Non-Corrigé
Uncorrected

CR 2009/7

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2009

Public sitting

held on Thursday 12 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 jeudi 12 mars 2009, à 10 heures, au Palais de la Paix,

sous la présidence de M. Owada, président,

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

COMPTE RENDU

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

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

M. Couvreur, greffier

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

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

as Agent;

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

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

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

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

Mr. 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.

The Court meets today to hear the second round of oral argument of the Republic of Nicaragua. I now give the floor to Mr. Brownlie.

Mr. BROWNLIE: Thank you, Mr. President.

I. A REAFFIRMATION OF THE SPECIAL CHARACTER OF THE TREATY

1. Mr. President, distinguished Members of the Court, it is my task to respond to the presentations of my friends on the other side of the Court relating to the general character of the Treaty of Limits and the nature of the legal interests which result from that Treaty.

2. Before examining the observations of Professors Crawford and Caflisch individually, I must point to the weak analytical foundation common to both speeches. Both fail to give full faith and credit to the sovereignty of Nicaragua, that is to say, Nicaragua's title to the river as a whole. This legal interest, this title to territory, is not created by the Treaty but is the result of the determination of the boundary. The legal result of the fixing of the international boundary is the existence of a title to territory.

3. It is a consequence of two elements in combination:

— *First*, the implementation of the territorial settlement by means of fixing a boundary which allocated the extensive region of Nicoya to Costa Rica, and the region of the San Juan River to Nicaragua.

— *Second*, the necessary result, in general international law, was the establishment of title for Nicaragua.

4. Mr. President, counsel for Costa Rica insist on treating title or sovereignty as if it is divisible into several layers of jurisdictional rights, of navigation, of communication, and so forth.

5. What is missing here is the qualitative difference between title and the regulatory power which goes with title on the one hand and, on the other hand, the entitlement to treaty rights on the part of another State, rights which can only be vindicated by claim, and by methods of peaceful settlement. Because Nicaragua is the territorial sovereign, the title holder, she has not only the

legal power but the legal duty to maintain public order and appropriate conditions of safe navigation on the San Juan.

6. It is this basic condition, this basic system of public order which is recognized in the decision of the Claims Commission in the *McMahan* case. The system depends upon the principle that the power of control and decision inheres in the sovereign, and the question is, who has that power? The answer is Nicaragua and not Costa Rica. The Treaty provisions are administered by the territorial sovereign.

7. My outline of this system of public order, that is, the maintenance of the discipline of the Treaty, provoked Professor Crawford to refer to the outline as an extraordinary statement. But, Mr. President, if Professor Crawford did arrive at the local market of Sarapiquí with his eggs still unbroken, and ready for sale, this would be the result of the system of public order which he finds extraordinary.

8. Both Professor Crawford and Professor Caflisch share the same confusion concerning the coexistence of certain rights and the regulatory powers of the State with title to territory.

9. This confusion is apparent in the conclusions proposed to the Court by Professor Caflisch (CR 2009/6, p. 40, para. 13).

10. First, he says that the instrument of 1858 is a treaty establishing a boundary with a multifaceted legal régime governing a waterway. This formulation involves a failure to draw the legal conclusions from the establishing of a boundary, especially, one which constitutes the settlement of a major territorial dispute.

11. Secondly, he says that sovereignty and the right of navigation are "pieces of one and the same picture" and that it cannot be said that the one dominates the other. This formulation encapsulates the recurrent failure of our opponents to distinguish between the question of rights and the enforcement and protection of those rights.

12. In fact in his third conclusion Professor Caflisch recognizes that Nicaragua can "exercise her sovereignty via measures and regulations" that are not unlawful, discriminatory or unreasonable. This, Mr. President, is a belated acceptance of the system of public order created by the Treaty and by general international law.

13. I have now addressed the false premises on which the reasoning of Costa Rica concerning sovereignty rests, and I can now return to some of the specifics of the submissions of Professor Crawford.

14. It will be of assistance to the Court if I first of all indicate what Professor Crawford did not deal with in response to my first round speech.

15. First, he steers clear of the doctrine of contemporary international law. And it is not the case that Professor Crawford has left this aspect of the matter to his colleague, because Professor Caflisch shows a similar reticence when it comes to the doctrine. Professor Caflisch confines his response to say that "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" (CR 2009/6, p. 40, para. 15). Professor Caflisch accepts this position and so, presumably, does Professor Crawford.

16. And this is all highly relevant because it emphasizes that the Treaty provisions on navigation are exceptional and form an inherent element in the territorial settlement.

17. I must return to the reticences of Professor Crawford.

18. As I have pointed out, he avoids reference to doctrine *tout court* .

19. Secondly, he avoids reference to third State evidence, including the Note dated 28 May 1858 from Mr. Mirabeau B. Lamar to the United States Secretary of State. Mr. Lamar recognized the extent of the territorial concession made by Nicaragua. The Court will recall that he was the United States Resident Minister to the Governments of Costa Rica and Nicaragua.

20. *Thirdly*, Professor Crawford plays down the evidence that the 1858 Treaty involved the settlement of a long-running territorial dispute between Costa Rica and Nicaragua. The relevant paragraphs of the first Rives Report, cited in my first speech, are not rebutted. Moreover, the wording of the preamble to the Treaty of Limits is ignored, along with the provisions of Article I, which explicitly indicate the historical background.

21. Fourthly, Professor Crawford leaves on one side the whole question of the legal consequences of the existence of Nicaraguan title over the San Juan as a result of the 1858 Treaty.

22. I move on to the thesis of Professor Crawford according to which the Nicoya theory is wrong and, he says, in any event irrelevant (CR 2009/6, pp. 12-14, paras. 16-26).

23. Counsel for Costa Rica makes heavy going of this issue. The documents show that the question of title to Nicoya remained open until the Treaty of 1858. The Memorial of Costa Rica expressly recognizes that the question of Nicoya was not finally settled until the 1858 Treaty; I refer to the Memorial, page 12, paragraph 2.14. And the position was confirmed by the first article of the Juarez-Cañas Treaty of 1857.

24. If Professor Crawford were correct about the history, the 1858 Treaty would have been unnecessary.

25. Professor Crawford raises questions about the extent of Nicoya (CR 2009/6, p. 12, paras. 17-18). Nicaragua stands by the map published by Fermin Ferrer, but would adopt the same argument as before on the basis of the judges' folder for round 2, tab 53. This is said to be the representation of Nicoya as described by Rives. This version still presents Nicoya as very extensive, and including the southern coast of Lake Nicaragua. Thus, it still indicates the subject-matter of a substantial territorial dispute.

26. Professor Crawford's final point is to the effect that "the obvious purpose of the Treaty" was the interoceanic canal (CR 2009/6, pp. 14-15, paras. 27-30). No doubt the Treaty had many aspects but Nicaragua does not accept that the object and purpose of the 1858 Treaty was not the settlement of the long-standing territorial dispute but "the interoceanic canal". It is true that Article VIII of the Treaty contemplated the possibility of a canal. At the same time it would be astonishing to see the Treaty itself as an interoceanic treaty.

27. And in respect of the issue of natural rights raised in the second Rives Report, it is true that Point 11 of Cleveland's Third Article refers to "cases where the construction of the canal will involve an injury to the natural rights of Costa Rica . . ." and provides then that Costa Rica may "demand compensation".

28. I shall move now to the decision of the Permanent Court in the *S.S. "Wimbledon"* case, in which the Judgment used the phrase "general and peremptory" in relation to Article 380 of the Treaty of Versailles. This was invoked by Professor Crawford in the second round (CR 2009/6, pp.8-9, para. 3).

29. Professor Crawford accepts that the Treaty of Versailles has a distinct character from the 1858 Treaty, which was "general and peremptory", whilst the latter — the bilateral Treaty of

1858 — is "bilateral rather than general". But he nonetheless considers it to be relevant. With respect, this reliance on the *S.S. "Wimbledon"* decision displays excessive optimism. The case could not be more different from the present. The context is the multilateral peace treaty of Versailles and the refusal of access to the Kiel Canal by the German authorities on the basis of obligations of neutrality. And so the circumstances were unusual in several respects. In the words of the Permanent Court:

> "The Court considers that the terms of Article 380 are categorical and give rise to no doubt. It follows that the canal has ceased to be an internal and national navigable waterway, the use of which by the vessels of states other than the riparian state is left entirely to the discretion of that state, and that it has become an international waterway intended to provide under treaty guarantee easier access to the Baltic for the benefit of all nations of the world. Under its new régime, the Kiel Canal must be open, on a footing of equality, to all vessels, without making any distinction between war vessels and vessels of commerce, but on one express condition, namely, that these vessels must belong to nations at peace with Germany." (*Judgments, 1923, P.C.I.J., Series A, No. 1*, pp. 22-23.)[1]

30. Mr. President, in the result, the Permanent Court is deciding that Germany could not invoke the law of neutrality and that is peremptory indeed. But the subject-matter has no relevance for the present case. The strange result, however, is that at the end of the day Costa Rica appears to espouse the categorization of the right of navigation as peremptory. And yet when Nicaragua described the Costa Rican analysis as involving a peremptory right of navigation, counsel for Costa Rica protested. I refer to the argument of Professor Caflisch in the second round (CR 2009/6, p. 40, para. 15).

31. I return to some specific points raised in the presentation of Professor Caflisch (CR 2009/6, p. 41, para. 16). He refers to the decision of the General Claims Commission in the case of *McMahan*. He quotes a passage already included in the transcript (CR 2009/4, p. 32, para. 59) but does not deny the relevance and authority of the decision itself. The decision adopts the basic system of public order which I have already outlined this morning.

---

[1] "La Cour estime que l'article 380 est formel et ne prête à aucune équivoque. Il en résulte que le canal a cessé d'être une voie navigable intérieure, nationale, dont l'usage par les navires des Puissances autres que l'Etat riverain est abandonné à la discrétion de cet Etat, et qu'il est devenu une voie internationale, destinée à rendre plus facile, sous la garantie d'un traité, l'accès de la Baltique, dans l'intérêt de toutes les nations du monde. Sous son régime nouveau, le Canal de Kiel doit être ouvert, sur le pied de l'égalité, à tous les navires, sans qu''il y ait à distinguer entre les navires de guerre et les navires de commerce, mais à une condition expresse, c'est que ces navires ressortissent à des nations en paix avec l'Allemagne."

32. My distinguished opponent also states that "a treaty right to free navigation cannot be regulated out of existence by invoking Nicaragua's sovereignty" (CR 2009/6, pp. 40-41, para. 15). And he adds: "This observation is also valid for the passages quoted from Wheaton and O'Connell."

33. These statements involve tilting at windmills and the Court certainly is in a setting appropriate for such sport. In any event, Wheaton and O'Connell do not support the position of Costa Rica. The relevant passages appear in my first round speech at paragraphs 55 to 57 (CR 2009/4, p. 31). Both Wheaton, published in 1866, and O'Connell, published in 1970, accept that any right of navigation is subject to the regulatory power of the riparian State.

Mr. President, I have now concluded my submissions in the second round and I thank the Court for its kind attention. I would ask you now to invite Professor Remiro to the podium.

The PRESIDENT: Thank you, Mr. Brownlie, for your presentation. I now give the floor to Professor Remiro Brotóns.

M. BROTÓNS :

II. LE DROIT DE LIBRE NAVIGATION DU COSTA RICA «CON OBJETOS DE COMERCIO» SUR UN TRONÇON DU FLEUVE SAN JUAN

1. Introduction

1. Monsieur le président, Messieurs les juges, c'est dans les arbres de la ville d'Olivabassa, née de l'imagination fertile d'Italo Calvino, que le baronnet Cósimo de Piovasco se promenait sans jamais toucher le sol et c'est là qu'il rencontra, un jour, une colonie d'aristocrates espagnols en exil, qui vivaient également perchés dans les bananiers et les ormes de la ville. Pourquoi ? Parce que les magistrats locaux, qui voulaient leur donner refuge, se devaient néanmoins de respecter l'ancien traité conclu avec le roi d'Espagne, en vertu duquel ils étaient tenus de lui extrader tout fugitif *posant son pied sur le sol* d'Olivabassa[2].

[2] I. Calvino, *Il barone rampante*, 1957 ; trad. française : *Le baron perché*, 1959 (voir Ed. du Seuil, Collections Points, n° 232, Paris, 2001) ; trad. anglaise : *The Baron in the Trees*, 1959.

2. Eh bien, Monsieur le président, Messieurs les juges, c'est cela que vous propose maintenant le Costa Rica, en défendant une décision *policy-oriented* en vue de laquelle la Partie demanderesse n'a aucun scrupule à manipuler le canon d'interprétation codifié dans l'article 31 de la convention de Vienne. Mais, êtes-vous les juges d'Olivabassa ?

2. *Reductio ad absurdum* et principe de bonne foi

3. Lundi dernier, les conseils du Costa Rica ont tenté, dans un ultime effort, de vous convaincre d'accepter leurs prétentions tout à fait dépourvues de fondement, réduisant les conclusions auxquelles une application correcte de la *règle générale* d'interprétation conduit naturellement à l'absurde.

4. Les conseils du Costa Rica nous parlent de paysans qui se déplacent avec leurs œufs au marché de Sarapiquí et qui ne peuvent retourner chez eux parce qu'ils les ont tous vendus[3], ou encore d'un producteur du café obligé de faire le tour du cap Horn alors que sa récolte prend la route du San Juan vers l'Europe[4]. Ils affirment avec désinvolture que l'expression *objetos de comercio* contenue dans l'article VI du traité Jerez-Cañas a pour objet de clarifier et d'étendre le droit perpétuel de libre navigation accordé sans limites au Costa Rica[5]. Tout en accusant le Nicaragua de vouloir remplacer l'interprétation résultant de la *règle générale* par une interprétation fondée sur les moyens complémentaires[6], les conseils du Costa Rica font prévaloir le rapport de Rives sur le texte du traité[7].

5. Monsieur le président, Messieurs les juges, c'en est assez ! L'opération interprétative menée par le Costa Rica est difficilement compatible avec le principe de bonne foi, principe essentiel dans la *règle générale* d'interprétation. Il est évident que les bateaux destinés au transport de marchandises ne changent pas leur qualification quand, une fois leurs marchandises déchargées au port, ils naviguent sur lest. Tous n'ont pas forcément de charge pour leur voyage de retour et certains comme les pétroliers ou les navires qui transportent du gaz liquide ou des déchets

---

[3] CR 2009/6, p. 17, par. 35.

[4] CR 2009/6, p. 31, par. 43.

[5] CR 2009/6, p. 17, par. 34.

[6] CR 2009/2, p. 73, par. 63.

[7] CR 2009/6, p. 15, par. 29.

dangereux naviguent en général à vide au retour. Et il va de soi que les commerçants peuvent accompagner leurs marchandises.

6. Le Costa Rica s'obstine à proposer une interprétation de son droit de navigation qui prive la limitation de le faire «con objetos de comercio» de tout effet ; il soutient que son droit de navigation est plus que libre, absolu. Néanmoins, même la traduction anglaise de l'article VI du traité Jerez-Cañas chérie par le Costa Rica limite ce droit de navigation costa-ricien : «said navigation being for the purposes of commerce». Il est donc évident qu'on ne peut soutenir sérieusement que les objets de commerce sont une extension du droit de navigation illimitée. Toutes les références au droit de navigation dans le traité reposent, expressément ou implicitement, sur le texte de l'article VI et sa limitation «con objetos de comercio».

3. Une navigation «con objetos de comercio»

7. Monsieur le président, Messieurs les juges, nous avons déjà longuement débattu sur la signification du syntagme «objetos de comercio»[8].

8. Conformément au sens ordinaire des termes dans le contexte du traité, le Nicaragua croit avoir démontré que naviguer «con objetos de comercio», c'est bien naviguer «avec les choses qui font l'objet d'une activité commerciale», c'est naviguer avec des marchandises. Mais même dans l'hypothèse où la Cour considèrerait que l'article VI du traité Jerez-Cañas se réfère, sous couvert de cette expression, aux finalités commerciales, le résultat ne changerait pas pour autant, car à l'époque où le traité a été conclu, le commerce n'était rien d'autre que le trafic de marchandises.

9. La Partie adverse n'a pas avancé lors du deuxième tour de ses plaidoiries des éléments ou raisonnements qui nous obligent à modifier notre position. Cependant, si vous me le permettez, je souhaite faire des brefs commentaires à propos de certaines questions reprises par le Costa Rica lundi dernier.

10. La première concerne les tableaux présentés par le Costa Rica afin de prouver que l'expression «objetos de comercio» signifie «fins commerciales» et que le trafic commercial est décrit par d'autres termes quand on veut se référer aux marchandises.

---

[8] CR 2009/4, p. 37-40, par. 6-15.

11. Le Nicaragua croit avoir discrédité la valeur probante de ces tableaux[9]. Il y a bien sûr d'autres termes utilisés dans le trafic commercial pour identifier les choses impliquées dans l'activité commerciale et qui sont, peut-être, utilisés dans le trafic commercial plus fréquemment que celui de «objetos». Mais, si nous nous en tenons au critère du Costa Rica[10], les «commodities» ne seraient pas des «commodities», car elles n'apparaissent pas une seule fois dans la liste que le Costa Rica lui-même a établie. Or, ce terme de «commodities» ne fait-il pas partie des termes les plus populaires, et donc des plus courants, de la langue commerciale anglaise ?

12. La signification du terme «objeto» au singulier (et il en est d'ailleurs de même au pluriel), dépend du contexte dans lequel il est utilisé. Il s'agit d'un terme polysémique dont on ne peut déterminer le sens que grâce à son contexte.

13. Citons, à titre d'exemple, cette définition d'opérations liées au commerce tirée du *Corpus diachronique de l'espagnol actuel*. Il s'agit «d'opérations indépendantes, qui ont *pour objet* de faciliter l'achat et la vente des *objets de commerce*, ou de servir de médiation dans ce type d'affaires»[11]. Et voila ! Nous trouvons là, dans la même phrase, «objet» comme finalité et «objets de commerce» comme marchandise.

14. C'est pourquoi on ne peut tirer aucune conclusion basée sur l'interprétation de ce terme hors de son contexte ; dans notre cas, il s'agit bien d'objets de commerce («objetos de comercio»). Et c'est bien là ce que le Nicaragua met en question : le sens que le Costa Rica donne à des *objets* au pluriel quand ces *objets sont liés au commerce et qu'on prétend naviguer avec eux.*

15. Pourquoi l'expert du Costa Rica, M. Moreno de Alba, passe-t-il sous silence tous les cas du syntagme «objetos de comercio» que recense le *Corpus diachronique*, ouvrage qu'il connaît et qu'il invoque à l'appui d'autres points ? La réponse est bien simple : parce que, dans tous les cas, le syntagme «objetos de comercio» est compris au sens de «choses faisant l'objet d'activités commerciales»[12].

---

[9] CR 2009/4, p. 40-44, par. 16-27.

[10] CR 2009/6, p. 25, par. 18-20.

[11] Dossier de plaidoiries, 5 mars 2009, plaidorie de M. Antonio Remiro Brotons, liste de documents, document 1 : CORDE «objetos de comercio».

[12] CR 2009/6, p. 39, par. 15.

16. En outre, le seul point qui pourrait appuyer l'interprétation finaliste du syntagme «objetos de comercio» que propose le Costa Rica se trouve dans les traités qui ont suivi le modèle du traité Jay ; rappelons que ces traités, conclus par le Costa Rica avec les Etats-Unis en 1851 et par le Nicaragua en 1857, 1859 et 1867, se réfèrent au droit des citoyens des parties à «louer et occuper des maisons et des entrepôts *para los objetos de su comercio (for the purpose(s) of their commerce)*», une fois énoncé leur droit «to come with their Ships and Cargoes to the Lands, Countries, Cities, Ports Places and Rivers within their Dominions and Territories»[13].

17. Le terme «objets» dans l'expression «para los objetos de su comercio» peut donc être interprété tant au sens de «choses» ou «marchandises» qu'au sens de «fins commerciales». L'expert du Costa Rica lui–même admet l'ambigüité du texte[14]. A notre avis la seule raison pour donner *dans ce cas* un certain crédit à la seconde interprétation réside dans le fait qu'elle a été traduite par «for the purposes of commerce» dans le texte anglais du traité, qui fait également foi. Mais eu égard au contexte des dispositions mentionnées, les activités commerciales portent sur des cargaisons, c'est-à-dire, sur des marchandises qu'on emmagasine dans les entrepôts, ce qui renvoie à nouveau au seul commerce des marchandises.

18. Monsieur le président, Messieurs les juges, il y a des différences significatives entre ces traités et le traité Jerez-Cañas. Ce dernier est un traité portant sur des limites territoriales et non un traité d'amitié, de commerce et de navigation comme les autres. Il ne repose pas sur un modèle. On y parle de navigation *avec* des objets de commerce et non de louer des entrepôts *pour* les objets de commerce. Le traité Jerez-Cañas fait autorité seulement en espagnol. Le traité Jerez-Cañas est singulier, absolument singulier.

19. Le conseil du Costa Rica triomphe parce que dans aucun des huit cas citant «objetos de comercio» mentionnés dans le *Corpus diachronique de l'espagnol actuel*, tous avec une signification indubitable de «choses faisant l'objet d'activités commerciales», la préposition «con» précède le syntagme, telle qu'elle figure à l'article VI du traité[15]. Cela n'affecte pas l'interprétation

---

[13] CR 2009/4, p. 41-42, par. 21-25.

[14] J. G. Moreno de Alba, *Dictamen sobre el significado del sintagma «con objetos de comercio» en el contexto del artículo 6º del «Tratado de límites entre Costa Rica y Nicaragua» (14 de abril de 1858)*, 9 de noviembre de 2008, par. III.3 (Documents Annexed to Letter from Agent of Costa Rica dated 27 November 2008, Ann. I).

[15] CR 2009/6, p. 22, par. 11.

de l'expression[16], mais, pour les besoins de la démonstration, peut-on trouver un seul cas dans le tableau présenté par le Costa Rica dans lequel la préposition «con» précède le terme «objetos» ? La réponse est clairement *non*. En fait, on peut dire que la formule de l'article VI nous met devant un *hapax*, c'est-à-dire, un cas unique, sans aucune confirmation : le syntagme «con objetos de» plus un substantif («commerce» dans notre cas) ne correspond à aucune pratique qui soit connue[17].

4. La notion de *comercio* (commerce) vers le milieu du XIX^e^ siècle

20. Dans le contexte du milieu du XIX^e^ siècle, «commerce» visait le trafic de marchandises. Le Nicaragua croit que ce fait a été bien établi et démontré avec les arguments exprimés au premier tour de ses plaidoiries[18]. La preuve grammaticale et la pratique conventionnelle confirment cette affirmation.

21. Le Costa Rica admet que tel était le cas, mais il insiste sur la deuxième acception de «commerce» au XIX^e^ siècle, défini comme «communication et relations de groupes de personnes et de peuples avec d'autres»[19]. Certes ! Mais le Costa Rica n'explique pas comment cette acception pourrait, d'une manière ou d'une autre, être retenue dans le texte et le contexte de l'article VI du traité Jerez-Cañas et pourrait conduire à écarter la première définition du commerce communément acceptée.

22. L'acception du terme commerce promue par le Costa Rica est aujourd'hui reléguée à la huitième et dernière acception du *Dictionnaire* et est, d'ailleurs, comme je l'ai signalé en passant au premier tour, tombée en désuétude[20]. Il n'y a pas de contradictions parmi les conseils du Nicaragua sur ce point. Le Nicaragua ne prétend pas tirer profit du fait que cette acception, toujours secondaire, est aujourd'hui obsolète, si ce n'est pour attirer l'attention sur l'intérêt que lui porte le Costa Rica, soucieux de relier à l'acception la plus large du mot «commerce» des

---

[16] Voir M. Seco Reymundo, *Dictamen sobre el sintagma «con objetos de comercio» en el texto del Tratado de Límites entre Costa Rica y Nicaragua suscrito el 15 de abril de 1858*, par. 6 (duplique du Nicaragua (DN), vol. II, annexe 64).

[17] Voir M. Seco Reymundo, *Dictamen.*…, par. 8.

[18] CR 2009/4, p. 43-46, par. 28-42.

[19] CR 2009/6, p. 30, par. 30.

[20] CR 2009/4, p. 44, par. 35.

développements bien plus récents, qui n'étaient pas imaginables pour les auteurs du traité Jerez-Cañas en 1858.

23. Comprendre le mot «commerce» dans le cadre de l'article VI du traité comme «communication et relations de groupes de personnes et de peuples avec d'autres» équivaut à faire de commerce un synonyme de «communication». Cependant, le commerce présume la communication, mais ne se confond pas avec elle, à moins qu'une intention contraire puisse être démontrée.

24. En résumé, c'est la première acception de commerce qui exprime le mieux le sens commun et courant du terme et il n'y a dans le traité aucune indication qui permettrait une acception différente. Force est donc de s'en tenir à cette première acception.

5. Le transport de passagers

25. Monsieur le président, Messieurs les juges, le conseil du Costa Rica estime avoir fourni la preuve que le transport de passagers est compris dans le droit de libre navigation découlant de l'article VI du traité Jerez-Cañas[21]. Mais où se trouve-t-elle — la preuve ? Contrairement à ce que soutient le Costa Rica, le transport de passagers est exclu de la notion de commerce au milieu du XIX^{e} siècle et, en particulier, de la notion de commerce retenue par l'article VI du traité.

26. Tout d'abord, le commerce est défini comme «négociation et trafic qui se fait en achetant, en vendant, en échangeant des choses» ; c'est la première acception du terme dans tous les dictionnaires pendant tout le XIX^{e} siècle et encore aujourd'hui[22]. Mais elle est d'autant plus intéressante qu'aucune des autres acceptions de commerce, qui incluent même deux jeux de cartes, ne fait la moindre allusion au transport de passagers.

27. En second lieu je rappelle la position du Costa Rica lui-même dans l'arbitrage Cleveland[23], déjà évoquée par le Nicaragua au premier tour[24] et sur laquelle reviendra tout de suite mon collègue, le professeur Pellet : dans sa question «rhétorique» le demandeur se référait expressément au «transport de marchandises» à l'exclusion de celui des passagers.

---

[21] CR 2009/6, p. 31, par. 41.

[22] CR 2009/4, p. 43, par. 29-30.

[23] DN, vol. II, annexe 5.

[24] CR 2009/4, p. 58-59, par. 20-21 ; CR 2009/5, p. 31-32, par. 13.

28. En troisième lieu, il faut rappeler que si durant une période remontant à 1849 des passagers ont, en effet, été transportés en grand nombre sur le fleuve, cette pratique était le fait du Nicaragua, mais en aucune manière celle du Costa Rica. Si le Costa Rica avait un droit quelconque au transport de passagers sur le fleuve San Juan, on ne peut que s'étonner qu'il n'en ait fait aucun usage pendant plus de cent trente ans. Ce n'est qu'à partir de 1994 que le Costa Rica s'est aventuré à promouvoir un tourisme régulier et important sur le San Juan. Auparavant, le Nicaragua n'avait nul besoin de rappeler au Costa Rica ce que «objetos de comercio» signifiait dans le traité.

29. En quatrième lieu, et comme le Nicaragua l'a expliqué de manière détaillée dans ses pièces écrites, le transport de passagers en tant qu'activité commerciale fut soigneusement exclu du droit de navigation reconnu par l'article VI du traité[25].

30. Finalement, le Nicaragua n'a pas gardé un silence «assourdissant» que lui veut attribuer le Costa Rica[26] au sujet de la clause relative à la prétention du Gouvernement et des citoyens costa-riciens de bénéficier d'un libre passage pour le fleuve San Juan d'un océan à l'autre, renfermée dans les traités conclus par le Nicaragua avec les Etats-Unis, la France et la Grande-Bretagne entre 1857 et 1860. Dans la duplique du Nicaragua on peut trouver la réponse adéquate[27]. En fin de compte cette clause se limitait à préserver les prétentions des citoyens et du Gouvernement costa-riciens à un libre passage dans la perspective de la construction éventuelle d'un canal interocéanique traversant partiellement le fleuve San Juan.

Monsieur le président, Messieurs les juges je vous remercie de votre très aimable attention et ayant conclu mon exposé, je vous prie, Monsieur le président, d'appeler le professeur Pellet à cette barre pour la suite des plaidoiries du Nicaragua.

The PRESIDENT: Thank you, Professor Remiro Brotóns, for your presentation. I now give the floor to Professor Alain Pellet.

---

[25] Contre-mémoire du Nicaragua (CMN), p. 161-165, par. 4.1.37-4.1.48 ; DN, p. 151-154, par. 3.90-3.95.

[26] CR 2009/6, p. 31, par. 42.

[27] DN, p. 153-154, par. 3.94.

M. PELLET :

III. INTERPRÉTATION DU TRAITÉ (SUITE)

1. Monsieur le président, Messieurs les juges, il m'incombe ce matin de me pencher à nouveau sur l'interprétation de l'expression «avec des marchandises» («con objetos de comercio») en répondant aux arguments avancés par les professeurs Crawford et Kohen sur ce point, que le professeur Remiro Brotóns n'a encore pas réfutés. Sans m'astreindre à un plan «à la française», je le ferai en suivant en substance l'ordre dans lequel nos contradicteurs ont formulé leurs critiques.

1. Le paradoxe du professeur Crawford : «moins = plus»

2. Monsieur le président, je pars pour l'instant du principe que le droit (perpétuel) de navigation du Costa Rica sur le fleuve — pas forcément sur l'éventuel futur canal… — soit acquis à la condition que cette navigation se fasse avec des marchandises comme «objetos de comercio». Voyons si, indépendamment de l'analyse lexicale et grammaticale à laquelle Antonio Remiro a procédé, ceci est aussi absurde que le dit le professeur Crawford[28] dont les conceptions mathématiques laissent perplexe puisque pour lui «moins = plus», «cependant = de plus», «pero = más aún».

3. Permettez-moi de remarquer d'abord, Messieurs les juges, que je ne comprends plus du tout pourquoi la Partie costa-ricienne s'obstine à défendre une interprétation différente de la nôtre puisque James Crawford a expliqué que «même si» *(even if)*, l'expression contestée signifie ««articles de commerce» ou «articles of trade», these are words of extension, not limitation»[29]. Then, pourquoi, alors, s'opposer à une définition si avantageuse qui, loin de limiter les droits du Costa Rica, les étendrait ? Il est rare que toute une équipe de conseils joue ainsi contre son camp…

4. Il faut dire que le raisonnement de notre contradicteur est pour le moins alambiqué. Si je l'ai bien compris, il nous dit :

1) le Nicaragua a reconnu au Costa Rica un droit de libre navigation ;

---

[28] Cf. CR 2009/6, p. 16-18, par. 32-38.

[29] *Ibid.*, p. 17, par. 33.

2) par hypothèse, la liberté de navigation suppose l'exonération de taxes, d'impôts et de droits de douane ; et,

3) si l'on précise ensuite que ceci s'applique aux marchandises, cette précision «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.»[30]

5. Mais, Monsieur le président, si, par définition, la libre navigation implique l'exonération des droits de douane, comme ceux-ci ne peuvent être appliqués qu'à des marchandises ou à des services, il est clair qu'en précisant que la liberté en question s'applique à la navigation «avec des marchandises» comme «objetos de commercio», les rédacteurs du traité entendait bien signifier qu'elle ne s'appliquait qu'à une telle navigation. Cette formule, à l'évidence, n'étend rien — elle restreint. «Moins = moins».

2. La parabole de la poule et des œufs

6. Mais… il y a la parabole de la poule de M. Crawford[31]. Si je peux lui donner un conseil : le plus avisé serait qu'il se rende au marché de Sarapiquí non seulement avec ses œufs, mais aussi avec sa poule — qui, elle aussi est un objet de commerce — et qu'il revienne avec elle. Cela lui éviterait les désagréments qu'il redoute et lui ferait de la compagnie.

7. Plus sérieusement, je pense qu'il devrait garder à l'esprit que toute interprétation doit être faite de bonne foi, être raisonnable, et donner aux dispositions conventionnelles un sens utile. Ainsi que la Cour l'a rappelé dans son avis consultatif de 1950 : «[L]e premier devoir d'un tribunal, appelé à interpréter et à appliquer les dispositions d'un traité, est de *s'efforcer de donner effet*, selon leur sens naturel et ordinaire, à ces dispositions prises dans leur contexte» (*Compétence de l'Assemblée générale pour l'admission d'un Etat aux Nations Unies, avis consultatif, C.I.J. Recueil 1950*, p. 4 ; les italiques sont de nous). Pour que la liberté de navigation reconnue au Costa Rica par l'article VI du traité Cañas-Jerez ait un effet utile, il faut l'interpréter

[30] *Ibid.*, par. 34 (Crawford).

[31] *Ibid.*, par. 35.

— raisonnablement — comme permettant au professeur éleveur de poules de revenir de Sarapiquí sans ses œufs.

8. Au surplus, prise au pied de la lettre, la fabulette de la poule ne permet pas davantage de donner un effet utile à l'interprétation du Costa Rica lui-même qu'à celle du Nicaragua : si le professeur Crawford va à Sarapiquí avec l'intention d'y faire du commerce (à des fins commerciales) mais s'en revient avec celle de se divertir ou d'admirer le paysage, sans aucune «intention commerciale», il ne peut pas davantage se prévaloir de la liberté de navigation reconnue par l'article VI du traité Jerez-Cañas. Et la même chose vaut pour l'argument qu'il veut tirer de son expérience personnelle lorsqu'il se plaint qu'on ne l'a pas assez contrôlé[32].

3. Un défi sans pertinence

9. J'en viens, Monsieur le président, au «défi» que nous a lancé le professeur Crawford. Il me semble que, quand bien même il n'y aurait aucun exemple de traité rédigé conformément à la réécriture de l'article VI du traité de 1858 opérée par mon contradicteur (qui voudrait y lire «si, et seulement si, il s'agit d'une navigation avec des marchandises» — «if and only if this navigation is with articles of trade»[33]), cela ne signifierait pas que le traité Cañas-Jerez serait dépourvu de sens, ou que l'interprétation que nous en faisons serait absurde («an obvious nonsense»[34]). Notre instrument, comme la Partie costa-ricienne l'a fort justement souligné[35], est très particulier : traité de frontières, il fixe une limite à la rive (ce qui, en soi, est inhabituel), tout en octroyant des droits (de navigation perpétuelle avec des marchandises) à l'Etat n'ayant pas la souveraineté sur le fleuve. Les chances statistiques de retrouver exactement la même clause dans un autre traité sont donc très faibles.

10. Chaque instrument est unique et ce sont «ses termes»[36] qui sont l'objet de l'interprétation, pas un «concept» abstrait ou une formule hypothétique. Les termes «avec des

---

[32] CR 2009/6, p. 18, par. 37 (Crawford).

[33] *Ibid.*, par. 36.

[34] *Ibid.*

[35] CR 2009/2, p. 32, par. 7 ; p. 34, par. 12 (Caflisch) ; CR 2009/3, p. 22, par. 2 (Caflisch) ; CR 2009/6, p. 38-39, par. 7 et 8 ; p. 40, par. 13 i) (Caflisch) ; p. 66, par. 8 (Ugalde-Alvarez).

[36] Voir *Différend territorial (Jamahiriya arabe libyenne/Tchad), arrêt, C.I.J. Recueil 1994*, p. 21-22, par. 41 ; *Ile de Kasikili/Sedudu (Botswana/Namibie), arrêt, C.I.J. Recueil 1999 (II)*, p. 1060, par. 20.

marchandises» («con objetos de comercio») doivent avoir un effet utile[37] — que lui donne l'interprétation qu'en propose le Nicaragua, mais dont le prive celle du Costa Rica : car pour aller dans le sens costa-ricien, il aurait été suffisant d'accorder un «droit perpétuel de libre navigation» (tout court) pour assurer à la Partie demanderesse un droit aussi absolu et aussi illimité qu'elle le réclame.

4. Navigation sur le San Juan

11. Monsieur le président, je ne peux malheureusement pas contre-interroger le témoin Crawford mais si, comme je le suppose, il a emprunté l'un de ces petits bateaux qui transportent les touristes sur le San Juan [projection n° 1], un coup d'œil suffisait aux militaires chargés de procéder à l'inspection pour s'assurer qu'il ne s'agissait pas de commerce de marchandises ; bien sûr, il eût pu s'agir de marchandises illicites, adroitement cachées dans les bagages ou dans les chaussettes du professeur Crawford — mais a-t-il l'allure d'un dangereux contrebandier ou d'un trafiquant de drogue ? Ceci dit, on ne peut raisonnablement prétendre, je l'ai dit, que la liberté de navigation dont dispose le Costa Rica soit illimitée ou «absolue». [Fin de la projection n° 1.] Je signale d'ailleurs au passage, Monsieur le président, que si cet adjectif («absolu») n'apparaît peut-être que quatre fois dans les écritures du Costa Rica et sans que l'on puisse imputer à celui-ci une interprétation excessive et déraisonnable[38], en revanche, le professeur Caflisch qui, j'en suis sûr, est l'interprète fidèle de la position de la Partie costa-ricienne l'a, pour sa part, utilisé pas moins de quatre fois[39] lors de sa seule présentation de mardi de la semaine dernière, pour caractériser le droit de navigation reconnu dans le traité de 1858.

12. Revenons au voyage — sans œufs cette fois — du professeur Crawford. Il semble se plaindre que les douaniers ou la police des frontières du Nicaragua ne l'aient pas *interrogé* sur les marchandises qu'il transportait — ou non : «But it made no difference whether I had articles of trade or not. No one asked if I was carrying articles of trade»[40]. Mais ceci relève de la logique la plus élémentaire, Monsieur le président : le principe, sur le fleuve, c'est la souveraineté du

[37] Voir, par exemple, *Détroit de Corfou (Royaume-Uni c. Albanie), fond, arrêt, C.I.J. Recueil 1949*, p. 24.

[38] CR 2009/6, p. 8, par. 2 (Crawford).

[39] CR 2009/3, p. 23, par. 7, p. 30, par. 23, p. 31, par. 26, p. 33, par. 33.

[40] *Ibid.*

Nicaragua ; si M. Crawford entendait se prévaloir de la liberté de navigation garantie à son client par le traité de 1858, c'était à lui de préciser qu'il se trouvait dans le cadre de l'exception ; il ne le pouvait pas ; il le dit lui-même : «Je suis allé là-bas sans article de commerce» («I went there without any articles of trade») — et comme, à juste titre d'ailleurs, touriste qu'il était, il ne se considérait pas lui-même comme une marchandise, comme un *objeto de comercio*, il ne pouvait pas se prévaloir de l'exception et il ne s'en est pas prévalu.

5. Retour à la sentence Cleveland

13. Monsieur le président, j'en viens maintenant aux reproches tous azimuts que nous adresse le professeur Marcelo Kohen, auxquels Antonio Remiro Brotóns a déjà répondu pour partie. Remontons d'abord aux années 1886-1888, c'est-à-dire l'argumentation des Parties devant Cleveland et la sentence de celui-ci.

Les argumentations des Parties

14. S'agissant de «l'approche du Costa Rica» mon ami et contradicteur persiste et signe. Mais, c'est pour mieux esquiver le problème. [Projection n° 2.] Il a projeté à l'écran la réponse du Costa Rica à ce qu'il appelle la «question rhétorique» sur laquelle nous avions insisté durant le premier tour[41] et que, cette fois, je projette à mon tour :

> «Does this mean that Costa Rica cannot under any circumstances navigate with public vessels in the said waters, whether the said vessel is properly a man-of-war, or simply a revenue cutter, or any other vessel intended to prevent smuggling, or to carry orders to the authorities of the bordering districts, or for any other purpose not exactly *within the meaning of transportation of merchandise*?»[42]

15. La question donc — rhétorique ou pas — que se posait le Costa Rica (avec une pointe d'indignation sous-jacente) revenait à faire valoir que, si Cleveland ne lui reconnaissait pas le droit de naviguer avec des vaisseaux publics, il serait réduit au seul transport des marchandises *(transportation of merchandise)*. [Fin de la projection n° 2 ; projection n° 3.] Evidemment *sa propre réponse* était qu'il ne devait pas en aller ainsi et qu'il était

---

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

[42] DN, vol. II, annexe 5, Argument on the Question of the Validity of the Treaty of Limits Between Costa Rica and Nicaragua and Other Supplementary Points Connected with it, submitted to the President of the United States of America, Filed on Behalf of the Government of Costa Rica ; les italiques sont de nous.

> «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»[43].

16. Seulement voilà, Cleveland, lui, a donné une réponse différente : au lieu de reconnaître la liberté de navigation pour tous les navires publics costa-riciens autre que les «vrais navires de guerre», il limite celle-ci aux seuls navires du service des douanes, et je cite la sentence Cleveland, «dans la mesure où cette navigation est en relation avec, et liée au» *(as may be related to and connected with …)* [le] droit qui lui est reconnu à l'article VI du traité. [Reprise de la projection n° 2.] Dès lors, comme le Costa Rica le redoutait, les bateaux des douanes mis à part, il en est réduit, de son propre aveu, au seul transport des marchandises («exactly within the meaning of transportation of merchandise»).

17. De son côté, selon le professeur Marcelo Kohen, le Nicaragua, s'il avait eu des doutes sur le bien-fondé de la traduction de l'expression «con objetos de comercio» par «for the purposes of commerce» aurait dû rajouter l'expression espagnole entre parenthèses après sa traduction, comme il l'avait fait pour d'autres mots. Mais tous ces termes (trois mots isolés et deux expressions) ont comme caractéristique commune de concerner des problèmes qui, eux, *étaient en cause* devant l'arbitre, ce qui n'était pas le cas de l'expression «avec des marchandises»[44].

18. Quoi que semble en penser M. Kohen, cette absence de désaccord est aussi ce qui interdit de voir dans la traduction des deux Parties de l'expression «objetos de comercio» par «purposes of commerce» un quelconque accord concernant l'interprétation de cette expression. Certes, le conseil du Costa Rica a tout à fait raison de souligner que les Etats peuvent se mettre d'accord sans désaccord préalable[45]. En revanche, un accord ne saurait être inadvertant ; il ne peut résulter que de la rencontre de deux *volontés :* en l'espèce, le Costa Rica et le Nicaragua ont traduit l'expression *aujourd'hui* litigieuse de la même manière mais il s'agit là d'un fait, pas de la rencontre délibérée de deux volontés — ou d'une formule proposée par l'un des Etats à laquelle l'autre aurait consenti.

---

[43] MCR, vol. 6, annexe 207, p. 155 *[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. 155-156). Dossier de plaidoiries, onglet n° AP-3.

[44] Voir CR 2009/2, p. 60, par. 47 (Kohen) ; CR 2009/4, 5 mars 2009, p. 57, par. 19 (Pellet) ; CR 2009/6, p. 29, par. 31 (Kohen).

[45] CR 2009/6, p. 29, par. 31.

Et j'ajoute que c'est là un fait dont le contexte montre qu'il n'a nullement la signification dont le Costa Rica veut le revêtir — il suffit de penser à l'interprétation de la Partie costa-ricienne elle-même dans l'argumentation écrite qu'elle avait proposée au président Cleveland, et dont je viens de redire quelques mots. [Fin de la projection n° 2*bis*.]

La sentence

19. Reste, Monsieur le président, la sentence elle-même. A cet égard, le professeur Kohen a beau me taxer «d'imagination débordante»[46] ou «étendue»[47], «d'affirmations des plus légères»[48], de «fébrilité»[49] — et j'en passe (ça fait beaucoup de noms d'oiseaux dans une seule page du compte rendu…) ; [projection 4] le fait est que le libellé du «Deuxièmement» est vraiment troublant, *très* troublant :

> «The Republic of Costa Rica under said Treaty [the 1858 Treaty] and the stipulations contained in the sixth article thereof, . . . may navigate [the river San Juan] 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 . . .»

20. D'abord, il y a les guillemets. Répétant ce qui est dit dans la réplique[50], Marcelo Kohen nous dit qu'ils «s'expliquent tout simplement par le fait que Cleveland était en train de citer les termes de l'article VI tels que traduits par les deux Parties»[51]. Comme je l'avais indiqué la semaine dernière, ce n'est guère convaincant. Monsieur le président, la sentence n'utilise les guillemets qu'en une seule autre occasion, pour attirer, justement, l'attention sur un problème d'interprétation[52]. Par ailleurs et à l'inverse, Cleveland procède, évidemment, à la citation de très nombreux mots ou expressions figurant dans le traité et traduits de façon identique par les Parties sans, pour autant, éprouver le besoin de les mettre entre guillemets : c'est le cas par exemple des «natural rights» («droits naturels») qu'il évoque au point 10 de la troisième partie de sa sentence sans les assortir de guillemets bien qu'il s'agisse d'une citation de l'article VIII du traité, dont la

---

[46] *Ibid.*, p. 27, par. 24.

[47] *Ibid.*, par. 26.

[48] *Ibid.*, par. 24.

[49] *Ibid.*, par. 25.

[50] RCR, p. 65, par. 3.68.

[51] CR 2009/6, p. 27-28, par. 26.

[52] Voir CR 2009/4, p. 58, par. 19.

traduction n'allait tout de même pas de soi ; de même, l'arbitre n'a pas considéré nécessaire de mettre entre guillemets, dans le point 1 de la sentence, l'expression «the extremity of Punta Castilla of the mouth of the San Juan de Nicaragua River» dans le point 10 bien qu'il s'agisse de citations pures et simples de l'article II du traité.

21. [Projection 4-1.] Mais il y a plus important encore. Relisons ensemble, Messieurs les juges, si vous le voulez bien, le membre de phrase dans lequel figure l'expression entre guillemets : «may navigate [the river San Juan] with such vessels of the Revenue Service as may be related to and connected with her enjoyment of the 'purposes of commerce'». Mais comment peut-on jouir de «fins commerciales» (how can you *enjoy «purposes of commerce»* ?). Pris à la lettre cela n'a aucun sens — ni en français (Marcelo Kohen l'avait bien vu même si, maintenant il s'en défend[53]), ni en anglais. [Projection 4-2.] Et l'on comprend l'embarras des traducteurs du Greffe qui proposent une traduction très libre en français, s'éloignant considérablement du texte anglais : «mais elle peut naviguer sur ledit fleuve avec des bateaux du service des douanes dans l'exercice du droit d'usage de ce fleuve «aux fins du commerce» que lui reconnaît ledit article»[54]. Alors là, oui, cela fait sens — mais cela fait sens aussi si l'on remplace «aux fins du commerce» par «avec des marchandises» ; et cela peut aussi se lire en anglais «may navigate with such vessels of the Revenue Service as may be related to and connected with her enjoyment of *her right of navigation* on the river for 'purposes of commerce' or, as well, «with articles of commerce». Et cela confirme aussi, Monsieur le président, que Cleveland, ayant sans doute vu le problème, s'est prudemment abstenu de le trancher en recourant à ces guillemets troublants — mais ils n'ont pas l'air de beaucoup troubler mon collègue et ami de l'autre côté de la barre… [Fin de la projection 4-2.].

6. Bref retour sur l'interprétation évolutive

22. Monsieur le président, n'étant pas particulièrement élitiste, je me réjouis vivement de l'avènement d'un tourisme de masse, permettant au plus grand nombre de profiter des beautés de notre bonne vieille planète. Mais je ne vois pas bien ce que ces considérations de philosophie sociale viennent faire ici ? Que le tourisme existât au temps de Mark Twain, aucun doute (même si

---

[53] Voir CR 2009/6, p. 27, par. 24.

[54] MCR, vol. 2, annexe 16, p. 34 *[traduction du Greffe]*.

je n'ai pas l'impression qu'il ait effectué son voyage de 1863 entre San Francisco et New York en qualité de touriste[55] — mais plutôt comme passager ce qui, comme mon ami Antonio Remiro l'a expliqué, est quelque chose de différent). Mais ce qui importe pour nous, c'est que le mot «tourisme» n'avait alors aucune connotation commerciale et qu'il n'est tout simplement pas pensable que les rédacteurs du traité Cañas-Jerez aient eu le tourisme à l'esprit lorsqu'ils ont rédigé l'article VI.

23. Cela me conduit à redire quelques mots de l'interprétation évolutive[56] — sans qu'il me semble utile de m'y attarder. Au fond, le professeur Kohen s'est borné lundi à répéter le peu qu'il avait dit à ce propos durant le premier tour[57] : il faut s'en tenir au précédent du *Plateau continental de la mer Egée*[58]. Mais il ne suffit par de dire que le mot «commerce» est «générique» pour être débarrassé du problème. Il faut encore se demander comment il était interprété à l'époque (pour déterminer quelle était l'intention des Parties) et si cette signification n'a pas subi une évolution telle que l'on s'éloigne par trop de celle que les négociateurs avaient en tête au moment de la conclusion du traité[59]. Or, je l'ai montré la semaine dernière, ce serait le cas, si l'on en venait à inclure dans les «marchandises» ou même dans les «fins commerciales», le tourisme — une activité qui existait au XIX^{e} siècle, mais que nul n'aurait songé à qualifier de «commerciale».

7. L'absence de pratique subséquente

24. Reste à savoir, Monsieur le président, si la pratique subséquente devrait (ou pourrait) conduire à adopter une position différente, voire même s'il existerait une coutume internationale qui obligerait l'Etat fluvial à autoriser la navigation des touristes sur ses fleuves et rivières. Cette seconde «piste», à vrai dire, me paraît assez extravagante — je ne la mentionne que parce que mon fougueux contradicteur s'obstine à interpréter ainsi l'arrêt de la Cour dans l'affaire de l'*Ile de Kasikili/Sedudu*[60]. Je l'avais montré[61], dans cette affaire, c'est en vertu de l'accord exprès des deux

---

[55] Voir http://www.accessmylibrary.com/coms2/summary_0286-32179301_ITM.

[56] Voir CR 2009/4, p. 49-55, par. 3-12.

[57] CR 2009/2, p. 67, par. 73 et note 192.

[58] CR 2009/6, p. 35, par. 58.

[59] *Interprétation des traités de paix conclus avec la Bulgarie, la Hongrie et la Roumanie, deuxième phase, avis consultatif, C.I.J. Recueil 1950*, p. 229 et *Droits des ressortissants des Etats-Unis d'Amérique au Maroc (France c. Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 1952*, p. 196.

[60] CR 2009/6, p. 33, par. 48.

Etats concernés, que la pratique antérieure a été juridiquement consacrée et entérinée par la Cour[62]. Or, à l'évidence, pas d'accord en ce qui nous concerne.

25. Mais pas non plus de pratique, Monsieur le président ! Les trois très brefs paragraphes qu'y consacre mon contradicteur[63] ne répondent pas à l'argumentation que j'avais fait valoir à cet égard durant le premier tour[64], et ne vont guère au-delà d'affirmations que le professeur Kohen ne prend la peine ni d'expliciter, ni de discuter. Il me suffira donc de dire :

1) que s'il y a eu, en effet, dans un lointain passé, un trafic relativement intense de passagers — Antonio Remiro en a parlé —, celui-ci était exclusivement le fait *du Nicaragua*, pas du Costa Rica ;
2) en tout état de cause, il n'a jamais été question de tourisme organisé sur le San Juan avant une période fort récente ;
3) si, au tout début du phénomène, une certaine tolérance a pu se manifester, une simple tolérance ne crée pas de droit (comme le Costa Rica le répète à l'envi — en matière de pêche de subsistance par exemple[65], ou de dispense de l'exigence d'un visa pour les Costa-Riciens riverains du fleuve[66] notamment) ; en revanche,
4) dès que le phénomène a pris de l'ampleur (en même temps que les prétentions du Costa Rica à une interprétation de plus en plus extensive et absolue de ses prétendus droits sur le fleuve), le Nicaragua s'y est vigoureusement opposé.

26. Pas de pratique subséquente, pas d'accord ultérieur, Monsieur le président. L'article VI du traité de 1858 doit être lu tel qu'en lui-même, en fonction des intentions des négociateurs de cet instrument. Et cette intention, telle qu'elle ressort du texte de cette disposition, de son contexte et des circonstances de cette adoption est claire : le Costa Rica peut se prévaloir d'un droit, perpétuel (mais non absolu), de libre navigation sur le fleuve, avec des marchandises mais, certainement pas, pour les touristes ou avec des touristes. De même, si les bateaux des douanes peuvent naviguer

---

[61] CR 2009/4, p. 55, par. 12.

[62] *Ile de Kasikili/Sedudu (Botswana/Namibie), arrêt, C.I.J. Recueil 1999 (II)*, p. 1107, par. 102.

[63] CR 2009/6, p. 33-34, par. 51-53.

[64] CR 2009/4, p. 55-64, par. 13-32.

[65] CR 2009/6, p. 63, par. 30 (Crawford).

[66] CR 2009/3, p. 27-28, par. 19 (Caflisch) ; CR 2009/6, p. 17, par. 35 (Crawford).

librement sur le fleuve, conformément à la décision du président Cleveland, ceci ne leur est possible que dans le strict exercice de ce droit d'usage du fleuve, ce que mon collègue et ami le professeur McCaffrey va établir maintenant si vous voulez bien lui donner la parole, Monsieur le président ?

27. Pour ma part, il ne me reste qu'à vous remercier de la bienveillante attention que vous m'avez à nouveau prêtée.

The PRESIDENT: Thank you, Professor Alain Pellet, for your presentation. I now give the floor to Professor Stephen McCaffrey.

Mr. McCAFFREY: Thank you, Mr. President.

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

1. Mr. President, Members of the Court, it is an honour to appear before you again today on behalf of the Republic of Nicaragua.

1. Introduction

2. This morning I will show how Costa Rica misunderstands and mischaracterizes the provisions of the 1858 Treaty of Limits and the 1888 Cleveland Award concerning navigation on the San Juan River by public vessels. Costa Rica persists in reading Article VI of the Treaty as if it contained only nine words: "Costa Rica shall have perpetual rights of free navigation." Actually, that is not true — she adds to this phrase six more words, which are purely of her own invention. Those words are: "with all kinds of public vessels". She pays lip service — but only barely — to Nicaragua's sovereignty over the river, but then through a multi-pronged attack, seeks to fragment Nicaragua's sovereignty into so many effete and helpless bits that Nicaragua is prevented from fulfilling her responsibility to police and regulate the river, let alone exercising her rights in the waterway — which, after all, is part of her territory. For all of Costa Rica's objections to them, Nicaragua's regulations concerning navigation by Costa Rica on the San Juan — again, Nicaraguan territory — are in line with those on *true* international waterways, such as the Rhine, which is

governed by what Paul Reuter called the "doyen of international organizations", the Central Commission for Navigation on the Rhine[67].

3. Mr. President, my specific task this morning is to address two points: first, the 1858 Treaty as interpreted by the Cleveland Award provides no basis for the rights Costa Rica claims to navigate with her public vessels on the San Juan; and second, Article IV of the 1858 Treaty also provides no basis for the navigational rights Costa Rica claims for her public vessels.

2. The 1858 Treaty as interpreted by the Cleveland Award provides no basis for the rights Costa Rica claims to navigate with her public vessels on the San Juan

4. Mr. President, Members of the Court, as to the first point, in her quest for rights of navigation by public vessels on the San Juan, Costa Rica places greatest store in the Cleveland Award. Here she focuses principally on three arguments: first, that the Cleveland Award did not determine Costa Rica's rights to navigate with any and all public vessels; second, that President Cleveland actually *enlarged,* not restricted, George Rives's recommendations concerning navigation by Costa Rican public vessels; and third, that Costa Rica's failure to exercise her limited right to navigate on the San Juan with revenue vessels does not destroy that right. I will take these arguments up in turn.

5. First, Mr. President, Professor Crawford argued again on Monday that in his Award, President Cleveland did not determine Costa Rica's rights to navigate with any and all public vessels[68]. He persisted in this argument despite the fundamental illogic of it: Nicaragua has sovereignty — sovereignty — over the river, which forms part of her territory; Costa Rica has only rights to navigate "con objetos de comercio" under the Treaty. The Treaty having granted no other rights to Costa Rica in Nicaraguan sovereign territory, how could there possibly be *further* rights — further rights — that President Cleveland did not explicitly recognize? You cannot recognize what is not there. Finding that there could be further navigational rights would make a mockery of the 1858 Treaty. This is doubtless the major reason why President Cleveland was so careful to keep the *only* kind of public vessels he allowed to navigate on the San Juan, revenue

[67]See generally http://www.ccr-zkr.org/.

[68]CR 2009/6, p. 51, para. 4 *et seq.*

vessels, on such a short leash. In light of Nicaragua's "sumo imperio" over the river, interpreting Article VI of the Treaty and the *Second* Article of the Cleveland Award to permit navigation by the veritable armada of kinds of public vessels argued for by Costa Rica would, to borrow from the language of Article 31 of the 1969 Vienna Convention, lead to a result which would be manifestly absurd and unreasonable. Such an interpretation should therefore be rejected by the Court.

6. Second, Mr. President, Professor Crawford went to great lengths on Monday to attempt to shrink down to something akin to mere courtesies the "privileges" of navigation on the San Juan by Costa Rican warships and revenue vessels recommended by George Rives. He did this in a Herculean, but ultimately futile, effort to convince the Court of the following improbable proposition: that President Cleveland, by allowing only carefully restricted navigation by Costa Rican revenue vessels, somehow gave Costa Rica much *more* than Rives, who would have allowed *both* Costa Rican revenue vessels *and warships* to navigate on the San Juan, and with only those restrictions that were generally recognized internationally. It would take a magician to pull this off, and Professor Crawford is a very good one. He attempted this analytical sleight of hand by contrasting the "privileges" recommended by Rives with the "rights" recognized by President Cleveland.

7. But however they are characterized, the authorizations recommended by Rives and those granted by President Cleveland could not be more different. When all is said and done, the arbitrator took a recommendation that navigation by warships and revenue vessels would be allowed and whittled it down to what he evidently considered to be the barest of essentials: navigation with revenue vessels that was related to and connected with navigation "con objetos de comercio", or that was necessary to the protection of the enjoyment thereof. Especially given Nicaragua's sovereignty over the river, there is nothing left from which to conjure supposed additional rights of navigation by public vessels.

8. Incidentally, as my colleague Professor Pellet has just noted, Professor Crawford also challenges the use by me and other counsel of Nicaragua of the expression in Spanish "con objetos de comercio", in lieu of the English translation of this expression submitted to President Cleveland by both Nicaragua and Costa Rica "for purposes of commerce". But, Mr. President, as Professor Pellet has just pointed out, the Treaty itself was negotiated and concluded in Spanish, not

English. Nicaragua has amply demonstrated in her written pleadings[69] that the meaning of this expression was not at issue in the arbitration; there was simply no dispute about it by the Parties at the time. President Cleveland took great pains to make clear that his ruling was without prejudice to the meaning of the expression by enclosing it in quotation marks in the *Second* Article of his Award.

9. Mr. President, Members of the Court, I turn now to Costa Rica's third point. Professor Crawford states that "whether Costa Rica exercises its treaty right to navigate with revenue service vessels is irrelevant", because "the right survives independently of its exercise"[70]. But here Professor Crawford misses the point: Costa Rica has not exercised her right to navigate with revenue vessels because she has not exercised her right to navigate "con objetos de comercio". She therefore has engaged in a campaign, for over a century, to transform her right to navigate with revenue vessels *into* a right to navigate with public vessels of *all* kinds and descriptions, both armed and unarmed. It is *this* that is not permitted by the Treaty of Limits and the Cleveland Award, and that is therefore not permitted by Nicaragua on her sovereign territory — *not* navigation by revenue vessels related to and connected with navigation "con objetos de comercio" or necessary to the protection thereof, with which Nicaragua has never interfered. As Costa Rica herself has amply shown[71], President Cleveland knew well what a revenue vessel was, and therefore knew that this expression, "vessels of the revenue service" as he put it, had a very specific meaning. A revenue vessel is not a police boat. A revenue vessel is not a boat carrying arms and personnel to resupply border posts. In short, a revenue vessel is not a public boat performing the myriad functions Costa Rica would like to perform with her public vessels on the river. Wishing does not make it so. Therefore, although Costa Rica's failure to exercise her limited right to navigate on the San Juan with revenue vessels does not destroy the right, it most certainly does not extend it or enlarge it.

10. Mr. President, finally on this point, on Monday Costa Rica continued to beat the dead horse of the Cuadra-Lizano Joint Communiqué — or perhaps that is an inappropriate metaphor

---

[69]CMN, paras. 3.1.19 *et seq.*

[70]*Ibid.*, para. 14.

[71]E.g., CR 2009/3, p. 13, para. 23.

since the communiqué was never alive in the first place. Here Professor Crawford tries mightily to convince the Court that this document had nothing to do with Nicaragua giving permission to Costa Rica to navigate with arms on the San Juan. He then tries much less mightily to show, in fact he only states, that the communiqué reflected the *status quo ante*.

11. Mr. President, Members of the Court, the Cuadra-Lizano Joint Communiqué would have constituted a blanket authorization for use of Costa Rican public vessels under specified conditions and for a single and very specific purpose: the resupplying of her border posts. Nothing more. Not policing the river, not the provision of services to the riparian population — nothing but the resupplying of border posts. After 120 years, this is the extent of navigation by Costa Rican public vessels that Nicaragua was willing to consider — and in fact it was considered in the context of a problem of the moment: resupplying border posts. Costa Rica has not resupplied these posts via the San Juan in the past ten years.

12. But, Mr. President, the important point here is that Costa Rica would not have been so covetous of this stillborn communiqué — she would not have *needed* this authorization — if she actually *had*, and believed she had, a right to navigate with vessels carrying arms and personnel to her border posts. As to whether the communiqué reflected past practice, if it had, why would Costa Rica have sought the authorization so fervently? In any event, the fact that the communiqué does not reflect past practice has already been shown by my colleague Mr. Reichler.

3. Article IV of the 1858 Treaty also provides no basis for the navigational rights Costa Rican claims for her public vessels

13. Mr. President, Members of the Court, turning to my second point, Costa Rica in her second round effectively conceded that Article IV of the Treaty of Limits provides no basis for her to defend or otherwise police the *river* by boat. The best she could do by way of responding to the undeniable fact that Article IV says *nothing* about Costa Rica's uniting in the defence of either the bays or the river by *boat* was to caricature the manner in which she would have to fulfil this obligation as "synchronized swimming"[72] — a nice image, to be sure, but unfortunately there would be nothing for her to synchronize with since Nicaragua would prefer to exercise *her*

[72] *Ibid.*, p. 54, para. 11.

obligations of defence of the river by boat, as she alone is entitled to do. Costa Rica also conflates Article IV's provision for "defense" of the common bays and the river "in case of attack from without"[73] with "protect[ion] of commerce on the river", implying that both of these are authorized by Article IV[74]. As the Court is well aware, Article IV says nothing — indeed the entire 1858 Treaty says nothing — about protection of commerce on the river by Costa Rica. That idea was a creature of the Cleveland Award, which I addressed earlier, and as we have seen President Cleveland was very careful to restrict any protection to *revenue* vessels, not other kinds, and only when *necessary* to the protection of navigation "con objetos de comercio"[75]. Perhaps Costa Rica was led to confuse defence with protection by her earlier idea — from which she now seems to have backed away — that the San Juan is an "international river". For the purpose of Costa Rica's navigational rights it certainly is not, for reasons that Nicaragua has shown[76], and as Costa Rica now seems to accept.

14. Mr. President, Members of the Court, I will close on the subject of Costa Rica's contention concerning policing and defending the river by boat with the wise words of a former President of Costa Rica herself. In his memoir, *Su pensamiento*, President Don Ricardo Jiménez Oreamuno, who served as President during three periods between 1910 and 1936, wrote the following of what he called "the obligation assumed by Costa Rica to take part in the river's defense in the event of foreign aggression":

> "Costa Rica shall take part in this defense when the foreseen hypothesis [foreign aggression] takes place.
>
> Meanwhile, in full peace, without the slightest risk of hostilities, to pretend that our ships of war navigate the river in order to take part in a defense provoked by no attack is to arrive at the subtlety with which the Nicaraguans have examined the treaty. Through Article 4, Costa Rica was obliged to defend the San Juan as an ally of Nicaragua. When has one seen that an ally, being an ally, purports to have the right, in the absence of war, to transit with its troops the allied territory to navigate with warships her interior waters or station armadas in her ports?"[77]

---

[73]Article IV of the 1858 Treaty.

[74]CR 2009/6, p. 54, para. 11 (Crawford).

[75]Cleveland Award, *Second* Article.

[76]E.g., CR 2009/04, pp. 19, *et seq.* (Brownlie).

[77]Don Ricardo Jiménez Oreamuno, *Su pensamiento*, Editorial Costa Rica, San José, Costa Rica, 1980, p. 55. For the full quotation see CMN, pp. 222-223, in which the former President also refers to navigation by Costa Rican "merchant ships" under Article VI of the Treaty.

15. Mr. President, the eloquent words of the former Costa Rican President speak for themselves, and confirm the only sensible interpretation of the 1858 Treaty.

16. Mr. President, Members of the Court, that concludes my presentation. I thank you for your courtesy and kind attention. Mr. President, I request that you call upon my colleague, Mr. Paul Reichler, perhaps after the coffee break. Thank you very much.

The PRESIDENT: Thank you, Professor McCaffrey, for your presentation. Yes, indeed, as you suggest, I am going to call for a short coffee break before I ask Mr. Paul Reichler to take the floor.

The Court adjourned from 11.30 to 11.45 a.m.

The PRESIDENT: Please be seated. I now give the floor to Mr. Paul Reichler.

Mr. REICHLER:

V. THE LAWFULNESS OF NICARAGUA'S REGULATIONS AND THE PRACTICE OF THE PARTIES WITH RESPECT TO NAVIGATION BY PUBLIC VESSELS

1. Mr. President, Members of the Court, I am honoured once again to appear before you today. I will respond first to Professor Caflisch's presentation regarding the lawfulness of Nicaragua's regulation of navigation on the San Juan River, and then I will respond to Professor Crawford's presentation on the practice of the Parties with regard to navigation by Costa Rican public vessels.

1. The lawfulness of Nicaragua's regulations

2. Mr. President, after listening to Professor Caflisch on Monday, I can begin today with the good news that Nicaragua's right to regulate navigation on the San Juan River is no longer disputed by Costa Rica. It is now possible, for the first time, to say that both Parties agree that Nicaragua has the right to regulate navigation on the river, including navigation by Costa Rica, provided that Nicaragua's regulation of that navigation is reasonable, non-arbitrary and non-discriminatory. As Professor Caflisch said on Monday: "[W]hen mentioning regulations, [the authorities] 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."[78]

3. With the Parties now in agreement that Nicaragua has the right to regulate Costa Rican navigation on the San Juan River, provided that the regulations put in place by Nicaragua are reasonable, the burden for the Court has been reduced: the Court need only decide whether Nicaragua's regulations are proven by Costa Rica to be unreasonable.

4. On this subject, I am afraid, the Parties are still divided. While Professor Caflisch now accepts that Nicaragua has the right to regulate navigation, he sticks firmly to his guns on the issue of the reasonableness of Nicaragua's regulations. In fact, he made many of the same arguments in the second round that he made in the first one. I have already responded to all of his criticisms made the first time around. Today I will respond only to Professor Caflisch's new criticisms, or at least his new twists on old criticisms, about each of the five regulations that he has challenged.

(a) ***Stopping and registering***

5. The first of these regulations is the requirement that all vessels, Nicaraguan as well as Costa Rican, stop and register upon entering and exiting the protected area of the river. Professor Caflisch did not question Nicaragua's judgment that this regulation safeguards the environment, and deters and prevents criminal activity on or adjacent to the river[79]. Instead, he focused his criticism of this regulation on what he called Nicaragua's charges "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"[80]. He further complained that "it is a lot for the inhabitants of a poor area of Costa Rica whose daily lives depend on the river"[81]. I am afraid that Professor Caflisch has his facts wrong, and his regulations confused.

6. First, there are no charges for stopping and registering, and no fees for entry onto the river or for what he called "handling". The evidence is undisputed on this point. Professor Caflisch apparently has confused this regulation with a different one, concerning immigration, and which

---

[78]CR, 2009/6, p. 42, para. 21.

[79]CR 2009/5, pp. 16-20, paras. 25-33.

[80]CR 2009/6, p. 43, para. 24.

[81]*Ibid.*

applies only to foreign tourists, who are required to purchase a tourist card whose cost is $5 and to pay a fee of $4 for the service of immigration processing[82]. The evidence is also undisputed that these requirements are not applied to local Costa Rican inhabitants, who are free to navigate on the river without acquiring tourist cards or passing through Nicaraguan immigration[83]. Whether poor or not, they do not pay any of these fees. Professor Caflisch's complaint about this regulation, then, is based on fees for stopping and registering which are not charged, and a burden on local residents that they do not bear.

(b) ***Inspection and departure clearance***

7. The second challenged regulation is the departure clearance certificate. Professor Caflisch did not question the evidence that the requirement to undergo an inspection and obtain a departure clearance certificate promotes navigational safety, and deters and prevents illegal trafficking in protected wildlife species, arms and drugs[84].

8. What Professor Caflisch *did* say about the departure clearance certificate is really quite unusual. He transformed himself from counsel and advocate in these proceedings to witness, and actually provided personal testimony in support of his own argument. Here are his words:

> "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."[85]

It is not every day that counsel before this Court turn themselves into fact witnesses. That Professor Caflisch felt the need to do so suggests that Costa Rica's argument against this regulation is so devoid of real evidentiary support that counsel must himself try to fill the gap with his own personal testimony.

9. The evidence — the *real* evidence — shows that inspections are regularly performed, and departure clearance certificates are regularly issued, for a fee of $5 to cover the cost of the inspection. In fact, the *real* evidence, which was submitted by Costa Rica herself, in the form of

---

[82]CR 2009/5, p. 25, para. 43.

[83]CR 2009/5, p. 24, para. 42; RN, Vol. I, paras. 4.88-4.89; RN, Vol. II, Anns. 70, 73, and 78.

[84]CR 2009/5, pp. 20-23, paras. 34-38; RN, pp. 198-199, 204-206, 208-209.

[85]CR 2009/6, p. 44, para. 25.

affidavits and publicly reported statements by Costa Rican nationals who navigated on the river, contradicts the anecdotal testimony provided by Professor Caflisch, and confirms that inspections are routinely performed and departure clearance certificates are issued for payment of a small fee[86]. Annex 101 of Costa Rica's Memorial in particular describes an inspection, in meticulous detail, of the Costa Rican witness's boat and cargo. The Memorial — the Memorial itself states: "Nicaragua required that all Costa Rican vessels stop at every Nicaraguan Army post along the river for inspection . . ."[87]

10. In fact, it was Costa Rica herself which urged Nicaragua to establish posts along the San Juan River to register and inspect passing vessels, and to issue departure clearance certificates. The Final Minutes of the 1997 meeting of the Binational Nicaragua-Costa Rica Commission recorded that, at Costa Rica's request,

> "It was agreed that Nicaragua will make efforts to establish posts at determined sites, so as to extend coverage in the fight against [drug trafficking] . . . With respect to the movement of vessels, it was considered necessary that they navigate only if duly registered by the posts that issue corresponding navigation certificates; in this case the posts at San Juan del Norte, San Carlos and Sarapiquí."[88]

11. In the first round, Professor Caflisch acknowledged that Costa Rica agreed to the registration and inspection of vessels, and the issuance of departure clearance certificates, at these posts in order to fight drug trafficking. This, of course, is alone sufficient to establish the reasonableness of the requirements[89]. In the second round, Professor Caflisch tried a new approach. This time, he said that the Minutes of the Binational Commission did not specify whether the agreed registration, inspection and departure clearance of vessels would be done in Nicaragua or Costa Rica[90]. I am afraid that Professor Caflisch has got the geography wrong again. [Slide PSR] Projected on the screen before you is a sketch-map from Nicaragua's Rejoinder showing the location of Nicaragua's posts on the river[91]. The fact that these posts are there is undisputed by Costa Rica. You will see the posts, indicated by the red triangles on the Nicaraguan

---

[86]MCR, Vol. V, Ann. 116, p. 591; RCR, Vol. II, Ann. 54, p. 288.

[87]MCR, p. 35, para. 3.24.

[88]RN, Vol. II, Ann. 4, pp. 23-24.

[89]CR 2009/3, p. 29, para. 22.

[90]CR 2009/6, pp. 45-46, para. 30.

[91]RN, Vol. I, p. 190, sketch-map 7.

side, at the precise locations mentioned in the Minutes: San Juan del Norte, Boca San Carlos and Sarapiquí. Professor Caflisch might not know where they are, but Costa Rica does. As recorded by the Binational Commission: "Nicaragua will make efforts to establish posts at determined sites . . ." These are the sites. The same ones specified in those Minutes.

12. Professor Caflisch complains that Nicaragua has charged different amounts for the departure clearance inspection, and that this is arbitrary[92]. He displayed a certificate reflecting the payment of a $25 inspection fee and said that on other occasions Nicaragua has charged $5. This is true, but it is not arbitrary. The $25 certificate is dated May 2001[93]. Two months later, the Nicaraguan authorities issued a Plan of Action which, among other things, reduced the fee to $5 — largely in response to protests from Costa Rica — and the fee has remained at that level ever since[94]. Arbitrary it is not.

13. Professor Caflisch challenged my assertion, from last Friday, that local residents are not required to pay this fee. He said there were six affidavits from local residents, in four of which the witness declared that he paid the fee[95]. We read those affidavits and, again, Professor Caflisch shows he is unfamiliar with the geography of the area. Three of these four "damaging" affidavits are from residents of Barra del Colorado, which is situated not on the San Juan but on Costa Rica's Caribbean coast, far removed from the river[96]. These are not local residents. The fourth affidavit is from a retired tour boat operator[97]. Another affidavit, which is from a local resident, states that the neighbours in the area all carry "a courtesy departure clearance"[98]. The truth then, is exactly as published in Nicaragua's Plan of Action, issued in July 2001: "Costa Ricans whose domicile is located in the adjacent proximities shall be issued a courtesy departure clearance certificate . . ."[99].

---

[92]CR, 2009/6, p. 44, para. 25.

[93]MCR, Ann. 241 *(b)*.

[94]RN, Ann. 48; See also MCR, Vol. 3, Ann. 72.

[95]CR, 2009/6, p. 44, para. 27.

[96]MCR, Vol. IV, Anns. 92 and 96; RCR, Vol. 2, Ann. 51.

[97]MCR, Vol. IV, Ann. 103.

[98]RCR, Vol. II, Ann. 50, p. 280.

[99]RN, Vol. II, Ann. 48, p. 306.

(c) ***Night-time navigation***

14. The third challenged regulation is the prohibition on navigation after nightfall. Nicaragua has fully supported with evidence the justification for this regulation, which is navigational safety[100]. In particular, Nicaragua has supplied evidence of the real dangers associated with navigation after dark on this particular river[101]. Costa Rica has not offered any evidence to the contrary. Or, at least Costa Rica offered none until Monday when her star witness, Professor Caflisch, told the Court that the river had few obstacles and he did not find it to be so dangerous[102]. I am afraid that, in this regard, Professor Caflisch is in conflict with Costa Rica's own long-standing position on the dangers of navigation on the San Juan River, a position Costa Rica has held at least ever since she told President Cleveland in 1887: "it is well known that the navigation of the San Juan River encounters many obstacles, not only on account of its shallowness at certain places, but also owing to its rapids and other dangers"[103].

15. Professor Caflisch argued on Monday that, even if navigation on the river is dangerous, Nicaragua discriminates against Costa Rican navigation by permitting night-time navigation on the upper portion of the river, where Costa Rica enjoys no navigation rights, but not permitting it on the lower portion, where she has Treaty rights. This time, I must say, Professor Caflisch got his geography right. But, most unfortunately, there are other problems. In his speech on Monday, as reproduced in the *compte rendu*, he cited two different timetables for the same ferry service that operates on the upper portion of the river; the timetables were apparently downloaded from the Internet over the weekend, for the purpose of responding to my speech of last Friday[104]. One of the cited timetables, which is in your judges' folder, was not mentioned by Professor Caflisch on Monday. It shows that the ferry does not operate at night[105]. The other timetable, on which Professor Caflisch based his argument to the Court, and which he displayed, shows that it does[106].

---

[100]RN, pp. 199-200, 209-211.

[101]*Ibid.*

[102]CR, 2009/6, p. 46, para. 31.

[103]RN, Vol. II, Ann. 5, pp. 160-161.

[104]CR 2009/6, p. 47, n. 150: http://www.nicatour.net/en/nicaragua/orario_lanchas_rio_san_juan.asp and http://www.visitariosanjuan.com/elcastillo/elcastillo-comollegar-es.html.

[105]See http://www.visitariosanjuan.com/elcastillo/elcastillo-comollegar-es.html.

[106]See http://www.nicatour.net/en/nicaragua/orario_lanchas_rio_san_juan.asp.

Since this is the same ferry service, one of Professor Caflisch's timetables has to be wrong. This alone raises doubts about the probative value of his evidence. So we investigated this further. After his speech, we contacted by email the travel agency whose timetable Professor Caflisch relied on, and asked if that timetable is correct. It turns out it is not, according to the correspondence we received back from the travel agency, which we would be happy to make available to the Court and to the Costa Rican side. There is no night-time navigation on the upper portion of the San Juan, just as there is no such navigation on the lower portion. There is no basis for any argument that Costa Rica has been discriminated against.

16. It is undeniable, and even Professor Caflisch denies it no longer, that the prohibition on night-time navigation on the lower San Juan is applicable equally to Nicaraguan and Costa Rican vessels. There is no evidence in the record, and no reason to believe, that Nicaragua would deprive herself of the ability to navigate at night on this portion of the river just to harass or make a political point to Costa Rica. To the contrary, Nicaragua's population centre at San Juan del Norte is only reachable by the river. It is cut off completely from the rest of Nicaragua and the outside world after dark, because of Nicaragua's prohibition on night-time navigation. By contrast, Costa Rica's sightseeing boats are only interested in transiting the river in the daytime, since the sights cannot be seen at night. Nicaragua is thus hurt more than Costa Rica by this regulation. Nevertheless, Nicaragua believes it is justified because of the danger to human life associated with night-time navigation on this river. When Professor Caflisch suggests that these dangers can be better addressed by requiring or installing lights on all vessels, or along the shore[107], he asks the Court — sitting here in The Hague and far removed from the San Juan River — to substitute its own judgment for that of Nicaragua and decide what measure is most appropriate and cost effective to ensure navigational safety on a river it has never seen. Surely that is not a role the Court wishes to play. The regulatory measure adopted by Nicaragua is demonstrably reasonable, and it does not discriminate against Costa Rica. The enquiry necessarily stops there.

[107]CR 2009/3, p. 32, para. 26 (v).

(d) ***Flying the flag***

17. The fourth regulation challenged by Professor Caflisch is the requirement that certain vessels fly the Nicaraguan flag while navigating on the river. Nicaragua only applies this requirement to the very few vessels that have masts or turrets[108], and there is no evidence that any Costa Rican vessel has ever been prohibited from navigating on the river because of a failure or refusal to fly the Nicaraguan flag. Does Costa Rica have evidence that any vessel was ever stopped from navigating because of failure to fly the flag? Professor Caflisch himself provided the answer: "Of course not . . ."[109] Then what is Costa Rica complaining about? Professor Caflisch agreed that flying the flag of the riparian sovereign is an accepted international custom[110]. Then how can he argue that Nicaragua's regulation requiring the same thing is "unreasonable"?

(e) ***Visas***

18. The fifth and final regulation challenged by Costa Rica is the requirement that foreign nationals, including Costa Ricans, obtain a Nicaraguan visa before entering Nicaragua, including when they enter Nicaragua via the San Juan River. Professor Caflisch suggested that there was no justification for Nicaragua to require visas of persons operating or riding on tour boats because "boatmen and their passengers transit on the river without entering Nicaragua for any length of time"[111]. With respect, that misses the point in at least two ways. First, as a sovereign State, Nicaragua has the same right as every other State, in its discretion, to require foreign nationals, including their government officials, to obtain a valid visa before entering her territory, for whatever length of time, and it cannot be questioned that one enters Nicaragua when one enters the San Juan River. Second, many countries require visas even for very short stays; in the United States, for example, a visa is required even to transit through a United States airport from one international flight to another, without otherwise entering the country. And the tourist excursions along the San Juan implicate Nicaragua far more than that. [Slide PSR] The journey that Costa Rican tour boats make on the San Juan, with its dramatic views of flora and fauna native to

---

[108]CR, 2009/5, p. 26, para. 45.

[109]CR, 2009/6, p. 8, para. 35.

[110] CR, 2009/6, p. 48, para. 36.

[111]CR 2009/6, p. 49, para. 40.

the river and the adjacent environmental reserves on the Nicaraguan side, is featured in advertising brochures distributed by Costa Rican tour operators:

> "Costa Rica, in particular San Juan, has a rich history [I note that here the San Juan is claimed to be part of Costa Rica] . . . We'll then take a ride to Siquirres, which is a bit of a jaunt, but well worth it for what comes next: a delightful glide down the San Juan River . . ."[112]

There are faster, cheaper and more comfortable means of transport between the Costa Rican interior and her Caribbean coastal resorts. The reason for the river tour is nature sightseeing, and the most attractive part of the voyage, according to the promotional literature of the Costa Rican tour operators, is along the San Juan[113]. That is why the tour boats linger there.

19. Professor Caflisch suggests that Nicaragua's visa requirement imposes a hardship on Costa Rica's boatmen, who allegedly cannot afford the fee. To be sure, nobody likes to pay for a visa, and nobody likes standing in a queue to get one. But that is true almost everywhere, and does not constitute a reason to deny Nicaragua her sovereign right to control her borders, or the entry of foreign nationals into her territory. Costa Rica does not allow any Nicaraguans into her territory without a visa.

20. Nicaragua, however, exempts local Costa Rican riparians from her visa requirements. Professor Caflisch said on Monday that this is not so, and cited affidavits from those he called "local riparians" who said that they had to get Nicaraguan visas to navigate on the river[114]. Well, we read the affidavits too. None was submitted by a local riparian or commercial boatman. All were signed by non-riparian tour boat operators, who are not exempt from the visa requirement[115].

21. Professor Caflisch painted the picture of a hypothetical Costa Rican tour boat operator, whom he said would be bankrupted by all of Nicaragua's fees. So much, he said, for what he rather sardonically called "Mr. Reichler's non-burdensome immigration regulations"[116]. I prefer not to deal in hypotheticals, but in evidence. The evidence, which Costa Rica has never denied, is that Costa Rica's tourism traffic on the San Juan River increased by more than 350 per cent

---

[112]http://www.pedalandseaadventures.com/costa-rica-adventure.html.

[113]See e.g., *ibid*. and http://oasisnaturetours.com/gallery/index.html.

[114]CR 2009/6, p. 48, para. 38, n. 156.

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

[116]CR 2009/6, p. 49, para. 39.

between 1998, when Costa Rica says Nicaragua first began to systematically deny her rights on the San Juan River, and 2004, the year before this lawsuit began[117]. That allows me to reply in kind to Professor Caflisch: so much for his *burdensome* immigration regulations.

22. Mr. President, the challenges that Costa Rica has made in the second round, to the reasonableness of Nicaragua's regulations, do not fare any better than the challenges that were made in the first round, or in the written pleadings. Costa Rica now accepts that Nicaragua has the right to regulate all navigation on the San Juan River, provided that her regulations are reasonable, non-arbitrary and non-discriminatory. Nicaragua has submitted evidence demonstrating the reasonableness of all five of her challenged regulations. Costa Rica has failed to prove that any of them is unreasonable, or to prove that they are arbitrary or discriminatory in any way. As a consequence, her challenges to all of them must fail.

2. The practice of the Parties

23. Mr. President, I will now respond to my good friend and renowned poultry farmer, Professor Crawford, and his remarks on the practice of the Parties with regard to navigation by Costa Rican public vessels.

24. What is most remarkable about Professor Crawford's presentation is his abandonment of ground long held sacred by Costa Rica. Until Monday, Costa Rica had argued throughout this case that the practice of the Parties with respect to navigation by police and other public vessels was of singular importance, and that it supported Costa Rica's reading into the 1858 Treaty and the Cleveland Award a right of navigation on the San Juan River for all of her public vessels. It came as quite a surprise to me, then, when I heard Professor Crawford say that the practice of the Parties with regard to this matter is now "entirely subordinate", and that it is of "less significance"[118]. While surprising, Professor Crawford's sudden turnabout is understandable, especially in light of the evidence that has been emphasized in these hearings. It appears that Costa Rica has come to the conclusion, during the oral proceedings, that the practice of the Parties is no longer helpful to her, and she has now chosen to distance herself from it. I could say, perhaps a bit metaphorically,

[117]CR 2009/5, p. 25, para. 44.

[118]CR, 2009/6, p. 55, para. 14; p. 56, para. 16.

that, as regards the practice of the Parties, the Costa Rican army has fled the field of battle, except that, of course, as we all know, Costa Rica says she has no army. There can be no doubt, however, that, on this matter, her "Public Forces," or whatever she chooses to call them, have abandoned ship.

25. Professor Crawford spoke about navigation by three kinds of public vessels: revenue vessels, police vessels, and other government vessels. I will separately address each of these.

(a) ***Revenue vessels***

26. I start with revenue vessels. The evidence does not show that Costa Rica has exercised her right to navigate on the San Juan River with these vessels. The point is not seriously challenged by Costa Rica. Nor could it be. She has presented only a handful of documents even purporting to show that she exercised her right to navigate on the river with revenue vessels in activities related to and connected with navigation "con objetos de comercio", and none of the documents states that any such navigation on the San Juan River actually took place[119]. Professor Crawford did nothing to refute this basic point. Bereft of any other documentary support, he called the Court's attention to a single report, dated 26 July 1968, and said that Nicaragua's argument can be "disproved by reference to only one example"[120]. Well, he had better say that, because one example is all he has. But even his lonely example proves nothing.

27. The report on which Professor Crawford relies says only that the revenue guards went from their base at Boca San Carlos to a place called Infiernito to carry out a mission[121]. It does not say that they travelled on the San Juan River to get there. Professor Crawford does not deny this. [Slide PSR] However, he projected a sketch-map on the screen, the same one that is now before you, pointed to the locations of Boca San Carlos and Infiernito, and said that the revenue guards' transit on the San Juan may be *inferred* because it takes much less time to travel between these points by boat; the route by automobile is long and circuitous; and, in the rainy season the roads are practically impassable[122].

---

[119]MCR, para. 4.89, n. 234; RCR, Ann. 33, p. 245.

[120]CR 2009/5, p. 56, para. 17.

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

[122]*Ibid.*

28. Let us give him the benefit of the doubt and assume he is entitled to his inference. What would it prove? Only that there was one instance of navigation on the San Juan by Costa Rican revenue vessels. Between 1858 and today, there is no other report or official record of any other such navigation — that is, navigation on the San Juan by Costa Rican revenue vessels. The affidavits cited by Professor Crawford on Monday are not official reports or contemporaneous records, and they do not help him because they refer only to navigation by police vessels, not revenue vessels and the navigation they describe is unrelated to commerce, however that word is defined. The point is clear. Costa Rica could not have had a practice of navigating on the San Juan with her revenue vessels. If she had had one, there would be numerous official reports and records, and Costa Rica would have produced at least some of them.

29. The reason there was no such practice is also clear. There was never any commercial navigation on the San Juan that required the presence, operation or protection of Costa Rican revenue vessels, and this is what led Costa Rica to close all her customs posts on the San Juan, and even on the internal rivers that connect to the San Juan, many decades ago[123]. These facts were not challenged by Professor Crawford, nor could they be.

30. Nicaragua has never disagreed that, regardless of actual use, Costa Rica continues to enjoy the right to navigate that was specified by President Cleveland in the second paragraph of his Award. But it is important to be clear about what that right is. It is the right reflected in that paragraph to navigate with revenue vessels, and only with revenue vessels, when related to and connected with navigation "con objetos de comercio". It is not a right available to police or other government vessels; and it may not be exercised even by revenue vessels except in relation to and connected with navigation "con objetos de comercio".

(b) ***Police vessels***

31. This leads me directly to the second group of Costa Rican vessels: police vessels. Here, Costa Rica makes a deliberate effort — and regrettably my friend Professor Crawford is one of the perpetrators — to confuse revenue vessels with police vessels. He would have the Court believe that the police have become revenue guards, and that their boats have become revenue vessels, so

[123]CR 2009/5, p. 45, para. 9.

that police boats would enjoy the same rights as revenue vessels under the Cleveland Award. I respectfully submit that the Court should have none of it. The evidence does not support it. Costa Rica presented to the Court only two official police reports showing navigation by police vessels on the San Juan[124]. One of the documents, from 1992, describes a single voyage on the San Juan[125]. The purpose is not reported. There is certainly no mention of customs or revenue-related activity. The other document, which has now been discussed by counsel for both Parties, is a detailed report by a local police commander recording navigation on the San Juan River between 1994 and 1998[126]. It makes no mention — no mention whatsoever — of any police navigation related to revenue, customs or fiscal matters, and no mention of any navigation related to trade or commerce. This is because these were not, these were never, activities with which the police were ever concerned. Costa Rica has made no suggestion that her police posts on the San Juan are customs posts. They are not. The documents produced by Costa Rica thus refute her effort to assimilate police vessels to revenue vessels, because they show that the police have not performed, do not perform, revenue or customs-related activities. They demonstrate that — as Professor McCaffrey explained this morning — the right President Cleveland found for revenue vessels is limited to those vessels, and is not available to police vessels.

32. Professor Crawford made every effort to depict these police vessels as unthreatening and innocuous. He displayed a photograph of them with a smiling Costa Rican policeman in the foreground[127]. He referred to them especially as "humble" vessels[128]. Well, Mr. President, Members of the Court, there is nothing humble about these. [Slide PSR] Projected before you are the weapons carried by Costa Rican police officers on these "humble" vessels: M-16s and Galils, and the like[129]. This is not our photograph. It is Costa Rica's, and can be found in her Memorial[130]. The photograph, so helpfully supplied by Costa Rica, explains why, during the

---

[124]CR 2009/5, pp. 46-47, paras. 11-12.

[125]RCR, Vol. 2, Ann. 38.

[126]MCR, Vol. VI, Ann. 227.

[127]Costa Rican judges' folders, Round Two, slide 65; MCR, Vol. I, pp. 78*bis* and 86*bis*.

[128]CR 2009/6, p. 56, para. 15.

[129]MCR, p. 84*bis*.

[130]MCR, p. 83*bis*.

period in the 1990s when Nicaragua authorized Costa Rican police vessels to navigate on the river for the purpose of resupplying their posts, she required that all weapons be stowed on the floor of the vessel, under supervision of a Nicaraguan soldier who was required to be on board.

33. In regard to this practice, the evidence shows that both Parties recognized that Costa Rica had no right to navigate on the river with police vessels, and that she could not do so without first seeking and obtaining Nicaragua's prior permission. The Court is, by now, quite familiar with the aide-memoire of July 2000 recording the statements of Costa Rica's Public Security Minister and the Ministry's International Legal Adviser to this effect[131]. Professor Crawford gave us no reason to disregard or disbelieve this contemporaneous official record of a high-level meeting between the two States, which was duly authenticated by its author. He took two shots at it. Missed with both. In the first one, he simply repeated what he said in the first round, that there is no evidence that Costa Rica received or approved the document[132]. Unlike love, his argument is not better the second time around! In fact, he admitted on Monday that Costa Rica received and took note of the document, as it surely could not have failed to do, in July 2008, when it was annexed to and discussed within Nicaragua's Rejoinder[133]. Yet, he offered no reason why Costa Rica submitted no affidavits or other documents refuting, or even mentioning, the aide-memoire or the statements contained therein. Surely if the damaging statements attributed to her Minister of Public Security and the Ministry's International Legal Adviser were inaccurate, Costa Rica would have submitted affidavits from these government officials to that effect. The inference, if not the conclusion, to be drawn is that affidavits were not supplied because they would not have been helpful to Costa Rica.

34. Professor Crawford's second shot at the aide-memoire is the affidavit of Colonel Walter Navarro, which is the only one Costa Rica submitted after the close of the written pleadings[134]. The Navarro affidavit makes no mention of the July 2000 meeting, no mention of the aide-memoire and no mention of the statements attributed in it to his senior officers. There is no denial that these statements were made. All Colonel Navarro says is that in his own meetings with

---

[131]RN, Vol. II, Ann. 68.

[132]CR 2009/6, p. 59, para. 24.

[133]CR 2009/6, p. 59, para. 23.

[134]CR 2009/6, p. 59, para. 24.

Nicaraguan army officers, held after he assumed command of the Costa Rican police forces along the San Juan in May of 1998, no permission was sought for Costa Rican police vessels to navigate on the river. All this tells us is what we already know: that Colonel Navarro implemented a new policy between May and July of 1998, as part of which Costa Rica stopped requesting authorization from Nicaragua before navigating on the river, to which Nicaragua responded by prohibiting all further navigation by Costa Rican police vessels. Colonel Navarro's affidavit does not even address, let alone refute, the statements made by his superior officers two years later, in July of 2000, as recorded in the aide-memoire.

35. Now, Professor Crawford has attempted to call me to account on my use of the Costa Rican police report to show that, pursuant to the new policy implemented by Colonel Navarro, Costa Rica forcibly detained Nicaraguan nationals, ordered them to board her armed police vessels, and transported them on the river to her police posts. He claimed that I was wrong about this, and that the detained Nicaraguans were actually transported on land, not by boat[135]. Well, I would now like to call him back. Let us, for a moment, return to the sketch-map that Professor Crawford displayed on Monday. [Slide PSR] He used this, as I mentioned a few moments ago, to claim entitlement to an inference that, in travelling between Infiernito and Boca San Carlos in 1968, the Costa Rican forces used the river, even though the report in question does not say that. Now, Professor Crawford and I do agree that the police report that I cited on Friday says that the detained Nicaraguan nationals were transported between La Cureña and Boca San Carlos, both of which are depicted on the same map[136].

36. Unlike Professor Crawford, I make no request for a mere inference that the Costa Rican police travelled with their Nicaraguan detainees in tow by river rather than by road, because, unlike Professor Crawford, I can cite proof that they went by boat. The proof is actually supplied by Costa Rica herself, which has said, on *repeated* occasions in this case, that La Cureña is not reachable by land transport. Indeed, Costa Rica cited the inaccessibility of La Cureña by land as her reason for closing the post there after Nicaragua prohibited further police navigation on the

[135]CR 2009/5, p. 56, para. 17.

[136]MCR, Vol. VI, Ann. 227, p. 963.

river[137]. Even in these oral proceedings, Professor Crawford *himself* declared that La Cureña was inaccessible by land: that is in CR 2009/3, page 18, paragraph 35. So how can Professor Crawford now argue that the Nicaraguans were transported from La Cureña to Boca San Carlos by land? I will show you. The original report, in Spanish of course, says that the detained Nicaraguans were transported in "movil 711"[138]. [Slide PSR] "Movil" in Spanish and in this context, means "mobile unit"[139]. But look how Costa Rica translated it into English in her annexes: "vehicle"[140]. [Slide PSR] Somebody on the Costa Rican side, through the miracle of modern translation, turned a boat into a car. Of course, Professor Crawford, who is not a Spanish speaker, would not have been aware of this linguistic gamesmanship.

(c) ***Other public vessels***

37. I turn next and last to navigation with other government vessels. No argument was made by Professor Crawford that either the 1858 Treaty or the Cleveland Award created a right for Costa Rica to navigate on the San Juan River with her public vessels for the purpose of performing governmental services. Instead, his entire speech on Monday was devoted not to making a legal argument but solely to portraying Nicaragua as the "bad guy" in this case. We heard repeatedly from him that Nicaragua has "prohibited" or "prevented" Costa Rican government officials from delivering vital education, health and other social services[141].

38. In his attempt to support these charges, Professor Crawford relied on a number of affidavits from Costa Rican government officials and other interested parties. We have read them, and, even if taken at face value, they do not support his argument. But before turning to their contents, I would like to say a few words about how this Court might wish to treat them. Professor Crawford employs a double standard. For him, the five affidavits from Nicaraguan army commanders should be disregarded by the Court *because*, because they are affidavits from Nicaraguan army commanders[142]. No other reason is given. On the other hand, affidavits from

---

[137]RCR, para. 3.94.

[138]MCR, Vol. VI, Ann. 227, p. 986.

[139]Larousse, *Gran Diccionario: Español-Ingles/Ingles-Español* (2d. ed., 2002), p. 493.

[140]MCR, Vol. VI, Ann. 227, p. 963.

[141]See, e.g., CR 2009/6, p. 60, para. 27; p. 61, para. 28.

[142]CR 2009/3, p. 18, para. 36; p. 51, para. 27.

Costa Rican government officials and workers should be given full faith and credit. Please forgive me if find something uneven about this attitude. Nicaragua asks only for equality of treatment. Either the affidavits submitted by both Parties are to be treated as "evidence", or none are.

39. The affidavits relied on by Professor Crawford do not show that Nicaragua prevented or prohibited Costa Rican government officials from navigating on the San Juan. The affidavits that report a prevention of navigation expressly refer to navigation in police vessels, after 1998, when Nicaragua stopped authorizing police vessels to navigate on the river. Only Costa Rican officials riding in police vessels would have been affected. By contrast, navigation by Costa Rican officials in privately-owned vessels has not been affected by the prohibition that is applicable only to police vessels. This includes transport-for-hire of Costa Rican officials by local boatmen in what Professor Crawford perhaps euphemistically referred to as "river taxis". Nicaragua has not prohibited or interfered with such transport; the affidavits cited by Professor Crawford do not state otherwise.

40. Professor Crawford expressly referred to the affidavit of Dr. Laura Navarro, as evidence that Nicaragua imposed "a prohibition . . . upon Costa Rican public workers . . . navigating the San Juan River"[143]. The affidavit reveals, however, that there was no Nicaraguan prohibition at all, merely a requirement that Costa Rican officials seek a Nicaraguan visa or other formal authorization before entering Nicaragua and travelling on the river[144]. Professor Crawford also did not mention that Dr. Navarro, far from being prohibited, was actually *given* authorization by Nicaragua to travel on the San Juan, and the written proof of this is in Annex 47 of Costa Rica's Reply. Dr. Ching, whose affidavit was also invoked by Professor Crawford, was likewise given authorization by Nicaragua to navigate on the San Juan[145].

41. Nicaragua has never had a policy of preventing or prohibiting navigation by Costa Rican civilian officials. The evidence shows that Nicaragua's practice has been to authorize such navigation, subject only to two requirements, whose reasonableness I discussed earlier: that the officials possess visas to enter Nicaragua and that the vessels stop and register at the Nicaraguan

---

[143]CR 2009/6, p. 61, para. 27.

[144]RCR, Ann. 57.

[145]CMN, Ann. 53.

post upon entering and exiting the river. To be sure, as I previously acknowledged, there have been delays in the issuance of some visas, in a few cases lengthy delays, as Professor Crawford noted. But this is not internationally wrongful conduct. There can be no wrongfulness without violation of a right, and Costa Rican public officials do not have a right to a Nicaraguan visa, or to navigate on the San Juan in public vessels for the purpose of delivering governmental services. In any event, Costa Rica's evidence of delays in issuing visas is almost entirely from 2005 and 2006. By 2007, even she acknowledges, in her Reply, "Nicaraguan authorities have responded quite quickly to Costa Rican requests for permission to navigate"[146].

42. Mr. President, I will conclude today, as Professor Crawford did on Monday, with fishing — just a few words. The Parties are now agreed that Costa Rica neither has nor claims a right of her nationals to engage in commercial or sport fishing[147]. It is Nicaragua's position that Costa Rica has also failed to prove the existence of either a customary or a treaty right to engage in subsistence fishing. Nevertheless, subsistence fishing in the San Juan River can easily be, and in practice is, carried out from the shore, and Nicaragua confirms that it is not, and has not been, her policy to prevent subsistence fishing from the right bank of the river by Costa Rican nationals. Costa Rica has demonstrated no need, for subsistence purposes, to fish by boat in the middle of this particular river. That is the method used by commercial fishermen, large and small. It is Nicaragua's *right* to prohibit this practice in her sovereign waters, which in this case are part of the environmentally protected areas of the San Juan River Wildlife Refuge and the San Juan River-Nicaragua Biosphere Reserve.

43. Mr. President, Members of the Court, this concludes my presentation. I thank you once again for your patience and your courtesy and I ask you now to call on the distinguished Agent of Nicaragua, Ambassador Carlos Arguëllo.

The PRESIDENT: Thank you, Mr. Paul Reichler, for your presentation. I now call His Excellency Dr. Carlos Arguëllo Gómez, the Agent of Nicaragua, to offer the Agent's speech and submissions.

---

[146]RCR, para. 4.36.

[147]CR 2009/6, p. 63, para. 30.

Mr. ARGUËLLO:

1. Thank you, Mr. President, distinguished Members of the Court. This final presentation will first address the question of the remedies sought by both Parties and will conclude with the presentation of the Nicaraguan submissions.

1. Remedies sought by Costa Rica (Costa Rica's submissions)

2. Costa Rica has requested the Court to make a declaration on nine specific points that cover her rights of navigation on the San Juan River as understood by Costa Rica. She also requests the Court to declare that Nicaragua should cease and make reparation for all breaches of these alleged rights and, finally, that Nicaragua should give assurances that her future behaviour will be to the satisfaction of Costa Rica.

3. The nature and extent of the limited rights of navigation of Costa Rica on the San Juan River have been analysed by Nicaragua throughout the written pleadings and during these oral pleadings. The remedies sought by Costa Rica are simply based on a different interpretation of these rights and thus any response to the specific question of remedies cannot be separated from the main arguments developed throughout the pleadings of this case.

4. The few additional comments made during these oral pleadings by Professor Crawford under this specific heading of "Remedies" were addressed by Professor Pellet. No substantive content has been added to this issue during the second round of oral pleadings by Costa Rica. For this reason, I will only address this issue by way of summary with a short comment on each heading of Costa Rica's submissions. Before discussing each of the nine headings in particular it must be pointed out that the submissions, although seemingly the same as those in her Memorial and Reply, have in fact been modified by the assertions of Costa Rica's representatives during these hearings to the effect that Nicaragua has the right to regulate the navigation on the river and also the right to dredge the San Juan in accordance with the 1858 Treaty and the Cleveland Award.

5. The first submission of Costa Rica prays the Court to declare that Nicaragua is under "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". In so far as Costa Rica asks the Court to reiterate what the 1858 Treaty states, that is,

that the Court declare that Costa Rica may navigate freely "con objetos de comercio", this declaration would be unnecessary. Nothing would be served by a reiteration of the wording of Article VI of the Treaty. That is why Costa Rica seeks an interpretation of the Treaty that would equate the phrase of the authentic Spanish text "con objetos de comercio" with the English text of "purposes of commerce" and, furthermore, not satisfied with the way the English translation seems to inflate her rights, Costa Rica wants the Court to add to the 1858 text that this navigation "for purposes of commerce" includes "communication and the transportation of passengers and tourism". The right of navigation "con objetos de comercio" has now evolved in Costa Rica's view into an obligation to allow "*all* Costa Rican vessels" — that is, public and private — to navigate for purposes of commerce understood as covering any human activity. After writing "any human activity", I went back thinking that this might sound exaggerated but after renewed consideration I could not think of any human activity that is not covered by commerce in this blown-up interpretation that even includes communication.

6. The second declaration requested by Costa Rica is "the obligation not to impose any charges or fees on Costa Rican vessels and their passengers for navigating on the river". Nicaragua does not impose charges or fees for navigating on the river in accordance with the 1858 Treaty. There is no proof that Nicaragua has ever done so. Of course, the wording of Costa Rica's submission is studiously misleading. Nicaragua is obligated not to impose charges or fees for navigation "con objetos de comercio" and not simply for navigating on the river with any purpose whatsoever. And this is what Nicaragua has been doing as Mr. Reichler has just been explaining.

7. Next, Costa Rica requests the obligation from Nicaragua: "[T]he obligation not to require persons exercising the right of free navigation on the river to carry passports or obtain Nicaraguan visas." This submission has two points. One is that passengers should not have to carry passports. But the question would be, what other better method of identification could be substituted for this universal accepted method? Should Nicaragua ask them to have their birth certificate as an alternative means of identification? On the question of the need for a visa I would suggest that our Costa Rican colleagues attempt to enter and navigate, for example, the nearby Rhine River without any passports or visas. Of course, the comparison is not exact. The Rhine is an international river under multiple sovereignty whilst the San Juan is an entirely Nicaraguan river. Once on the

San Juan river the person is inside Nicaragua and can go anywhere in the Nicaraguan territory. Thus, if no visa is required to enter the river then there would be no immigration control for entering Nicaragua.

8. The other submission of Costa Rica is "the obligation not to require Costa Rican vessels and their passengers to stop at any Nicaraguan post along the river". As a matter of principle, the sovereignty over the river gives Nicaragua the authority of the "sumo imperio" to order vessels to stop and be inspected on any part of the river which is after all Nicaraguan territory. Professor Caflisch is aware of this and has suggested[148] that in lieu of this procedure of stopping at the two or three Nicaraguan posts along the river, perhaps Nicaragua could increase its patrols on the river. Since these patrols naturally would have the right to stop and inspect, the suggestion of Professor Caflisch is a bit bizarre.

9. The next submission is "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". Again this is a question of the right of regulation which indisputably is an attribute solely of Nicaragua. As a point of comparison on this issue we might point out that the Costa Rican land border posts are closed at night. I could add by personal experience, since the field apparently is open to personal appreciations and reminiscences by counsel, that if you are travelling from Nicaragua to Costa Rica through this leg of the Pan American highway — the most important international highway of the Americas —, and you reach the border crossing at night, you have to find sleeping accommodation to wait for morning for the border post to open and get through. The reason given for this schedule at the land border crossing is that it is for the convenience of the personnel and also for reasons of security. These reasons are even more cogent in the semi-jungle reaches of a very dangerous river and yet these regulations on the river are portrayed as a form of harassment.

10. On the question of the use of the flag on the vessels, it must be recalled that 99 per cent of the river traffic consists of small boats in the nature of canoes that do not carry nor are they

[148]CR 2009/3, p. 28, para. 20.

obliged to carry flags. The 1 per cent that normally proudly waves the Costa Rican flag is asked to fly the Nicaraguan flag.

11. The next Costa Rican submission is "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". This Costa Rican submission presumably is based on the last part of Article VI of the 1858 Treaty. The text of this Treaty does not stipulate that landing on any part of the river is free of charges. It clearly says that this landing will be without payment of duties or imposts. In Spanish, "sin cobrarse ninguna clase de impuestos". So even in 1858 any charges for services were not included in this mandate. But the whole question in the present day is moot. It is surprising that Costa Rica should claim this right on the basis of the 1858 Treaty which has been superseded by treaties well known to the Parties. Today there are no rights of landing anywhere along the river without payment of duties. If Costa Rica maintains this position then it should be published in all the media that anyone can land on any part of the river and unload cargo without paying duties. This would come as an enormous surprise in all of the Central American countries. If this were true, all commercial treaties from the last 100 years would not be applicable along the river. But this is all fantasy; any Nicaraguan who lands on the Costa Rican margin with or without merchandise should travel with his lawyer in order to get him out of jail.

12. The next submission refers to "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". This Costa Rican claim is not based on the 1858 Treaty since it gives no such rights to Costa Rica even by way of a hint. Besides, it has not crossed the Nicaraguan authorities' minds to request that hapless, army-less Costa Rica come to the military defence of the San Juan River.

13. The Cleveland Award is the only instrument that allows Costa Rica a form of navigation not limited to vessels "con objetos de comercio". But the Cleveland Award is absolutely clear in limiting this right to those "vessels of the revenue service 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". The words added by President Cleveland are not a superfluous description of what a revenue vessel is supposed to do since their description is part of any dictionary definition. The only purpose of President Cleveland's use of the words is to make clear that this right of protection by revenue vessels is limited to the right of navigation for the purposes envisioned in the Treaty and does not extend to the maintenance of the whole security needs of the State of Costa Rica.

14. The next submission refers to "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". Nicaragua has always complied with the mandates of the 1858 Treaty and the Cleveland Award and needs no reminder of this obligation. The bilateral Agreement of 1956 is absolutely irrelevant to the issues before the Court and has been quietly laid to rest during these pleadings.

15. Then, the final submission is "the obligation to permit riparians of the Costa Rican bank to fish in the river for subsistence purposes". Mr. Reichler has just addressed this point and I will limit myself to saying that as a question of rights, Nicaragua holds absolute title to any and all of the resources of the San Juan River. This has been recognized by Costa Rican counsel[149]. As a matter of humanity and good neighbourliness, Nicaragua has never stopped subsistence fishery from the Costa Rican margin of the river. Naturally, it is a question that has to be regulated because an undefined permission for subsistence fishery could easily be used to cover any type of fishing, including commercial fishing, in the special circumstances of the river where the type of fishing gear for one and the other might be confused.

16. With the preceding overview and comments on the substantive declarations requested by Costa Rica on the alleged violations of her rights by Nicaragua, any further rebuttal of Costa Rica's claims for reparation for these violations or of assurances of this respect by Nicaragua is unnecessary. The one claim cannot subsist without the other. But it could be added further that

[149]CR 2009/3, p. 23, para. 7, *first* subpara. (Caflisch).

even those rights claimed by Costa Rica have not been demonstrated to have been prejudiced or denied by Nicaragua in the 150-year existence of the 1858 Treaty.

2. Declarations requested by Nicaragua

17. Mr. President, distinguished Members of the Court, in normal circumstances Nicaragua as respondent State would have limited its submissions to a request for the rejection of the Costa Rican claims. After consideration, the conclusion reached by Nicaragua is that the real objective of this case is to try to open up or loosen up the clear stipulations of the 1858 Treaty and the Cleveland Award. Today, Costa Rica has felt no embarrassment in emphasizing before the Court and public opinion its purported lack of an army and at the same time to request and insist on the demand that is at the origin of this litigation: that is, Costa Rica's alleged rights to navigate freely, not only with public vessels for any purpose, but also with armed public vessels. At the same time, Costa Rica is attempting to magnify the meaning of free navigation "con objetos de comercio" (with objects of commerce) to encompass any present-day human endeavour.

18. For this reason, Nicaragua decided to request of the Court a declaration reaffirming her sovereign rights and jurisdiction on certain concrete issues.

19. The first declaration requested is that Costa Rica is obliged to comply with the regulations for navigation and landing in the San Juan, imposed by Nicaraguan authorities, in particular related to matters of health and security. Nicaragua has never imposed arbitrary regulations and there is no evidence whatsoever provided by Costa Rica that this has ever been the case. In the course of the present proceedings, Costa Rica has clearly recognized Nicaragua's right to dictate these regulations[150] and the requested declaration will only reaffirm this obligation.

20. The second declaration requested is that Costa Rican vessels have to pay for any special services provided by Nicaragua in the use of the San Juan, either for navigation or landing on the Nicaraguan banks. The 1858 Treaty liberates Costa Rica from paying duties or taxes for navigation but does not include services provided. It is incontrovertible that Nicaragua has a right to charge

[150]See, e.g., CR 2009/3, p. 22, para. 4 (Caflisch).

for these services in the same way as fees for special services are charged in all river navigation. Professor Caflisch[151] agrees that as a matter of principle Nicaragua has this right.

21. The third declaration is that Costa Rica has to comply with all reasonable charges for the modern improvement in the navigation of the river with respect to its situation in 1858. This declaration does not have the purpose of subjecting Costa Rica to charges for the normal maintenance of the river. The intent of this declaration is to make clear that the 1858 Treaty or the 1888 Cleveland Award did not provide Costa Rica with the free benefit of any and all such improvements including those that might imply the use of the Nicaraguan land territory that is not subject to any right of free navigation by Costa Rica.

22. The fourth declaration is that Costa Rica may only use the revenue service boats in the way stipulated by the Cleveland Award, that is, during and with special reference to actual transit of the merchandise authorized by the Treaty. The reason for this declaration or rather this request for a reaffirmation of what the Cleveland Award stipulates is that any decision by the Court must be at least as careful on this issue as was President Cleveland. The reason for the specific wording of the Cleveland Award on this question of the navigation has been explained a few minutes ago. We might add that if the limits on the right to navigate with these revenue vessels are not those set forth by the Cleveland Award, then in fact Costa Rica would *de facto* be able to navigate the river with heavily armed vessels by simply painting them with the name "revenue cutter".

23. The fifth declaration was to the effect that Nicaragua has the right to dredge the San Juan in order to return the flow of water to that obtaining in 1858, even if this affects the flow of water to other present-day recipients of this flow such as the Colorado River. Professor Crawford[152] has conceded in clear language Nicaragua's right to dredge the river in conformity with the stipulations of the 1858 Treaty and the Cleveland Award. This concession is in fact satisfactory to Nicaragua.

---

[151] *Ibid.*, p. 28, para. 21.

[152] CR 2009/3, p. 68, para. 25, and CR 2009/6, p. 63, para. 31.

3. Summary statement

24. Mr. President, distinguished Members of the Court, having concluded the previous observations on the remedies sought by the Parties, I would continue with some final general comments.

A. Historical background

25. The historical background that led to the signing of the 1858 Treaty has been gone over repeatedly throughout the written and oral pleadings and we will spare the Court further iterations on this issue.

26. The circumstances of the conclusion of this Treaty in 1858 have also been explained in detail in our written pleadings. It was pointed out and contested by Professor Crawford that in my first presentation I had said that Nicaragua had signed this Treaty under a cloud of duress. Since this case is not about the validity of the 1858 Treaty but about its interpretation, the pertinence of the use of this word to characterize the context in which the Treaty of 1858 was signed is not relevant. But, under any other name, the facts speak for themselves. At the moment of signing the Treaty Nicaragua had just been devastated by a war against a foreign invader, General Walker. Costa Rica was occupying the San Juan River and had given an ultimatum to Nicaragua to surrender the fortifications of the San Juan. Nicaragua responded by declaring war on Costa Rica. It would seem unnecessary to recall that this war and this occupation were occurring inside Nicaragua and not Costa Rica. All this can be reviewed in the Nicaraguan Counter-Memorial[153]. Perhaps the best way to portray the events is by citing the Note sent by the Secretary of State of the United States, Mr. Lewis Cass, on 30 July 1857 to the special agent of the United States to Central America:

> "Reports have reached here . . . that the government of Costa Rica . . . intends to appropriate to itself portions of the Territory of Nicaragua . . . Such a design is so unjust in itself, in view of the circumstances . . . she would violate the solemn pledges given when she proposed to go to the aid of Nicaragua by attempting to convert this into a war of conquest."[154]

27. I am sure that State Secretary Cass would not have been surprised by my use of the word "duress" to characterize the situation under which Nicaragua found itself in that period.

---

[153]Paras. 1.2.35-1.247.

[154]CMN, para. 1.2.42.

B. Interpretation of the 1858 Treaty

28. The main issue presently before the Court is the interpretation of a treaty entered into in 1858 by two Spanish-speaking nations. If this case had been before a tribunal of Spanish-speaking judges or arbitrators the insistence by Costa Rica in using an English translation of the text as the definitive version for interpreting the treaty would have been surprising. If we eliminate from the pleadings all reference by Costa Rica to the English text presented to President Cleveland from which the other English translations are derived, for example, that published in the British papers, there is very little argument on the plain Spanish text. If we start from the plain text in Spanish "libre navegacion . . . con objetos de comercio" and translate it literally into English we come up with the phrase "free navigation . . . with objects of commerce". The French version, which is a language closer to Spanish, would render it as "libre navigation . . . avec des objects de commerce". The only way that we could come up with the English translation of "purposes of commerce" or the French "aux fins du commerce" is if the Spanish text had used the very common everyday phrases of "con fines comerciales" or "con propositos comerciales" or even "con objetivos comerciales". It is as unusual in Spanish, to say the least, to express the meaning of the very common expression "con fines" or "con propositos comerciales" with the phrase "con objetos comerciales" just as it would be unusual to use the phrase "with objects of commerce" or "avec des objets de commerce" for the same purpose in English or French.

29. The text in Spanish is clear. But even conceding for argument that there were any doubts as to its meaning it would be surprising that in a treaty of limits the meaning would be construed in the most overreaching way against the sovereign State.

30. There is a word in the English language presently in vogue: "repurpose", which in practice applies to anything that was made or meant for one thing and is used for another. This in fact is what Costa Rica wants the Court to accomplish with the 1858 Treaty: to repurpose it to fit any type of navigation and, even more so, to fit any type of human activity on the river.

31. Mr. President, distinguished Members of the Court, I will now proceed to read the submissions of Nicaragua.

On the basis of the facts and legal considerations set forth in the Counter-Memorial, Rejoinder and oral pleadings, may it please the Court to adjudge and declare that: the request of

Costa Rica in her Memorial, Reply and oral pleadings are rejected in general, and in particular, on the following bases:

(a) Either because there is no breach of the provisions of the Treaty of Limits of 15 April 1858 or any other international obligation of Nicaragua.

(b) Or, as appropriate, because the obligation breach of which is alleged, is not an obligation under the provisions of the Treaty of Limits of 15 April 1858 or under general international law.

Moreover the Court is also requested to make a formal declaration on the issues raised by Nicaragua in Section II of Chapter VII of her Counter-Memorial, in Section I, Chapter VI, of her Rejoinder and as reiterated in these oral pleadings.

32. Before concluding this statement, we wish to most sincerely thank you, Mr. President and distinguished Members of the Court, for your kind attention and patience with our pleadings. Our special thanks also to the Registry for its expert and always welcome assistance as well as to the translators and interpreters.

33. Mr. President, distinguished Members of the Court, Nicaragua would conclude this presentation by reiterating her traditional and unwavering respect for the decisions of this highest world tribunal. We are certain that the Court's judgment will be a turning point for the better in the history of the relations of Nicaragua and Costa Rica. Thank you.

The PRESIDENT: I thank His Excellency Ambassador Argüello Gómez. The Court takes note of the final submissions which the Ambassador, the Agent of Nicaragua, has just read on behalf of the Republic of Nicaragua, as it took note of the final submissions of the Republic of Costa Rica on Monday 9 March. There are a few questions to put to the Parties from some Members of the Court. I shall now give the floor to Judges Koroma, Keith and Bennouna, who have questions for the Parties. First, I call upon Judge Koroma, if you please.

Judge KOROMA: Thank you. I wish to assure the Parties that I am not oblivious to possible archival constraints on their part, because of historical reasons. I will, however, appreciate it if they could answer the following question. Can either Party provide evidence as to whether Costa Rican locals and immigrants used the San Juan River in the period around 1858, when the

Treaty of Limits was concluded, and can either Party provide evidence as to the nature and scope of the subsequent practice in the use of the river by Costa Rican locals and immigrants? Thank you.

The PRESIDENT: Thank you, Judge Koroma. Next, I call upon Judge Keith, if you please.

Judge KEITH: Thank you, Mr. President. This is a question for both Parties. On the assumption that Costa Rica's right of navigation under Article VI of the 1858 Treaty does extend to the carriage of passengers, must the passengers or someone on their behalf make a payment for the carriage to the operator of the vessel for the carriage to fall within that right? I appreciate, of course, that Nicaragua rejects the assumption on which the question is based. Thank you, Mr. President.

The PRESIDENT: Thank you, Judge Keith. Finally, I call upon Judge Bennouna. You have the floor.

M. le juge BENNOUNA : Merci, Monsieur le président. Ma question s'adresse également aux deux Parties. C'est donc la question suivante. Lorsqu'il a adopté des mesures pour la régulation de la navigation sur le fleuve San Juan, le Nicaragua a-t-il chaque fois informé et/ou consulté, au préalable, le Costa Rica ? Comme je dispose, Monsieur le président, du texte en anglais de cette question, vous me permettrez aussi de la lire en anglais, peut-être pour satisfaire à ce qu'on pourrait appeler l'égalité de traitement dans l'écoute en direct de la question. Je ne garantis pas par contre l'égalité de l'accent avec lequel la question sera prononcée. When it adopted measures for the regulation of navigation on the San Juan River, did Nicaragua, each time, inform and/or consult Costa Rica in advance? Je vous remercie, Monsieur le président.

The PRESIDENT: Thank you, Judge Bennouna. The precise text of these three questions will be sent, in written form, to the Parties as soon as possible. In accordance with the usual practice, the Parties are invited to provide their written replies to the questions not later than 6 p.m. on Thursday 19 March 2009. Any comments a Party may wish to make, in accordance with Article 72 of the Rules of Court, on the replies by the other Party must be submitted no later than 6 p.m. on Thursday 26 March 2009.

This brings us to the end of the two weeks of hearings devoted to the oral arguments in this case. I should like to thank the Agents, counsel and advocates of the two Parties for their statements during these last two weeks. In accordance with the usual practice I shall request both Agents to remain at the Court's disposal to provide any additional information the Court may require.

With this proviso, I now declare closed the oral proceedings in the case concerning the *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua)*. The Court will now retire for deliberation. The Agents of the Parties will be advised in due course as to the date on which the Court will deliver its judgment.

As the Court has no other business before it today, the sitting is now closed.

The Court rose at 1.10 p.m.

_____