reichler).

[223]RCR, paras. 4.36-4.37.

[224]CRR, Anns. 49 and 56; CRR, paras. 4.34-4.36.

[225]CR 2009/3, pp. 55-57, paras. 13-22 (Kohen).

[226]CR 2009/5, p. 27, para. 48 (Reichler).

[227]*Ibid.*

[228]*Ibid.*

boats and tackle have been confiscated[229]. As to the second, if you decide there is an admissible dispute, we ask the Court, in its *dispositif*, respectfully, to record and give effect to Nicaragua's stated position that subsistence fishing by riparians, whether from the Costa Rican bank or from boats on the river, will not be impeded. As to the third point, Costa Rica has never claimed — and does not claim — a right to commercial fishing or sport fishing on the river and we have no objection that this be made clear in the judgment.

Remedies

31. Mr. President, Members of the Court, I dealt with remedies in my abbreviated speech in the first round[230]. Professor Pellet in his unabbreviated speech on Friday did not say much that requires a response. We agree on the need for the Court by way of a clear declaratory judgment to spell out the respective rights and obligations of the Parties in so far as they are in dispute before the Court[231]. Where we do not agree is that Nicaragua apparently persists in seeking a declaration on hypothetical matters not presently in dispute — such as dredging[232]. Nicaragua's right to dredge is as set out in the Cleveland Award in response to the sixth point of doubtful interpretation[233]. Whether any particular dredging programme meets Cleveland's conditions will depend on its scope, scale and modalities. Presently there is no proposal for dredging and the matter is entirely hypothetical. This is not, you will be relieved to know, an advisory opinion.

32. Turning to what Professor Pellet persists in calling injunctions[234], obviously the Court does not issue injunctions in the domestic law sense; it issues orders, often very clear and specific, which are binding on the States parties to the case. I would simply and respectfully request the Court not to allow any room for backsliding in the terms of the provisions of the *dispositif*. On the subjects in dispute the Parties need to know exactly where they stand, so there can be no excuse for non-performance, no new circumstance precluding wrongfulness, so they can — more happily than

---

[229]On Nicaragua's established fishing prohibition, see the following affidavits: MCR, Anns. 106, 107, 108, 109; RCR, Ann. 54, and the Press notes at RCR, Ann. 59. On the confiscation of fishing gear, boats and fish see MCR, Anns. 105, 106, 107, 109; RCR, Anns. 54 and 59.

[230]CR 2009/3, pp. 63-70, paras. 1-28 (Crawford).

[231]CR 2009/5, p. 57, para. 3 (Pellet).

[232]CR 2009/5, p. 59, para. 6 (Pellet).

[233]MCR, Ann. 16, p. 99, numbered para. 6.

[234]CR 2009/5, p. 61, para. 15 (Pellet).

in recent decades — co-exist on the river which marks for a substantial distance their common border.

33. Mr. President, Members of the Court, there being nothing I can usefully add on damages, it remains to thank you for your courteous attention during this case, and to ask you, Mr. President, to call on Costa Rica's Agent to present our final remarks and submissions.

The PRESIDENT: Thank you, Professor Crawford, for your presentation. I now give the floor to the Agent of Costa Rica, Ambassador Edgar Ugalde to present his closing remarks.

Mr. UGALDE-ALVAREZ:

V. CLOSING REMARKS

1. Mr. President, distinguished Members of the Court, Costa Rica has come to the end of its oral pleadings. It is my task to draw our final conclusions for the Court as well as to state Costa Rica's submissions. However, before I turn to these final points, I will refer briefly to various misstatements made by Nicaragua in its oral pleadings.

2. (Tab 69 of the judges' folder) First, let me say again that Costa Rica does not possess military forces. The chart presented by Nicaragua last Thursday[235], apparently showing Costa Rican "military" expenditure, is referenced from a website[236] which bases the information on the CIA's *World Factbook*[237]. It should be noted that Nicaragua omitted expenditure on its police forces and only included expenditure on its military forces. Costa Rica rejects the assertion that the amounts depicted correspond to Costa Rican "military expenses". As a matter of fact, the CIA source cited from the website clearly indicates that Costa Rica does not possess military forces[238]. If Nicaragua's total police[239] and military expenditure was considered, as should have been the case, then in absolute terms Nicaragua's expenditure on security is nearly $100 million!, about a fifth more than Costa Rica's, despite large discrepancies between the GDP of both countries.

---

[235]CR 2009/4, p. 12, para 18 (Argüello).

[236]See http://www.militarybudget.info/WorldwideSpending.html.

[237]See https://www.cia.gov/library/publications/the-world-factbook/.

[238]See https://www.cia.gov/library/publications/the-world-factbook/geos/cs.html.

[239]See http://www12.georgetown.edu/sfs/clas/pdba/Security/citizensecurity/nicaragua/presupuestos/gobernacion2008.pdf.

Furthermore, as you can see in the graphic projected, the chart there shows that Nicaragua's expenditure, both in real terms[240] and as a percentage of GDP[241], is much higher than Costa Rica's (tab 70 of the judges' folder).

3. In addition, the recent Human Development Report[242] prepared by the United Nations Development Programme states that Costa Rica has zero, I repeat, zero military expenditure for the period between 1990 and 2005.

4. Secondly, the reference made by Nicaragua to its 1986 Application to the Court[243] cannot and should not have any weight in the present proceedings. As Nicaragua has pointed out, that case was discontinued by it in 1987, before Costa Rica had any opportunity to respond to Nicaragua's Memorial, let alone appear before this Court[244]. In any case, Costa Rica emphatically rejects all allegations that may have been made by Nicaragua there.

5. Nicaragua seems satisfied to use the Court's valuable time to fashion new fields of conflict, because that is precisely what it does by stating that Costa Rica has not reacted to other problems, such as environmental issues as a result of mining operations or the settlement of maritime boundaries[245]. It must be said that these issues fall entirely outside the dispute before the Court in the present case. In this context, however, Costa Rica expects to soon receive the relevant documents pertaining to Nicaragua's planned hydroelectric dam on the San Juan River[246], with indications of its possible environmental impact on the river and both riparian States. Costa Rica is also hopeful that Nicaragua will finally decide on the date when the maritime delimitation talks, which were unilaterally suspended by it in 2005, could be resumed.

---

[240]See tab 69 of the judges' folder. Information derived from http://www.militarybudget.info/WorldwideSpendin`g.html; https://www.cia.gov/library/publications/the-world-factbook/index.html; and http://www12.georgetown.edu/sfs/clas/pdba/Security/citizensecurity/nicaragua/presupuestos/gobernacion2008.pdf.

[241]See tab 70 of the judges' folder. Information derived from http://www.militarybudget.info/WorldwideSpendin`g.html; https://www.cia.gov/library/publications/the-world-factbook/index.html; and http://www12.georgetown.edu/sfs/clas/pdba/Security/citizensecurity/nicaragua/presupuestos/gobernacion2008.pdf.

[242]See http://hdr.undp.org/en/media/HDR_20072008_EN_Complete.pdf.

[243]CR 2009/4, p. 15, para. 29 (Argüello).

[244]CR 2009/2*, p. 12, para. 1 (Ugalde-Alvarez).

[245]CR 2009/4, pp. 16-17, paras. 32-34 (Argüello).

[246]See http://www.elnuevodiario.com.ni/imprimir/41417; http://www.telesurtv.net/noticias/secciones/nota/43824-NN/nicaragua-y-brasil-firman-acuerdo-sobre-plan-hidroelectrico/.

6. Nicaragua insists on censuring Costa Rica for enforcing its immigration laws in Costa Rica's own territory. As has been shown to the Court, Nicaragua has misrepresented evidence related to this issue[247]. However, I would like to respond to Nicaragua's allegation that in 1998 Costa Rica's Government engaged in a new policy in response to what was perceived as increased Nicaraguan illegal immigration to Costa Rica[248]. It has been shown that these allegations are not true[249]. As a matter of fact, it was that Administration that enacted in 1998 the largest immigration amnesty in Costa Rican history[250], which effectively allowed some 150,000 Nicaraguans to legalize their situation in Costa Rica.

7. Finally, Nicaragua's Agent found it appropriate to announce before the Court that, for the first time in over 150 years, it is disputing issues regarding the situation of the common Bays of San Juan and Salinas[251]. Is Nicaragua disposed to challenge, once again, the final and perpetual character of the 1858 Treaty of Limits, along with the *res judicata* character of the 1888 Cleveland Award?

8. Costa Rica has come to the International Court of Justice, as I said, as a last resort to definitively settle the way in which it can effectively enjoy its rights of free navigation on the San Juan River[252]. The river has an exceptional régime which is reflected in the number of instruments and decisions that relate to it, in particular the 1858 Treaty of Limits, the 1888 Cleveland Award, the 1916 judgment of the Central American Court of Justice and the 1956 Agreement. We trust that the Court will view this régime in its entirety and will find it, along with the evidence submitted, to fully support Costa Rica's submissions.

9. Therefore, we trust that the Court will find that Costa Rica indeed possesses the rights of navigation for purposes of commerce that the instruments have granted it. The clarity of your decision is of great importance, so that Costa Rica and Nicaragua will be able to recognize that children may navigate freely to school, that mothers and their children can have effective access to

---

[247]CR 2009/2, p. 27, para. 12 (Ugalde). See also CR 2009/6, pp. 50-64 (Crawford).

[248]CR 2009/5, p. 51, para. 21 (Reichler).

[249]CR 2009/2*, pp. 25-27, paras. 7-13 (Ugalde).

[250]See http://www.unhcr.org/refworld/publisher,NATLEGBOD,,CRI,3ae6b560c,0.htm

[251]CR 2009/4, p. 17, para. 35 (Argüello).

[252]CR 2009/2*, p. 14, para. 9 (Ugalde-Alvarez).

health and social services, that tourists may be transported without being searched and subjected to *ad hoc* measures, and that police protection can be brought to communities. It is equally important for the State of Costa Rica to fully exercise its rights and obligations, including the protection and guarding of the San Juan River and the Bay of San Juan del Norte, which is commonly owned by both countries, as well as that of Salinas. It is our hope that these rights, shall they be found to belong to Costa Rica, be enjoyed in such a manner that they are effective and meaningful, free from constant and aggravating interference. The people of Costa Rica wish nothing more than peaceful and friendly relations with their neighbours, but they also desire that the rule of international law be upheld and fully respected.

Submissions

10. Mr. President, pursuant to Article 60 of the Rules of Court, I shall now read the final submissions of the Republic of Costa Rica.

Having regard to the written and oral pleadings and to the evidence submitted by the Parties, may it please the Court to adjudge and declare that the Republic of Nicaragua has:

(a) the obligation to allow all Costa Rican vessels and their passengers to navigate freely on the San Juan for purposes of commerce, including communication and the transportation of passengers and tourism;

(b) the obligation not to impose any charges or fees on Costa Rican vessels and their passengers for navigating on the river;

(c) the obligation not to require persons exercising the right of free navigation on the river to carry passports or obtain Nicaraguan visas;

(d) the obligation not to require Costa Rican vessels and their passengers to stop at any Nicaraguan post along the river;

(e) the obligation not to impose other impediments on the exercise of the right of free navigation, including timetables for navigation and conditions relating to flags;

(f) the obligation to allow Costa Rican vessels and their passengers while engaged in such navigation to land on any part of the bank where navigation is common without paying any charges, unless expressly agreed by both Governments;

(g) the obligation to allow Costa Rican official vessels the right to navigate the San Juan, including for the purposes of resupply and exchange of personnel of the border posts along the right bank of the river with their official equipment, including service arms and ammunition, and for the purposes of protection as established in the relevant instruments, and in particular the Second Article of the Cleveland Award;

(h) the obligation to facilitate and expedite traffic on the San Juan, within the terms of the Treaty of 15 April 1858 and its interpretation by the Cleveland Award of 1888, in accordance with Article 1 of the bilateral Agreement of 9 January 1956;

(i) the obligation to permit riparians of the Costa Rican bank to fish in the river for subsistence purposes.

11. Further, the Court is requested to adjudge and declare that by reason of the above violations, Nicaragua is obliged:

(a) immediately to cease all the breaches of obligations which have a continuing character;

(b) to make reparation to Costa Rica for all injuries caused to Costa Rica by the breaches of Nicaragua's obligations referred to above, in the form of the restoration of the situation prior to the Nicaraguan breaches and compensation in an amount to be determined in a separate phase of these proceedings; and

(c) to give appropriate assurances and guarantees that it shall not repeat its unlawful conduct, in such form as the Court may order.

12. The Court is requested to reject Nicaragua's request for a declaration.

13. Mr. President, distinguished Members of the Court, the Government and the people of the Republic of Costa Rica express their gratitude to the Court for the opportunity given to Costa Rica to be heard. May I also offer our thanks to the Court's Registry and to the team of interpreters and translators for their excellent work. Costa Rica reaffirms its full confidence in the Court and expresses its acceptance of the judgment to be found. This judgment should serve to allow both countries to build a fraternal and peaceful future. Thank you, Mr. President.

The PRESIDENT: Thank you very much, Ambassador Edgar Ugalde. The Court takes note of the final submissions which you have now read on behalf of the Republic of Costa Rica. The

Republic of Nicaragua will present its second round of oral argument on Thursday 12 March from 10 a.m. to 1 p.m. This sitting is now adjourned until Thursday.

The Court rose at 1 p.m.

_____